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Brian C. Murchison

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LAW, BELIEF, AND BILDUNG: THE EDUCATION OF HARRY EDWARDS

Brian C. Murchison*

I. INTRODUCTION

A strikingly common theme of a range of recent cultural commentary is the fate of belief—not only in God but also in self, politics, and law. As the twentieth century ends, with its stream of questioned truths¹ and dissected creeds,² thinkers in the fields of psychology,³ political the-

* Professor of Law, Washington and Lee University School of Law. B.A., J.D., Yale University. I wish to thank Barry Sullivan for his comments on an earlier draft and for his support of scholarship as Dean of Washington and Lee; Christopher W. Meyer and Steven C. Minson for their invaluable research assistance; and the Frances Lewis Law Center for supporting the project.

¹ See, e.g., CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 16-17, 18 (1989) (noting that in contemporary Western society, “traditional frameworks are discredited or downgraded to the status of personal predilection . . . . Others have ceased to be credible altogether in anything like their original form . . . . The forms of revealed religion continue very much alive, but also highly contested,” and observing that a fear of “meaninglessness” defines our age). Iris Murdoch refers to “the disappearance of a permanent background to human activity; a permanent background, whether provided by Good, by Reason, by History, or by the self.” IRIS MURDOCH, THE SOVEREIGNTY OF GOOD 53 (D.Z. Phillips ed., 1971); see also DAVID TRACY, THE ANALOGICAL IMAGINATION: CHRISTIAN THEOLOGY AND THE CULTURE OF PLURALISM 341 (1991) (providing a theological perspective on the contemporary “situation,” defined as the “threat of meaninglessness, of nonbeing itself”).

² See, e.g., JULIA KRISTEVA, IN THE BEGINNING WAS LOVE: PSYCHOANALYSIS AND FAITH 23 (Arthur Goldhammer trans., 1987) (applying psychoanalysis to Christianity’s “Credo”); GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY ix-xi (20th ed. 1962) (applying sociological analysis in comparing the Christian principles and idealism of the “American Creed” to actual practice in America, including “economic, social, and sexual jealousies; [and] group prejudice against particular persons or types of people”) (emphasis omitted); H. RICHARD NIEBUHR, FAITH ON EARTH: AN INQUIRY INTO THE STRUCTURE OF HUMAN FAITH 5 (Richard R. Niebuhr ed., 1989); see also A. BARTLETT GIAMATTI, A FREE AND ORDERED SPACE: THE REAL WORLD OF THE UNIVERSITY 80-81 (1988) (noting that United States’ participation in Olympic games and American political conventions “were vast rituals enacting the continuous search by the American people for a stable creed, a religious doctrine capacious enough to include everyone and coherent enough to provide a spiritual framework for shared values”); SANFORD LEVINSON, CONSTITUTIONAL FAITH 36 (1988) (arguing that “[c]onstitutionalism, like religion, rep-
ory, literary criticism, and religion, are revisiting the scorched territory of human faith and asking what, if anything, remains on the landscape. Recent critiques of law use similar terminology, concluding that strong questions about law's neutrality can only lead to a severe skepticism, best understood as a loss of traditional "belief" in law. This provocative language likens an attitude of engagement in the legal system to religious belief, and legal skepticism to atheism, without a great deal of psychological or other support for the analogy. The present Article examines the use of this motif—belief and loss of belief—as a way of understanding one formulation of law's contemporary theoretical crisis. This Article considers the intellectual dynamic of a struggle with belief, identifies several "articles of faith" that survive for one thoughtful American judge, Harry T. Edwards, and asks whether these articles have sufficient sturdiness for a new century.

Perhaps it is not surprising that a host of millennial commentators have turned to the nature of belief; at the end of the last century, the subject was equally pervasive. An example is Anton Chekhov's play of


5. See, e.g., JAMES WOOD, THE BROKEN ESTATE: ESSAYS ON LITERATURE AND BELIEF xvi (1999) (discussing novelists "great enough to move between the religious impulse and the novelistic impulse," and tracing the impact of modernist fiction on religious belief).


8. Similar language is found in EDGAR BODENHEIMER, POWER, LAW, AND SOCIETY: A STUDY OF THE WILL TO POWER AND THE WILL TO LAW 1 (1972) (noting "the spectre of legal nihilism" in Western consciousness, arguing that "[t]he outstanding characteristic of this phenomenon is an erosion of the belief in law as a beneficial institution of societal organization," and tracing the impact of Nietzsche's thought). For an insightful study of the gap between skeptical legal theory and conventional legal practice, see Steven D. Smith, Believing Like a Lawyer, 40 B.C. L. REV. 1041 (1999).

the late 1890s, *The Seagull*, which is a study of ebbing belief in art and its capacity to give "meaning and purpose" to the world. Chekhov's characters, writers and actors gathered at a country estate, dispute the nature of art and its value to human existence. They posit different views on the faith an individual rightly can place in art's capacity to order experience and define human values. An aspiring playwright, Konstantin, scorns the superficiality of the status quo in Russian theater and expresses fervent belief in the power of "new forms" to shatter weary old ways of thinking about art and life. He proposes his own artifacts—verse dramas notably devoid of human characters—as the forms necessary to break the cycle of society's ways, but his work proves lifeless, too abstract to inspire much interest. In contrast, the worldly, ironic writer of popular fiction, Trigorin, takes the less lofty position that art simply serves an insatiable human need to order and respond to experience, while at the same time acknowledging that the work of art never matches the artist's original vision. In fact, Trigorin readily admits that his work is "false to the very core" but he devotes his entire life to it anyway, caught uneasily between its challenge and emptiness. These perspectives clash in the consciousness of Nina, a fledgling actress who encounters both men. Initially she shares Konstantin's spiritual belief in the transformative power of art, and she seeks transformation in an affair with Trigorin. The principal trajectory of the play is Nina's gradual movement from her original belief in art as salvation, through despair and disorientation when the affair collapses, to traces of a different sort of faith—not in "new forms" of art but in her own "vocation" as an artist, her commitment to an expressive craft which in some way will serve herself and humanity. Nina struggles toward an understanding of art not as something to be "believed in" but as a practice; for Nina, the in-

12. In discussing varieties of faith, one philosopher has noted that "not all faith is religious. People have faith in themselves and in one another, in institutions and in ideals, in the practice of science and in the performance of art." WILLIAM LAD SESSIONS, THE CONCEPT OF FAITH: A PHILOSOPHICAL INVESTIGATION 2 (1994); see also MICHAEL SHERMER, HOW WE BELIEVE: THE SEARCH FOR GOD IN AN AGE OF SCIENCE 61 (2000) (discussing religious and secular belief systems).
13. CHEKHOV, supra note 10, at 123.
14. See id. at 129-31 (a mocking audience interrupts performance of Konstantin's play).
15. See id. at 150.
16. For a perceptive analysis of Nina's development, see RICHARD GILMAN, CHEKHOV'S PLAYS: AN OPENING INTO ETERNITY 92-95 (1995).
tersection of art and life reveals vocation, a life’s project based on the individual’s difficult exercise of “courage and honor.” Nina’s end-of-the-century journey depicts a process from abstract belief, through a range of experience in which belief is tested, toward a significantly altered “faith” and continuity.

One hundred years later, three eminent American legal scholars—Duncan Kennedy, Louis Michael Seidman, and Mark Tushnet—use the motif of belief and unbelief in providing accounts of contemporary loss of faith in law. But, while these commentators share either the insistent purity of Konstantin or the sophisticated detachment of Trigorin, they have little or no affinity with Nina’s struggle, much less with her qualified hope. In A Critique of Adjudication: (fin de siècle), Kennedy offers a “modernist/postmodernist” account of judicially-imposed ideology in the adjudication of cases and creation of rights in American law. Kennedy’s now familiar claim is that judging often consists of “externally motivated, ideological choice” inflicted on litigants and society by judges who in bad faith clothe their decisions in neutral principles and other rhetorical devices.

According to Kennedy, this practice “functions to secure both particular ideological and general class interests of the intelligentsia in the social and economic status quo.” Like Konstantin in his determination to shatter the old with “new forms,” Kennedy seeks no less than to do away with “belief in . . . legal rationality”; he identifies his project with the “postness” of postmodernism, defined as “loss of faith,” toward the rationalizing, universalizing claims and aspirations of modern elites, whether left or right, personal or political, intellectual or practical. Indeed, Kennedy repeatedly defines his goal as “the induction of loss of [his readers’] faith” in law’s neutrality, legal rights, and “rightness” itself, at the same time resisting any inclination to commit to reform or reconstruction.

17. See CHEKHOV, supra note 10, at 180-81.
18. KENNEDY, supra note 7.
19. Id. at 1.
20. See id. at 2.
21. Id.
22. Id. at 2, 8.
23. Id. at 361. Kennedy does not consider his project to be nihilist or that it implies “lost faith in ‘everything.’” Id. at 362. He states that “[t]o lose your faith in judicial reason means to experience legal argument as ‘mere rhetoric’ (but neither ‘wrong’ nor ‘meaningless’).” Id. at 311. Although his mission is to “shatter” conventional understandings of law, he asserts that critique does not sap all of a person’s belief but “leaves us whatever we had before critique, in the way of tools for working out our commitments and our concrete plans for the future.” Id. at 362. But he leaves unclear the meaning of “whatever we had before critique” and his sense of how it survives.
Kennedy explicitly analogizes the loss of faith in legal reason “to one of the many kinds of experience of loss of faith in God.” He compares his own initial faith in legal reasoning [to] the religion of eighteenth-century intellectuals who believed that there were good rational reasons to think there was a God, that the existence of a God justified all kinds of hopeful views about the world, and that popular belief in God had greatly beneficial social consequences.

However, these intellectuals “woke up one morning in the nineteenth century and realized that they had ‘stopped believing,’” not because the existence of God had been disproved or that they had decided such proof was impossible; rather, “[i]t was just that they didn’t find any extant proof convincing.”

Kennedy states “that loss of faith [in law] is neither a theory nor the outcome of a theory. It is an event that may or may not follow critique.” He recounts two incidents which comprised the event of his own loss of legal faith. The first took place early in law school. After Kennedy enthusiastically noted language in a judicial opinion that might signal a change in the law, an upperclassman chided him for taking the language of a judicial opinion “too seriously.” The embarrassing moment was a turning point in Kennedy’s willingness to believe the stated reasoning of judicial opinions. As he puts it: “No judicial opinion since has looked the way some opinions looked before this experience.”

Kennedy then tells about an experience as a summer associate in a law firm. After preparing a brief on an antitrust issue, he was asked to turn around his argument when the client’s goals changed. These incidents both surprised and instructed Kennedy; both, he says, taught him “bad faith.” But Kennedy offers little more than this about the psychology of losing faith—nothing, for example, about his initial interest in law, about the impact of those experiences on any previous commit-

24. Id. at 312.
25. Id. at 312-13. Kennedy says that these individuals “also had confirmatory religious experiences,” and that their faith persisted despite moments of doubt. Id. at 313.
26. Id. For an extended study of the demise of traditional religious belief among nineteenth century intellectuals, see Wilson, supra note 9.
27. Kennedy, supra note 7, at 313.
28. See id. at 314.
29. Id.
30. See id.
31. Professor Donald Galloway notes that while Kennedy states a belief in the rule of law, he fails to explain why he does not critique the rule of law, fails to say why his concept of political morality supports the rule of law, and does not explain the values he associates with the rule of law.
ments to working for legal change, or about why he accepted the two above-described experiences as emblematic of what law is really about. Kennedy certainly presents no Chekhovian struggle with loss or groping in the dark towards "vocation." His account of lost legal faith in this respect is as thin as his summary of the loss of religious belief in the last century, i.e., that intellectuals "woke up one morning" to find their faith unconvincing. As a result, "loss of faith," the book's most repeated phrase and powerful metaphor, is its least explained concept.

Although Kennedy acknowledges that loss of legal faith can occur in different ways, he implies that the experience can lead the consciousness in only one direction: toward a logic exposing all of law as manipulable and legal outcomes as products of bad faith. What then is left for the lawyer? Kennedy does not urge joining those whom he calls "mainstreamers" in law reform projects and he does not urge commitment to ensuring legal assistance to those on the receiving end of law's bad faith. Instead, he contemplates production of "an artifact or a performance that is supposed to have [a] disruptive, potentially ecstatic effect on its audience" and thus to reflect leftist modernism/postmodernism as "the true (antifaith) faith." According to Kennedy, "[t]he idea is to turn daily objects into art objects, and daily living patterns into theater or dance, in a way that disrupts both poles, rather than affirming their harmonious distinct existences, and still to please."

Kennedy's account is a challenging, often brilliant, effort to lead others to a specific state of consciousness by presenting a picture of

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or the "concept of human well-being...he think[s] it promotes." Donald Galloway, Nothing if Not Critical, 36 ALBERTA L. REV. 273, 283 (1997) (reviewing DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIECLE) (1997)).
32. See KENNEDY, supra note 7, at 321.
33. Id. at 343.
34. Id. at 359.
35. Id. at 351. Kennedy rejects law reform but embraces the goal of a "transformation of society...that could not be simply imposed by law." Id. at 271. The objective of critique is "conversion" of "attitudes" and "spiritual orientations," "a kind of antinomianism, rather than...obedience to correct thought." Id.; see also id. at 280; id. at 341, 354 (noting that the critique "seeks to counter" the constructed "artifacts" of bourgeois culture with "transgressive artifacts" rather than "political 'actions'". Transgressive artifacts are designed to "induce a set of emotions—irony, despair, ecstasy, and so on" that are "associated with the death of reason," id. at 341-42, and "that are crushed or blocked when we experience the text or representation as 'right,'" id. at 341. Kennedy rejects projects of "reconstruction," but he mentions in passing that despite his rejection of legal reason, rights, and rightness in general, he "make[s] the leap into commitment or action." Id. at 362; see id. at 359-61. However, he discusses no particular action; to those who work in institutions, he recommends lives in which the individual alternates between "politicization" and "passivity," although he rejects any notion of "rightness" that would motivate politicization. See id. at 374-76.
law's priesthood engaged in ideological decision-making. But the choices left open by Kennedy suggest that the picture is incomplete. For Kennedy, the only real choices in American law are the lost faith of the sidelined postmodernist, the bad faith of the judge ensnared in the system's language of pretense, or the occasional empty-sounding efforts to "politicize" institutional situations by those who are convinced by Kennedy's argument, including the claim that talk about "rightness" should be abandoned.

The motif of "loss of belief" also pervades Seidman and Tushnet's Remnants of Belief, an account of how constitutional law has come to be understood by many as indistinct from the political preferences of federal judges, and why no citizen's continued belief in neutrality of constitutional adjudication can be justified. If Kennedy resembles the intensely abstract Konstantin, Seidman and Tushnet display the irony and worldly despair of Trigorin. They begin with a nuisance case, Miller v. Schoene, in which the Supreme Court, "influenced by legal realism," recognized the presence of legislative choice in decisions to act as well as in decisions not to act. According to the authors, the Court's realization that legislative action was "everywhere" was equally applicable to judicial action, including decisions not to "redetermine" common law rules. From this, the authors assert that old legal baselines such as common law property rights could no longer bear scrutiny as neutral principles of "law" but could only be conceived as politically constructed, "the mere imposition of one group's power." Seidman and Tushnet explain that this set of insights propelled legal theorists' search for "neutral premises . . . outside constitutional law." Since none could be found, the inevitable conclusion was that "all law [is] politics." The authors state that the jurisprudence of the New Deal, circa 1937 and thereafter, gave force to the insights of legal realism but gener-

36. Seidman & Tushnet, supra note 7.
37. 276 U.S. 272 (1928).
38. See Seidman & Tushnet, supra note 7, at 33.
39. Id. at 27.
40. See id. at 28.
41. Id. at 34.
42. Id. at 35.
43. Id. For a different analysis of Miller v. Schoene, see Edgar Bodenheimer, A Neglected Theory of Legal Reasoning, 21 J. LEGAL EDUC. 373, 388-90 (1969) (using the case as an example of dialectical reasoning used by judges "when a decision depends upon the interpretation of broadly-phrased, vague constitutional provisions, general standards, statutes, or judicial rules and a fairly elaborate explanation is needed to render plausible the application of the norm in question to the facts of the case").
ated no new notion of law as distinct from politics. New Deal jurisprudence "seemed to eliminate any plausible nonconstitutional baseline of natural rights against which claims of constitutional entitlement could be measured." However, although "old convictions [were made] less plausible," they were not entirely eliminated. "Instead," the authors maintain, "they survive as remnants of belief, too central to our worldview to be abandoned, yet too tattered to serve any real purpose."

