

THREE FALLACIES OF INTERPRETATION: A COMMENT ON PRECEDENT AND JUDICIAL DECISION

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American jurisprudence has for many years been preoccupied with the nature of judicial decision-making. One of the virtues of that preoccupation has been the progressive refinement of our understanding of the act of judging in "hard" cases. But if a price has been paid for this hard-won understanding, it is the surrender of sophistication about the process of deciding "easy" cases. This is because the almost inevitable move that must be made to examine the exceptional case is to create a category for the unexceptional with which to compare it. The unexceptional, easy case goes unscrutinized. It involves an issue that is already "settled", is "clearly" governed by an existing rule of law and allows little if any room for disagreement about the "proper" result. In contrast, the exceptional case presents a problem not yet settled, existing rules of law seem not to govern it authoritatively, and there is disagreement about the proper way to resolve it.

This dualistic conception of adjudication has shifted attention away from the notion that the essence of a legal system such as ours, in easy or in hard cases, is its reliance on precedent as a determinant of decisions. Under this dualistic view, there are some cases for which there are no relevant precedents; these are the exceptional, "hard" cases. The rules inherent in the body of past decisions must then be relegated to the realm of the unexceptional, standard case. In such a dualistic scheme, precedent will have little role to play where existing rules do not dispose of the issue at hand.

Although the distinction between easy and hard cases dominates

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legal discourse, it has not captured the legal imagination. Anyone familiar with the legal process knows that the distinction is misleading. There is, of course, reliance on precedent through the entire spectrum of legal decision. Yet we also know that some cases are easy and some are hard, and that they are easy or hard in part because of precedents which do or do not seem determinative of the questions they raise.

Professor Ronald Dworkin has shed much light on this paradox by characterizing decisions even in hard cases as relying on precedent as a determinant of decision.¹ Dworkin argues that even where there is no existing rule of law that governs an issue, the principles presupposed by the decisions of the past are binding on the judge and provide him with one right answer to almost every legal dispute.² Although Dworkin thus accords precedent a central place in his formulation, he nevertheless seems to accept the distinction between the unexceptional and the exceptional, the easy and the hard case. Reasoning about the significance of the past will, for him, be different in the two kinds of cases. His judge must look for rules that bind, and if he finds them, the case will be an easy one to decide. If such a rule is not discovered, different and more difficult reasoning will be required to reach a correct decision.³

This essay will explore some features of this problem that have been given too little attention in the debates about the nature of judicial decision. Whether precedent is conceived as the binding force of existing rules or as the discovery of principles embedded in the law as a whole, its functions in judicial decision-making are similar. By anchoring the justification for both easy and hard decisions in a past—in history and tradition—a legal system circumscribes the authority of its judges, who must make decisions in the present. The process of interpreting the past thereby becomes one of the defining features of legal reasoning. Furthermore, in our system it is not the past itself but the method used to interpret the past which binds decisions in the present. It is through interpretation that the past is constituted and reconstituted in the present. Uncritical acceptance of the existence of easy cases hides this central fact. Even in easy cases the past must be interpreted. When our “strategies” of interpretation change, what was once an easy case may become hard to decide.

Three fallacies about the nature of interpretation support the distinction between hard and easy cases. By examining these fallacies we will be able to see more clearly what interpretation is, and how the

1. See R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977).
2. *Id.* at 104; Dworkin, *No Right Answer?*, in LAW, MORALITY AND SOCIETY 58 (P. Hacker & J. Raz eds. 1977).
3. Dworkin names his hypothetical judge “Hercules.”

strategies of interpretation that we hold in common are in fact the precedents that bind decision.

THREE FALLACIES OF INTERPRETATION

Lurking behind much commentary on the nature of judicial decision is a contrast between an ideal of adjudication and the imperfections of the process as it actually operates. The imperfections are not those of individual judges (although of course these exist), but supposed deficiencies in the devices relied upon by law to govern conduct: the vagueness of language, the subjectivity of interpretation and the incompleteness of legal rules. I will argue that the notion that these are imperfections is fallacious. My point, however, is not to deny that language is "vague", interpretation "subjective" or legal rules "incomplete." Rather, it is to indicate that these propositions presuppose ideals (verbal precision, interpretive objectivity, completely inclusive rules) that are created in the same manner as their ideal opposites. That is, both perfection and imperfection can only be produced and exist meaningfully within a setting where strategies of interpretation render phenomena vague or precise, objective or subjective and complete or incomplete.

