

Finding Law

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ABSTRACT.—That the judge’s task is to find the law, not to make it, was once a commonplace of our legal culture. Today, decades after *Erie*, the idea of a common law discovered by judges is commonly dismissed—as a “fallacy,” an “illusion,” a “brooding omnipresence in the sky.” That dismissive view is wrong. Expecting judges to find unwritten law is no childish fiction of the benighted past, but a real and plausible option for a modern legal system.

This Essay seeks to restore the respectability of finding law, in part by responding to two criticisms made by *Erie* and its progeny. The first, “positive” criticism is that law has to come from somewhere: judges can’t discover norms that no one ever made. But this claim blinks reality. We routinely identify and apply social norms that no one deliberately made, including norms of fashion, etiquette, or natural language. Law is no different. Judges might declare a customary law the same way copy editors and dictionary authors declare standard English—with a certain kind of reliability, but with no power to revise at will.

The second, “realist” criticism is that this law leaves too many questions open: when judges can’t find the law, they have to make it instead. But uncertain cases force judges to make *decisions*, not to make *law*. Different societies can give different roles to precedent (and to judges). And judicial decisions can have many different kinds of legal force—as law of the circuit, law of the case, and so on—without altering the underlying law on which they’re based.

This Essay claims only that it’s plausible for a legal system to have its judges find law. It doesn’t try to identify legal systems that actually do this in practice. Yet too many discussions of judge-made law, including the famous ones in *Erie*, rest on the false premise that judge-made law is inevitable—that judges simply can’t do otherwise. In fact, judges *can* do otherwise: they can act as the law’s servants rather than its masters. The fact that they can forces us to confront, rather than avoid, the question of whether they should. Finding law is no fallacy or illusion; the brooding omnipresence broods on.

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INTRODUCTION

Judges ought to remember, that their Office is *Jus dicere*, and not *Jus dare*; *To Interpret Law*, and not to *Make Law*, or *Give Law*.¹

This Essay defends the view that unwritten law can be found, rather than made. Suffice it to say that this view is not in vogue. To modern scholars, law is always made by somebody: written law is made by legislators, and unwritten law is made by judges. The notion “that the common law had a positive source independent of judicial decisions” is said to have “no modern adherents.”² Maybe Blackstone thought judges were not “to pronounce a new law, but to maintain and expound the old one”;³ today “[i]t would be only a slight exaggeration to say that there are no more Blackstonians.”⁴ Some do still assign the courts a duty “to say what the law is, not to prescribe what it shall be.”⁵ Yet the late Justice Scalia, who wrote those words, also took unwritten law to be “law developed by the judges,” and he viewed “playing common-law judge” as akin to “playing king—devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind.”⁶

Since *Erie Railroad Co. v. Tompkins*,⁷ many judges and academics have treated this modern approach as the only conceivable one. To them, *Erie* not only overruled *Swift v. Tyson*,⁸ but “overruled a

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1. FRANCIS BACON, THE ESSAYS OR COUNSELS, CIVIL AND MORAL, in 15 THE OXFORD FRANCIS BACON I, 165 (Michael Kiernan ed., 2000) (1625).
 2. Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1076 (1999).
 3. I WILLIAM BLACKSTONE, COMMENTARIES *69; see also Allan Beever, *The Declaratory Theory of Law*, 33 OX. J. LEGAL STUD. 421, 421 (2013) (quoting Blackstone).
 4. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1758–59 (1991).
 5. *Am. Trucking Ass’ns v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment); see also *Rogers v. Tennessee*, 532 U.S. 451, 472 (2001) (Scalia, J., dissenting) (quoting Bacon’s aphorism).
 6. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 4, 7 (Amy Gutmann ed., 1997).
 7. 304 U.S. 64 (1938).
 8. 41 U.S. (16 Pet.) 1 (1842).

particular way of looking at law.”⁹ *Erie* agreed with Justice Holmes that law “does not exist without some definite authority behind it”—and that courts rendering decisions, much like legislatures enacting statutes, establish new rules of law in a “voice adopted by the State as its own.”¹⁰ That left no room for a common law to stand apart from courts or legislatures, or to be found instead of made. As one scholar put it, “*Erie*’s real significance is that it represents the Supreme Court’s formal declaration that this view of the common law . . . is dead, a victim of positivism and realism.”¹¹

If that’s what *Erie* declared, then *Erie* is wrong. A system of positive law, with fallible people as judges, can still expect those judges to find unwritten law and not to make it. That kind of system is a real possibility, not what John Austin called a “childish fiction” of the benighted past.¹² Which legal systems actually work this way is an empirical question, one this Essay doesn’t address; the claim here is that it’s *plausible* for a legal system so to arrange things.

In making that claim, this Essay adopts a different strategy than other recent responses to the modern view. Some scholars contrast judge-made law to natural law or to moral principles, rules “out there” that judges might discover¹³—or to particular social customs, like those of merchants or sailors, that judges might seek to preserve.¹⁴ This Essay doesn’t contest those theories, but it doesn’t rely on them either. It sets a higher bar by assuming that law is “in

9. Guar. Trust Co. v. York, 326 U.S. 99, 101 (1945).

10. *Erie*, 304 U.S. at 79 (quoting Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533, 535 (1928) (Holmes, J., dissenting)).

11. Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 283 (1992).

12. 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 655 (Robert Campbell ed., London, John Murray 3d rev. ed. 1869).

13. See, e.g., Beever, *supra* note 3, at 426; Gerald J. Postema, *Philosophy of the Common Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 588, 588 (Jules L. Coleman et al. eds., 2004).

14. See, e.g., Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 932–33 (2013); accord Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 10–13 (2015); Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L. ECON. & POL’Y 17, 31 (2013).

some important sense a social fact or set of social facts.”¹⁵ These facts must be *about* some particular society; hence the modern derision of a “transcendental body of law outside of any particular State” as a “fallacy,”¹⁶ an “illusion,”¹⁷ a “brooding omnipresence in the sky.”¹⁸ Finding law is impossible, the argument goes, because there’s nothing out there to find. Societies are too diverse to share any real customs,¹⁹ so their unwritten law must come from judicial decisions instead.²⁰ If it isn’t made by legislatures, then it has to be made by judges—for who could believe, to use Austin’s phrase, in a “miraculous something made by nobody”?²¹

What’s strange about this argument, though, is that we follow somethings-made-by-nobody all the time. People routinely conform their conduct to familiar norms of fashion, etiquette, or natural language. These norms purport to apply to society as a whole, though no one necessarily enacted them or laid them down. Like legal norms, these social norms can be contested, changeable, controversial, political, or morally fraught. Yet in any given society and at any given time, they can also have determinate content, offer broad guidance for the future, and stand apart from the style manuals or Miss Manners columns in which they’re expressed. The slogan that unwritten law is “whatever judges say it is”²² might be true only in the sense that standard English is whatever English teachers, dictionary authors, and copy editors say it is—with no copy editor

15. Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, in *THE AUTONOMY OF LAW* I, 19 (Robert P. George ed., 1996).

16. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

17. *Black & White Taxicab*, 276 U.S. at 533.

18. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

19. See Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 *NW. U. L. REV.* 719 (2006).

20. See Roosevelt, *supra* note 2, at 1078 (“*Erie* . . . recognized that the common law was nothing more than those decisions.”).

21. 2 AUSTIN, *supra* note 12, at 655.

22. John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 *FORDHAM L. REV.* 1563, 1591 (2006) (criticizing Holmes’s view).

or society of copy editors, however influential in practice, having any right to revise it at will. Law depends on social facts, but the social facts are “out there” for diligent jurists to find.

That leaves a second, realist strain of modern arguments against finding law: that courts are inherently lawmaking institutions. Even if there’s some unwritten law for judges to find, there’ll never be quite enough. To fill the gaps, judges have to make new law: “the process of adjudication necessarily entails articulating rules to elaborate and clarify” the law already on the books.²³ And if making law is inevitable, then *Erie* got it right: whether a state’s rules “shall be declared by its Legislature in a statute or by its highest court in a decision” is only a matter of detail.²⁴

This Essay again sets a higher bar by assuming, for argument’s sake, that some legal questions lack a right answer. Judges in unclear cases do have to make *decisions*. But we shouldn’t assume that, in making decisions, they’re also making *law*. A judge’s decision can have different force in different cases or different legal systems. And a decision can be influential, or even binding, in future cases without ever altering the law. Instead, courts might be legally obliged to treat a past decision *as if* it stated the law—taking it as the law of the case, the law of the circuit, *stare decisis*, and so on, without taking it to supplant whatever law was there before. The losing party in a negligent-driving case might be estopped from later asserting that his light was green, but this doesn’t change the fact of the matter; the light was the color it actually was, whatever future judges are obliged to assume. In the same way, doctrines like precedent or preclusion can serve as temporary stand-ins for the actual law, whatever it might be—settling certain questions among judges, though not necessarily settling them right.²⁵ The law is one thing, the decisions of courts another.

23. Kramer, *supra* note 11, at 269.

24. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

25. *See Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); RANDY J. KOZEL, *SETTLED VERSUS RIGHT* (2017).

To be clear, this Essay won't defend any number of other views often associated—sometimes pejoratively—with a “declaratory”²⁶ theory of law. (Say, that judges' decisions all follow mechanically from crisp legal rules; that judges are never influenced by policy or politics; that common-law doctrines have all existed since time immemorial; etc.) Some of these are indeed matters of “childish fiction,” and anyway they're irrelevant to the central point. It's both possible and sensible to task judges with finding the law, even if they retain their human failings after donning robes.

Unwritten law is something we ought to understand, if only because it affects how we understand written law. Statutes and constitutions aren't insulated from cavalier judicial attitudes toward the common law.²⁷ And the structure of our federal system depends in part on abstract issues like these. In other countries, the roles of state and federal courts might have little to do with legal theory; a federal system can allocate authority how it likes. But *Erie's* approach to the American legal system depends quite heavily on whether the Court's theoretical claims were right. If law can be found as well as made, then *Erie's* strongest pillar collapses, and the decision itself may be ripe for reexamination.

I

CAN JUDGES FIND LAW?

Judges can only find law if there's something there to find. The old vision of a body of unwritten law, already in place and ready to hand, is now widely seen as “a delusion,”²⁸ stemming perhaps from

26. See generally Beever, *supra* note 3 (using this label).

27. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (arguing that statutes “should—like the Constitution and the common law—be interpreted ‘dynamically,’ that is, in light of their present societal, political, and legal context.”); accord GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

28. Lea Brilmayer, *Untethered Norms After Erie Railroad Co. v. Tompkins: Positivism, International Law, and the Return of the “Brooding Omnipresence,”* 54 WM. & MARY L. REV. 725, 734 (2013) (criticizing this view).

a “self-deceiving refusal to face the reality of legal decision making.”²⁹ That “*judges make the common law*” is said to be something that “[a]ll lawyers know”³⁰ and that “[e]very beginning law student is taught.”³¹ Open declarations that “judges had made up the common law” appear in the Federal Reporter with little comment and no dissent.³² Despite confirmation-hearing claims that judges can apply the law as it stands,³³ many modern lawyers think otherwise. They assume that a state’s unwritten law is “fundamentally like the written law of each state,” though “made by a different branch of the state government: written law is made by legislatures and unwritten law is made by appellate courts.”³⁴

On the modern account, unwritten law is nothing but case law: a special kind of written law, found in judicial opinions rather than statutes.³⁵ An opinion might not read like an enactment, and it might need some interpreting before it yields a general rule,³⁶ but in the end the precedent is the source of authority. Vacate or reverse the judgment, and the legal rule goes away.³⁷ As Kermit Roosevelt

29. Beever, *supra* note 3, at 422 (criticizing this view).

30. BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 175* (2010).

31. Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 *LEGAL THEORY* III, 115 (2010); *cf.* Postema, *supra* note 13, at 588 (criticizing this view).

32. *Liu v. Mund*, 686 F. 3d 418, 421 (7th Cir. 2012) (Posner, J.).

33. *See The Nomination of Elana Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 103 (2010) (statement of Elana Kagan) (stating that “it’s law all the way down”).

34. Nelson, *Critical Guide*, *supra* note 14, at 930 (criticizing this view); *cf.* Morris Cohen, *The Process of Judicial Legislation*, 48 *AM. L. REV.* 161, 168 (1914) (“[J]urists and lawyers actively participate in different ways in the process of law making.”). *But see* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 *U. ILL. L. REV.* 173, 197 (critiquing the “modernist misconception . . . that the common law is simply legislation by judges,” rather than “aris[ing] from custom”).

35. *See generally* Peter M. Tiersma, *The Textualization of Precedent*, 82 *NOTRE DAME L. REV.* 1187 (2007) (describing the evolution of this view).

36. *Cf.* H.L.A. HART, *THE CONCEPT OF LAW* 134 (3d ed. 2012) (noting that “there is no single method of determining the rule for which a given authoritative precedent is an authority,” although “[t]he head-note is usually correct enough”).