What response to the world of tattered legal faith is tenable in the eyes of Seidman and Tushnet? They recommend not abandonment of law but participation based on awareness that neither side to a legal argument can claim any, but rhetorical, superiority. "What is ultimately required is a kind of dual consciousness," a mentality similar to what Kennedy calls "bad faith." The enlightened—because now skeptical and ironic—lawyer or judge "must somehow authentically admire the emperor's new clothes, all the while knowing on a different level of consciousness that he is most assuredly naked." Seidman and Tushnet hope that exposing legal adjudication's lack of meaningful constraint can lead lawyers to a new attitude of humility, "honesty and generosity of spirit," permitting them to keep working even with the knowledge that their legal arguments are a "sham." The authors' directive—to persist "authentically" while at the same time knowing that what you persist in is false to the core—may be possible to meet as a matter of psychology, but the authors do not explain how this response can arise from the ashes, or even the remnants, of belief.

Kennedy, Seidman, and Tushnet are hardly alone when they highlight the ebbing of faith that law can be something other than politics, "the mere imposition of one group's power." The other end of the political spectrum finds its own reasons to declare that law is not "law." An example is the Wall Street Journal's lead editorial of June 24, 1999, which was entitled The Law Disfigured and addressed the breast-implant litigation of the 1990s, described by the editorial as "[t]he

44. See SEIDMAN & TUSHNET, supra note 7, at 35-37.
45. Id. at 23.
46. Id.
47. Id.
48. Id. at 200.
49. See KENNEDY, supra note 7, at 311.
50. SEIDMAN & TUSHNET, supra note 7, at 200.
51. Id. at 198.
52. See id. at 194.
53. Id. at 34.
breast-implant horror show.'\textsuperscript{55} The editorial's focus was a new report issued by the National Academy of Science's Institute of Medicine after a two-year investigation of whether a link exists between silicone-gel breast implants and diseases such as lupus and cancer.\textsuperscript{52} Consistent with other studies from diverse institutions, the Institute reported that no link had been found.\textsuperscript{57}

The editorial lambasted trial lawyers who had "recruited" plaintiffs to file thousands of lawsuits—claims which the editorial said were "more appropriate to medieval superstition than an advanced society"—against manufacturers of the implants.\textsuperscript{59} More generally, the newspaper decried plaintiffs' ability to subject the tort system to allegedly unsupported lawsuits and thus foster "cynical opinions of the U.S. legal system," all the while abetted by media sensationalism, politicians' hyperbole, and states' willingness to jump on the bandwagon.\textsuperscript{57} The editorial maintained that "[a]t all levels of American society, especially business, the idea that American courtrooms strive toward justice is no longer taken seriously."\textsuperscript{59} Holding out no expectation of change in the tort system by legislators (said to depend on the trial lawyers for campaign contributions), the editorial argued that it was up to "the American judiciary" to keep greater control over their dockets.\textsuperscript{61} The editorial concluded: "The courts are greatly feared for their ability to ruin, but they aren't much respected anymore by the American people."\textsuperscript{62} Regardless of the persuasiveness of the editorial with respect to the breast implant litigation,\textsuperscript{63} its broader message of doubt and distrust echoes the thrust of the other critiques. While Kennedy, Tushnet, and Seidman argue that law's content is politics, the editorial voices the even more dispiriting view that law's content is the manipulation of process for direct financial gain.

The fate of legal belief is the theme not only of critics from left and right but also of at least one member of the United States Supreme Court, Justice Anthony Kennedy. In a speech delivered to the American Bar Association in 1997 and published a year later under the title, \textit{Law

\begin{itemize}
  \item \textsuperscript{55} \textit{Id.}
  \item \textsuperscript{56} \textit{See id.}
  \item \textsuperscript{57} \textit{See id.}
  \item \textsuperscript{58} \textit{Id.}
  \item \textsuperscript{59} \textit{See id.}
  \item \textsuperscript{60} \textit{Id.}
  \item \textsuperscript{61} \textit{See id.}
  \item \textsuperscript{62} \textit{Id.}
\end{itemize}
Justice Kennedy stated that "despite our historic strength and prestige, the [legal] profession and the nation face a difficult and most urgent task... no less than to reaffirm and reassert our country's belief in the law." By "law," Justice Kennedy appears to mean the "rule of law." He speculates that there may be "a crisis of disbelief in our nation," although he declines to cite a specific event, case, or theoretical development. From the idea of a "crisis," Justice Kennedy proceeds to consider "the principles that must be believed and upheld by our own people if our legal order is to be secure and a source of inspiration for us and for others." He derives these "principles" (later "precepts") not from the text of the Constitution but from "the constitution with a small 'c,'" which he says "comprises the whole condition of our society, with all the conventions, customs and beliefs that are the distinguishing mark of a free people." He identifies three precepts: responsibility of the individual, defined as essential to freedom; rationality, invoked by the image of "a group of citizens united in law... examin[ing] a problem with adequate information and com[ing] to a reasoned, common conclusion"; and civility, explained by "the proposition that we owe respect to our fellow citizen because of the humanity we share in common."

Justice Kennedy's three precepts are not legal principles but what he understands to be hallmarks of a "decent and just" society, belief in which is necessary to make the "Constitution and its rule of law... secure." Like Duncan Kennedy, Justice Kennedy is concerned with affecting "'attitudes,'" although for a different objective. But the Justice does not explain how faith in these background precepts can carry over, or ensure, faith in the legal system as it operates. Additionally, Justice Kennedy does not explain his choice of background precepts. The appeal of these precepts may be that they are components of the ideal disposition of a case: the facts and law are argued a certain way (civility), the judge weighs each argument by sympathetically grappling with the argument's force (responsibility), and the judge finally decides the case

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64. Anthony M. Kennedy, Law and Belief, TRIAL, July 1998, at 23.
65. Id.
66. Id.
67. Id.
68. Id. at 24.
69. Id.
70. See id.
71. Id.
72. Id. at 25.
73. Id. at 24.
74. See KENNEDY, supra note 7, at 271.
and gives reasons (rationality). In effect, Justice Kennedy's speech suggests that belief in a certain way of exercising legal judgment is necessary for acceptance of the outcome of a particular case and for faith in the system as a whole. But how we are to navigate from crisis to belief is left mysterious.

The problem, then, is two-fold: how to understand the nature of the crisis of faith in law, and how to identify any options that the crisis presents. Perhaps a clue can be found in analogy, that is, in contemporary writings from other disciplines on the ebbing of religious belief at the century's end. Despite different disciplines and analytic frameworks, these writings share an interest not only in the fate of traditional religious belief but in the interplay between "remnants of belief" and intellectual doubt in contemporary consciousness. They ask what happens when belief encounters counter-visions or contrary proofs. In the dynamic of such encounters, the commentators locate tension, which can be either creative or paralyzing. Some of the authors imply that the tension between fragmentary belief and intellectual doubt can produce a particular ethical response, although the contours of such a response remain shadowy.

For example, in The Secular Mind,75 psychiatrist Robert Coles meditates on "where we stand" and "where we are headed" at the millennium.76 Coles unpacks the textured mid-century Christianity of social worker Dorothy Day and fiction writer Flannery O'Connor,77 among others, and contrasts it with the bracing secularism of Freud and contemporary "faith"—defined by Coles as a faith in "ourselves, in our ability to know ourselves, gain control of things (within and outside ourselves) through such knowledge."78 Coles suggests that many in today's society have traded theistic belief's realism about human limitations, its tragic sense of a fallen world,79 for a nontheistic faith in human power and self-mastery.80 The implications of this exchange are uncertain: Coles worries that as creatures of conviction, we are too set on "knowing,"81 our old capacity for theistic belief perhaps excessively re-channeled to

75. COLES, supra note 3.
76. See id. at 97, 151.
77. See id. at 23-24, 40-42, 162-66 (discussing Justice Day); id. at 134-46 (discussing Justice O'Connor).
78. Id. at 116.
79. See id. at 148-49.
80. See id. at 145.
81. See id. at 187 (noting that "we are the creatures in whom knowing, clearly, has its greatest distinction").
the project of human perfectibility. We still "believe," but the object of faith is man rather than God. However, Coles intimates that the sacred and the secular are not quite dichotomous. The secular mind encountering O'Connor's fiction can experience the "discomfort" of self-recognition, and the theist can feel alienated from religious belief's tendency to overpower the self. Coles ends his book ambiguously, noting a tension between the secular thirst for knowledge and lasting traces of religious belief (particularly theism's persistent commitment to being, to "deeds," to "one another"). Coles intimates that out of this human divide may arise a new ethic of responsibility, but he breaks off the narrative without developing the substance of such an ethic.

Political theorist William Connolly's recent book, Why I Am Not a Secularist, offers a "vision of multidimensional pluralism" in politics, which is similarly tantalizing. In his book, Connolly regrets what he views as the "dogmatism" of secular political culture's exclusion of faith-based discussion from public debate, although he "oppose[s] a religiously centered politics" and is not a "defender of a specific church." In Connolly's view, religious faith is one element of human personality's "layered intricacy of thinking and judgment" and therefore relevant to the believing person's "[e]thical and political thinking." Calling for a public life that is "more pluralistic in shape," Connolly imagines "[a]n ethos of engagement among multiple constituencies honoring different moral sources." How will this engagement be possible? According to Connolly, modern faith's collision with "the speculative death of God" means that "[t]he experience of faith" includes moments of ambiguity.

82. See id. at 153-54 (discussing Edward Bellamy's idea of perfectibility); id. at 185-89 (discussing the future of human efforts to know and perfect consciousness).
83. See id. at 139. In contrast, Charles Taylor emphasizes the "deep satisfaction" of the mastering self rather than any discomfort. Taylor describes a "disengaged agent" who has taken a once-for-all stance in favour of objectification; he has broken with religion, superstition, resisted the blandishments of those pleasing and flattering world-views which hide the austere reality of the human condition in a disenchanted universe. He has taken up the scientific attitude. The direction of his life is set, however little mastery he may have actually believed. And this is a source of deep satisfaction and pride to him.

TAYLOR, supra note 1, at 46.
84. See COLES, supra note 3, at 165.
85. See id. at 188-89.
86. CONNOLLY, supra note 4.
87. Id. at 4.
88. Id.
89. Id. at 3.
90. Id. at 5.
91. Id. at 155.
92. Id. at 44.
just as modern nonbelievers experience "truant moments of forgetful faith." Connolly thinks that these interactions between belief and doubt on both sides can lead "numerous ... constituencies ... to appreciate the contestability of the source of morality they honor the most," clearing the way for a greater approximation of "[m]ultidimensional plurality." Connolly's optimism is refreshing, but he falls short of a convincing psychological explanation of how moments of ambiguity can enable different groups to achieve the necessary forbearance.

Recent poetry looks at the dynamic of belief and doubt as well. Mark Jarman's prize-winning book of poems, Questions for Ecclesiastes, includes a series of "unholy sonnets" that express a persistent longing for some sort of transcendent being or reality. At the same time, Jarman appears to recognize the imagination's power to deceive itself with visions of an eternal order, the personality's stubborn resistance to redemption, and the possibility that even a real God could fail to satisfy human demands for justice and explanation. In the title poem, a minister's failed effort to console the overwhelmed parents of a child who has committed suicide prompts the poet's bitter observation: "And God who shall bring every work into judgement, with every secret thing, whether it be good or whether it be evil, who could have shared what he knew with people who needed urgently to hear it, God kept a secret."

In focusing on the transcendent being's unwillingness to console, Jarman suggests a duty of the living to practice the needed consolation, but he does not say why this is more likely than indifference or despair. In another poem, Jarman imagines that the Transfiguration was Christ's moment of resistance to the "plan" according to which not only he, but most of his friends, would be forced to die. Jarman's suggestion is that an ethic of resistance to entrenched consciousness can emerge from a conflict of belief, but the nature of the poet's ethic remains obscure.

Postmodernist religious thought represented in a recent collection of essays, The Postmodern God, also focuses on the dynamic between

93. Id. at 45.
94. Id. at 154.
95. MARK JARMAN, QUESTIONS FOR ECCLESIASTES (1997).
96. See id. at 83 (juxtaposing a praying woman to uncomprehending God).
97. See id. at 64 ("[D]espite your prayers, [y]our listening and rejoicing, ... [t]here is still murder in your heart.").
98. See id. at 40 (recognizing the context in which religious words of comfort offered to bereaved are "stark and irrelevant platitudes, albeit stoical and final, oracular, stony, and comfortless").
99. Id. at 41.
100. See id. at 17-21.
101. THE POSTMODERN GOD, supra note 6.
belief and doubt. An essay by Michel de Certeau, Jesuit priest and associate of Jacques Lacan, asks, "How is Christianity Thinkable Today?" According to Certeau, Christianity is "thinkable in our epistemological situation" only if considered from the vantage point of "how the Christian experience works." According to Certeau, Christianity "works" as a "relationship" to an inaugural event—the life and "disappearance" of Christ. The relationship, however, hardly resembles a traditional religious stance; as Certeau declares, "[t]he past is not our security." Relating to the Christ event means relating to absence (the disappearance of Christ), multiplicity (the wide range of interpretations of Christ’s life and message), and engaging in the kind of Christian action (praxis) that displaces "binary" visions of the world. Christ’s absence "permits" the flow of "a multiplicity of practices and discourses." The Christian experience therefore consists of a sharing of a plurality of elaborations in community, implicitly defined as those who, like Christ, "make room" for multiple interpretations of truth and thus "make room" for others. Christianity also requires action, a moving beyond boundaries, an out-going that may bring about a critical divergence. Certeau concludes that Christianity must be "alive"—in the sense of "undergo[ing] the experience of losing objective securities"—in order to be thinkable. In this condition of "risk" he locates the place of "faith," which appears to be associated with both an ethic of tolerance for competing articulations and an ethic of commitment to action. Unlike the other authors already discussed, Certeau suggests the outlines of a psychology of abandoning creedal orthodoxy and adopting the "thinkable" faith he defines. But he is not able to explain how—much less, why—the encounter with absence and multiplicity leads to "praxis" rather than inaction or indifference. And when he concludes with refer-

103. Id.
104. Id. at 142, 145 (emphasis omitted).
105. Id. at 145.
106. See id. at 144-47, 151-54.
107. Id. at 146. According to Certeau, particular interpretation of the inaugural event can never be identical to the event, or "the event itself, but that which the event made possible in the first believers." Id. at 144. "The Jesus event is irreducible to a particular knowledge or experience." Id. at 145. The inaugural event accordingly "is more and more hidden by the multiple creations which reveal its significance." Id. at 147.
108. See id. at 150-51.
109. See id. at 153.
110. Id. at 155.
111. See id.
ences to "faith," it is not clear what a person would have faith in—an absent god, increasingly hidden, without even a singular defining story? 112

Despite their limitations, these non-legal commentators on religious belief do envision the crisis of faith as triggering an intellectual process of considerable complexity, involving the achievement of a "thicker" state of consciousness than the anti-reconstructivism of Duncan Kennedy, the one-eye-shut irony of Seidman and Tushnet, the exaggerated despair of the Wall Street Journal, or the willed continuity of Justice Kennedy. While each of the legal commentators agrees—although for different reasons and to different ends—that "belief in law" is, at the very least, at a low ebb, if not thoroughly drained away, their accounts of the crisis of legal faith are partial at best. Each contains traces of psychological insight but each is largely silent on the process of losing faith and on the nature of human response. If "loss of faith" is meant to be more than merely rhetorical, if it implies a fairly major life experience triggering a significant response, the legal commentators have not come close to justifying use of the phrase by adequately addressing that experience or response. It appears as if the legal commentators are hesitating before the abyss of lost faith without actually falling in. What would a loss of faith look like if one truly suffered it, slipping all the way down? Can yet another discipline—the realm of imaginative literature—give us the necessary picture? If so, can we then turn back to law and recognize fiction's lessons in the approach of some who have experienced the crisis of legal belief but remain part of the system, working with a consciousness shaped and even enriched by the crisis?