Characterizations of the judicial process that view it as a combination of two types of decision-making—one occurring when the ideal obtains (the easy cases), and the other when one or more of the imperfections exist (the hard cases)—ignore the fact that the ideals and their imperfect counterparts are both characteristics of interpretive settings. In this sense it is the interpretive community that is ultimately responsible for the products of interpretation. Focus on the difference between easy and hard cases, and on the perfections and imperfections associated with them, therefore camouflages the fact that both hard and easy cases spring from the same source.

The Vagueness of Language

Legal theorists sometimes imply that the judicial role would be mechanical and judicial decisions predetermined if it were not for the inherent weaknesses of language. Thus Professor H.L.A. Hart, though he praises this situation because it avails us of flexibility in the future, notes that what he terms "open texture" is "a general feature of human language."⁴ Of course, Hart's notion of "open texture" can have significance only in contrast with those situations in which the texture of language is not open. Yet Hart himself acknowledges that the distinc-

4. See H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961).

tion between the two situations is not at all firm. "The plain case," he indicates, "where the general terms seem to need no interpretation and where the recognition of instances seems unproblematic or 'automatic,' are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms."⁵

In noting what in fact makes case law (and language) plain, Hart has provided us with insight into the nature of open texture. Vagueness and precision are not properties of language alone, but of language operating in situations. The plain case is plain because it is "constantly recurring in similar contexts" and "there is general agreement" about the meaning of language that may be applied to it. In short, meaning is a function of agreement, not of anything inherent in the words we use. Vagueness, imprecision, and open texture are the absence of agreement.

Language, then, is not vague or precise in the abstract. We agree on meaning, or are certain that language is vague, in situations where we hold strategies of interpretation in common. The now classic debate between Professors H.L.A. Hart and Lon Fuller illustrates the point.⁶ A part of the debate concerned the meaning of a rule prohibiting "vehicles" in a public park. Hart argued that there are some activities plainly prohibited by the words of the rule: for example, operating automobiles. This is not, however, because when the word "vehicles" is used it always includes operating automobiles, but because, as Professor Fuller argued in response, there is no readily imaginable situation in which the *purpose* of the rule would not comprehend operating automobiles.⁷ Other activities are not plainly prohibited merely by reading the words. Professor Hart suggested bicycling as one of these.⁸ In this respect the word "vehicles" does have an open texture. But if this is so, it is not because the word itself has a clear core and a vague penumbra. It is because we cannot agree on the purpose of the rule (is it supposed to prevent movement at high speed or noise?) or because even though we agree on its purpose (it is to prevent movement at high speed) we are uncertain about the strength of that purpose.

5. *Id.* at 123.

6. See Fuller, *Positivism and Fidelity to Law—A Reply To Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958); Hart, *Positivism and The Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-15 (1958). In the portion of the debate with which this discussion is concerned, Hart argued that in order for rules to communicate their meaning, words must have a settled central core of meaning, even if they also have penumbral meanings that may or may not be applicable. Fuller responded that words do not have standard instances that remain constant regardless of context. He argued that the central concern of legal interpretation is not the meaning of words, but the purpose and structure of the rules in which words are contained.

7. See Fuller, *supra* note 6, at 633.

8. See Hart, *supra* note 6, at 607.

In both simple and hard cases, the essence of the legal reasoning that leads to a decision is oriented to a past, or a tradition, whose force is only loosely captured by the term "precedent." In the plain or easy case, the effect of that tradition is unrecognized, because it is embodied in our agreement on the meaning of the language of the rule. In the hard case, we also refer to the past, but we must do so more consciously because the situation is problematic rather than "normal" or "constantly recurring." Even here we produce agreement on the meaning of the language of the rule by constructing the context in which it should be understood. Purpose is a kind of shorthand for context, and, of course, purpose is not something that must be either closed or open, wholly determined or devoid of fixed content. It is, rather, understood in relation to what is already known about the rest of the legal and social system. And what is already known is part of both the past and the present. Moreover, as the next section argues, what is already known is determined by strategies of interpretation so ingrained and fundamental that the idea that a judge could subjectively choose to ignore them mistakes the nature of interpretation.

The Subjectivity of Interpretation

The notion that interpretation is plagued by the reader's subjectivity is in many ways a counterpart of the linguistic fallacy discussed in the previous section. If language is inherently imprecise, then those applying it to human activity must, it is supposed, have discretion in interpreting it. And, under this view, what is the exercise of discretion but the choice of personal preference—the subjective—over the impartial, impersonal and objective?

