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## The Art of Legal Reasoning and the Angst of Judging: Of Balls, Strikes, and Moments of Truth

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# The Art of Legal Reasoning and the Angst of Judging: Of Balls, Strikes, and Moments of Truth\*

Timothy P. Terrell\*\*

## ABSTRACT

*An essay of only five short paragraphs published several years ago by the noted Harvard paleontologist Stephen Jay Gould about a controversial call by baseball umpire Babe Pinelli provides all the foundation necessary for a thorough investigation of the phenomenon of legal reasoning. The present article contrasts Gould's analysis of a "strike" with the comment by then-Judge John Roberts at his Supreme Court confirmation hearings that he just wanted to "call [the] balls and strikes," and through this exchange develops a new approach toward identifying—and teaching—the basic elements of sophisticated legal thinking. This article divides legal reasoning into four interrelated elements that anchor and structure the complex process that lays "beneath" the more traditional references to "analogy" and "characterization" and the like on which the existing literature on the topic focuses. The challenge of legal reasoning, and the difficulty of being a decision-maker in this context, arise from the fact that each of these elements generates its own special forms of disagreement and controversy, all of which lawyers and judges attempt to resolve satisfactorily. The result is a complicated, but patterned, thought process that corresponds to the equally complicated, but patterned, nature of the law itself. The four elements of legal reasoning developed in detail here are:*

- 1) Text: understanding the subtle "is/ought" distinction that animates the language in which the law is expressed;*
- 2) Context: identifying with care the "scale" of the circumstances (micro or macro) that will characterize the legal controversy;*
- 3) Hypertext: determining not just the normative values, but the kind of values (categorical or consequential) that will justify an argument or result; and*

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\*A catchier title to this article would have been, of course, "The Umpire Strikes Back," but it was used by Fay Vincent, the former Deputy Commissioner of Baseball, in an op-ed piece in July 2007 in the *New York Times* for a comment on the nature of modern umpiring, not legal reasoning. I would like to acknowledge the thoughtful comments I have received on earlier drafts of this article from a number of my faculty colleagues at Emory Law School, from colloquia discussions and otherwise. In this regard, I would like to thank in particular Professors Robert Shapiro, Morgan Cloud, and John Witte. I have also received useful perspectives on the article's discussion of the task of judging from sitting judges who have taken the time to review this effort—most particularly, Judge David V. Brewer, Chief Judge of the Oregon Court of Appeals, and Judge Emeritus Bea Ann Smith of the Texas Court of Appeals. I also have to thank Emory Law School students too numerous to mention for their remarkable patience and frequent insights over the years as we explored Professor Gould's essay together, *see infra* note 55. Finally, I also acknowledge the remarkable research assistance provided by (then) Emory Law School student Alexander Ritchie.

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- 4) *Subtext: appreciating the institutional and political circumstances of the judiciary within our form of government.*

*The last of these categories will in fact be argued as the true, or at least the only plausible, basis for Justice Roberts' evidently simplistic comment about "balls and strikes."*

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## I. INTRODUCTION: CONSIDERING THE CASE OF GOULD V. ROBERTS

A few years ago, *The New York Times* reported sad news, as it regularly does, on its front page. It was a death, and an obituary followed. But this newsworthy event did not involve a politician or world leader or any other expected category. It was instead the story of the passing of a zoology professor: Stephen Jay Gould, Harvard's prolific author of both popular and scholarly books and essays on biology, paleontology, and evolutionary theory, who had died at the age of 60 after a long battle with cancer.<sup>1</sup> Professor Gould was such an unusually well-known scientist, teacher, and commentator that his death merited serious acknowledgement. But the obituary failed to mention, and in fact few people even know of, what may be one of his finest publications. It had little or nothing to do with science, however. It was about much more: truth, justice, language, law, and particularly the angst of judging.

In a very short, but remarkably profound, essay he published (ironically enough) in the *Times*,<sup>2</sup> and indeed as a eulogy for someone else, Professor Gould presented in five paragraphs all the ingredients necessary to summarize most of any law school course in jurisprudence, even though his topic had nothing directly to do with the law. He was commenting instead on his other great passion outside of science and scientific theory: baseball. I have for many years used this essay as the opening foray for law students into the mysteries of clear rules that aren't, of sources of authority that implicitly claim to be complete but aren't, of decision makers—like judges—who must cope with being “final” but also with being human and imperfect, and much more. I have also occasionally raised Gould's essay with judicial audiences to provoke conversation about the reasonableness or legitimacy of the example of quick decision making that Gould praises and memorializes. I have happily speculated along with students and judges about what Professor Gould may have meant by various provocative passages, for he himself provided us with very little additional commentary on this essay.<sup>3</sup> We are left to wonder what his responses might be to the weighty issues his essay so effortlessly raises.

Gould's analysis of baseball has become timely again by recent hearings for nominees to the Supreme Court. It started with Chief Justice John Roberts, who noted during his confirmation that his modest ambition was only “to call [the] balls and strikes”<sup>4</sup> as best he could, an analogy that has since been echoed less “officially” in comments by pundits and politicians in later confirmation processes as well.<sup>5</sup> This seemingly innocuous remark has been criticized, however, as being a disingenuous understatement of the nature and role of a Supreme Court Justice, if not of the judicial role more generally.<sup>6</sup> Gould's essay is, I believe, directly relevant to this point,

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<sup>1</sup> Carol Kaesuk Yoon, *Stephen Jay Gould, 60, Is Dead; Enlivened Evolutionary Theory*, N.Y. TIMES, May 21, 2002, at A1.

<sup>2</sup> Stephen Jay Gould, Op-Ed., *The Strike That Was Low and Outside*, N.Y. TIMES, Nov. 10, 1984, at 23.

<sup>3</sup> See STEPHEN JAY GOULD, *THE FLAMINGO'S SMILE: REFLECTIONS IN NATURAL HISTORY* 227-29 (1985) [hereinafter GOULD].

<sup>4</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., nominee to be Chief Justice of the United States).

<sup>5</sup> See Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 11, 2009, available at [http://www.nytimes.com/2009/07/12/weekinreview/12weber.html?\\_r=0](http://www.nytimes.com/2009/07/12/weekinreview/12weber.html?_r=0).

<sup>6</sup> See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 186 (2005) (questioning by Senator Joe Biden). Senator Joe Biden pointed out:

and reveals a profound irony underlying Chief Justice Roberts's sports reference: Despite the fact that both of them use the same regulatory concept (a "strike") to make their argument, Professor Gould views baseball as subjective, and thus like the law, while Chief Justice Roberts views the law as objective, and thus like baseball. Their perspectives could hardly be more divergent.<sup>7</sup>

But the situation might be even worse. One lesson that could be drawn from the distinction between Professor Gould and Chief Justice Roberts is that the latter may have a remarkably simplistic understanding of not only baseball, but of objectivity itself. Chief Justice Roberts's comment is reminiscent of the famously profound observation by an earlier Justice Roberts—Owen—who also saw nothing particularly complicated in the judicial function: The Court was "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."<sup>8</sup>

Through the convenient medium of Professor Gould's essay, I shall argue that the effort to minimize judicial reasoning to rote exercises of robotic comparison is demeaning to every judge in this country, including Chief Justice Roberts himself.

Nevertheless, Professor Gould's analysis potentially justifies Chief Justice Roberts's comment at least in part, even though that would no doubt come as a surprise to both of them. This support is based in appreciating the specific role of the umpire or judge within the "game" being played—a point we will explore in detail at the end of this essay.<sup>9</sup>

To demonstrate the richness and importance of Gould's article, I need do no more than allow you to read it for yourself. Without further ado, the entire essay is presented below. Thereafter, I will discuss the points I believe make it relevant to legal theory in general—that is, to an understanding of law as a functioning social institution—and to theories of judicial reasoning and decision making in particular. My comments, however, will do no more than

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[Rehnquist] used the phrase "tacit postulates." He said that these tacit postulates are as much ingrained in the fabric of the [Constitution] as its express provisions. . . . Chief Justice Rehnquist made this vital point [in a case] about States' rights [regarding] language that didn't speak directly to [the States] in the Constitution. And he concluded the answer was a rule he was able to infer from the overall constitutional plan.

So, Judge, you are going to be an inferer. You are not going to be an umpire. Umpires do not infer. They do not get to infer. Every Justice has to infer.

*Id.*

<sup>7</sup> One objection to this entire enterprise of comparing baseball and the law should be confronted and put to rest. An obvious reason for the divergence of the approaches of Professor Gould and Chief Justice Roberts to objectivity and subjectivity is the physical differences between baseball and courtrooms: While the rules of baseball are, by and large, "objective" in the sense of being quite specific about the physical circumstances in which they are to be applied, "subjectivity" nevertheless enters the picture because an umpire must make snap decisions where human senses may not have perceived all the available data perfectly. Legal situations, on the other hand, are "subjective" in the sense that the law cannot possibly predict all future circumstances to which it might be applied, and the law itself is expressed in human language, which is notoriously malleable. Nevertheless, judges have the luxury of time, allowing development of facts and opportunities for reflection, to create the impression that their decisions are, all things considered, "objective" and mandated, rather than capricious. Thus, umpiring and judging are connected by the fact that both seek a justification for asserting certainty in the face of uncertainty: baseball, because its circumstances put umpires under significant pressure; the law, because its constituent materials put judges under similar pressure. And that "pressure" needs to be appreciated. Umpires and judges both exist *not* for the purpose of making easy calls, but for making tough ones. Chief Justice Roberts's use of the baseball analogy is therefore worth exploring.

<sup>8</sup> *United States v. Butler*, 297 U.S. 1, 62 (1936). We will note a similar comment from Montesquieu later. *See infra* note 120.

<sup>9</sup> *See infra* text accompanying notes 112-119.

demonstrate how much more could and should be said about Gould's essay. Despite this article's length and ambition, it is still only an article, while a topic as broad as legal reasoning ordinarily elicits a book. I concede, then, that every element of the analysis to be presented here—including the development of each of the constituent pieces of the alternative model of legal reasoning I will propose—will necessarily be incomplete. I nevertheless believe that enough can be said in this format to do justice to Gould's analysis of justice, and to allow us to judge his understanding of judging so that we can usefully reconsider the idea of "thinking like a lawyer."

#### A. Gould's Essay

Gould's essay, which first appeared with a different title in the *New York Times* on November 10, 1984, was reprinted in his book, *The Flamingo's Smile*, along with a short commentary by him acknowledging the praise the essay has received. But his commentary also indicated, as we will see later, how limited his appreciation was of the implications of his analysis. In particular, I think you will find that one of his most pointed observations about the judicial role—one that he probably made inadvertently—is captured in the essay's last two words.

### STRIKE THREE FOR BABE

Tiny and perfunctory reminders often provoke floods of memory. I have just read a little notice, tucked away on the sports pages: "Babe Pinelli, long time major league umpire, died Monday at age 89 at a convalescent home near San Francisco."

What could be more elusive than perfection? And what would you rather be—the agent or the judge? Babe Pinelli was the umpire in baseball's unique episode of perfection when it mattered most. October 8, 1956. A perfect game in the World Series—and, coincidentally, Pinelli's last official game as arbiter. What a consummate swan song. Twenty-seven Brooks up; twenty-seven Bums down. And, since *single* acts of greatness are intrinsic spurs to democracy, the agent was a competent, but otherwise undistinguished Yankee pitcher, Don Larsen.

The dramatic end was all Pinelli's, and controversial ever since. Dale Mitchell, pinch-hitting for Sal Maglio, was the twenty-seventh batter. With a count of 1 and 2, Larsen delivered one high and outside—close, but surely not, by its technical definition, a strike. Mitchell let the pitch go by, but Pinelli didn't hesitate. Up went the right arm for called strike three. Out went Yogi Berra from behind the plate, nearly tackling Larsen in a frontal jump of joy. "Outside by a foot," groused Mitchell later. He exaggerated—for it was outside by only a few inches—but he was right. Babe Pinelli, however, was more right. A batter may not take a close pitch with so much on the line. Context matters. Truth is a circumstance, not a spot.

I was a junior at Jamaica High School. On that day, every teacher let us listen, even Mrs. B., our crusty old solid geometer (and, I guess in retrospect, a secret baseball fan). We reached Mrs. G., our even crustier French teacher, in the bottom of the seventh, and I was appointed to plead. "Ya gotta let us listen," I said, "it's never happened before." "Young man," she replied, "this class is a

French class.” Luckily, I sat in the back just in front of Bob Hacker (remember alphabetical seating?), a rabid Dodger fan with earphone and portable. Halfway through the period, following Pinelli’s last strike, I felt a sepulchral tap and looked around. Hacker’s face was ashen. “He did it—that bastard did it.” I cheered loudly and threw my jacket high in the air. “Young man,” said Mrs. G. from the side board, “I’m sure the verb *écrire* can’t be that exciting.” It cost me 10 points on my final grade, maybe admission to Harvard as well. I never experienced a moment of regret.

Truth is inflexible. Truth is inviolable. By long and recognized custom, by any concept of justice, Dale Mitchell had to swing at anything close. It was a strike—a strike high and outside. Babe Pinelli, umpiring his last game, ended with his finest, his most perceptive, his most truthful moment. Babe Pinelli, arbiter of history, walked into the locker room and cried.<sup>10</sup>

The purpose of parsing this extraordinary essay is not simply to acknowledge the many directions in which a conversation about it could go, but to focus on how remarkably well it serves as a useful introduction to two topics fundamental to legal education:<sup>11</sup> the key elements of legal reasoning, and the personal challenge judges face when making a difficult and close

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<sup>10</sup> What a remarkable piece of work. Gould later acknowledged that he wrote it “in a quarter hour’s flood of inspiration during an interminable round of speechmaking at my son’s annual Little League banquet . . .” GOULD, *supra* note 3, at 227. It depresses me to realize that even after a lifetime of work, and given unlimited time, I will never be able to write like this.

This is not, by the way, the only story about the umpiring of Babe Pinelli. He himself wrote an article for a book on baseball lore in which he described an encounter with another Babe—Ruth, of course—when Pinelli was a rookie umpire and Ruth was at the close of his career. Pinelli writes that he was told that one did not call close pitches as strikes when The Babe was at bat, but he did so anyway. After being fussed at by Ruth, who claimed that “forty thousand [people in this park] know that was a ball, tomato-head!” Pinelli calmly responded, “Maybe so . . . but mine is the only opinion that counts.” Babe Pinelli, *Kill the Umpire? Don’t Make Me Laugh!*, in *THE SECOND FIRESIDE BOOK OF BASEBALL* 278 (Charles Einstein ed., 1958).

I should also acknowledge that to some readers, Gould’s baseball references (“high and outside” and the like) may not be comprehensible. Indeed, this became evident in the law school class in which I used this essay to initiate an analysis of “law,” *see infra* note 55. For example, one student from the Bahamas complained that while she understood cricket, baseball was a mystery. Another student, from France, misunderstood important aspects of Gould’s analysis because she thought that the key to the essay was the fact that the batter had been inappropriately standing on one of the lines on the field (“with so much on the line”).

To respond briefly to the specialized cultural knowledge required, I will note that a “strike”—in the specific circumstances of Gould’s essay—is a pitch by the pitcher that the batter *should have* tried to hit, but did not. This kind of pitch places the baseball within an area where it is reasonable for the batter to swing at it—a space over the width of the “home plate” which is in front of the batter, and no higher than the batter’s armpits and no lower than the batter’s knees. The point of the essay, then, is that Larson’s pitch was, according to this definition, *not* a strike, but a “ball”—it was too “high” and also “outside” the width of home plate. But Umpire Pinelli nevertheless called the pitch a strike anyway (and quite correctly, according to Gould).

<sup>11</sup> The idea of connecting the rules of baseball to the rule of law is hardly new. *See, e.g.,* Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975); Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227 (1994); *BASEBALL AND THE AMERICAN LEGAL MIND* (Spencer Weber Waller, Neil B. Cohen & Paul Finkelman eds., 1995); William D. Araiza et al., *The Jurisprudence of Yogi Berra*, 46 EMORY L.J. 697 (1997); Paul Finkelman, *Baseball and the Rule of Law Revisited*, 25 T. JEFFERSON L. REV. 17 (2002); Neil B. Cohen & Spencer Weber Waller, *Taking Pop-Ups Seriously: The Jurisprudence of the Infield Fly Rule*, 82 WASH. U. L.Q. 453 (2004); Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. ILL. L. REV. 1207.

decision. Both subjects essentially concern the search for two illusive qualities: a structure to the analysis that avoids the appearance of mindless whimsy, and a foundation that makes the structure universally applicable rather than idiosyncratic. All lawyers and judges seek to claim that their thinking and conclusions are not chaotic and arbitrary, but patterned, coherent, and constrained, and hence, worthy of respect. One rudimentary form that this effort takes is the commonplace observation that legal reasoning is basically about consistency—“treating like cases alike, and different cases differently.”<sup>12</sup> However, that rubric merely describes the challenge rather than resolve it. The important question is how the legal mind, judicial or otherwise, attempts to identify *relevant, meaningful* resemblances and distinctions, and hence how it believes it *justifies* its arguments and conclusions beyond simple assertion itself.

The discussion below of lawyering, judging, and umpiring—of the search within all of them for arguments and conclusions that are grounded, thorough, and credible—is divided into five sections. Part I sets the stage by contending that legal reasoning can best be understood as both multi-dimensional and multi-layered: The legal mind must confront a host of challenging dichotomies that split the thought process into competing perspectives, each potentially appropriate, but each also the basis for disagreement. This section establishes an analytic framework that will allow us to appreciate and organize our challenges. It structures this daunting mental process, describing in detail the multiple rhetorical strategies available to legal advocates, and in turn the special difficulty facing judges and umpires alike. As that framework has four segments—that is, four different forms of division *and* blending<sup>13</sup>—Parts II-V develop each in turn. Considered as a whole, we have, in effect, a map of legal argumentation—whether for attack, defense, or resolution—which Professor Gould’s essay so admirably reflects. The last of these sections, Part V, will focus on the singular anxiety and pressure imposed on those who must make close calls, legal or otherwise, and will revisit in some detail the differences between the visions of decision making of Professor Gould and Chief Justice Roberts.<sup>14</sup>

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<sup>12</sup> This phrase is ubiquitous in legal contexts, but one of its most thoughtful discussions appears in H.L.A. Hart’s classic work, *The Concept of Law*. H.L.A. HART, *THE CONCEPT OF LAW* 159 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994) [hereinafter HART].

<sup>13</sup> One might get the impression that these multiple perspectives yield little more than a chaotic mess. To the contrary, however, this article will argue that legal reasoning is inevitably, and healthily, quite complicated. Complexity does not necessarily entail disorder and turmoil.

<sup>14</sup> What one will *not* find in this essay, however, is a detailed review of Chief Justice Roberts’s opinions over the years he has served as a judge. We shall focus in Part VI.C, *infra*, only on a few of his decisions written while he was on the Court of Appeals, not the Supreme Court. A wider review of his work is beyond the scope of this article for three reasons.

First, Professor Gould’s essay and Chief Justice Roberts’s comment at his confirmation hearing limit the direct comparison of their approaches to decision-making to a particular kind of case: one in which a single concept, like a “strike,” is the central point on which a decision will turn. To broaden the analysis to all aspects of Chief Justice Roberts’s opinions would therefore be unfair to him and off-point here.

Second, we will focus on Court of Appeals decisions because they are more analogous to that of an umpire’s call than would be Supreme Court opinions, which would be more akin to decisions by the Commissioner of Baseball. The best comparison, of course, would be between an umpire and a district or trial court, but Chief Justice Roberts never served at that judicial level.

Third, using then-Judge Roberts’s Court of Appeals decisions for the D.C. Circuit allows us to contrast his approach more directly with the reasoning of another judge who served on that same Court—Judge J. Skelly Wright—which we will do in Part IV, *see infra* text accompanying notes 63-89.

## II. LEGAL REASONING: THE CLASSICS AND A NEW APPROACH

Because the slippery concept of “context,” in various forms and guises will be important to the analysis of both Gould’s essay (where it is invoked and relied upon explicitly) and the remarkably broad and complex topic of legal reasoning, this article, then, should correspondingly place itself within a similarly appropriate background that will give us some perspective on the framework to be suggested. That is more of a challenge, however, than might otherwise be assumed, simply because the topic of legal reasoning, as a general proposition, has been examined countless times by numerous scholars in many ways. Yet legal reasoning *itself*, as a target of focused interest, has actually very seldom been carefully studied and unpacked. Within this literature, however, a few analytic efforts have become somewhat paradigmatic—points of departure for the rest of us, as it were. Subpart A below thus provides a first, very summary step to establishing this foundation by noting the primary, classic commentaries on legal reasoning, and identifying their principal shared themes. The picture that emerges, however—multi-hued though it is—will still be incomplete, and hence unsatisfying. Subpart B will then suggest an alternative framework, which will in turn animate the remainder of this Article.