To develop a sense of the contours and implications of the crisis of legal faith, this Article turns first to fiction, following the advice of British philosopher Iris Murdoch "that art is the clue" in its power to disclose "the real quality of human nature," 113 and that "[a]rt gives a clear sense to many ideas which seem more puzzling when we meet with them elsewhere." 114 This Article considers Paul Scott's novel, The Towers of

112. For an interesting comment on Certeau's work, see Frederick Christian Bauerschmidt, Michel de Certeau (1925-1986): Introduction, in THE POSTMODERN GOD: A THEOLOGICAL READER, supra note 6, at 139-40.
113. MURDOCH, supra note 1, at 64-65.
114. Id. at 88. Murdoch states that "the most essential and fundamental aspect of culture is the study of literature, since this is an education in how to picture and understand human situations." Id. at 34; see also PHILIP BOBBIT, CONSTITUTIONAL INTERPRETATION 179 (1991) (noting that "[t]he study of history—which includes of course the history of ideas—poetry and fiction, drama and biography, enriches the daily experience of legal practice. But the latter is the soil from which justice must grow"); see generally MARTHA C. NUSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1995) (arguing that values displayed in works of literature can be relevant to social policy analysis and construction); JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE
Silence," a richly imagined and detailed account of a crisis of religious and political faith and its aftermath. Through the character Barbara Batchelor, an English missionary in India at the moment of independence, Scott explores the interplay of faith, despair, and ethics. The Article then considers some of the scholarly writings and judicial opinions of Harry Edwards, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, whose work and experience acknowledge the power of critique and yet signal faith in a distinct ethic of judging at the century's end.

II. ANATOMY OF A CRISIS OF BELIEF: THE MISSIONARY'S JOURNEY IN THE TOWERS OF SILENCE

A. "Faith in Question"

For legal commentators Kennedy, Seidman, and Tushnet, faith in law is either a naive state of consciousness currently held or held at one time but abandoned altogether on the realization that legal rules have a proven record of manipulability by those with the power to manipulate them. But faith, whether religious or non-religious, surely has more nuance than these scholars acknowledge." Presenting a "philosophical portrait of faith," William Lad Sessions has identified six different "models," declaring that "it is their ensemble, not any single model, that clarifies the concept of faith." Another portrait of faith's complexity comes from psychologist James W. Fowler, who has charted six "stages of faith," beginning with the simplicity of "intuitive-projective" faith and ending in the multi-faceted "universalizing faith." However, these

Rhetoric and Poetics of the Law (1985) (drawing on themes of Sophocles and other imaginative writers for an understanding of persuasive speech); Eric Blumenson, Mapping the Limits of Skepticism in Law and Morals, 74 Tex. L. Rev. 523, 540 (1996) (noting interest of many legal scholars in imaginative literature as "thickly descriptive accounts [that] can help us understand law and care about its consequences").

116. See generally Niebuhr, supra note 2 (discussed infra text accompanying notes 120-32).
117. Sessions, supra note 12, at 10-11. Sessions states that his six models—the personal relationship model, the belief model, the attitude model, the confidence model, the devotion model, and the hope model—are not meant to be exhaustive but that they "seem relatively prominent, and they are revealingly independent of one another; that is, they highlight fundamental and distinct facets of faith or groups of conceptual features of faith." Id. at 19.
118. Fowler, supra note 6, at 122-34 (describing the intuitive-projective stage of faith); id. at 199-213 (describing the stage of universalizing faith).
accounts do not focus on our present concern: the phenomenon of lost faith or faith in crisis.  

Closer to this concern is H. Richard Niebuhr’s “inquiry into the structure of human faith.” For Niebuhr, “faith...refer[s] to a complex experience or many-faceted attitude of the human self.” Niebuhr muses on the multiple meanings of faith: “Now it means belief in a doctrine; now the acceptance of intuited or self-evident truths; now confidence or trust; now piety in general or a historic religion. In some cases the word applies to man’s relation to the supernatural but again it refers to human interpersonal relations.” On this view, faith is more than belief in propositions; it encompasses a bond of interpersonal relationships, expressed in “reciprocities of believing, trusting, and being loyal.” But Niebuhr is also intensely interested in faith’s “problematic form...faith in question,” which arises “in all the Hamlet-like discoveries we make of the contradiction between the appearance in which we believed and the reality that now seems to manifest itself.” Niebuhr invokes a concept of “broken faith,” the self’s disposition “of disappointment, of distrust, and of disbelief,” toward a universe experienced as hostile. He speculates that the depth of humanity’s broken faith is a function of promises unfulfilled: the disappearance in each life of “that sense of meaningfulness and splendor with which personal being awakes to existence.” As Niebuhr explains: “There is no area of human con-
duct—not economics, not religion, not the family—which is free from the wreckage of broken words. The massive law books and the great machinery of justice give evidence of the vast extent of fraud, deceit and disloyalty among men.” Niebuhr thus attends closely to “[t]he great tragic note which runs through all human literature and philosophy,” which he identifies as “the distance between appearance and reality,” and he notes the consequences in individual lives: the turn from trust to treason, from promise-making to promise-breaking. Although “[o]ur human dilemma” is that “we live as selves by faith but our faith is perverted and we with it,” Niebuhr contemplates the possibility of a “reconstruction of faith” through the building of a “community of infinite interactions of loyalty.” But Niebuhr is not entirely clear on how the steps will be taken—or found—between the treacheries of broken faith and the capacity for “loyalty” and community building. Perhaps neither philosophy nor theology can trace these steps as well as fiction.

B. A Holy Woman’s Search

The Raj Quartet, by British novelist Paul Scott, is a sequence of novels that have been called “among the greatest prose fictions of this and of the nineteenth century.” Although Scott’s deeper concerns are the complexities of human individuality and relatedness, his immediate subject is the situation of the British in India in the 1940s, as Nationalist demands for independence coincide with the events of World War II. Transplanted to the subcontinent from various strata of British society, Scott’s characters find themselves at the top of a political hierarchy that is rapidly losing any moral justification it once might have claimed. In Gandhi’s words, Britain must “quit India.”

129. Id. at 81.
130. Id. at 80.
131. Id. at 83.
132. Id. at 109.
136. SCOTT, THE TOWERS OF SILENCE, supra note 115, at 43 (recounting Gandhi’s demand in 1942 that the British leave India).
tions of the edifice" have cracked; the code of duty that had rationalized colonial rule is no longer distinguishable from its corruption and collapse. Against this backdrop of political and moral confusion, Scott situates a crisis of belief—in God, the political order, and the self—and a profoundly anxious search for a principle of action in the wretched latter half of the twentieth century. After decades of service in India, Barbara Batchelor, an aging teacher in the Christian mission, loses her familiar feeling of contact with God, senses that her understanding of life is somehow flawed, and eventually doubts her right to existence. Barbie’s crisis leads to a search for religious reconnection and then to terror when her spiritual emptiness coincides with the shock of escalating British injustice. She then is capable of seeing India’s own suffering more clearly as well as the implications of her own passivity. Ultimately, she achieves something like an ethic of engagement, a willingness to act in new ways based on exemplary past conduct of persons who had shown decisive understanding of, and respect for, human dignity.

Even as Scott traces Barbie’s development, however, he implies that the practice of such an ethic, if not thwarted altogether, is almost always too little and comes too late. Nevertheless, Barbie’s layered journey—from too many words to sometimes unbearable silence, from steady belief to a full-blown encounter with despair—supplies missing steps in the accounts of crisis of faith considered above. Her story provides a counter-portrait in which the experience of lost faith paradoxically enables development of the justice-seeking consciousness that religious faith had claimed to promote in the first place, prompting action based on the exercise of an analogical imagination.

137. Id. at 255.
138. See id. at 195.
139. See id. at 194. Eva Brann notes that Scott’s daring gives these novels their dignity, their unexpected gravity. It is almost startling that a series of novels about so secular a world should have at its center, in the third book... the historia arcana of a search for God carried on within by an old, unregarded holy woman.

... [The sequence as a whole is] a work of intensely but unobtrusively artful world-recording.

Brann, supra note 135, at 195-96.

140. In his book, The Analogical Imagination, David Tracy discusses analogical thought as a means to understanding the world and the other. He states: “We understand one another, if at all, only through analogy. Who you are I know only by knowing what event, what focal meaning, you actually live by. And I know only if I too have sensed some analogous guide in my own life.” TRACY, supra note 1, at 454-55. In a similar vein, Linda Ross Meyer writes about thinking as “handiwork,” as “practice,” and she defines practice “as the relations we see in our experience of working in the world as we engage in the tracing of connections.” Linda Ross Meyer, Is Practical Reason Mindless?, 86 GEO. L.J. 647, 656 (1998). She continues:
At the heart of the Quartet is an outbreak of violence by Indians against the colonial government (or “Raj”) in an imagined Indian city in 1942. Two Englishwomen are victims of the violence, and their stories haunt the four novels. One (a hospital volunteer, Daphne Manners) is raped by unknown assailants, and the other (a teacher, Edwina Crane) is attacked by a mob as she drives with an Indian colleague on a village road. A British police superintendent (Ronald Merrick) unjustly arrests and detains an innocent group of Indian men for the rape, and the teacher’s Indian colleague dies. Scott traces the Raj community’s various interpretations of these events, especially their effect on the Laytons, a prominent military family whose members grapple with responsibility and futility as British rule unravels. The father, Colonel John Layton, is absent, taken prisoner of war in North Africa. His wife, Mildred, keeper of the colonial flame, is bitterly aware that time has run out on the Raj, but she disdains the Indians’ demands for self-rule and resents their own resentment. She also resents the Colonel’s elderly stepmother, Mabel Layton, the widowed survivor of a prior generation that had promised the Indians independence. An unforgiving witness to British racism and failure to fulfill the pledge, Mabel responds to the hypocrisy of colonial rule by detaching herself from the Raj community, retreating to a state of silent judgment, and devoting herself to the care of a rose garden. Other key characters are the two daughters of Colonel and Mrs. Layton: Sarah, who is “cursed with a

These connections make possible what we do—they are the shapes slumbering in the wood, the potential tent in the blanket, the music that a vibrating string in a mathematic and artistic tradition makes possible. The possibilities that we see when we make cabinets and when we judge cases are given to us from the past . . . .

mind that questioned everything” and assumes the moral center of the novels, and Susan, who is emotionally overcome by political and personal events. In the third book of the sequence, *The Towers of Silence*, Christian missionary Barbie Batchelor appears on the periphery of the Layton family and then strides bravely, if awkwardly, to the center of their privileged place in the military community of the fictional hill station, Pankot.

The daughter of an English solicitor’s clerk, Barbie has spent thirty years in India as a teacher in mission schools. As *The Towers of Silence* begins, her career as superintendent has “ petered out,” ironically because her religious convictions were out of step with the mission’s increasingly “secular attitude.” Since British military and civil authorities blame the religious work of the missions for past Indian unrest, pragmatic mission leaders have shifted emphasis from faith to education. Finding herself an outsider who belongs in spirit to neither the ruling class nor the mission, Barbie “retires” in 1939 with “no plans and no clear idea where to go or what to do.”

She encounters the Layton family when the old widow, Mabel Layton, places an advertisement for a companion “to share accommodation” at Rose Cottage, Mabel’s residence in the hills, considerably removed from the clamor of wartime India. Barbie answers the advertisement, conscious of her inferior social rank and curious about Mabel’s desire to share coveted living space in wartime, not with family, but with a stranger. When Mabel accepts Barbie and the retired missionary moves in as a “paying guest,” the elites of the Raj disapprove; it appears that Mabel has taken in Barbie to avoid taking in Mildred—and more broadly, to avoid associating intimately with the Raj community. In bringing the missionary into the Laytons’ privileged milieu, the novel at first seems to be only about class conflict and domestic intrigue.

154. *Id.* at 100; *see also id.* at 167 (describing Sarah’s attitude “of taking very little on trust, of preferring to work things out for herself”); *id.* at 168 (noting that Sarah’s “dignity” was “committed to discovering where she would feel it earned, where her duty was”).
158. *See id.* at 5-6.
159. *See id.* at 5.
160. *Id.* at 4.
161. *See id.* at 6.
162. *See id.* at 15.
163. *See id.* at 32-34.
It proves to be considerably more—a story of intense spiritual conflict. Scott introduces Barbie as a well-meaning but rather foolish figure, afflicted with "two besetting sins: she seldom stopped talking," in prayer or conversation with others, and she "was inclined to act without thinking," often leaving confusion in her wake.\textsuperscript{164} Freely admitting these shortcomings, Barbie knows that her appointment as school superintendent was a "sop" based more on seniority than on merit, and she concedes her obsolescence amid the growing secularism of the Christian mission.\textsuperscript{165} At the same time, she possesses a sporting pride, mainly in the quality of her voice. "It carried,"\textsuperscript{166} she says, strong enough to be heard, even if ignored, in the din of the subcontinent.\textsuperscript{167} Barbie accepts herself, "besetting sins" and all, on the basis of faith: She is "content to bear the burden of her own nature in the belief that God had known best what was right for her."\textsuperscript{168} More generally, Barbie is a believer "in God, in Christ the Redeemer and in the existence of Heaven."\textsuperscript{169} Her trust extends as well to the secular world; she "was a believer in the good will and good sense of established authority."\textsuperscript{170} In Barbie, then, we find a strong, if unreflective, personality sustained by a cheerful trust in established political order and a faith composed of traditional theology.

It is this psychology of determined conventional belief that Scott's novel puts to the test. Scott writes that beneath Barbie's comic blend of order and disorder she had "a secret sorrow."\textsuperscript{171}

It lay in the fact that in recent years she had felt her faith loosening its grip. She believed in God as firmly as ever but she no longer felt that He believed in her or listened to her. She felt cut off from Him as she would if she had spent her life doing something of which He disapproved . . . . She no longer felt [His presence]. She could not help blaming the mission [and its secularism] just a bit for this and she

\textsuperscript{164} Id. at 3.
\textsuperscript{165} See id.
\textsuperscript{166} Id. at 3. By the end of the novel, after Barbie has suffered repeated indignities at the hands of the Raj community as well as diminishment in her faith in God, her voice is all but gone. Still, she manages to make herself heard and understood by the corrupt British policeman, Merrick, and she reminds him of his duty to the "unknown Indian." See id. at 364, 383.
\textsuperscript{167} See id. at 63-64 (stating that the elites of the Raj community ignore Barbie's speech about British duty).
\textsuperscript{168} Id. at 3.
\textsuperscript{169} Id. at 4.
\textsuperscript{170} Id. at 3.
\textsuperscript{171} See id. at 4. Scott means "secret" in the sense that this is one of the few things Barbie has refrained from speaking about with friends and strangers. Scott may also be making the ironic point that the nature of her spiritual malaise is "secret" to Barbie as well and that at least one aspect of her journey in the novel is towards an understanding of her own soul.
thought there might be a chance of regaining the joyful sense of contact now that she was retiring.\textsuperscript{172}

Although Barbie blames the mission for her secret sorrow, and although later she will have ample reason to blame the moral hollowness of the Raj for confirming God's absence from the world's affairs, Scott hints very early that Barbie's crisis of faith stems, at least in part, from a lack of understanding—even after decades in the missions—of what her faith could entail, what her awareness of deficiency could mean, and ultimately who she is. The novel traces the undoing of her faith not only by the political and social circumstances but also by her own "besetting sins" of too much talk, careless action, and evasion of self and the world. The garrulous Barbie is forced to endure complete spiritual silence, which prompts a watchfulness she apparently had long resisted. Scott's splendid subject is whether Barbie's experience of emptiness on cosmic, political, and personal levels will lead to despair—the fate of others in the \textit{Quartet}—or to some other end.