This conception of interpretation, a caricature of what we now think of as legal realism, has a curious affinity with another straw man of legal theory: formalism, or "mechanical" jurisprudence. On the one hand, each approach is unremitting in its rejection of the other. For the formalist, legal interpretation is an objective process in which the true meaning of a case or statute is simply searched for and discovered. For the realist, this notion is a hopeless impossibility—a myth—and the metaphor properly associated with interpretation is not discovery, but creation. On the other hand, under each view meaning is derived from a source that is independent of a community of interpretation. Either legal texts, including the body of past decisions, are objects in the world with an existence and meaning of their own, or the law is nothing but the creation of individual judges, whose fundamental subjectivity renders interpretation arbitrary and hides the fact that the past never binds

the present. Under both views, therefore, the fundamentally social character of interpretation is ignored.

Of course it is difficult to find anyone today who will admit to believing in either the theory of mechanical jurisprudence or legal realism. Nevertheless, it is also difficult to find an account of legal interpretation that is not at some level a combination of the two. Theoretical dualisms pepper the more measured and balanced examinations of judicial decision—easy versus hard cases,⁹ the core of meaning versus the penumbra,¹⁰ judging versus legislating.¹¹ Each pair reflects the presupposition that interpretation is and can be objective up to a point, and insists at the same time that beyond this point something individualistic and therefore subjective must take over.¹² Formalism and realism are not transcended by such explanations; rather, they are simply combined in a compromise. What the two have to say about interpretation, however, exhausts what the combinations have to say as well.

This system of thought has old and deep philosophical roots. At least since Descartes, the dominant analysis of questions concerning the basis of human knowledge has been in terms of objects and subjects.¹³ We are accustomed to thinking of outer and inner worlds, of texts and readers, language and language users, fact and value, as though these are ultimately grounded distinctions. It is thus profoundly difficult to reason without relying on these paradigms. The most plausible explanation within this mode of thought for the general agreement among readers on the meaning of a text is that there is such agreement because that *is* what the text means. And the most plausible way to account for disagreement among interpreters is likewise to ascribe responsibility to the text. Only where there is such disagreement is the text thought to be vague, confused or ambiguous, and the reader free to exercise his subjectivity.¹⁴ Where the text is "clear and unambiguous" and an occasional reader nevertheless produces a deviant reading, something of a crisis may be precipitated, and various explanations aimed at reducing the raw threat posed by such deviance may be adopted. The reader is

9. See R. DWORKIN, *supra* note 1, at 81.

10. See Hart, *supra* note 6, at 607.

11. See R. DWORKIN, *supra* note 1, at 82-84.

12. See F.R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 13-33 (1975) (cognitive versus creative functions of the judge); H.L.A. HART, *supra* note 4, at 124 (plain case versus open texture).

13. See Michaels, *The Interpreter's Self: Peirce on The Cartesian "Subject"*, 1977 GA. REV. 383.

14. Nor will resort to context as a means of resolving the problem be successful. Contexts, too, must be interpreted, and their interpretation may raise similar problems. The difficulties of relying on legislative history are only one example. See Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676, 684-85 (1980).

persuaded to surrender his view, or we are persuaded to accept his. He provokes from us an admission that interpretation is subjective (his reading is the text's meaning *for him*); or he is (at least for this purpose) insane—he does not see the reality we see.

Tolerable though these accounts may be for some purposes, they are unsatisfactory characterizations of judicial decision-making, because they make the same error as did the account of language's imperfections. Meaning is not the cause of agreement, but the product of it. Agreed-upon ways of reading may become so common that the characteristics which these readings have deposited in texts come to be thought inherent in the texts themselves. On other occasions the strategies of the reading community will not be monolithic, and the textual object will not appear to have a "plain" meaning. But this is not to say that when meaning is not plain, interpretation is necessarily subjective. If meaning is the product of agreement, then interpretation is a fundamentally public act, requiring by definition a community of interpreters in order to take place. And the existence of a "community of interpretation," to use Josiah Royce's term,¹⁵ presupposes a set of interpretive strategies that will bring meaning into being, whether or not it appears plain.