### A. Legal Reasoning: The Common Traditional Themes

Most summaries of the phenomenon of legal reasoning—as opposed to the closely related, but not identical, topic of “what is law”<sup>15</sup>—would probably begin with a reference to Karl Llewellyn and his “bramble bush,”<sup>16</sup> then pay homage to the very careful examination of practical lawyering in the materials developed by Hart and Sacks,<sup>17</sup> then make reference to the short but insightful summary of legal reasoning developed for lawyer and non-lawyer audiences alike by Edward Levi,<sup>18</sup> certainly include a discussion of the debate between H.L.A. Hart<sup>19</sup> and Ronald Dworkin,<sup>20</sup> perhaps go so far as to note the interconnection between legal “rights” and legal “remedies” developed by Guido Calabresi and Douglas Melamed in their justly famous work in law-and-economics,<sup>21</sup> note as well the thoughtful commentary by Steven Burton,<sup>22</sup> and

<sup>15</sup> The difference here can be imagined thus: Assume that future astronauts discover a population of aliens on Mars, and you are hired to investigate whether this society has “law.” What would you investigate? What would you look for? The best summary of what that exercise would entail probably continues to be the traditional positivist analysis employed by Professor Hart in *The Concept of Law*. See HART, *supra* note 12.

<sup>16</sup> KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (Quid Pro Books 2012) (1930).

<sup>17</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958). See also WILLIAM R. BISHIN & CHRISTOPHER D. STONE, *LAW, LANGUAGE, AND ETHICS: AN INTRODUCTION TO LAW AND LEGAL METHOD* (1972).

<sup>18</sup> EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949).

<sup>19</sup> See HART, *supra* note 12.

<sup>20</sup> Although Professor Dworkin has discussed the work of Professor Hart in various places, the most extended direct analysis and criticism of his work appears in RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 14-130 (1978) [hereinafter DWORIN, *TAKING RIGHTS SERIOUSLY*], where, as one of his commentary techniques, he contrasts the judicial efforts of hypothetical judges named “Herbert,” the positivist (guess what the “H” in H.L.A. Hart stands for), and “Hercules,” the anti-positivist. See *infra* text accompanying notes 86-87.

<sup>21</sup> Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). I will confess here that the absence of a discussion of this work in the context of an article on legal reasoning is a significant deficit, but it is beyond the scope of what can usefully be developed here. The point of the “Property Rules” article was not simply that economic principles were relevant to legal analysis—it was more profound. The observation that these authors made was that the law in at least one substantive area—nuisance law, and tort law more generally—could be understood much more accurately and usefully if one separated the “rights” that might determine who should “win” in a given case from the “remedy” that

conclude, perhaps, by reviewing the remarkably ambitious and insightful series of articles by Frederick Schauer.<sup>23</sup> These sources<sup>24</sup> are so frequently referenced in part because they share three crucial perspectives that have come to be associated with all discussions of legal reasoning.

First, and most fundamentally, each of these sources preaches the message that studying the phenomenon of legal reasoning is interesting and important *not* because it is an inquiry into the process for discovering and establishing some underlying “truth,” the way scientific method attempts to do, but instead because it examines how to appreciate and operate within a realm where fundamental truth is *absent*—where all conclusions remain contingent and challengeable, and “discretion” is unavoidable. Each emphasizes, disconcertingly to the uninitiated, that the study of law is something that changes as it is being studied. Professor Levi perhaps puts the proposition most directly: “Therefore it appears that the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them.”<sup>25</sup>

Yet, as a second critical theme in the midst of this unsettling picture, each classic source enjoys this status because it is simultaneously committed to the idea that this malleable process of legal reasoning is not infinitely manipulable, with no form and content. Instead, legal reasoning is presented as following certain identifiable, rational, and widely accepted patterns of analysis and decision making. After all, the topic here is labeled legal “reasoning” rather than legal “goofiness” or legal “arbitrariness.”

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will be employed to manifest that “win.” Thus, as they demonstrated, cases were decided quite differently depending on whether a victory by one party resulted in the extreme imposition of an injunction (which they labeled a “property rule”) that stopped or imposed an action completely (like shutting down a polluting factory), or it resulted in the less painful sanction of damages (which they called a “liability rule”). As a matter of economic theory, the key to this differentiation was that the former remedy would force the loser in a case, if the loser wanted to change the outcome, to pay the winner’s price, whatever that might be; the latter remedy instead allowed the court to set the price.

But more generally (and fundamentally) concerning legal reasoning, the separation between “rights” and “remedies” speaks directly to the decision-maker’s context, as the issue of a “strike” illustrates as well as any. The “remedy” of calling a pitch a “strike” could be made more or less onerous than the current rule of calling the player “out”: It could be that this batter would be required to do ten push-ups before attempting to swing at another pitch; or it could be that the batter is thrown out of the game altogether. The point is that the “rule” of the strike zone cannot really be appreciated without reference to what will happen once a decision is made—how serious, nasty, unalterable, or unreviewable the result may be. Unfortunately, we will put all of that interesting nuance aside as we compare the baseball metaphor employed by Professor Gould and Chief Justice Roberts.

<sup>22</sup> STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* (Aspen Publishers, 3d ed. 2007).

<sup>23</sup> In these articles he explores in detail his depiction of the sequence of analytic steps that produces the complex matrix of the common law. Fredrick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Fredrick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); Fredrick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) [hereinafter Schauer, *Precedent*]; Fredrick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991). Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995). But this short list, long as it seems, is only a small portion of an immense body of work that stretches to the present, further exploring and interrelating these concepts.

<sup>24</sup> Some may complain that missing from this list is a reference to Lon Fuller, *The Morality of Law* (1964). This is indeed an important and impressive classic as well, but its agenda is much more the (necessary) connection between law and morality, rather than the nature of legal reasoning itself. Nevertheless, Professor Fuller’s concern with an “inner” morality of law is certainly relevant to the discussion of “hypertext” that is developed later in this essay, *see infra* pp. 17, 36-41, so I put his work aside with all due reverence.

<sup>25</sup> LEVI, *supra* note 18, at 3-4.

Two important points follow from this simple observation. One is that this Article's analysis of legal reasoning will not explore in depth what is labeled the "critical" approach to assessing legal material.<sup>26</sup> Although to summarize this school is always dangerous, one of its distinctive characteristics is the belief "that no distinctive mode of legal reasoning exists to be contrasted with political dialogue. . . . Law is not so much a rational enterprise as a vast exercise in rationalization."<sup>27</sup> The classic sources emphatically disagree, distilling instead from the words and actions of judges certain patterns of reasoning that are legitimate and appropriate for the context of the law. Although more (but not much more) will be said later about the relationship of critical scholarship to the analytic form suggested here,<sup>28</sup> it needs to be acknowledged that the critical approach does not play a significant role in the development of this Article's thesis.

A second point follows from the search for legitimate forms of reasoning. The classic commentaries identify within case-based law in particular certain analytic techniques appropriate to fluid circumstances: the use of analogy, deductive and inductive reasoning, and theories of language.<sup>29</sup> Despite these regularizing forms, however, a conundrum always remains: Careful application of these patterns and accepted techniques will not produce specific, singular, "proven" outcomes, but rather results that *seem* legitimate in an analytic sense yet remain controversial. The critical scholars are therefore correct, but exaggerate the point, when they claim that "[l]egal doctrine can be manipulated to justify an almost infinite spectrum of possible outcomes."<sup>30</sup> For the classic sources on legal reasoning, it is not the *outcomes* that matter, but the *process*: Fundamentally, legal reasoning exists, and must be studied, not because it produces legal or social agreement, but because it is the method by which we *manage disagreement*.

This connection of legal theory to dispute management is most evident, perhaps, when the inquiry turns more pragmatically (largely from the influence of Professor Dworkin) into a search for a "theory of adjudication,"<sup>31</sup> or how judges can legitimately resolve so-called "hard cases"<sup>32</sup>—cases that lack a clear and uncontroversial legal rule that would easily settle the matter. And in turn, this kind of legal theory demonstrates how a skillful legal advocate can

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<sup>26</sup> The literature associated with the so-called "critical legal studies" movement is both vast and varied. Among many summary discussions, a good one appears in ROBERT L. HAYMAN, JR., NANCY LEVIT & RICHARD DELGADO, JURISPRUDENCE: CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM 402-460 (Jean Stefancic ed., 2d ed. 2002).

<sup>27</sup> Allan C. Hutchison & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 206 (1984). This article is part of a wide-ranging symposium collection in this volume of the *Stanford Law Review*.

<sup>28</sup> See *infra* text accompanying note 50.

<sup>29</sup> See BURTON, *supra* note 22, at 25 ("Legal reasoning takes two principal forms: One is analogical; the other is deductive."); *id.* at 27 ("Analogical legal reasoning is not fundamentally different from analogical reasoning in familiar situations. It is, however, more formal, rigorous, and uniform in its expression."); *id.* at 46; ("Deductive legal reasoning, like its analogical cousin, is more formal and rigorous than similar reasoning in most everyday non-legal contexts."); see also LEVI, *supra* note 18, at 1-2 ("The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable in the second case.") (citation omitted). On matters of language, the best sources would be HART, *supra* note 12, at 18-20, 124-136, and BISHIN & STONE, *supra* note 17, at 403-538.

<sup>30</sup> Hutchison & Monahan, *supra* note 27, at 206.

<sup>31</sup> This approach was announced in *Taking Rights Seriously*, see DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 20, at viii, 1-13, but has been a constant theme throughout Professor Dworkin's work, including *Matter of Principle* (1985), *Law's Empire* (1986), and *Justice in Robes* (2006).

<sup>32</sup> DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 20, at 81-130.

create a “hard” case out of what might otherwise appear simple legal circumstances. In this frequently encountered context, in addition to the various forms of reasoning noted above, the literature has developed and analyzed at length the distinctions between and among various theories that blend and merge an approach to thinking with an understanding of what may legitimately be *thought about*: for example, realism,<sup>33</sup> positivism,<sup>34</sup> anti-positivism (or interpretivism),<sup>35</sup> formalism,<sup>36</sup> rule-skepticism,<sup>37</sup> and so on.

Certainly the differences among these camps are important to an understanding of law and legal systems. In particular, for example, one critical insight into a lawyer’s thought process is Professor Dworkin’s distinction between narrow, objective legal “rules,” on the one hand, and broad, abstract, normative legal “principles,” on the other.<sup>38</sup> But the key point for present purposes is the third classic element within the legal reasoning literature that arises in this context: the acknowledgement that the distinctions between these legal theories are driven in major part by differing views concerning the relevance of *values* to the resolution of a matter, whether those be a person’s own personal values, or larger social policies, or any other form of normative contingency. The questions that positivists, anti-positivists, and so on at least acknowledge, but answer quite differently, are, for example: To what extent can judges consider such value-based perspectives in deciding a case? To what extent, then, can lawyers legitimately argue these perspectives to a judge? What sorts of values can appropriately be considered by a judge in contested legal matters, and which are inappropriate? And why?

I will not argue here that any of the several approaches to resolving these kinds of questions in the existing literature on legal theory and legal reasoning is “wrong” to any significant extent. Instead, my contention is that they are all to one degree or another incomplete. I seek to be both more detailed and structured in my analysis of legal reasoning, and thus present a more comprehensive catalogue of analytic strategies available in legal argument and judicial decision making. Consequently, much of the detail in other work, and the details of the disagreements among the authors, can be put aside, for we will attempt to go “underneath” this

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<sup>33</sup> This genre could just as easily today be labeled as “pragmatist”—the effort to connect legal results to our actual experiences and practical expectations. One classic statement within this genre is Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930), but examples abound.

<sup>34</sup> To put it in its simplest form, the basic notion within this school is that claims about “law” must be rooted in some “positive,” objective background source, such as a statute or court decision, rather than more amorphous possibilities like a society’s sense of “morality.” The most well-known and well-regarded statement of this approach continues to be *The Concept of Law*, see HART, *supra* note 12.

<sup>35</sup> Most directly associated with the work of Ronald Dworkin, this kind of legal theory rejects any separation (rigid or otherwise) between law and the contextual morality within which it operates. See generally RONALD DWORKIN, *LAW’S EMPIRE* (1986) [hereinafter DWORKIN, *LAW’S EMPIRE*]. In his later work, Professor Dworkin would refer to his anti-positivism theories as “interpretivism.” See, e.g., RONALD DWORKIN, *JUSTICE IN ROBES* 249 (2006).

<sup>36</sup> This label basically derives from the emphasis on the demands of formal logic: major premises entail the minor, and reasoning leads wherever this process may take you. Law therefore looks a lot like mathematics, with self-referential proofs, and very narrow understandings of the reach of “rules.” An excellent discussion of this approach appears in *The Concept of Law*, HART, *supra* note 12, at 124-54.

<sup>37</sup> As an analytic matter, this approach is the opposite of formalism—it rejects the idea that an anchoring, narrow postulate lies in the background of any rule. Instead, law is an exercise in ambiguity and vagueness, with the only certainty being the ruling of an authoritative decision-maker. Hence, we are back to the realists. Hart’s book is also a useful source on this topic, and its relation to formalism. See HART, *supra* note 12.

<sup>38</sup> This has been a major theme in Professor Dworkin’s work, but it began (in book form at least) in *Taking Rights Seriously*. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 20, at 22-28, 71-80.

discussion to even more basic questions about how lawyers *reason* about analogies or rules or principles or values or anything else they might claim is relevant to their contentions.<sup>39</sup>

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<sup>39</sup> The issue for us is not the fact that analogies are used, or that inductive or deductive reasoning is displayed, but *how* those analogies work, and *which* generalities or particulars are the beginning points for the thought process, and *why*: Do the analogies and other forms of reasoning depend on texts or on values or on references to practical circumstances or what?

A good example of the difference between the approach in prior literature and the tack taken here is the description of legal reasoning developed by Professor Schauer. Although it is always dangerous to summarize a nuanced study of a topic this abstract, Professor Schauer's argument basically reduces to an observation that a judicial decision links to others through a series of three mental exercises: The legal mind "characterizes" the problem at hand, then "compares" the current matter to existing legal authority within that context, and then "assimilates" the new decision into that context. Schauer, *Precedent*, *supra* note 23, at 576-77. (It is not as if these steps occur in this rigorous order, of course, but they are all going to have to be made, *see id.* at 577, 589.) In effect, the effort is to connect this new case to all three temporal perspectives: the past—the preexisting contexts that have been recognized as appropriate perspectives or categories of legal thought; the present—the relationship of the current case to those existing categories; and then the future—the way the new case is perceived to impact the way life (legal and otherwise) will be led in light of the new decision. Professor Schauer does not contend, however, that these steps are necessarily taken in this order, or that each is somehow rigidly separated from the others. They blend, as he explains:

Reasoning from precedent, whether looking back to the past or ahead to the future, presupposes an ability to identify the relevant precedent. Why does a currently contemplated decision sometimes have a precedent and sometimes not? Such a distinction can exist only if there is some way of identifying a precedent—some way of determining whether a past event is sufficiently similar to the present facts to justify assimilation of the two events. And when we think about precedential effect in the future of the action we take today, we presuppose that some future events will be descriptively assimilated to today's.

*Id.* at 576-77.

What we need, then, is an "organizing standard specifying which similarities are important and which we can safely ignore," *id.* at 577, what he calls "rules of relevance," *id.* at 578. In turn, these rules will "be explained as a choice among alternative characterizations," *id.* at 579, and these characterizations will be viewed with reference to assimilation as the spin "the future . . . will place [on] today's facts," *id.* And, as you would expect, the question then becomes whether there are any "rules" of assimilation as well—that is, preexisting categories of some sort "in the larger consciousness surrounding the particular decisionmaking individual or institution" that constrain or direct that activity as well. *Id.* at 585.

This is a complex and interesting picture of thinking within the context of legal issues, and it can be seen at work, in a way, in Gould's analysis of Pinelli's called third strike. The "characterization," or category, at stake might be simply that of baseball's traditional, physical understanding of a "strike," or it might instead be "a strike in a big game toward the end of a spectacular effort by a pitcher." Which category is chosen depends on how we compare the game in question to the games of the past, and that assessment may or may not support this distinction between the two categories. And the category we choose, and the comparison we make, will also depend on how we assess the impact the "strike" call will have on the game of baseball as it will be played in the future.

There is nothing wrong or inaccurate about the depiction of reasoning being presented here. We can accept all of it, but then ask additional questions: Is there more that might be said about this process? Are there more precise ways of capturing the "categorizing," "comparing," and "assimilating" that no doubt seem to be occurring within the legal mind? Can we identify, in other words, the typical analytic strategies that lawyers (and more generally, all very careful thinkers) use "underneath" Professor Schauer's steps? In a way, we are trying to determine what the "rules" of relevance and assimilation might be that guide (or perhaps warp, depending on your point of view) the legal reasoning process. Can we articulate *how* the categorizing, and so on, unfolds in a particular lawyer or judge's mind so that we can compare and contrast that thought process to the thinking of others? Professor Schauer does not seem to believe so, for at one point he observes that "the rules of precedent are likely to resemble the rules of language—a series of practices not substantially reducible to specifics." *Id.* at 595.

Here I disagree. Although "specifics" in the sense of "precise" maps of analytical process may well be impossible, "specifics" in terms of additional *structure* within that process *is* quite possible.

While this inquiry will necessarily be at a high level of abstraction, the analytic focus will still remain, as it primarily did for these classic sources, on the most basic, and initial, conceptual hurdle confronted by all new law students concerning “legal reasoning”: the structure and nature of “typical” judicial thinking, and hence of legal argumentation more generally. I want to determine whether there is anything special about that mental activity—whether the concept of “thinking like a lawyer” has any identifiable content *and predictable structure* that could then be used by lawyers to their advantage in assessing the contentions thrown at them by adversaries or judges.

I believe there is in fact something rather special about *legal reasoning* in particular<sup>40</sup> that deserves to be identified and appreciated for the range of insights it provides about the challenge of judicial decision making that Gould’s article about Umpire Pinelli is meant to illustrate. Indeed, I would argue that this deeper examination of reasoning is also quite *necessary* as a matter of both legal and political theory: The question that lies beneath all the classic sources on legal reasoning is quite simply *why*, in the first instance, are there so many competing sources? *Why*—with so many smart people doing this analytic work so regularly and for so long—do lawyers and judges nevertheless continue to disagree so profoundly about appropriate outcomes in so many cases? We can understand that *litigants* (and by extension their lawyers) will disagree simply because they have competing interests they wish to vindicate by any means at their disposal. But why do *judges* disagree, when presumably they do not have a personal motive to do so?<sup>41</sup> Why does social consensus develop so grudgingly, if it develops at all? Carefully examined, one can discover that disagreement on issues of law and public policy are in fact *inevitable* and *intractable*—not because of some sinister conspiracy, but because the process of *analyzing* the issues at stake is itself so fractured.<sup>42</sup>

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<sup>40</sup> One of Professor Schauer’s final conclusions about the process of legal reasoning might appear to be directly inconsistent with the thesis motivating this Article: At one point he rejects “the view that a theory of law must identify some form of thinking or decision making unique to legal institutions.” *Id.* at 603. Yet that proposition, properly understood, is not at all inconsistent with the analytic argument being made here. The conceptual matrix proposed in the next subsection is not “necessary” to a theory of *law*—it does not attempt to *justify* any particular view of our legal institutions. Instead, the matrix is an *explanatory* theory of *legal reasoning*: It is a “useful,” pragmatic tool for understanding, and anticipating, any argument about what “the law” might be in any given case. This analytic theory will also therefore not be “unique” to legal institutions, in the sense that no other decision makers employ it; instead, it will be more modestly a claim about what is quite “characteristic” of the way thoughtful lawyers and judges assess their professional circumstances.

<sup>41</sup> Disagreement—often vociferous—among dedicated, well-informed, experts has always intrigued me, and has been a motivating factor in several articles I have published. *See, e.g.,* Timothy P. Terrell, *Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the “Metaethics” of Legal Ethics*, 49 EMORY L. J. 87 (2000) [hereinafter Terrell, *Turmoil*]; Timothy P. Terrell, *Statutory Epistemology: Mapping the Interpretation Debate*, 53 EMORY L. J. 523, 524 (2004) [hereinafter Terrell, *Epistemology*].

<sup>42</sup> Another example of the unfortunate, but inevitable, “incompleteness” of the analysis of legal reasoning presented in this article is a further step that will be only mentioned briefly here. One element of appropriate legal reasoning is that a lawyer be “thorough” in analyzing whatever must be considered. The claim I am defending here is that a “thorough” understanding of the *law* will require more analytic steps than most other situations of study.

For example, imagine that you ask an environmental scientist to give you a thorough understanding of a “river.” You would probably get a discussion from her that would start with the most obvious “surface” aspects of the course of moving water, but then she would note the nature of the land that contains and defines the river’s course, the varying depths and widths of the water along the course, the varying chemical composition of the water or the sediments within it, the life forms within the water, the life forms that surround and are nurtured by this water, perhaps a discourse on the economic importance of the river to the larger community near the river, and so on. Despite this impressive array of information, notice how none of it is abstractly normative or philosophical—it is all well-organized objective data.

Although some law students seem to take this observation as one of cynicism and despair, it is not. It is, quite the contrary, a message of professional *opportunity*.