37. *Cf.* *U.S. Bancorp Mtg. Co. v. Bonner Mall P’shp*, 513 U.S. 18, 26 (1994) (citing the benefits of “[j]udicial precedent” as a reason not to vacate a judgment (internal quotation marks omitted)).

puts it, “the positive source of the common law is just the judicial decisions in which it is embodied.”³⁸

This vision of unwritten law is often associated with positivist views of law in general. On Abbe Gluck’s account, “the idea of a body of ‘natural,’ general, or universal legal principles”—something that judges might find rather than make—has given way “to a more positivistic understanding of law as something specific,” namely “a policy choice linked to a particular jurisdiction.”³⁹ If that policy choice was first recorded in a judicial decision, then it stands to reason that the people who made the choice were judges, and that the unwritten law is whatever the judges say it is. For scholars like these, “[p]ositivism has thoroughly eroded” the notion “of a general law existing independently of any territorial sovereign,”⁴⁰ and “the positivist view” is simply “that judges ‘make’ new law.”⁴¹

Accordingly, a few recent defenses of finding law have begun by rejecting positivism. Alan Beever, for example, straightforwardly argues that the common law “include[s] the natural law.”⁴² Judges don’t make the natural law, so they don’t make the common law either. Gerald Postema charts a different path, describing the classical conception of the common law as a “process of practical reasoning.”⁴³ Because this process looks past the propositions stated in judicial opinions to the reasoning that underlies them,⁴⁴ he sees his

38. Roosevelt, *supra* note 2, at 1076; *see also* Kramer, *supra* note 11, at 281 (describing “the modern understanding of common law as a form of positive law made by judges”); *cf.* Nelson, *Legitimacy*, *supra* note 14, at 14 (describing views that treat precedent as the source of common law).

39. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1902 (2011).

40. Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 780 (2010).

41. Fallon & Meltzer, *supra* note 4, at 1760; *accord* Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, 19 U. PA. J. CONST. L. ONLINE 1, 25 (2017) (describing Brandeis’s position in *Erie* as “the now prevalent positivist view”).

42. Beever, *supra* note 3, at 425–26.

43. Postema, *supra* note 13, at 601.

44. *Id.* at 601 (arguing that a judge can’t “unilaterally and finally fix the scope or meaning of a rule through his or her decision, regardless of how carefully crafted the language

view as “incompatible with both orthodox natural law thought and with orthodox legal positivism.”⁴⁵

These responses, right or wrong, rest on stronger assumptions than necessary. One can be a positivist without thinking that all law is *posited*—“set, or prescribed, . . . laid down by humans to humans,”⁴⁶ in the form of explicit “statutes [or] court decisions.”⁴⁷ Law might just be like other normative systems, such as grammar, etiquette, or fashion, which are solidly rooted in social facts without having been formally adopted by anyone. No one disparages grammar or spelling as a “miraculous something made by nobody.”⁴⁸ And to borrow H.L.A. Hart’s phrase, it’d be “merely dogmatic”—indeed, rather absurd—to say that nothing can be a rule of grammar “unless and until it has been ordered by someone to be so.”⁴⁹

Other defenses of finding law focus on preserving popular customs. In Caleb Nelson’s example, if merchants traditionally allow each other three “days of grace” before payment, judges might take account of that practice and incorporate it into the law.⁵⁰ But many common-law rules, from issue preclusion to intestate succession, can’t be attributed to popular practice in this way. Instead, lawyers and judges identify a particular set of *prevailing* standards: rules known to and employed by an elite group of legal experts, but which are still understood to govern society as a whole. Judges might then be expected to apply these prevailing standards without alteration: to find the rules, and not to make them.

of the opinion is,” because “the quality and force of the reasoning, not the public utterance of it . . . lends authority to a court’s rationale”).

45. *Id.* at 599.

46. A.W.B. Simpson, *The Common Law and Legal Theory*, in LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 359, 362 (1987) (criticizing this view).

47. Beever, *supra* note 3, at 425.

48. 2 AUSTIN, *supra* note 12, at 655.

49. HART, *supra* note 36, at 46–47.

50. Nelson, *Legitimacy*, *supra* note 14, at 11; see also Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1791 (1997) (“Customary law was constituted by the usual or ordinary understandings of parties to a commercial transaction.”; cf. Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval ‘Law Merchant,’* 21 AM. U. INT’L L. REV. 685 (2006) (cautioning against hasty attributions of mercantile law to mercantile practice).

Finding those prevailing rules may not be easy. There are difficult questions of judgment in extracting a standard practice from different groups, in tracking a changed custom over time, and so on. But few would call these tasks impossible or incoherent. People who can't explain how prevailing norms are grounded on complex social facts can still tell you whether an outfit you see on the street would be out of place at an important business meeting, or which ordinary English phrases a speaker of formal English should avoid. When it comes to fashion, etiquette, or grammar, we routinely distinguish common practice from the governing standard—and we seem to manage these issues every day, usually without thinking.

There's nothing mysterious about law resembling or resting on social norms like these. On what Mitchell Berman calls the standard positivist picture, societies can produce any number of “independent artificial normative systems,” of which law is a wholly “non-exceptional” example.⁵¹ We regularly distinguish what's customary from what just happens (the “done thing” from what's frequently done), or separate “hard” customary obligations from “soft” ones (say, bad grammar from bad writing). We can equally well distinguish legally enforceable norms from the informal social customs of legal elites, drawing a line between intestate succession and judges' wearing black robes. Whatever faculty lets us sort out custom from mere practice can help us sort out law from mere custom. And just as we sometimes find it useful to designate particular people to apply our customary standards—say, the grader of a college entrance exam, or the amateur referee of a pickup basketball game—we might appoint particular officials to apply standards that are already taken as legally obligatory. This move from custom to law can happen without any judge's ruling needed to make it so, any more than a rule in a pickup game waits around to be born when a referee first applies it.

Positivist theories of law don't always agree. But it's not clear that anything in the nature of law prevents us from finding it. And

51. Mitchell N. Berman, *Of Law and Other Normative Systems*, in *DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE* (D. Plunkett et al. eds., forthcoming 2018), <http://ssrn.com/abstract=3042669> (manuscript at 3).

there's good reason to think that unwritten law is regularly found in practice. Indeed, without it, courts couldn't make many familiar types of decisions, including the federal “*Erie* guess” about the content of state law. That should make us appropriately skeptical of *Erie*-based arguments against finding law: if judge-found law didn't exist, *Erie* would have us invent it.

1.1 Finding custom

Analogies from law to social rules aren't always straightforward. Written standards are clear and crisp; custom is gauzy and hard to identify. To Mark Greenberg, “[t]elling lawyers to look to customs . . . doesn't take us very far,” at least not without answers to some very basic questions: “Which customs matter? Do customs of ordinary people count for anything? Of ordinary lawyers or only certain elite lawyers?”⁵² For that matter, how do unwritten rules ever change, unless someone changes them? And how can judges declare this changing practice, without deciding the answers themselves?

These questions are sharp ones, but hardly unanswerable. In other contexts, for other systems of customary norms, we manage to answer them every day. And if the problems are surmountable in other areas of life, then maybe they should trouble us less with respect to law.

1.1.1 Identifying the custom

To find unwritten law, we have to know where to look. “Written” law might be unclear, but it's no mystery: the statute says what's in the statute book, and it's law because the legislator said so. But “unwritten” law has an air of obscurity. If there's nothing authoritative for us to read, then what's the law, and where does it come from?

52. Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 113 n.24 (2017).

The mystery is made worse by Blackstone’s ecstatic descriptions of the common law—as “the universal rule of the whole kingdom,”⁵³ discerned by judges as “depositories of the laws” and “living oracles,”⁵⁴ who “do not pretend to make a new law, but to vindicate the old one from misrepresentation.”⁵⁵ There’s a strong temptation to view these as fairy tales, or even as deceit: a con job by judges, who never really set their “own private judgment” aside when declaring “the known laws and customs of the land.”⁵⁶ Hence the critics’ mockery of the “transcendental body of law,” the “mysterious something made by nobody,” and so on.

But the mystery dissolves once we remember how good we are at identifying unwritten rules. Language, fashion, etiquette, and other customary systems are all unwritten in this way. A rule of standard English might not be “the universal rule of the whole kingdom,” but it’s close: with surprising consistency, we spell words correctly, compose full sentences, follow shared norms of grammar or word order,⁵⁷ and so on. What’s more, we do this without any authoritative list of social rules analogous to the Statutes at Large. A social norm can be taught and transmitted through writings (textbooks, fashion magazines, Dear Abby columns, and so on), without being founded on these writings; no grammar book *establishes* rules of English “in the way that statute books *establish* rules of law.”⁵⁸

The important question isn’t whether a rule can be expressed in words, but why the words matter. A statute would be just as “written” if it were “a string of ones and zeros in ASCII format,” or “a set of interpretive dance steps,” or even “if we all just memorized it, taught it to our children, and then burned the National Archives.”⁵⁹

53. 1 BLACKSTONE, COMMENTARIES *67.

54. *Id.* at *69.

55. *Id.* at *70.

56. *Id.* at *69.

57. Cf. MARK FORSYTH, THE ELEMENTS OF ELOQUENCE: SECRETS OF THE PERFECT TURN OF PHRASE 45–46 (2014) (noting that size adjectives are placed before color, such that “great green dragons” will scan but “green great dragons” won’t).

58. See Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 160 (2017).

59. *Id.* at 159.

It would “still contain particular terms, adopted on a particular occasion, and carrying legal significance by virtue of their adoption.”⁶⁰ Rules of grammar or etiquette, by contrast, don’t have to be adopted in any particular way. They typically rest on a general practice that different people can describe differently, with any standard formulations (like “I before E, except after C”) useful only insofar as they get the practice right.⁶¹ The authorities in these fields are epistemic ones, “living oracles” and “depositories” of practice like Ann Landers, your third-grade teacher, or *Strunk & White*.⁶² Their job is to report the “customs of the land” without “pretend[ing] to make a new [rule],”⁶³ just as almanacs report the tide schedule without pretending to command the tides.

Unwritten law can work the same way. Brian Simpson saw “[f]ormulations of the common law” as resembling “grammarians’ rules, which both describe linguistic practices and attempt to systematize and order them.”⁶⁴ The rules discussed by Blackstone—say, that “there shall be four superior courts of record, the chancery, the king’s bench, the common pleas, and the exchequer”; that “wills shall be construed more favourably, and deeds more strictly”; that “money lent upon bond is recoverable by action of debt”;⁶⁵ or that the crime of burglary “must be by night”⁶⁶—are all written down in his book, but they aren’t founded on any particular writings. They’re just things that competent lawyers were supposed to know. Even today, without any statute to tell us so, we know that duress is a defense to certain crimes, that the defendant has the burden of proving it, and so on; a judicial decision might illustrate the rule,⁶⁷ but the rule long predates the decision.

60. *Id.*

61. *Id.* at 160.

62. WILLIAM STRUNK JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* (3d ed. 1979).

63. 1 BLACKSTONE, *COMMENTARIES* *67.

64. Simpson, *supra* note 46, at 376.

65. 1 BLACKSTONE, *COMMENTARIES* *68.

66. 4 *id.* at *224.

67. *E.g.*, *Dixon v. United States*, 548 U.S. 1, 6, 8 (2006).

Because these rules are unwritten, they don't always need to be expressed in particular terms, so long as there's agreement on their content. Six torts professors might give six different explanations of *res ipsa loquitur*,⁶⁸ if they're similar enough to "secure general agreement,"⁶⁹ that's all that matters. Some unwritten rules do have a classic formulation, like John Chipman Gray's version of the rule against perpetuities (that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest").⁷⁰ What makes the formulation classic isn't some special legal power vested in John Chipman Gray, but the successful reception and use of his formulation by subsequent generations of law students—just as the standard lyrics to "Jingle Bells, Batman Smells" are determined by playground practice, and not their attribution to some long-lost author. The formulation is only as good as the practice it's meant to describe.

So we might well identify unwritten legal rules largely as Blackstone did: by their "long and immemorial usage, and by their universal reception."⁷¹ The adjectives should be taken with a grain of salt: neither a grammar rule nor Gray's formulation has to have been used always and everywhere for it to reflect the practice here and now. What's important, though, is that the norm is drawn from current practice, as opposed to some special authorizing event; its "original institution and authority are not set down in writing, as acts of parliament are."⁷²

1.1.2 Whose customs count

To derive a norm from social practice, we need to know whose practice matters. Sometimes customary law draws on the practice

68. See Simpson, *supra* note 46, at 372.

69. *Id.*

70. See JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201, at 174 (3d ed. 1915).

71. I BLACKSTONE, *COMMENTARIES* *64.

72. *Id.*

of regulated parties, like merchants,⁷³ ranchers,⁷⁴ or nation-states.⁷⁵ The model is that of a distinct community whose informal norms are absorbed into the formal law.⁷⁶

To critics of this model, including the early-twentieth-century scholar John Dickinson, such a “customary theory of law breaks down in a complex society.”⁷⁷ For the legal system as a whole, “practically no legally pertinent customs are universal, but nearly all are partial, fluid, conflicting.”⁷⁸ Matt Adler similarly contends that the modern world is too diverse, its social norms too specific to individual groups, for there to be shared norms that define the law.⁷⁹ To Adler, there’s no single community that defines dress norms for all of Manhattan, and perhaps no single community that defines legal norms for the entire United States.⁸⁰

Social practice is very diverse. But for nonlegal norms, there’s often one practice that dominates the others—and we often have no trouble identifying it. No matter how varied the fashions on the Manhattan subway, in a lineup most people could pick out those dressed “professionally.” And no matter how polyglot the city of New York, we can still distinguish (in John Fisher’s words) between the “formal, official language in which business is carried on” and “the various casual dialects of familiar exchange.”⁸¹ People who rarely use standard American English can still identify it as the

73. See Nelson, *Critical Guide*, *supra* note 14, at 933 & n.36; Young, *supra* note 14, at 31; see also U.C.C. § 1-205 (usage of trade).

74. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994).