This conception casts much doubt on the viability of the idea of an individual "self" operating independently and subjectively in an interpretive situation. The judicial "self" will always already hold beliefs that are constitutive of the texts it interprets. Yet these beliefs are not subjective—they are by definition what that self has in common with a community of interpretation. In a sense, the judicial self does not "have" beliefs, because the beliefs "have" it, and they have that self in common with others.

None of this provides any protection against one of the fears prompting the charge that legal interpretation may be subjective—that judges in hard cases may decide as they wish. Nevertheless, it does supply a different account of what it means for a judge or any interpreter to "wish" to read a text in a particular fashion. Arguably, it would be impossible to read any other way—what would it mean to understand a text in a way contrary to one's wishes? Yet reading in accordance with one's wishes is not subjective in the way that is often claimed. To read a text in accordance with one's purposes or prejudices is still to read in accordance with a learned set of interpretive strategies.

Moreover, judges do not merely read. They must also explain

15. See J. ROYCE, *THE PROBLEM OF CHRISTIANITY* 211-75 (1967). For a brilliant development of the notion of communities of interpretation, see generally S. FISH, *IS THERE A TEXT IN THIS CLASS?* (1980).

their interpretations and attempt to justify them. The justification for judicial decisions must be given in terms of widely accepted strategies of interpretation. We merely need note how narrow (though admittedly far-reaching in impact) are the disagreements among judges even in landmark cases to recognize the force of the interpretive constraints within which they operate. Competent members of the legal community can easily predict the range of choices available to a court even where no rule is directly on point. The terms in which the justification of a decision is phrased are normally seen as legitimate. Even if one disagrees with the result, the court's rationale generally quite clearly conforms to an established point of view concerning the issues addressed.

The realist response to this account would distinguish between the "real" reasons for a judge's decision and the justifications he marshals in support of that decision. Traditionally, this critique is refuted at two levels. At an empirical level, it is said that judges in fact typically do make decisions for the reasons they cite in their opinions rather than for ulterior motives. This empirical response, although perhaps correct, offers itself as a mere contingency that has happily come true rather than as a logically unavoidable outcome of the very act of judging. At a normative level, it is argued that judges ought to decide in accordance with accepted justifications and that the possibility of imperfection does not weaken the ideal. This normative response, of course, conflicts with the account I proposed above because it presupposes an ideal of strategy-free interpretation. Yet in easy as well as hard cases, judges cannot avoid being guided by such strategies.

Thus, the notion that some private mental activity by a judge may hide from view the true reasons for decision mistakes the nature of interpretation. Although decision may occur in private, it will inevitably be the product of the manner in which that judge reads the world, including the body of past decisions from which justifications must be derived. A judge who looks at a legal dispute that is ripe for resolution will inevitably see what his (and our) strategies of interpretation have already injected into the dispute. In a contracts case, for example, he will see offer and acceptance, a meeting of the minds, conditions, warranties and beneficiaries, or he will see the absence of these phenomena. The idea that these and all other legal constructs can somehow simply be escaped, and a judge's desires substituted in their stead, gives these desires a deliberative quality they simply cannot have.

It is also important to recognize the context in which the charge that judicial decision-making in hard cases is subjective has arisen. Theories of precedent have been principally concerned not with the

ultimate metaphysical status of judges and legal texts, but with the nature of judging as distinguished from legislating. These theories have described the presumed division of functions between the legislative and judicial branches in order to fashion justifications for the apparent power of the courts to make new law. This search for justifications of judicial power inevitably confronts the last interpretive fallacy we will explore: the assertion that legal rules are inherently incomplete.

The Incompleteness of Rules

Common law rules emerge from decisions in individual cases. These decisions, taken as a whole, form the rules that are regarded as precedent. Thus, a "rule of law" is an interpretation—a reading of what has been done and said in the past and what, therefore, counts as precedent for future decision. Likewise, a statute may be paraphrased or a portion of it quoted in order to summarize the import of the statute as a whole; such a summary is derived from that which is the law and therefore is an interpretation. Such shorthands as rules are practical and harmless when used by those who are familiar with what the shorthands summarize. Much of the first year of a traditional legal education is devoted to acquiring such a familiarity in basic subjects while learning to recognize the dangers of reliance on the "rule" alone. In this sense, there can be little doubt that rules of law are incomplete and that complete specification would be impractical in most cases, for it would involve verbatim repetition of lengthy texts.

