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THE MEANING OF A PRECEDENT

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A familiar jurisprudential view is that a judicial decision functions as a legal precedent by laying down a rule and that the content of this rule is set by officials. Precedents can be followed only by acting in accordance with this rule. This view is mistaken on all counts. A judicial decision functions as a precedent by being an example. At its best, it is an example both for officials and for a target population. Even precedents outside of law function as examples when they have conduct-guiding significance. Examples may be rule-like in their scope, but need not be. Their import is independent of their justification; this point has implications for coherence theories of precedent meaning. The content and scope of a legal decision's extension is not set exclusively by officials. It is socially set and depends upon social salience.

> If you tell me, I'll forget. If you show me, I'll remember.
> Anonymous

A familiar jurisprudential view is that a judicial decision functions as a legal precedent by laying down a rule whose content is set by officials. Only by acting in accordance with this rule can one follow a precedent. This view is an orthodox theory of legal precedent's meaning or significance, not the only theory deserving of the name "orthodox," but certainly one of them. It has two claims: (a) The meaning of precedent is a rule,[1] and (b) the content of the rule is set by legal officials. The purpose of this article is to offer a model of precedent meaning that denies (b) and replaces (a) with a broader claim.

The following is a clear statement of the view that this article rejects:

> The primary idea of a precedent is that of a rule judicially established and presumptively binding. *It is not to be considered in the light of a model which may safely be followed, nor as an example which will justify subsequent judicial action in*

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1. Philosophers of language may find the use of the word "meaning" in this context odd. Anyone so inclined may substitute "conduct-guiding significance."

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> *the same direction*. It declares or enunciates the rule or principle of law which must (not may) be followed in the decision of similar causes in the future. . . . (Black 1912, 2–3 [emphasis added])[2]

The first thesis of this article is that precedent should be viewed as setting an example. A precedent is a judicial decision that exemplifies something; or more accurately, something succeeds as a precedent only when it exemplifies something. Does this mean that precedent should not be thought of as laying down or communicating a rule? That depends on what is meant by "a rule." The associations that many people, particularly those who write about law, make with "rule" blind them to valuable points about precedent. Rather than think of precedent as laying down a rule, it is more helpful to think of it as setting an example. A precedential decision sometimes lays down a rule that fits people's rule-associations, but even then, this can be seen as a special case of setting an example. More important, a precedential decision that has conduct-guiding significance does not always lay down something that fits these models of rules.

The second thesis of this article is that the meaning of a precedent is socially set and socially salient. It is not set exclusively by officials. It follows that a precedential decision's meaning in law is inherently public. This second thesis focuses solely on legal precedent. It will be defended by some reflections on the role of law. Other theses on how meaning is set may be more fruitful for nonlegal precedents. So this second thesis is intended to apply only to legal precedent, and only because of some truths about law.

The first thesis, in contrast, is intended to apply to nonlegal precedents as well. If legal precedent is law's use of example, by examining conduct guidance by example in general, we direct our attention to aspects of precedent that can be overlooked. Much of what is said in this part of the article applies to any conduct guidance by example. It applies, then, to a variety of behavior and situations; for there is conduct guidance by example whenever, by demonstrating behavior or a reaction to behavior, guideposts to action are communicated. This part of the discussion has implications for educators, linguists, social scientists, and a broad range of philosophers who have struggled with the idea of rules as action-guides. It has implications for moral education, because much moral teaching, and perhaps the most effective moral teaching, proceeds by example. There are nuances of behavior that make the difference between the bare doing of what is permissible or required and doing it as an expression of a virtue. These nuances are badly communicated, if they are communicable at all, by

2. Quoted with approval in Wasserstrom 1981, 44–45. Postema calls the orthodox view the "positivist conception of precedent." Postema traces it to Bentham (Postema 1987*a*, 13–15). *Compare* Salmond 1966, bk. 2, ch. 5. Salmond is concerned to describe the common law system as we know it, not make a conceptual claim. He does not think that the common law came in any significant degree from nonofficial sources—e.g., from actual customs of the people. Nonetheless, it is consistent with Salmond's position to hold that theoretically a precedent might be "declaratory" of law from nonofficial sources.

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explicit rules. Yet a good model acting virtuously can show, and thereby communicate all at once and with greater psychological impact than exhaustive description, even if such description could be managed. For instance, kindness can be exhorted, but its full meaning can be conveyed over a range of instances only by example. ("This, too, may be done with kindness—thus!") This phenomenon may partly explain the practice in every major religious tradition of finding a spiritual teacher, or moral master, to supplement—and in some cases supplant—explicit rules or other explicit standards. (There are several other explanatory reasons, one of which is that one-to-one communication facilitates honest soul-searching.)

I. CLARIFICATIONS

Three clarifications are in order at the outset. First, there is ambiguity in the use of the word "decision" as applied to judicial decisions. "Decision" can be used narrowly to refer to a writ of execution, authorizing a legal officer to do something to satisfy a judgment for money or possession, or an official order, which in some sense settles the legal dispute between the parties (albeit not necessarily permanently). "Decision" can be used to refer to a judge's decision on the law that is taken by him to justify the writ, or for the conjunction of the two. "Decision" might be used to refer to a judge's implicit decision on the law that we ascribe to him, to which he is committed in our view, and which justifies the writ; or to a very broad amalgam of any of these and whatever interpretative considerations can be used.[3] When "decision" is taken to refer to a decision on the law, it is taken as a cognitive decision, as an answer to a question about some legal issue. When "decision" is taken to refer to a writ or court order, it is taken as an action decision, as a disposing of a controversy by doing something, or by ordering something to be done. Unless otherwise indicated, "decision" as used in this article to refer to legal decision will mean a disposing, a doing by the court.

As is generally known, in common law systems, courts that follow precedent generally regard themselves as bound to do so, as constrained by precedent. When one asks why the use of precedent is a rational strategy for the law, one is asking whether it is rational to adopt a strategy whereby prior courts or higher courts can constrain other courts to follow their leads. This question cannot be answered without a clear understanding of how, if at all, it is possible for some court by its decision to set up something that *can* be followed. The second point is that the bulk of this article will be concerned with the question of what it is to follow precedent, whether one

3. Cross suggests that "decision" is sometimes taken so widely that it can cover "everything said by a judge with regard to the grounds for making an order (the entirety of his opinion including statements of fact and *obiter dicta*) . . . " (Cross 1977, 103).

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does so voluntarily, or is bound to do so, by the rules of some institution. The rationality issue will, however, be addressed in part.

In a legal precedent, a particular legal case is disposed of in a certain way, almost always to the advantage of one of the parties and the disadvantage of the other. Almost always, too, a legal precedent is accompanied by a written judicial opinion with arguments and reasons for the disposition. The third point is that it is a mistake to *define* "precedent" in terms of rationale-offering or in terms of a rationale. The claim that what counts as following precedent is acting in the way dictated by the rationale is a substantive thesis. It will be treated that way, so that reasons for believing it can be intelligibly explored, and doubts about it intelligibly expressed.

II. PRECEDENT AS EXAMPLE

Precedent in the law has affinities with example-setting outside the law. Outside the law, examples can be used to teach behavior to a target population directly, by showing them how to do it. This is largely how exercise instructors have to work, because verbal descriptions of the actual contortions are often cumbersome and unnatural. Along similar lines, Lewis offers the example of teammates learning to coordinate their rowing (Lewis 1969, 86). The point can be summarized by saying that examples can be do-as-I-do examples. Moreover, they can function that way even if they are not actually intended to teach anything. Consider the way in which one child will "copy" another child as an act of aggression, even when the second child certainly does not intend or want to be "copied," and even resents it. Yet the second child has furnished do-as-I-do examples to the first.

It is worth considering whether precedents in the law can be viewed as do-as-I-do examples. The judge(s) setting precedent has (have) disposed of a certain case in a certain way, and when there is an institutional commitment to precedent, that disposition has some striking similarities with do-as-I-do examples for other judges.

An example can also be used to teach behavior to a target population indirectly. The exemplar decision can be used to discourage, disadvantage, or label behavior of others (also encourage and advantage behavior), and by this means can be used to communicate a message of what will be permitted and what will not. A decision may be seen as carrying this message, and thus may have the requisite effect, even when there is no intention to discourage or teach. Then the example can be for the target population either a you'll-get-away-with-it-too or a you-can't-get-away-with-it-either example. Parents sometimes intend their children to take parental decisions in this way ("Let this be a lesson to you, too"); sometimes parents don't and it happens anyway ("But you let *him* do it!"). For brevity, these will be called "get-away-with-it" examples.

In law, the precedential decision is very rarely about the behavior of

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judges; almost always it is about the behavior of someone in a different category of the population served by the legal system. So it is worth asking whether and how precedent in law may be a get-away-with-it example for a target population. The focus on legal precedent's role as a get-away-with-it example distinguishes this discussion of precedent from traditional discussions of precedent, which, if they come close to seeing precedents as setting examples (which is doubtful), come closest to seeing them as do-as-I-do examples.

An apparent difficulty in applying observations about examples outside the law to precedent within the law is that within law, almost no one in the target population is actually shown the behavior that was advantaged or disadvantaged in the initial legal case. That behavior is described. Precedent presents examples through the filter of language.

Moreover, precedent presents examples through several filters of language. As one commentator puts it:

> The initial naive description by the potential litigant [activates] a set of legal categories in the lawyer's mind. . . . [C]oming up with a description of "what happened" that "makes legal sense" . . . is accomplished as a dialogue between a person with the raw experience and a person with training in professional storytelling. . . . The process of matching potentially relevant legal materials against the facts as described by the litigant results in highlighting certain facts, downplaying others, and omitting [still others]. (Scheppele 1988, 97–98; compare Llewellyn 1960, 48.)

In short, the narrative of what happened between the parties, the one presented to the trial court, is shaped in the light of what the litigating attorneys are prepared to view as significant and relevant. (Both their cultural training and their legal training will show itself here. "Legal narratives . . . are supposed to be constructed in such a way that they are recognizable both as stories that resonate in the general culture and as stories that work as legal accounts." [Scheppele 1991, 63])

In addition, in the trial court's decision on the facts, the judge may change the narrative in the light of the legal materials the attorneys present. The judge will present to the jury, if there is one, decision points on the narrative of what happened. They may be yes or no decisions in terms of categories already selected. The judge will communicate what he or she regards as legally significant categories to the jury. Occasionally, the jury will disregard these categories and construct an entirely new view of the facts, though whether its view gets generally communicated depends on factors outside the legal process, such as whether the jurors later speak to reporters.

If the case is appealed on a point of law, there is a possible third narrative, the appellate court's official narrative(s) of what happened, some or all of which may differ from the trial court's narrative. The appellate opinion

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might, for example, select more general categories than the ones in the trial description as a result of some legal principle or partial legal theory through which this case is seen as of a broader-than-previously-noticed type. In our system, the appellate court's description(s) will be the description(s) in the official report. (Technically, only the majority opinion forms precedent; but the minority opinions may influence the way in which the behavior of the parties is subsequently conceived.)

In earlier times, common law reporting operated through yet another filter, the narrative of the reporter, who could supply his own description of the behavior that is advantaged or disadvantaged by the court's decision. Finally, there is always the possibility of unofficial reports, which may be very loosely based on the appellate court's majority version(s). One can think of this process as analogous to a game of Telephone, with most of the subsequent descriptions informed by theories or filters that the other players may not share.

Yet even through the filter of a narrative, of all these narratives, an incident and the reaction to it may function as an example. Consider the effectiveness in some contexts of the cautionary tale (in school: "Did you hear what Ms. C. did when Ernest tried to . . . ?"; in religion: "Harden not your heart as it was done at Meribah. . . " [Psalm 95:8], combined with the tale of Meribah). Consider the morally instructive parable, Aesop's fables without the tag line, and so on.

The next thing to note is that examples can be used in a lot of ways, but there is a way captured somewhat loosely by the English expression "to set an example," in which examples are given a certain force in practical reasoning. That force can be called "exemplar force." Examples function as do-as-I-do or get-away-with-it examples when they have exemplar force. That force determines for the audience what the "it" is in "get away with it, too," (just as the force also determines for the audience what it is to "do as I do").

Exemplar force is not reducible to the force of any justification—real or purported—for that example, for having done that thing at that time in those circumstances. The children's game "Follow the Leader" would be impossible if examples did not have exemplar force, since there are no justifications for the moves, and everyone involved knows this. An academic faculty worries that its unusual solution to the problems of one student will unintentionally set a precedent even when the present reasons do not apply—in fact, even when there is no good reason to do it this way. Its worry is intelligible only on the assumption that examples can have exemplar force in practical reasoning independent of their justifications.[4]

Since exemplar force is not reducible to background justification, its scope may be different than the scope of the justification for the original

4. *See* similar examples in Benditt 1987, 89; Schauer 1987, 578, 590. Compare Fuller's remark about authority figures making concessions in a particular case only if there is agreement not to take them as precedent (Fuller 1969, 218).

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example. (This is true whether background justification is one the displayer believes or is committed to, the rational defense that best fits the act, or a justification that someone else sees for the original example.) In consequence, one might suppose that following exemplar force is misguided or irrational. Certainly, there are pathologies that give color to this supposition. A woman mindlessly mimics her mother's preparation of the canned ham by cutting off one inch all around before recooking. When asked why she does it, she can only answer that she is doing as her mother did. Her behavior serves no useful purpose. When her mother is asked why she does it, she, too, answers that she is doing as her mother did. When the grandmother is asked why she did it, she replies, "My roasting pan was too small to hold an entire canned ham" (Friday 1977, 430). This tale can be taken as illustrating (unintentional) do-as-I-do example-setting where the original justification no longer applies—indeed, is probably unknown by most of the parties involved. (This is to take the action exemplified to be cutting one inch off the perimeter of the ham. If, on the other hand, the action is cutting the ham to fit one's pan, then the daughter and granddaughter misunderstood and the grandmother's example misfired as an action guide.)

Similarly, some people continue as adults either to do what they were allowed to do as children or avoid what they were not allowed to get away with as children, even though it is abundantly clear that any justification that applied to them as children no longer applies to them as adults. ("It had survival value in your family of origin, but has now become dysfunctional.") They are likely to present themselves for psychotherapy when the lack of current justification is abundantly clear to them, too. These cases illustrate (unintentional) get-away-with-it example-setting where the original justification no longer applies.

The next claim is that it is crucial to the idea of a precedent that it has this sort of justification-independent exemplar force. The whole idea of a decision being treated as precedent entails the idea that the precedent can be followed, at least theoretically, whether or not it had a plausible justification; in law, this entails the idea that precedent can be followed whether or not the resulting decision was correct as a matter of antecedent law.[5] A decision may be wrongly decided, may even be without justification for any practical purposes, and yet function as a precedent nonetheless; and this

5. To paraphrase Wasserstrom:

> If prior decisions can guide behavior in a legal system if and only if these prior decisions are "correct," then it at once becomes relevant to ask in what way does it make any sense to speak of following precedent? For, if the doctrine of precedent has any significant meaning, it would seem to imply that precedents can be followed because they are precedents and not because they are "correct" results. (Wasserstrom 1961, 52)

Compare the remark by Lord Devlin in *Jones v. DPP*, [1962] App. Cas. 635, 711: "The principle of stare decisis does not apply only to good decisions; if it did, it would have neither value nor meaning" (cited in Atiyah and Summers 1987, 115). *Compare* Radin 1933, 200 (quoted in Wasserstrom 1961, 54).

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entails that a decision's meaning or force is independent of the existence, let alone content, of its justification.