75. See Grant Lamond, *Legal Sources, the Rule of Recognition, and Customary Law*, 59 AM. J. JURIS. 25, 43 (2014).

76. See, e.g., Lessig, *supra* note 50, at 1791; cf. Emily Kadens, *Custom’s Past, in CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD II*, 21–30 (Curtis A. Bradley ed., 2016) (describing this process).

77. John Dickinson, *The Law Behind Law*, 29 COLUM. L. REV. 113, 131 (1929).

78. *Id.*

79. See Adler, *supra* note 19.

80. *Id.* at 728.

81. John H. Fisher, *Chancery and the Emergence of Standard Written English in the Fifteenth Century*, 52 SPECULUM 870, 870 (1977).

standard—or at least can identify the elite practitioners whose practices get to *set* the standard. Nothing about this process need be democratic, or even all that fair, for it to be a distinctive feature of our society.⁸²

The same thing happens in law. What’s customary for ordinary people, the custom *in pays* (“in the country”), coexists with a more specific custom *in foro* (“in the court”)—in Simpson’s terms, a “body of traditional ideas received within a caste of experts.”⁸³ It’d be “absurd” to treat the rule against perpetuities as a popular custom, like eating with knife and fork.⁸⁴ But it makes perfect sense to place it among the internal customary practices of a legal elite.⁸⁵ As Joseph Beale saw, unwritten law reflects the “body of principles which is accepted by the legal profession,” shaped by the “teachers of law,” the “expressed opinion of writers,” and “the argument of practicing lawyers.”⁸⁶ The relevant community is the community of jurists, and its norms are those of the expert legal class.

Because these are *our* jurists, there’s also a clear sense in which custom *in foro* belongs to society as a whole. We often rely on what Hilary Putnam called a “division of linguistic labor”: people with no idea how elm trees differ from beech trees can still talk about them as separate kinds of trees, trusting that expert botanists will know which are which.⁸⁷ We equally rely on lawyers or grammar snoots to know their field’s rules and to tell us what they are. (And these groups, too, sometimes contract out to a smaller class of real

82. See David Foster Wallace, *Tense Present: Democracy, English, and the Wars over Usage*, HARPER’S, Apr. 2001, at 39, 50, 53.

83. Simpson, *supra* note 46, at 362; see also JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 182–84 (J.H. Burns & H.L.A. Hart eds., 1977) (1823); accord Postema, *supra* note 13, at 592.

84. Simpson, *supra* note 46, at 374; cf. Dickinson, *supra* note 77, at 129 (presenting similar examples).

85. Simpson, *supra* note 46, at 376.

86. I JOSEPH H. BEALE, TREATISE ON THE CONFLICT OF LAWS § 4.7, at 40 (1935); cf. Matthew X. Etchemendy, Legal Realism and Legal Reality 13–17 (Jan. 14, 2018), <http://max-etchemendy.com/wp-content/uploads/2018/01/LR2-MXE-I-14-18-formatted.pdf> (discussing Beale’s view of unwritten law).

87. HILARY PUTNAM, *The Meaning of ‘Meaning,’ in MIND, LANGUAGE, AND REALITY* 215, 226–27 (1975).

experts—say, admiralty or tax lawyers, whose views are taken to count for the profession as a whole.) What makes standard English “standard” is precisely this sort of incorporation-by-reference, as everyone’s “good grammar” and not just the dialect of one cloistered group. And the same process turns the legal customs of elites into the legal customs of their society. So long as we can pick out the experts, and the experts can pick out the rules, the rules still belong to us all.

For some legal rules, the “us” extends quite far. Judges once claimed to find, not the common law of New York or South Carolina, but *the* common law: something that transcended particular jurisdictions while deciding real cases within them. That kind of law might seem hard to base on social facts, and easy to mock as a “brooding omnipresence”—until we remember that customs aren’t confined by political boundaries, and that they can be shared across borders and across cultures, too. Whatever the linguistic differences from Manhattan to Myrtle Beach, their English teachers generally aim at shared standards, making it strange to deny (per Holmes) “that there is this outside thing to be found.”⁸⁸ And just as American and British English are variations of a common global language, the common law applied in New York could be mostly the same as that applied in Charleston or London, with all three jurisdictions drawing from a single transatlantic well. In Beale’s day, courts often used the term “common law” without indicating which they meant;⁸⁹ but this loose talk is no more unusual than saying that Americans speak “English,” without mentioning the many other languages spoken here or the many kinds of English spoken elsewhere in the world. If a jurisdiction’s law incorporates a general customary rule, as supplemented by local variations or local usages,⁹⁰ then there’s nothing mysterious about this general custom being “outside of any particular State but obligatory within it.”⁹¹

88. *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

89. BEALE, *supra* note 86, § 4.3, at 35.

90. *See Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842).

91. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

1.1.3 How custom can change

Finding custom is one thing; accounting for change is another. “If judges never make any laws,” an American realist once asked, “how could the body of rules known as the common law ever have arisen, or have undergone the changes which it has?”⁹² On the one hand, it’d be silly to claim that the common law “exist[s] . . . from eternity,”⁹³ as Austin mockingly suggested—or, to quote a 1910 doggerel, “[t]hat there prevailed in Babylon / [t]he law of motor cars.”⁹⁴ On the other hand, accepting changes in the common law might mean accepting that judges change it, amending the law every time they overrule a case.⁹⁵

This dilemma resembles what international lawyers call the “chronological paradox.” If custom is practice-plus-obligation, the very first person to engage in a practice can’t have been required to do it by custom. Yet if she had no customary obligation, then her practice can’t have established a custom to obligate the second person, and so on.⁹⁶ So how can a custom ever get started? One response to the paradox is to deny that a custom exists; the other is to have the courts impose it themselves, as “a binding norm going forward” that’s “socially and morally desirable.”⁹⁷ For any common-law rule, the Supreme Court reasoned in 1907, “there must . . . be a first statement,” which will be “found in the decisions of the courts,” and which “presents the principle as certainly as the last.”⁹⁸

As applied to nonlegal norms, though, these arguments lose their bite. The first person to wear a skinny tie in 1950s America

92. Cohen, *supra* note 34, at 162.

93. AUSTIN, *supra* note 12, at 655.

94. Harry R. Blythe, *A Theory*, 22 GREEN BAG 193, 193 (1910); *cf.* I BEALE, *supra* note 86, § 4.7, at 39 (“[B]y a process of backward projection, it is argued that unless the courts changed the law the law must have been the same in 1200 that it is today.”).

95. *See* Dickinson, *supra* note 77, at 119.

96. *See* Kadens, *supra* note 76, at 15; Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, in CUSTOM’S FUTURE, *supra* note 76, at 34, 40.

97. Bradley, *supra* note 96, at 56.

98. *Kansas v. Colorado*, 206 U.S. 46, 96–97 (1907).

didn't respond to what was already the fashion; nevertheless, at some point, some other people did. The same goes for changes in accepted spelling—say, from Chaucer's time to Shakespeare's to today.⁹⁹ Maybe the first American to drop the 'u' from 'behaviour' misunderstood the custom, or maybe it was just a printer's error; eventually, the error caught on. Neither an English teacher nor a person getting dressed in the morning needs to resolve any philosophical problems before they can follow the current practice.

Because it's founded on practice, a custom can change without anyone needing authority to change it.¹⁰⁰ No one has to issue a decree on tie width for the fashion to evolve over time. It just does, as people change their beliefs and actions. If *Vogue* editor Anna Wintour declared that skinny ties were "in," she'd at best be trying to hasten this change in practice—to "make 'fetch' happen."¹⁰¹ Given her position, she might be successful; but a *causal power* to influence others isn't the same as a *norm-conferred authority* to legislate. Wintour might persuade others, or she might not, but there's no preexisting social rule authorizing the editor of *Vogue* to establish new rules of tie width at will.

At this point, the legal analogy should be clear. Unwritten law certainly changes over time, as a function of changes in how lawyers and officials understand the law.¹⁰² Courts are especially well-equipped to effect these changes, even without *stare decisis*—as many prominent district-court opinions have.¹⁰³ But this, again, is

99. Cf. Fallon, *supra* note 127, at 1119 (noting linguistic changes over time).

100. See John Gardner & Timothy Macklem, Book Review, NOTRE DAME PHIL. REVS., Dec. 8, 2011, <https://ndpr.nd.edu/news/legality/> (reviewing SCOTT J. SHAPIRO, LEGALITY (2011)) (discussing the "chicken and egg problem").

101. See MEAN GIRLS (Paramount Pictures 2004) ("Gretchen, stop trying to make 'fetch' happen. It's not going to happen!").

102. See BEALE, *supra* note 86, § 4.13, at 49; accord I JAMES WILSON, *Of the Common Law*, in WORKS OF JAMES WILSON 423, 425 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896) (describing it as part of "the very nature of a system of common law" that it "insensibly" adapts "to the situation and circumstances of the people, by whom it is appointed").

103. See, e.g., *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003) (establishing influential cost-shifting factors for electronic discovery); *Zippo Mfg. Co. v. Zippo Dot*

a causal and not a legal power. George W. Bush and Will Ferrell between them managed to get “stratergy” into the *Oxford English Dictionary*,¹⁰⁴ but no one argues that this is among the powers vested in the President by Article II.

To criticize these changes for their lack of authority, as Dickinson did,¹⁰⁵ is to recite the chronological paradox again. Unlike written law, custom doesn’t need to prove its pedigree. Once enough people had dropped the ‘u’ from ‘behaviour,’ or had treated parol contracts as requiring consideration, a good dictionary editor or legal treatise writer would have been obliged to recognize the new standard. Tracing the precise mechanism of the change would be burdensome and pointless to all except historians; it even bored Blackstone, who found “nothing more difficult than to ascertain the precise beginning and first spring of an antient and long established custom.”¹⁰⁶

In fact, worrying too much about the origins of a particular rule is a symptom of ignoring the distinctions between written and unwritten law. Rules of written law trace their validity to an initial enactment, made by particular people in a particular way; as Simpson writes, a statute “is both the only reason and a conclusive reason for saying that this is the law.”¹⁰⁷ This may be the normal way of thinking about American law, which gives pride of place to written sources.¹⁰⁸ But unwritten law, like a natural language, derives its

Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) (proposing an oft-cited test for Internet jurisdiction).

104. *Stratergy*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/33737630> (last visited Jan. 4, 2018); see *Saturday Night Live* (NBC television broadcast Oct. 7, 2000), <https://www.nbc.com/saturday-night-live/video/cold-opening-gore--bush-first-debate/n11360>; *Stratergy*, WIKIPEDIA (Dec. 26, 2017), <https://en.wikipedia.org/w/index.php?title=Stratergy&oldid=817180017>.

105. Dickinson, *supra* note 77, at 125–26.

106. 1 BLACKSTONE, COMMENTARIES *67.

107. Simpson, *supra* note 46, at 367.

108. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 885 (1996) (noting, to his dismay, that the “common law method” is “not [one] we usually associate with a written constitution”); see also Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 820 (2015) (“If the

content from usage today, not from whatever happened a long time ago. It simply doesn't matter which obscure case, "decided say in 1540," was the first to hold "that parol contracts require consideration";¹⁰⁹ the rule doesn't "derive[] its status as law today from this antique decision," and the old decision wouldn't even be "good authority for the rule" in a modern brief.¹¹⁰ Nor does it matter whether today's law of choses-in-action started with some shenanigans pulled by Lord Mansfield in the eighteenth century.¹¹¹ The existing doctrine might have been "judge-made" in some causal sense, but it'd be deeply misleading to view that doctrine as "the product of a series of acts of legislation" by unremembered judges.¹¹² Its current validity rests on current acceptance; Lord Mansfield has nothing to do with it.

Living with past judicial shenanigans doesn't mean giving *carte blanche* to future ones. At any given time, officials are obliged to conform to the law as it stands.¹¹³ The fact of past evolution doesn't offer any legal ground for new departures, any more than the fact of past changes in spelling license each English teacher to invent more. Dickinson criticized "the paradoxical conservatism . . . of the historical jurist, which holds that because law has continually changed in the past it is somehow impossible to change it in the present."¹¹⁴ But changing the law isn't impossible; it might just be *forbidden* by other rules of law.¹¹⁵ A legal system can coherently give

law was *X* at the Founding but is supposed to be *Y* today, the natural follow-up question is what happened in between—and *why* whatever happened (an amendment, a statute, a shift in custom or usage) was legally capable of making that change.”).

109. Simpson, *supra* note 46, at 366.

110. *Id.* at 367.

111. See Dickinson, *supra* note 77, at 123.

112. Simpson, *supra* note 46, at 367–68.

113. Cf. *Livingston v. Jefferson*, 15 F. Cas. 660, 664 (C.C.D. Va. 1811) (No. 8411) (Marshall, Circuit Justice) (refusing to depart from an “innovation on the old rule” because it had since become the standard “for a long course of time”).

114. Dickinson, *supra* note 77, at 139.

115. Cf. I BLACKSTONE, COMMENTARIES *70–71 (noting that “a positive law” might be “fixed and established by custom, which custom is evidenced by judicial decisions; and therefore [could] never be departed from by any modern judge without a breach of his oath and the law”); Sachs, *supra* note 108, 844 (“Our law requires us, at one and

legislative power only to certain officials (like legislators), while expecting other officials (like policemen or judges) merely to apply that law, whatever it is and wherever it came from. The fact of change over time doesn't mean that there's no legal standard to apply right now; and if there weren't any standard to apply right now, we couldn't talk coherently about change over time.