### B. A Structured Alternative: The Law's "Text" Gives Way to Context, Hypertext, and Subtext

The model of legal reasoning suggested here has four interrelated segments, each of which contains in turn its own special "split analytic personality." Together, they produce a diagrammatic map of this special, complex, and quite challenging, mental process.<sup>43</sup> As a heuristic device, the diagram below uses the most obvious manifestation of the law—its words, or "text"—as the taxonomical touchstone:

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Or imagine that you asked a psychologist to give you a thorough understanding of a "person." This might be a bit more challenging, as the discussion would quickly move from the superficial, readily observable characteristics of skin and hair color, height and weight, and the like—for we are certainly more than just "flesh and bones"—to background elements of ethnicity, birthplace, age, life experiences, test results showing various aptitudes or limitations, and so on. More and more detail would produce what seems to be a "complete" picture of any human being, but again in an objective, data-based way. Any abstraction about the nature or importance or character of this person would make the psychologist begin to squirm.

Both these categories—river and person—are essentially and largely anchored in tangibility—something identifiable and familiar. What happens, though, if the topic to be developed is itself *only* an abstraction, with at best slender connections to anything concrete?

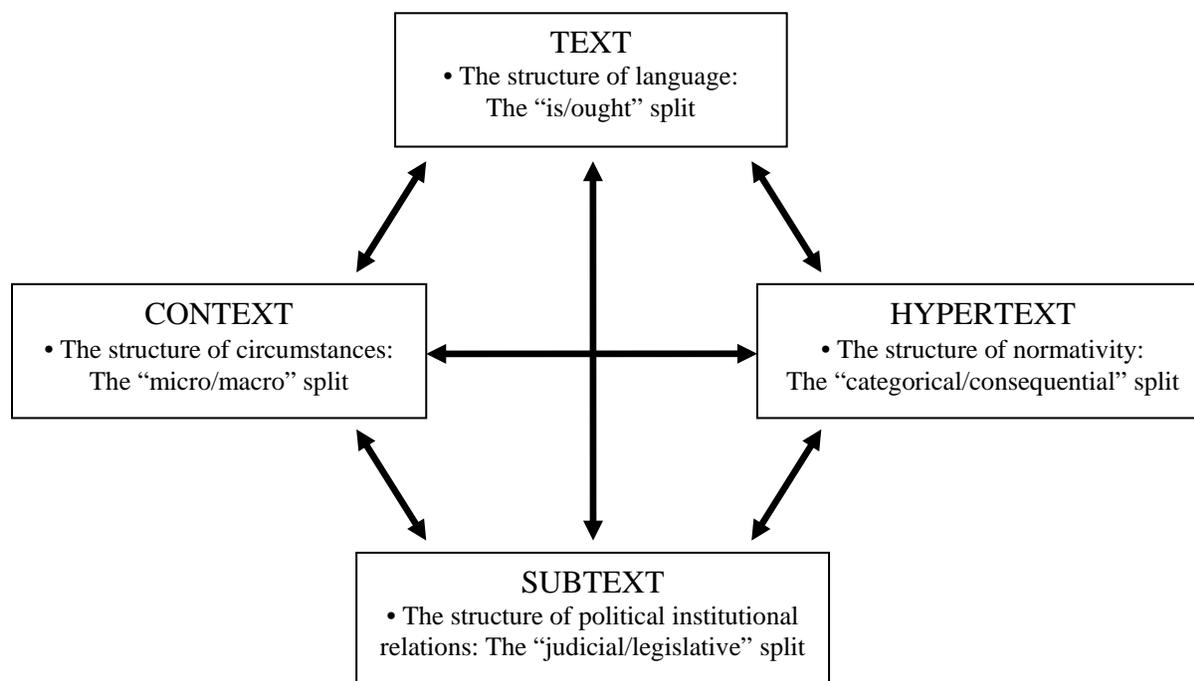
What, for example, is "property"—what can you "own"? What is a "contract"? What is a "crime"? What is "personal jurisdiction"? What is "income"? What is a "security interest"? What is a "reasonable person"? These are all *concepts*—they are mental constructs that *summarize* and embody in a word a host of constituent elements lying in the background. Certainly "river" and "person" are similarly composed of numerous definitional pieces, but the constituent elements of the legal concepts are *themselves* abstractions: How do you know when you have sufficient "agreement" to create a "contract"? If we need "consideration" for this contract, what is that? And so on.

The challenge of *legal* reasoning in particular—to understand *concepts* thoroughly—is therefore the need to handle effectively this peculiar kind of information that involves the layering of abstraction on top of abstraction. Although the analysis of *any* term—"river," "person," or anything else—will need a structure of some sort to make it comprehensible, the conceptual context of the law will require more attention to this structure than we are accustomed to applying. Even something as seemingly mundane and ordinary as a "strike," because it is a purely human construct invented for a special regulatory context, will be a daunting proposition to pin down.

What, then, is the nature of this "conceptual analysis" that lies at the heart of legal reasoning? Here is where the unique form of multi-dimensional structure developed in this article comes into play.

<sup>43</sup> Anyone familiar with the literature on legal reasoning will note, of course, that the analysis here is a structured approach to the concept of "narrative" that has become so important to discussions of the nature of precedent. Professor Robert Cover was particularly poetic in his summary of the phenomenon: "Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms." Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 10 (1983). For him, law and narrative were "inseparably related." *Id.* at 5.

I would make this point in the following form, captured in the article's diagram. The qualities of "structure" and "foundation" noted in the text are developed by lawyers not simply by amassing "information" of one sort or another, but assessing a daunting form of information organized by and around multiple (and layered) *abstract concepts*, represented in the diagram. That circumstance demands a special analytic facility of several parts—and, to make matters even worse, those parts may indeed conflict and compete with each other.



As this Article will explain, each of these elements is fundamental to any society’s effort to identify and justify the guidance that its legal system is presumed to provide, both to ordinary citizens and official decision makers, within its political context. In addition, each element is invoked in and relevant to Gould’s article.

The vertical order of the elements depicted Figure 1 is only tangentially an aspect of the analytic argument to be made. Although “text” is at the top of the diagram, and is ordinarily assumed to be the starting point for traditional legal analysis,<sup>44</sup> it is not necessarily “primary” in an analytical sense. The examination of a particular legal controversy—in a lawyer’s brief or in a court’s opinion—may well not emphasize the language used to describe or express it. Indeed, the double-pointed arrows that appear throughout Figure 1 indicate that each segment of this analytic approach is simultaneously related to all the others. Nevertheless, the contention of the diagram is that the nuances of language will inevitably and unavoidably play some role in the full consideration of that controversy. By the same token, although language does not “precede” society’s moral and social values, nevertheless the ways in which society attempts to capture and express our values in the medium of language—our effort to *communicate* values—is intimately connected to the substance of our normativity. “Sequence” within the diagram is therefore not the point. The key is the distinction between and among these analytical elements. Despite the fact that each segment influences all the others, they are each separate and distinct *enough* from each other to deserve explicit attention. Appreciating each analytical element on its own terms leads to a more useful understanding of the craft of legal reasoning—even though, in the end, they all do mush together.

<sup>44</sup> See, e.g., Eva H. HANKS, MICHAEL E. HERZ & STEVEN S. NEMERSON, *ELEMENTS OF LAW* 282 (2d ed. 2010), which observes that in statutory interpretation this is “commonplace.” But this description is not at all limited to that context. Any analysis resting in language must necessarily start with an acknowledgement of that language.

Subsequent sections of this Article below will develop in more detail each of the pieces of the diagram, and hence each particular “split personality” generating consternation within its arena. For now, they can be summarized as follows:

*Text:* Law and legal systems are essentially efforts to regulate human conduct. This effort travels on the basis of the language used to express those regulations. Thus, any study of law must pay particular attention to the nature of language as our medium for embodying social guidance. In the case of Gould’s article, the disconcerting example is the single word—and critical concept—of a “strike.” It is an apt illustration of that most basic of philosophical distinctions resting at the core of linguistics: the difference between the way in which a word is *in fact* used by a population, and the way in which the word *should* be used, according to some preexisting criteria or normative agenda.<sup>45</sup> These linguistic elements in turn simply reflect the distinction that the philosopher David Hume<sup>46</sup> urged us to make: between “is” (facts, loosely understood) and “ought” (values, largely understood).

*Context:* Language, in the form of regulation, necessarily applies within shifting circumstances. Thus, the question becomes whether this kind of contextual contingency can and should make a difference—to our language, to our values, or to various institutional players in the analysis of a matter. And *how much* difference will we permit this shift in circumstance to make? For Gould, this struggle is captured in the importance he affords context-based “truth” and its relationship to linguistic messiness: Being in the realm of the World Series somehow causes a definitional shift. For lawyers and judges, this is the realm of “categorization” and “comparison” that Professor Schauer emphasizes, where the legal mind assesses situations by examining possible similarities and differences. The issue for our analysis of legal reasoning is whether the activities of labeling, relating, and distinguishing regularly fall into identifiable analytic subsets. They do. The most obvious will be the differing circumstances of “facts” and “legal categories,” but more fundamentally and subtly will be the impact of differences in

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<sup>45</sup> The point is *not*, of course, that these two elements are separate and distinct; instead, they interact with and influence each other. For example:

If I attempt to retell a funny story which I have heard, the story as I tell it will be the product of two forces: (1) the story as I heard it, the story *as it is* at the time of its first telling; (2) my conception of the point of the story, in other words, my notion of the story *as it ought to be*. As I retell the story I make no attempt to estimate exactly the pressure of these two forces, though it is clear that their respective influences may vary. If the story as I heard it was, in my opinion, badly told, I am guided largely by my conception of the story as it ought to be, though through inertia or imperfect insight I shall probably repeat turns of phrase which have stuck in my memory from the former telling. On the other hand, if I had the story from the master raconteur, I may exert myself to reproduce his exact words, though my own conception of the way the story ought to be told will have to fill in the gaps left by faulty memory. These two forces, then, supplement one another in shaping the story as I tell it. It is a product of the *is* and the *ought* working together.

LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 8 (1966).

<sup>46</sup> 1 DAVID HUME, *A TREATISE OF HUMAN NATURE* 302 (David F. Norton & Mary J. Norton eds., Oxford Univ. Press 2007) (1740) (“In every system of morality, which I have hitherto met with, I have always remark’d, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz’d to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, ‘tis necessary that it shou’d be observ’d and explain’d; and at the same time that a reason shou’d be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.”)

“scale” in the inquiry: from the “micro” (or moral) context of particular individuals in singular circumstances, to the “macro” (or political) context of larger populations in general situations.<sup>47</sup>

*Hypertext:* Neither text nor context, however, just “happen”—the words we decide to employ and the circumstances that somehow actually *matter* to us must be explained and justified: They become the “right” words and the “correct” social contingency to which to refer. We (meaning lawyers and judges) demand *reasons*, which require reference to the values we believe make our choice of language and circumstances appropriate. We must, in other words, at this stage become straightforwardly normative. Gould makes forays into this philosophical realm with his references to “justice” and “democracy,” and, by unspoken implication, their relevance to concepts of community, political theory, and law. But his essay is tantalizing in part because it says so little on these critical points. Nevertheless, Gould’s defense of Pinelli’s call reflects a fundamental distinction that legal reasoning regularly makes between two forms of normative analysis: on the one hand, “categorical” (or deontological) thinking, and, on the other, “consequential” (or teleological) assessments.<sup>48</sup>

*Subtext:* As a final step, to fully appreciate the relevance of Gould’s essay to the world of legal reasoning, all these factors of language, circumstances, and values must be understood to intersect and integrate within a *particular* context that will put them into proper practical perspective: the political—meaning the operative *governing*—institutions within which efforts to regulate human conduct will take place. We must appreciate who makes and applies the rules, whether of baseball or the law, and the relationships between these actors. Although this topic could stretch quite far—from legislatures to court decisions prompted by litigation to private contracts creating special relationships, and beyond—the more immediate focus here for purposes of appreciating Gould’s essay is limited to the arbitrators of disputes within situations of rule-governed activity: For Gould, the central political actor is his fabled baseball umpire. For law more generally, we will need to expand to a vision and theory of judging in the context of a complex circumstance of multiple centers of regulatory authority. But Gould nevertheless supplies an interesting bridge between these two realms, I will argue, in his essay’s last two words.<sup>49</sup>

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<sup>47</sup> See, e.g., Terrell, *Turmoil*, *supra* note 41, at 100-101.

<sup>48</sup> *Id.* at 102-05.

<sup>49</sup> Perhaps, for the sake of completeness, I should note that these diagrammatic interrelationships are an extension of an earlier picture of legal reasoning I developed in an article that summarized this analytic process around the “dimensions” of our thinking. In Timothy P. Terrell, *Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles*, 72 CAL. L. REV. 288 (1984), I observed that law students early in their education proceed quickly from an assumption that “the law” is an array of isolated, dimensionless “points” of authority, to an additional awareness that many points in fact connect with each other to form something akin to one-dimensional “strings” of propositions or “lines” of authority that characterize the development of a more broadly applicable legal rule. This stage is in turn supplemented by a more professionally sophisticated understanding that these “lines” in fact form themselves into two-dimensional “shapes” that pull together an image of an entire area of legal doctrine, like “contract law” or “tort law” and so on. Hence, students arrive in the traditional legal world of “flatlaw.” Eventually, however, with a good legal education, these “shapes” of the law become more complex three-dimensional objects, as legal doctrine is placed within wider interdisciplinary contexts. At this stage, the law becomes only one slice (among many) of a larger, richer reality: Tort law, for example, is studied as a reflection of economic theory or as a means of vindicating human dignity or as a function of any number of other perspectives. The law, then, rather than being a subject isolated unto itself—a “closed” analytic system like mathematics—is understood more profoundly as a complex function of a wide range of human concerns.

The diagram suggested above is quite consistent with this earlier dimensional depiction of legal reasoning. Two-dimensional thinking corresponds essentially to putting the law into a “context,” while three-dimensional

A final preliminary comment about the segments of the diagram: By setting aside the “critical legal” approach, the list does not include a super-category that might overlay the entire exercise: “pretext.” One could believe that legal reasoning is, as noted earlier,<sup>50</sup> a sham—it is simply political power dressed up for public consumption. Unfortunately, those who proceed from this assumption cannot be persuaded otherwise by the legion of examples to the contrary that demonstrate, to my satisfaction at least, conscientious people doggedly pursuing what they believe to be the public good, rather than social domination.<sup>51</sup> So I will not attempt to engage in that fight. I will, I admit, assume that the process of legal reasoning is psychologically legitimate, and the job here will be to identify its operative elements.

The final picture of that process will indeed be complex. This is not my fault. It is a function of the fact that none of the elements of legal reasoning exists in isolation from any other—they intersect and overlap and generally influence each other. Although the result is complicated, the message here, as noted earlier, is not one of despair, but of quite practical *opportunity*. Using Gould’s essay, we can demonstrate and appreciate the subtle methods used by astute lawyers to listen carefully to the arguments of others and identify weak spots available for exploitation. It is a lesson, then, in learning how to organize effective arguments and counterarguments in the special world of law and public policy.

But first, however, it is a lesson more simply in how to think like, and hence argue effectively with, an umpire.

### III. THE CHALLENGE OF TEXT: THE “IS” AND “OUGHT” OF “STRIKES,” AND THE ART OF UMPIRING

#### A. Language, Set Theory, and the Inevitable Connections to Other Analytic Dimensions

Nothing is more basic to the game of baseball than the “balls” and “strikes” that constitute the competitive relationship between pitcher and batter from which everything else in the game flows. But what does Gould consider a “strike” to be? Clearly it includes any pitch that he *wants* to be a strike for some personal reason. But less arbitrarily, how does he “know” this pitch was a strike? On what, besides his own agenda, does he base his assertion that Don Larson’s pitch was “a strike, high and outside”?

As an initial matter, Gould must be congratulated for acknowledging that the fabled final pitch was indeed a bad one. Strong evidence—more than just Dale Mitchell’s grumbling—establishes the point. Every year at World Series time a film of that pitch taken from a camera above and behind home plate is telecast as part of the usual ritual of anticipation. The purpose of the repeated showing is not, of course, to reexamine the moment critically, but to join in the Yankees’ celebration of that unique, historic perfect game. Nevertheless, the film quite clearly shows that the pitch was well outside the “technical” strike zone, as Gould refers to it. But

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thinking brings “hypertext” into play. The exercise here is to engage in a yet deeper examination of the nature of the connections that create the lines, shapes, and objects that the law forms metaphorically in our minds.

<sup>50</sup> See *supra* text accompanying notes 26-28.

<sup>51</sup> Of the many responses to and assessments of the Critical Legal Studies movement, a few interesting examples would include: Jerry L. Anderson, *Law School Enters the Matrix: Teaching Critical Legal Studies*, 54 J. LEGAL EDUC. 201, 202 (2004) (“worthless concepts”); Jonathan Turley, *The Hitchhiker’s Guide to CLS, Unger, and Deep Thought*, 81 NW. U. L. REV. 593 (1987) (wide-ranging review); Daniel A. Farber and Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (criticism aimed particularly at the CLS technique of attacking legal doctrine through micro-stories).

somehow, despite that evidence and Gould's apparent acceptance of it, the pitch was a legitimate "strike." How can the term "strike" be so easily and egregiously manipulated?

One conclusion—very widely accepted in our postmodern<sup>52</sup> world, in which everything is considered contingent and foundationless—could simply be that language is a human construct meant to be used in human ways, whatever those may be. So Gould may be doing nothing more in his essay than anyone does when confronted by words that get in the way of desired results: Let the results define the words. This is not, then, "manipulation" as a pejorative; it is a well-recognized form of normativity: The ends justify the (linguistic) means.

Two serious problems attend applying this approach to Gould's essay. The first and most obvious is that Gould himself certainly does not understand his argument about the concept of a "strike" to be so crass. He clearly thinks his, and Babe Pinelli's, use of the word is not merely instrumental, it is fully *legitimate*. It is a use, in other words, that not only gleeful Yankee fans, but also disappointed Dodger fans, should accept and honor. The values of *both* camps, he would argue, are here vindicated, which should cause *all* of us to *praise* Pinelli's call rather than criticize it. This is an ambitious contention to which we will return in a moment.

The other difficulty with understanding language as infinitely flexible and simply self-serving is that language does not, and cannot, work that way. I have argued this point at length in other legal contexts:<sup>53</sup> If words can be made to mean anything, then they will mean nothing. Of all the information that is out there that people want to communicate, words, to be able to accomplish the task of information transfer, must designate some identifiable piece of that vast range, not any and all of it. "Baseball" cannot include the game of "football" (whether in its American meaning or otherwise), nor can it include the noodles called "spaghetti" or the vehicle called "airplane." If it could, then I would have little idea what you might be talking about if our conversation turned to "baseball." Language can only be effective—be meaningful—if it *excludes* as it includes.

A straightforward way to deal with these two linguistic challenges—claiming legitimacy and avoiding non-arbitrariness—is to borrow from mathematics the simple notion of set theory. Think of a word as denominating a set (which is usually depicted as a circle) of instances or examples, each of which will be communicated when the word is used. The more general the word ("dog"), the more instances follow (the bigger the circle becomes); the more specific ("poodle"), the fewer. Scientists and similar professionals are of course constantly trying to make their words as specific and narrow as possible to make their linguistic references as precise as they can be. Lawyers and judges, on the other hand, are—ironically and, to many, disconcertingly—engaged in a rather different analytical exercise.

As any competent lawyer can tell you, and as all law students learn very quickly, the law, based as it is in language, is anything but precise, clear, and unwavering. It is instead slippery, malleable, and uncertain. Lawyers would be among the first to embrace philosophy's postmodernism, with its rejection of objective truth or singular perspectives on meaning. Yet lawyers, and certainly judges, do not then extend this thinking so far as to reject the idea of meaning altogether. There is—there must be—some sense of truth, some reasonable accuracy, out there toward which we are imperfectly striving: Without this assumption, the entire legal

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<sup>52</sup> A useful summary of the basic premises that characterize postmodernism can be found in Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2508-09 (1992).

<sup>53</sup> Timothy P. Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L.J. 861 (1982) [hereinafter Terrell, *Property*].

enterprise is pointless, and worse, deceptive. Postmodernism is fine, in other words, up to a point. How then to reconcile these twin urges to accept ambiguity while simultaneously acting as if there is clarity? How, in the context of Gould's essay, can a pitch be *both* a "strike" and "high and outside"?

The trick to doing this with a straight face is to return to the concept of set theory and add some additional steps. The key for present purposes is to recognize that language reflects a basic philosophical divide between "is" and "ought":<sup>54</sup> between the (relatively) objective "facts" that are captured by the use of a word (labeled here "context") and the quite subjective "values" that are being furthered or vindicated by the use of the word (here, "hypertext"). The former is about dictionaries—a chronicle of how a particular population most often "in fact" uses a given term. The latter, however, is about agendas—how the word can be used to accomplish some "good" or "end." The former is descriptive and sociological; the latter is prescriptive and philosophical. Only together—never alone—do these elements produce the full, practical "meaning" of a term.