The claim of justification-independence, though, must be clarified. Suppose that legal precedents do lay down rules. The rule might be taken as the justification of the decision, even though the decision is the reason the rule exists. This is not the sort of justification meant. If precedents lay down rules, the justifications in question will be justifications for laying down those rules, and thus for reaching the decision in the first place. These justifications will be a background to the rules laid down. So, for instance, if the grandmother's example laid down the rule, "Always cut the ham to fit the pan," there might be some justification for that rule (avoiding messiness in the oven, ensuring even cooking), and it is from those considerations that the example, if it is operating as precedent, is independent in practical reasoning. The scope of the example is different than the scope of those original considerations. The example might indicate cutting the ham to fit one's pan even when there would be no messiness in the oven otherwise.

Another illustration may be adopted from Schauer (Schauer 1991, ch. 2). Suppose that I work for a restaurateur and I see him evict a black dog named Angus. His reasons are that the premises are to be kept hygienic, and a dog is not hygienic. Suppose that I know his reasons. Then the eviction is for me transparent to his reasons if I follow him in later evicting a pet raccoon and if my reason is that raccoons are not hygienic in restaurants, either. If his reasons were different—viz., that he is allergic to dog hair—then the story of what I later do to follow him must be different, too. It must not include raccoon-evicting, if the eviction is to be for me transparent to his reasons. If, however, the eviction has for me exemplar force, something other than his reasons sets the force, and there are several possible scenarios: E.g., I evict all and only dogs, or I evict all and only animals, and my actions may or may not coincide with what his reasons justify.

Exemplar force is independent of background justifications. There is, however, a complicating consideration. Consider what it is for a population to treat an example as having exemplar force, that is, consider exemplar force *relative to* a population (or in its eyes). There are some who would claim that an example cannot have exemplar force *for* a population unless there is a connection between that meaning and a justification the population assigns to the example. There is and must be, they claim, always some connection between the way a population can understand an example and a justification that it sees for the example. Fuller is associated with the view that people cannot comply with rules without holding some belief about why it is reasonable to act on them, because they cannot apply those rules without such a belief (Postema 1994, 376). An apparent corollary is that people cannot follow an example (intentionally) without thinking of it as an example of something they find sensible to do. One might draw from this premise the conclusion that people cannot follow an example without using mental categories that for them have justificatory significance.

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It *is* useful to talk about what it is for an example to have exemplar force *for* a population, and to talk about that in terms of the population's conceptions, understandings, and expectations. However, Fuller's point can be granted while allowing room for justification-independence.

When I see the boss evicting Angus, I will think of Angus in terms of a salient category (probably animal). I will think of the boss's response to Angus in terms of another category, a category of act (eviction). The salient description of what I have been shown will be in terms of these categories, and I will identify future instances of the same circumstances and the same act-possibilities in terms of these categories. So if I am determined to follow the boss's lead, I will see that act-type as evicting animals from the restaurant. Perhaps one reason I fasten on these categories is that it makes sense to me to evict animals from restaurants. I can view this act-type as justifiable (and as more easily justifiable than evicting only dogs. This may explain why under the circumstances I did not fasten on dog as the salient category for Angus). Hygiene or social conventions are considerations likely to pop into my head, if I am pressed to justify my choice of salient category. They make the category of animals justificatively significant to me.

Nonetheless there is room for a distinction between exemplar force and background justification. In my determination to follow the boss's lead, I could take one of two tacks. I see the act-example as justifiable in terms of hygiene or social convention (and the accompanying consideration of the reasonable expectations and conditioned preferences of others). One option is treating the example as transparent to these justifications. Then if I had occasion to remove a dirty sock from the restaurant, I would see that act as following the boss's lead (being justified by the same justification). Another option is treating the example as having exemplar force, as being first and foremost a case of evicting an animal from a restaurant. This category, evicting-an-animal-from-a-restaurant, is the salient category for me, the thing of which the boss's act is an example, even though I may be aware that the boss's act is also an example of many other categories I can call to mind. Then my determination to follow the boss's lead would not cause me to remove the dirty sock, but would move me when the occasions arose to evict pet raccoons (even ones as hygienic as the average infant restaurant patron). Fuller's point can be accommodated by admitting that in order for me to be prepared to evict especially clean and well-groomed raccoons, I must see some point or purpose in following the boss's lead even when this will not serve the purposes that justified the boss in acting.

This section has argued that the import of precedents for conduct (their exemplar force) is independent of background justifications. This should not seem an odd idea when applied specifically to legal precedent. Most people are willing to concede that when a precedential decision is wrongly decided, is perhaps hopelessly unjustifiable from the standpoint of pre-existing law, it nonetheless has a meaning. As has been said, it is perfectly intelligible to suppose that a judicial decision can mean something and be

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legal precedent even when not within the limits for justified judicial decisions. For the decision must have some content to be unjustifiable, to make demands on future decisions, to be worth overruling because it applies to future conduct. Moreover, not only do institutional policies sometimes require the following of precedents that were not justified in the first place, they also may justify not following precedent when following it is all things considered not justified. That is to drive a wedge between how a decision applies and what it is all things considered justified to do. It is an admission that what would otherwise be binding precedent can apply in ways that, considering everything, including reasons for following incorrect precedents, there is no justification (or no legal justification) for doing.

There is an important philosophical objection to any attempt to conflate precedential meaning and background justification. Any attempt to go behind the judicial decision to justification and hold justification in every case determinative of the extension of the decision has regress problems that must be solved. Consider a judicial decision that seems to require a certain sort of action; suppose that its final meaning is determined by some background justification, J1. What determines how J1 requires an agent now to act? The problem is that using J1 and only J1 to determine how to act (or how to decide) is open to a demand for still deeper justification. What is the purpose of restricting the justification to J1, assuming that it considers only certain values, as opposed to all other values that might be promoted now? One answer is that there is no such purpose: Applying J1 is justified only so long as it is all-things-considered justified, and one of the things that must be considered is whether applying it in this instance would involve failing to consider, and promote, some worthy values. That view of the role of justifications combined with the view that judicial decisions do not have extensions apart from their justifications, yields the conclusion that judicial decisions are superfluous.[6] What we are really doing at every turn is engaging in all-things-considered practical reasoning. However, judicial decisions are often used to circumvent or short-circuit that process, particularly when they are treated as precedent. How can one account for decisions used in this way?

Suppose, instead, that J1 is to be applied even when it is not all-things-considered justified to do so. What is the purpose of doing that? On a coherence theory of precedent meaning, there is an answer: J1 is a justificatory theory constructed for legal materials, and these materials have no legal significance apart from it. (Shortcomings of this view will be dealt with in the Appendix.) Suppose, however, that there is no further purpose. Then in applying J1, we are following something very rule-like ("Apply J1") but also something that can be couched in example language ("Do whatever can be justified thus"). It is also something that looks like a decision: to decide in the way justified by J1. It is simply not plausible to assume that the

6. Compare an analogous point about rules made in Schauer 1991.

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extension of that example (decision) exists absent a background justification, whereas the same is not true for the original decision.

Suppose that there is a further justification, some background justification J2. Since the original decision has no final extension independent of J1, the assumption that "Do whatever can be justified by J1" has an extension independent of J2 is ad hoc. Assume, then, that J1's extension is dependent on J2. Now, the same questions can be asked with respect to J2, and one is soon faced with an infinite regress. Even if justifications run out, sooner or later we come to a point where something like a rule ("Apply Jn"), or an example ("Do whatever can be justified thus"), or a decision (to decide in the way justified by Jn) has to be taken as having extensions, without reference to background justification. There is no reason for not coming to that point sooner, at the level of the original decision.[7]

Still, the idea persists that when a precedential decision *correctly* applies a preexisting rule or legal principle, its meaning is transparent to that rule or principle. The trouble with this line of thinking is that there is nothing that can then count as following the precedent. The target population may follow a rule (and subsequent courts may apply a rule) that antedates and justifies the precedential decision, but that is not treating the precedent as authoritative. The same thing may be said about applying any preexisting standards. The odd and counterintuitive consequence of the transparency view, then, is the same as the all-things-considered justification view: Precedential decisions cannot literally and directly be get-away-with-it (or do-as-I-do) examples for action. Precedents cannot be normatively authoritative for any behavior.

Moreover, there are philosophical problems in assuming that a precedent (a) correctly applies a preexisting legal standard, and (b) is transparent in its meaning to that standard. If the claims of transparency are meant in the strongest way, there is no sense in looking for a justification to fit the precedent, or vice versa. Precedent could not provide constraints on which justification fits it.[8] The claim that precedents correctly apply standards, then, is empty. In addition, there is no conceptual possibility of mistaken application of a standard in a precedent, which is counterintuitive.

The idea of total transparency is silly, if not incoherent. If "precedent" means a judicial act disposing of a legal controversy (perhaps understood in connection with a description of the behavior of the parties to the legal action), then it has features or properties, and the act fits into categories independent of its justification—unmanageably many categories, actually. It is better to assume that total transparency is not what people who think of precedent as meaning its justification have in mind. In all likelihood, they

7. This argument is a version of an anti-Fuller argument given by Schauer (Schauer 1991, 212–13). In an early work criticizing Hart, Fuller argues that how explicit legal rules apply to the world is in every case determined by their purposes (Fuller 1958, 661–69). That article contains a suggestion that one cannot apply precedents, except in a "wooden and literal" manner, without "understanding the philosophy that animated them" (648).

8. These remarks were inspired by Schauer's discussion of terms and speaker's intentions (Schauer 1991, 219).

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would admit that a precedential decision has some "prejustificatory" meaning, as a member of this, that, and the other kind of act. We do not think about acts without classifying them in some categories and, being disposed to classify them in still others, choosing those that are salient. So one kind of prejustificatory meaning that precedents have is that they are seen as about behavior of a certain kind or, more likely, certain nesting and overlapping kinds. (The judicial decision is also seen as a certain kind of disposition, e.g., rewarding the party who . . . , allowing a lawsuit about . . . , etc.) A background justification view would then deny that this is the final meaning of the precedent. The final meaning is given by the justification.

However, the precedential decision must fit the alleged justification, and if the prejustificatory meaning is to have some role in the fit, the justificatory categories must have some relation to prejustificatory categories. The justification might substitute for the prejustificatory categories another that the prejustificatory categories overlap. It might prune the prejustificatory categories, or substitute a category in which some of them nest. The prejustificatory categories, however, are some check upon possible justifications for the precedent, some constraint on whether it is true that it correctly applies the justificatory standard. The precedential decision is something that must fit the justification in order to be the correct application of the justification.

Outside of some coherence theories, any way to specify this relation of fit seems ad hoc. Why think the fit is acceptable when what the justification does is prune some prejustificatory categories or substitute another for them? What is the reason to suppose that the pruning that the justification does, or the substitution, is privileged compared to all of the prejustificatory categories? Although the justification might be useful when those categories are indeterminate or conflict, why is the justification not then being used to decide what to do when the meaning is unclear, unhelpful, or unacceptable?[9]

The positive philosophical arguments for recognizing a meaning or meanings independent of justification may now be summarized. The existence of some independent meaning (prejustificatory categories into which the example fits) must be admitted in order to account for an example being a correct application of a justificatory standard, when it is conceptually possible that the application is incorrect. The existence of enough independent meaning to guide conduct must be admitted to account for the rationality of fearing to set precedent in a decision which is eminently justified. One fears, then, that the direction of its meaning will diverge in future cases from the direction of the justifications. An independent meaning must be admitted to account for the phenomenon of precedent-setting

9. For a parallel view that an explicit rule may have a meaning independent of its justification, see Schauer 1991. One sort of justification is a purpose; some people read Hart as holding that an explicit rule has a meaning independent of its purpose (Hart 1961). *See also* Marmor 1992, 148–54.

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when the decision did not correctly apply an antecedent justificatory standard, or for that matter, had no particular justification at all.

Examples, in short, have conduct-guiding significance, or meaning, independent of justification. This is their exemplar force.

When a decision is given a meaning independent of justification, the decision is treated as pure precedent. This idea of pure precedent supplies a central case from which divergences may be measured. It must be admitted that sometimes legal reasoning and other forms of practical reasoning treat decisions as transparent to background rules, or a mix of justificatory considerations weighed against each other. This is to fail to treat the decisions as pure precedents. However, often judicial decisions in common law systems are treated as pure precedents.

Although willing to admit that examples can operate as pure precedents, some people would argue that law is a special case. There is something about the nature of law, they hold, that prevents decisions from being pure precedents, even in common law systems. For instance, on a certain kind of coherence theory of law, judicial decisions have neither legal validity nor significance independent of a large-scale justificatory theory. Since it challenges both theses of this article, the examination of a coherence theory of precedent meaning is deferred to the Appendix.

I contend that the results reached so far do apply to legal decisions. A legal decision can be treated as (pure) precedent, or can be denied that treatment. Even a decision taken under an explicit rule can be treated as precedent. When, on the other hand, a decision is (relatively) transparent to an explicit rule, if that decision is perceived as correctly applying the rule, it may be commended and used as a learning device for following the rule. If that decision is perceived as incorrectly applying the rule, it may be criticized for its failure. However, nowhere is it treated as having the independent practical force of its own that is characteristic of precedent. It is useful, and is allowed a role in directing behavior, only insofar as it is perceived as having correctly applied the rule. Similarly, one decision may be based upon an earlier one, and the later one not treated as precedent. Then the later one is used, if at all, only as a device for learning what the earlier precedent decided. The later one has no independent practical force of its own.

When, however, a decision is treated as precedent, the scope of its precedential meaning can and often does differ from the scope of the rule or the case it followed. This fact may be obscured in practice because the explicit rule may come to be seen to take on the meanings that the precedential decision acquires. A practical system, e.g., a legal system, may allow such influence in order to avoid conflicts. Because a precedent's meaning can conflict with the meaning of the rule it correctly applies, the legal system ought to offer ways to dissolve the conflict. Yet a particular system may fail to do so, and the resulting confusion is one of the disadvantages of admitting precedent into a legal system.

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III. PRECEDENT AS A RULE

The discussion so far has revealed difficulties with the view that when a precedent correctly applies an *existing* legal rule, its meaning is that rule. What of the view that the meaning of a precedent is a rule that the judicial decision *lays down*?

Modeling precedent on example both illuminates the truth in, and exposes what is misleading about, the claim that precedent, or example in general, lays down a rule. It is more perspicacious to think of precedent on the model of example than on the model of rule. Every truth that the model of rule captures can be accommodated by the model of example. In addition, some truths that the model of rule invites us to overlook are highlighted by the model of example. The purpose of this section is to argue these points.

It is worth noting that rules can be applied and followed independently of their background justifications.[10] Schauer (1991) distinguishes between rule-based decision-making and other sorts of decision-making, and points out that rule-based decision-making treats rules as independent of their background justifications, and therefore as potentially over- and under-inclusive of these justifications. So far, then, what has been said does not seem to differ in any detail from part of the orthodox theory of precedent this article rejects, the part that says that precedent guides conduct when it lays down rules.

There is one thing to be said for the rule thesis. It is significant, not trivial, that the target population sees something normative in precedent. If they treated what happened in a precedential case exactly like what happens when someone touches a hot stove, they would be adopting what Hart referred to as an "external point of view" toward the court's decisions.[11] They would be viewing what the court did simply as evidence for predicting what courts will do, a kind of empirical law of court behavior.

People sometimes do adopt what Holmes called the "bad man['s]" perspective on law, making choices out of prudent consideration of what the legal system is likely to do to them if they choose otherwise (Holmes 1897, 461). However, for people operating on this motive, it takes more than the expectations of what courts will do to give them reason to alter their behavior. It also takes expectations of what others will do. For if I see that the court allowed a lawsuit and I think that you would be allowed to sue me

10. Fuller is committed to denying the claim (Fuller 1958). His view about statutory rules runs into the same problems as the view that precedential meaning is a background justification, namely, the incoherence of postulating meaning transparency and the threat of infinite regress.