1.2 How custom makes law

Analogizing law to social rules is only the first step: we still have to decide which social rules really are rules of law. As Mark Greenberg argues, the same facts can be used to support many different and conflicting norms.¹¹⁶ So which facts produce legal norms, and which norms do they produce? Whatever norms we pick might seem a deliberate choice of the judges, not the result of some dispassionate process of discovery. And if law is something wielded by real officials, rather than brooding omnipresently in the sky, then maybe the officials get to decide what the law is.

In fact, ordinary custom does plenty of work. Facts about social practice might be consistent with multiple rules, but we should be wary of any argument that'd make it impossible to identify custom at all. If we can reliably identify custom from a mass of practice, then we can also identify legal rules from a mass of custom, even before the judges get their hands on it. Maybe something in the nature of law requires custom to be blessed first by officials before it can serve as part of the law; but that claim is highly controversial, and there may not be much reason to believe that it's true.

1.2.1 From practice to custom

Custom is said to arise from current practice and also to create rules for the future. How do we get from the 'is' to the 'ought'? If

the same time, to overlook past violations and to commit to being rule-governed in the future; to go, and sin no more.”).

116. Cf. Greenberg, *supra* note 52, at 113–14 n.24.

milkmen were to regularly “adulterate the milk supplied to their customers,”¹¹⁷ Dickinson asked, would that create a custom of milkmen—or even a customary law? Maybe, as Jeremy Bentham wrote, “a law is to be extracted [from the cases] by every man who can fancy that he is able: by each man, perhaps a different law.”¹¹⁸

To solve this problem, customary law has long been said to demand two things: that there be a widespread practice, and that the practice be followed from a sense of obligation (*opinio juris*).¹¹⁹ This definition strikes some as circular, even “mysterious”: “the legal obligation is created by a . . . belief in the existence of the legal obligation.”¹²⁰ So critics have offered various other explanations for these practices—for example, that the actors are motivated by self-interest rather than felt obligation.¹²¹

For practices of language or etiquette, though, *opinio juris* makes a lot of sense. A speaker who conjugates her verbs doesn’t have to be *motivated* by a love of conjugation or of rule-following; she might have perfectly ordinary and self-interested reasons, such as wishing to seem well-educated or to be understood.¹²² Still, she’s acting in full compliance with the rule, and if questioned she might cite the rule to explain or justify what she did. As Hart explains, we don’t need to delve deeply into psychology to explain why “chess-players will move the bishop diagonally,”¹²³ so long as the rules matter in guiding, explaining, and justifying what they do.¹²⁴ *Opinio juris* reflects whether they take the rule *as a rule*, distinguishing

117. Dickinson, *supra* note 77, at 129.

118. Jeremy Bentham, OF LAWS IN GENERAL 192 (H.L.A. Hart ed., 1970).

119. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

120. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 24 (2005).

121. *Id.* at 26.

122. See Mark Greenberg, *How to Explain Things with Force*, 129 HARV. L. REV. 1932, 1962 (2016); see also Adam Perry, *The Internal Aspect of Social Rules*, 35 OXFORD J. LEGAL STUD. 283 (2015).

123. HART, *supra* note 36, at 147.

124. *Id.* at 140.

“the adult chess-player’s move from the action of the baby who merely pushed the piece into the right place.”¹²⁵ (As Leslie Green notes, the most powerful rules are the ones we obey without even thinking: “Few men wake up in the morning, mentally rehearse the gender-rules about dress, and then put on trousers instead of a skirt in a deliberate attempt to conform to that norm.”¹²⁶)

So practice-plus-obligation actually fits our norms rather well. What counts as standard English may vary over time,¹²⁷ but it’s not just a corpus-linguistics catalog of whatever words people happen to use. Instead, it’s a *normative* practice, chock full of do’s and don’t’s, accepted standards of behavior and shared grounds for criticism. The longstanding battle between “descriptivists” and “prescriptivists” overlooks the fact that we always act in both roles at once: we can *describe* our system only in terms of the *prescriptive* norms in current use.¹²⁸ Whatever our statistics on word usage (“52% of respondents approve of the singular ‘they’”), there might be no magic number that suddenly counts as general acceptance, just as there’s no magic number of sand grains that suddenly count as a heap. Still, we understand that some usages are generally permitted in our language while others are not. Someone grading the Advanced Placement English Language and Composition exam has to decide what counts as a “lapse[] in diction or syntax,”¹²⁹ something that’s unintelligible absent a shared understanding of standard English as ruling some usages in and others out.

All this can also be true of law. Just as English-speakers don’t have to like formal English, and just as store clerks don’t have to

125. *Id.*

126. Leslie Green, *Law and the Causes of Judicial Decisions* 23 (Univ. of Oxford Legal Research Paper No. 14/2009, 2009), <http://ssrn.com/id=1374608>.

127. See Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Har-tian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1119 (2008).

128. See generally Bryan A. Garner, *Making Peace in the Language Wars*, 7 GREEN BAG 2D 227 (2004); Wallace, *supra* note 82.

129. College Board, AP English Language and Composition: Sample Scoring Guidelines for the Synthesis Essay (2006), http://apcentral.collegeboard.com/apc/public/repository/sample-scoring-guidelin_51461.pdf.

believe that “the customer is always right,”¹³⁰ law-abiding citizens don’t have to be motivated by their admiration for various rules of law. They only need, when the point is raised, to understand the customary rules *as rules*, and not just as things that lots of people do.

A subtler problem is raised by Mark Greenberg. Whatever our social practices might be, in theory they could support any number of rules.¹³¹ Just as dots can be connected by an infinite number of curves, a given set of cases might establish any number of “lines” of case law, if we use “a non-standard or ‘bent’ model” to read them.¹³² For example, how can we be sure that the doctrine of quasi-contract doesn’t lapse on December 31, 2049? That kind of “bent” rule seems like “a non-starter”;¹³³ but how can we rule it out, if all of the cases on quasi-contract are from before 2050? Everything the legal system has done to date is equally consistent with both rules. (And while we might not *say* that quasi-contract will lapse on a particular date, our habit of *talking* about quasi-contract is drawn from pre-2050 practice too.)

To Greenberg, if all we have is social practice—a bunch of data points on the page, which don’t tell us how best to fit them to a line—then it’s not clear what keeps these “bent” rules out. Something has to limit which aspects of the practice are legally relevant;¹³⁴ but that limit can’t be supplied by the law, as it’s necessary to determining the law in the first place.¹³⁵ We might just take the rules to be determined as brute facts, but that doesn’t seem right either; there ought to be an intelligible *reason* why people’s actions

130. See Perry, *supra* note 122, at 288.

131. Mark Greenberg, *How Facts Make Law*, in *EXPLORING LAW’S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 225, 249–51 (Scott Hershovitz ed., 2008); see also Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 *GEO. L.J.* 569, 614–17 (1998).

132. Greenberg, *supra* note 131, at 249.

133. *Id.* at 250.

134. See *id.* at 251.

135. See Greenberg, *supra* note 52, at 113 n.24 (arguing that something beyond “the practices must determine how the legal practices contribute to the content of the law”).

and beliefs have the legal consequences we think they do.¹³⁶ Yet if we look only to social practice, it's not clear what reasons those are.

This is a powerful argument, but maybe it's too powerful. As Greenberg recognizes, it isn't "limited to the law"; it follows the same structure as other well-known problems of language and induction,¹³⁷ and it applies just as much to other social rules. (Do chess bishops move diagonally only before 2050?¹³⁸ If not, why not?) Without reviewing other possible answers to these puzzles,¹³⁹ it's enough to note that, if the problems have the same structure, then they ought to be handled with the same solutions. If practice generates real social norms for chess, then maybe it can do the same for quasi-contract.

In fact, it may be crucial to Greenberg's theory that the general problem be solvable. He would rule out "bent" interpretations with "value facts," which privilege certain ways of inferring obligations from practice.¹⁴⁰ A statute's legal content might rest in part on ordinary linguistic usage, because that's evidence of what Congress intended or how the provision is reasonably understood, and because those things matter for reasons of democracy or fairness.¹⁴¹ A new ordinance that "cars must drive on the right" might affect our obligations by changing how other people are likely to act, which matters for other things we value (like preventing accidents).¹⁴² But to conclude that there *is* such a thing as ordinary linguistic usage—or that we *have* a social norm of driving on the right, or that others reading this statute are likely to keep doing so, and so on—we have to extract general rules from past practice. Simply to apply the value

136. See Greenberg, *supra* note 131, at 232.

137. See *id.* at 251 (discussing "Nelson Goodman's problem about *green* and *grue*, and Saul Kripke's problem about *plus* and *quus*").

138. Cf. Etchemendy, *supra* note 86, at 51 n.189 (presenting a similar example).

139. E.g., David Lewis, *New Work for a Theory of Universals*, 61 AUSTRALASIAN J. PHIL. 343, 375–76 (1983); see also David Plunkett, *A Positivist Route for Explaining How Facts Make Law*, 18 LEGAL THEORY 139 (2012) (suggesting that conceptual facts might do the job for law).

140. Greenberg, *supra* note 131, at 225; see also *id.* at 259.

141. Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1339 (2014).

142. *Id.* at 1340.

facts correctly, we need to rule out in advance any “bent” interpretations of our linguistic or social practices (say, “use ‘right’ and ‘left’ in the traditional way only until this afternoon, then flip”). Whatever method Greenberg uses to rule those out, anyone else can use too. Customary law, like other kinds of custom, can be rooted in practice even if we can’t spell out the precise relation between the two. It can be intelligible enough for our purposes, without needing to be intelligible all the way down.

1.2.2 From custom to law

Language, etiquette, and fashion are all systems of social norms. Is law different in kind? Drawing analogies to these other systems might threaten to blend them—leaving us unable, say, to tell whether “curb your dog” or “don’t wear white after Labor Day” are legal rules or just social ones. Something has to keep law and custom apart, and maybe that something is the courts.

In our society, law is marked by its reliance on formal proceedings and authoritative pronouncements, along with a vast and complex structure of powers, immunities, and officials. No one is arrested by the fashion police (yet), but law speaks with the sovereign’s voice and is backed by the use of force. That’s why Greenberg discounts analogies to “rules of practices (including organizations, games, and so on),” because “familiar practices, such as etiquette, . . . have no equivalent to legal officials, let alone to the acceptance by officials of a rule of recognition.”¹⁴³ Even Blackstone thought the “customs or maxims” that “shall form a part of the common law” were distinguished by their being “known,” and their “validity . . . determined,” by “the judges in the several courts of justice.”¹⁴⁴ Is what differentiates law, then, the fact that judges make it?

As it turns out, legal and nonlegal norms are remarkably similar. Almost every important feature of legal norms can also be found outside the law. What truly differentiates legal norms from social

143. Mark Greenberg, *Hartian Positivism and Normative Facts: How Facts Make Law II*, in *EXPLORING LAW’S EMPIRE*, *supra* note 131, at 265, 275.

144. I BLACKSTONE, *COMMENTARIES* *69.

norms might just be what differentiates different kinds of social norms from each other: their use in particular fields and their application to particular problems.

Rules of recognition, for example, are often found in nonlegal groups. Informal clubs or student associations can follow customary rules of practice, and some of these rules recognize other authorities: for example, the traditional pride of place given to *Robert's Rules of Order*.¹⁴⁵ Natural languages, too, can have “secondary”¹⁴⁶ rules like these: it might be that a customary rule of French authorizes the *Académie française* to define or exclude new words (like “*le email*”), such that recognizing the *Académie's* authority is part of what it means to be a competent French-speaker. There's little distance between the informal social recognition that “what *Robert's Rules* prescribe is proper procedure,” or that “what the *Académie* approves is proper French,” and a recognition by legal officials that “what the Queen-in-Parliament enacts is law.”¹⁴⁷

Reliance on officials is also very widespread, even in customary domains. Once we identify shared norms, we regularly task some persons or institutions with applying them. A teacher hired by the College Board to grade AP English essays is expected to ignore her own preferences or pet peeves and to grade the exams according to common standards. Even the unorganized group of friends who choose a referee for a pickup basketball game are empowering a neutral official, by means of a social rule, to render authoritative resolutions of disputes.

Official constructions of law do carry an authority often lacking in private applications of social rules. But this may be a difference in degree, not in kind. Hart famously compared judges to the official scorers of games, who have authority to apply the rules and to

145. See HENRY M. ROBERT III ET AL., *ROBERT'S RULES OF ORDER NEWLY REVISED* (11th ed. 2011); JIM SLAUGHTER ET AL., *NOTES AND COMMENTS ON ROBERT'S RULES* 160 n.4 (4th ed. 2012).

146. See HART, *supra* note 36, at 94 (distinguishing primary and secondary rules).

147. *Id.* at 107.

make binding determinations.¹⁴⁸ This in-game authority entails that “the score is what the scorer says it is”; but it doesn’t eliminate every *other* rule, collapsing the game into one of “scorer’s discretion.”¹⁴⁹ A player without such authority can still privately “assess the progress of the game,”¹⁵⁰ using the same rules that the scorer would “find[. . . established as a tradition and accepted as the standard for [his] conduct.”¹⁵¹

In the same way, the fact that customary legal rules have to be applied by judges doesn’t entail that the judges get to make the rules. Instead, they might be expected to apply rules already known and established by custom. A customary legal rule might eventually fade away if it weren’t accepted by most of the judges, most of the time; but that doesn’t make the judges who use the rule its author,¹⁵² any more than a basketball referee is the author of the three-point line. (A \$5 million award in Maine recently turned on the absence of an Oxford comma in the statute;¹⁵³ certainly the judges didn’t create *that* rule, even if they could decide whether or not to apply it.¹⁵⁴) Richard Ekins points out that a court need have “no more authority than any other subject of the law to interpret” what the law requires; its job might simply be to resolve disputes, with interpretation only becoming relevant when the disputes turn on contested understandings of the law.¹⁵⁵ The rest of the time, the court is engaging in essentially the same activity as the lawyer who renders opinions in her office,¹⁵⁶ or the Monday-morning referee who watches the replay and questions the call.