### B. On the "Meaning" of "Strike:" Teaching Law Students to Think Like Lawyers

Although the immediate topic of this segment of this Article is "text," you will note how quickly and inescapably we move into other dimensions in the earlier diagram, all of which will be developed in more detail in subsequent sections. At this point, however, we need an example that can bring this analytical interplay dramatically to the surface. That is precisely what Gould's article about Umpire Pinelli's called strike provides.

I will ask my class<sup>55</sup> to define a strike<sup>56</sup> (in baseball, not labor law<sup>57</sup>). They will immediately refer to the physical space between armpits and knees and over the width of home plate, as anyone familiar with the sport would know. I then ask how they know this to be an accurate definition. They will make some vague reference to some baseball rulebook that must be lying somewhere in the background, even though none of them has actually seen a copy. This, they realize, is what Gould meant by the "technical definition" of the concept. But if we assume that this rulebook is indeed "official," and thus otherwise a legitimate and "authoritative" source to be consulted, how can Larson's pitch be labeled a strike, which the rulebook limits to certain physical circumstances? Obviously, something other than the rulebook seems to matter in giving

<sup>54</sup> See *supra* notes 45-46 and accompanying text.

<sup>55</sup> The class to which I refer was a first semester, first year course at one time (but no longer) offered at Emory Law School (which a number of law schools have, under varying labels) called "Legal Methods." It is intended to be an extended and rigorous exploration of the "tools" of legal thinking and argumentation: precedent, statutes, and administrative regulation. I treated the course as if its title were "Jurisprudence-Lite." I have also occasionally used Gould's essay as introductory material in my course in Jurisprudence.

<sup>56</sup> My Emory colleague Professor Robert Schapiro has noted to me that perhaps this entire analysis is incomplete because Gould's essay actually also depends on a theory of a "walk." The problem, he argues, is that a walk is not at the moral core of baseball, even though it is part of the duel between pitcher and batter. It is an exception to the "excellence" of play we expect of competent players. "Real men," he contends—as well as official scorers for the sport—do not "count" walks. Hence, there is a kind of hollowness and defensiveness to the expression "a walk is as good as a hit." To the contrary, the biggest, most memorable games turn on hitting, not walking. Consequently, in games like the World Series, perhaps a thumb is already on the scale in favor of strikes.

<sup>57</sup> Although the same word can have different meanings in various contexts, often, as Ludwig Wittgenstein famously noted, these uses can be related by "family relationships" that connect their independent uses to shared characteristics across a range of uses in the language. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 2-41 (G. E. M. Anscombe trans., 2001) (1953). One example he used was the word "game" that had various connotations, but nevertheless formed a "family" of applications. *Id.* at 27-28. I do not think the two uses of the term "strike" noted in the text have any sort of connection like this at all. They are simply distinct uses of the same six letters.

the concept of a strike its *full* meaning. The questions now are several: How is the dictionary of baseball incomplete? What is the extra-textual source for this proposition? And how does this mysterious source claim competing—and indeed in this case, superseding—legitimacy and authority? This is deep stuff, and we are only talking baseball.

The answer, of course, is that the meaning of a term, just as Gould asserted, also depends on context, but not just the factual circumstances in which the term is being used. This substantive sense of context is the set of circumstances *relevant* to the use of the term, the facts that somehow *matter*. These are identified only by reference to the values that lie behind the use of the term. I make this point to the students by asking them for the “justification” for the word “strike.” I ask them for its “theory.” They look at me quizzically. So I ask them why the word “strike” *matters* to anyone—why it is being used here. They will usually respond that it matters simply to know whether a batter is “out” or not, or something of that sort. But the next question is obvious: So what? Why does knowing “out” matter? Ah, but that is important to the *game*, they respond, satisfied that the line of questions has come to its natural and necessary end. But, I ask, what is the “game” to which they refer? Is it baseball? Or is it a critical game in the World Series? The latter is *Gould’s* context. Perhaps, then, we must always connect the fact of the rulebook definition to the values at stake at the moment the term is invoked to know what a strike “truly” is *in that context*. If so, Gould is right again: “Truth is a circumstance, not a spot.”

What is happening, of course, is that text (language), context (the game and its surrounding circumstances), and hypertext (the normative values within baseball) are not just colliding here, but *fusing*. And for the novice legal reasoner, who is hoping to memorize some rule that will resolve things easily, this can be both confusing and upsetting.

Now the fight in class truly starts. Some students are quite critical of the idea that the meaning of “strike” can float from game to game, context to context. For them, it is ordinarily a matter of notice: How would you know, as a player, that the rules are shifting? How would you know whether the umpire had the same perspective on the game that you did? How can the game be played, reasonably and fairly, in such circumstances? At this point I simply play back for them their own words, and note that instead of challenging the idea that values matter in the use of a word, they have endorsed it: They have simply invoked the competing values associated with “fairness” and fair play. The trick in this exercise, then, is not to reject the analytic move that Gould makes in appealing to the ethereal values of the World Series, but to beat him at his own game, appealing to different—and, you hope, somehow “better”—values. It is *your* sense of context that should really matter, not his.

Note, for example, how Gould does not refer to “fairness” to justify his praise of Pinelli, but to “justice.” Is there anything important in that choice of term? Or, as students ordinarily assume, are the two words basically synonymous, communicating the same fundamental notion of “good” or “being correct”?

But we are (again) getting ahead of ourselves. For now, we should just focus on what is turning out to be an “inadequate” text—a rulebook definition of a vital concept that seems to leave important questions unanswered. To simply say that now the argument shifts to “my values are better than your values” leaves students deeply dissatisfied. How, they ask, can we arbitrate between these competing claims? Gould has his values, I have mine; we are at stalemate. How can we decide whether to praise or condemn Pinelli for his call? Indeed, how could anyone *ever* argue with an umpire if the response we get is that the “values” of the game justify the call that was made? Suddenly a group of students in the room realize that they are “strict constructionists” and never knew it. They don’t like the idea of the umpire altering the nature of the game on the

basis of some set of values that might be quite personal to that official, and the surest way of being able to reign in this decision maker is to return to a value-circumscribed, “technical” approach to the concept of a “strike.” The rulebook rules, they say, and properly so, if only to avoid intractable debates about “bad” calls.

So, they conclude, Pinelli was wrong, and so is Gould. No wonder the umpire cried: He knew he blew it, and in a big game with everyone watching. But, I ask them, is that the way the game is *in fact* played? Is their approach consistent with the traditions of the sport and the expectations of the players? That doesn’t matter, they say: It is the way the game *should* be played. “Should?” I ask. Where did that come from in this argument ostensibly focused on the “technical,” objective, rule-based definition of a strike? They look at me with consternation. The *rule* is the thing that matters here—otherwise we would have chaos: The game itself would begin to unravel. So, I observe, values *are* relevant here, after all, but they are now just the values intrinsic to baseball itself, and its continuation. That’s correct, they concede, grudgingly. But do these baseball values exist independent of the participants in this sport, and the history of the playing of this game? Do the players and umpires and perhaps the spectators—their actions, reactions, and varying circumstances and expectations—not matter at all to the values, and hence to the rules, of their game? Does the fact, for example, that this was a World Series game not matter at all? Feeling boxed in, the students’ response is emphatic: No. The “values” of baseball, to the extent they exist at all, are reflected and captured in the technical rules of the game, in any and all circumstances. That’s what rules are for: to prevent dumb arguments like the one they have just endured.

With any luck, at this point, some brave and unintimidated soul speaks up—quite often someone who has some personal experience with the game—and objects to this line of reasoning. That is *not* the way the game is played, this student insists. The “rules” hardly capture the way the game actually unfolds and is enjoyed. Does a shortstop actually have to touch second base, while holding the ball, in the midst of turning a fast and furious double play, particularly in the context of professional games where the players are so fast? Does the “infield fly” rule actually have to be written down to be a part of the game? Do we actually have to articulate the obvious point that the special circumstances of the World Series, and indeed a perfect game, mold or shape the nature of the rules, or at least their application? If we replaced the umpire with a computer that is programmed with only the “technical rules” of the game, would we still be playing baseball?<sup>58</sup>

I applaud the student’s resolve and passion, but then ask whether they have just made an “is” or an “ought” argument: Is their opposition to the other student’s analysis based on observations about the way the game is *in fact* played, or is it based on an implicit claim that the way the players actually play and understand the game is also the *right* way to play and understand the game? It seems to be both, but this is troubling, for you are not supposed to be able to derive an “ought” directly and simply from an “is”: The actual way the players play could perhaps be labeled as *wrong* from some different, perhaps deeper, perspective. Could that perspective be, for example, “fairness”? Doesn’t this batter “deserve,” in some way, the application to him of consistent expectations concerning his performance? Yes, the student will concede, but *other* values might be relevant here as well—values like the “good” of the game as a whole, or the recognition of the special demands of a World Series game, or of a perfect game, or some other consideration that puts this particular batter in his appropriate “place” in this analysis: The world—and particularly the World Series—does not revolve around *him*.

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<sup>58</sup> This would surely eliminate a fertile source of law journal articles. *See supra* note 11.

But why not? Why isn't this player entitled to the same consideration regardless of circumstance? Why do his "rights" change just because the stakes have gone up? Shouldn't we be even *more* diligent to protect him from arbitrariness when "larger" forces are said to be at work?<sup>59</sup>

The discussion now usually descends into chaos, if anyone is willing to talk at all. The "strict constructionists" seem more adamant than ever to focus on the rule, and its sanctity, but for different reasons: Some emphasize the importance of the individual batter, and are concerned with his potential victimization. Some emphasize the pitcher, and argue that he should be honored with the mantle of "perfect game" only in the narrowest of circumstances. Some don't worry about the players so much as the game and its rules—these players are but momentary occupants of this space called baseball, and the forces that preceded them and will sustain the activity into the future should be the focus here, meaning that the "technical" rules that have both history and the dependence of the future behind them should control.

The other camp is just as adamant, and as diverse. Some see the situation quite broadly—the game and its heritage and its viability are indeed the key—but that doesn't mean that the technical rules are paramount. Quite the contrary, the larger values reflected in the game must be honored, and that means seeing a "strike" for what it "truly" is: merely one step in a more complex dance that has an elegance that must be recognized above all else. Others, however, are a bit leery of turning the analysis over to an abstract appreciation of some "dance," where a range of unanchored images might compete and clash. They want the "steps" (the rules) to be given more respect, but not to be viewed in isolation. The rules exist for reasons intrinsic to the game itself, and it is that set of more limited values that must be given emphasis. But values of some sort are nevertheless primary in the analysis, rather than secondary, and the umpire's job is ultimately, then, to be sensitive to those normative concerns.

Now everyone is dissatisfied, except me. I hope the class has at least recognized that the differences of opinion they have developed are all based initially in the rather simple observation that the "meaning" of a "strike" has varied initially on the basis of the separation of "is" from "ought" (in the terminology here, from context to hypertext)—the difference between describing the facts of the situation and justifying the values implicated by the situation. But the disagreement goes much deeper, for the facts seem to be understood quite differently by different students: Is the key circumstance the dual between pitcher and batter, or more generally the game of baseball? Or is it the *World Series* baseball game, or the *perfect* World Series baseball game? And which values ought to matter here? Fairness? Or Gould's seemingly larger sense of "justice"? And how do we go about picking the values that will be infused into the analysis? In the final analysis, aren't the facts a function of the values we espouse, and the values we espouse a function of the facts upon which we focus?

On the basis of what has been said so far, there seems to be no way to assess the call made by Umpire Pinelli. Some think it is correct, others that it is incorrect, and the "insight" of the distinction between "is" and "ought" doesn't help to resolve that impasse. Instead, differences between description and justification seem equally illusive, if not simply perverse. We're back to "I'm OK, you're OK." We have gone round and round, and ended up nowhere.

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<sup>59</sup> This is Ronald Dworkin's basic conception of "rights": You have a "right" when you are permitted to do something even though, all things considered, the community would be better off if you didn't act. This is based on his distinction between "principles," which establish individual rights, and "policies," which establish collective goals. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 20, at 90-94.

Not so, I reassure the class: They are simply becoming lawyers. They are beginning to appreciate the characteristics of annoying, but quite practical, argument. “*Practical?*” they almost want to howl. “Okay, then, which is it?” they ask me in great frustration. Was Pinelli correct or incorrect?

I can’t answer that question, I tell them, until they answer another: Who is paying me?

Lights go off, and the theology majors groan. The worst fears of many in the class are now realized, as the crass cynicism and instrumentalism at the heart of law practice—the “true” meaning and point of multi-dimensional legal reasoning—is revealed. All that counts is money. Postmodernism wins after all.

Not so fast, I suggest. Developing an argument that will protect a client’s interests is not necessarily evil or arbitrary: Would it make any difference to you if Don Larson or Dale Mitchell were your brother? Disagreeing with someone who is arguing for the *wrong* result isn’t a bad thing at all. So, rather than assuming that the entire mental exercise is capricious, perhaps a better way out of this soup is to go in *deeper*. What might be useful would be a more sophisticated understanding of these two basic camps of “is” and “ought,” which might reveal that they have form and symmetry as well.

That is the task of the next two sections.

#### IV. THE CHALLENGE OF “IS”: “CONTEXT” AS DETERMINING THE “SCALE” OF THE ANALYSIS

At the heart of Gould’s defense of Umpire Pinelli is his assertion that “Context matters. Truth is a circumstance, not a spot.” Truth is not a single house; it is an entire neighborhood. The pitch was a strike because it found itself in this magical circumstantial “vicinity” of a strike.<sup>60</sup> How did it get there? And what is this “there”?

The relevance of context to an argument about social guidance—whether baseball rules or legal rules—is an application and expansion of the basic “is/ought” distinction lying in the linguistic background: Do the *facts* actually matter to this analysis, or is everything controlled simply by normative values?

The actual circumstances that bring a situation to the attention of decision makers can indeed matter—can make the situation distinctive—in some readily identifiable ways. One, involving the typical patterns or themes into which facts can be divided, is a rather obvious point relating to the nature of stories or narratives as a general proposition. It is developed briefly in the first subsection below. Other methods by which facts can take on independent significance in the analysis of a matter are, however, rather subtle, as they begin to connect various factual patterns to themes of “guidance” and “assessment,” and hence “governance,” and therefore form the foundation for “*legal stories*” more particularly. These will be developed at greater length in the subsequent three subsections. They deserve this extra attention because they will present the clearer, more direct link of this section’s contextual “is” to the analytic “ought” of hypertext in Part V.

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<sup>60</sup> The idea of “vicinity” is directly related to the “set theory” on which the approach to linguistics in this article is based. See Terrell, *Property*, *supra* note 53. Another version of this idea was once related to me by a judge who commented that his father, a veteran of World War II, told him that ordinarily you don’t have to be perfect, you just need to be “grenade close.”

### A. Context as Fact Categories

First, foundational to describing situations—or telling stories generally—is simply the implicit understanding, as journalists are trained, that a “complete” story will include reference to the basic patterns or divisions into which facts most naturally fall: the who, what, when, where, and why/how sets of informational detail that comprise the situation.<sup>61</sup> In other words, the circumstances that may relate or distinguish two cases could be a focus on or an emphasis of any one or more of the following: *Who*, the key individuals in the situation—for example, the identity of the parties, or of important participants, or of witnesses; *What*, the materials, documents, things, or issues that are of particular interest; *When*, the sequence of events that produced the situation; *Where*, the location or other geographical context in which an incident should be placed; and *Why/how*, the explanation or motive for events.

This is, of course, the stuff of the first week of law school: Mr. Brown and Ms. Green can be factually compared in any number of ways: They might both be employed as teachers, or be brother and sister; they might both be the owners of a particular kind of automobile; they might both have been born on the same day; they might both be residents of a particular city; they might both be the victims of identity theft.

Which of these factual or circumstantial themes really matters here is a function of the deeper inquiry into the values of hypertext, which we have yet to bring into the analysis fully and directly. Nevertheless, this attention to factual context allows us to sense that an assessment of the situation may have normative subdivisions within it driven or anchored by contextual details.

Gould’s essay blends these factors into a seamless story of singular significance: We have the “what” of not just a baseball game, but a World Series game, and the subtle “when” of being at the very end of that game. The “who” is not just a bunch of players and spectators, but individuals with names: the key professionals, including Pinelli and Larson and so on, and the key observers, including Gould himself, his classmate, and their teacher. It is not just a story, but a dramatic one. Most dramatically, these elements then ineluctably combine to support the reasonable conclusion that the pitch was a strike, not because of bias or cheating or other inappropriate attitude, but because the circumstances somehow dictated that it *had* to be.

But how does Gould achieve this? The essay contained no explicit appeal to particular values, and yet Gould has somehow managed to make the values that *will* be applied look obvious and inevitable rather than controversial. Somehow we just *know* how this particular story will, and *must*, come out. Apparently, for this seemingly innocuous, innocent analysis to have such influence, more must be going on in this circumstantial “is” realm than mere traditional fact categories.

### B. Context as Legal Categories

For any lawyer, another form of categorization also seems immediately relevant: the traditional divisions of the law itself. Most of the time, this is not a complicated point: The case involves two parties trying to reach an agreement about something, so the *legal* context is therefore contract law; or they have been involved in an automobile crash, so the context is torts; or they are trying to buy and sell a patent, so a combination of contract and property law will be relevant. This rather rudimentary observation is important, however, because much baggage

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<sup>61</sup> This quick summary is developed further, with examples, in STEPHEN V. ARMSTRONG & TIMOTHY P. TERRELL, *THINKING LIKE A WRITER: A LAWYER’S GUIDE TO EFFECTIVE WRITING AND EDITING* 111-120 (3d ed. 2008).

follows from these characterizations.<sup>62</sup> The traditions and expectations that are typical of these areas will color and sometimes dictate the way the matter will be handled. Thus, as an aspect of legal reasoning, any lawyer would pay attention to this particular form of context as well.

Gould's essay is once again a useful non-legal introduction to this point. The "legal" context of the Pinelli call is implicit, but no less emphatic: We are not to apply the rule-set of ordinary baseball to this pitch, but the separate and special set of *extraordinary* baseball rules. A strike may be one thing in the former, but it becomes a different thing in the latter. Although the physical facts have not changed—Gould readily concedes that the pitch was indeed "high and outside"—our understanding or appreciation of that physical fact certainly has. The key point is this: While the call may seem inconsistent with the ordinary rules, it is quite consistent with the extraordinary rules. By switching the "legal" circumstances simultaneously with his emphasis of certain factual circumstances, Gould's argument seems all the more reasonable and compelling.

The intriguing observation about the connection between facts and law is not, then, simply that the choice of facts can influence or determine the legal category that will be considered relevant—as noted earlier, that an accident puts us within tort law, and so on—but that the *opposite* may be at work: Because we *want* a particular legal category to be the focus, that then tells us which facts we should emphasize. For example, in Gould's essay, which do you think came first—his "who" and "what" *facts*, or the special "legal" realm of extraordinary baseball *rules*? They seem to act inextricably together to compel us toward the conclusion he wants us to reach: It is because this alternative universe of pseudo-strikes exists (at least for Gould) that he can select the facts that will get us there.

But where did this alternative "legal" realm come from? Nothing in Gould's facts *dictates* that this separate context must exist. It is evident, then, that something more than the simple "is" of *both* factual *and* legal categories, in and of themselves, is at work. And just as evidently, that factor is the influence of hypertextual values, the element of legal reasoning we have yet to develop. But it would be premature to jump to that new topic immediately, for Gould's essay is only an analogy for, or approximation of, the professional sense of legal reasoning that is the actual subject of this Article. Thus, we need a more traditionally legal example of this phenomenon of the outcome of a case being influenced—perhaps even determined—by the availability of alternative legal, rather than factual, contexts.

Fortunately, we have not only a fine example, but the perspective of a legal philosopher as well that will better enable us to appreciate it.

The example is the remarkable decision by Judge J. Skelly Wright of the District of Columbia Circuit Court of Appeals in *Javins v. First National Realty Corp.*,<sup>63</sup> which was the first case in the country to recognize the new legal doctrine in landlord-tenant law of a "warranty of habitability"<sup>64</sup>—the right of tenants to withhold rent payments when the premises they have leased become "uninhabitable." Prior to this decision, the tradition in this area of law—

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<sup>62</sup> Although there are countless examples of this proposition, one of the most entertaining is the development of the "right of publicity," which began life as an adjunct to the "right of privacy." The question that arose was whether this publicity right was inheritable by a famous person's heirs. One conceptual problem was that if the publicity right retained its privacy roots, privacy was understood to be a "liberty" interest, and such interests are extinguished with the person's death. But if publicity could be reimagined as a "property" interest, the analysis would change simply because one of the well-known attributes of property is that it is inheritable. And that, basically, is the way the issue was resolved. See Timothy P. Terrell & Jane S. Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1 (1985).

<sup>63</sup> 428 F.2d 1071 (D.C. Cir. 1970).