The novel delineates the various stages of Barbie's experience of spiritual doubt. She first takes her secret sorrow to Rose Cottage, as if rushing toward the safety of a purely spiritual realm. Scott writes that the road to the cottage "curve[s] uphill, this way, that way," the altitude is "sweet and welcoming," the panoramic views of mountains and "rich and private pasture" resemble a "vision of beauty"; the "crests of the hills" contain "a holy silence."\textsuperscript{173} Surely a threatened religious faith could be restored in such a place! This account suggests that a conventional believer's experience of doubt may prompt a dream-like pursuit of the thing doubted, a flight from the world in order to dispel doubt and bring back belief. Yet Rose Cottage offers no solution to Barbie's spiritual void. Mabel Layton presides, but she is "oddly withdrawn,"\textsuperscript{174} "something of a recluse,"\textsuperscript{175} preoccupied with her plantings, spending time largely alone "in celebration of the natural cycle of seed, growth, flower, decay, seed."\textsuperscript{176} As Scott exquisitely implies, Mabel is as inscrutable and untouchable as Barbie's God. "In a way my secret sorrow is Mabel," Barbie senses.\textsuperscript{177} "I don't know how much of me gets through. I'm rather like a wave dashing against a rock, the sounds I make are just like that. There is Mabel, there is the rock, there is God. They are the same to all.

\begin{thebibliography}{99}
\bibitem{172} Id. at 6.
\bibitem{173} Id. at 11-12.
\bibitem{174} Id. at 21.
\bibitem{175} Id. at 23.
\bibitem{176} Id. at 199.
\bibitem{177} Id. at 86.
\end{thebibliography}
intents and purposes."178 The more Barbie tries to interpret Mabel, the more baffled she becomes by the silence of the spiritual realm.179 When Barbie prays, her prayers fall "flat, little rejects from a devotional machine she had once worked to perfection. The prayers hardened in the upper air, once so warm, now so frosty, and tinkled down. But she pressed on, head bowed, in the hailstorm."180

Besides offering no consolation, this abstract realm turns out to have its own share of brokenness. Barbie becomes convinced that Mabel herself is unable to "enter" the "tranquillity" of Rose Cottage, but is "trying to and finding it difficult to do so alone."181 Mabel is therefore both an unreachable and a wounded god, hardly the unproblematic being of Barbie’s formulaic creed. Barbie also senses an unsettling presence, "a curious emanation, of a sickness, a kind of nausea that was not hers but someone else’s."182 Through Scott’s powerful blend of the literal and figurative, it appears certain that Barbie’s longing for tranquillity will not be satisfied at Rose Cottage, that even there her secret sorrow may culminate in a nausea of despair. With her Christian consciousness, Barbie links despair to a supernatural force, but there is also a hint that the "emanation" relates to her own vulnerability to despair as long as she lacks greater knowledge of herself and the world. It is as if Barbie, hoping for a tranquil retirement, has wandered into, or imagined herself within, a heavenly realm which is unexpectedly exposed, has no answers for human questions, and intimates that even a life such as Barbie’s has been unsatisfactory in an unspecified way that she alone must discover and correct. It also appears that the place of learning is not to be the sacred heights of Mabel’s dominion but the world below, the site of human conflict and tragedy.

Barbie is therefore redirected to the world she left—to the daily life of India, made more confusing and dangerous by the dissolution of British moral and political authority. Barbie’s religious crisis becomes part of an enveloping political crisis, with Scott ultimately linking the two and showing that Barbie’s ignorance of the link is a key to her struggle. She begins to see Mabel as suggestive not only of a distant,

178. Id.
179. See id. at 85 ("It was a curious relationship, like one between two people who hadn’t yet met but who would love each other when they did."); see also id. at 193 (Barbie saying of Mabel: "I have never really found her").
180. Id. at 24.
181. Id. at 21-22.
182. Id. at 17.

http://scholarlycommons.law.hofstra.edu/hlr/vol29/iss1/3
wounded deity, but also of a lost political° and moral° promise. In a rare moment of candor, Mabel articulates her own view of the British failure in India: "I thought there might be some changes, but there aren't. It's all exactly as it was when I first saw it more than forty years ago. I can't even be angry. But someone ought to be."° Mabel's torment is that the British mission in India failed itself and India by never changing, growing, or developing an awareness of human brotherhood, much less a practice of it. If Mabel on some level is the novel's stand-in for God, she is a god who expected, even demanded, change in the form of a fulfillment of the promise of respect and freedom.° In her haunted sleep, Mabel mutters a phrase which Barbie overhears but misunderstands; true to her spiritual ignorance, Barbie thinks it is a person's name,° not knowing that it is the name of a place where British troops massacred civilian Indians decades before. As The Towers of Silence unfolds, the current British rulers revive the same pattern of repression, causing a chain reaction of political violence. When the British authorities jail Indian politicians, mobs riot, spurring repression by the authorities and then violent Indian retaliation against British citizens.° Among the victims, as noted earlier, are Daphne Manners and Barbie's acquaintance from mission work, Edwina Crane.°

When reports of these events penetrate Rose Cottage, they lacerate and disorient Barbie,° seemingly commenting on the worth of her own beliefs and the way she has lived. Her mind confuses the two attacked women; at times she seems to be talking aloud to them, at other times

183. In the first book of the sequence, another character reflects on the original promise of the relationship between England and India:

Out of it was to come something sane and grave, full of dignity, full of thoughtfulness and kindness and peace and wisdom... For years [the English] have been promising [independence] and for years finding means of putting the fulfillment of the promise off until the promise stopped looking like a promise and started looking only like a sinister prevarication....

SCOTT, THE JEWEL IN THE CROWN, supra note 141, at 63. One scholar interprets Mabel as "the spirit of loss and of mourning, the England that sees the opportunity missed, the guardian of the lost ideals." WEINBAUM, supra note 135, at 180.

184. Scott writes that Mabel's "complete detachment from Pankot's public life" suggested the image of a witness "with an earlier golden age which everyone knew had gone but over whose memory she stood guardian, stony-faced and uncompromising, a bleak point of reference." SCOTT, THE TOWERS OF SILENCE, supra note 115, at 25; see also WEINBAUM, supra note 135, at 185, 190 (discussing Scott's use of metaphors in his novels for his inquiries into the truth).


186. See id. at 199 (noting Mabel's observance that "everything will be just as it always was").

187. See id. at 86.

188. See id. at 144.

189. See supra notes 142-45 and accompanying text.

190. See id. at 65.
she splits into separate identities. "There is more than one of me," she insists. One self is that of a tormented unbeliever; the other is a version of Miss Crane, who Barbie assumes "had been close to God and therefore to herself" throughout a long career in India. Barbie imagines herself cradling Miss Crane’s dead colleague on the road—a moment which Barbie associates with "apotheosis," the fulfillment of a life of service, a clarifying heroic moment. The stalemate of her two selves produces a fantasy of winning "release from [the] muddiness and uncertainty" of experience.

Barbie also experiences an acute sense of diminishment, furthered by her discovery of the essays of Ralph Waldo Emerson in which she finds a frighteningly inflated theory that all of human history can be explained by one individual’s experience. In Emerson she also thinks she finds the claim that each individual bears responsibility for the course of civilization. Barbie cannot hope to embody Emerson’s self-reliance, and his concept of individual responsibility in the stream of history is overwhelming in the context of India. The sense of shrinkage intensifies when she learns of Miss Crane’s suicide, news that destroys the previous image of her friend as the epitome of uncomplicated religious belief. Barbie senses that the suicide was a product of despair, Crane’s realization that she herself had failed India by being no more aware of, or respectful to, the Indians than the Raj itself—simply put, that she had been “out of touch with the world around her.”

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191. See id. at 57.
192. Id. at 70.
193. Id. at 65. Barbie is quite wrong about this. In the first book of the Quartet, Scott makes clear that Miss Crane was never religious, but joined the mission as a teacher in order to avoid going back to England when her former job as a governess ended. See SCOTT, THE JEWEL IN THE CROWN, supra note 141, at 11.
195. Id.
196. See id. at 84.
197. See id. at 68.
198. See id. at 84.
199. When Miss Crane dies, Barbie considers the nature of despair, using Christian vocabulary to associate despair with evil. Scott writes:

Barbie’s Devil was not a demon but a fallen angel and his Hell no place of fire and brimstone but an image of lost heaven. There was no soul lonelier than he. His passion for souls was as great as God’s but all he had to offer was his own despair. He offered it as boundlessly as God offered love. He was despair as surely as God was love.

Id. at 88-89.
200. WEINBAUM, supra note 135, at 129. Iris Murdoch sees despair as a consolation of the self. Extolling the virtue of moral seeing, she writes: “The difficulty is to keep the attention fixed upon the real situation and to prevent it from returning surreptitiously to the self with consolations of self-pity, resentment, fantasy and despair.” MURDOCH, supra note 1, at 91.
Scott thus traces Barbie's descent into a startled judgment of her own life. She fixates on an allegorical portrait of Queen Victoria, the Raj, and the Indians, insisting at first that the portrait represents British love for India, as if willing herself to believe that such love, if it ever existed, could continue. Later, this interpretation becomes impossible. The picture blurs, becoming an image of Miss Crane and the dead colleague—no longer a representation of love but of futility and unkept promises. The picture later empties completely; she can see nothing of her previous projections. These shifting interpretations suggest fervent efforts to pierce to the heart of England's purposes and the reasons for its failures of both love and justice.

Barbie's disorientation stops just short of madness. Scott brilliantly suggests that Barbie's crisis of splitting and shrinking, coupled with her constant reinterpretations of the portrait, have the paradoxical effect of producing not blindness, but sight. Her experience of reduction to baffled suffering leads Barbie to envision "the figure of an unknown Indian," a faceless Indian in torment as a result of colonial misrule. Scott writes: "It occurred to her that the unknown Indian was what her life in India had been about. The notion alarmed her. She had not thought of it before in those terms and did not know what to do about it now that she had."

Scott thus portrays Barbie's crisis of faith as a process of forced discernment not simply about whether God exists, but about the nature of her own existence and its relation to other lives. The root of religious doubt at first seemed to be divine silence but ultimately reveals itself as the inadequacy of Barbie's "life in India," the insufficiency of her knowledge and love of the unknown Indian. Ignorance of "what God is" combines with a question of whether one suffering from such ignorance has a "right to [existence]." This formulation is a crucial moment in Barbie's journey; her question changes from "where is God, and why have I lost contact?" to "what is 'God' and what should a life be in the

201. See SCOTT, THE TOWERS OF SILENCE, supra note 115, at 63-64.
202. See id. at 67.
203. See id. at 84.
204. Barbie's journey can be seen as one of slowly, painfully attaining clearer, truer vision of the world of India and the reality of Indians as persons. Cf. MURDOCH, supra note 1, at 34 (arguing that "moral seeing"—in the sense "of a just and loving gaze directed upon an individual reality"—is "the characteristic and proper mark of the active moral agent").
205. SCOTT, THE TOWERS OF SILENCE, supra note 115, at 69.
206. Id.
207. See id. at 195.
context of such a question? She ultimately struggles toward a recognition of God as agape, explaining, “I do not mean pity, I do not mean compassion, ... nor do I mean devotion,” but rather love for the stranger whose facelessness to colonialist eyes makes the British unfit to rule. She condemns herself for having “done nothing, nothing to remove” the divisions between Indians and the English.

In another of Scott’s marvelous paradoxes, Barbie finds the wit and self-sufficiency for action only when the god-figure, Mabel, dies. Is the death of a particular idea of God necessary for moral agency at a deep level? The rest of the novel consists of three seemingly modest actions which Barbie, with her “eternally alert” consciousness, takes despite inevitable failure. First, Barbie insists that the Raj honor Mabel’s wish to be buried next to her late husband in another city, where the two had been active in earlier, perhaps nobler, efforts of the British in India. Second, when a gift of silver “apostle spoons” which Barbie had made to one of the Layton daughters is rejected, Barbie goes to great lengths to redirect the gift to the British Army in Mabel’s memory. Finally, when Barbie returns for a final visit to Rose Cottage and encounters Merrick, the police superintendent, she confronts him directly about his corrupt handling of the rape case and the general failure of the Raj. Each of these actions appears to be a function of her newfound grasp of egalitarian respect, discovered in the territory between her old faith and the threat of despair. In effect, the crisis of faith has been a forced education for Barbie, a hard tutelage in what, if anything, she believes in the absence of either a religious or political creed, and in her inklings of a concept of good. In three confrontations with the Raj, she acts in an

208. See id.
209. See id.
210. Id.; cf. MURDOCH, supra note 1, at 66 (stating that “[t]he direction of attention is, contrary to nature, outward, away from self which reduces all to a false unity, towards the great surprising variety of the world, and the ability so to direct attention is love”).
211. See SCOTT, THE TOWERS OF SILENCE, supra note 115, at 200.
212. See id. at 204. In a rather stunning parallel, Scott places Mabel’s death and Barbie’s responsive action on D-Day.
213. See id. at 392.
214. See id. at 223-37 (detailing Barbie’s unsuccessful efforts).
215. See id. at 289-92 (detailing the plan to give a gift of silver spoons to the Officers’ Mess).
216. See id. at 370-83 (detailing Barbie’s encounter with Merrick).
217. See WEINBAUM, supra note 135, at 155.
218. Scott never says that Barbie surrenders belief in some kind of God. But her progress resembles that of Murdoch’s “moral pilgrim” who discovers that:

The self, the place where we live, is a place of illusion. Goodness is connected with the attempt to see the unself, to see and to respond to the real world in the light of a virtuous consciousness. This is the non-metaphysical meaning of the idea of transcendence to
effort to serve her unknown Indian, even if only symbolically.\textsuperscript{219} Without her crisis of faith, these actions could not have been possible.\textsuperscript{223}

Is there another thread that links Barbie's three actions? Each strikingly echoes an \textit{earlier} significant action in the story. Scott hints that the later actions recommend themselves to Barbie because they are analogous to earlier choices that over time proved worthy. Thus, the effort to secure a proper burial site for Mabel is immediately analogous to Barbie's habit of ensuring her friend's comfort in sleep;\textsuperscript{221} on another level, it is analogous to Mabel's own gesture decades earlier to honor Indian civilians gunned down by British troops.\textsuperscript{222} Barbie's second act, making a gift of silver "[a]postle teaspoons" to the forces of power, is analogous to Mabel's own gift of silver to the Army forty years before.\textsuperscript{223} Both acts invoke the duty of power to recall its original ideals.\textsuperscript{224} Finally, Barbie's encounter with Merrick is analogous to the efforts of other characters in the \textit{Quartet} to challenge the moral corruption of the Raj, risking a variety of consequences, including despair.\textsuperscript{225} In acting, Barbie implicitly defies the view that individuality is inevitably overwhelmed by the wave of history; she stands for the patient, if awkward, forward motion of individuals in crisis toward moral actions based on the authority of prior judgments of value.

Her scene with Merrick at the end of the novel measures the distance Barbie has traveled. She returns to a now-deserted Rose Cottage to retrieve the trunk of remnants of her life in India.\textsuperscript{226} Mission headquarters has decided to post her temporarily to the school in Dibrapur where her

\begin{quote}

which philosophers have so constantly resorted in their explanations of goodness. 'Good is a transcendent reality' means that virtue is the attempt to pierce the veil of selfish consciousness and join the world as it really is. It is an empirical fact about human nature that this attempt cannot be entirely successful.

\textbf{MURDOCH, supra note 1, at 92-93.}


220. \textit{At the same time, Scott makes clear that the actions are taken at a fatal price. The first ends in her eviction from Rose Cottage; the second ends in a serious illness; the third, in an almost certain physical if not mental breakdown. See id. at 234, 305, 385.}

221. \textit{See id. at 85, 193-94 (describing scenes in which Barbie, late at night, checked on Mabel as she slept, turned off Mabel's light, and arranged her bedcovers).}

222. \textit{See id. at 40 (noting the massacre in 1919); id. at 314 (noting Mabel's surreptitious gift of one hundred pounds in 1920 to the widows and orphans of the dead civilians).}

223. \textit{See id. at 181 (detailing Mabel and her husband's gift of silver to the Officers' Mess, decades earlier, perhaps symbolic of Britain's original promise of the treasure of independence).}

224. \textit{See id. at 169 (noting that Barbie had chosen twelve silver apostle spoons as a wedding present for the Layton daughter, representing "{t}welve witnesses to love of the sublimest kind").}

225. \textit{For example, Daphne Manners had refused to cooperate with Raj officials in the investigation of her rape, fearing that they would imprison the innocent man they had arrested. See Scott, The Jewel in the Crown, supra note 141, at 428-29.}


\end{quote}
friend Miss Crane had worked, and Barbie is heartened at the prospect. At Rose Cottage she unexpectedly encounters the man whom she has pondered for years but has never met: the police captain from the rape case.