148. See HART, *supra* note 36, at 142–45.

149. *Id.* at 144.

150. *Id.* at 142.

151. *Id.* at 146.

152. *Id.*

153. See O’Connor v. Oakhurst Dairy, 851 F. 3d 69, 70 (1st Cir. 2017).

154. Cf. Leslie Green, *Legal Positivism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2009), <https://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>.

155. Richard Ekins, Constitutional Statutes and (Constitutional) Interpretation 5 (Jan. 2016) (unpublished manuscript on file with author).

156. *Id.*

Nor is it a significant distinction—for these purposes, at least—that legal norms are frequently controversial, of great moral weight, or characterized by the use of force.¹⁵⁷ Most of the time, there's not much morally at stake in linguistic practice; people can talk however they want. But some language use might be highly controversial, as in the case of gender pronouns or the singular “they.”¹⁵⁸ And other social norms can give rise to urgent moral concerns: think of the *code duello*, or “honor killings,” or the bloody unwritten rules of Jim Crow. People have always used violence to impose and enforce social norms, whether or not those norms had the name of law. The fact that legal norms sometimes give the state a monopoly of violence may be a point in their favor, but it doesn't make them fundamentally different from social rules of other sorts.

That shouldn't surprise us, because on the standard positivist picture, legal rules simply *are* social rules.¹⁵⁹ We can usually tell social rules apart without any kind of formal apparatus; understanding a custom means understanding what the custom is *not*. We can tell fashion from etiquette simply by knowing their respective domains, notwithstanding the occasional edge case where the same conduct breaches both (like wearing a long white dress to a wedding); and we can tell bad grammar from bad writing simply by knowing the conventions applicable to each. We're already pretty good at distinguishing Shakespearean English from modern English, or kickball from dodgeball, or the ordinary rules of etiquette from the nonlegal conventions specific to law or politics (judicial robes, faithless electors, State of the Union addresses, pre-Roosevelt limits on presidential terms).

157. See generally FREDERICK SCHAUER, *THE FORCE OF LAW* (2015) (describing coercion as a fundamental characteristic of legal systems).

158. See Deborah Cameron, *Gender and the English Language*, in *THE HANDBOOK OF ENGLISH LINGUISTICS* 724, 736–38 (Bas Aarts & April McMahon eds., 2006); John E. McIntyre, *Everyone Goes Their Own Way*, *BALT. SUN*, Jan. 6, 2015, <http://www.baltimoresun.com/news/language-blog/bal-everyone-goes-their-own-way-20150106-story.html>.

159. See Berman, *supra* note 51 (manuscript at 18–19).

That might sound a little hand-wavy, but it's borne out by our ordinary experience. Divisions between normative systems aren't always cut-and-dried, but they do real work, and they can do real work for law. Berman, for example, suggests that legal systems are marked out by their connections to politics, serving as "political communities' normative Swiss-Army knives."¹⁶⁰ If so, they'd inherit all the messiness involved in distinguishing political communities from many other overlapping social structures—including those defined by class, culture, profession, religion, region, or ethnicity. Yet the field of political science hasn't collapsed for lack of borders, and neither has the law. People don't need a crisp set of necessary and sufficient conditions to know a legal rule when they see it: the degree of legal obligation attached to a custom *in foro* may be something the custom itself tells us.

1.2.3 The nature of unwritten law

Whether unwritten rules are really rules of law might depend on what counts as law in the first place. If your theory grounds law in official action, as many positivist theories do, then you might insist (with Dickinson) that a custom has legal force "only when and so far as the courts have determined to accept it as such."¹⁶¹ If courts get to choose which customs are legally binding, then they might be said to choose the law—making it hard to say that this law is found rather than made.

But are those theories correct? Citing Holmes, *Erie* relied on an Austinian command theory: law is the command of the sovereign, and it speaks with the sovereign's voice. So a common-law rule needs "some definite authority behind it," such as a declaration of the sovereign's court.¹⁶² Since *Erie*, though, Austin's theory has come under withering scrutiny. As Brian Bix describes it, the theory

160. *Id.* (manuscript at 19).

161. Dickinson, *supra* note 77, at 135; *accord* Cohen, *supra* note 34, at 174.

162. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

is now “almost friendless, and is today probably best known from Hart’s use of it as a foil.”¹⁶³ On Hart’s account, the custom comes first: the written rule is special only because an unwritten rule makes it so. To paraphrase an argument by Stefan Sciaraffa, a judge’s decree that a custom has legal force would still “be a dead letter absent a custom among the system’s legal officials of conforming” to the judge’s decrees.¹⁶⁴ That custom continues to matter even after the decree issues, because “whether a written [decree] is live or a dead letter comes in degrees.”¹⁶⁵ Indeed, in a regime in which the very existence, identity, and jurisdiction of the courts was determined by rules of customary law—say, that “there shall be four superior courts of record, the chancery, the king’s bench, the common pleas, and the exchequer”¹⁶⁶—it’d seem rather circular to base these rules’ legal force on their having been announced by the courts they constitute. In the end, we can’t do without customary rules.¹⁶⁷

Elsewhere Holmes suggested a different theory, that law depends on official action because it’s just a prediction of how officials will act: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”¹⁶⁸ That theory is popular among cynics as well as practicing lawyers, who get paid to advise clients on what judges might do. But among legal experts, it’s *also* “nearly friendless,”¹⁶⁹ with some authors denying

163. Brian Bix, *John Austin*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Summer 2017) (citation omitted), <https://plato.stanford.edu/archives/sum2017/entries/austin-john/>.

164. Stefan Sciaraffa, *The Ineliminability of Hartian Social Rules*, 31 *OXFORD J. LEGAL STUD.* 603, 620 (2011).

165. *Id.*

166. 1 BLACKSTONE, COMMENTARIES *68.

167. See John Gardner, *Can There Be a Written Constitution?*, 1 *OXFORD STUDIES IN PHILOSOPHY OF LAW* 162 (Leslie Green & Brian Leiter eds., 2011).

168. O.W. Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 461 (1897).

169. Leslie Green, *Law and Obligations*, in *OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 514, 517 (Jules Coleman & Scott Shapiro eds., 2002); accord Fallon & Meltzer, *supra* note 4, at 1763 (“The fallacies of a ‘predictive theory’ of law, which Holmes is often taken to have asserted, are well known.”).

that the realists ever believed in it.¹⁷⁰ A judge consulting a law-book isn't trying to predict her own actions, any more than chess-players merely predict that they'll move bishops diagonally.¹⁷¹ For our purposes, moreover, the prediction theory fails to say anything interesting about unwritten law. We want to know whether courts might treat unwritten standards the way they treat statutes or binding precedents—or, conversely, whether unwritten law is necessarily judge-made in the way that some kinds of law are *not*.¹⁷² If law is a prediction about judges, then all these sources are evidence together, and there's nothing any less law-like about an unwritten rule. (Indeed, it's not clear why judges are the officials who matter; the people your clients really want to understand are bailiffs, policemen, and the 101st Airborne. On the other hand, if we bring judges and statutes back into the picture—say, because bailiffs usually listen to judges, and judges usually listen to statutes—then it would also matter whether judges usually listen to customary law.)

A third theory, suggested by Joseph Raz, is that courts are responsible for identifying customary legal rules because of their fundamental role in the legal system. On Raz's account, a legal rule is “part of the system only if it is recognized by legal institutions”—in particular, by the “primary law-applying” institutions like courts.¹⁷³ Courts do have an enormous impact on legal practices, and law-applying institutions do need some way of separating legal norms from nonlegal ones when the occasion arises. But do they

170. See, e.g., BRIAN LEITER, *Legal Realism and Legal Positivism Reconsidered*, in NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 59, 60 (2007). *But see* Green, *supra* note 126, at 11–12 (arguing that some realists really did believe this); cf. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 124–25 (Roland Gray ed., 2d ed. 1921) (arguing that “all the Law is judge-made law,” for “it is only words that the legislature utters; it is for the courts to say what those words mean”).

171. HART, *supra* note 36, at 147.

172. See Leslie Green, *Introduction* to HART, *supra* note 36, at xvii (“It would be like being told God doesn't exist, only to find out that the interlocutor doesn't believe in the existence of dogs either.”).

173. Joseph Raz, *The Identity of Legal Systems*, 59 CAL. L. REV. 795, 803 (1971).

need an institutional decision to draw this line? Perhaps these institutions could instead respond to what's already the case—to the fact that a particular custom might already be recognized as law, even before its first discussion by a court, just as a particular grammar rule is operative even before its first invocation by a grader of AP exams. Raz notes that there are some customs on which courts are already disposed to act,¹⁷⁴ as to which the courts are “merely recognizing and enforcing” existing standards and not making their own.¹⁷⁵ And courts are hardly the only law-appliers in town. If all sorts of officials and private citizens are routinely engaged in applying the law, and if they already consider particular customary rules to be an ordinary part of the law that they apply, then why must they wait for a court to speak first? A system in which the courts routinely enforce different rules would certainly be *unstable*,¹⁷⁶ just as a sporting event will be unstable if the scorer has gone rogue.¹⁷⁷ But the practical need for a faithful scorer doesn't mean that rules only go into effect once a scorer has applied them.

To Hart, it seemed clear that courts might “apply custom, as they apply statute, as something which is already law and because it is law”; to exclude this possibility was “merely dogmatic.”¹⁷⁸ If a society can recognize as law whatever's written in a particular book, whatever's “carved on some public monument,” and so on, it can also recognize as law whatever's identified by a certain kind of customary practice.¹⁷⁹ There may be responses to this, and reasons why custom must wait for the courts. But without having those reasons in hand, the burden seems to rest with those who reject this view—who claim that customary law can only be created by courts, and that it *can't* be found by judges.

174. See *id.* at 804 (“[I]f presented with the appropriate case the courts would act on the law.”).

175. *Id.*

176. See *id.* at 803.

177. See HART, *supra* note 36, at 142–45.

178. *Id.* at 46.

179. *Id.* at 94–95.

1.3 Finding law in practice

One last reason to believe that judges can find law is that they actually do it quite often. (As in the old saw about believing in infant baptism: “Hell yes, I’ve seen it done!”¹⁸⁰) This Essay doesn’t claim that any particular society has charged its judges *only* to find the law, and never to make it. But at least some legal norms have been found throughout history, a practice that still continues today.

The common law is often identified with case law—that is, with judicial legislation structured by rules of stare decisis. But English law used unwritten rules for centuries before such doctrines took their modern form. “Legal historians widely agree,” Postema writes, “that before the eighteenth century there was no firm doctrine of stare decisis in English common law.”¹⁸¹ In other words, “if historians are correct, English common law functioned well enough for over 500 years without the one thing that, according to current orthodoxy, held the practice together as a form of law.”¹⁸²

Instead, according to David Ibbetson, the English relied on customs *in foro*, customs not “of the English people as a whole but of the lawyers.”¹⁸³ The customary law thus created was not “just judge-made: it was the product of the whole legal culture focused first on Westminster Hall and later on the Inns of Court, where lawyers lived, discussed, taught and learned together.”¹⁸⁴ Even today, as Peter Tiersma notes, “a remarkable amount of orality has survived in the English common law.”¹⁸⁵

180. Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL’Y 479, 479 (1996).

181. Postema, *supra* note 13, at 589.

182. *Id.*

183. David Ibbetson, *Custom in Medieval Law*, in THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 151, 165 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007); *see also* Oran Doyle, *Conventional Constitutional Law*, 38 DUBLIN UNIV. L.J. 311, 315 (2015).

184. Ibbetson, *supra* note 183, at 165.

185. Tiersma, *supra* note 35, at 1188.

These English practices were carried across the pond. In the early nineteenth century, as Judge Fletcher famously described, federal and state courts managed “to develop a uniform body of law” on marine insurance, seeing themselves as “engaged in the joint endeavor of deciding cases under a general common law.”¹⁸⁶ Brandeis himself found it difficult to resist the practice; shortly after *Erie*, he decided a case in which “[m]ost of the issues . . . involve questions of common law and hence are within the scope of [*Erie*],” yet he saw no claim “that the local law is any different from the general law on the subject.”¹⁸⁷

In our own day, federal courts constrained by *Erie* will frequently act as if they’re finding rules of unwritten law. This might happen in cases involving the rules for accretion and avulsion of littoral property;¹⁸⁸ uncodified criminal defenses, such as self-defense or duress;¹⁸⁹ the doctrine that the interest goes with the principal;¹⁹⁰ the rules of waiver on appeal;¹⁹¹ and so on. Many rules of so-called federal common law are really just the old general-law doctrines in disguise. Nelson documents how courts applying common-law concepts in federal statutes will look to general principles of torts or agency—“how *most* states do things,” as opposed to what any *one* state has said.¹⁹² This looks a great deal like courts finding, rather than making, law.

Most importantly, federal courts are told to find law in the one place where we might expect the contrary: namely, the decision of state-law issues under *Erie*. In George Rutherglen’s quip, Justice Holmes’s “predictive theory of law has been everywhere discredited as a theory of adjudication—except in its application to state law

186. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1515 (1984).

187. *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 111, 113 n.1 (1938) (Brandeis, J.). I am indebted to James Stern for this example.

188. *See New Jersey v. New York*, 523 U.S. 767, 784 (1998).