There is a second sense, however, in which the specifiability of rules is an issue. Even if we were to articulate the entire texts of cases or statutes, would such expressions constitute a complete specification of the "rule" (or the "law") governing the problem at hand? For example, there is no practical difficulty in repeating the rule prohibiting "vehicles in a public park." But the rule does not read "automobiles, bicycles, airplanes" and so forth. It mentions only "vehicles." Such a rule can never be made so explicit that it becomes "self-interpreting." Rather, it is explicit or not in interpretive situations, where strategies of interpretation bring its meaning into being.

Professor Hart suggests that it is a lucky coincidence that rules have this incomplete quality, since our relative ignorance of what facts will occur in the future and our relative indeterminacy of aim require the flexibility which the incompleteness of rules supplies.¹⁶ But Hart's formulation ignores the logical relationship between rules and these two sorts of indeterminacy. It is because of our relative ignorance of

16. See H.L.A. HART, *supra* note 4, at 125.

fact and indeterminacy of aim that rules seem, in the abstract, to have open texture. In concrete situations, however, rules are rendered complete (their texture is closed) by inferring their purposes and then determining how these purposes affect the case at hand. When these purposes seem determinate, rules will appear explicit; when these purposes seem indeterminate, rules will be incomplete, and the judicial decision applying them will be a hard one.

Professor Ronald Dworkin has attempted to describe the details of such decision.¹⁷ Dworkin's proposed judicial method relies heavily on "principles" that are presupposed by rules. In this scheme, rules apply or do not apply in an all-or-nothing fashion. Principles, on the other hand, have weight—they incline a decision in one direction or another.¹⁸ Dworkin's project is to demonstrate that even in hard cases where a rule does not plainly dictate a result, there is one right and principled answer to almost every legal dispute.

This conceptual scheme both describes a method of rendering rules more explicit in situations in which this is required, and prescribes a set of interpretive strategies designed to distinguish judging from legislating. The descriptive component suggests that principles are embedded in past decisions in much the same way that conventional legal theory uses rules as shorthands for the sum total of these decisions. The prescriptive component of Dworkin's theory suggests two kinds of standards which judges could use in deciding hard cases. In addition to principles, which give rise to individual or group rights, judges could conceivably decide such cases in conformity with "policies"—collective goals.¹⁹

In Dworkin's view, reliance on policies as a ground of decision should be proscribed for two reasons. First, choices of policy are characteristically legislative acts. Dworkin's objection to judicial decisions based on policy is that such "legislative" acts seem to create rights after the fact and apply them retroactively to the litigants. Decisions based on principle, on the other hand, take the form of adjudication of the rights the litigants already have. If there is one principled and right answer to every legal question, then adjudication is not the creation of retroactive rights; rather, it is the discovery of the right answer that already exists. Second, policy decisions are, in contrast, often compromises among goals, and we expect such compromises to be struck by elected officials. Decisions of principle are not compromises, and while we sometimes expect them of elected officials, principled decisions are

17. See generally R. DWORKIN, note 1 *supra*.

18. See *id.* at 22-28.

19. *Id.*

characteristically judicial acts.²⁰

Dworkin's critics have questioned the possibility of there being one right answer to almost every legal problem. The dispute has been carried on as an inquiry into the character of the legal materials "in" which the answer (or answers) may be found.²¹ The inability of the disputants to agree can be ascribed in part to this focus on the texts of the law. By arguing about what the true nature of legal texts really is, they have chosen to focus on the descriptive component of Dworkin's thesis. The character of the legal materials upon which decisions in hard cases are based, however, is constituted by the interpretive strategies through which judges and scholars read and understand the law. A descriptive inquiry into the character of legal texts will inevitably reflect the interpretive strategies already in force. Readers, including the critics of Dworkin's thesis, often put different things "in" texts, and then they discover them there. Inquiring whether there is a right answer to every legal question, therefore, will not be helpful in evaluating Dworkin's thesis, since he is calling for judges to act in accordance with the thesis because it *should* be true.

Thus, the more powerful part of Dworkin's thesis is not his description of the nature of judicial decision-making, but his argument about what it ought to be. Critics of his proposal nevertheless seem to be asking whether it describes what now occurs. They seem to want to know whether the meaning legal texts would have if Dworkin's strategy were adopted is already "in" the texts themselves. When posed this way, the question can have no meaningful answer. It would be quite rational for a judge or scholar who subscribed to Dworkin's rights thesis to "see" only principles (not policies) embedded in the body of decisions in his jurisdiction. But it would be impossible for him to persuade another interpreter, who maintained that he had suspended his beliefs and was impartially investigating the nature of existing texts to see whether they contain principles, unless that second interpreter already held beliefs consistent with Dworkin's rights thesis. The second interpreter would "see" the body of legal materials through interpretive strategies so long and so deeply held that their existence would go unnoticed. These would make the text what it is for that interpreter.