Barbie discovers him as he stands on the verandah where the god-figure Mabel had died. This setting suggests that the scene concerns Barbie's contention with her own latent despair and, more deeply, its source in a conception of human existence as bereft of purpose. Meeting Merrick for the first time, she impetuously brings up the rape and the imprisonment of innocent men. She insists on talking about the British mission in India and how it went wrong. Because questions of political morality have become inseparable from religious questions in Barbie's consciousness, she presses Merrick in this same climactic conversation for the contents of Miss Crane's suicide note. Her relentlessness is matched by Merrick's "desire for her soul." As if calculating to undermine whatever remains of Barbie's moral stability, Merrick reveals what he says are the contents of the note: "There is no God. Not even on the road from Dibrapur."

Directly asserting what Barbie has merely suspected of her friend's (and indeed her own) conclusions about life and death, the words pierce the old missionary. Yet somehow they do not shatter her, and the question is why. Perhaps a clue can be found in her response. The assertion

227. See id. at 362-63.
228. See id. at 370.
229. See id. at 369.
230. See id. at 376-79.
231. See id. at 377-80.
232. See id. at 380.
233. Id. at 386. Throughout the scene, Scott links Merrick, face scarred and arm damaged from action in the war, to Barbie's earlier sense of the reality of evil. Thus, on Barbie's arrival at Rose Cottage, she senses a presence, of someone in possession and occupation, of something which made the air difficult to breathe. She put her hand to her throat and felt for the gold chain with its pendant cross and then walked forward, turned the corner and gasped—both at the sight of a man and at the noxious emanation that lay like an almost visible miasma around the plants along the balustrade which had grown dense and begun to trail tendrils . . . . [A] lean tall Englishman, . . . gazing as from a height, upon a world spread out before him.

Id. at 369-70. This image of the disfigured Merrick contemplating the Pankot hills surely evokes Milton's Satan looking out upon the created universe and then the world. See JOHN MILTON, PARADISE LOST (Odyssey Press ed. 1962); id. Book II, at 1051-55 (describing Satan coming in sight of a "pendant world" or spherical universe); id. Book III, at 540-43 (arriving in the world Satan "[l]ooks down with wonder at the sudden view / Of all this World at once"); id. Book IV, at 131-45 (describing Satan surveying Eden).

234. SCOTT, THE TOWERS OF SILENCE, supra note 115, at 381 (internal quotation marks omitted).
of purposelessness attributed to Miss Crane triggers not passivity or a similar suicidal response in Barbie, but action—action based on the purpose she has recently stumbled upon in the midst of her religious crisis: the duty to the unknown Indian. To be sure, it is a purpose that she has only partially defined and whose implications she incompletely understands, but it is firm enough in its outlines to spur a last act of instruction. Determined to share her "hopes" with Merrick, she gives him a present—the allegorical portrait of the British in India—and provides a final interpretation that marks the substance of her moral journey. She insists that Merrick considers the portrait from the perspective of "what got left out"—"the unknown Indian. He isn't there. So the picture isn't finished."

In this dazzling encounter, Barbie holds her own with Scott's emblem of the devil as purveyor of despair, articulating a purpose of human respect to counter Merrick's cosmic claim that the universe is empty of any motivating standard of God or good. Scott writes: "[S]he knew that God had shone his light on her at last by casting first the shadow of the prince of darkness across her feet." And in Barbie's consciousness: "I have been through Hell and come out again by God's Mercy."

Scott's marvelous ambiguity does not disclose whether Barbie is mad or sane when she makes the latter statement; perhaps neither term can apply to her after this encounter. Her vocabulary is still the language of religion, but her meaning is surely transformed, almost every word a metaphor. The crisis of faith has revealed a capacity of words to link her to a tradition of belief but at the same time to stand for new, or at least newly grasped, meanings. The confrontation with Merrick exhilarates Barbie, yet it leads to an accident and finally death alone in a mission hospital.

Barbie's story initially seems to depict a believer's loss of religious and political faith, the reduction of Barbie from one whose voice "carried" to a voiceless casualty of twentieth century moral experience. However, Scott's real point is probably quite different. In Barbie, he presents a believer who for nearly all her life has failed to comprehend either the context or potential content of her own beliefs. When her creed proves at best obscure, the crisis leads through shock to painful spiritual

235. See id. at 382.
236. Id. at 382-83 (emphasis omitted); see also Scott, The Jewel in the Crown, supra note 141, at 21 (referring to the same portrait and to "the very evils the picture took no account of: poverty, disease, misery, ignorance and injustice").
238. Id.
239. See id. at 391-92.
activity, a working out of the value that remains when it is no longer understood as merely given. This process involves becoming intimately, painfully aware of the conditions of one's time and place, articulating an understanding of them in conventional but newly charged language, and taking action in accordance with that understanding. Ultimately, it may be possible to see Barbie's crisis as leading not to a loss but to a deepening of faith, perhaps no longer in the same god-figure, but in the possibilities of purpose flowing from recognition of, and connection with, those "left out" of the portrait, perhaps with intimations of another order of reality as well. As Barbie says of her mission work: "One may carry the Word, yes, but the Word without the act is an abstraction." And the actions she takes in a setting of political and moral confusion are the products of analogy—measures that are justified as comparable to, and extensions of, past acts whose perceived richness somehow survives the surrounding disorder.

III. JUDGE EDWARDS: BELIEF, CRITIQUE, AND BILDUNG

In 1979, President Jimmy Carter appointed then-Professor Harry T. Edwards to a seat on the United States Court of Appeals for the District of Columbia Circuit, and since 1994, Judge Edwards has served as Chief Judge. Judge Edwards has published a number of articles addressing contemporary concerns about the nature of judging and judge-made law. Although he has not specifically addressed Kennedy’s *Critique of Adjudication*, or Seidman and Tushnet’s *Remnants of Belief*, Judge Edwards has responded forcefully to the argument that judicial decisions are best understood as the imposition of political preference. On the one hand, Judge Edwards insists that critique fundamentally misunderstands the judicial process; on the other hand, he acknowledges the threat and reality of unprincipled adjudication when pressure for results distracts a court.

240. *Id.* at 337.

241. For an interesting profile of the judge, see Jonathan Groner, *Chiefly, Edwards Is a Calming Influence*, LEGAL TIMES, July 8, 1996, at 1. In discussing the "essence of Harry Edwards," Groner describes him as "[i]ntense and driven, ... infused with a self-confidence and an inner security that have propelled him to repeated accomplishments in areas where he has been one of the first African-Americans." *Id.* Groner quotes Judge Laurence Silberman, who was appointed by Ronald Reagan, as saying of Judge Edwards: "Harry Edwards has been quite fair and sensitive to differing views. I have a very high regard for his integrity." *Id.* (quoting Circuit Judge Laurence Silberman). The article mentions Judge Edwards' efforts to bring "a degree of civility to an influential court often marked by personal and ideological rancor." *Id.* Groner notes "that Edwards is not regarded as a partisan judge. ... Although he is a Democrat and ordinarily a strong civil libertarian, his views on some cutting-edge issues before the court do not reflect conventional liberal opinion." *Id.*
How does Judge Edwards answer the claims of critique? What are his own doubts, and how does he respond to them? As shown below, Judge Edwards’ faith in law, like Barbie Batchelor’s religious faith, has been tested. Like Barbie looking initially for answers about God in the rarefied environs of Rose Cottage, Judge Edwards has walked the slopes of legal scholarship and engaged the issue of law’s neutrality there. Like Barbie, however, he finds more questions than answers on the contemplative plane. For both, there is much, if not more, to be discovered in the active life—in Barbie’s acts of confronting the Raj with her newly-charged vocabulary of belief, and in the Judge’s practice of deciding appeals in his revealing deployment of legal conventions. After examining the strong yet incomplete conclusions of Judge Edwards’ scholarly articles, this Article examines a range of his decisions in order to identify more precisely the nature and limits of his faith in law in an era of skepticism and distrust. Like the preceding portrait of Barbie, this Article’s analysis of Judge Edwards pays special attention to his practice—or ethic—of analogy, particularly its role in what has been called the “secret of judging”: “deciding what is the appropriate context of judgment.”

A. Declarations of Belief, Confessions of Doubt

After four years on the bench, Judge Edwards published an article entitled, *The Role of the Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication.* His starting point: “Appellate judges sometimes make law.” Although this “fact” had been commonplace in American legal thought for more than fifty years, Judge Edwards noted that “the activity of judicial lawmaking remain[s] mysterious.” And not simply mysterious: Recognizing the contemporary landscape of intense legal skepticism, Judge Edwards conceded that “a surprisingly large number of people, both within and without the legal community, question [the] legitimacy [of judicial lawmaking] in any

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244. Id. at 388.
245. Id.
Judge Edwards' purpose was to examine the nature and extent of constraint on appellate judges. Of his approximately 200 cases per term, Judge Edwards maintained that about fifty percent could be classified as "easy," in the sense that "the pertinent legal rules seem to me unambiguous and their application to the facts appears clear." In these cases, he said he feels "strictly bound"; any other decision than the one he gives would be considered error. On the other hand, thirty-five to forty-five percent of the cases per year are "'hard' in that each party has submitted at least one colorable argument." After research, reflection and discussion," Judge Edwards wrote of these cases, "the argument(s) advanced by one party seem to me demonstrably stronger than the argument(s) advanced by the other [such that] I feel constrained to render judgment in favor of the party [with] the more compelling claims." In his view, these decisions do not require any reference to "personal values or" the exercise of "any real measure of discretion or free choice."

This classification leaves a small subset—five to fifteen percent of the total cases per year—requiring the exercise of "discretion." Judge Edwards denoted these cases as "very hard" in the sense "that fair application of the law to the facts leaves me in equipoise," requiring the exercise of "some significant measure of discretion."

Offering a "first-level explanation" of "the varying degrees of constraint to which [judges] are subject in different kinds of cases," Judge Edwards referred to the work of Ronald Dworkin. In hard cases in-

246. Id. (emphasis omitted).
247. See id. at 389.
248. Id. at 389-90; see, e.g., Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. NLRB, 168 F.3d 509, 510 (D.C. Cir. 1999) (Edwards, J.) (finding legal question concerning rights of non-union members "an issue of first impression [but] not difficult").
249. See Edwards, The Role of a Judge, supra note 243, at 390. In Int'l Union, Judge Edwards ruled that "the case is really no different from" an earlier case in which the agency ruled that a union committed an unfair labor practice when it discriminated between members and non-members in processing grievances under the collective bargaining agreement. See Int'l Union, 168 F.3d at 513-14.
250. See Edwards, The Role of a Judge, supra note 243, at 392.
251. Id. at 390-91.
252. Id. at 391.
253. See id. at 390.
254. Id.
255. Id. at 392.
256. Dworkin has been called "the most influential English language legal theorist of this generation." Brian Bix, Jurisprudence: Theory and Context 81, 83 (2d ed. 1999) (summarizing Dworkin's view of law and legal practice "as processes of 'constructive interpretation,' interpretation that makes its object the best it can be (in Dworkin's words, an interpretation which makes it
volving interpretation of ambiguous statutory language, Edwards maintained that he does not rely on "personal values" but searches for legislative purposes and "select[s] the interpretation that would most effectively advance those ends." In a "borderline case," he "develop[s] a theory that accounts for as many as possible of the prior judicial decisions interpreting the doctrine in question, and then use[s] the resultant construct to make sense of the dispute before [him]."

Moving next to a "second-level explanation," Judge Edwards left Dworkin behind, admitted the strength of critique, and acknowledged that "if Legal Realism teaches anything, it is that deriving from general rules answers to specific questions in real cases, using nothing more than ordinary canons of rationality, is often difficult and sometimes impossible." He recognized "that reference to some complex of underlying policies or principles is unavoidable when interpreting and applying almost any rule," and that "the sources of indeterminacy are manifold." Edwards thus conceded the possibility that law is no different from politics, that adjudication is potentially a practice without constraint. How did he respond to these assertions?

He began with a statement of faith: "I believe that there is a recognizable and reasonable coherence to our judicial system." He then referenced his colleagues' sincere feeling of constraint, which he credited as unlikely to be a product of self-deception. Recognizing the need for additional explanation, he invoked declarations of faith made by two distinguished precursors, Justices Frankfurter and Cardozo, finding the implication of "something crucial, something necessary and almost sufficient to respond to the serious objections" of critique.

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257. Edwards, The Role of a Judge, supra note 243, at 393.
258. Id. at 394; see Dworkin, supra note 256, at 255 ("Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community.").
260. Id.
261. Id.
262. See id.
263. Edwards cited Frankfurter's statement that when statutory interpretation requires "the exercise of choice," the judge's duty is to avoid "capricious choice as much as choice based on private notions of policy," and Cardozo's trust in a "sense of fitness and proportion that comes with years of habitue in the practice of an art." Id. at 397.
264. Id.
The "something more" consisted of three factors of constraint. The first was legal reasoning, including the recognition of "what kinds of efforts to link concepts, rules, and cases from distinct spheres of the law are credible and what kinds are not," and certain "habits of the mind" exemplified by analogical reasoning.\textsuperscript{265} The second was the "code[] of conduct affecting relations among judges," including an attitude of "suspicion" with respect to departures from "the law."\textsuperscript{266} The third was "the personal makeup of a judge," including educational and family history, wealth, prior employment, social circle, and even age, sex, race, and nationality.\textsuperscript{267} Edwards argued that "judges strive mightily to diffuse the impact of the human factor," but that its influence appears in the disposition of hard cases and in the categorization and disposition of "'very hard'" cases.\textsuperscript{268}

For Edwards, these factors supported the conclusion that federal appellate judging, although not "infallible" or "unaffected by ideological influences," is "significantly constrained."\textsuperscript{269} More, however, was needed to respond to critique, and Judge Edwards turned last to the character of the judicial mind itself. He opposed the ideal of the judge as a monk-like figure who cultivates total independence from the world and uses "his cases as catalysts for reflection on the nature of his society and polity."\textsuperscript{270} Edwards urged that federal judges remain involved "in the world," participate in "exchanges of ideas" in non-judicial settings, and subject their ideas to "informed and critical development."\textsuperscript{271} Engagement enables the judge to "recognize" his beliefs as personal and thus "to evaluate and minimize the influence of" his beliefs in very hard cases.\textsuperscript{272} For Edwards, the human factor is a product of both the existence of personal beliefs and the effects of the judge's contact with the world beyond his chambers.

This article may not have wholly satisfied Edwards. He has returned to its subject matter—a judge's practical and theoretical response to critique—time and again, finding different ways to argue that adjudi-
cation is a matter of principle. In *Judicial Review of Deregulation*, published in 1984, Judge Edwards addressed judicial review of administrative action in the wake of President Ronald Reagan’s executive order requiring cost-benefit analysis of certain agency rules. When a number of courts invalidated instances of deregulation as arbitrary and capricious under the Administrative Procedure Act, newspapers characterized the decisions as products of liberal judicial activism. Judge Edwards strongly attacked the view that courts were “entering the fray, taking sides, making law, and upsetting the balance of power.” He denounced “the myth that judges are real participants in the political process,” a perception that “inaccurately taints the appearance and fact of the propriety of the judicial process, and misleads the public into believing that purely political struggles may be waged pursuant to litigation in the courts.” Declaring it “false ... to suggest that judges are power brokers in the political process,” Judge Edwards insisted that Congress itself provided for judicial review of agency action and supplied the standard of review.