189. *E.g.*, *Dixon v. United States*, 548 U.S. 1 (2006).

190. *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162–63 (1980).

191. *Musacchio v. United States*, 136 S. Ct. 709 (2016).

192. Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 504 (2006).

under the *Erie* doctrine.”¹⁹³ Federal courts deciding state-law issues must perform the “*Erie* guess,” predicting how the issues might be decided in the state court of last resort.¹⁹⁴ As Holmes put it almost three decades before *Erie*, the “fiction” of *Swift* and of general common law “had to be abandoned” once everyone realized “that decisions of state courts of last resort make law for the State.”¹⁹⁵ If court decisions make law, rather than find law, then federal courts have to apply the law made by those courts, and they should try to reach the same ruling that the state courts would.

What’s strange, though, is that the *Erie* guess presumes that federal courts are indeed capable of finding law—so long as it’s the law of a state. When a federal court makes an *Erie* guess, it’s guessing what state courts *would* do by their own lights, not deciding what those courts *should* do. To Holmes, federal courts have power “only to declare the law of the State,” based on existing sources, and “not an authority to make it” out of whole cloth.¹⁹⁶ But if that’s possible, then a federal court can also make a guess about how the courts of its *own* system might decide a given issue, based on the existing legal sources and according to prevailing views. That is, it could go about finding, and not making, the preexisting law.¹⁹⁷

II

MUST JUDGES MAKE LAW?

Suppose that judges sometimes find law. Could that be all they do? Or do they sometimes need to make it instead?

193. George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Populism*, 10 CONST. COMMENT. 285, 293 (1993).

194. See, e.g., *McKenna v. Ortho Pharm. Corp.*, 622 F. 2d 657, 661 (3d Cir. 1980) (making “a prediction of how the state’s highest court would decide were it confronted with the problem”); Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PENN. L. REV. 1459, 1461 (1997).

195. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 371 (1910) (Holmes, J., dissenting).

196. *Id.*

197. Cf. Young, *supra* note 14, at 32 (“That distinction [between following others and acting by one’s best lights] exists even in contemporary practice prescribed by *Erie* itself, as federal courts must try to follow state law in diversity cases while enjoying greater autonomy in enclaves of federal common law.”).

This Essay assumes, for argument's sake, that the “right-answer thesis” is false: not every legal question has to have a uniquely correct right answer, and certainly not one that's easy to find. When such questions arise, the legal system needs a way of settling them, like handing them over to a judge. If the system has rules of precedent, then that decision will be taken as a standard for the future—making new law, some would say, in order to fill the gap. If legal uncertainty will always be with us, then so will judicial lawmaking.

Both courts and scholars have accordingly treated judge-made law as inevitable. The Supreme Court borrowed from Austin the view “that judges do in fact do something more than discover law: they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic . . . terms that alone are but the empty crevices of the law.”¹⁹⁸ Hart, too, concluded that in “legally unregulated cases” in which the law dictates “no decision either way,” a judge “must exercise his *discretion* and *make* law for the case”¹⁹⁹—employing “law-creating powers” to choose “between the competing interests in the way which best satisfies us.”²⁰⁰ Some realists described this as a crucial “discovery about the way our courts work,” one that “helped to bring about the *Erie* decision—the realization that the judicial process is not a mechanical process of ‘finding’ or ‘discovering’ an already existing law, but quite often the creative job of making new law.”²⁰¹ Even Justice Scalia confessed that judges must make law, with the caveat that they should act as if they don't:

198. *Linkletter v. Walker*, 381 U.S. 618, 623–24 (1965).

199. HART, *supra* note 36, at 272; *see also id.* at 272 (describing “the judge as filling the gaps by exercising a limited law-creating discretion”); *accord* Kramer, *supra* note 11, at 269 (“Deciding individual cases thus generates some common law because the process of adjudication necessarily entails articulating rules to elaborate and clarify the meaning and operation of statutory texts.”); Postema, *supra* note 13, at 588 (discussing the view that, “[i]n novel cases, where law arguably is silent, judges fill the silence with new binding precedents,” and in this way “massage precedents and in the process make new law”).

200. HART, *supra* note 36, at 129, 273.

201. Charles E. Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 TEX. L. REV. 211, 223–24 (1961). *But see generally* TAMANAHA, *supra* note 30 (questioning how revelatory this really was).

making law “*as judges make it*, which is to say *as though* they were ‘finding’ it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.”²⁰²

Forbidding judges to make law is actually more plausible than it seems. Even when judges can’t help breaking new ground in their decisions, they’re still just making *decisions*; they don’t have to be making *law*. The legal force of their decisions rests on other doctrines in the legal system, and a decision can be legally influential, or even binding, without changing the law on it’s based. A legal rule might be “the law of the case” or “the law of the circuit” without being “the law”; it stands in for the actual law without supplanting or altering it. So a system might provide that the decisions of courts, even those of last resort, only establish stand-in obligations like these—leaving future judges and officials free to pursue the real law, and leaving that law to be found rather than made.

Requiring judges to find the law is consistent with hiring fallible human beings to be judges. Plenty of people, including other officials and private parties, have to make decisions under legal uncertainty—sometimes facing precisely the same kinds of problems as the uncertain judge. We can expect them to follow the law, as a normative matter, at the same time that we expect them as an empirical matter to fail repeatedly in doing so. But what we expect of them still matters, and it makes a real difference to the law.

2.1 Making decisions and making law

The basic argument that decisions make law is rather simple. To Hart, if courts can “make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are.”²⁰³ If future courts have to decide similar cases in a similar way, then these “judgments

202. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment).

203. HART, *supra* note 36, at 135–36.

will become a ‘source’ of law”—resembling “the exercise of delegated rule-making power by an administrative body.”²⁰⁴

But not all legal systems treat precedent this way. Some civil-law systems have treated it as persuasive authority only.²⁰⁵ Some past common-law systems waited for a *line* of cases, not just a single decision, before declaring a matter settled.²⁰⁶ And even modern-day systems needn’t treat a court’s judgment as equivalent to a statute—something that, in Simpson’s phrase, “is both the only reason and a conclusive reason for saying that this is the law.”²⁰⁷ Precedent can make a powerful difference without having to make law; and a system can be committed to judicial precedent without being committed to judicial lawmaking.

2.1.1 As-if law

A court’s judgment can be a “‘source’ of law” in more than one way. It might be *res judicata*, the law of the case, the law of the circuit, *stare decisis*, and so on. All of these doctrines treat prior judgments as having a certain amount of legal force in the future. But they do so by treating the judicial decisions *as if* they were law, and not by substituting those decisions for the underlying legal standards on which they’re based.

A judgment is certainly a source of law in a particular *case*. The final judgment in a civil action, unlike an interlocutory order, can only be corrected by limited means.²⁰⁸ An appellate judgment won’t be second-guessed on remand under the mandate rule²⁰⁹—or even

204. *Id.* at 132, 135.

205. See ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 1156 (2d ed. 1977).

206. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. (forthcoming 2019) (manuscript at 34–36).

207. Simpson, *supra* note 46, at 367.

208. See FED. R. CIV. P. 54(b), 60(b).

209. See *Sunshine Heifers, LLC v. Citizens First Bank (In re Purdy)*, 870 F.3d 436, 442 (6th Cir. 2017).

on a subsequent appeal, under the law-of-the-case doctrine.²¹⁰ But this doesn't mean that either judgment actually sets out the law. They only set out what the court must assume is the law for purposes of a particular decision. The law-of-the-case rule has an exception if the prior decision is "clearly erroneous, and would work a substantial injustice";²¹¹ that error can only be judged in light of the actual legal standards, not those determined by the prior court.

And a judgment can be a source of law for the *parties*. It can bar certain claims or arguments through preclusion doctrines without affecting the legal system as a whole. When a party loses on a particular issue—say, whether the light was green or red, or whether the defendant had a duty of care—it might be collaterally estopped from challenging that determination in future cases, sometimes even as to third parties.²¹² But the decision doesn't change the fact of the matter: the light was actually green or red, or the defendant did or didn't owe a duty, no matter what the court said about it and no matter what future courts must assume.

Judgments can also be sources of law for other *courts*. The Fourth Circuit's search-and-seizure holdings bind district courts in Maryland and not Delaware, even though the same Fourth Amendment applies in each state. The force of those holdings might vary by legal issue: the Federal Circuit applies its own law to patent issues, but "the law of the regional circuit" to others."²¹³ In this context, no one would confuse "the law of the Fourth Circuit" with "the law"; otherwise it'd be impossible, for example, for the Federal Circuit to read the same (nonpatent) statute according to the rival interpretations of different circuits in different cases. Judges of the Federal Circuit, like district judges in Maryland, are occasionally required to assume that Fourth Circuit precedent is correct—just as they're occasionally required to assume the irrelevance of a waived argument, the absence of a precluded issue, or the truth of

210. See *Perez v. Stephens*, 784 F. 3d 276, 280 (5th Cir. 2015).

211. *Sunshine Heifers*, 870 F. 3d at 443.

212. See, e.g., *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971).

213. *Romag Fasteners, Inc. v. Fossil, Inc.*, 817 F. 3d 782, 784 (Fed. Cir. 2016).

a well-pleaded complaint. They may have to say it, and even act on it; but they don't have to believe it, and it doesn't have to be right.

The same theory can be applied to courts of last resort. There's no reason why the holdings of the Supreme Court of the United States have to be taken to represent "the law," as opposed to "the law of the Supreme Court," binding on other courts within the range of its appellate jurisdiction. When the Court construes state law, for example, its decision isn't always binding on the courts of that state. Even within the federal system, the Court acknowledges a distinction between the law and its precedents every time it describes a past decision as "wrong the day it was decided."²¹⁴

Societies have good reasons for occasionally forcing their courts to assume false things. Acting *as if* a certain proposition were law helps achieve a variety of social goals: avoiding relitigation, providing stability, and so on.²¹⁵ But a legal practice of occasionally ignoring the real answers doesn't suggest that there *are* no real answers, either as to facts or as to law—or that the answers the court gave somehow became the real ones, as opposed to our being required to act as if they were. (Indeed, we often refuse to apply issue preclusion to certain "unmixed questions of law,"²¹⁶ precisely to avoid forever binding the parties to something other than the actual law.)

So Scalia was too hasty when he claimed that "the requirement that future courts adhere" to a decision thereby "*causes* that decision to be a legal rule."²¹⁷ Rules of precedent might make a past decision of obvious legal interest; they might sometimes require actors to treat the decision *as if* it were the law. But precedent alone doesn't require "that the decisions of Courts constitute laws"—something that the Supreme Court, prior to *Erie*, thought would "hardly be contended."²¹⁸

214. See Christopher R. Green, *Constitutional Truthmakers*, NOTRE DAME J. L. ETHICS & PUB. POL'Y (forthcoming 2018), <http://ssrn.com/abstract=2901157> (manuscript at 5).

215. See KOZEL, *supra* note 25; cf. KWAME ANTHONY APPIAH, AS IF: IDEALIZATION AND IDEALS (2017) (noting the prevalence and importance of as-if thinking).

216. *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 171 (1984); see also RESTATEMENT (SECOND) OF JUDGMENTS § 28(2)(a).

217. Scalia, *supra* note 6, at 7 (emphasis added).

218. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

2.1.2 Defining the difference

For some, this distinction between precedent and law may seem gossamer-thin. It's one thing to say that precedent doesn't displace law when we know what the law is. But if there *is* no law on a subject, or we really can't tell what it is, how could it possibly matter whether the precedent makes "real" law or just a stand-in? Why even try to differentiate the two?

Distinguishing "real" law from "as-if" law might seem quite difficult. Does an administrative agency make new law when it issues a regulation, changing people's legal rights and obligations? Or is it merely issuing an instruction, with which some other legal rule (like the organic statute) requires as-if compliance? Nondelegation worries aside, either view seems fraught with dangers. On the one hand, if the agency makes new law, then it's hard to deny that private parties make new law when they sign a contract;²¹⁹ that senior partners make new law when they give reasonable ethics instructions to junior associates,²²⁰ or that airline crewmembers make new law when FAA regulations require passenger compliance with lighted signs and crewmember instructions.²²¹ On the other hand, maybe none of these things are real lawmaking, as opposed to the exercise of a preexisting legal power, or some other kind of action to which some other rule lends as-if force. But how far up the chain can that argument go? Are we sure that *Congress* makes any laws, as opposed to producing mere pieces of paper that Article I requires us to respect? And if we don't want to go that far, how can we be sure where on the scale a judicial decision might stand?

In fact, we can distinguish judges from these other actors without needing a general theory of who makes law and how. The proper way to classify a judicial holding might depend on its goal: say, to conform to a preexisting set of legal entitlements (as determined by external standards), or alternatively to lay down new

219. I am indebted to William Baude for this line of inquiry.

220. See MODEL R. PROF. CONDUCT 5.2(b).

221. See 14 C.F.R. § 121.571(a)(1)(3).

standards for the future. To put it another way, we might ask whether the holding has a “mind-to-world” or “world-to-mind” direction of fit.²²² A private contract might be unwise, or even unlawful, but it usually won’t be *incorrect*: it’s not trying to match some legal norm already in the world, but rather to do something new. By contrast, it usually makes perfect sense to describe a court’s holding as incorrect, even if it turns out to have a variety of consequences for the future. As Nelson writes, “[a]ll modern lawyers would understand” a claim that “[t]he Constitution plainly establishes Rule *X*, but the Supreme Court has interpreted it to establish Rule *Y* instead”—even if “the Court is not going to overrule that interpretation.”²²³ So long as the court’s holding is supposed to comport with an external standard, it can make sense to describe that standard, and not the holding, as the law.