Schauer has made the point that rules can be applied and followed independently of their justifications (Schauer 1991). He is not, however, the first to do so. *See, e.g.*, Alexander 1989, 15 (and citations given on that page); Regan 1989, 1003–13.

11. More precisely, it is one of the attitudes to which this phrase refers (Hart 1961, 86–88, 96, 112, 197, 244). For a discussion of various attitudes Hart may have meant, see Hodson 1976.

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if I behaved the way that a party to the original lawsuit behaved, I may still believe that you cannot or will not bring suit. In that case, I have lost a motive to behave otherwise. Similarly, you may expect me to decline to sue, or to fail to think of it. In neither case will the court's decision result in our having expectations of each other such that we will not do what the court disadvantaged.

Of course, one sometimes has every reason to expect others to sue, and this is mutually known. One often has every reason to expect the police to arrest for what the courts do not allow in criminal cases, and all know this. (This is not all that needs to be taken into account. Sometimes the police need a complainant to get the legal process going.) You may know that I take it as my moral duty to refrain from what courts disadvantage, or I may know this of you. So there will be some coordination of behavior and some convergence of expectations. However, this will happen as a result of fortuitous further knowledge about the peculiarities of persons we know who are most proximately affected by our plans and decisions.

Convergence of expectations and coordination of behavior is better realized when we both see, and know we both see, precedent as setting a normative standard for our behavior. Then it is not just a matter of believing that courts will advantage this or disadvantage that. It is a matter of seeing what happens to the parties in the precedential case as showing us that we *may* do this or we *may not* do that. So there is something important, not trivial, about saying that the target population is guided by precedent when it relies on a rule for which the precedent stands. That is saying that precedent guides when the target population takes itself as having duties, permissions, liabilities, and powers as a result of the precedential decision or as illustrated by the precedential decision.

The significant truth in the rule thesis is that precedent guides best under these circumstances; yet this truth can be expressed in the language of examples. One can say that precedent guides best, or has full meaning, when the example it sets is taken as an example of what is to be done, or is to be avoided, of what one is entitled to do, and so forth; and the exemplar force is publicly known. Setting an example is consistent with setting a rule in this way.

So why prefer example language? The answer is that rule language can be misleading. People harbor mental models of rules. Sometimes these models can lead the unwary to draw wrong conclusions, or to overlook features of precedent. These points need elaboration.

Some people, though not sophisticated philosophers nowadays, would be tempted by rule talk to make metaphysical mistakes. Suppose one assumes that in the above situation people do grasp a rule that is unformulated. The history of philosophical discussion about rules in the twentieth century warns us that no special metaphysical content should be given to the claim that people grasp an unformulated rule. To see this, consider what would be the evidence that everyone grasps the same unformulated rule. Shall we

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say that everyone should be able, when asked, to formulate the same rule? (Compare Schauer's account of one way in which a community can share an unformulated rule [1991, 69–70].) Ability to formulate the same rule is neither necessary nor sufficient. First, as others have pointed out, formulation can be trivial, as it would be for the proper use of color words ("Call all and only those things that are red, 'red.'"). Nothing in this sort of formulation provides any evidence that you and I agree on the unformulated rule, because the point is whether we know what "red" means, and that remains to be seen in our behavior and judgments. Second, sometimes natural languages have gaps, and so the rules cannot be formulated, at least not without coining new terms or using indexicals ("This is the way to behave on such occasions."[12]).

It would be better for rule theorists to say that the evidence of grasping the same unformulated rule is convergence in people's behavior and judgments. Some philosophers who describe following the same unformulated rule talk in terms of acting just *as if* the rule were formulated and the formulation known, except for the fact that no one formulates it (Black 1962, 129–131; Schauer 1991, 60–71). The evidence includes convergence in people's sortings of who is in the same category or what act is the same, meshing of their judgments of what belongs with what. But competencies and convergence in judgments about what belongs with what can be adequately described by saying that people agree on exemplar force. They agree that this is a case of that, that this belongs with that, that this is properly categorized with that (note the normative attitude here), that this is the way to do the same thing as was done then.[13]

Moreover, unformulated rule talk invites confusion with a certain kind of formulated rule, a legislated rule, that exists independently of compliant behavior. We can know what a legislated rule says though we may have some doubt about how to interpret this or that provision, or how to apply it in some cases (Simpson 1961, 157). That is because we have the formulation, which has a meaning or meanings, and public meaning-assigning rules, or conventions, or practices have something to do with the relevant meanings of that formulation. Our awareness of the formulation is the first step in a process that ends in certain competencies: the abilities to act in accordance with the rule and to correctly judge when someone else is acting in accordance with it.

12. Inspired by Hart's example (Hart 1961, 121).

13. Moreover, for any example, we can follow Wittgenstein by saying that postulating an unformulated rule transcending evidence of competences and convergencies that somehow governs or causes the convergencies would not help explain or guarantee the convergencies (Wittgenstein 1953, secs. 218–19 [on rules as rails]). *See* Bix 1993, 148–50; McDowell 1981, 141–62. McDowell makes the point, attributing it to Wittgenstein, that we will never have grounds for postulating the ability to grasp (through a rule, say) independent groupings, over and above the grounds for postulating the reactions and responses we have shown and will continue to show that are our practice of going on doing the same thing (sorting this way). We might as well cut out the middleman of a psychological state of grasping independent reality, because it adds no certainty to our expectations of future rule-following behavior.

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To force the story of unformulated rules into this mold would be to distort psychological and philosophical reality. What is the analogue of a formulation of a rule? Some private sign or image? Wittgenstein is credited with pointing out that a private sign or image does not apply to the world by itself, and that myriad problems emerge once we ask what fixes its application (Malcolm 1967, 338–39; Bix 1993, 149–50). And how is meaning to be fixed or determined? If we have to rely only on my present and past intentions in using the sign or image to stand for something, then the road to skepticism is wide open (Kripke 1982). (How do I know that they extend to this new, unanticipated instance?)

Suppose somehow that this difficulty can be surmounted, and suppose further the difficulties of the limitations of language already discussed are waived. Even if this sometimes happens, it is surely atypical. Wittgenstein pointed out that there is no common mental element that accompanies cognitive operations, including following a rule (Malcolm 1967). When we grasp for what a precedential decision stands, we do not typically, as it were, first say to ourselves, "This decision stands for the rule that vehicles are not allowed in the park," and *then* understand what categories the rule is about and how to act accordingly. In understanding how to do the sorting and how to act accordingly, we are grasping the alleged unformulated rule.[14]

In sum, the first reason to prefer example language is that supposing that there is a rule laid down in precedent invites metaphysical and empirical mistakes. On the other hand, there is a kernel of truth to the claim that precedent lays down a rule. Precedent guides best, and has the fullest meaning in law, when the target population takes itself to have duties, permissions, liabilities, or powers exemplified by the precedential decision. It is necessary, however, that the target population converge in its beliefs about the decision's exemplar force, and know this convergence.[15]

The second reason to prefer example language is that some people have models of rules that exclude important truths about precedent. Example language pinpoints these truths more accurately. One approach is to think of a rule as having a scope that is specified in advance (Schauer 1991, 118). Trying to cast precedents, particularly legal precedents, into this mold leads to overlooking a kind of flexibility, almost fluidity, possessed by precedent. As we shall see, this is different from the flexibility that arises once formalism is rejected as a method of applying rules. This flexibility can be advantageous under some circumstances and disadvantageous under others. When we see precedents as examples, we are free to note that scopes are not always specifiable in advance. People experience the example, or display the example, and, unfortunately, experience does not always present itself to them clothed in a series of prejustificatory categories. (Compare

14. For similar comments made on Wittgenstein's behalf, *see* Marmor 1992, 146–52.

15. They must have mutual knowledge or mutual belief about it. At the lowest level of expectation, we all expect each other to do the sorting a certain way, and at the next level, we expect each other to expect us to do the sorting this way. *See* Lagerspetz 1989).

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Hart on rules, 1961, 123.) Sometimes in addition to categories through which we perceive what is happening, or what someone just did (or even what we ourselves just did!), we have the sense that some significant category eludes us. We sense that there is or ought to be a way of classifying it that is the key for some practical purpose, but that we do not yet know.

Suppose, to use an example from New York law in the last century, that an established legal rule is that a manufacturer or supplier is not liable to parties with whom he had no contract, even if the article manufactured is defective. Yet there has been one notable exception made in a prior case: A customer became gravely ill from ingesting a small quantity of (poisonous) belladonna from a jar that the manufacturer of vegetable extracts had mislabeled as (harmless) extract of dandelion. The court allowed the customer to sue the manufacturer, even though the manufacturer had sold the jar to one druggist, who sold it to another, who sold it to the customer. In other words, the customer had no contract with the manufacturer (*Thomas v. Winchester*, 6 N.Y. 397 [1852]). The court's decision pointed out that the defendant's act of negligence was "imminently dangerous to the lives of others." How ought we to understand the scope of the exception carved out?

Suppose that people are quite sure that some things belong with the mislabeled belladonna as imminently dangerous if negligently produced: other poisons, gunpowder, a torpedo, a loaded rifle. Suppose that they are quite clear, from another precedent, that a defective balance wheel (in a circular saw) that eventually flies apart and kills the person using the saw does not belong with it (*Loop v. Litchfield*, 42 N.Y. 351 [1870]). And suppose that they are not clear about whether other things manufactured or supplied belong with the original exemplar if defective: a scaffold (when it injures workmen intended to be on it), a boiler that blows up. The resources of the language may fail them. People might balk at saying that the case was about liability for *any* product that because of its defects was "imminently dangerous to the lives of others." They might be unable to assent to anything more specific ("weapons and poison," "things that are expected to have the capacity to kill even if not negligently made," even a coined term for the items so far recognized as clear cases), because that contextually implies that it is only this category that counts. Perhaps the category is things manufactured or purveyed that are "wholly unfit for their intended use," where this category excludes those that have a "latent defect" but can be useful as intended for a time.

This is a situation where the relevant category is not known, but it could also be a situation where the relevant category is not set. There may be no (whole) category specified in advance. The intuition is that rules specify in advance by using whole categories. Yet sometimes all that is communicated by a judicial decision is part of a category, it not yet being determined *what* category. What is noteworthy is that in a case like this, the precedent still has some kind of meaning, something that can be used to guide conduct. It is not meaningless.

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The reader familiar with the literature may think at this juncture about discussions of indeterminacy in the law, "open texture," vagueness, and the like. The point about partial categories is different than the point made by several legal philosophers that concepts used in law can be vague. The concept of a bird is vague, but embraces clear cases. Hence, if there is a statutory rule prohibiting importing birds without a permit, assuming that nothing other than the ordinary reach of the concepts determines the rule's application (which may well be false), then the rule applies to all paradigm cases of birds. So it forbids importing a parakeet without a permit. Suppose, however, that there is a single precedential case upholding a refusal to let someone import a vulture without a permit, and nothing to determine the relevant concept (like an unstated rule of common law). Then it is not yet determined whether the case is precedent for upholding refusals to let people import parakeets and other paradigm cases of birds without a permit. Perhaps it is vultures that are relevant, as they are carrion-eating birds (and less hygienic than other birds). Perhaps it is the part of the world from which they are imported that is of concern; or it is birds threatened with extinction that are at issue, and so on.

So there is a distinction between vague but whole concepts, as typically found in statutory rules, and partial concepts, as often found in precedential cases. This distinction becomes blurred in application if one takes the view, approached by some philosophers, that the application of statutory rules depends in every case upon things used to make (whole) categories salient (obvious purpose of the rule, e.g.). That is because, as will be argued, what makes categories salient determines, or ought to be viewed for purposes of law as determining, what (whole) category a precedential case has set. Hence, on this view of what determines the application of statutory rules, statutory rules apply to whole categories under exactly the conditions under which precedents set whole categories, and otherwise do not. It follows that if it is not salient what is at issue (birds that are threatened with distinction, birds from a certain area of the world, etc.), it is not determinate for either the precedent *or the statute* that it applies to all paradigm cases of (imported) birds. Nonetheless, the distinction exists, no matter what determines the application of statutory rules.

There is a subtle advantage to talking of exemplar force in cases where the concept is partial. There are stages in the growth of a shared exemplar force that can be traced with example language, for exemplar force language makes for finer discriminations than "rule" talk. There is the case in which people unconsciously assign the same exemplar force to the example. They do not know that others agree with them. They might not even know what they themselves take the example to cover until they come upon a concrete instance, and then discover they "know it when they see it,"[16] that this belongs

16. This is to paraphrase what Justice Stewart said about obscenity in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

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with that. When they discover that others know it when they too see it, the stage represented by alleged unformulated rules of language has been reached. At that stage, people are confident that they will know what is grammatical and so will others, but may be unable to articulate, to formulate in natural language, the rule that they know. However, there are earlier stages. People might know that there are a few particulars they and others would lump with the exemplar (isn't it obvious that the type of mislabeled poison does not matter?), but be unwilling to declare that this is all. They are not yet in the position of knowing it when they see it. When some concrete question arises, they might have to slowly work out whether or not to include this particular with others. They might have to reflect, reason by analogy, discuss with others, attune their attitudes to those of others, let something currently in the cultural climate sway them one way or another, relying on rational or nonrational means. In these ways, exemplar force can be slowly worked out. (It does not matter, for the present, whether you suppose that it is the general public that is slowly working out the categories, or officials.) Rule talk either tends to obscure these subtle developments, or accounts for a slow working-out in the wrong way.

To see that it is the wrong way, consider what follows if one assumes that judicial decisions mean rules and then postulates flexibility in the procedure for deciding to apply rules. Suppose, for instance, that the rules are subject to certain operations, like outweighing, when there are competing relevant standards. Then the picture might look like this: After *Thomas*, we are reasonably confident that no other standards will outweigh the one for which *Thomas* stands in a case in which arsenic is mislabeled as something harmless to ingest. However, we do not yet know what competing standards might outweigh the *Thomas* standard when workmen are injured by the collapse of a defective scaffold. This picture appears to provide the flexibility and slow working-out of the implications of a precedent mentioned above. But it does not. Notice that if a *Thomas* rule might be outweighed in the defective scaffold case, then the rule by its terms applies to the case. The categories in the rule apply at the outset of the chain of legal reasoning. So *Thomas* is a precedent for deciding a certain way in the scaffold case; the only question that remains is whether, all things considered, it is legally justifiable to follow the *Thomas* precedent in that case. The *Thomas* rule must have categories with determinate applications in all cases in which the question of what outweighs the rule arises.[17]

17. It is worth emphasizing that the same can be said with respect to any flexible procedures for deciding to apply the rule. Schauer describes two such procedures: rule-sensitive particularism and (with respect to law particularly) presumptive positivism. In rule-sensitive particularism, a rule's background justification plus justifications for having a rule (certainty, reliance, and predictability) are factored against each other (Schauer 1991, 95–97). In presumptive positivism, rules are to be applied "unless [there are] particularly exigent reasons" not to apply them (Schauer 1991, 203). In either procedure the rule must initially cover the situations with respect to which these operations may be performed. A *Thomas* rule must apply by its categories to a defective scaffold case in order to start the chain of reasoning.

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The point being made is that it can be indeterminate whether *Thomas* is a precedent for the defective scaffold case, because *Thomas* establishes only partial categories. When this happens, it is not determined if *Thomas* enters into the chain of reasoning imagined. So in addition to the kind of working-out that a rule theorist might recognize, there is another that rule language tends to obscure. That is this working-out of the boundaries of the categories that *Thomas* covers initially. (This point ought not to be confused with one a rule-theorist *can* recognize, that once there are whole categories, a case may arise in the borderline of those categories. It must then be worked out whether to include it, stretch the category, exclude it, and so on.) To the extent that "rules" suggests whole categories, a rule theorist is entirely unable to account for the power of *Thomas* under the circumstances just mentioned to guide behavior, to be something subsequent courts can follow.