<sup>64</sup> *Id.* at 1072-73.

specifically, this area of *property* law—had always been, quite simply, that the responsibility to pay rent was independent of the condition of the premises.<sup>65</sup> In effect, tenants were imagined to be like their agrarian forebears who were, by necessity, jacks-of-all-trades, able to make repairs themselves. Rent simply represented the grant of permission by the landlord for the tenant to be on the premises; what those premises were like and what the tenant did there were largely up to the tenant.

Judge Wright’s opinion is famous, in part, for its fundamental rethinking of this entire legal context. Rather than accept and apply the traditional property doctrine of landlord-tenant law, he reexamined it critically, concluding that its foundational assumptions were inaccurate and antiquated. Tenants today, he concluded, desire—and indeed expect—much more than just access to particular premises.<sup>66</sup> They are not farmers anymore, but—particularly in Judge Wright’s context of Washington, D.C.—city dwellers, many of whom would be, like Ms. Javins, of very modest financial means. Such persons pay rent, he found, to obtain “shelter” for themselves and their families adequate to maintain some modicum of health and happiness.<sup>67</sup> Tenants assume, Judge Wright decided, that they will receive in exchange for their rent payments premises that are at least “habitable.”<sup>68</sup> He therefore held that all residential leases within his jurisdiction would have implied into them a new clause—a “warranty of habitability”—that embodied and vindicated the tenant’s expectations.<sup>69</sup>

But, reasonable as the outcome of this case appears to be to modern eyes, it was quite a legal stretch at the time. Judge Wright’s problem was that he had no (or very little and distinguishable) precedent *in the area of landlord-tenant law* on which to base his conclusion.<sup>70</sup> So he didn’t try to do so. Instead, he reached out to another area of law to find support: contract law, and its rapidly developing, and widely accepted, concept of “warranties of fitness.” Within that setting, he noted, were plenty of judicial decisions imposing on sellers of goods the requirement—even if not explicitly stated in the sale contract—that the item exchanged would be fit or appropriate for the purpose for which it was purchased.<sup>71</sup> Rental premises, he reasoned, were just “like” this: They were a kind of commodity—more accurately, a bundle of services that Judge Wright labeled “shelter”<sup>72</sup>—that had been purchased by the tenant with a rather clear purpose in mind: to obtain a place where one could “live,” in a larger sense than merely “exist.”

Armed with this extra weapon of precedent, Judge Wright had no difficulty in concluding—now from the safety of existing legal support—that every residential lease in the District of Columbia had within it a “warranty of habitability,” even though no lease document itself actually contained any such provision. It was a clause that Ms. Javins was “legitimately”<sup>73</sup> entitled to expect, even though she had almost certainly never actually thought about it.

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<sup>65</sup> See *id.* at 1074 (noting that “in traditional analysis, a lease was the conveyance of an interest in land, [and so] courts have usually utilized the special rules governing real property transactions to resolve controversies involving leases”).

<sup>66</sup> *Id.* at 1074.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1072-73.

<sup>70</sup> See *id.* at 1074-75.

<sup>71</sup> *Id.* at 1075.

<sup>72</sup> *Id.* at 1074.

<sup>73</sup> *Id.* at 1075 (“In order to reach results more in accord with the legitimate expectations of the parties . . . courts have been gradually introducing more modern precepts of contract law in interpreting leases.”).

The key here, then, is this: Legal legitimacy for Wright's conclusion came *not* from the area of law traditionally applied in this landlord-tenant context—property law, with its focus on the “things” being traded in a market. While this would certainly have been the expectation of Ms. Javins' *landlord*, that did not matter to this court. Instead, Judge Wright was focused on “relationships”—the human connection between Ms. Javins and her landlord, the reasons that brought them together to create this lease. That perspective allowed him to tap the resources of a parallel doctrinal universe, contract and sales law, with its emphasis on “meetings of minds” and “expectations.” The judicial result of an implied warranty—indeed, a *nonnegotiable* warranty<sup>74</sup>—thus seemed quite reasonable and unsurprising, rather than remarkably creative.

This masterful bit of legal reasoning also enjoys powerful scholarly support as well, although it was developed many years later and without attention to this particular case or area of law. In his book *Law's Empire*,<sup>75</sup> Professor Ronald Dworkin reconsiders<sup>76</sup> his previous efforts to develop a comprehensive theory of adjudication, and produces an elegant and impressive new vision he labels “law as integrity”<sup>77</sup>—a descriptive and normative theory of the method by which he believes judges should analyze challenging cases so as to reach decisions with intellectual and moral “integrity.” It is a complex picture—and one quite consistent with the framework suggested by Professor Schauer—but it can be reduced to two basic elements, one of which is relevant here, the other to be discussed further in the next section. To reason with “integrity,” a judge must combine a careful analysis of “fit”<sup>78</sup>—the way the current decision integrates into the existing legal material it must now join (which I have here called legal context)—with an appreciation of the responsibility to put the law into its “best light”<sup>79</sup>—the more general normative implications the opinion will have in making the law and the legal system look “good” or “bad” (which is the hypertext of the next section). In other words, judges must honor both, on the one hand, a sense of consistency and connectedness with the past *and*, on the other, a substantive concern with “justice” and “fairness.”<sup>80</sup>

At this level of abstraction, none of this analysis is particularly surprising, but it does suggest something quite important to the approach to legal reasoning being argued in this article: If Professor Dworkin is serious about these two large analytic categories, then it would seem to follow inevitably that neither fit nor best light is a single, uncontroversial “thing” or instance or entity, but instead more akin to a variable, like in algebra. Appropriate “fit” might be achieved, a judge could believe, by lumping eight out of ten cases together, with the remaining two being considered “mistakes,”<sup>81</sup> or it might be seven out of the ten. Similarly, “best light” could be viewed within some range of philosophically justified results—that is, some results are particularly “good,” others only modestly so. If so, then both these two categories of reasoning

<sup>74</sup> *Id.* at 1081-82 (“The duties imposed by the Housing Regulations [which now include the warranty of habitability which they help create] may not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor.”); *id.* at 1082 n.58 (“Any private agreement to shift the duties would be illegal and unenforceable.”).

<sup>75</sup> See DWORKIN, *LAW'S EMPIRE*, *supra* note 35.

<sup>76</sup> This is my characterization of Professor Dworkin's effort, not his. Professor Dworkin has never acknowledged, as far as I know, that he has ever changed his mind on any aspect of his legal theory; he has simply refined and expanded initially correct ideas.

<sup>77</sup> DWORKIN, *LAW'S EMPIRE*, *supra* note 35 at 225-275.

<sup>78</sup> *Id.* at 230.

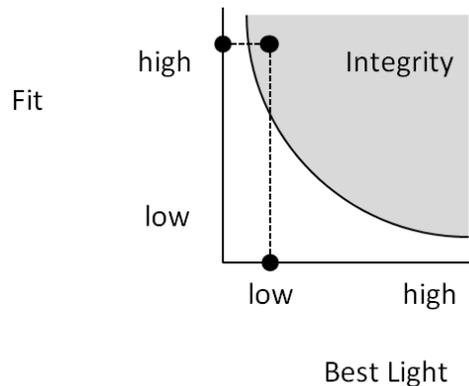
<sup>79</sup> *Id.* at 231.

<sup>80</sup> *Id.* at 249.

<sup>81</sup> Professor Dworkin discusses in *Taking Rights Seriously* the inevitability of having to recognize some prior judicial decisions as “mistakes” if the principles on which the legal system is based are to be properly implemented. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 20, at 118-123.

have ranges of different degrees or amounts that can be attributed to them, with those degrees in turn ranging from some sort of “low” to “high.” Thus, one convenient way to imagine the interaction between consistency and normativity is the following graphic representation:<sup>82</sup>

Figure 1



The area labeled “integrity” in the graph is therefore the range of possible decisions that a court could reach in a particular case that would at least have been arrived at through a legitimate reasoning process, as far as Professor Dworkin is concerned. A case does not, therefore, have one unique appropriate outcome (it could have several), but it does have one unique *route* by which an appropriate result can be reached, and an identifiable “area” of appropriate results.<sup>83</sup>

<sup>82</sup> This graph is my invention, and should not be attributed to Professor Dworkin. I think it is an accurate depiction of his analysis, but he did not put it in this form. And in this form, it is too simple to capture the further complexity that Professor Dworkin adds: “Fit” is itself a function of multiple dimensions, as discussed in the text above, *see* DWORKIN, *LAW’S EMPIRE*, *supra* note 35, at 230, and the notion of making the law the “best” it can be is similarly a function of at least two, and perhaps three, additional factors (the “justice” and “fairness” noted in the text, along with “procedural due process,” *see id.* at 243).

<sup>83</sup> I hasten to note, however, that this idea of an “area” of appropriate decisions is not necessarily consistent with Professor Dworkin’s own understanding of his analysis, but the text of this article is not the place to resolve that difficulty. Nor will it be resolved in this footnote either—just developed a bit further.

The issue here is Professor Dworkin’s famous claim that a judge who employs an appropriately rich analytic technique to decide a case (meaning, of course, Professor Dworkin’s technique) will be able to produce a “right answer” in *every* case—an answer somehow uniquely dictated by determining the correct amount of consistency with prior decisions, the correct identification of the normative principles that animate the legal system as a whole, and the correct mix of these two elements. The image would be that the axes above would have a single spot on each of them where the “correct” degree of that element exists, and the interaction of the two of them would produce a singular “spot” or point within the graph, rather than an “area” of multiple results. This proposition has been developed by Professor Dworkin in different places in his work, *see, e.g.*, Ronald Dworkin, *No Right Answer?*, in *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 58 (P.M.S. Hacker and J. Raz eds., 1977), but the most elaborate defense of it may be the portions of *Law’s Empire* that precede his elaboration of the “law and integrity” technique in the chapter that bears that title, as well as in that chapter itself. *See* DWORKIN, *LAW’S EMPIRE*, *supra* note 35, at 45-86, 260-63. But having examined these discussions carefully, I am convinced that Professor Dworkin is not defending (nor need he defend) the rather strange proposition that each difficult case has, lurking beneath its complexity, a singular, correct answer with which no reasonable judge (or other person more generally, for that matter) could disagree. Instead, Professor Dworkin’s claim is that in reaching a decision “with integrity,” a judge is at least announcing that this result is *the* unique, and uniquely appropriate, decision *for this judge*. In other words, the decision and the process by which it was reached are both taken by this judge very seriously, such that the judge can claim that the decision is the very best that he or she can produce. The judge is satisfied, in other words, that he or she has, in Dworkin’s terms, “impose[d] order over doctrine.” *Id.* at 273.

The relevance of Professor Dworkin's analysis to this article's thesis is therefore rather obviously that fit corresponds to the current topic of context (both factual and legal), while best fit corresponds to the topic in the next section of hypertext. And certainly his approach illustrates quite well the same analytic point being made here that these two dimensions are indivisibly interconnected—you cannot adequately assess one without reference to the other. But more specifically concerning our present focus on context and its artful manipulation in *Javins*, Professor Dworkin's analysis is particularly interesting because he defines the concept of fit quite creatively, and in just the way Judge Wright seems to understand it as well. Rather than simply "counting up" cases that are directly "on point," Dworkin argues that the relationships within the supporting data should be seen in a series of "concentric circles,"<sup>84</sup> with the most similar precedents being given extra weight through a sense of "local priority"<sup>85</sup>—weight, however, that can nevertheless be overcome by stronger principles emanating from other areas of the law. Using the example of a tort case involving emotional injury, he argues that the good judge (whom he calls Hercules<sup>86</sup>) would proceed in a series of analytic steps:

He asks which interpretations [of prior law] on his initial list fit past emotional injury cases, then which ones fit cases of accidental damage to the person more generally, then which fit damage to economic interests, and so on into areas each further and further from the original . . . issue. This procedure gives a kind of local priority to what we might call "departments" of law.<sup>87</sup>

Thus, if there aren't enough tort cases available to meet the dimension of fit adequately, the judge can reach out to contract cases to examine their relevant principles, and perhaps to

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Consequently, for any particular judge, the graph above would indeed have a single spot on each axis where the judge fixes the "amount" of each variable, and their intersection will in turn identify a single spot within the graph where the "right answer" in the case resides. But different judges, as reasonable people, could fix the amount of the two variables differently, and thus if we were to plot all these possible results, we would end up with the "area" depicted in the text. *All* of these decisions would be able to claim legitimacy through Professor Dworkin's *process* of "integrity."

Even though this elaboration of Professor Dworkin's thesis is necessarily a limited one, two additional points must nevertheless be made about it that are directly related to the themes of this Article. First, note that the difference between the "right answer" understood from the perspective of a particular judge (the "spot") and the "right answer" from the perspective of the judiciary as a whole (the "area") is a straightforward application of the "micro/macro" element within legal reasoning generally that is the focus of this section of the Article. Thus, the confusion on this point concerning Professor Dworkin's message should not be all that surprising.

But second, and more importantly, the difference between the "spot" and the "area" within the graph is critical to appreciating the distinction between a theory of "law" and a theory of "lawyering." This article is about the latter, and by extension about the former. The key observation here is this: If the result of Professor Dworkin's integrity thesis is the "spot" of a singular, uniquely legitimate result in every case, then every lawyer (or dissenting judge) who has argued in favor of a different position or result—*using Professor Dworkin's own analytic technique*—is either a liar or a fool. The "right answer" takes on a mystical and mythical characteristic of ontological perfection that is both, as noted above, counterintuitive and unnecessary. Lawyers (and judges) who argue a losing cause do not lack "integrity," under any reasonable definition of that concept. They have instead simply identified a different "spot" within the area of "integrity" that is the "right answer" *for them*.

<sup>84</sup> DWORKIN, *LAW'S EMPIRE*, *supra* note 35, at 250.

<sup>85</sup> *Id.*

<sup>86</sup> *See supra* note 20.

<sup>87</sup> DWORKIN, *LAW'S EMPIRE*, *supra* note 35, at 250.

property cases, and so on, to build support within existing authoritative sources. In the context of *Javins*, the circles of authority might look like this:

Figure 2



Quite evidently, the dimensions of fit and making the law look its best are not at all starkly separate from each other as the graph above suggests.

One way to imagine this exercise is to view fit as having two dimensions of its own, what we could call “vertical” and “horizontal” consistency. The former is the more traditional search by a court (or lawyers more generally) for support for a decision by reviewing the existing legal material (prior opinions, say) in a given area of the law, and doing so chronologically—and hence “vertically”—over the many years that preceded the present case. For example, in the *Javins* opinion, this would be Judge Wright’s search through the doctrinal context of property law for landlord-tenant cases supporting some kind of implied warranty of fitness. On the basis of that effort alone, Judge Wright’s intended conclusion—that such a warranty exists within current law—would look very shaky indeed, for very little support for that proposition could be identified.<sup>88</sup> Thus, on the basis of the element of fit—the vertical axis in the “integrity” graph above—he would find himself toward the bottom. This would mean, in turn, that to hold that a warranty of habitability actually exists within the law, and to reach that decision *with integrity*, he will have to work extraordinarily hard on the dimension of best light to push the normative force behind his decision as far to the right in the graph as possible—that is, to

<sup>88</sup> The analysis would involve something like the following, although all the numbers in this chart are purely imaginary:

		Number of cases developing the concept of warranties of quality		
		<u>Property</u>	<u>Tort</u>	<u>Contract</u>
“vertical”	1950	0	1	2
	1960	1	4	6
	1970	4	10	20
	1980	4	15	25
	1990	5	20	30
		“horizontal”		

This data, if it were real, would indicate that the case law support for a warranty of quality within the realm of property law alone over time—a “vertical” analysis alone—would be quite low, and that the variable of “fit” in the integrity diagram would be correspondingly low. If, however, the search for case law support were extended across the range of doctrinal areas, support would increase substantially, and the “fit” amount would correspondingly go up.

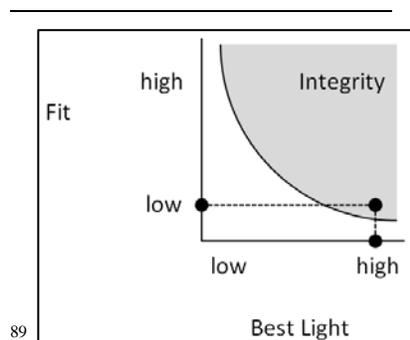
maximize that variable—to allow the minimal fit to be overcome, and the decision thus to appear to be within the “integrity area” of the graph.<sup>89</sup>

The brilliance of Judge Wright’s decision, however, is his skillful *avoidance* of that pressure by making an analytic move Professor Dworkin would heartily endorse: rethinking the dimension of fit by extending his search for support “horizontally” beyond the area of property law to include other (parallel, in a way) doctrinal legal areas like contract and tort law, where the critical underlying feature of relationships is more important, more evident, and more developed. Thus, by searching “across” the law, and counting the numerous decisions that appear in other “lines” (vertically) of cases that have imposed on sellers of goods implied warranties of fitness, Judge Wright found the fit—the preexisting legal support—he needed to make his decision concerning *landlords* all the more obvious and acceptable. In effect, he could move up the fit axis of the graph, and correspondingly make his decision seem all that much more obviously to fall well within the realm of integrity, and hence legal acceptability. His opinion, then, despite its evident boldness and creativity, and especially its controversial emphasis on the normative importance of protecting low-income tenants, could nevertheless look traditionally grounded and reasonable.

And so it is for Umpire Pinelli as well. Professor Gould does not want to be confined to arguing solely (and defensively) that the called strike was correct because the values of baseball—putting the sport in its best light—somehow alone demand that result. Although he will certainly so contend, he also wants to give the call additional support by placing it within the correct “legal” context as well, where “baseball precedent” will make it look reasonable. He wants the call to fit, in other words, within the history and traditions of baseball in a more descriptive, factual sense. He accomplishes this only by assertion, however, rather than citing particular authority: He contends that ample precedent exists for the proposition that in the circumstances of the “big game” a batter must “swing at anything close.” But we can certainly see better now why he seems compelled to make that argument: Putting baseball in its best light requires a more creative assessment of baseball precedent, and in turn, understanding that precedent in a broader form reveals the underlying values of the sport. Voila: Impressive decisional integrity generated through both variables.

### C. The Combined Contexts of “Scale”: Of Macro and Micro, and Justice and Fairness

Lying beneath the attention to, and manipulation of, context in each of our examples—the *Javins* decision, Professor Dworkin’s concept of fit, and Professor Gould’s assertions of historical foundation—and the way each switches between factual and legal distinctions, is an analytic perspective particularly fundamental to legal reasoning: the role played by the scale at which the context will be considered or defined. This step in fact establishes a critical link to the

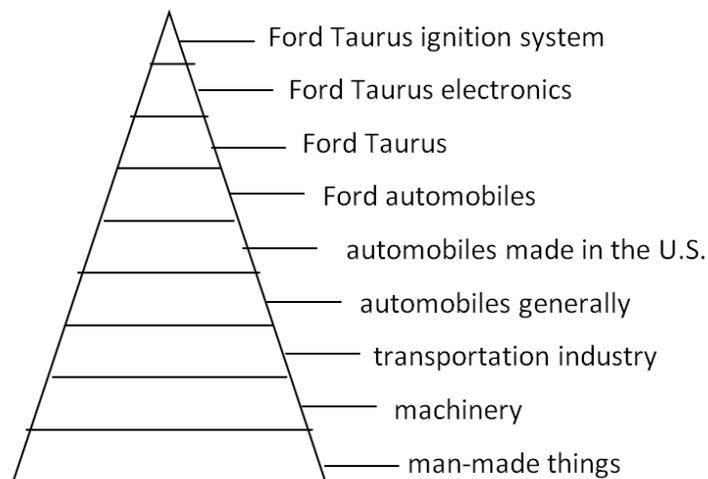


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next, and perhaps most controversial, element of legal reasoning, which will be examined in detail in Part V, *infra*: how these circumstances will be normatively assessed. But this transition between, on the one hand, what a legal arguer would like the audience to believe is a relatively objective establishment of context, and what the arguer must concede is the subjective, messier world of values, is sufficiently pivotal to the reasoning process that it needs more attention. The analytic dichotomy in this realm is not simply the difference between facts and law, or among various factual and legal categories, but a subtler factor. What *connects* the facts and law, and produces the true “legal story” before us for consideration, is the potential *breadth* of the implications of the story.

Quite simply, “scale,” or breadth, means levels of generality or specificity.<sup>90</sup> One way to organize this for law students is to suggest a rather familiar “fact pyramid,” where the base is the most general view of a situation and the top is its narrowest:

Figure 3



For example, the *factual* context of a case could be, at the top of the pyramid, that it involves specifically the ignition system of a Ford Taurus automobile, or, one step down, the electronics system in that automobile, or, more generally, an automobile of any sort, or machinery, or perhaps at its most general, things that are man-made, as opposed to naturally occurring. How should a court determine the precedential “relevance” or “meaning” of its opinion? To what kinds of cases will it be relevant in the future?