Similarly, the assertion that there is a single right answer to every legal dispute (a counterpart to the notion that litigants have preexisting and principle-based rights) is best viewed as an injunction concerning

20. *Id.* at 82-86.

21. *See, e.g.,* Greenawalt, *Policy, Rights and Judicial Decision*, 11 GA. L. REV. 991, 1037-42 (1977) ("Do legal materials provide one right answer to all legal cases?"); Munzer, *Right Answers, Preexisting Rights and Fairness*, 11 GA. L. REV. 1055, 1059 (1977) (because words do not precisely determine their extensions, one right answer will not always be available).

proper judicial behavior. If the needs of the judge's institutional position require that his texts yield one right answer, then they will do so. The "right" answer that they yield will not be the only right answer that could conceivably be arrived at. It will be, as Professor Dworkin has indicated, the answer that best fits the materials, given the special political theory held by the judge interpreting the materials.

CONCLUSION

The foregoing analysis suggests that meta-textual analysis puts the cart before the horse. Rules are not fully or only partially formulated; the meaning of texts is neither explicit nor implicit. Therefore, the interpretation of rules is neither the discovery of what is in them nor the creative or discretionary placement of meaning in an empty vessel. Legal interpretation—judicial decision in both easy and in hard cases—is the practice of competence in the problem at hand. Professional conceptions of the nature of interpretation, whether legal, literary or Biblical, will change along with the specific modes of interpretation that are dominant in any period. Thus, not only what competent readers see in texts, but what such readers think they see when they read texts may change with the exigencies of the profession. One need only remember the fluctuation in favor of such doctrines as substantive due process in constitutional law and the "intentional fallacy" in literary theory to appreciate the variations in both practice and theory. These fluctuations may blend with a pervasive cultural style, or may be traced to critical issues specific to a profession or discipline. In the debate over judicial discretion, the desire to defend the role courts have played in social change over a generation has been influential. By locating a domain of determinacy in judicial decision, anything within its perimeters may be protected against the charge that legislating has masqueraded as judging.

It is unclear whether a conception of judicial decision as the practice of competence will provide satisfaction to those seeking precision in language, objectivity in interpretation and completeness in rules. The constraints under which a competent member of the judicial profession practices certainly render problematic the notion that he has discretion. Once obsession with the distinction between text and interpreter is surrendered, there is little warrant for the corollary contrast between rights already existent and rights newly created. The desire to preserve the formalist notion that the meaning of a rule inheres in its language and that rights therefore exist from the moment the rule is formulated is a kind of noble legal lie. If one keeps his eyes glued on the text of the rule, it will seem to be self-elaborative, and only a series

of metaphors will capture what happens as the judge, competent in the use of rules, practices his profession.

The way in which rules are elaborated is not always predictable with the certainty of a mathematical progression. It is only superficially a paradox that even in a world where judges have no discretion, individuals will find themselves under duties or in possession of rights previously only suspected. The essence of the practice of professional competence is conformity with a tradition of behavior. It is nevertheless inevitable that as the full implications of that tradition are revealed, the members' own sense of what that tradition entails will change. An atomistic view of such a transformation will be misleading. The German philosopher H.G. Gadamer writes of Aristotle's question,

How does an army that is in flight come to take a stand again? Certainly not by the fact that the first man stops, or the second or the third. We cannot say that the army stands when a certain number of fleeing soldiers stops its flight, and also certainly not when the last has stopped. For the army does not begin to stand with him; it has long since begun to come to a stand. How it begins, how it spreads, and how the army finally at some point stands again (that is, how it comes once again to obey the unity of the command) is not knowingly prescribed, controlled by planning, or known with precision by anyone. And nonetheless it has undoubtedly happened.²²

Yet the seasoned commander knows when the army has in fact obeyed the command. It may be important for some purposes to be able to say whether a particular soldier has halted, just as it is significant whether at the very time he acted a litigant had the right for which he contends. It would be wrong, however, to suppose that the answers to these questions tell us much about retreat or about rules.

22. H. GADAMER, *PHILOSOPHICAL HERMENEUTICS* 63-64 (1976).