Depending on how the rule theorist thinks rules are applied, there is further trouble for him with the sort of working-out being suggested. If one assumes that there is an unformulated rule in *Thomas* that is being expanded, contracted, or modified as subsequent cases arise, then what is clearly required / permitted / forbidden by the alleged unformulated rule is subject to revision as unencountered cases are encountered. One intuition is that rules have a kind of immunity to this revisability, that rules for conduct do all of their requiring / permitting / forbidding *in advance* (Patterson 1992, 95). The presence of this intuition among legal writers is evidenced by the fact that the sort of situation represented by the imminently dangerous exception on manufacturer liability that began to be carved out by New York law is sometimes referred to as one in which there is an "incomplete rule."[18] However, this difficulty might be avoided if the theorist holds that it is principles that give the meaning of precedents, and then adopts Dworkin's idea that principles are not altered when they do not "prevail" in an authoritative judicial decision (Dworkin 1977*a*, 26).

So although it is true that precedent gets a public meaning when there is an unformulated rule for which the decision stands, one should hesitate to make that a biconditional: "when and only when." There are degrees of meaningfulness, or increasing scopes of meaning, or stages on the way to rule-like meaningfulness, and precedent is capable of some conduct-guiding along the way. Example language highlights that fact, reminding us of these "unfinished" categories even while it can expand to cover categories specified in advance. To the extent that a decision has exemplar force and the force is recognized, a decision can set precedent, be followed, and provide a guidepost for conduct.

Describing these degrees of meaningfulness with the model of rules as having whole categories and the language of incomplete rule is less satisfac-

18. Some legal writers have talked of "incomplete rules" or "rule fragments" in law (Montrose 1956, 191; Ashley 1988, 206). Some have claimed that precedent lays down incomplete rules (Benditt 1987; Simpson 1961, 164–67, 170–71).

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tory. Such language makes judicial decisions with partial categories seem like deviant cases of decisions with precedential force, like cases that are, to paraphrase Finnis in another context, undeveloped, corrupt, qualifiedly ("in a sense") precedent (Finnis 1980, 10–11). That view is unwarranted. Example language is even-handed in this respect: It is equally applicable to whole and partial categories, and sets neither up as ideal against the other.

IV. THE ADVANTAGES OF LEGAL PRECEDENT, CONCEIVED AS SETTING AN EXAMPLE

Seeing precedent as setting an example highlights its independence of background justification. Seeing precedent as setting a rule may or may not; it depends on how one thinks of a rule. The independence of background justification can be an advantage, for reasons often pointed out in discussions of rules. Much has been said about the value, in efficiency, predictability, certainty, stability, and ease of reliance, of a system in which a decision is opaque with respect to its background justification. What can seeing decisions as examples, and their meaning as exemplar force, add to this discussion?

First, it adds a special communicative power in well-publicized decisions. In general (and outside the law), examples can have psychological power that rules ordinarily lack. One picture is worth a thousand words, and so is one example. As Samuel Johnson observed, a public hanging has a wonderful capacity to focus the mind.[19] The psychological impact of examples can survive the narrative form. Consider how narratives in literature hook us, emotionally, how we identify with one of the characters, and how we thereby absorb some point about the evils of a line of behavior (or the virtue of it) vividly. Some educators believe in the importance of having children read about so-called "role models." Those narratives can encourage by making vivid for children the possibilities for their own lives, and they do so more convincingly than mere exhortations or abstract assertions. Such stories encourage and motivate, and at the same time, through exemplar force, inform and instruct.

So, too, if legal precedents are examples, they can communicate a guidepost for conduct more vividly than a rule. Admittedly, official reports of legal cases are not noted for their emotional power. Yet they do contain, typically, quite detailed descriptions of the behavior of the litigants, descriptions which can engage the imagination. Fuller remarks that there is a contrast between reporting of cases in precedential and nonprecedential legal systems: In precedential systems, there is a more complete detailing of the behavior of the litigants (Fuller 1968, 148; compare Cross 1977, 42). There is, typically, more description than seems strictly necessary to justify the application of whatever rules or principles are cited in the rationale.

19. Boswell 1980, 849 (September 19, 1777). Johnson meant one's own imminent hanging.

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Given some of the advantages of examples, this kind of reporting is understandable. It is the example that matters most for conduct guidance, not the rationale, and the detailing preserves some of the psychological impact of the example.

More important, perhaps, official reports are rarely the communicators of judicial decisions to members of the target population. Unofficial reports, particularly through gossip or journalism, do most of the work. As anyone who has read a newspaper or watched a newscast lately can attest, these reports can be quite emotionally engaging. They will almost certainly contain a detailed account of the behavior that precipitated the legal action if that behavior was colorful, or if the behavior was familiar and the decision surprisingly tolerant or intolerant of it.

Second, if judicial decisions are examples, they can be more palatable action-guides than rules. This is true only for those rules which one must be able to formulate in order to apply. People in the target population are not always trustworthy judges in their own cases. They will tend to misapply rules to themselves, particularly when the rule is formulated in pejorative language. Not many of us are trustworthy about determining whether what we want to do will be "mak[ing] unreasonable noise,"[20] "[erecting something] indecent or offensive to the senses,"[21] "discriminat[ing]" on the basis of sex,[22] "indulg[ing (in the presence of a child)] in . . . vicious . . . practices."[23] Few who engage in it view their behavior at the time as "lewd and lascivious conduct." For that matter, anyone who thinks it is a good idea to give or sell drugs or pornography to children is unlikely to view what he is distributing as "harmful to minors."[24] This is due to the human propensity for rationalization and our desire to avoid attaching negative labels to ourselves or our behavior. But we may sometimes be better able to see that what we plan to do is the same sort of thing as that which someone else was not allowed to do in some well-publicized case, provided it is not described in pejorative terms. When that occurs, the conduct is more reliably guided by example than by explicit rule. (That we don't have to think of it as "unreasonable," "vicious," "discriminatory," and so on may be just the opening our egos need to allow us to group it with the exemplar.)

Third, if precedent sets an example, it has a special kind of flexibility. Precedent does not, of course, supply *maximal* flexibility. That would be given by a case-by-case determination of every relevant factor. If precedents meant (and were transparent to) reasons, then a precedential system would have maximal flexibility. Unfortunately, as should be clear by now, there

20. From the definition of "disorderly conduct" in ALA. CODE §13A-11-7 (1995). Another way to commit the crime is to use "abusive language."
21. From the definition of a nuisance, CAL. CIV. CODE §3479 (West 1997).
22. *See* Title VII of the Civil Rights Act of 1964 §2000e-2(a)(1).
23. CAL. PENAL CODE §273g (West 1999).
24. ARIZ. REV. STAT. §13-3506 (1995).

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would then be no instance of following the precedential decision itself.[25] Precedential guideposts are, as Schauer said about rules, resistant to attempts to modify them at the moment of application (Schauer 1991, 82–85). This is why, as pointed out above, it can be rational later to regret precedent, and why attempts not to set precedent by decisions may be rational.

Flexibility need not be entirely lacking with rules, as has been pointed out. Precedent can, however, provide an adaptability to the movement of future understanding *at a different level* than do rules, understood as having whole categories. That is because sometimes all a precedent does is set up a mutually-understood partial grouping. The categories may be partial or indeterminate, as in the example of the emerging imminently dangerous exception on manufacturer liability. When a new case arises, a process may begin involving persuasion, politics, cultural influences, and sheer use of power to extend and determine the grouping.

In this way, precedent may invite the use of power, rather than end power struggles. This is particularly disadvantageous when power is not justly distributed in a society, and when the power is wielded by an elite distinguished in its interests from many in the target population. In addition, there are certain interests—e.g., succession to political office, the sale of securities, wills, real property—that are best protected when people can confidently make use of the laws for planning long into the future. Guideposts for these matters may be best made by rule, and specifically, by legislated rule, so that the categories are explicitly specified in advance, somewhat inflexibly (Pound 1954, 69–70; see also Schauer 1987, 598).

Nonetheless, the partial categories available in precedent can be an advantage. Categories set in advance are both under- and overinclusive, as Schauer has pointed out. The categories become the salient ones for any-

25. This needs a qualification if the precedent is taken to introduce a reason. To take a favorite case of Dworkin's, suppose that *Riggs v. Palmer,* 115 N.Y. 506, 22 N.E. 188 (1889), in which a murderer is denied an inheritance from his victim, introduced into law the principle that no one shall profit from his own wrong. Then *Riggs* might be thought to be precedent for using this principle in a judicial justification. This article makes no claim about precedents for using reasons, or for establishing operations among them (e.g., establishing a "balancing approach" for deciding certain kinds of cases). To say that courts can introduce reasons or operations among them is to deny that these reasons or operations were legally relevant before the court action, which is a controversial claim. But even if precedential cases can introduce reasons or operations, they do not simply "mean" the reasons or operations they introduce. As has been noted above, precedential decisions tend to drift away from their underlying reasons. *Riggs* would be precedent for not permitting a murderer to inherit even if the inheritance did not profit the murderer (because, e.g., the bonds were worthless by the time the estate was probated). Perhaps the difficulty can be gotten around if one assumes that all the reasons for the initial court's decisions, of whatever generality, are the meaning of the precedent. (Compare Raz 1979, 184 n.9). Then one can point out that one of the reasons in *Riggs* is that the would-be heir murdered the testator. However, this fix introduces new problems: If the reasons at various levels pull in different directions, shall we say that the precedent does not have a coherent or consistent meaning? Will not this always be the case? (Note that this is a difficulty even if a single judge issued the opinion.) Moreover, the problem of whole categories arises once again. (Do reasons close the categories?)

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one who knows them. The categories determine what is or is not the same; they determine sortings. When categories are being worked out, however, people are free to classify as they see fit. The principles they use for classification may be easier to apply or more intuitively appealing than those that would have been set in advance. The resultant classifications may be more sensitive to morally relevant similarities and differences, to culturally important similarities and differences, to minority or subordinated group experiences and categorizations, and so on.

As an example of the last point, imagine a rape statute, which is or states an explicit rule, replaced with a series of precedential cases finding criminal behavior in sex acts explicitly labeled "unconsented-to" by the female. Now suppose that the series creates an unformulated rule, so that the category of what it is to do the same thing to a female is set in advance. Some feminists charge that the grouping of sex acts with rape reflects male viewpoints rather than female viewpoints and experiences, regardless of the gender of the people doing the grouping (MacKinnon 1987, 88, 105). (For a perspective from clinical psychology, see Kasl 1989, 192.) Suppose that these charges are correct. When the categories are set in advance, they will reflect male viewpoints; and everyone, including females, will learn these categories and sort accordingly. The result may be an underinclusive rape law. It is also disadvantageous to society. There are psychosocial prices to pay, as our society is discovering.

If, on the other hand, the series of precedential cases yields only partial categories, the outlook is more hopeful. When a situation arises in the indeterminate area, there is room, at least theoretically, for women's experiences and viewpoints to affect the resultant grouping. Gradually, the law can become something that reflects women's experiences. The same social forces that caused the initial problem in categorization remain, of course. However, they may be weakened sufficiently with the passage of time so that women's input is not marginalized or excluded every time a determination must be made.

Even when the issue is not integrating some subordinated group's experience and viewpoint, partial categorization in precedent can lead to better decision making. For instance, prior to the enactment of statutes on point, courts in England and America wrestled with the question of whether a person can properly be convicted of a criminal attempt to commit a substantive offense if under the circumstances it was impossible for that person to commit that offense. All too often, actual appellate decisions tested intuitions and understandings sorely. Some judges and legal commentators, seeking reasons why cases should be grouped with precedents (and/or reasons why precedents should be regarded as properly decided or misguided), looked for whole categories. A cottage industry sprang up explaining why groupings should be made in certain ways, and the explanations frequently pointed in different directions when unencountered cases were encountered. (For a careful tracing of the implica-

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tions of pronouncements and theories on impossibility in attempts, see Duff 1996).

One line of confusion will suffice to illustrate the point. There were judicial decisions holding defendants guilty of attempts to commit larceny by pickpocketing when they stuck their hands into someone else's empty pocket, believing it to contain something worth stealing. Does it then follow that a defendant who receives goods he believes to be stolen (and that had been stolen, but had lost their stolen character because they had been restored to the owners) is guilty of an attempt to receive stolen goods? (Is the one who receives nonstolen goods, believing them to be stolen, doing "the same thing" as the pickpocket who has unknowingly chosen an empty pocket?) The court in *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 [1906], thought not, saying that "the immediate act which the defendant had in contemplation" must be criminal, and putting the nonstolen character of the goods into the description of the intended immediate act. Citing *Jaffe*, a later court concluded that there was no criminal attempt when hunters shot a decoy (a stuffed hide) out of season, believing it to be a living deer (*State v. Guffey*, 262 S.W. 2d 152 [1953]). But other courts viewed the proper category as a "specific intent." Such specific intent did not have to take as its sole object an "immediate act." The courts then concluded that one who receives goods no longer stolen can be guilty of an attempt to receive stolen goods (*People v. Rojas*, 55 Cal. 2d 252, 358 P.2d 921 [1961], relegating the nonstolen character of the goods to "circumstances" and not to the "specific intent" of the defendant). Citing *Rojas* (among others), a later court found a criminal attempt when the defendant received goods that had never been stolen (*People v. Wright*, 105 Cal. App. 3d 329, 164 Cal. Rptr. 207 [1980]). Using reasoning similar to *Rojas*, a court upheld a conviction for attempted possession of narcotics even though the substance was, unknown to the defendant, talcum powder (*People v. Siu*, 126 Cal. App. 2d 41, 271 P.2d 575 [1954], labeling the nature of the substance a "fact" "extrinsic" to the defendant's intent and consistent with an attempt *actus reus*). Both the *Jaffe* and *Rojas* courts believed themselves to be faithful to the pickpocket precedents.

Suppose that the categories explicitly named in even the best line are too broad, too narrow, or otherwise unhelpful. (How does one apply the *Rojas* categories of "specific intent" and "circumstance" to the case of a man who lights a bonfire in order to burn leaves, falsely believing it will damage his neighbor's trees but not especially wanting this to happen? Does he specifically intend to damage his neighbor's trees? [Duff 1996, 27–28] Does his belief belong to circumstances?) If a case was wisely decided, as most likely were the pickpocket cases, no one may know exactly *why*. When wise decisions can be spotted without whole categories, any movement to turn partial categories into whole ones (and thus close the categories) would be foolhardy. For even if it is possible to justify subsequently not applying the rule, the conditions of this justification cannot always be met. The rule's catego-

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ries will have a force to be overcome in the chain of reasoning (and thus, unwisely drive some decisions, as may have happened in the *Jaffe* line). Intuitions are sometimes more reliable than rules, or at least, more reliable than all the rules so far formulated.

In short, precedent can be the vehicle of a legal system ultimately working out the outlines of the relevant categories, discovering or inventing the organizing principles, the direction of sameness, over time, as unencountered cases are encountered and brought to the public arena through litigation and appeal. Exemplar force might be minimal at first and grow later, as encountered cases force people to publicly draw and test conceptual lines, and consensus slowly emerges. A decision can be precedent for very little at first, and the meaning can grow as common understandings emerge. With this process comes the possibility of adapting to the growth of understanding about and insight into the phenomena being regulated by the law in a way that is additional to anything from rules.

One who thinks of rules as having whole categories might make another mistake about something like *Thomas* (the New York case that began an emerging exception on manufacturer liability). If one supposes that precedents guide action by rules, one will miss the real possibilities for action-guiding that go on before categories become whole. Even in *Thomas*, an example has been set for mislabeled poisons other than belladonna. The case will be a get-away-with-it example to some degree, a fact officials rely upon. To take a later example from New York law, suppose that a man (MacPherson) is allowed to sue an automobile manufacturer (Buick) for a defect in the Buick that he purchased, which caused injury (*MacPherson v. Buick Motor Company*, 217 N.Y. 382, 111 N.E. 1050 [1916]). Then the example has been set for suing the manufacturer of a Ford for a defect in a Ford that caused an identical injury. That example has been set whether or not there is a whole category set (e.g., whether or not it has been determined that the case is precedent for what one can do about other defective machines).