Gould’s essay is once again a terrific example of careful attention to this analytic detail. On this point of breadth, Gould is quite consistent, and emphatic: he is relentlessly “micro.” The Pinelli call did not involve merely any baseball game, like some generic and ordinary fish plucked from the ocean. No, this involved a *big* fish, perilously caught: Much more specifically and specially, this call occurred in an enormously significant World Series game. Correspondingly, this special game context means that, for Gould, the *human* context is just as narrow and specific: The participants here are not just a pitcher and a batter, but much more

<sup>90</sup> See Terrell, *Epistemology*, *supra* note 41, at 536.

personally, Don Larson—by name—the “competent, but otherwise undistinguished Yankee pitcher,” and Dale Mitchell—again, by name—a mere pinch hitter.

This very focused attention is not an accident, nor is it merely an effort to give his argument a “homey” or human touch. It is a deliberate effort on Gould’s part to push our consideration of appropriate values in the right direction. Since this is a particularly important point, allow me to rephrase it: If we are concerned simply about the care and feeding of baseball players generally, we may fret about Pinelli’s call a little bit as it might be imposed on this generic group; but if we see the situation personally (as Gould wants us to) as involving Larson and Mitchell individually in a magical, unique moment, we may connect more directly, and hence sympathize more readily, with values that legitimize Pinelli’s call, and worry less about its technical inaccuracy.

The critical point here is that we do not simply apply values to a situation—we worry quite explicitly about the scale, or level of generality, at which those values are going to be applied. Indeed, as Gould well illustrates, the decision about scale can be part and parcel of the normative inquiry—we find particular values to be critical *because* of the scale at which we choose to view the situation. If this is so, it becomes difficult to determine which—normative values (hypertext) or descriptive scale (context)—is truly dominant in the analysis.

To tie this discussion of scale back to the topic of language, with which we began, it is interesting to note that we have two different words that summarize our normative assessment of events that occur within the two different contextual views of the game.<sup>91</sup> If our perspective is “macro”—being concerned with the overall circumstance of the game of baseball in our society, and just as generally the thousands of people who play the game at any given time—then we ordinarily say that “justice” or “injustice” has occurred. If, on the other hand, our view is “micro”—as we focus on particularized events and people—then we characterize an event as “fair” or “unfair.” For example, children, who by definition see the world around them as focused on them quite specially, will label a disappointment in their expectations as “unfair,” not “unjust.” Justice, then, is about society, while fairness is about you and me.<sup>92</sup>

Interestingly, even though Gould establishes a relentless micro focus in his essay, he nevertheless refers only to justice rather than fairness. This is not altogether surprising, since, as I noted earlier, few people actually perceive a difference between the two terms. I would put Gould in this camp. This is not, however, necessarily an analytic defect. By conflating justice and fairness, he is inadvertently connecting himself to a recognized and respected philosophical tradition. John Rawls, in his much-admired work, *A Theory of Justice*,<sup>93</sup> performed the same move with admirable aplomb. He connected the two concepts of fairness and justice intimately by having the former lead naturally to the latter: If you can understand the demands of fairness, it

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<sup>91</sup> See Terrell, *Turmoil*, *supra* note 41, at 100-01.

<sup>92</sup> I do not at all mean to suggest here that the use of the terms “fairness” and “justice”—by either lawyers or the public at large—consistently reflects the connection to micro and macro perspectives developed in the text. For example, some might argue that the distinction between the two terms is actually rooted in the separation of procedure from substance: a substantively “just” law can nevertheless be implemented “unfairly,” or a “fair” election process is a necessary prerequisite to a “just” political system, and so on. But I would note two points. First, the distinction between substance and procedure is not at all at odds with the analytical distinction I am drawing between micro and macro—it is instead simply another application of it. Procedures apply to particular parties in adjudicative settings; substantive laws apply to society generally. Second, whatever inconsistency one encounters in the sometimes interchangeable use of the terms “fair” and “just,” this linguistic messiness does not diminish the importance of the analytic perspectives developed in the text. The words are simply an interesting manifestation—a possible bit of evidence—of our struggle with context within legal reasoning.

<sup>93</sup> JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

will tell you all you need to know to achieve justice as well—“justice as fairness,”<sup>94</sup> as he labeled it. Likewise, Gould is contending (without saying so directly, of course) that the obvious fairness of calling a strike in the precise circumstances of this particular game meant automatically that the call was consistent with justice as well.

I am dubious about this conclusion, however, for I think the difference between macro and micro must be taken more seriously. To establish the basis for my attitude, we will need to bring the values of hypertext more directly into play—which is the job of Part V, *infra*.

#### *D. Philosophical Context: Moral and Political*

Before we make that leap, another half-step is necessary to illustrate the overlap among all the analytic categories with which this article began. The distinction between micro and macro perspectives, and between the words fairness and justice, is mirrored in a traditional division within philosophy as well. The word “traditional” is important here because, although this separation has long been in the background of normative analysis, it has more recently been either ignored or denied, as the work of Professor Rawls demonstrates.

Corresponding to the perspective we have thus far labeled micro, and connected to the concept of fairness, is the realm of “moral” philosophy<sup>95</sup>—the set of values we attach to interactions on an intimate scale: how you and I should treat each other. On the other hand, corresponding to the macro-justice perspective is the domain of “social” and, more specifically for our purposes, “political” philosophy<sup>96</sup>—the set of values pertaining to larger scales of interaction: how men should treat women; how the institutions of our government should be arranged and guided; how, in the most general sense, we should govern ourselves. However, just as there is no evident break in the gradual movement from one end of the earlier “fact pyramid” to another, there is no clean break between these two philosophical categories. Hence, we should not be surprised if the separation between them will be challenged (or misperceived) from time to time. But, the key to note here is that the nature of facts themselves (and of course our perception and appreciation of them) creates the hierarchy depicted in the pyramid: the top and bottom of the pyramid are *not* the same. They are no doubt related, since they are part of the same hierarchy, but they are not identical. Therefore, we should also not be surprised if there is significant evidence that the *values* attached to different levels of the pyramid are also not identical.

This point will become critical for our understanding of legal reasoning, for lawyers in particular are continuously confronted with the challenge of operating professionally at both ends of the pyramid—often, indeed, simultaneously. Lawyers must necessarily attend to the micro, which is the client paying the bill—or less pejoratively, individuals who need their professional assistance. But simultaneously, that assistance involves the macro—guidance through the maze of the legal system, which is itself a part of our larger social and cultural setting. What, then, is the lawyer’s “proper” perspective: the client or the legal system?<sup>97</sup> Every lawyer always hopes

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<sup>94</sup> *Id.* at 11 (“[T]he guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness.”).

<sup>95</sup> See Terrell, *Turmoil*, *supra* note 41, at 100-01.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 110-13.

that these two consistently dovetail into convenient and comfortable advice. But every lawyer will also tell you that they do not. How, then, will the values of hypertext be applied to this contextual conundrum?

Note the connection again to Gould's essay. His wonderful sleight-of-hand is to personalize the story as much as possible, emphasizing individual people in a special one-of-a-kind setting, but then globalizing his observations and conclusions to the dizzying heights of all-encompassing justice. How did he do that? Clearly, he would have made a terrific trial lawyer.

## V. THE CHALLENGE OF "OUGHT": "HYPERTEXT" AS CATEGORICAL AND CONSEQUENTIAL VALUES

Part of the insight into Gould's analytic dexterity rests in the next step of connecting various possible circumstances to an underlying normativity—moving the analysis straightforwardly from description to justification. Here we finally confront directly, and add explicitly to legal reasoning, the element so often raised earlier in various forms, but left hanging—"ought," normative values, Professor Dworkin's "best light,"<sup>98</sup> and so on. The analytic question becomes this: How can an advocate defend her argument, or a court defend its reasoning, by demonstrating that the contentions or result reflect appropriate respect for the values and norms of our law and legal system? To develop this aspect of legal reasoning, note, however, that just as the topics of the previous sections of this article were not, respectively, "everything about language" and "every possible context," here, too, the topic is not "everything you ever wanted to know about philosophy." Instead, the focus, as it has been relentlessly, is on *reasoning*: how we analyze, approach, and apply the abstract subject of values—how we *organize* our understanding of normativity. And, more particularly, the examined subjects are not all possible forms of normative reasoning and organizing, but those efforts that seem most characteristic of the legal mind.

We discover, once again, that that mind, when approaching, defining, or defending normative arguments, is analytically split between two fundamental perspectives, which sometimes complement each other, but sometimes clash and compete.<sup>99</sup> On the one hand, there are values that are "categorical" (unconditional, universal), like "human dignity" or "treatment as a moral equal," and on the other, values that are "consequential" (contingent, result-oriented), like "increased happiness" or "enhanced economic efficiency."

### A. Distinguishing Categorical From Consequential

This normative dichotomy travels under different labels, all closely related. Philosophers sometimes debate whether "right" behavior (categorical) determines "good" outcomes (consequential), or vice versa; or whether deontology (the study of fundamental duties and related rights) should dominate teleology (the study of social ends), or vice versa;<sup>100</sup> or whether *a priori* values (those that somehow pre-existed our current circumstances) are more fundamental than *a posteriori* values (those we derive from our experiences), or vice versa. We will here avoid much of this detail by focusing on the basic point that a normative argument in a case can

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<sup>98</sup> See *supra* text accompanying note 79.

<sup>99</sup> See, e.g., Terrell, *Turmoil*, *supra* note 41, at 90, 102-05.

<sup>100</sup> See SIR W. DAVID ROSS, FOUNDATIONS OF ETHICS 114-67 (1939). This distinction is also developed at length in the modern classic, A *Theory of Justice*. RAWLS, *supra* note 93, at 28, 32, 446-48.

be based either in fundamental values themselves without regard to real-world consequences, or instead in the idea of a better-functioning community—or both together. The usual indication of which perspective is in play in a case is whether a claim is labeled “legitimate,” which is code for categorical, or “reasonable,” which means appropriately consequential.

The question in this segment of legal reasoning is this: Which of these perspectives, if either, will dominate the forming of an argument or the assessment of a case?

This is rather abstract and abstruse stuff, and it would be nice if, as in other instances in this article, we could use Professor Gould’s essay as a starting point or introduction. But Gould’s discussion of the values underlying his analysis and conclusion are so frustratingly obscure and implicit that it is actually easier to start with a legal example that explicitly struggles with the distinction between these normative approaches.

Perhaps the easiest legal example of this distinction is the never-ending debate over the “deep” (that is, fundamental) theory of freedom of speech: Why does the Constitution guarantee this particular right?<sup>101</sup> It could be because, consequentially (teleologically), freedom of speech produces a “better” society, all things considered: The reasoning could be that with lots of ideas out there circulating, we can compare and contrast competing propositions to determine which produce more praise-worthy or acceptable social results. Or, quite differently, it could be because, categorically (deontologically), we believe that all citizens are entitled, as a matter of individual dignity, to express themselves, whether or not what they have to say will be instrumentally “useful” to anyone.

One standard law school case study of this distinction is the effort by the American Nazi Party and the Ku Klux Klan to obtain a permit to hold a parade/demonstration down the main street of Skokie, Illinois—a city well known for having a significant population of survivors of the Holocaust.<sup>102</sup> What could be more offensive or unproductive? The officials of the city predictably rejected the application for a permit. But the Nazis and the Klan found an ironic ally: the American Civil Liberties Union, which challenged the city’s action, and won a significant victory for them in the federal courts.

The argument by the ACLU was not that their clients had anything useful or appropriate to say. Instead, it was that as citizens, they were nevertheless entitled, simply as an aspect of their citizenship within our social and political community, to the inherent human right to express themselves, even though the vast majority of the community would find their statements not just worthless, but harmful to our very sense of community in the first place.<sup>103</sup> It was a courageous,

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<sup>101</sup> Explanations and justifications for freedom of speech are legion. *See, e.g.,* Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES*, 18-20 (1941); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1; MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970).

<sup>102</sup> *See* PHILIPPA STRUM, *WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR SPEECH WE HATE* 1 (1999); Smith v. Collin, 439 U.S. 916, 916 (1978) (Blackmun, J., and White, J., dissenting from denial of certiorari). Skokie had a population of approximately 70,000 persons, a majority of which were Jewish. *Id.* Of these Jewish residents, a number were survivors of World War II persecution. *Id.* In March 1977, the National Socialist Party of America “publicly announced plans to hold an assembly in front of the Skokie Village Hall.” *Id.*

<sup>103</sup> Smith v. Collin, 439 U.S. at 918 (“On the one hand, we have precious First Amendment rights vigorously asserted and an obvious concern that, if those asserted rights are not recognized, the precedent of a ‘hard’ case might offer a justification for repression in the future. On the other hand, we are presented with evidence of a potentially

relentlessly categorical, argument—that freedom of speech was based in values themselves, pure and simple, and not in any particular outcome produced by the expression. And it was an argument that cost the ACLU, in the short term, a significant chunk of its membership.<sup>104</sup>

Although this is a particularly dramatic example, it is by no means unusual. The constant struggle in litigation is to determine (hopefully, with the kind of “integrity” identified earlier by Professor Dworkin) which of the contending parties possesses the requisite “rights” that will justify a ruling in its favor. The hypertextual question is whether this reasoning should be based on the categorical values reposed in the arguments of one party or the other, or should it be grounded in the consequences, either to these parties or to the community more generally, that will flow from one result or another? Specifically, should the (categorical) value of “dignity” at the heart of the freedom of speech—a value possessed even by Nazis—prevail, or should we be more concerned with the quite negative (consequential) impact of the Nazis’ behavior on the residents of Skokie?

Answers here are by no means obvious—but *that is precisely the point*. The analysis described in this article is *not*, as emphasized throughout, to produce answers and more easily resolve legal controversies. It is instead to produce better *questions*—it is a roadmap for either advocates or judges as they formulate and assess legal arguments. Here, the objective is to reveal the variation in hypertextual strategies so that one can recognize the important differences in the value-based claims being made.

In *Javins*, for example, either of these philosophical perspectives could be used to justify a result for *either* party. The case is simple enough: A landlord seeks to evict, or extract money from, a tenant who has failed to pay rent (indeed, admits readily to doing so). A court could quite legitimately, according to the analysis of legal reasoning here:

- *categorical; landlord wins*: emphasize the categorical property rights of the landlord, which requires respect for the lease agreed to by the tenant that gave the tenant the right to be on the premises, and imposed on the tenant the responsibility to pay rent; or
- *categorical; tenant wins*: emphasize the categorical rights to human dignity possessed by the tenant not to be subjected to inhumane treatment by a powerful landowner, a tenant who never actually “agreed” to live in squalor; or
- *consequential; landlord wins*: quite differently, focus on the consequences to the immediate or larger community in which these parties interact, concluding that a ruling in favor of the landlord would maintain stability in the housing market, thus benefiting the social context appropriately; or
- *consequential; tenant wins*: reason that a ruling for the tenant would force improvements to be made in the premises available to renters generally, thus also improving social circumstances.

Or, a court could mix elements of several or all of these approaches. In any event, any of these outcomes could be said to reflect an effort by the court to put the law involved in its best light, and thus be a reflection of a court reasoning with “integrity.”

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explosive and dangerous situation, enflamed by unforgettable recollections of traumatic experiences in the second world conflict.”).

<sup>104</sup> When it decided to take on the litigation in 1977, the ACLU had 200,000 members nationwide. STRUM, *supra* note 102, at 23. Towards the end of the year, as the litigation dragged on and garnered much attention in the press, the ACLU had lost about 30,000 members, or fifteen percent of its membership. *Id.* at 82.

In the *Javins* case itself, Judge Wright, in holding for the tenant and imposing the implied warranty of habitability, employed primarily the categorical perspective in the tenant's favor, although he seemed to assume that positive consequences would also follow in the local low income housing market more generally.<sup>105</sup> He reasoned, for example, that the lease must be interpreted with reference to the "legitimate"<sup>106</sup> (note: not "reasonable") expectations of the parties—meaning the expectations of a person entitled to a sense of human dignity seeking decent shelter, rather than a farmer seeking land to plow. The key for present purposes is to note that with this approach, Judge Wright did not need any testimony from the tenant herself that would demonstrate what her "actual" expectations might have been at the time she signed the lease—that information was now irrelevant. Judge Wright determined that the tenant was entitled to refuse to pay rent as a matter of, quite simply, categorical values rather than contingent, specific consequential impacts on the parties.

### B. Combining Context and Hypertext

Now, as if things weren't daunting enough, the analytic circumstances *really* get complicated. More is going on in Judge Wright's assessment of the factual and legal situation in *Javins* than just different approaches to values that might be employed. He is evidently also, and simultaneously, applying any relevant values at different "scales" of reference: Are the keys here the values to be associated *in particular* with either Ms. Javins or her landlord, or the values attributable to the *community more generally*—tenants as a group, or landlords as a group, or the wider community of Washington, D.C.?

This additional step obviously links us back to the preceding section's focus on context: We noted there that legal reasoning could divide itself between focusing on factual distinctions or legal distinctions, and that both would be assessed by reference to different scales of analysis, from micro to macro. Adding hypertext to the mix, we now realize that legal reasoning can quite straightforwardly produce for *any* case four different analytical perspectives:

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<sup>105</sup> See *Javins*, 428 F.2d at 1077 (noting for example that "the nature of today's urban housing market also dictates abandonment of the old rule").

<sup>106</sup> *Id.* at 1075.

		CONTEXT	
		MICRO	MACRO
HYPERTEXT	CATEGORICAL	<i>Values</i> connected to the <i>parties</i> are key (e.g., Ms. Javins’s “dignity”; OR her landlord’s right to the sanctity of contractual obligations)	<i>Values</i> associated with the <i>community</i> are key (e.g., tenants as a group seek something more than just a place to “exist”; OR landlords have established a market based on time-honored “property rights”)
	CONSEQUENTIAL	The <i>impact</i> on the <i>parties</i> is the key (e.g., Ms. Javins should not have to live in squalor; OR her landlord should not suddenly be forced to operate a business without cash-flow)	The <i>impact</i> on the larger <i>community</i> is key (e.g., tenants will be assured that the available housing stock will not be disgusting; OR landlords will not be burdened with new responsibilities that will cause them to leave the market, and hence make the housing shortage for low-income tenants worse)

Note how challenging this picture is: *Each* of these perspectives can be the basis for a ruling in favor of *either* of the parties. The point here—to emphasize it once again—is *not* that the process of legal reasoning will generate any particular result, but that it can generate a *range* of legitimate outcomes. Most importantly, that range can be identified and predicted *in advance*, and hence be the basis for careful legal analysis and argument. This is the key, I would argue, to “sophisticated” lawyering.<sup>107</sup>

### C. Back to Professor Gould

Professor Gould’s essay can now be seen as another impressive example of this skillful mixing of context and hypertext to produce a desired result and make it look eminently reasonable. Beyond the circumstances of the World Series game itself, values certainly matter critically to his defense of Pinelli’s call, for he invokes nothing less than “justice” to vindicate him—indeed, a sense of justice grounded in our deepest American political justification of “democracy.” But, where did Gould’s normativity come from, and what is its nature and structure? Unfortunately, Gould only asserts these values and their relevance rather than trying to prove the point, so we will have to do some speculating and filling here to round out the argument.

Gould seems rather obviously to emphasize the categorical over the consequential. His argument is apparently that the unique circumstances of that particular game—the World Series—combine with the unique virtues of dignity, human struggle, and the striving for excellence to produce a clearly justified outcome. The values critical to him seem rooted in democracy. He asserts, indeed emphasizes, that the event must be viewed from the political

<sup>107</sup> This has been my argument throughout a series of articles analyzing the nature of philosophical and legal disagreement. *See supra* notes 41, 49, and 53.

theory perspective that “*single* acts of greatness are intrinsic spurs to democracy”—that is, that our democracy’s most basic normative assumption—“rule by the people”—is justified by our abiding assumption that *anyone* among us is capable of an heroic act. Equality, then, upon which democracy is based, is ironically, but powerfully, rooted in the *unequal*: individual behavior worthy of praise and admiration. Thus, it is important that the pitcher of this perfect game is not a great baseball star, but an ordinary Joe called upon to produce a brilliant performance over the course of an entire game, in contrast to the momentary pinch-hit batter. In this situation of extraordinary pressure at the culmination of extraordinary effort, the “law” of baseball—to be decided by the umpire, not by a jury of players or fans or anyone else—would *have* to be, would it not, that the batter bears a special burden—he must “swing at anything close.” Just as Gould says, “[t]ruth is a circumstance [this special game as a whole], not a spot [the particular pitch and its precise location].”

Now we can see all the factors in Professor Gould’s reasoning come into play. The definition of a strike depends upon separating the physical facts from the normative values at stake; those values must in turn be assessed within the proper context, which is micro in character, focusing on the extraordinary event of this particular World Series game and its final inning when the law of baseball itself may undergo a shift; and in this narrow and unusual circumstance, the hypertextual values that are key are therefore not consequential in nature, since the ramifications of the umpire’s call in this singular game will necessarily be quite limited in scope and future relevance to the game of baseball generally, but instead categorical, as Gould links the event to our most fundamental moral and political norms.