This view did not, and perhaps could not, last. Judge Edwards’ faith appeared seriously shaken in *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, published eleven years after his appointment to the bench. The article seemed to be the work of a differ-
ent man. Admitting that he was "less sanguine" in his views, he wrote that although he "still believe[s] in and subscribe[s] to principled decision-making" as the essence of the judicial function, "it is no longer entirely clear . . . that partisan politics and ideological maneuvering have no meaningful influence on judicial decisionmaking." Edwards was diplomatic enough to attribute the situation to "certain external pressures felt by judges," which he saw as "both created and exacerbated by the continuing distortion of public perceptions [of] the judicial function . . . as just one more 'political' enterprise." He stated that such a "false perception can create a new reality which is a horror to behold." Having earlier worried that a public perception of judges as political creatures would "become a self-fulfilling prophecy," Judge Edwards indicated that his concern had become a partial reality.

The article aches with disillusionment. Its context was the government's "war on drugs" in the late 1980s. Edwards dissented in several cases in which the court, in his view, sacrificed constitutional rights to the government's interest in curbing drug trafficking. For Edwards, those decisions broke from "the ideal of principled adjudication"; the court responded to "'external pressure'" and engaged in "result-oriented decisionmaking" which amounted to the "trade [of] rights for results." Edwards decried the "real and lasting costs" of departures from legal principle.

Despite a chastened view of judging, Edwards in the same piece repeated his earlier general defense. Turning to the view that his court is part "of a politicized judiciary" deciding cases "on ideological grounds," Edwards insisted that "it is the worst indictment for judges to be labeled political partisans and to be seen as result-oriented in their

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282. *Id.* at 838.
283. *Id.* at 863.
284. *Id.* at 838.
285. *Id.*
286. *Id.*
287. *Id.*
289. *Id.* at 839-40. Edwards made the ultimate condemnation of these decisions by comparing them to two notorious Supreme Court decisions, *Korematsu v. United States*, 323 U.S. 214 (1944), and *Dennis v. United States*, 341 U.S. 494 (1951). Both, in Edwards' view, were judicial departures from principle, which had legal effects beyond the immediate cases. See Edwards, *The Judicial Function*, supra note 281, at 841-42, 845-46.
291. *Id.*
decisionmaking."  

Noting press accounts of attorneys' predictions of outcome based on panel selection, Judge Edwards rejected "the extraordinary premise [that] in all cases, even those involving simple and straightforward applications of legal doctrine, attorneys and their clients believe that judges will render decisions guided chiefly by their political or ideological leanings."  

Still, it was impossible to deny the political factor. Edwards recounted a story in which another judge's law clerk took an overtly ideological position with Edwards' clerk, threatening an en banc reversal if a panel decision reached a "liberal" result. While noting that conservative and liberal law clerks alike are no strangers to ideological zeal, Edwards expressed concern that judges themselves would begin regarding their function as political. According to Edwards, this could happen not simply in "hard" or "very hard" cases but in every case: "The more the D.C. Circuit is portrayed as divided into warring ideological camps, the more D.C. Circuit judges may see themselves as engaged in an ideological struggle and view every case in these terms." At stake was "the vulnerability of our decisionmaking process to political infection" of the judges themselves.  

In a "Postscript," Edwards referred to the visible infection of practicing attorneys. He noted a growth of "professional amorality that accepts and even demands a suspension of individual moral judgment." Citing the profession's emphasis on billable hours and results for clients over concerns of justice, he recalled a "patently frivolous" case that was brought to his court and argued in strident, unjustifiably righteous terms. Edwards invoked the duty of the courts to recommit to a principled approach that will "reverberate throughout the legal system."  

In a controversial article published a year later, Judge Edwards extended his disillusionment to the law schools. Sharply dismissing perceived academic disregard of practical scholarship and doctrinal teach-

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292. Id. at 850.
293. Id. at 853.
294. See id. at 855.
295. See id.
296. See id.
297. Id.
298. Id. at 863.
299. Id. at 864.
300. See id. at 865.
301. Id.
ing, Edwards suggested that some law students lack sufficient grounding in ethics as a result. He argued that "a doctrinal education is a crucial part of the lawyer's ethical development," and that "the ethical lawyer should only advance reasonable interpretations of the authoritative texts—interpretations that are plausible from a public-regarding point of view." In his view, too many practicing lawyers demonstrate "a lack of depth and precision in legal analysis," and insufficient familiarity with "controlling or analogous precedent." They are therefore ill-equipped to serve as officers of the court. The article emphasized that "the law" is a function of a certain kind of legal argument and reasoning, implying that constraints on judges derive at least in part from legal arguments made pursuant to an ethical appreciation of the lawyer's role.

Edwards' most recent article, Collegiality and Decision Making on the D.C. Circuit, responded to two authors who argued with statistical evidence that his court is "driven by ideology." In a specific refutation of their methodology and legal understanding, Edwards maintained that the authors' work exhibited a reductionist bias. Again he saw "serious confusion" in the view "that judges are lawless in their decision making, influenced more by personal ideology than legal principles." Acknowledging that some "shrug their shoulders in apparent disbelief" at his writings and insist "that non-partisan, rule-based judging is a foolish idea, easily refuted by empirical analysis demonstrating pervasive bias," Edwards reiterated the stance that appellate judging is fundamentally a principled practice.

In sum, the scholarly writings of Judge Edwards reveal an intensive engagement in a central problem of American jurisprudence—the decline of belief in what has been called "this mythical autonomous system

303. See Edwards, The Growing Disjunction, supra note 302, at 34. Edwards argued: "While [elite law] schools are moving toward pure theory, the firms are moving toward pure commerce, and the middle ground—ethical practice—has been deserted by both." Id.

304. Id. at 59. Edwards added that "doctrinal capacity—the capacity to develop and communicate a true understanding of some legal regime—is a necessary condition for ethical practice." Id.

305. Id. at 64-65.

306. See id. at 66.


308. Id. at 1335-36.


310. Edwards, Collegiality and Decision Making, supra note 307, at 1337.

311. Id. at 1365.

312. Id. at 1364.

313. Id.
of objective legal norms.” Edwards’ concern has been that “[w]hat hangs in the balance . . . is the idea of law as a neutral forum for the adjudication of contested claims.” When time and experience challenged Judge Edwards’ belief in judicial neutrality, he openly discussed his doubts. In the Wisconsin and Michigan Law Review articles, he recognized the impact of ideology within the judiciary, the profession, and the law schools, and he struggled for a persuasive framework to demonstrate that “principled” judging is both possible and pervasive. Nevertheless, an affirmative case for faith in law remained elusive. Judge Edwards’ declarations in the end begged a question: what is it that he believes besides these conclusions?

Judge Edwards’ articles tantalize by sounding a note of protest against the view that “the whole realm of political and legal action must be absorbed into . . . a more encompassing, indeed universal, will to power.” But his emphasis on predominating unity of thought on the D.C. Circuit, his categorization of cases, and his references to judicial conventions strongly suggest that the key to his belief, strained to the breaking point in the Wisconsin article, lies in his own work product. What can be gleaned from his opinions in actual cases? Do they manifest an approach to judging that can offer any further answer to critique and support the Judge’s call for restored belief in law?

B. Judge Edwards’ Practice of Judging

Judge Edwards acknowledged long ago that judges in hard cases were constrained in part by “conventions,” including “permissible forms of reasoning.” As discussed below, Judge Edwards’ judicial decisions exemplify a kind of reasoned argument that is clearly a form of what Karl Llewellyn called “the common law tradition,” in which “legal truth” “is a function of three elements: training, tradition, and creativity.” These are the components of able “practice,” whether by lawyer or judge. Like Llewellyn, Edwards knows that certainty of legal outcome in “hard” and “difficult” cases is often illusory, but he would insist with

319. Patterson, supra note 315, at 593.
320. Id.
Llewellyn "that 'the law is predictable to a truly amazing degree.'"\textsuperscript{321} Edwards is a jurisprudentially interesting figure because he defends the legitimacy of law from within its practice in a time of intense doubt about legitimacy. Recognizing and even participating in that doubt, he seeks to discipline and improve the practice, using his opinions not simply to decide disputes but to indicate his sense of the quality of "practice" on display, whether by a party, a lower court, or a fellow appellate judge. Judge Edwards’ quarry seems to be an internal ethic to make the Llewellyn model "work," in the sense of narrowing the universe of acceptable argument within the model and using certain forms of analysis. His apparent goal is to respond to critique by furthering the credibility and discipline of the common law model.\textsuperscript{322} In the sense of his demanding quest for a mode of ethical practice, he resembles Barbie Batchelor as "she pressed on, head bowed, in the hailstorm."\textsuperscript{323}

The next sections provide a reading of Judge Edwards' decisions as efforts to discipline the practice of the common-law model. The Article first discusses the Judge's "negations," his fierce rejections of certain legal arguments and analyses. This approach may be attributed to a heightened sense of the fragility of the model within which he works and a perceived need to be vigilant against practice that would support the argument of critique. The Article then discusses his affirmations—his own performance of analogical reasoning to reach credible results and in some cases to take the law on a new path.

1. Edwards' Negations: The Voice of Bildung

Judge Edwards' judicial opinions are reliably his own. In a short piece written several years after his appointment to the D.C. Circuit, he provided a glimpse of how he works:

"It is absolutely clear to me and to my clerks that no opinion leaves my chambers until I personally have completed work on a written product that satisfies my own standards. Every detail of my opinions must conform to my thinking and preferred methods of expression."

\textsuperscript{321} Id. at 596 (quoting KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 76 (Paul Gewirtz ed., Michael Ansaldi trans., 1989)).

\textsuperscript{322} In another article not discussed above, Judge Edwards mentions Llewellyn's expansive concept of legal study. The article, an address to the student editors of a law review, first mentions various attitudes towards life and professionalism that are available to young persons in law school and law practice. Judge Edwards then quotes Llewellyn's definition of the most challenging and most satisfying approach to legal study: "'[t]o make of your law a study of the way and the working and the wonder of this curious higher primate known as Man.'" Harry T. Edwards, Goals in Life Worth Pursuing, 10 FLA. ST. U. L. REV. 517, 519 (1983).

\textsuperscript{323} SCOTT, THE TOWERS OF SILENCE, supra note 115, at 24.
Although my clerks labor tirelessly to assist me in this work, they and I know that the final product is mine.\footnote{324}

A key feature of an Edwards opinion is its tone. What makes this voice distinctive, and what does it suggest about the nature of Edwards’ belief in law?

Edwards’ sternness is noticeable immediately. Encountering what he considers to be poor legal argument by a party, a lower tribunal, or another judge, Edwards can be unforgiving. For example, in a 1997 case, he denounced an argument proffered by the Federal Communications Commission (“FCC”) as “a preposterous position, one that we will not countenance.”\footnote{325} In another case that year, he leveled a party’s argument as “bizarre,” a claim “based on [an] absurd suggestion” bereft of any “case authority of which we are aware.”\footnote{326} In 1996, he declared in one case that an argument of the National Labor Relations Board (“NLRB”) was “limitless and nonsensical,”\footnote{327} and in another that “the Board’s decision to issue a bargaining order . . . is so lacking in evidentiary support and reasoned decision-making that it seems whimsical.”\footnote{328} Not restricting criticism to government agencies, he rejected a private party’s argument in another 1996 case as “patently meritless.”\footnote{329}

Judge Edwards’ tone cannot be attributed simply to intolerance of poor research or fuzzy logic. In the context of his scholarly writings, his harsh criticism can be attributed to a larger concern. A close look at several of his decisions suggests a concern with the proffer of baseless or barely marginal legal arguments that, if “countenanced” by the court, could well give credence to the position of critique that law is politics. For example, in a 1999 case, \textit{Associated Builders and Contractors, Inc. v. Herman},\footnote{330} a labor dispute led to the filing of unfair labor charges by a local union against an employer.\footnote{331} While the charges were pending at

\begin{itemize}
  \item \textit{COMSAT Corp. v. FCC}, 114 F.3d 223, 227 (D.C. Cir. 1997).
  \item \textit{Schoolman Transp. Sys., Inc. v. NLRB}, 112 F.3d 519, 521 (D.C. Cir. 1997).
  \item \textit{Aroostook County Reg’l Ophthalmology Ctr. v. NLRB}, 81 F.3d 209, 214 (D.C. Cir. 1996).
  \item \textit{Skyline Distrib. v. NLRB}, 99 F.3d 403, 410 (D.C. Cir. 1996).
  \item \textit{Burka v. Aetna Life Ins. Co.}, 87 F.3d 478, 482 (D.C. Cir. 1996).
  \item 166 F.3d 1248 (D.C. Cir. 1999).
  \item See id. at 1250.
\end{itemize}
the NLRB, the employees went on strike. The employer asked the Department of Labor’s Bureau of Apprenticeship and Training (“BAT”) for permission to train striker replacements. The employer proposed to train the replacements either in an agency-approved apprenticeship program to be administered by the employer, or in an existing agency-approved program run by another employer. BAT, however, declined to answer the employer’s request. BAT relied on a regulation which it interpreted to require NLRB action on the unfair labor charges as a prerequisite to BAT approval of participation in any apprenticeship program. Writing for a unanimous panel, Judge Edwards invalidated the agency action. He found that the agency had cited no authority for its interpretation of the regulation with respect to existing apprenticeship programs, that the only justification mentioned at oral argument was clearly illegitimate—that the agency had sought “to give the Union an advantage in the ongoing labor dispute”—and that BAT’s “blatantly disingenuous” interpretation was “plainly erroneous.” Edwards also found that counsel from two agencies had “consistently misrepresented” the regulation’s language, and that the misrepresentations “hardly can be viewed as simple oversights.” Edwards’ message was unmistakable: the court rejects arguments that do not comport with explicit regulatory language, the court rejects apparent governmental efforts to blur the line between law and politics by even appearing to favor one party over another in an adjudication, and the court does not shrink from accusing a party of lying if the accusation is tenable. Edwards’ rhetoric put agencies—in fact, all litigants—on notice that arguments thought by the panel to be frivolous or marginal would be identified as such. In the context of his other writings, Edwards’ purpose appeared clear: to discipline legal argument and reduce the vulnerability of courts and the law itself to critique.

In Rollins Environmental Services (NJ), Inc. v. EPA, Edwards dissented from a panel decision upholding the EPA’s finding that an operator of a hazardous waste facility had violated federal regulations.

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332. See id. at 1251.
333. See id. at 1250.
334. See id.
335. See id.
336. See id. at 1253.
337. See id. at 1255.
338. Id. at 1254-55.
339. Id. at 1255-56.
341. See id. at 654.
During operations to close a concrete basin of liquids and sludges with Polychlorinated Biphenyl ("PCB") content, the operator repeatedly rinsed the basin with a solvent and then measured the solvent's PCB concentration as less than fifty parts per million ("ppm"). The operator subsequently disposed of the solvent in an incinerator that had not been approved for disposal of PCBs. The operator relied on an EPA regulation that for purposes of PCB disposal appeared to allow the operator's chosen method of incinerating solvents with concentrations below fifty ppm. Six years later, the EPA charged that the operator had misconstrued the regulation and violated the Toxic Substances Control Act and agency regulations by disposing of the solvent in an incinerator that the agency had not approved for incineration of PCBs. A panel of the D.C. Circuit split, two to one, on whether the operator had violated the law. The majority noted that although the agency's interpretation of the regulation "would not exactly leap out at even the most astute reader," the interpretation was plausible. The operator's own interpretation was plausible as well, "[b]ut in a competition between possible meanings of a regulation, the agency's choice receives substantial deference." The operator was, therefore, liable for violating the regulation. In a footnote, the panel rejected the operator's argument that it could not have violated the regulation because it lacked notice of the agency's interpretation. The panel stated that the operator had failed to raise the argument about notice in a timely manner.

In a vehement dissent, Judge Edwards insisted that because "no reasonable reader of the disputed regulations could have known that EPA's current construction of the regulations is what the agency originally had in mind," the operator could not have had notice of the requirement and could not have committed a violation. Edwards declared that the panel's rejection of the operator's notice argument made "no sense," was unfathomable, and contravened "a cardinal rule of ad-
Because the agency itself had addressed the problem of notice, Edwards believed that "it [was] utterly specious to suggest that 'inadequate notice' was not an issue." Edwards found the issue raised in the operator's brief. He also faulted the majority for "bizarre reasoning" in rejecting the notice argument on the question of liability but accepting it on the question of penalty. Edwards' discontent reached a crescendo in his final paragraph, where he stated:

It strikes me as both absurd and injudicious to ignore the undeniable legal and logical implications of [operator's] notice argument . . . . To reach the result that it has today, the majority has strained to embrace a notion of legal formalism that defies every notion of justice. The problem is that the "formalism" sought to be embraced is not even well-founded, so that the majority opinion produces nothing more than an unduly harsh result.