A particular legal decision may never yield a rule on the model of rules as having whole categories, and yet, a precedent can do much action-guiding through the decades. There can be a public guidepost, one that is recognized by the public, even in the absence of whole categories. Therefore, the production of rules with whole categories should *not* be regarded as the paradigm of precedent in action. One suspects that it often is, at least among legal commentators. Seeing precedents as examples calls attention to the action-guiding capacity of decisions when whole categories have not been set.

V. SOCIAL SALIENCE AND PRECEDENT

The force of a precedent or example can be its meaning *for* someone, as has been said. If a particular precedent had different exemplar forces for everyone who heard of it, and nothing that could be considered an exemplar force

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in common, it could not succeed in coordinating conduct, save by accident. Yet legal precedents do function to coordinate behavior, and officials rely on this fact in publicizing judicial decisions. So if legal precedents have exemplar force, they also have at times a common or public exemplar force. The purpose of this section is to investigate what sets the common exemplar force of precedent. This investigation will introduce the second thesis of this article: The meaning of a legal precedent is socially set and socially salient. To be more precise: A legal precedent's categories (whole or partial) should be understood that way. It is not set exclusively by legal officials.

This second thesis is *not* a consequence of viewing legal precedent as example-setting. For many purposes and in many contexts, it makes sense to take the meaning of an example to be controlled by something about or attributed to the displayer. For instance, if mother is setting an example for the other children by sending one away from the table in disgrace, it is plausible to view the meaning of her example as governed by some amalgam of her understandings and desires, rather than by anything the children understand. A short way of saying this is that it makes good sense to take the meaning of her example as given by her intentions. (This way of putting it may not be all that helpful; there is a lot of literature to show that "intention" language is tricky at best and unhelpful at worst.) Similarly, in the example of the trimming of the canned ham, it makes good sense to take the meaning of the grandmother's example as given by *her* intentions, so that her example is one of cutting the ham to fit one's pan, rather than as given by the understandings of her descendants. Then one can explain how examples misfire by being misunderstood. One can say things like, "They took her to be demonstrating trimming the canned ham under every circumstance, but what she was really demonstrating was trimming the canned ham to fit one's pan."

Similarly, if my young daughter is making up a game with her friends and tells them to copy her as she moves around a chalked course, then it is natural to suppose that the example she is setting is determined by her intentions. The other children misunderstand when they do not attend to those aspects of her performance that she takes to be significant, and also when they imitate aspects of her performance that she takes to be irrelevant. To the extent that either of these situations occurs and the other children act on their misunderstandings, she has failed to guide them by her example.

But this view of the meaning of examples runs into difficulties if universalized. Sometimes the displayer has not enough intentions on point, or sometimes has no good reason for acting. The displayer merely acts, perhaps without awareness that others might take the act as example, perhaps knowing and dreading their doing so. ("If I make a mistake and come late to teach class several days in a row, the students will take that as permission to come late themselves.") Here it seems better to resist the urge to say in these instances that the example had no "real" meaning. One can say that

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it had a meaning anyway, independent of the displayer; maybe because it was given a meaning by the target population. ("He set a very poor example for his students by coming late to class himself.")

These are, however, speculations. For present purposes, it is not necessary to make a commitment about what sets exemplar force outside of law. The issue is: What sets common, interpersonal exemplar force in law? And the answer will rest on some truths about law. The thesis that the scope of exemplar force *within law* is socially set is a direct result of some observations about law and the consequences of viewing the meaning of precedent as officially set.

To begin, let it be clear what is at issue. A judicial decision can be precedent for later and lesser courts deciding the same sort of situation in the same way. It is the meaning of "same," the categories of the precedent and the resultant groupings, that is at issue. What determines what is the same as what in the original? Moreover, a judicial decision also can provide a guidepost of conduct for members of the target population. (Such a guidepost was referred to in the first part of this article as a get-away-with-it example.) The precedent can communicate that it is prohibited to do the same thing as the defendant in the case, that other people have the same power as the plaintiff, that they will be liable to the same civil suit as the defendant if they do the same thing, and so on. What it is to do the same thing is at issue here, too. One orthodox view is that whatever categories officials assign are the true ones, that officials determine what is the same for purposes of precedent's meaning. According to this view, it is not enough, in fact it is technically irrelevant, that other people see what the meaning is, that nonofficials grasp the categories involved. What makes those categories *the* categories that count is that officials have set them. This is a top-down view of precedential meaning, and it is what this section will deny.

The assumption that officials control the product of judicial decision making is familiar in jurisprudential literature. Judges must control what their precedential decisions mean in order for *them* alone to be practicing the art of "adding a piece [coherently] to a chain novel," or "legislating within interstices in the law"—familiar metaphors for how judges decide hard cases and set precedent. Judges must control the scope of the product, at least in general, in order for constraints on judicial deciding (like "fit" with settled law) to have any significant bite. Otherwise, even though the decision with regard to the actual litigants before the court meets these constraints, the scope of that decision is out of official hands. As that scope is determined, it may turn out that there is (on the whole) poor fit with settled law, or legislation beyond the bounds of the interstices, or a chain novel without continuity and cohesiveness.

The following quotation represents a particular version of the (rejected) claim:

> [In precedent,] what . . . is of any importance . . . is what the . . . judge, attempting to see the law as a fairly consistent whole, thinks should be the

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> determining classification [for which facts are similar to the ones in the original case, and which ones are different]. (Levi 1961, 2–3)[26]

For "the . . . judge," one could substitute "the judiciary over time," "the legislature," or "whatever subsequent judge is deciding a case under a precedent," and still have versions of the claim that is being rejected. It is important to add this qualification, since some people would be quick to agree that a precedent's meaning is not determined by the initial judge.

A top-down view cannot be correct, because it ignores the very real constraints that determine what it is that decisions can mean, or, in more familiar legal terms, what *ratio decidendi* officials can meaningfully assign to a case. (Since the nineteenth century, the orthodox doctrine in common law countries is that what binds judges in precedent is the *ratio decidendi* of the precedent case [Black 1912, 37, 40; Goodhart 1959, 122]). Suppose that officials were to decide *MacPherson* in a way that allowed MacPherson to sue (as they did), then announced it as precedent. Suppose they subsequently refused to allow a lawsuit by a man who bought a Ford defective in exactly the same way on the grounds that they were different men with different make cars. No one would believe that officials were actually following the precedent. If officials honestly believed that *MacPherson* was a decision only for Buick owners, the kindest thing to say is that they would be mistaken. The reason is not that the officials would be violating their own canons of assimilation, or rules of practice, or some such social rules about what is relevant in categorizing. If that were so, then officials could change these rules or canons and be correct about the scope of *MacPherson*. Officials would be, collectively at least, incorrigible on the meaning of precedent; yet they are not. The reason is that these canons or rules, if they exist, are constrained by something not directly controllable by officials as a group. They are constrained by strongly entrenched and very basic understandings of what is the same as what, what makes sense to group with what, that are shared by everyone affected. What everyone knows constrains official practices, canons, and rules of assimilation. It constrains what any alleged official meaning-assigning practice can intelligibly be said to be. In sum, what is "on all fours" with a previously decided case is not a matter of official fiat.

For this reason, it is doubtful that anyone really believes that *whatever* officials might choose to assign to a decision is its meaning. Taken literally, that claim is ludicrous. It makes the meaning of a decision entirely a matter of official fiat. It has officials setting categories of sameness no matter how

26. Levi goes on to note that litigants through their attorneys influence the categorization. Compare Goodhardt's claim that the *ratio decidendi*, or "principle of the case," is determined by the judge's choice of material facts (Levi 1959). *See also* the quotation from Black on the first page of this article. Some commentators treat precedent-setting judges as only sometimes creating legal rules ("laying down rules"); otherwise, they view judges as following ready-made rules. Among these are Cross and Salmond (Cross 1977, 79; Salmond 1966, bk. 2, ch. 5).

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insensitive that is to entrenched ways of grouping. The point bears repeating: That is to overlook real constraints on how officials think. The belief, the don't-you-see-they're-the-same-thing-at-bottom, comes first and drives the process, the choice of reasons, the reasoning to the *ratio*, or whatever it is that officials allegedly use to set the meaning.

At this point, the top-down theorist might be willing to concede that in "all fours" cases (the "exactly the same, and everyone knows it" cases), the categorization does not depend on official fiat. Communication is involved in promulgating law, and communication depends upon common, shared understandings. Most people are willing to concede that in explicit legislation, the sentences constructed have a meaning not entirely determined by official fiat; and that is why they are meaningful to others who are speakers of the language. There are parameters beyond which legislators cannot push language no matter what they might have thought they were doing in passing a bill. These parameters are outside the direct control of officials, and so occasionally legislators can misunderstand what they have passed. Similar parameters, a top-down theorist might now say, apply to categorizing once a case has been decided and is to be treated as precedent. It follows that should officials be so shortsighted as to not realize what would be on all fours with their decision, they have not fully grasped the precedent they have set.

The top-down theorist must insist, though, that beyond these parameters of meaningful grouping, officials set the grouping. So even if lay people, ignorant of many other judicial decisions and rules, think a decision about mislabeling belladonna applies to selling rotten meat (but are willing to concede that the situations are not *exactly* the same, and do not group them so closely together), it is open to officials to decide that it does not.

However, this move is not open once the crucial concession has been made. For the process of grouping in the cases that are by concession beyond the reach of official fiat is a dynamic process. There is change over time, and the process is not directly controllable by officials. They cannot govern, nor sometimes anticipate, which way the process will evolve, which "of course groupings" will emerge to make nonsense of previous groupings. For example, *Macpherson* involved a defective rear wheel, which made the car suddenly collapse while the plaintiff was driving. As a result, he was seriously injured. A case arose later in the same state in which a man was injured by a defective door handle, which caused the door to suddenly open, throwing the man through the door and under the car. The New York court denied recovery, in effect refusing to group the two defective parts of an automobile together for these purposes (*Cohen v. Brockway Motor Corporation*, 240 N.Y. App. Div. 18, 268 N.Y. Supp. 545 [1934]; discussed by Levi 1961, 24). Perhaps it was not clear in 1934 how to group these things. Now, however, nearly everyone would think it "virtually" (if not "clearly") "the same thing" to produce an automobile with a defective door handle that causes injury as to produce an automobile with a defective wheel that does

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the same. The official sorting in 1934, which amounted to putting producing autos with defective wheels in one category and producing autos with defective door handles in another, did not stick. Those two producings were on their way in 1934 to becoming saliently the same (see the dissenting opinion in the *Cohen* case), and have become saliently the same, in the context of causing injuries to owners. This grouping cannot easily be traced to subsequent legal developments, even though there were changes in legal doctrine and legal cases that made more liberal groupings with the negligent act in *MacPherson*. Judging from the quick acceptance of *MacPherson* by courts in other jurisdictions and its subsequent wide application, it would appear that the common view, absorbed by judges, drove legal developments, rather than the other way around. Admittedly, *Cohen* involved a single court, not "the judiciary over time." Nonetheless, it illustrates the fact that the officials are not entirely in control of what comes to be seen as "belonging" with what.

It does not yet follow, of course, that social salience is what is entirely in control. Perhaps officials are largely in control, with incursions from a wider society (in the all-fours cases) from time to time. Yet this modified top-down view has its own difficulty. It is unable to account for precedent's ability to guide self-directed conduct in a fairly direct way. There is a need for precedent to do so. It is not practicable to have every lay person who wishes to be law-abiding seek expert advice whenever the possibility arises that a judicial decision may provide guidance for conduct. Nor is it feasible to have legal experts issue this advice each time a precedent applies in someone's life, for all applicable precedents (even to a centralized information system). It goes without saying that there are not enough resources (courts, judges, attorneys) to litigate every question of the application of a single precedential decision, and neither are there resources to litigate for nearly every precedent. Officials suppose that enough of the application of a precedent will be accurately gleaned by the target population to make it socially useful to announce the precedent. By depending upon people to understand some of the conduct-implications of a precedent (and to adjust their behavior accordingly), officials rely on precedent's ability to provide guidance for self-directed conduct in a fairly direct way. They need to do so if decisions about lay conduct are the subject of much precedent.

Moreover, it is a fact the precedent provides this guidance. Most laymen know something of criminal and civil law without ever having seen or heard formulations of the rules involved. They have heard or read news accounts that someone was convicted or successfully sued (a judicial disposition, albeit by a lower court and not usually setting precedent for other judges) for an act which is then described in terms of ordinary life. ("Did you hear the news? This preacher collected money for an alleged ministry and spent it all on his mistress and his second home in the Bahamas. He's now in prison.") Or they read news accounts about an appellate case in which

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someone was allowed to sue, or a conviction was upheld, for behavior described in terms of ordinary life. The indisputable fact is that most lay people manage to be law-abiding, even law-using. They do this with an eclectic combination of knowledge of some formulated rules (themselves usually too truncated to be entirely accurate), bits of legal advice, and an ability to group cases with the judicial decisions about which they learn. One example of this lay ability to grasp cases of doing the same thing may suffice. Women who remember the prosecution of Lorena Bobbitt do not need to consult lawyers or legal texts to know that whacking off a part of their husband's anatomy in his sleep is forbidden, even if he is abusive. Similarly, lay people come to understandings about self-defense as a defense to murder, about being able to sue a doctor for malpractice, about criminal liability for wife beating, cocaine use, rape, helping yourself to your employer's till, and so on.

It also goes without saying that familiar explanations of how experts can figure out what officials have set as the meaning of precedential decisions will not work for the lay public. Many formulae for figuring out what is really the meaning, explicitly or implicitly in the opinion, are not formulae that the general public can use often. The public's knowledge of the opinion itself is usually truncated, its knowledge of antecedent law is usually very limited, its understanding of key legal concepts may diverge from that of experts, the public is usually unaware of the history of decisions that may seem to experts to be on point, and so on. One of the purposes of giving legal experts a special education is to inform them about these matters and train them to think along different lines than the average person. This includes training them to see salient categories that the average person would not, and to have a grasp of assumptions that may be unexpressed because obvious to the legally trained.

The problem for a modified top-down model, then, is to account for precedent's ability to guide self-directed conduct, and the (reasonable) reliance of judicial officials on this ability.[27] It is tempting to assume that the public is able, more or less successfully, to reproduce the kind of reasoning judges use in applying precedent. It does seem that people can and generally do group or categorize the same way. After all, officials are members of the larger society, and are likely to think as most people do about what is the same as what, unless trained to do otherwise. Ordinary people are litigants in many cases, and urge through their attorneys their own views about the relevant categorizings. The arguments before courts influence judges, and, as the next section admits, judges through their decisions influence ordinary categorizings. What the top-down theorist needs to assume, however, is that officials set the way to categorize in

27. The emphasis on precedent's ability to guide self-directed conduct owes much to Fuller. For the general point that law does this and is not a top-down system, *see* Fuller 1968, 92–95; 1969, 192–95, 210, 223, 227–34; 1981. *See* Postema's account of Fuller on this point (1994). Postema agrees that law is not a top-down system (Postema, 1987*b*, 310–13).