This result is by no means inevitable, of course. Reasonable people could disagree at each analytical point along this journey. For example, at the final stage of invoking fundamental values, one could argue that Gould’s connection between democracy and heroism is misplaced. A different approach is illustrated in Bertolt Brecht’s play *The Life of Galileo*<sup>108</sup> in which one of Galileo’s students criticizes him for succumbing to the pressure of the Catholic Church to recant his scientific findings in exchange for his life. The student laments, “Unhappy the land that has no heroes!”<sup>109</sup> After further chastisement by the student, the scene ends with the student, now ill with disappointment, being helped from the stage, and Galileo responds quietly: “Unhappy the land that is in need of heroes.”<sup>110</sup> Perhaps this is the problem with Gould’s praise of Pinelli: It misapprehends, one could say, the very nature of our civil society, which depends for its deep justification not on the occasional extraordinary act by impressive individuals, but on the vast bulk of ordinary behavior by people humble enough to expect to be treated with equal dignity no matter what the circumstances. Thus, the focus of our attention at that World Series game should not be on Don Larson, the glorified pitcher, but Dale Mitchell, the forgotten pinch-hitter, who is entitled to just as much respect.

The point here is not, however, that Gould got it wrong, for the analysis in this article does not depend on any particular conclusion about Pinelli’s call. The point instead, as it has been from the beginning, is simply the reasoning behind our assessment of the call. With careful attention to the elements of that process, one should be able to see more clearly the layers within the thinking of Professor Gould or Judge Wright or anyone else presenting a “legal” argument. The matter at stake is therefore, as noted earlier, only indirectly the presentation of sophisticated legal *answers*; it is more directly the effort to develop the sophisticated legal *questions* that lie

<sup>108</sup> BERTOLT BRECHT, *THE LIFE OF GALILEO* (Desmond I. Vesey trans., 1960).

<sup>109</sup> *Id.* at 107.

<sup>110</sup> *Id.* at 108.

“under” or “before” those answers. At its most practical and instrumental, then, this article is about listening to an opponent’s contentions carefully to identify spots of weakness and strength. It is the essence of “thinking like a lawyer.”

## VI. SUBTEXT: THE NATURE AND IMPORTANCE OF JUDICIAL “DISCRETION” WITHIN POLITICAL THEORY, AND A RETURN TO CHIEF JUSTICE ROBERTS

But a last step in this process of unpacking legal reasoning is evidently missing. All things considered, Professor Gould’s essay ends quite oddly. Having mounted a spirited and impressive defense of Pinelli’s called third strike, Gould nevertheless acknowledges that the famed umpire returned to the locker room after the game “and cried.” If, according to Gould, Pinelli was so “correct” in that call, why would he do so? Has Gould just been kidding throughout his essay, knowing all along that Pinelli was in fact quite wrong in making that call—and indeed *knew* that he was wrong? Or is there a final twist to the story that we need to add? Could the tears indicate, in other words, the recognition by Pinelli not of a personal momentary mistake, but of a deeper, more profound *institutional* mistake impacting the game of baseball itself?

### A. Subtext: Psychological vs. Institutional Explanations

Students are split on the explanation for Pinelli’s emotional reaction after the game. Most seem to believe that Gould is correct in his positive assessment of Pinelli’s call, and that Pinelli knew he had decided correctly, all things considered. But the tears, they believe, came from the extraordinary pressure of the moment. This was, after all, a fabled moment of the only perfect game in World Series history, and likely the only one ever to be pitched, and it was that unique circumstance that simply overcame him when he had a chance to pause and reflect. It was a release, pure and simple. Others, however, believe that Pinelli broke down because he knew that, because of the pressure of the moment, he had gotten it (technically) wrong. He had called a strike not because the pitch was “in fact” a strike, but because, in the intense pressure of the moment, he made the call he *wanted* to make—to give Don Larson his perfect game—but not the call the rules of baseball directed him to make. Thus, he had failed in his responsibilities as an umpire (by acting arbitrarily), and indeed failed when it mattered with particular gravity. From this perspective, his only defense, of course, would be that he believed, along with Gould, that the pitch *should* be a strike—that Larson somehow (categorically) *deserved* the strike call, and deserved it more than the batter deserved a technically accurate call. But that convenient move into hypertext isn’t consistent with his tears. Perhaps, then, he recognized the thinness of this value-based façade, and was simply, and appropriately, ashamed for having made such an inaccurate call in front of the entire baseball world.

Unfortunately, neither of these competing explanations can ever be proven to anyone’s satisfaction, which means that the issue will forever remain frustratingly in doubt. But this is not where the matter should be left. Another perspective is possible that, while no more certain descriptively or psychologically, does provide a kind of analytic satisfaction—a version of closure, if you will, on our connection of Umpire Pinelli to the world of judicial decision-making. Rather than attempt to explain Pinelli’s tears in the limited form of either emotional catharsis or embarrassment for a specific mistake, we could (and should) connect his response to our foundations of context and hypertext—by blending them into another, separate element within our topic of legal reasoning. In doing so, we will, at long last, return to, and appreciate in

a new way, the remark made by Chief Justice John Roberts, noted at the beginning of this essay, about the judge's job being merely to "call the balls and strikes."

Pinelli's reaction may, for our purposes here, be understood best not as a reflection of *personal* angst, but of a larger and more profound *professional* regret on his part: His tears could reflect his realization that the key importance of his call was *not* whether it was "right" nor "wrong" in any sense we have thus far identified—that is, whether the pitch was a strike according to the baseball rule book (text), or because the social or cultural circumstances of the game (context) said so, or because the deeper values of the game (hypertext) justified the label. Instead, and quite differently, he may have been—and perhaps should have been—upset when he realized that the call was questionable *institutionally*, concerning *his role* in the game as an umpire—what I will label the analytical element of "subtext:" From this perspective, the issue in his mind would not have been the narrow issue of "strikes" and "balls" as such, but more profoundly the concept of *umpiring* itself—the nature of the difficult task of decision making he was required to accomplish. Perhaps he realized that, despite the comfort offered by Professor Gould's defense of his call, he had made an error *independent* of (perhaps even "*deeper*" than) the call itself.

What he might have regretted was his violation, as almost he alone could have perceived it, of his function as a "judicial" arbiter within baseball disputes. It was not his eyesight or his reasoning that had gone astray. Instead, it was his mishandling of his professional status of a decision maker operating with some degree of discretion<sup>111</sup> which had caused him in turn to impact the game inappropriately—in fact, to *redefine* the game itself. The dislocation he may have perceived he had introduced was not, then, linguistic or circumstantial or normative—it was *political*.

This is a subtle but important point within the complex topic of legal reasoning, and one we have yet to face directly in this essay. But again we have a convenient analytical bridge that will allow us to see the link between the difficult circumstances faced by Umpire Pinelli and those confronted by judges on a regular basis.

#### B. "Scorer's Discretion" and a Positivist Approach to Judging

The perspective we need is provided by H.L.A. Hart's *The Concept of Law*, which continues to be, even after almost half a century, the single best development of a "positivist" approach to law and legal systems. Hart's perspective rigorously denies that law needs a foundation in any particular set of moral values to be valid and effective.<sup>112</sup> At an early point in his argument about the proper way to imagine how legal systems develop sociologically,<sup>113</sup>

<sup>111</sup> In a return to the problem of the inherent differences between decision making in baseball and the law first discussed in note 7, *supra*, this idea of "discretion" actually reinforces the similarities of the two contexts. Anyone who has played baseball at a significant level will recall a coach or manager yelling to a batter: "Protect the plate! Protect the plate!" (usually followed by something like "You moron!"). What the coach is acknowledging is the inherent human fallibility that will characterize the umpire's effort to call balls and strikes: The pitches are fast and the margins are small. The batter must assume, then, that the "discretion" that will be exercised by the umpire may well be disadvantageous, and pitches at the margins will therefore have to be scrutinized carefully and defensively. By the same token, lawyers advising clients always know that a judge's discretion in contested situations may well be exercised in a direction the lawyer and client do not like, and they too will "protect the plate" in the sense of structuring their circumstances as carefully as possible to avoid these marginal situations. Litigators will nevertheless, of course, always portray their positions as not marginal at all, but "straight down the middle."

<sup>112</sup> HART, *supra* note 12.

<sup>113</sup> Professor Hart's agenda was to *describe* how a legal system, and hence law, came into being, not to *justify* any particular aspect of a given set of laws. *Id.* at 17 ("[The purpose of the book] is to advance legal theory by providing

Professor Hart suggested an example drawn, conveniently for us, from sports. Imagine a game—soccer, cricket, baseball, whatever—that is being played. The game has players that can claim they are playing the game because they have a set of shared rules in their heads that define the nature of the game, including what they are trying to accomplish within this competitive and cooperative environment, what actions are permitted and forbidden to the players, and so on (what Hart labeled an “internal point of view” about the game). The game can continue as such, and be enjoyed, as long as the players simply know, and agree among themselves, what these rules and expectations are. Disputes about violations of the rules will certainly arise from time to time, but as long as the players can work things out, again simply among themselves, the game will be able to proceed.

To this familiar, uncomplicated picture, Professor Hart added another element and posed a challenging question: What would happen to the game if an “official scorer”<sup>114</sup> of some kind became the arbiter of issues involving the game’s rules? Does the nature of the game itself stay the same, or does it change significantly, shifting from its original soccer or cricket to what Hart called “scorer’s discretion”<sup>115</sup>? Surely it is supposed to remain the same game, with the same rules and expectations, but now with an improved method of resolving disputes.

Hart’s point, of course, was that this common sense observation was consistent with, and helped confirm, the positivist perspective about the nature of a society’s legal system: Just as the most basic rules of—and intrinsic values within—a game develop and are accepted among the players *before* there is a referee or umpire designated to help make them behave properly, so too the most basic values characterizing a community (its internal point of view) develop *before* there are any judges designated to resolve disputes. In Professor Hart’s terminology, “primary rules of obligation”<sup>116</sup> precede the invention of “secondary rules”<sup>117</sup> that help resolve disputes about the nature and application of the primary rules—that is, the rules that guide umpires and judges as they make decisions. “Official scorers,” then, do not—and should not—normatively

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an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena.”) The book is therefore much more a sophisticated piece of sociology than philosophy. The following sequence of footnotes concerning Professor Hart’s text are necessarily very summary and limited, intended only to connect this article’s discussion to certain basic (rather than all of the) analytic concepts within his rich description of law and legal systems.

<sup>114</sup> *Id.* at 142 (“Like the changes from a regime of custom to a mature system of law, the addition to the game of secondary rules providing for the institution of a scorer whose rulings are final, brings into the system a new kind of internal statement; for unlike the players’ statements as to the score, the scorer’s determinations are given, by secondary rules, a status that renders them unchallengeable.”).

<sup>115</sup> *Id.* (“There might indeed be a game with such a rule, and some amusement might be found in playing it if the scorer’s discretion were exercised with some regularity; but it would be a different game. We may call such a game the game of ‘scorer’s discretion.’”); *id.* at 144 (“Up to a certain point, the fact that some rulings given by a scorer are plainly wrong is not inconsistent with the game continuing . . . . The fact that isolated or exceptional official aberrations are tolerated does not mean that the game of cricket or baseball is no longer being played. On the other hand, if these aberrations are frequent, or if the scorer repudiates the scoring rule, there must come a point when either the players no longer accept the scorer’s aberrant rulings or, if they do, the game has changed. It is no longer cricket or baseball but ‘scorer’s discretion’ . . . .”).

<sup>116</sup> *Id.* at 98 (“Under the simple regime of primary rules [legal guidance] is manifested in its simplest form, in the use of . . . rules as the basis of criticism, and the justification of demands for conformity, social pressure, and punishment. Reference to this most elementary manifestation of [legal guidance] is required for the analysis of the basic concepts of obligation and duty.”).

<sup>117</sup> *Id.* at 98-99 (“With the addition to the system of secondary rules, the range of what is said and done [legally] is much extended and diversified. . . . These include the notions of legislation, jurisdiction, validity, and, generally, of legal powers, private and public.”).

transform the game; instead, they simply inherit whatever game they have been instructed to observe.

Judges, by the same token, from Hart's perspective, inherit the legal system that preceded them as well. They do not have an independent normative foundation from which to impose improvements upon the society that has designated them as decision makers. The moral content, or lack of such content, of any of the rules of their society should not matter to any judge doing his or her job appropriately. The rules are simply the rules, to be applied to the facts as straightforwardly as humanly possible, no matter how uncomfortable or unfortunate those directions may be from the judge's own personal perspective. Perhaps the most extreme version of this approach, not surprisingly rendered from a civil law perspective,<sup>118</sup> comes from Montesquieu: Judicial judgments are to be "fixed to such a degree that they are never anything but a precise text of the law."<sup>119</sup> Judges were "only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor."<sup>120</sup> Thus, judicial power becomes "invisible and null."<sup>121</sup>

This would seem, then, to be the perspective offered by then-Judge Roberts in his remark during his confirmation hearings: He is simply a good, old-fashioned positivist, understanding the task of judging as letting the game of life proceed as it will, making "calls" occasionally in disputed or close moments when an independent eye is necessary, but otherwise not insinuating himself into the contest. "Life," then—in all its social, political, legal, and moral complication—remains the same, basic game it was before he (like all judges) arrived on the scene. No independent element of "discretion" has been introduced to alter it meaningfully.

This would seem to be a happy, comfortable, and, above all, *politically legitimate* resolution of the issue. But our questions here now become these: Is this reasoning, and positivist defense (i.e., "these are the pre-existing rules and I have no institutional authority to ignore or change them") available to Pinelli—and by extension, to Chief Justice Roberts? Did Pinelli's called third strike permit baseball to remain baseball, or had he transformed it, even for just a moment, into "scorer's discretion"? Had he injected himself into the game as an independent force or variable that made him a "player" as well? But most important of all: If we conclude that he had indeed become a part of the game, is that necessarily *wrong*, as the positivist approach seems to maintain?

### C. Varying Perspectives on Institutional Subtext

At this point, you should not be surprised to learn that (at least) three possible approaches to this issue are immediately evident, each based on the analytic perspectives developed earlier: text, context and hypertext. As the assessments of Pinelli's call progress from harshest to kindest, they offer different explanations for Pinelli's tears after the game. In turn, they each offer different assessments of whether the "scorer's discretion" analysis is available as a defense for then-Judge Roberts' remark.

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<sup>118</sup> The distinction between civil law and common law systems can be summarized thus: "The common law has its source in previous court decisions. The main traditional source of the common law is therefore not legislation but cases. . . . In civil law countries, cases are simply not a source of law—at least not in theory. . . . Civil law jurists tend to see the civil code as an all-encompassing document." JANE S. GINSBURG, *LEGAL METHODS* 66, 69-70 (rev. 2d ed. 2004).

<sup>119</sup> CHARLES DE SECONDAT DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 158 (Anne M. Cohler, Basia C. Miller & Harold S. Stone trans. and eds., Cambridge Univ. Press 1989) (1748).

<sup>120</sup> *Id.* at 163.

<sup>121</sup> *Id.* at 158.

### 1. Pinelli and the Supposed Primacy of Baseball's "Text"

First, perhaps Pinelli realized that he had indeed erred in a profoundly political way because, by failing to apply the rule of strikes in the manner contemplated by baseball's rulebook, he had altered the game itself—indeed, in its most celebrated and venerated moments in a World Series game. He had, in effect, transformed the game from one of exacting, consistent expectations and demonstrated skill, to one of approximation (“close is good enough”), suddenly uneven demands (“batters must swing defensively, rather than pitchers must pitch accurately”), and endorsed paltry performance even though based on earlier skillful performance (“given all your earlier good pitches, I’ll let you get away with a few bad ones”). From this perspective, Professor Gould’s defense of Pinelli on the basis of the supposed unwritten rule that “batters must swing at anything close in a big game” was actually nothing more than a thinly veiled rationalization for his error and an excuse probably based in Gould’s biased attitude toward the outcome of the game. Perhaps Pinelli thought the call made *him* look biased as well: Maybe he had always harbored favoritism toward the Yankees, and it emerged most evidently in that particular moment. Or, maybe he had, over the course of the game, developed sympathy for Larson personally because of the pitcher’s superior performance up to that point. In either event, despite Gould’s attempt at praise, Pinelli’s tears of embarrassment would be both explainable and justifiable, based on his non-umpire-like method of defining a strike.

And, as noted above, perhaps this would be Judge, now Chief Justice, Roberts’s perspective as well. His theory of judging, at its most fundamental, could be that judges should conscientiously avoid “interfering” in the social milieu they have been asked to assess from time to time by introducing elements *extrinsic* to that setting. They should take the text of the rules they must apply as *the* key to their decision making. The other analytic factors of context and hypertext—of circumstances and values—may certainly come into play simply because the judge will be human and will consider in some background sense whether the “specialness” of the game or any of the players should make any sort of difference, or whether the game has an underlying normative dimension that would justify a modification of the usual rules. But these elements would be perceived as the interlopers they are, sneaking into an analysis that should instead remain focused on the consistent application of the pre-existing, announced rules of the game. The “life” of baseball should not be altered just because umpires have been hired to call the balls and strikes.<sup>122</sup>

Examining the opinions of then-Judge Roberts reveals much evidence of this approach. When confronted with the problem of defining an important word or phrase in a text—a statute, of course, given the Court on which he was serving—Judge Roberts never, as far as I can determine, launched into the kind of creative, multi-factored analysis pursued by Judge Wright in *Javins*. To the contrary, if a text did not reveal its own meaning on its face, he regularly simply turned to another text: a dictionary. For example, to define “action for money damages”<sup>123</sup> and “complaint,”<sup>124</sup> he turned to Black’s Law Dictionary; to define “divert,”<sup>125</sup> he employed Black’s

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<sup>122</sup> I readily concede that this description of Chief Justice Roberts’s thought process is remarkably politically neutral, if not friendly. It does not acknowledge that his thinking may be much more related to a conservative social and legal agenda of much controversy. That kind of assessment, however, is well beyond the scope and purpose of this article.

<sup>123</sup> *Amoco Production Co. v. Watson*, 410 F.3d 722, 733 (D.C. Cir. 2005).

<sup>124</sup> *Id.*

<sup>125</sup> *PKD Laboratories Inc. v. U.S.D.E.A.*, 362 F.3d 786, 801 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the decision).

and the Oxford English Dictionary. The fact that dictionaries can have disagreements among themselves would not seem to matter much, since whatever differences they may have would introduce less flexibility and controversy into the situation than a judge turning to sources as broad and unanchored as context or values.

In circumstances in which neither “plain text” nor a dictionary would (relatively) settle the matter of meaning, Judge Roberts would, in statutory interpretation circumstances, turn to the traditional limiting factor of the statute’s “purpose.”<sup>126</sup> Although this would seem to open a door to a much wider and richer inquiry, Judge Roberts never found any serious difficulty in divining Congress’s direction. Even though a reference to “purpose” would necessarily send us outside the strict confines of “text”—which would suggest disconcertingly that context and hypertext would inevitably seep into the analysis—by focusing on *Congress’s* supposed purpose, any circumstances or values that might be invoked to give meaning to any words would be *Congress’s*, not his. No significant independent inquiry on his part would be necessary.<sup>127</sup>

Similarly, Judge Roberts certainly acknowledged in a couple of cases<sup>128</sup> that the words of a statute could indeed be broad and ambiguous, leading to challenges in their interpretation. The explanation for this phenomenon lies again in the concept of legislative “purpose,” for Congress had apparently meant just that: a breadth of discretionary results: “The fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity, it demonstrates breadth.”<sup>129</sup> “The Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application.”<sup>130</sup> But in both these instances, this looseness in the law did not trouble him, for the discretion created by the statute did not apply to *him* (meaning the judiciary), but to administrative officials who would use this breadth of authority to create and apply regulations that would fill in these “gaps” in the law. Hence, *his* (balls-and-strikes) “call” remained easy: The question was only whether *others* had discretion and had exercised it legitimately. Perhaps *their* judgment “calls” would now reach out beyond text to context and hypertext, but that was equally untroubling because Congress had implicitly endorsed that approach for these non-judicial actors.

None of these examples would seem to be of much comfort to Umpire Pinelli, however. Baseball’s “text” on strikes seems rather clear, with no discretionary breadth. Dictionaries will not add anything to the analysis. A resort to “purpose” would seem disingenuous and self-serving: There is no one to whom Pinelli could delegate the call who might be able to legitimately exercise the discretion he so much seems to want to apply. Judge Roberts’s approach as applied to Pinelli, then, would lead to nothing but the conclusion that the umpire simply got it wrong (by introducing considerations extrinsic to the textual definition of *strike*), pure and simple. Tears of professional embarrassment would, in turn, be appropriate.

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<sup>126</sup> See, e.g., *AT&T Corp. v. F.C.C.*, 394 F.3d 933, 939 (D.C. Cir. 2005) (noting that “[t]he whole purpose of the tariff provision in question was to ensure that benefits could not be transferred without concomitant obligations”).