With language of this kind, was Edwards accusing the majority of lawlessness, in effect providing support for the Kennedy-Seidman-Tushnet critique? If the Rollins majority opinion was truly unfathomable, absurd, and injudicious, did Edwards imply that the case was "easy" in the schema of his scholarly writings and that the majority's performance was only fathomable as an unprincipled exercise of ideology—here, an ideology of procedural formalism favoring state controls over individual justice? Perhaps Edwards was suggesting something different—that the majority opinion used a form of argument that did not necessarily reflect an exercise of ideology but nevertheless was outside the range of forms of argument that give law its legitimacy. If this reading of Edwards' dissent is proper, then the Judge may have aligned with Philip Bobbitt's view that the forms of argument are finite—in constitutional law, they are very few—and that argument "outside these modali-

353. Id. at 655. Judge Edwards stated "that a party cannot be found to have violated a regulatory provision absent 'fair warning' that the allegedly violative conduct was prohibited." Id. (citing Phelps Dodge Corp. v. Fed. Mine Safety & Health Review Comm'n, 681 F.2d 1189, 1192 (9th Cir. 1982)).

354. Id.

355. See id. at 656. Edwards could not point to explicit language used by the operator because none apparently had been used; the Judge's point was that the operator's meaning was nonetheless plain. The fundamental difference between majority and dissent appeared to be the characterization of the operator's argument and hence whether the issue of notice was preserved on appeal. See id.

356. See id. The majority had accepted the operator's claim for mitigation. See id. at 654 (holding that "the lack of adequate notice resulting from the regulation's inherent uncertainty in meaning is a mitigating factor that had to be taken into account in assessing the civil penalty").

357. Id. at 657.
ties" is not legitimate. As Professor Bobbitt asks: "What, after all, is 'judicial philosophy' if it is not the belief that certain forms of argument may provide a legitimate basis for a judicial opinion?" A third possibility is that Judge Edwards believed that the majority opinion remained within legitimate forms of argument but at the same time concluded that "its deployment of the forms of argument [was] illogical or untenable." And perhaps his complaint was not simply that the majority's argument was unreasoned; the heightened pitch of Judge Edwards' dissent suggested that debate within the forms of argument can involve "profoundly moral question[s]," "that the interpreter as decisionmaker does not escape the burden of moral choice merely because she decides within a tradition and by employing methods of interpretation provided by the tradition." Arguments about precedent, statutes, and other interpretable documents must be hard-fought because, even there, moral stakes can be high.

Regardless of which response to the Rollins majority is attributed to Judge Edwards, the predominant feature of his dissent was its tone. Edwards' voice in these and many of his other decisions arguably relates to the concern of the Wisconsin Law Review article that judges may come to see "every case" as a partisan battle to be won or lost rather than an occasion to search for principled analysis, and the concern of the Michigan Law Review article that the legal profession, aided by the academy, is guilty of serious neglect of the ethic and practice of public-regarding doctrinal argument. In this context, the tone of his opinions recalls the tone of the teacher whose first task is to instruct, elevate, and shape his students. And the idea of a rhetoric of shaping, of discipline, recalls the German concept of Bildung, which Lionel Trilling defined as "education," at the same time noting that it is "a word which is almost comically notorious for the multiplicity of its meanings, which make it the despair of translators." Among the meanings emphasized by Trill-
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Trilling added "that Bildung can mean gentle and gradual things, such as development, growth, generation, and achieved things, such as structure and organization, and, going beyond these, cultivation, culture, civilization, but it also means fashioning, forming, shaping, and it means as well the state of being fashioned, being formed, being shaped."

This concept, according to Trilling, was descriptive of a "humanistic educational tradition[]" in the United States in former times, involving "a fashioner, a former, a shaper, who puts forth strenuous effort against the recalcitrance of the material he is dealing with, and ... the material—which is to say the person—who submits to being dealt with, consents to undergo the ordeal of being fashioned, formed, shaped."

Trilling sensed that this educational tradition had faded because contemporary culture focuses not on the fashioning of a self—and hence the possible limiting of other options and possibilities—but on the multiplicity of identity and a "limitlessness in our personal perspective."

Perhaps Edwards' tone can be fruitfully understood as the voice of one who, in a time of doubt about everything from God's existence to law's autonomy, including law's capacity to contribute to the pursuit of a just society, would strive to fashion the deployers of legal argument in a strenuous way.

But fashion them to do what, and for what purpose? As Professor Smith has pointed out, Bildung can refer to a dynamic of development that is both rhetorical and philosophical: The individual is first challenged "to make knowledge vivid" by encountering the richness of metaphorical expression of knowledge; she then learns such expression

366. Id.

367. Id. Hegel’s concept of Bildung and its roots in classical and humanist principles of rhetoric is the subject of an excellent study. See John H. Smith, The Spirit and Its Letter: Traces of Rhetoric in Hegel’s Philosophy of Bildung (1988). Professor Smith begins by relating Bildung to the more familiar term, Bildungsroman, the genre of novels concerning the hero’s "education or cultivation." Id. at 5. Smith offers a detailed analysis of Bildung as "an individual’s recapitulation, in an activity of formative education, of cultural formations." Id. at 16. He notes that the eighteenth century German philosopher, Herder, developed the concept to include a variety of meanings:

(1) the development of an individual thing’s form; (2) education, especially that of advanced nations; (3) the process and product of the formation of human cultures; (4) the historical unfolding of “humanity” (Humanitat); and (5) the scientific view that all of nature is unified by a principle (force, Kraft) according to which each being strives for its ideal organic form.

Id. at 48.

368. Trilling, supra note 365, at 171.

369. Id. at 175.
by imitating examples from tradition; finally she “transforms” “the great texts of the past[]” in attaining her own independent voice and meaning. 370 In this process, the individual is formed by a tradition of speech and action. The formation is both limiting and enabling; it provides a distinctive means of both understanding and addressing new circumstances.

In this sense, then, one of Edwards’ often severely expressed purposes may be to preserve an aspect of “culture” in the sense of a system of particular “meanings” and “artifacts” that “will eventually be lost if they are not kept up.” 371 Describing law itself as a cultural artifact, Dean Kronman observes that “to keep up a system of laws requires an educational program of some sort through which each generation of newcomers can be introduced to the laws and learn the methods for interpreting them.” 372 In a similar sense, the concept of Bildung has been linked to Karl Llewellyn’s theory of legal practice, in which “legal truth” “is a function of ... training, tradition and creativity.” 373 Professor Patterson has drawn a connection between “Llewellyn’s conception of the role of training in constituting a practice,” and the understanding of Bildung as “culture” or “cultivation.” 374 Bildung can also be seen as the product “of an inner process of formation.” 375

Llewellyn sought to understand legal truth in this sense; he probed what he called the lawyer’s “operating technique,” which he saw as “the trained, tradition-determined manner of handling [legal] material.” 376 In Llewellyn’s view, this training enabled the judge to use legal rules as “guidelines,” points of direction, “which do not enable him to derive the solution of the new case from old law, but which will bring the solution of the new case into harmony with the essence and spirit of existing law.” 377 Llewellyn saw this disposition—this “conscious freedom of a trained lawyer”—as contributing to “a powerful source of constraint and predictability in the law.” 378 But constraint and predictability do not preclude the capacity for change. For Llewellyn, a rule in the hands of a

370. SMITH, supra note 367, at 19-20.
372. Id. at 1053.
373. Patterson, supra note 315, at 593.
374. Id. at 594.
377. Id.
378. Paul Gewirtz, Editor’s Introduction to LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA supra note 376, at xviii.
judge molded by legal training and tradition "functions not as a closed space within which one remains, but... as a bough whose branches are growing;... not as inflexible iron armor which constrains or even forbids growth, but as a skeleton which supports and conditions growth, and even promotes and in some particulars liberates it." This openness to change is reminiscent of Scott’s point in the *Quartet* that Britain’s failure in India was a function of never growing, never fulfilling its original promise.

The "inner process" of legal formation makes possible a process of legal change, along with what Llewellyn calls "the judicial conscience." Llewellyn leaves "conscience" undefined but implies that it involves "humility, self-questioning, and the willing internalization of tradition." Llewellyn also locates the site of conscience in what he calls "the world of What Is." One of Llewellyn’s philosophical heirs similarly focuses on "the world of legal practice and actual decision," the world in which "conscience is cultivated and faith embodied."

Having started with Judge Edwards’ tone, the present analysis posited a connection between the Judge’s voice and the possibility of a felt duty to form and to cultivate, but the analysis ends on the vague notes of "judicial conscience," "the world," and "faith." Have we wandered astray from the solidity of practice to the vagaries of metaphysics? Tone and cultivation beg the question of the quality of conscience and its purposes. If Judge Edwards, spurred by doubts both external and internal, is calling litigants, agencies, and fellow judges to renewed cultivation of a concept of practice, and ultimately to either retrieval or fresh discovery of a kind of legal conscience, what can be said about the nature and content of that practice and that conscience? We need to delve further in the Judge’s decisions for clues.

2. Edwards’ Analogies

A primary clue is that Judge Edwards, in using his often daunting adjectives, appears to be calling for a particular quality of reasons in the arguments he hears and the opinions he is asked to join. He gives prior-

379. Llewellyn, supra note 376, at 80. This capacity for change is akin to "the expansiveness of mind associated with Bildung [which] constantly seeks out what is of value in the new." Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 321 (1985).

380. Llewellyn, supra note 376, at 80.

381. Gewirtz, supra note 378, at xx.

382. Llewellyn, supra note 376, at 82.

383. Bobbitt, supra note 114, at 183.

384. Powell, supra note 360, at 1750.
ity to justification in law,385 insisting that legal conclusions depend on the soundness of reasons and intimating that not every reason offered or mode of reasoning demonstrated can be accepted in legal adjudication.386 This insistence on strong reasons to support legal conclusions is clearly a response (if not a complete one) to the argument of critique that “the judicial function is nothing more than a political enterprise.”387 By emphasizing the priority of justification, Edwards pays homage to what he calls “the ideal of principled decisionmaking.”388 Of course, in calling judges to the pursuit of that ideal, and in associating principled adjudication with reliance not on “partisan politics, ideology or personal whim,” but on “constitutional norm, a statutory provision or a case precedent,” Edwards begs the question of whether any of this is possible—whether “the rationality and ethical quality of legal reasoning” can ever be convincingly established.389 As argued here, Edwards’ core insistence on disciplined justification may reflect the view that the value of legal reasoning—more broadly, the value of a certain quality of “practice”—lies not in the provability of a principle as the basis of judicial decision-making, but in something else: the development of a vocabulary, style of argument, and thought process—captured, perhaps, in the concept of “conscience”—that can achieve legal change under certain circumstances and thereby contribute to the shaping of conditions for a more just society.

Edwards’ most vigorous language is often reserved for those who, in his view, have misused arguments from precedent and analogy. In a

385. See Scott Brewer, Valuing Reasons: Analogy and Epistemic Deference in Legal Argument 141-44 (1996) (discussing how rule of law norms—clarity, notice, and accountability—affect a judge’s “argumentative practice,” specifically that “judges are best understood as seeking to offer deductively clear rules ... to satisfy rule of law ideals”); Steven J. Burton, Judging in Good Faith 19 (1992) (noting that “[a] justification claims to show that one or another way of going on should be advantaged over others,” and observing that “[t]he possibility of this privileging is precisely what the new jurisprudences sometimes seem to deny”).

386. Cf Burton, supra note 385, at 37 (arguing “that[,] upon taking office, judges give up the opportunity to act on some kinds of reasons in the performance of their legal duties—most obviously ad hominem reasons, but also reasons excluded by the law’s authoritative standards and moral or policy reasons not warranted by the law as grounds for judicial decision”); id. at 49 (stating that “the idea of a legal reason includes both reasons that are created by the law and independent reasons the law warrants as grounds for judicial action”).


388. Id. at 840.

389. Id. at 839.

1990 case, New York Times Co. v. NASA, the D.C. Circuit reheard a case involving whether Exemption 6 of the Freedom of Information Act ("FOIA") entitled the National Aeronautics and Space Administration ("NASA") to withhold an audiotape of the crew of the space shuttle Challenger in the moments before it exploded. When the New York Times asked NASA for a duplicate of the tape, the agency declined, citing the privacy of the deceased astronauts' families, and released a transcript rather than the audiotape itself. Arguing that the audiotape would disclose additional information, the newspaper sued NASA for release of the tape pursuant to the Freedom of Information Act. NASA resisted, citing FOIA's Exemption 6, which allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The district court found the exemption inapplicable and ruled for the Times, and a split panel of the D.C. Circuit affirmed, with Judge Edwards in the majority. On rehearing, the Court reversed. Judge Edwards wrote a dissent joined by four other judges.

The legal issue presented by the case—whether the tape constituted a file "similar" to personnel or medical files under Exemption 6—paled in comparison to the emotional context of the dispute. The shuttle had exploded little more than four years before the case arose, and memories of the media's "intensive and extensive" coverage remained. The prospect of media access to the crew's voice inflections was understandably unsettling to NASA and could well have repulsed members of the court. The majority opinion, discussing whether the tape contained "personal information" for purposes of the Exemption, cited the New York Times' "chilling" coverage of a 1967 fire that killed Apollo astronauts. While the news account of the fire and deaths had not been based on an audiotape but on NASA's "verbal description," the majority had no "doubt that the horror in the voices on the tape would convey additional information that applies to the astronauts in the throes of their

391. 920 F.2d 1002 (D.C. Cir. 1990) (en banc).
392. See id. at 1003.
393. See id. at 1004.
394. See id.
398. See N.Y. Times Co., 920 F.2d at 1003.
399. See id. at 1010-18 (Edwards, J., dissenting).
400. See id. at 1004, 1012.
401. See id. at 1004.
402. See id. at 1005-06.
The majority interpreted a leading precedent of the Supreme Court as setting a very low threshold for government treatment of information as a "similar" file, and consideration of coverage of the earlier Apollo deaths contributed to the majority's conclusion that the threshold for permissive non-disclosure had been met. Dissenting, Judge Edwards charged that the majority's opinion accepted an "astonishing" argument by NASA, "defie[d] the will of Congress," "essentially discard[ed] [crucial language] from Exemption 6 as surplusage," and constituted an "absurdity." What accounted for this series of rebukes? Judge Edwards believed that the majority had not been faithful to the judicial function in the sense of a requirement that judges remain within a certain interpretive scope of statutes that have already been authoritatively interpreted by the Supreme Court. He suggested that the majority opinion had gone astray with its "hint ... that the Times' interest in obtaining the Challenger voice recording is sensational or voyeuristic." Whether or not the case's tug at judicial sympathies affected the majority opinion, Judge Edwards' dissent staunchly refused to be affected. He insisted that fidelity to FOIA and its interpretation by the Supreme Court should prevail over any extra-legal concerns about the propriety of an "arguably morbid" FOIA request. "[W]e are not at liberty to rewrite FOIA to defeat an unseemly request," he wrote.