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precedent, that in theory *any* way they categorize is correct, and that everyone else has an ability to anticipate (or reason to) the way they categorize, no matter how that happens to be. What is the evidence for *this* ability? It appears ad hoc, postulated to save a theory from the undeniable facts that legal systems need some convergence in order to function successfully in conduct guidance, and that legal systems do function successfully in conduct guidance to a large degree even when relying on a system of precedent. Moreover, postulating an ability to extract from opinions largely unknown to it the same thing that judges with special training and broader legal knowledge extract suggests that what is not known by the public is inessential to the extraction. It suggests that special training is inessential, as is broad legal knowledge. It even suggests that the terms of the opinion are inessential, since they are rarely known by the public. So the top-down view cannot then consistently claim support from the practices judges sometimes have, particularly in England, of treating the words of precedential opinions (laid down, of course, by officials) as important in the application of a precedent.

It would seem, therefore, that the top-down theory cannot maintain that a precedent's meaning is *inherently* publicly accessible. That leaves it with no apparent ability to account for the public accessibility of the meaning of precedent in a way that fits actual *lay* practice. Social salience does, however, account for the public accessibility of the meaning of precedent in a way that fits lay practice, and it makes the meaning inherently publicly accessible.

Finally, some of the same points about the untenability of a top-down view can be made about an aspect of meaning outside the focus of this article. The argument has been that the groupings of sameness for applying a precedent are socially set. These groupings cover what it is to do the same thing as a party in the original case did, as well as what it is for a court to do the same thing as the original court. But a precedent commonly has a normative dimension. Consider some previous examples, namely, the court decisions upholding a conviction for attempted larceny when a would-be pickpocket chose an empty pocket. It is arguable that no one truly understands "the meaning" of these decisions unless he or she sees something normative in them, and, in particular, unless he or she sees that the court is demonstrating that doing this sort of thing is *prohibited*. At this juncture, there may appear room for the top-down theorist to argue that it is the officials who exclusively determine that decisions upholding criminal convictions "mean" that doing as the defendant did is prohibited.

The plausibility of this approach cannot be assessed in advance of its details. Are we to suppose that the officials could theoretically do/intend/practice something so that in the future their upholding a conviction for attempted larceny in a pickpocket case would "mean" that this sort of behavior was permissible or required? What would make that state of affairs intelligible? One can imagine a change so that what officials decide in one case is not to be taken as a guideline for other cases at all, i.e., not prece-

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dent; but more is now being asked, and it is not clear how to imagine it. If all the officials, contrary to everyone else's belief, believed that they were signaling permissions to everyone other than the defendant by upholding his criminal conviction, would that make it so? Or would that state of affairs describe a deep confusion and pathology in the legal system? One suspects the latter, and this suggests that there are constraints on what officials can do, even in the normative dimension of precedent meaning.

If there is a normative dimension to the meaning of a precedent, then it must be publicly accessible; and it is not yet clear how a top-down theory can explain that public accessibility. Happy accidents are deeply suspect. A better answer is that there is a convention or social rule creating the fact that when a court upholds a conviction for particular behavior, that kind of behavior is prohibited. The normative dimension will be publicly accessible (and *not* by happy accident) if the public is a party to this convention, if the public is among the people who must have certain attitudes, mutual beliefs, or mutual expectations. There is room to say, then, that what counts is that "everyone knows" the normative import, and that normative import is socially set. (This "better answer" is meant to be speculative only.)

Some may worry that if precedential meanings are not officially set, there is no conceptual room for the precedent misfiring and the public misunderstanding. Taken literally, this worry is misguided. Individual members of the public may misunderstand the common guidepost that a precedent sets up. They may misunderstand, as individuals, even the very basics, that is, what is on all fours with what. Nothing in this article suggests that *whatever* ordinary people understand about law is correct.[28]

More important, the sword of possible misunderstanding cuts two ways. Where is there conceptual room for officials misunderstanding on a top-down view? There may be room on a top-down view for *individual* officials to misunderstand the common guidepost that a precedent sets up. What distinguishes a top-down view from the one advanced here will then be which group is corporately incorrigible: "everyone," which includes the target population, or officials. There is no reason, certainly none from the concepts of precedent or law, to view officials as corporately incorrigible about the scope of the common guidepost created by a precedent.

We must, therefore, be cautious in the case in which lay salience and official groupings diverge. Suppose that a case is decided in which a man is

28. There *is* much inaccuracy in lay understandings, as any legal expert can attest. One can say, on the present thesis, that lay opinions that do not reflect what is socially salient from accurate reports of judicial decisions may be inaccurate. This can happen because of idiosyncracies, individuals leaping to conclusions, individuals not knowing what is both known to the broader public and throws a new light on the decision (such as related decisions carving exceptions), individuals relying on inaccurate reports, and individuals overreacting (the "chilling effect" of some decisions). But see below and the next section for why, where lay opinion otherwise diverges from what it would have been or what expert opinion is, it is begging the question to pronounce the lay understanding straightforwardly inaccurate, so that the expert understanding is, by implication, straightforwardly accurate.

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convicted of manslaughter for failing to summon medical aid for his wife, who is dying in the home as a result of the injudicious mix of alcohol and drugs. To the public, it may clearly "mean" that any adult has a duty to summon aid for another dying in his or her home. However, to a judge trained in inheritance law and other cases on the duty to rescue, the duty might clearly appear to be restricted to those in legally sanctioned relationships, and so, to exclude a duty to summon aid for a mistress. The decision in *People vs. Beardsley*, in which the couple had an adulterous relationship, illustrates the judicial view (150 Mich. 206, 113 N.W. 1128 [1907]).

Such a case is one in which judges march to a different drummer on "of course" groupings than the society at large. If the public grouping is deeply entrenched, this is *not* a clear case of the public misunderstanding the "real meaning" of a precedential decision. It is a deeper pathology. For theoretical purposes there is no single right answer to the question of the meaning of the precedent. There is now a split between those who see one thing as "of course" the same as the original (the public), and those who deny that sameness (the officials). It is a philosophical mistake to treat such a situation as a paradigm of setting meaning for precedent (or of what would count as precedent following by courts). The paradigms are in the all-fours cases and in the cases of salience to "everyone."

In sum, thinking about what is central to the meaning of precedent should be shifted. The convergence in groupings should be seen as central, neither a happy fortuity when meanings are officially set nor an important product of promulgating the official meaning. The meaning of precedent should be thought of, for theoretical purposes, as *essentially* public in the paradigm case of precedent having a meaning in law. This view allows for deviant and corrupt cases. Situations that fit a modified top-down model are better placed in one of these categories.

The view denies that the official role is dispositive. It is not so much that officials set the meaning, as that they are an essential part of a process or essential members of a body whose experience and world view, and resultant habits of conceptualizing and methods of reasoning to salience, set the meaning. Yet so is the target population. It distorts this picture to single out one component, what officials do and believe, as *the* reason that the precedent means what it means.

VI. THE ROLE OF OFFICIALS

The role of officials is not as limited as an initial glance at a social salience account might suggest. Though judges are rightfully influenced by others' grasp of examples, judicial understandings and technical legal categories fold back into the process and influence the understandings of others. Recall that the parties, or rather their attorneys, frame the events and issues in certain terms, naming or describing certain categories, leaving out some

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facts as irrelevant. That shaping is influenced by the common culture, but also by past judicial decisions, legal rules, and legal theorizing. The account of what happened that gets communicated to the target population usually reflects this shaping, even if that account is not official (but comes, for instance, from the newspaper). This account will affect the understandings of the precedent by the target population.

How legal shaping works on the target population's groupings may be clearly seen in discussions of First Amendment issues. "Why," asks Schauer in reference to the Nazi march on Skokie, "do some people fear that allowing restrictions on Nazis because they are Nazis will establish a precedent for restrictions on socialists because they are socialists, even though the distinction between a Nazi and a socialist is obvious, accessible, and easily justified?" (1987, 578; note omitted). One answer is that the legal categories for disputes about permitting political marches that leap to mind for lawyers also leap to mind for nearly everyone who reads a newspaper or listens to news broadcasts in America: political speech, freedom of expression, political group, free speech, censorship, and so on. Fruitful and clear concepts from the law and legal theory are communicated to the public and affect the public's categorizations of what someone has done or is about to do.

A more subtle example of shaping from law is presented by the case of *Allied Van Lines, Inc. v. Bratton*, 351 So. 2d 344 [Fla. 1977], in which the court enforced a moving company's standardized contract against a woman who signed it without reading it. The court's description of Mrs. Bratton's behavior is that she "simply did not read . . . or even ask questions about the Bill of Lading" (348; Frug 1992, 97). Yet what Mrs. Bratton took herself to be doing was extending solicitude to cold and tired men by swiftly signing something so that they could go (Frug 1992, 99–100). Her characterization of her behavior was downplayed in the official account, and probably would not have made it to a newspaper account of the case. Those who read this case, including lay persons, will most likely come away with a rule like the following: Agreements that you sign will be strictly enforced even if you don't read them. The case will be seen as about the legal effects of signing agreements. It is unlikely to be seen as about the disadvantaging of courtesy or solicitude. This is because the fact, if it is a fact, that signing swiftly was courteous and solicitous was not effectively communicated. This is not surprising: Courtesy and solicitude are not salient legal categories, and contract (agreement of a sort) is.

So common understandings of precedent meaning are influenced by the legal subculture. The target population's expectations and beliefs do not occur in a legal vacuum.

In addition to this fairly common initial shaping of the original facts, the legal subculture can be particularly influential when social salience in grouping with the original breaks down, as it can for a number of reasons. More than one category may be salient, where the categories map in

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different directions over some course of action. For instance, in the much-discussed English case of *Donoghue v. Stevenson*, the facts were described by one of the deciding lords, Lord Buckmaster, as follows:

> [T]he appellant, who was a shop assistant, sought to recover damages from the respondent, who was a manufacturer of aerated waters, for injuries she suffered as a result of consuming part of the contents of a bottle of ginger-beer which had been manufactured by the respondent, and which contained the decomposed remains of a snail. (1932 App. Cas. 562; quoted in Twining and Miers 1976, 40)

The court allowed the suit. What sort of person or company belongs with the manufacturer? One salient answer is: anyone else who is a Scottish manufacturer of ginger-beer in opaque bottles. But each of the following may be just as salient:

a manufacturer of aerated water
a manufacturer of consumable products.[29]

These categories compete in a case in which someone bought a bottle of lemonade contaminated with carbolic acid (*Daniels and Daniels v. R. White and Sons and Tarbard*, [1938] 4 All E.R. 258; discussed in MacCormick 1978, ch. 2 and p. 216). A court deciding on the basis of *Donoghue* that the person who bought the contaminated lemonade may sue the manufacturer can have the effect of choosing for everyone one of the salient categories over the other. *Donoghue* will then be perceived as being about liability for tainted consumable products, or at least as not merely about liability for aerated water.

When the categories of sameness are partial, judges can help to make salient the next step in the process of completing them. Suppose, following the decision holding Buick liable for a defective automobile, the question arises whether Maytag is liable for injuries caused by a defective washing machine. By holding that Maytag is not, a court can be decisive in directing social groupings about sameness *in the Buick case* away from a broad "manufactured item" or "machine" category.

To use a metaphor, there is a dance between official creativity and the social reasonableness of understanding decisions along certain categorical lines, of grouping things a certain way. If this were not true, case law would be a far different system than we know, one which would likely be lacking the large element of self-directed voluntary compliance. Consequently, it would probably not run for long.

Nonetheless, there is not enough of authority in the view being developed to suit some people. They fear that the concept of law will have its

29. Items on the list are suggested by Twining and Miers (Twining & Miers 1976, 45). Compare other category choices suggested by Stone, Montrose, and Salmond (Stone 1950, 187–88; Montrose 1957, 591; Stone 1964, 269–70; Salmond 1966, 180).

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connection to authority (and authoritative sources) distorted unless the meaning of precedent is seen as officially set. What seems to be characteristic of law, as opposed to custom, is that law's public guideposts are authoritatively set. This contrast between law and custom may appear to be in danger of being lost if one takes the view recommended here.

That fear is grossly exaggerated. The connection to authoritative sources remains sufficiently intact to make the contrast. There *is* a sense in which it is true that authorities set a precedent. Obviously, there must be a judicial decision in the first place, and officials (judges, in particular) reach that decision. Depending on the precedential practices, anything judges decide and promulgate, whether or not it is correct as a matter of antecedent law, and whether or not it is legally justified, might be precedent. Officials start the ball rolling, and in every decision taken under the original precedent, they can keep the ball rolling.

If that were all there was too it, though, precedent would be authoritatively set only in a weak, maybe even Pickwickian sense. Imagine, to use an example of Raz's, this situation: If Jones eats the melon before him, we will take that as a signal to do one particular thing, and if Jones refuses, we will take that as a signal to do another, but Jones has no knowledge of this (Raz 1996, 265). Jones does not seem to be any more an authoritative source of our directive than would a storm if we conditioned our behavior on its occurrence.

There *is* more to it. First, judges intend to set precedent in their decisions, so they are not like the clueless Jones. At the very least, they have a general intention, intending to set precedent for something-or-other in reaching their decisions. Second, intention and foresight about content are often attributable to them on the basis of shared background, shared understandings, shared competencies, and the fact of their falling under standard conditions. Wittgenstein and others have pointed out that there is no particular mental content, certainly not a list of extensions, that must be in someone's mind in order for him or her to intend or foresee the scope of a directive ("Show the children a game"). It is sufficient that the person is familiar with the background understandings and assumptions, knows the language, and does not fall under exceptional circumstances, like confusion of thought or other mental defect (Raz 1996, 269–70).

So, too, with judges. They are part of a society that thinks a certain way, that will find some groupings so strongly salient as to be constraints on anything else one looks for, such as justifications for the decision. It is foreseeable by judges what will be seen as "of course the same thing" as what. They can often be said, with full justification, to intend to set the precedents they do set by reaching decisions, since "everyone knows" what is on all fours or "of course the same," even if they have not consciously canvassed the list. To this extent, this article does not deny that judges intend to set the precedents that they do set. Rather, it denies that this intention is *the* reason that the precedents mean what they mean.

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VII. THE ADVANTAGES OF LEGAL PRECEDENT, CONCEIVED OF AS SOCIALLY SALIENT IN MEANING

Once precedent's meaning is seen as paradigmatically socially set and socially salient, some of the standard claims about the advantages of a system of precedent can be made with greater force and precision. Precedent, it has been said, has the advantage of adding predictability in a system otherwise governed by explicitly set rules and whatever else constitutes law (implicit principles?). The social salience view explains why nicely. Precedent can add predictability when courts are bound to follow precedent because a precedent wears its meaning publicly. You and I know what it means, know how to group things with the precedent, know each other to know this, and so on. So if you and I know how a court has disposed of a case and facts about the behavior of the parties, and if we know that future courts are bound to follow this decision, *since we also can tell what that would be like,* we have a basis for prediction. I can predict how you would apply the original decision in these circumstances, you can predict how I would, and we both have a basis for predicting how courts will see it.

Fuller believed that a function of law is furnishing the target population with a baseline for self-directed conduct (Fuller 1969, 210, 229; 1981, 234). Baselines must, to be useful at all, be publicly accessible (Postema 1994, 371–72). Precedent is the sort of thing that can usefully fulfill this Fullerian function, and the socially salient way its meaning is set is the reason why. People can use their mutual knowledge of groupings in a system of precedent to predict a beneficial or unfavorable judicial response to contemplated behavior. If this is all that occurs, then in the crudest way (or perhaps the limiting case), precedent has furnished a baseline for self-directed conduct: Do the same thing, and take the same risk (or rely on the prediction) that a court will find similarly if the case gets to court. Since the "this kind of behavior," "people in the defendant's position," and all the other groupings of sameness are set by social salience, the core of a baseline set by precedent is not only publicly accessible, it is essentially public and mutually known. So if in no other way, precedents can furnish baselines for self-directed conduct in the limiting case because of the role of social salience in determining their scope. (And if the speculations in section V are correct, precedential meaning in its normative aspect may depend on a special form of social salience.)