When people argue that judicial lawmaking is inevitable, they tend to focus on cases in which these external standards are absent (or at least really hard to find). But if we’re going to treat judges as necessarily having authority to make real law, they can’t have that authority only in the gaps where “law runs out,” for the simple reason that no one knows where those gaps really are. Legal questions don’t come neatly separated into two piles, “obvious” and “obscure.” Even if the set of *actually* indeterminate cases were fixed over time, the set of cases we *believe* to be indeterminate is not. Sometimes we discover legal reasons we didn’t know of before: new evidence of constitutional or legislative history, important authorities that the parties forgot to mention in their briefs, and so on.²²⁴ At that point, a court might have legal reason to change its mind, wholly independent of any considerations of good public policy. In doing so, the court wouldn’t be repealing an enacted rule, so much

222. See Chris Green, *TerBeek, Theories, Movements, and Direction of Fit*, ORIGINALISM BLOG (May 12, 2017), <http://originalismblog.typepad.com/the-originalism-blog/2017/05/terbeek-theories-movements-and-direction-of-fit.html>.

223. Nelson, *Critical Guide*, *supra* note 14, at 937.

224. *Cf.* Kennedy v. Louisiana, 554 U.S. 945 (2008) (denying rehearing after the parties discovered a potentially pertinent criminal statute).

as determining that its prior decision was wrong the day it was decided. Yet if a precedent truly makes law—serving as “both the only reason and a conclusive reason for saying that this is the law”²²⁵—then the law the precedent made is complete and self-sufficient; it’s hard to see why any of this new information should matter.

Alternatively, if we imagine courts to be making law whenever the issues are *actually* indeterminate, and to be making mere precedent whenever a right answer *actually* exists, then we’ll regularly be in a state of ignorance as to whether any given precedential rule is really a rule of law or not. (Who knows what new evidence the future might bring?) Yet the entire point of treating precedent as law, on this gap-filling account, is to avoid the strangeness of drawing an important distinction between two things, precedent and law, that we can’t tell apart in practice. Limiting lawmaking to *actually* obscure cases does precisely the same thing, one level up.

This problem is particularly severe when dealing with other systems of law. Suppose that our choice-of-law doctrines require us to decide a particular case according to the law of Japan. The Supreme Court plainly has no power to “make” Japanese law, any more than it can “make” state law in an *Erie* guess. The conflicts rule may be part of our legal system, but the Japanese legal rule is not; as Green writes, American officials “can neither change it nor repeal it, and the best explanation for its existence and content makes no reference to [American] society or its political system.”²²⁶ The actual law of Japan is determined by Japanese social practices, and the most the Court can do is to determine the American system’s best guess of what Japanese law might currently be. If the Court missed out on some relevant aspect of Japanese social practice, the best explanation is simply that it misstated Japanese law, not that it made a new rule of American law relating to Japan (which rule might be criticized for policy reasons, but not for legal error). Declaring that the Supreme Court *must* be making new law, or that American law

225. Simpson, *supra* note 46, at 367.

226. Green, *supra* note 154.

can't incorporate Japanese law by reference, would seem an inappropriate limitation on what sorts of law American social practice might support.

Treating a court's application of a legal standard as necessarily generating a new standard—e.g., maintaining that the Fourth Amendment *really does* require different things in Maryland and Delaware—would also create all kinds of jurisprudential headaches. A district attorney's decision to drop a set of cases might set an internal precedent for her office, but it needn't change the elements of the charged offense. Claiming that it necessarily alters "the law of the 14th Judicial District of North Carolina," by eliminating the threat of criminal punishment for certain conduct, ignores the fact that the same conduct in the same jurisdiction will still be treated as unlawful in myriad other ways (postconviction review, official impeachment standards, negligence per se in civil actions, and so on). Disaggregating these issues into an innumerable set of separate and independent legal questions, some of them governed by the district attorney and some of them not, would assume away all of the systematic features that make the law a coherent system of norms.²²⁷ It would also bring on all the disadvantages of the predictive theory, as the rules of internal precedent in prosecutors' offices are subject to disaggregation too. The only thing determining *this* defendant's punishment would be whether *this* assistant D.A. is likely to bring a case—but of course the assistant D.A. isn't trying to predict her own behavior. Precisely the same could be said of any attempt to treat an appellate decision as *really* establishing "the law of the Fourth Circuit," as we'd still need to ask why the Fourth Circuit gets to make law across its entire jurisdiction in a way that the Fourth Amendment apparently can't.

Finally, even if we thought that the Fourth Circuit necessarily makes law for district judges, it's not clear that its authority has to bind anyone else. A legal system has a certain unity to it: the sale of

227. See Jeremy Waldron, "Transcendental Nonsense" and System in the Law, 100 COLUM. L. REV. 16 (2000).

a car between private persons will bind the U.S. government, altering its powers with respect to Fourth Amendment searches, Fifth Amendment takings, and so on. That kind of legal unity makes sense if we take precedents as stand-in law; everyone else can recognize, in a unified way, that the decisions of the Fourth Circuit create stand-in legal reasons for the district judges in Maryland. But it's *not* necessarily true if we take precedents as statements of the law in general. There's a live and longstanding controversy between departmentalist views of the judicial power, in which a court's judgment only determines the law for the parties or for lower courts,²²⁸ and judicial-supremacy views in which a precedential holding is binding on everyone in the jurisdiction.²²⁹ If the holding states *the law*, then every legal actor is bound by it, even if only within the Fourth Circuit. But if executive officials or legislators can adopt their own views,²³⁰ then the law-precedent distinction makes a real difference. At the very least, departmentalism and judicial supremacy both appear to be plausible options that a legal system could choose—meaning that it's no less plausible for a legal system to distinguish sharply between precedent and law.

There are plenty of reasons why a society might give superior courts a certain influence over legal questions, without granting them any power to change the law. In a hierarchical court system, having lower courts follow higher courts might help reduce uncertainty, process cases quickly, and kick important questions upstairs—all without reverting to a system of “scorer’s discretion.” Any doctrine of precedent that’s binding on courts will matter to parties who find themselves before courts; lawyers will tell their clients about the precedents, and clients will change their behavior

228. See William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1845 & n.212 (2008).

229. See Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 478–82 (2000).

230. Cf. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), http://avalon.law.yale.edu/19th_century/aincolnI.asp (“[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having . . . practically resigned their Government into the hands of that eminent tribunal.”).

accordingly.²³¹ But so would the Holmesian ‘bad man,’ who doesn’t care about legal rules anyway. Those who *do* care about legal rules can’t make a priori assumptions about the scope of judicial lawmaking; the force of precedent is itself something that has to be determined by law.

2.2 Can judges help it?

Judges are human beings, not mechanical rule-followers. It may be theoretically coherent to distinguish judicial decisions from the law on which they’re based, but does that distinction exist in real life? When judges are given only vague rules to follow, they can’t help but make choices of their own—many of which end up transforming the rules that were in place. So can judges truly be expected not to make law?

The answer turns on what one means by “expect.” We generally expect people to obey the law, but we also create police departments and prisons on the assumption that many won’t. For the same reasons, no one should be so foolish as to predict that judges will always get the law right, or even that all of them will always try in good faith. But predictions aren’t the point. We can make good faith a norm for judges’ conduct, even if we know that they’ll often fall down on the job. Put another way, we can expect more *of* judges than we expect *from* them.

Finding law sounds most unrealistic as an account of the process of judicial decision. Real judges in real cases don’t flip through their books until they find THE ANSWER, then stop. But that objection confuses legal reasoning with judicial psychology. Real-life judges also don’t proceed in the manner of a judicial opinion; they don’t sit down and start thinking about subject-matter jurisdiction, then the facts and proceedings, then the standard of review, and so on. Yet no one is surprised by this who understands what judicial opinions are for. Judges might proceed by hunches or guesswork, subject to a thousand biases and nonlegal influences; as Hart noted,

231. Nelson, *Critical Guide*, *supra* note 14, at 936–37.

the role of legal reasoning isn't found in these "methods of discovery," but rather in the "standards of appraisal" that judges "respect in justifying decisions, however reached."²³² As in Green's example of the person who gets dressed in the morning without consciously advertent to social norms, the judge's "[r]ule-following behavior is . . . displayed *ex post actu*, when rules are produced in justifications, used in communicating decisions to others, and [in] explaining what was done [or] defending it against criticism, actual or anticipated."²³³

So the fact that judges, especially in unclear cases, don't *feel* like they're "finding" an answer doesn't mean that they're making one instead. Hard cases often involve, not a shortage of legal reasons, but a surplus; the cases are hard because too many legal reasons are in play at the same time. Confronted by all of these at once, uncertain judges aren't forced into the position of choosing the best rule in the abstract, but of deciding how this menagerie of legal instructions is best satisfied on these facts. To Hart, "when the explicit law is silent, judges do not just push away their law books and start to legislate without further guidance from the law"; instead, courts proceed "by analogy," accounting for the decision "in accordance with principles or underpinning reasons recognized as already having a footing in the existing law."²³⁴

This process helps explain why such terms as "'choice,' 'discretion,' and 'judicial legislation' fail to do justice to the phenomenology of considered decision," including "its felt involuntary or even inevitable character."²³⁵ But it also ought to make us suspicious that the judge, in making a hard decision, is forced into the position of making new law. When a court addresses a legal standard to a particular set of facts, we usually call that activity "applying" law, not

232. H.L.A. HART, *Problems of the Philosophy of Law*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 88, 105–06 (1983); cf. GOTTLÖB FREGE, *Introduction to THE FOUNDATIONS OF ARITHMETIC*, at x (J.L. Austin trans., 2d rev. ed. 1980) (urging theorists "always to separate sharply the psychological from the logical").

233. Green, *supra* note 126 (manuscript at 23).

234. HART, *supra* note 36, at 273.

235. HART, *supra* note 232, at 108.

“making” it. Judges who disagree about the proper decision in a particular case—say, whether the plaintiff’s fear was “reasonable,” or whether the defendant acted with “due care”—are disagreeing about the law’s proper application, and not necessarily about its content. Some of those applications will be less persuasive than others, but so what? “[T]here is a great deal of ruin in a nation,”²³⁶ and a great deal of legal error in a nation’s courts; still, we generally manage to get by.

After all, judges are hardly the only ones who have to make hard legal decisions. Prosecutors, policemen, and private citizens do so routinely. We regularly speak of juries as “finding facts,” and relatively few people would call this a “childish fiction”; so why should it be odd to speak of judges in similar circumstances as “finding law”? Juries also make complex and largely unreviewable decisions in murky cases, but saying that the jury “makes facts” would sound paranoid or bizarre. And if a jury did exercise active choice over the facts—say, by flipping a coin or favoring a sympathetic party—everyone knows that it’d be acting *ultra vires*. A court faced with a similarly hard question might come to a satisfying answer or an unsatisfying one, but the mere fact that it’s acting under uncertainty doesn’t mean that it’s “making law.”

Unlike juries, of course, judges are supposed to explain their reasoning. But even in uncertain cases, they can do so while attempting to adhere to the existing standards. Berman distinguishes two categories of judicial doctrine: (1) the “operative propositions” of law, the ones the relevant sources of law actually establish, and (2) the judge-created “decision rules”—the menagerie of tiers of scrutiny, *n*-factor tests, and so on—which “direct courts how to decide whether [an] operative proposition is satisfied.”²³⁷ Even without a power to lay down new rules, a court might certainly come up with such *n*-factor tests on its own, as a way of formalizing its thought process in answering difficult questions—the way a per-

236. IAN SIMPSON ROSS, *THE LIFE OF ADAM SMITH* 345 (2010).

237. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004).

son having trouble choosing a house might draw up a list of relevant factors, like “move-in ready” or “easy commute.” Future courts might then adopt the same list of factors as a proxy for the underlying legal considerations. Perhaps, in the fullness of time, the list itself might become a rule of unwritten practice.²³⁸ But none of this suggests any judicial power to *alter* the operative propositions, or to transform their legal requirements at will. The proxy is not “a conclusive reason for saying that this is the law”;²³⁹ whatever its policy merits, it might still be a *bad proxy*, one that fails to track the operative propositions.

This understanding of decision rules isn’t just a word game: it rules out otherwise-attractive judicial tactics and common attempts at evasion. Say that the most accurate standard would involve seven factors, but it’s much easier for district courts to administer a standard with three. A court with authority to make new law could simply abrogate the old test and lay down a better one. But a court without that authority can’t sacrifice the best legal standard for easy administration, any more than it can introduce administrability concerns or cost-benefit analysis into a statute that ignores them.²⁴⁰ Doing so is equivalent to saying that there should have been a different legal rule, one responsive to fewer or more specific considerations than it was. The fact that judges frequently do rely on judicially authored *n*-factor tests doesn’t show that they’re making new law; what matters is how the tests are constructed and used.

The United States might have a legal system in which judges are allowed to impose new legal standards, or it might not. Again, this Essay doesn’t seek to describe our existing institutions, or even to suggest which choice is a better idea, all things considered. Its

238. *Cf.* *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 581 n.6 (2013) (describing the canonical private- and public-interest factors for venue transfer).

239. Simpson, *supra* note 46, at 367.

240. *See* *TVA v. Hill*, 437 U.S. 153, 184 (1978); *see also* Asher Steinberg, *Supreme Court 2016 Statutory Term in Review: Purposively Interpreting Statutes that Don’t Say Much in* *Midland Funding, LLC v. Johnson*, *THE NARROWEST GROUNDS* (Aug. 26, 2017), http://narrowestgrounds.blogspot.com/2017/08/supreme-court-2016-statutory-term-in_26.html. *But cf.* Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 *GEO. J.L. & PUB. POL’Y* 475, 476–77 (2016) (defending judicial supervision of such tests).

goal is merely to show that a world in which judges are charged to find the law, and not to make it, is hardly a strange hypothetical. It might be a world suspiciously resembling our own.