<sup>127</sup> I also recognize that this discussion of statutory interpretation is, as a general matter, quite quick and superficial. But the nuances in this realm of legal reasoning are beyond the more basic scope and purpose of this article. For those who might be interested in digging deeper here, I will note that I have developed this topic at length from an analytic perspective very similar to the structured approach advanced here. See Terrell, *Epistemology*, *supra* note 41.

<sup>128</sup> See, e.g., *In re England*, 375 F.3d 1169, 1179 (D.C. Cir. 2004).

<sup>129</sup> *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001).

<sup>130</sup> *Consumer Elecs. Ass’n v. F.C.C.*, 347 F.3d 291, 298 (D.C. Cir. 2003). Judge Roberts cited to both *Consumer Elecs. Ass’n* and *PGA Tour* in *In re England* to rebut arguments for a narrow application of a federal statutory provision that were based on a plain language reading of the provision. *In re England*, 375 F.3d at 1179.

To avoid this harsh conclusion—to supply other, kinder explanations for Pinelli’s emotional catharsis—we must therefore employ other elements of legal reasoning: We must develop more carefully the “is” and “ought” of Pinelli’s *political* role in the game. Perhaps alternative perspectives lie in viewing Pinelli’s role *not* as *extrinsic* to baseball—that is, as somehow outside this milieu—but as *intrinsic* to it—that is, as directly part of, and necessary to, the game itself. That will require resort to context and hypertext, either of which can nevertheless be the source of angst leading to tears.

## 2. Context: Pinelli and the Ambiguity of the Game’s “Circumstances”

As a second possibility for assessing whether Pinelli misbehaved *as an umpire*, we might become much more sympathetic to Professor Gould’s praise of the called third strike if we were able to examine much more carefully and thoroughly the *facts* of the game itself—meaning the way baseball is actually played from the sandlot to the professional ranks, and in ordinary games all the way to the World Series—what we noted earlier Professor Hart called the “internal point of view.” We might discover (or at least conclude to our satisfaction) that Gould is correct as a psychological matter concerning the expectations of the players involved—that players do indeed anticipate that in a situation like that faced by Umpire Pinelli, the pitcher does get a break of some unknown number of inches in the strike zone. This would then allow Pinelli to root his call in what scholars of, for example, property law and international law (and indeed, what Professor Hart would attribute as a feature to English law generally) would readily recognize as “custom.”<sup>131</sup> an unwritten, but nevertheless existing and legitimate, part of the “rules” of the game. The “customary law” of baseball might then include, just as Gould argued, this “rule” that “in a big game, at key moments, batters must swing at anything close.”

While this certainly makes Pinelli’s actions less arbitrary and more institutionally acceptable, troubling questions nevertheless linger: When does the usual definition of a strike shift? What is “close enough” to justify a strike call? Part of the job of the umpire would then seem to be to exercise the authority to decide these difficult points whenever necessary. But in the absence of widespread and articulable agreement on these important details, we would seem to be back to the world of “scorer’s discretion” where the game is at the mercy of the potential arbitrariness of a non-player. Baseball becomes “whatever the umpire says is baseball.”

Nevertheless, this could be what the players and fans *in fact expect*: In difficult game situations, a certain amount of arbitrariness is simply unavoidable. Pinelli’s call was not, then, really either “right” or “wrong”—it was just a decision he had to make where he had been given the authority to make it. The “customary law” of baseball was that the umpire, from time to time, would have to identify these occasional unwritten rules, perceive their relevance, and apply them at the appropriate moments.

But with such a happy defense, why would Pinelli cry after the game? Here, we actually return to the favorite explanation of the law students: All the ambiguity surrounding these customs could be the basis for serious decisional angst, for difficult questions now abound. Does the supposed custom actually exist? Do players actually have this particular expectation about

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<sup>131</sup> For an example of the use of custom as law in the United States, *see, e.g.*, *State ex rel. Thornton v. Hay*, 462 P.2d 671, 676-79 (Or. 1969) (using English doctrine of custom to create public rights in dry sand areas of coastal beaches). For discussions of custom in international law, *see, e.g.*, ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971), and *THE NATURE OF CUSTOMARY LAW* (Amanda Perreau-Saussine & James B. Murphy eds., 2007). Indeed, Professor Hart argued that custom was a fundamental feature of English law generally. *See* HART, *supra* note 12, at 44-48.

variations from this particular (otherwise written) rule? Did the umpire apply this variation well, and in the appropriate moment, or did he or she go too far? Or not far enough? The more that reasonable people can disagree on any of these points, the more pressure Pinelli could have felt about the weightiness of his decision—about whether he was just “calling” the game, or altering it. Emotional release in such a “politically” charged circumstance would seem quite reasonable.

In turn, that pressure could be relevant to the apparent reluctance of Justice Roberts to push his view of judging beyond the text of the rules. The search for unwritten forms of guidance is scary and dangerous, for it infuses the “official scorer” into the game in important ways that the players and observers may not fully appreciate. These participants may *think* they know the nature of the game they are playing, but at crucial moments, they could be wrong—and wrong in ways that they would not have been able to look up in any text anywhere. The argument by a defender of Umpire Pinelli would be that if these players had been paying attention appropriately, they would have known about these subtle variations, and have known that they might be imposed, so nothing “unfair” has occurred. But it seems troubling, does it not, that a judge—an official *arbiter* of the rules, rather than an actual *rule-maker*—has the authority to identify, define, and apply these rules that have never otherwise been officially adopted by the relevant community.

So Professor Gould was right—although Chief Justice Roberts would presumably disagree—when he observed that baseball “truth” isn’t a spot; it’s a “circumstance.” There is a “range” of truthful strikes into which Pinelli could insert himself, just as a judge can be “in the neighborhood” of justice. And an important judicial task then becomes determining the scope of that expected and accepted discretion. Chief Justice Roberts’s statement about “balls and strikes” therefore could be seen as rather disingenuous if by it he meant that a “range” of possible decisions facing a judge<sup>132</sup> does not exist—that rules are rules are rules, without meaningful variation available in their application—or that, despite the fact that rules can be messy, the job of a judge is nevertheless to perceive and ground each decision in rulebook-like “certainty.” That is a daunting political image for the judiciary to aspire to portray. Is it also dishonest?

### 3. Hypertext: Vindicating Pinelli Through Baseball’s Values

A third perspective from which to determine whether Pinelli’s call was an example of good or bad umpiring, in and of itself, also draws on something potentially intrinsic, rather than extrinsic, to baseball: the deeper normative values that are a constituent part of the game. Why does baseball exist, particularly at a professional level, and continue to be such an integral part of our culture? It is at least, in part, because of its celebration of athletic excellence (indeed, excellence that can be measured with the exactness of calculations to three decimal points), the individual integrity (usually) and personal investment of those who play, the teamwork that is nevertheless necessary for success, the history and continuity of the game, the strategy and intelligence that is necessary to win games at the highest levels, and so on. What is interesting here is that there seems to be an additional, subtle element that is integral—unavoidably necessary—to achieving all of these values, something beyond the players themselves, or the venues in which they play, or the fans that flock to watch: *It is the umpires*. The more “important” the game—that is, the more critical to the appreciation of the game the elements of excellence and integrity and strategy and so on become—the more the game requires an “official

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<sup>132</sup> “Range,” as Chief Justice Roberts uses the term here, arguably translates into the area (as opposed to a single spot or one-dimensional line) of “integrity” in the graph appearing earlier in this Article that I derived from Professor Dworkin’s theories and analysis. See *supra* note 83.

scorer” to become involved to endorse these feats formally for the historical record, rather than anecdotally among friends. Sandlot games, in other words, are one thing, while professional games are something else altogether. These two contexts are not, in fact, the same game, in a normative, value-laden sense.

This observation now becomes the true basis on which Pinelli’s call can be either justified *or* condemned—not just “explained” as a rational act. The argument would be, from this hypertextual perspective, that the game of baseball itself, at this higher level, has become a game dependent on the presence of, and the decision-making authority of, umpires. The values inherent in the game demand that this extra “player” be introduced to the situation: Without umpires, the professional game in particular cannot sufficiently manifest the values it needs to remain the game we have come to respect. Thus, the game of baseball *has* become altered by the addition of “official scorers,” not because the scorers have forced or remolded it into a new form of “scorer’s discretion,” but because the values of excellence and integrity and the like at this very high level of expectation cannot be adequately and appropriately appreciated and implemented without them.

Understood in this way, umpires do, and are expected to do, much more than just “call the balls and strikes.” They exist to make certain that the values that keep the game alive and well are manifested in the way the game is being played. Part of their responsibility would, therefore, obviously be to follow the “rules” of the game as articulated in the text of its official rulebook—but that is *only* a part. The additional question would always be whether the particular application of any given rule in a particular context is consistent with the long-term normative health of the game, or whether a variation on the rule, widely but perhaps not perfectly perceived, would be better for the game overall.

This is apparently what Professor Gould meant when he characterized Pinelli’s call as not just respectable (as grounded in some existing “custom”), but “his finest, his most perceptive, his most truthful moment.” The call was, for Gould, the vindication of the umpire’s role itself. It was a reflection of an umpire carrying on the deepest, most important traditions of the game, recognizing that the key *values* of baseball could, in the right instances, determine the “rules” by which the game would be played. “Truth” in baseball—those normative elements that sustain it—is therefore indeed *both* a “circumstance” (a variable context) and “inviolable” (a constant categorical norm). In the end then, if the values remain the same even if their applications vary, hypertext can be the dominant decision-grounding factor.

Why, then, Pinelli’s tears, if he got it so right? That’s precisely the problem: How would he *know*, in this pressure-packed moment, that he *had* gotten it right? With something as abstract, and undoubtedly controversial, as baseball’s values as stake, how could he assure himself that he had made the correct call? Others could argue just as vociferously as Professor Gould that Pinelli got it exactly *wrong*: In the game’s toughest moments, the job of the umpire is to apply the rules of the game as rigorously, technically, and carefully as possible. The umpire is *not* to get swept up in the emotional circumstances of the Big Game, but to remain aloof and judicious, to keep even this Game within the best traditions of the sport. The strike zone should not vary for either the pitcher or the batter, but remain relentlessly consistent, as baseball’s values of excellence, integrity, and respect require.

The tears, then, represent doubt—not about the “accuracy” of the call, but about whether it was the most appropriate, the most professional, call that could have been made. Did he have the values right, or had he done something that would hurt the game? Which values were the more important: those of the game in some general and amorphous sense, or those of treating the

individual players fairly and with respect? Did others see the unique context of this World Series moment the way he did, and particularly the way that context impacted the values of baseball? Would others understand and appreciate his “creative,” contextual, perhaps “customary” approach to the rulebook’s definition of a strike? These are tough, difficult, worrisome issues, the kind that vindicate Soren Kierkegaard’s famous, but seemingly exaggerated, observation that moments of decision are “moments of madness.”<sup>133</sup> They are the moments when all the elements of reasoning come together—perhaps more accurately, *crash* together—simultaneously. For those who must make contested, close decisions on a regular basis, this makes for serious professional angst.

#### D. From Umpires to Judges: And a Renewed Appreciation for “Judicial Independence”

Which returns us to the connection between Pinelli’s plight and the debate about the nature of judging. Now the issue is fully formed, for surely this complex analysis of decision making is controversial on several fronts when it is expanded beyond the realm of the game of baseball. It is one thing to perceive umpires as permitted—as a matter of the institutional “political” structure of baseball—to unearth from the game they observe the values that are intrinsic and critical to it, and make judgments based thereon; it is quite another to imagine permitting judges the same range of political authority to examine society from their vantage points behind the bench to find the values that are similarly essential to civil society, and thus determine the way in which they will apply society’s “law” to its citizens. But this is the essential political issue: One might well argue that the role of the judiciary should be much more limited and circumspect, focused on finding facts and applying law determined by our texts. If a rule needs to be modified to handle an unusual situation more acceptably, it is up to other political actors, with more political accountability, to make that change. This is the only way to ensure that our civil life does not become a version of “scorer’s discretion.”

But despite the reasonable modesty of this approach to the issue, it fails to capture an important nuance within the debate that must be confronted. No doubt “social life” as a general proposition could certainly go on whether or not we have judges available to adjudicate disputes, as indeed human interaction in all its forms preceded the existence of any formal judiciary. Thus, in the absence of judges, people would still buy and sell, eat and sleep, love and hate, and everything else we do. But could *civil life*, certainly in any modern form as we have come to understand and expect it, continue in anything like an acceptable form without the presence and participation of judicial arbiters? Would our economy still function, our interactions remain constrained, our communities continue to operate in a supportive manner, if we did not have—not just police to arrest wrongdoers—but also an accepted, legitimate form of settling disputes among us—some guidance, in effect, about the use of the police? I don’t think anyone could reasonably argue that these fundamental features of ordinary life would survive meaningfully.

Indeed, I would argue that the United States, as a political community, abandoned the view of a limited, myopic, super-neutral set of judicial “scorers” well over two hundred years ago. The

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<sup>133</sup> Although this phrase is often attributed to Kierkegaard by other philosophers, like Jacques Lacan and Jacques Derrida, among others, its precise location within Kierkegaard’s own work is notoriously difficult to pin down. See, e.g., Geoffrey Bennington, *A Moment of Madness: Derrida’s Kierkegaard*, 33 OXFORD LITERARY REV. 103 (2011). It is no doubt drawn from *Fear and Trembling*. See generally S. KIERKEGAARD, *FEAR AND TREMBLING* (Walter Lawrie trans., 1941). Derrida’s use of Kierkegaard in *Force of Law* is typical: All we get is “The instant of decision is madness, says Kierkegaard.” Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 11 CARDOZO L. REV. 919, 967 (1990) (Mary Quaintance trans., 1990).

Constitution did *not* assume, as had the Articles of Confederation,<sup>134</sup> that the existing, local, traditional judiciary—the kind that assisted in the assessing and settling of occasional disputes—was sufficient to address the kind of disagreements that would arise in the future. To the contrary, the Framers foresaw that national-level disputes would doubtless arise, and resolving them would require a judiciary adequate to this more challenging task.<sup>135</sup> Not surprisingly, then, that political entity was established by the same fundamental document as the rest of the new national government. By the same token, all states have established their own supreme courts to perform the same critical task. This must mean that this country’s political “game” *included* “scorers” from the very beginning—not for the purpose of imposing themselves on the game and transforming it as they pleased, but to be part and parcel of the action that would become modern life. The more challenging this game would become, the more important a thoughtful, sophisticated “scorer” would be to it. In the absence of this scorer, the game would be diminished, and its athletes (lawyers and the legal system) underappreciated.

This means, then, that judges, properly understood in their most fundamental political sense, are not simply *observers* of “balls and strikes.” They are instead essential to the *existence* of balls and strikes in the first place. The key proposition is therefore this: Judges do not exist as a part of modern political life to make the “easy” calls that make the sandlot game a bit more efficient and (perhaps) fun and satisfying; they exist to make the frequent “hard” calls that our circumstances now demand for us to remain a viable civil community. The “players” in this “game” of civil life expect nothing less, for the game itself has been redefined by all of us to include the presence, and authority, of these “official scorers.”

This observation, I think, gives additional perspective to the concept of “judicial independence” about which we hear from time to time—quite often from the judiciary itself.<sup>136</sup> Judges are indeed not “players” in the drama of real life the way the rest of us are; they are “scorers” who should be able to provide this vital function without being harassed by the players or the fans. The ability of an umpire to end a dispute by throwing a player or manager out of the game is therefore entirely appropriate and easily explained: At some point, to preserve the game itself, interference with the umpire’s function must end, and the umpire is in fact in the best position at that moment to make that determination. By the same token, judges must be able to operate from a vantage of perspective “outside” the fray that produced the dispute that is before them. It is not as if they do not live in our ordinary non-judicial communities—they most certainly do. But those communities should not be able to dictate to a judge—once the issue of a “score” has been brought before him or her—what the judge’s assessment of the situation should be.<sup>137</sup>

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<sup>134</sup> See generally, ARTICLES OF CONFEDERATION of 1791, available at [http://avalon.law.yale.edu/18th\\_century/artconf.asp](http://avalon.law.yale.edu/18th_century/artconf.asp).

<sup>135</sup> See THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>136</sup> The literature on judicial independence is immense. See, e.g., THE JUDICIAL BRANCH (Kermit L. Hall & Kevin T. McGuire eds., 2005); BRENNAN CENTER FOR JUSTICE, NYU LAW SCHOOL, JUDICIAL INDEPENDENCE: AN ANNOTATED BIBLIOGRAPHY (1999); Chief Justice Harry L. Carrico, *A Call to Arms: The Need to Protect the Independence of the Judiciary*, 38 U. RICH. L. REV. 575 (2004); H. Jefferson Powell, *The Three Independences*, 38 U. RICH. L. REV. 603 (2004); Chief Justice William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579 (2004); Penny J. White, *An America Without Judicial Independence*, 80 JUDICATURE 174 (1997) (former state supreme court justice).

<sup>137</sup> This does not at all mean that judges must necessarily enjoy life-tenure and be insulated from the democratic processes of election. A community *can*, quite consistently with the analysis here, be given the political authority to remove a judge from office for unpopular decisions (or anything else), just as a baseball umpire can be fired for

Perhaps most daunting of all, however, is the further observation that because judges are essential to the game, they are also essential to the *values* that constitute and justify the game. An important additional conclusion is therefore unavoidable: Every judicial decision will be relevant in some way to the values that are inherent in civil life, and the only question becomes whether judges acknowledge that fact or attempt to hide from it.

The fact that hypertext permeates the legal process does *not* mean, however, that these values are now clear and uncontroversial and readily available for reference in every judicial decision. Quite the contrary, the only point here is that moral and political values are unavoidably intertwined within every decision, even though those normative propositions can remain murky and in serious dispute within civil society. Consequently, my complaint about Chief Justice Roberts’s attempt at institutional modesty with his “balls and strikes” reference is not that his analogy was inaccurate; it was instead misleading. It sounded like the job of judging is a purely objective task of applying given facts to given legal texts, and the outcomes then determine themselves—so long as the judge has a good pair of glasses to use when considering all this material. If Chief Justice Roberts meant that his theory of judging was that judges should not insinuate themselves *personally* into legal life to turn that game into “scorer’s discretion,” that is one thing—one would hope that judges have not been elected or appointed for the purpose of running amok. But if he meant that the values embedded and reflected in the legal world are simply *not relevant* to a judge—that such considerations are to be conscientiously ignored or denied—then that is something else altogether. It reflects a failure to understand the nature of judging itself, which I am certain he does not in fact misperceive so badly. I therefore attribute the remark simply to the convenient politics of the moment: the theater of the confirmation hearing, where no one would attempt to unpack his remark carefully to see the difficulties and contradictions contained within it.

## VII. CONCLUSION: SUSPENDING CYNICISM

A “strike” isn’t simply a physical space, even if that physicality dominates the usual analysis of it. A “lease” isn’t simply the document that seeks to memorialize it, even if the words on that paper dominate the usual understanding of the relationship. A “statute” isn’t only the words that comprise it, even if the initial inquiry into its meaning inevitably begins there. The “art” of legal reasoning is the ability to understand any of these legal concepts thoroughly—multi-dimensionally—which requires more analytic sophistication than commonly believed.

But that skill will inevitably entail anxiety occasionally as well. Thanks to Professor Gould’s remarkable essay, Umpire Pinelli’s dilemma illustrates particularly well the struggle of the conscientious decision maker to do “the right thing.” In facing any issue of “line-calling,” where something must be declared to be inside or outside the boundary of some concept, like a strike, the judgment we hope will be applied will always entail attention to the texts that attempt to communicate and define the matter, the circumstantial contexts within which the matter is to be approached and appreciated, the normative hypertexts that make the matter significant to us, and the institutional political subtexts relevant to the institutions assigned to decide the matter. There simply is no “simply” in “simply calling the balls and strikes.”

On the other hand, making these calls is not impossibly difficult either. The argument here has been consistent with the classics on legal reasoning in that the emphasis has been on

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incompetence. The point is that this dramatic decision is not made *at the time of the controversial decision*—in the heat of the moment—but at regularly scheduled political (or employment) intervals.

“reasoning” rather than particular results: An analytic process exists for assessing claims as to “in-ness” or “out-ness,” and it is that method we demand of judges of all types, and which should be watched carefully. Reasonable people can always disagree about outcomes; they cannot, however, deny that a complicated, challenging, but accepted and respected, process lies underneath all those conclusions.

Kierkegaard, therefore, did exaggerate: Decisions are not “moments of madness.”<sup>138</sup> Instead, they are instances of suspended cynicism. Judges must accept that their goal is not perfection, but legitimate imperfection. Just as Professor Gould suggested, decision making in complex human circumstances is not about “inviolable truth” but “truthful *moments*,” when one accepts that one is operating in a world in which disagreement must be managed, rather than agreement imposed. The classics in legal reasoning thus enjoy their status because they are correct: Legal circumstances are murky, but they can be analyzed logically and rigorously, even though the thinking will be suffused with values over which we clash.

This is inevitable, it is difficult, and it breeds controversy. Welcome to the law, and to the angst of judging.

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<sup>138</sup> See *supra* note 133.