The standard claim that precedent brings efficiency can be augmented, for precedent is efficient in a way that is not usually appreciated. There is a special efficiency in setting a common guidepost through something that has an inherently public exemplar force. Officials can use the common understandings about what is "the same as" some act, circumstance, or legal person in the original case. They do not have to fight these understandings and try to communicate their special officially-set groupings or hope people somehow discover the "true" groupings set by some background justification.

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This is just as well. People will act on their best understandings of what is being communicated. Expectations and action will be based on the salient grouping. Some of these expectations are relatively intransigent to intellectual correction. This may be because they are deeply entrenched in nearly everyone, in nearly everyone in the culture ("Everyone knows it is the same"), or idiosyncratically in the individual. Sometimes, in other words, we would simply not see, hear, or remember the groupings judges explicitly said they wanted us to make, or legal experts told us were to be made. Moreover, as has been pointed out, we cannot always consult judges, lawyers, the better-informed, or the better reasoners among us before we act in everyday life; there are not enough of them, for starters. We often lack ready access to those who would allegedly be in a position to correct our entrenched groupings.

To the extent that social salience produces new categories quickly or precedent calls to mind preexisting (whole or partial) categories, precedent is an efficient communicator. All that judges need to do is decide the case before them, and communicate their decision and a story of the behavior of the parties. The common culture, in large part, will supply the groupings that inform the guidepost; and judges, being members of this culture, will have no epistemological obstacle to understanding what it is they have communicated. The target population, being members of the same culture, have no particular epistemological obstacles to understanding the guidepost, either. In short, there are psychological and epistemological efficiencies in using what is "of course the same" in "everyone's" eyes as the law's categorizations in order to guide conduct.

Social salience brings another advantage, since precedent allows the categories to come from the target population. The categories can come directly from the people, rather than being channeled (as in explicit legislation, for example) through officials. This can make the categories more reflective of wisdom gained from experience, shifting with what experience reveals.

Officials are sometimes in the worst position to create the categories of a guidepost. They may not understand all that is relevant to the behavior they wish to encourage/prohibit/require. They often have less firsthand knowledge of the situation that they desire to regulate than does the target population, and so are more likely to underestimate or ignore relevant factors. The social positions and life experiences of officials can blind them to the weight of factors brought to their attention. This can result in distortions even when the original impetus for the legislation begins at a grassroots level.

Unarticulated folk wisdom can supply what conscious deliberation (certainly conscious deliberation by an elite) cannot. Then all that officials need to be able to do is to spot the wise or correct resolution of a particular controversy before them. Their inability to tell which other cases are just like this one, and their confusion about why cases are to be grouped together, will not be obstacles when ordinary folk are more insightful and more

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experienced. They can group and mutually know each other to group certain situations with this one, and so they can act on the core of categories.

There is another aspect to social salience that may appear advantageous. Due to its dependence on social salience, precedent involves a little-noticed shift of decisional power. Schauer talks about shifting of power, about "decisional jurisdiction," with respect to rules (1991, 158–62). Precedent shifts decisional power, too. Most legal commentators will recognize that in a precedential hierarchy of courts, the power to decide when to ignore or modify a precedential judicial decision is shifted away from the target population and some judicial officials and onto others. What legal commentators are unlikely to recognize, particularly if they subscribe to a top-down view, is that precedent shifts the power to decide the original meaning away from judicial officials substantially. At the same time, it shifts that power away from individual members of the target population, leaving it to folk wisdom or group consensus, not idiosyncrasies. In terms of the first half of this article, the examples authoritatively set by judges get their meaning from life as the whole population groups it.

Those who believe that precedents make law might see in this shift a mitigation of the undemocratic nature of judicial law making. It may appear more democratic that the meaning and reach of a judicial decision is out of the hands of the officials (exclusively) and at least partly in the hands of the target population, even though it is not directly and consciously chosen by members of this population. However, it does not follow that precedent is morally better as a source of law than the top-down theory would allow, nor that its meaning evolves in a more democratic manner.

As everyone knows, there are often distinctly unfair balances of power within a population, including the power to set categories. Typically, it is the powerful, rather than the majority, who determine the evolution of a society's categories. Categories that evolve tend to reinforce or reflect the dominant group's viewpoint. This viewpoint can be self-serving or discount the needs and experiences of others. (Recall the earlier example of the rape decisions.) When there are power struggles to control the group-conceptualizing, they tend to be more intractable, because more hidden, less conscious, less openly acknowledged, and less easily openly challenged, than struggles over legislation in a public forum. A society might do better to have the struggle over its common guideposts out in the open, in a public debate over proposed legislation, where the categories will be named or described, then to have it go on sub rosa and be sunk without open acknowledgment by the cultural forces maintaining the status quo.

VIII. THE MODEL AND JUDICIAL PRACTICE

The main points of the model of the meaning of precedent can be summarized as follows: A precedent is an example whose meaning is paradigmati-

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cally socially set and inherently public. Examples have meaning independently of whatever justifies their display, so a precedent's meaning is not necessarily the legal standard it correctly applies when it correctly applies one. Its meaning is not necessarily whatever in law justified the decision in the first place, if it was legally justified. The guideposts for behavior supplied by precedents do not necessarily use the whole categories of a rule. A precedent's meaning is paradigmatically determined by social salience. It depends on what "everyone knows" is the same, what is "plainly the same," or what is "on all fours." These things are constraints on judges' understandings, not creations of judges, although judges can and do in turn influence common understandings.

Since social salience is a result of social processes not necessarily related to good thinking, it follows, again, that precedent's meaning is not a function of the good moral or policy reasons for reaching that decision even when there were good reasons. Therefore, one interpretation of *ratio decidendi* is faulty, namely the idea that it is the good moral or policy reasons for deciding and, at the same time, the true meaning of a precedential decision.

Sooner or later, it will be demanded: How true is this model to judicial practice? Since, as this article has argued, the judiciary do not primarily and paradigmatically create precedential meaning in their work, it is not immediately evident why it is important to look at judicial practice with regard to precedent. Perhaps it is assumed that, if anyone knows the meaning of a precedent, it is the judiciary, taken as a whole, whose job it often is to apply precedent. Then it is further assumed that the judiciary find and apply the meaning of precedents in their work, especially their appellate work, and that their practices of "interpreting" and applying precedents accurately reflect the finding of their meanings. At least some of these assumptions, it will now be argued, are dubious.

Consider how appellate cases that cite judicial precedent come to be. If it is plain or striking that this sort of behavior is the same sort of thing as that already allowed, prohibited, or disadvantaged by the courts, only a very few people or corporations will become parties to litigation by failing to adjust their behavior accordingly. (The very few include those unmotivated to comply with the law, the foolhardy, those who bet on not being arrested or sued, those incapable of compliance, those under various excusing or justifying conditions, those who bet on convincing the court that they have a defense, those hoping to change the law, those betting on a failure to follow precedent by the courts, and those who believe that there is a conflicting precedent or standard which will win out.) Thus, chances are that when the "meaning" of precedent is needed to help judges decide actual litigation, the story diverges from a simple story of social convergence on salient categories. The precedent to be applied by the court no longer functions as an example. At this point, the exemplary force of the precedent must be selected or created.

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There are several reasons, already remarked upon, why precedent might fail to be a straightforward example: More than one category can be salient, or the salient category may be partial and the case arise in the unsettled area. In addition, salience can vary in strength. It can also shade into something apparent only upon reflection and successful completion of a chain of reasoning (as in the correct answer to a complicated addition problem). And that can shade into something apparent only upon completion of a course of reasoning that few can successfully master (as in the correct answer to a complicated problem of higher mathematics or metalogic). In verbal analogy problems given on standardized tests like the SAT, one is required to reason to a grouping; the easier the problem, the easier the reasoning to salience. Consider, for example, this analogizing problem from a preparatory book for the SAT examination (Vlk 1994, 32): Blunderbuss is to weapon as:

A. spaceship: vehicle
B. archipelago: island
C. cauldron: pot
D. iota: amount
E. corset: garment.

This seems to involve a choice between an immediately salient concept for grouping (the concept of being an example) and a concept salient only after reasoning, with sensitivity to a feature that can be overlooked (the concept of being an *antique* example). Someone will pick answer (e) only if he knows that cauldrons are pots still in use, but corsets are garments not in general use (in addition to the fact that blunderbusses are not in general use as weapons). Here, an immediately salient grouping gives way to a different grouping that is salient with some intellectual work. (The need to do that work is created by the fact that otherwise, there are too many "correct" answers for a multiple choice question.)

There are a number of appellate cases in which the majority opinion uses analogical reasoning to decide that a precedent does or does not cover the present situation. So, e.g., in *Adams v. New Jersey Steamboat Co.*, Judge O'Brien sets out an argument to show that "for all practical purposes" a steamboat is classifiable as an inn, when the question is the application of precedents concerning the liability of innkeepers for goods stolen from their guests (151 N.Y. 163, 45 N.E. 369 [1896]). An analogy is drawn between the relationships of innkeeper and guest on the one hand and steamboat proprietor and guest on the other (Golding 1984, 46–48). Perhaps people at the time generally reasoned or were disposed to reason the way that the court did. However, if not, the court's analogical reasoning might have made the grouping of innkeepers and steamboat owners salient for future purposes.

In addition, the consensus on which social salience is built can come apart at various levels and to various degrees. In a nightmare scenario for

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action-guiding, there can be conflicting categorizations for distinct subgroups in the culture (men and women, officials and lay persons). A precedent may have a clear meaning within a legally expert community that it does not possess in a wider arena, just as a statement may have a clear (albeit idiosyncratic) meaning to two friends that it does not possess with reference to most native speakers of the language. One of the subgroups may far outnumber the other, or be otherwise dominant in the culture, so that there is a cultural response driven by the dominant group's expectations of what belongs together that is known to members of the other subgroup. That subgroup then anticipates the culturally dominant response, but nonetheless groups things differently.

In all of these cases, the original judicial decision is either no example at all, an example of too many different things, or something somewhere in the middle, being useful to a smaller degree than one would like. Its public and shared exemplar force may be in process. Although another judicial decision or so may clarify things, often, as has been said, the process is a subtle dance among official decisions and various groups' understandings. Understandings and categorizations get worked out by various processes: the dialectic of public arguments, nonrational persuasive mechanisms, and the shifting of cultural perspectives.

What these ruminations reveal is that when an appellate case turns on a precedent, the meaning of that precedent is likely to be problematic or nonexistent. For this reason, the central case of precedent following should *not* be sought among appellate cases, nor among reasoning by appellate courts. Actual appellate practice is not the best basis from which to defend—or criticize—a philosophical theory of the meaning of precedent. So one must be careful in appealing to appellate practice in judging any model of precedent. One must expect to see appellate judges attempting to expand, develop, prune, or alter the meaning of the precedents they apply, rather than merely applying a socially salient grouping to the instant case.

Nonetheless, there are cases where a straightforward application of a socially salient grouping with the original precedent is exactly what one does see. An example is *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 11 Tex. Sup. J. 143 [1967]. The precedent case cited by the court held that the snatching of a book is assault, or so the court says. The court then goes on to hold that grabbing a plate from someone's hand is assault, explicitly using this category as the common one: the "intentional snatching of an object from one's hand." Such grouping certainly appears socially salient; it would be oddly counterintuitive for the court to hold that the precedent applied to books and not plates.

More often, when appellate judges applying precedent are working with a socially salient concept and none of the defects hitherto mentioned cause problems, its use in grouping causes difficulties with which the courts can be seen to struggle. This is because, as a variety of philosophers have pointed out, concepts are complex (e.g., Marmor 1992, 141–44; Bix 1993,

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55–56, 147; Raz 1995, 174). People may be led in different directions by attending to different aspects of the same concept, or, more accurately, by using different aspects of the concept to attend to different features of the situations they are considering grouping together. Concepts can have multiple organizing principles, organizing principles difficult to articulate, or ones that conflict. All of this is eloquently attested to by the number of philosophical articles disagreeing about concepts like law, causation, intention, justice, rights, liberty, personhood, and personal identity, to name but a few.

For example, dissenting opinions in two factually similar cases, *Commonwealth v. Root*, 403 Pa. 571, 583, 170 A.2d 310, 315 [1961] and *Jacobs v. State*, 184 So. 2d 711, 717 [1966], use different aspects of the concept of being a direct cause (or different organizing principles for that concept) to draw different conclusions about whether one drag racer is a direct cause of a death caused by another. The history of negligence law on that point, in combination with the numerous times the concept of a direct cause was named by judges and legal commentators, and the "common sense" views of the community, made that concept salient. The cases of *Jaffe* and *Rojas* mentioned earlier can be seen similarly. The two courts use the salient concept of attempting (or intending) from various precedents differently in similar fact situations, either because they are attending to different aspects of that concept, to different organizing principles for that concept, or because of other messiness in that concept's contours.

In sum, some appellate practice proceeds as one would expect from the model outlined here, and more is explicable in terms of this model. One aspect of appellate practice, however, appears at odds with the model: the importance that judicial and legal practice place upon reading the opinions of cases for their rationales. The majority's rationale does not necessarily set the significance of the decision, as some legal commentators are prepared to admit. Why, one might ask, is it rational to require judicial authorities to decide for reasons and to write those reasons down if those reasons have no essential role in the meaning of the decision reached? (Compare Goodhart 1930, 168.)

When judges read rationales of appellate decisions carefully, they may be reading to discover whether the appellate decision is ripe for abandonment or modification. Subsequent judges or judges lower in a precedential hierarchy may be forbidden from modifying or abandoning a precedent except when the original judicial decision falls below a benchmark of legal justificatory strength.[30] In that case, the rationale helps them to determine whether that has occurred, by presenting them with ideas for justification they might not otherwise discover. They may be reading to discover whether

30. For example, a benchmark distinguishing a "dubious" justification from something clearly better. Atiyah and Summers say that this is the benchmark used in America (Atiayh and Summers 1987, 120). They may be referring to the reasoning actually given in the original decision, as opposed to the reasoning that could have been given for it.

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the original decision was legally justified in the first place. They may be reading for a model of how to justify a legal decision. They may be reading for the wisdom that would restrain them from overruling or diverging from an earlier legal decision, wisdom to be found in good reasons given by those who reached the earlier decision.

When judges write opinions, they may be trying to influence the meaning that their decision will be given. They may be doing any number of things to legal materials including justifying, overruling, or modifying them. The practice of legal justification in a particular system may require that reasons of a certain sort be given for these moves. More generally, rationality demands good reasons. Rationality demands adequate reasons for any judicial decision, and there are good reasons for institutionalizing the giving of reasons. As Benditt puts it:

> [T]he point of having judicial institutions is, at the very least, to resolve, or at least to end, disputes in a (relatively) peaceful way. In the long run this end can be achieved only if decisions do not appear to be arbitrary, and in the absence of an oracle in whom there is widespread confidence this requires the giving of reasons. A losing party might not be satisfied with the reasons, but in many cases it helps a lot if the loser can at least believe that he lost on the basis of an honest difference of opinion. (Benditt 1987, 94–95)

So it can be rational to require the public giving of reasons if those reasons do not necessarily determine the application of the decision.

Finally, the very nature of legal justification may be in the process of evolving. Judges may be engaged in an ongoing dialogue with their learned colleagues and legal experts, a dance of their own, in working out what will count as adequate legal justification. They may all be coming to some understanding of what legal justification requires, of the best way (or the best institutionally permissible way) of balancing conflicting demands in legal justification. If this is so, then a rationale becomes itself an example of the application of an idea about legal justification, and it has all the advantages examples have in persuading, communicating, inspiring, and stimulating.

Therefore, even if the rationale is not necessarily part of the meaning of the decision, nor necessarily the best evidence of that meaning, it may be important for judges and lawyers to read.