III

ERIE AND FINDING LAW

If law can be found, and not just made, what are we to make of *Erie*? No other decision has so exalted a place in American legal scholarship—worshipped as “a sea change in how judges view law,”²⁴¹ or even “a change in the nature of the law itself.”²⁴² Before *Erie*, judges were said to be “the living oracles of a preexisting natural law”; afterward, they apparently became “lawmakers in a relativistic legal world,”²⁴³ in which “the common law was nothing more than [their] decisions.”²⁴⁴ Yet among many legal philosophers, *Erie*’s Austinian theory is nowadays thought to be wrong—obviously, laughably, “friendless[ly]” wrong.²⁴⁵ So if *Erie* was wrong about the nature of law, then what else was it wrong about?

To Jack Goldsmith and Steven Walt, not much. These scholars have argued that *Erie* didn’t need Austin anyway; a “general theory about the nature of law” should have “no implications for the allocation of authority between the state and federal governments.”²⁴⁶ As Walt puts it, positivism was a premise, but a “superfluous premise[,] in *Erie*’s rationale and its constitutional holding.”²⁴⁷

Their reasoning is straightforward. At its core, *Erie* was a case about who defers to whom for what; it held that federal courts must

241. Gluck, *supra* note 39, at 1902.

242. Lessig, *supra* note 76, at 1802.

243. William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TULANE L. REV. 907, 908 (1987).

244. Roosevelt, *supra* note 2, at 1078.

245. Bix, *supra* note 163.

246. Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 675 (1998).

247. Steven Walt, *Why Jurisprudence Doesn’t Matter for Customary International Law*, 54 WM. & MARY L. REV. 1023, 1027 (2013).

defer to a state court's understanding of general law rather than applying that law for themselves. A view that judges make unwritten law could be compatible with either view. Maybe state judges make state unwritten law, which federal judges must then apply; or maybe federal judges make national unwritten law, which state judges must then apply. Or maybe judges can find unwritten law instead, in which case we'd still need to decide whether federal or state courts should look to that law or to each other.²⁴⁸ Since either theory of judicial authority is consistent with either approach to judicial federalism, general jurisprudence "says nothing about which roles are appropriate for federal courts," and *Erie* can't rest on whether judges make law or find it.²⁴⁹

The problem with this argument is not that it's wrong, but that it's too general. By looking only to which legal regimes are possible, it ignores the question of whether our actually existing constitutional rules, federal and state, *do* need a particular legal theory to justify *Erie's* holding.

Sometimes a legal system forces us to deal in high theory. If a case turned on the law of postwar Germany—say, involving retroactive civil liability for wartime acts—we might have to decide, in court, whether the Nazi laws were really law at all.²⁵⁰ Usually that's a question reserved for legal philosophers,²⁵¹ but the Federal Rules leave judges to their own devices, telling them to consider "any relevant material or source."²⁵² So an American judge would have to answer the question under the right theory of jurisprudence, whatever that is. That's unfortunate, but it's also their job; judges regularly decide whether a given chemical is really a carcinogen, or a given piece of evidence is really probative, so why not whether a given norm is really law?

248. *Id.*

249. *See id.* at 695.

250. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618–20 (1958) (discussing a related example).

251. *Compare* Hart, *supra* note 250, *with* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

252. FED. R. CIV. P. 44.1.

There's good reason to think that this is what happened in *Erie*. Justice Brandeis reasoned that “the law to be applied” was “the law of the State,” whether “declared by its Legislature in a statute or by its highest court in a decision”; the choice between them was “not a matter of federal concern.”²⁵³ Yet if the choice were really up to the state, some states might not have *wanted* their high courts to announce the law; maybe their legal systems still treated state judicial decisions as evidence of state law, and not as law themselves.²⁵⁴ *Erie* didn't address this issue, because it relied on a controversial theory of jurisprudence to assume the whole problem away.

As Michael Steven Green described in “*Erie's Suppressed Premise*”²⁵⁵—an article that others might have titled “*One More Reason Why Erie is Wrong*”—the Court didn't investigate any specific state legal systems to see if their courts were empowered to make law. Instead, Brandeis simply assumed that finding general law was impossible, so the courts must be making it instead. (The “fallacy” of a “transcendental body of law,” and so on.²⁵⁶) The underlying theory was provided by Justice Holmes in the *Taxicab Case*:²⁵⁷ if a state constitution chooses to delegate legislative powers to the state courts, providing that “the decisions of the highest Court should establish the law,” then the federal Constitution shouldn't interfere.²⁵⁸ And, Holmes assumed, this is the right way to read *any state constitution with a court in it*: “[W]hen the constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words.”²⁵⁹

253. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

254. See *Coon v. Med. Ctr., Inc.*, 300 Ga. 722, 730 (2017) (adhering to the view that “there is one common law that can be properly discerned by wise judges, not multiple common laws by which judges make law for their various jurisdictions”).

255. See generally Michael Steven Green, *Erie's Suppressed Premise*, 95 MINN. L. REV. 1111 (2011).

256. *Erie*, 304 U.S. at 79.

257. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 534–35 (1928) (Holmes, J., dissenting).

258. *Id.* at 534.

259. *Id.*

This is an extraordinary claim, especially when one remembers that many state constitutions—including, say, the Massachusetts Constitution of 1780—were enacted well before the modern acceptance of judge-made law.²⁶⁰ Why would Holmes assume that *every* state constitution must be read this way? Because, he wrote, each state supreme court necessarily “says, with an authority that no one denies, . . . that thus the law is and shall be. Whether it be said to make or to declare the law, it deals with the law of the State with equal authority however its function may be described.”²⁶¹

If judges can find the law instead of making it, this last sentence is plainly false. A court charged only to find state law might occasionally be mistaken, but its decision and the law are different things. Except as it’s used by lower courts or similar institutions, or as a practical guide for the parties, its authority is limited to its correctness. By contrast, if a court necessarily makes state law, then it attains Bishop Hoadly’s “absolute Authority to interpret,”²⁶² and state law becomes something that it can’t be wrong about: whatever it decides *is* the law. (To paraphrase President Nixon, when a state supreme court does it, that means it is not illegal.) These two authorities are nothing alike.

If Holmes was wrong to confuse the two—and he was—then the whole logic unravels. The mere existence of a court system wasn’t enough to infer a delegation of lawmaking authority to state courts. And without a delegation to state courts, the federal courts had no clear obligation to defer to them, whether under the Constitution or the Rules of Decision Act.²⁶³ That left *Erie* with very little to offer: a now-discredited theory of the origins of the Rules

260. See Nelson, *Critical Guide*, *supra* note 14, at 984.

261. *Black & White Taxicab*, 276 U.S. at 535.

262. BENJAMIN [HOADLY], *THE NATURE OF THE KINGDOM, OR CHURCH OF CHRIST* 7 (London, Booksellers 1717) (emphasis omitted);

263. 28 U.S.C. § 725 (1934) (codified as amended at 28 U.S.C. § 1652 (2012)) (“The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”).

of Decision Act,²⁶⁴ and an unlikely policy claim about which approach to precedent provides more (and more useful) uniformity.²⁶⁵ If *Erie* was wrong on the theory, then it's probably just wrong.

Today, eight decades on, Justice Holmes's vision of judge-made law is widely echoed. Perhaps our state constitutions now do confer, or have been authoritatively construed to confer, lawmaking powers on state courts. Still, that leaves *Erie* on shaky ground. Not only might some states dissent from the modern view (Green suggests Georgia),²⁶⁶ but *Erie* would have nothing to say about *federal* judicial power—which was parceled out in 1788, well before Holmes could get his mitts on it. If the federal courts back then were supposed to find the law, especially in areas where the states were incompetent to legislate,²⁶⁷ then *Erie*'s preference for judge-made law shouldn't stand in the way.

CONCLUSION

Accepting that judges can find unwritten law does more than correct a jurisprudential or historical error. Like its antithesis in *Erie*, it has the power to transform modern attitudes toward law.

Almost a century later, it's instructive to go back and see what Holmes actually envisioned for judicial legislation. In *Southern Pacific Co. v. Jensen*, a page away from his famous line about the “brooding omnipresence,” one finds the following:

A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*.²⁶⁸

264. See Nelson, *Critical Guide*, *supra* note 14, at 951–56.

265. See *id.* at 964–70.

266. See Green, *supra* note 255, at 1113; see also *Coon v. Med. Ctr., Inc.*, 300 Ga. 722, 730 (2017).

267. See Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1260–69 (2017).

268. 244 U.S. 205, 221 (1917) (Holmes, J., dissenting); cf. *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908) (Holmes, J.) (“[T]he making of a rule for the future . . . is an act legislative, not judicial, in kind . . .”).

Holmes's restraint here is surprising. For this is precisely how many judges, especially state judges, view their role today—as having been hired to examine any common-law rules and then to retain them or toss them aside. As New York's Chief Judge Judith Kaye wrote in 1995, "Time and again, state courts have openly and explicitly balanced considerations of social welfare and have fashioned new causes of action where common sense justice required"—though wisely tempered by the need to "exercise that responsibility with care."²⁶⁹ At its extreme, this picture presents each state judge as a swashbuckling Lord Mansfield, bravely reforming the law of the land (with due consideration and humility, of course).

This model is not without its advantages; there are reasons why Mansfield is still remembered today. But there are also drawbacks, like limiting democracy, frustrating expectations, and presenting legislators with a moving target—which deprives them of their ordinary ability, so crucial to striking bargains on other issues, to choose to leave well enough alone.

These considerations have received less attention as the model of finding law has receded. After all, one reason why judges adopt the swashbuckling role is a belief that there's no real alternative, that this is just what a common-law judge *does*. As Chief Judge Kaye put it, "[f]or state judges, schooled in the common law, to refuse to make the necessary policy choices when properly called upon to do so would result in a rigidity and paralysis that the common-law process was *meant* to prevent."²⁷⁰ Any residual "anxiety about 'legislating from the bench,'"²⁷¹ or worries that certain changes might be "best left to the Legislature,"²⁷² are really just naïveté or weakness of will—to be rebutted with the "inevitability" of gap-filling, or the discovery that "*all* judges are activists."²⁷³ In other words, it's much

269. Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 7 (1995).

270. *Id.* at 34 (emphasis added).

271. *Id.*

272. *Id.* at 9 (internal quotation marks omitted).

273. *Id.* at 10.

easier to breeze past the ordinary critiques of judicial lawmaking if the alternative is philosophically defunct.

This conceptual error also leads to revisionist readings of the history. Larry Kramer, for example, has explained how eighteenth-century common lawyers approached their subject very differently than many lawyers do today.²⁷⁴ But if “judge-made law is unavoidable,” as he argues, “simply because there is no clear line between ‘making’ and ‘applying’ law,”²⁷⁵ then it was just as unavoidable in the past. This leads to a sort of historical sleight-of-hand, with evidence of past courts’ finding law trotted out to support modern courts’ making it. Kramer argues that no one should “object[] when state courts take the initiative in fashioning common law,”²⁷⁶ for this practice—the *modern* practice, mind—necessarily “was, is, and always has been allowed in all these states.”²⁷⁷ And in the federal courts too, for if making law is just what courts do, then Article III must confer a “traditional judicial power to make common law.”²⁷⁸ Thus the Supreme Court’s famous, and famously self-serving, complaint that “the judicial hand would stiffen in mortmain if it had no part in the work of creation.”²⁷⁹

This change in attitude toward the common law seems to be rooted in a giant intellectual mistake. According to Kramer, the removal of limitations on judicial lawmaking “results not from doctrinal changes, but from *changes in our beliefs* about the nature of law and the lawmaking process.”²⁸⁰ It’s only because “[w]e have come to see that even the fundamental principles of the common law were ‘made’ by judges” that “the ‘natural’ limits of pre-modern common law disappear, and the potential for making common law becomes as broad as we are willing to let judges go.”²⁸¹ Surely the

274. Kramer, *supra* note II, at 281–84.

275. *Id.* at 269.

276. *Id.* at 287.

277. *Id.* at 279.

278. *Id.* at 275.

279. *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 313 (1947).

280. Kramer, *supra* note II, at 275 (emphasis added).

281. *Id.* at 283.

judicial process could have used some demystification; surely the history of the common law, under Lord Mansfield as well as others, is replete with examples of judges playing fast and loose with unwritten law. But the real motive force here seems to be a simple error about the nature of law: that it's a "fallacy" or "illusion" to suppose "that there is this outside thing to be found."²⁸²

Again, nothing in this Essay addresses the actual norms of actual legal systems—whether in Blackstone's England, New York State, or the United States as a whole. Maybe today's legal norms really do empower judges, federal or state, to trade in their black robes for superhero capes, or to play "junior-varsity Congress"²⁸³ with unwritten law. But in light of Holmes's own reticence, it's important to remember that this is *not* the only possible approach; that history and legal theory *do* offer alternatives; that different polities can *choose*, through their own constitutional systems, the powers they want their judges to enjoy. To make this choice, we need to restore, at least at the level of possibility, the consensus that such a choice exists. Unwritten law can be found, as well as made; the brooding omnipresence broods on.

282. *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

283. *Mistretta v. United States*, 488 U.S. 361, 427 (Scalia, J., dissenting).