In closing, it is worth noting that just as the model proposed here gets some support from appellate practice, it gets some support from received jurisprudential opinion. It nicely fits some thinkers' insights, even when those thinkers would disagree with the model at most points. Consider the following remarks, which are cited out of context. Hart pointed out that

> [Law's] successful operation over vast areas of social life depends on a widely diffused capacity to recognize particular acts, things, and circumstances as instances of the general classifications which the law makes. (Hart 1961, 121)

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And that

> If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist. (1961, 121)

Sartorius reminded us that

> Judges simply do not have the authority, in the course of deciding the concrete issues of law which come before them, to *also* decide which rules their decisions shall be made to stand for by later courts. (Sartorius 1967, 354)

Levi observed that an important part of the development of law through precedents is judicial "reasoning by example," which he described as a process of give-and-take among courts and "society" in which ideas that have "achieve[d] standing in society" get adopted by courts, modified, and linked to other ideas, in the "reinterpret[ation]" of prior cases. Levi summarized:

> The process is one in which the ideas of the community and of the social sciences, whether correct or not, as they win acceptance in the community, control legal decisions. (Levi 1961, 6)

More recently, Bix (glossing Postema 1987*b*, 306) pointed out that there is "work transforming 'mere behaviour' into legally significant actions," and that most of it occurs in the target population before officials get involved (Bix 1993, 127). Patterson observed that

> what counts as "following a rule" is often a relatively simple matter. If this were not the case, then ordinary citizens having little or no knowledge of legal materials would live in a Kafkaesque nightmare. This is not an apt description of our condition. (Patterson 1992, 114, n.151)

Recall that "following a rule" can be used very broadly, and if used loosely enough, applies very well to following a precedent.

Finally, the model honors Fuller's insight that law provides baselines for self-directed action. Precedent does so directly and efficiently, because its meaning is inherently public, essentially mutually known. This fact explains a pervasive phenomenon: Precedential decisions successfully guide conduct, and are intended to do so. They do so without much appeal to legal experts, without much agreement on what justifies the original decision, without much knowledge of the written opinion. This power of precedent to cut through the difficulties and indeterminacies of justificatory thinking, to render insignificant the disparities in legal knowledge and reasoning

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ability among officials and the target population, is very real. It is what precedent has in common with ordinary example following, and can be of considerable service in a legal system. This power is precedent's main contribution to a legal system.

APPENDIX: COHERENCE THEORIES OF PRECEDENT MEANING

To my knowledge, only one philosopher claims to have a coherence theory of the meaning of precedent. Nonetheless, coherence language has become familiar lately in legal philosophy, and there are ways to interpret recent claims that entail such a theory.

When a jurisprudential coherence theory is offered as a constitutive theory of law, it is a general account of what makes claims about the content of laws true. Applied to precedent, a constitutive coherence theory will yield a theory of precedent meaning. It will hold that a precedent's meaning is an outcome of the most coherent justificatory theory that can be constructed for a base consisting of far more than just the single decision in question. In a pure coherence theory, the base is not fixed independently of coherence considerations. Instead, one arrives, through a process like reflective equilibrium, at a theory that at once identifies those decisions that count as legal decisions for the legal system and also identifies the content and scope of those decisions. The base begins by including putative legal acts and legal decisions, primarily those that are uncontroversial. By tailoring the set of things initially accepted as legal acts or as legal decisions to a coherent normative theory, and vice versa, the theory makes the base coherent. (There is usually a caveat about not allowing more than modest deviations from the original set.)[31]

It is important to be as specific as the subject allows about what counts as a coherence theory. It is not enough that the theory postulate a procedure like reflective equilibrium that modifies the original base. There must be something special about the way the theory seeks to fit things together. The "fitting together" that constitutes coherence can be thought of as unification in a system whose principles are unified (Raz 1992). (What makes principles unified is a question best overlooked here.)

Dworkin can be interpreted as offering a constitutive coherence theory of law in an early work. In *Taking Rights Seriously,* he distinguishes between the "enactment force" of a precedent and its "gravitational force." A judicial opinion has enactment force when it contains a canonical form of words, but it never just has enactment force (Dworkin 1977*a,* 11). It helps to create the legal right of a litigant to win a lawsuit through its gravitational force, and this force is a product of what Dworkin calls "coherence" considerations (1977*a,* 41, 115–23). The ideal judge "must construct a scheme of abstract

31. The above follows the discussion of coherence theories in Raz 1992.

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and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well" (1977*a*, 116–17). "All" is too strong a word here: Dworkin adds that the process needs a "theory of mistakes" to adjust the initial base of precedents that are to be justified. He draws an analogy with Rawls's reflective equilibrium as the way the base and the theoretical structure get adjusted to each other (1977*a*, 161–63). During this or a further stage, the theory with its adjustments is checked against a moral or political theory or against rivals for relative moral soundness (1977*a*, 67–68, 106–07; Dworkin 1977*b*, 1252). Since, as Raz points out, "coherent" may be used to mean intelligible, this may or may not amount to a coherence theory of precedent meaning.

In *Law's Empire*, Dworkin appears to endorse a coherence theory again. (For an opposing interpretation, see Raz 1992, 315–21.) Law is an interpretive concept. Anyone claiming that something is law, even a judge deciding a case, is offering an interpretation of a social practice (Dworkin 1986, 50, 87–90). A constructive interpretation imposes a purpose on a practice (1986, 52), and this is, as Raz notes, to require "strong monistic coherence" in the sense of "coherence" at issue (Raz 1992, 315). As before, the initial base for the interpretation is to be adjusted (Dworkin 1986, 65–66, 99). Nothing in the initial base is absolutely fixed (1986, 72–73, 89–90). Dworkin describes the process of adjustment as achieving "equilibrium" between the practice and "the best justification of that practice" (1986, 90).

In particular, our legal practices are best viewed, says Dworkin, under the conception of "law as integrity" (1986, 94). This conception "defines" the law (1986, 218, 410). Dworkin speaks of interpreting law as integrity in terms of a coherent theory or a coherent scheme of principle in many places (1986, 217, 219, 243, 245). However, there is no insistence that the range of this coherence be global. On the contrary, Dworkin acknowledges that sometimes, because of legislative supremacy, strict precedential practice, or other reasons, "the principles and standards that would provide the most coherent account of the substantive decisions" of legal practice ought not to be considered its law (1986, 400–02). There can be "compartmentalization" of a subset of law, if there is a practice of treating it as special and if that compartmentalization can be justified (1986, 250–53, 405–06).

This coherent scheme of principles cannot be found without the help of morality, specifically, political morality. At some point a judge may have to choose between competing interpretations of a line of cases by considering which shows them "in a better light from the standpoint of political morality" (1986 256; see also 239). Legal practice (both past and present) is "organized by" justificatory principles that are "sufficiently [morally] attractive," "express[ing] a single, coherent scheme of justice and fairness in the right relation" ("so far as this is possible") (1986, 227–28, 219).

Integrity may demand "depart[ure] from a narrow line of past decisions in search of fidelity to principles conceived as more fundamental to the

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scheme as a whole" (1986, 219), insofar as this is permitted by doctrines of precedent or other legal practices like the "compartmentalization" of the law. What all this apparently means for precedent is that a precedent may have a tentative content at the "preinterpretive stage," but its real meaning and import are determined by the interpretive process.

A theory specifically about (common law) precedent that seems to be truly a coherence theory is sketched by Moore in his *Precedent, Induction, and Ethical Generalization*. At first, Moore's theory sounds strictly epistemic:

> We know how to justify [the] truths of the common law. We take the decision . . . , together with all other legal decisions in our jurisdiction, and construct the most coherent theory that we can think of that has those decisions as its deductive implications. . . . Recognizing that for any finite series of decisions there is an infinite number of such theories, we will prefer theories not only on the "aesthetic" grounds of scope . . . , but also on the moral grounds that some theories provide a better moral justification for the decisions than others. (Moore 1987, 201)[32]

Later it emerges that such coherence is constitutive: "[T]he *right* description of, e.g., what [a judge, e.g.,] Cardozo decided in [a particular case, e.g., *MacPherson*] (from which, when universalized, we get a truth of the common law) is a function of" this process (1987, 209–10). There is a suggestion that some decisions might be thrown out "as we cohere the common law," that is, as we construct "the most morally coherent account of all common law decisions" (1987, 210).

Moore has what he calls a "realist" theory of moral kinds. The right description of what a judge decided is a function of "the correct moral kinds into which the facts of that case fall; as modified by . . . the decisions of judges *in all cases*. . . . " (1987, 209; emphasis added). Moore goes on to characterize his account of the common law as "holistic" (1987, 211; see also 213). It follows that moral reality helps determine the law, but moral reality gets compromised. The result of cohering the law may be expressed in categories that do not correspond to the true moral categories.

The crucial question for exegetical purposes is what Moore means by "coherent." At one point, Moore uses the term "mutual reinforcement" to describe the kind of coherence he has in mind among truths of the common law (1987, 205). If he means this literally, he is using "coherence" to name a kind of unification (Raz 1992, 284 n.17).

On any of these theories, social salience does not set the meaning of a precedent; neither do officials, at least, not directly. In addition, a judicial decision does not function in law as an example independent of a justificatory theory connecting it to other legal materials. Raz has argued that any coherence theory that takes a plausible base cannot be true, because it

32. Note that "decisions" in Moore's usage cannot be disposings. They might be propositions that such disposings are justified, however.

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denies the role of authoritative sources in law and the phenomenon of law as a product over time of political forces (1992, 289, 292, 294–95, 297). That objection will be set aside here, as it opens deeply into the issue of the nature of law.

One can begin by noting that a coherence theory of decision meaning is incompatible with the commonsense idea of a precedent. The trouble stems not so much from the coherence as from the subsumed view that the significance of anything in law depends on relationships to a lot of other things. The incompatibility is especially clear for the theories that are holistic, holding that the significance of one thing depends on everything in the legal system. Moore, who thinks that the scope of coherence is global (at least, for common law adjudication), sees the point:

> On the holistic account of the common law . . . , how could a case have a holding? . . . The proposition of law for which a case stands, its 'holding', is the entire common law. (Moore 1987, 211; compare 213)

The incompatibility becomes less obvious as the relationship between elements in law is restricted in scope. Nonetheless, there is not much conceptual room for the idea of following a particular precedent in any such theory. For such theories treat a decision's meaning as determined by and dependent upon a system whose content is a function of many other judicial decisions, even those which seem only tangentially related to the issue adjudicated. This implies that judges do not follow *a* precedent. They follow the product of many precedents.

With the destruction of the idea of individual holding goes the destruction of the ideas of overruling and distinguishing, as Moore notes. He does not regard this as a reductio ad absurdum of his view. He points out that, psychologically, we can identify a holding with a case, because we see the case as adding new information against a set background. Presumably, to those who see the background, the individual decision causes a shift in a certain direction, a shift that can alter the guidance that was previously obtainable from the whole. That is the information contributed by the judicial decision, even as it becomes assimilated into the whole.

This alleged information, however, seems to be largely unobtainable by those who need it, namely, the target population. The chief objection to viewing the meaning of precedent as given by a coherence theory is that a precedential "meaning" so conceived would, like the top-down theories already discussed, be ill-suited to the task of guiding the conduct of the target population. The same can be said about the meaning of anything absorbed into the cohered theory, including statutes, and about the cohered theory itself.

As do top-down theories, coherence theories of precedent meaning erect epistemic obstacles to guidance by precedent. There is a lot of material to be canvassed in the base. One can never tell what a judicial decision means, or even if it means anything significant for law, in relative isolation. A

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number of decisions (and/or policies, practices, statutes, constitutional provisions) must be canvassed to begin the process of cohering the law. Canvassing such material is impossible for those with limited legal background, i.e., most of us. We do not have extensive legal training. Therefore, according to the theory, we can never tell, relying solely on our knowledge and the conceptual schemas and shared assumptions of the culture, what a judicial disposing "really means" in law.

Even for those with the background knowledge, the canvassing is a formidable task. On holistic coherence theories, the base contains a whole range of legal materials. On coherence theories that are not holistic, such broad canvassing is not always necessary. Nonetheless, one must check for practices like a strict doctrine of precedent (and then, following Dworkin, check that one's justifications for them fit the constraints of constructive interpretation). One must peek behind the precedent(s) at issue to the entire doctrine of binding precedents to know by what the "preinterpretive" meaning of precedents can or cannot be corrected, to know what range of legal materials must be canvassed.

The rest of us, waiting for agreement and for expert guidance, are in epistemic trouble. We will need to appeal to authority, but the problem lies in establishing the reliability of authorities. Suppose that there are alternate ways to cohere the base, but that one way is most coherent. Then it could be that none of the competent cohere the law correctly, in which case the agreement of experts about how to cohere it is useless as a guide to legal truth. Something similar can be said if among the alternate best ways to cohere only some are appropriate, or if it is difficult to distinguish actually cohering the base from trying (and failing) to cohere it. (Agreement will, however, be useful for predicting consequences in the legal system.) At any rate, competent people attempting to cohere the law will usually disagree at crucial points. Those who are not competent about the base, i.e., most of us, will be unable to discern who is cohering the base correctly, best, appropriately, or successfully. (The tale is similar if the initial base is not fixed. As long as legal decisions, statutes, and the like, regarded as uncontroversially relevant, must be canvassed in some form, only people educated about these legal materials are competent to do the job of cohering the law.)

These epistemic obstacles are significant defects for the same reason that the obstacles involved in top-down theories are significant. The epistemic picture presented by a coherence theory is at odds with the necessity for public accessibility and the facts of legal life as we know it. As has been said, ordinary people gain a certain amount of guidance just by knowing about judicial decisions, and officials depend upon that fact in promulgating those decisions. A coherence theory is incapable of accounting for this phenomenon in any plausible way. It would be a matter of great fortuity that the scope ordinary people take a publicized precedent to have is something that a cohered theory, which they have not constructed, also supports. More important, it would be a matter of great fortuity that the scope the competent take

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a publicized precedent to have is something that a cohered theory supports, for even experts do not go to the trouble of constructing such a theory.

A coherence theorist may claim that people develop a "feel" for the answer selected by cohered theories. Dworkin, for example, claims that judges develop some "unconscious" or "unthinking" feel for some of the work involved (Dworkin 1986, 245, 256). He also claims that they develop "skills of craft husbandry and efficiency" in their task of constructive interpretation (1986, 265). There is scant evidence for this phenomenon, however. There *is* evidence that judges can sometimes choose a legal answer before looking for the acceptable argument for it. There *is* evidence that judges with similar training tend to converge in their beliefs (but do not always converge). This evidence fits a lot of hypotheses. More important, there is evidence that ordinary people often converge in their beliefs about how a precedent applies to new circumstances. All of this evidence fits a theory that the meaning of a precedent is inherently public.

Coherence theory looks appealing as a way to account for the intelligibility and respectability of legal disagreement at high levels (e.g., in appellate litigation). (See, e.g., Dworkin 1977*a*, 55, 62–64, 66–67, 112, 123, 128; Dworkin 1986, 3–46 et passim.) There is always the possibility of good-faith disagreement among the highly knowledgeable if cohering law is difficult (still more if there are several equally good ways to do it) and especially if time constraints permit only partial attempts. However, a coherence theory goes too far by making law too difficult to discover by those most often affected by it, that is, by those who most often must apply it themselves in making choices every day. Law would be largely useless in affecting the conduct of ordinary people if it were so difficult to discern most of the time what it requires, permits, or empowers us to do. In many circumstances, to refrain from choosing until we have consulted either our own best estimates of what is coherently dictated or some legal expert's opinion is practically impossible. At the core of law, we need to know it when we see it, and to be able to rely on other people matching our expectations about what the law requires or allows us to do, individually or collectively. (See Postema 1994, 371–72.) Social coordination and cooperation among individuals could not be a product of a law that remains obscure to most of the individuals involved. In sum, law cannot be always as difficult to identify as coherence theory postulates.

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