Edwards found that the Supreme Court had specifically interpreted the "similar files" language of FOIA to limit the scope of the exemption, and that courts in other cases had granted the exemption to

403. Id. at 1006.
405. See N.Y. Times Co., 920 F.2d at 1003.
406. See N.Y. Times Co., 920 F.2d at 1010 (Edwards, J., dissenting). Edwards called the National Aeronautics and Space Administration's ("NASA") Exemption 6 argument "astonishing in light of [NASA's] concession that '[t]he withheld tape contains no information about the personal lives of the Challenger astronauts or any of their family members.'" Id. (Edwards, J., dissenting) (emphasis omitted) (citation omitted). The majority questioned whether NASA had made this "concession."" Id. at 1005 n.2.
407. Id. at 1011 (Edwards, J., dissenting).
408. Id. at 1018 (Edwards, J., dissenting).
409. Id. at 1016 n.7 (Edwards, J., dissenting).
410. Id. at 1018 n.10 (Edwards, J., dissenting).
411. See id. (Edwards, J., dissenting).
412. Id. (Edwards, J., dissenting).
413. Edwards quoted the Supreme Court's language in Washington Post that "it did not intend to 'render meaningless the threshold requirement that information be contained in personnel, medical, and similar files by reducing it to a test which fails to screen out any information that will not be screened out by the balancing of private against public interests.'" Id. at 1013 (Edwards, J., dissenting) (quoting United States Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 n.4 (1982)) (emphasis omitted). Edwards also quoted Washington Post for the proposition that the terms "medi-
the subjects of personnel or medical files, not the makers of the files. Edwards concluded that the astronauts were the makers of the audiotape, that the subject of the tape was not the astronauts but the operation of the shuttle, and that if the crew’s voice inflections were considered personal information protected as a “similar file” under Exemption 6, the threshold test of “similar files” would be effectively eliminated. The thrust of the dissent was that the court must be faithful to precedent even if a contrary view of Exemption 6 “reflects a better public policy,” and even if the contrary view appeals to an instinct of human compassion in the face of insensitive, even indecent, journalistic demands.

Edwards’ dissent, however, was not simply about obedience to precedent; it was also about expanding upon precedent, and it was about analogy. Edwards found guidance in precedent but not the entire solution to the problem; discovery of the necessary analytic framework required Edwards to infer from the statute, its legislative history, as well as from the Supreme Court case, a distinction between makers and subjects of government files, which he then applied to facts including litigation statements by the parties. Regardless of whether Edwards was correct in either statement or application of law, his dissent was a strong example of common law reasoning in the sense of “deriv[ing] basic guidelines from legal rules, guidelines which do not enable [the judge] to derive the solution of the new case from old law, but which will bring the solution of the new case into harmony with the essence and spirit of existing law.” In a broader sense, by taking his lead from precedent and seeking a formulation of new doctrine harmonious with existing law, Edwards demonstrated respectful grounding in the “accumulated fund of wisdom and experience” of the past, at the same time arguably participating in the “ongoing task of improvement” of law in incremental fashion. The message of his dissent, then, was not that precedent easily solved and controlled the case but that common law reasoning endorsed

415. See id. at 1017-18 (Edwards, J., dissenting).
416. Id. at 1018 (Edwards, J., dissenting).
417. See id. at 1013-14 (Edwards, J., dissenting).
418. See, e.g., id. at 1010 (citing NASA’s concession that the tape did not touch on the personal lives of the astronauts or their families).
419. Llewellyn, supra note 376, at 77 (emphasis omitted).
an interpretive use of precedent in the progressive creation of a rule to decide it.

But precedent-based doctrinal development was not the only feature of Edwards' dissent. In deciding whether the shuttle's audiotape was a file "similar" to personnel or medical files, Edwards used that "most familiar form" of legal thought, analogical reasoning. In fact, the entire analysis concerned identifying the relevant aspect of personnel and medical files, which "similar" files were to resemble in order to be treated as such. He thus engaged in the kind of analysis that Professor Cass R. Sunstein has termed "a process," one that usually operates in the absence of a comprehensive theory of what is right or good and invokes only low or intermediate level principles. Sunstein thinks analogical reasoning is "well-suited to a system ... in which participants must deal with political dissensus and moral flux"; perhaps Edwards' trust in this form of reasoning can be seen as an element of his response to the crisis of belief in American law. It is less likely, however, that Edwards' response places him in the camp of jurisprudential minimalism, which Sunstein attributes to the current Supreme Court, and which Sunstein links to the Court's own use of analogy. Edwards' response to "political dissensus and moral flux" lies less in pragmatic political operating theory of a Supreme Court and more in purposeful legal practice: Analogical reasoning helps "impose[] a certain discipline" on legal ar-

421. See Cass R. Sunstein, On Analogical Reasoning, 105 HARV. L. REV. 741, 741 (1993). Discussing analogical reasoning, Professor Bodenheimer wrote: "It has sometimes been asserted that, in contrast to deduction (involving reasoning from general to particular) and induction (constituting reasoning from particular to general), analogy may be characterized as reasoning from one particular to another." EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 390 (rev. ed. 1974) (citations omitted). Bodenheimer goes on to disagree with this assertion and suggests that decision makers proceed by identifying a "generalization implicit in the first decision" and "extend[ing] it by analogy to a" second or by deciding "to engraft exceptions upon the principle." Id. at 391. Bodenheimer suggests that the scope of a judge's discretion in analogical reasoning "demonstrate[s] the relatively limited role which formal logics plays in the solution of legal problems." Id.

422. Sunstein, supra note 421, at 747.

423. See id.

424. See id. Professor Brewer observes that "the defining feature of "analogical," "exemplary" reasoning is the use of examples in the process of moving from premises to conclusion in an argument." BREWER, supra note 385, at 22.

425. Sunstein, supra note 421, at 759.

426. Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 69-70 (1999) (discussing how "we" should "handle the problem of disagreement about the Constitution's meaning[,]" noting that reasoning by analogy "is frequently both shallow and narrow; it is an important part of minimalism in constitutional law").

427. Sunstein, supra note 421, at 770.
argument, a discipline arising from the consideration of similarities and differences of past cases. 428

What sort of discipline is this? As noted earlier, Edwards' approach to judging includes a sense of judicial duty to cultivate a kind and quality of legal argument. 429 His use of analogical reasoning seeks legitimacy for a present argument by offering both a certain attitude toward the past and a specific justification based on elements of a past decision. For the analogist, the past is a place of human conflict not wholly different from the conflict of the present, with partial resolutions achieved by both good law and bad law, just and unjust decisions. This attitude reflects and promotes both humility and pride on the part of the analogist. The turn to the past stems in part from humility, the sense that all or part of the answer to a current dispute is to be found not simply in the judge's own assessment of the dispute or his reliance on a rule or an overarching principle, but in study of a past resolution of a similar case and recognition of two things: that wise resolution of the current dispute may counsel adherence to a past resolution, and that fair resolution of the current dispute may require such adherence. 430 But the turn to the past involves pride as well, in the sense of confidence in the mind's ability to sort similarities and differences, to find both relevance and authority in one past decision rather than another, perhaps in none, and to explain the entire thread of analysis persuasively. If humility situates the analogist in a stream of past conflicts and decisions, pride enables the analogist to work with those materials for a present end—choosing, following, distinguishing, or rejecting. On this view, a judge's practice of analogy represents the judicial role as a blend of study and action, perception and initiative, criticism and performance. At the intersection of each pair is the judicial decision, the situs of explanation, the place where the workings of judicial humility and pride can be evaluated. Thus, an ethic of analogy begins with a premise that some, though not all, instances of past legal decision-making are worthy of respect, that present wisdom and fairness demand attentiveness, if not invariable acceptance, of past decisions, and that grappling with a body of authority promotes an acceptable combination of judicial freedom and restraint.

At its core, then, analogy is about choice. But choice, to stand up, requires reasons. Analogy is therefore both central to legal thought and exceedingly difficult and delicate work. On this view, the disciplined capacity of analogical choice may be what scholars mean by "judicial con-

428. See id. at 774.
429. See supra notes 385-90 and accompanying text.
430. See Sunstein, supra note 421, at 775-77.
science." But what more does the discipline entail? What is the nature of choice in analogy? How does the judge discern and articulate that part of law's past that can and should be made a basis for present action?

In Lutheran Church-Missouri Synod v. FCC, a church applied to the FCC for renewal of its two radio broadcast licenses. The National Association for the Advancement of Colored People ("NAACP") filed a petition to deny the application, charging that the licensee's equal employment opportunity ("EEO") program was deficient under the agency's EEO rules and that the licensee had hired an inadequate number of black employees. When questioned about its hiring practices, the church gave responses that were unsatisfactory to the FCC, which designated the application for hearing.

An administrative law judge determined that the church had violated the FCC's rules, although not intentionally, and the Commission affirmed. When the church sought review in the Court of Appeals, arguing violations of the First Amendment and equal protection, the agency filed a motion for remand. Looming in the background was Adarand Constructors, Inc. v. Pena, the Supreme Court's 1995 decision subjecting racial classifications in federal statutes to strict scrutiny.

The D.C. Circuit rejected the agency's motion for remand as an "unusual legal tactic[]" designed "to avoid judicial review." On the merits, a unanimous panel held that the agency's EEO regulations have the effect of "oblig[ing] stations to grant some degree of preference to minorities in hiring" without compelling justification and thus in violation of the Fifth Amendment. The panel reached its decision despite the fact that the record contained no evidence of discrimination by the church pursuant to the EEO rules.

431. 141 F.3d 344, reh'g denied, 154 F.3d 487 (D.C. Cir. 1998), reh'g en banc denied, 154 F.3d 494 (D.C. Cir. 1998).
432. See id. at 346.
433. See id.
434. See id. at 347. The church claimed that "its hiring criteria of 'knowledge of Lutheran doctrine' and 'classical music training' narrowed the local pool of available minorities." Id. at 346. The church also maintained that it did not conduct outside recruiting for many employment openings because it drew numerous employees from its affiliated seminary. See id. at 347.
435. See id. at 348.
436. See id. at 348-49. The FCC maintained that it had modified an agency standard and now permitted broadcasters to use a religious preference in hiring employees for any station position. See id. at 348.
438. See id. at 201.
439. Lutheran Church-Missouri Synod, 141 F.3d at 349.
440. The panel consisted of Judges Silberman, Williams, and Sentelle. See id. at 345.
441. Id. at 351.
442. See id. at 352.
Suggestions for rehearing en banc were denied. Judge Edwards dissented from the denial of the suggestions, relying on a two-part argument: first, that the panel had misread the content of the EEO rules, and second, that the panel had misunderstood the rules' practical effects. On the first point, Edwards relied on what he considered the plain meaning of the language of the rules; on the second, he relied on an analogy between what the legally questioned EEO rules required licensees to do, and what the legally unquestioned framework of Title VII required employers to do.

Judge Edwards insisted first that the court had seriously confused the language of the agency's EEO regulations. The court erred in failing to understand that the regulations were merely "nonpreferential" policies prohibiting discrimination in employment and requiring stations to design programs to ensure that the stations afforded equal opportunities. According to Edwards, it was not reasonable to construe the regulations as creating "the kind of racial classification that must be subjected to strict scrutiny under Adarand." Quoting long passages from the rules, Edwards pointed out that they "command virtually nothing, save good faith efforts by broadcasters to ensure against unlawful employment discrimination." He noted that the rules "do not 'oblige' anyone to exercise any sort of hiring preference," and that they "'influence' hiring decisions only in the sense that anti-discrimination law generally seeks to influence employers to avoid bias."

Judge Edwards then turned to existing law for an example of the practical effect of a requirement with similar content. He argued that the panel's view of the workings of the EEO rules—that by creating the possibility that the agency could subject a broadcast renewal application to a processing "audit," the rules constituted a preferential racial classification—"makes no sense" in light of a chosen base point, the law of Ti-

444. See id. at 496-97 (Edwards, J., dissenting).
446. See id. at 496 (Edwards, J., dissenting).
447. See id. at 497 (Edwards, J., dissenting).
448. Id. at 496 (Edwards, J., dissenting).
449. Id. (Edwards, J., dissenting).
450. Id. at 496-97 (Edwards, J., dissenting).
451. STEVEN BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 28 (1985) (noting that "[t]he first step in analogical reasoning is the selection of a proper base point with which to compare and contrast the problem situation," and observing that "the doctrine of precedent gives a special status as base points to law cases decided in the past by the highest court in the jurisdiction in which a problem case arises").
title VII, as interpreted by the Supreme Court. He pointed out that the Court’s precedents under Title VII “and disparate impact frameworks show definitely that no suspect ‘racial classification’ need arise simply because the law dictates that an employer might have to explain, on pain of sanction, why its hiring decisions were nondiscriminatory.”

Edwards unfolded his analogy in compelling fashion. He identified what he considered to be strongly relevant similarities between the EEO rules and Title VII’s analytic framework, showing that, if anything, the EEO rules “use race in an even less instrumental way[.]” He noted that Title VII’s framework is “routinely enforce[d]” without hint of triggering strict scrutiny. And he argued that the panel’s only real response to the Title VII analogy was weak—the argument that Title VII explicitly provides that it should not be interpreted to grant racial preferences. As Edwards dryly noted, adding such a “caveat” to the EEO rules “is easily achieved.”

The turn to analogy—to the specific similarities of the unchallenged workings of Title VII—led Edwards to even more specific statements about what he considered the essence of the connection between Title VII and the EEO rules. For Edwards, they shared common grounding in a specific understanding about reality itself, Llewellyn’s world of “What Is.” As Edwards wrote:

The panel decision seems to be of the view that any policy that leads an employer to be conscious of race while making hiring deci-

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452. See Lutheran Church-Missouri Synod, 154 F.3d at 497-98 (Edwards, J., dissenting) (citing Supreme Court cases under Title VII, including Tex. Dep’t Cmty. Affairs v. Burdine, 450 U.S. 245 (1981)).

453. Id. at 497-98 (Edwards, J., dissenting). In analogizing the equal employment opportunity (“EEO”) rules to Title VII, Edwards followed what Sunstein has called: the characteristic form of analogical thought in law. The process appears to work in four simple steps: (1) Some fact pattern A has a certain characteristic X . . . ; (2) Fact pattern B differs from A in some respects but shares characteristic X . . . ; (3) The law treats A in a certain way; (4) Because B shares certain characteristics with A, the law should treat B the same way.

Sunstein, supra note 421, at 745.

454. See Burton, supra note 451, at 29-30 (noting that “[t]he second step in analogical reasoning is the identification of factual similarities and differences between the base-point situation and a problem situation”).

455. Lutheran Church-Missouri Synod, 154 F.3d at 498 (Edwards, J., dissenting).

456. Id. (Edwards, J., dissenting).

457. See id. (Edwards, J., dissenting).

458. Id. (Edwards, J., dissenting).

459. See Burton, supra note 451, at 31-39 (discussing the third step in analogical reasoning, which is “determining whether the factual similarities or the differences between the two situations are more important under the circumstances”).
sions demands strict scrutiny. I think this is incorrect as a matter of law and logic: a person who is being scrupulously and self-consciously careful not to be racist in a hiring decision is certainly “conscious of” race—but in a positive way. To think otherwise is to confuse the aspiration to color-blindness with the reality that today, whether we like it or not, “race” exists as a social fact.  

Analogical reasoning thus led Edwards to narrow the inquiry, achieving his pinpointed yet rock-hard statement about the reality of race in American society—that race exists as “a social fact.” The judge’s declaration of course carried with it an implied principle—that rules merely requiring persons to take race into account as a social fact so as to guard against discrimination are not unconstitutional systems of preferential treatment—but I think the importance of analogy here for Edwards was not wholly or even necessarily that analogy assists in isolating a decisional principle, but that analogy helps the judge to see, that is, to arrive at an understanding of “social fact” that either underlies or leads to the principle’s formulation. On this view, the panel had failed to distinguish social fact from constitutional infirmity.

Edwards then noted that the panel had also misunderstood the applicable concept of diversity in the case, implying strongly that the panel had operated under its own understanding of social fact—the view that “diversity” in any of its forms was legally suspect as a governmental interest. Edwards clarified the sort of diversity at stake in the case before the panel (“programming diversity”), noted that the Supreme Court in Adarand had not overruled this diversity as a justification for EEO rules, and complained that the panel’s difficulty with the larger concept should have no bearing on the present case.

Edwards thus appeared to acknowledge that the Lutheran Church-Missouri Synod case at its core was about differing views of reality—of “social fact”—and that the difference at a deep level involved the nature of consciousness about race. Even with this acknowledgment, Edwards did not shrug off the case to ideology; he never divorced it from familiar legal frameworks. He linked deep competing concerns about race with legal doctrine: he relied on the fact that race as a social fact was encom-

460. Lutheran Church-Missouri Synod, 154 F.3d at 498 (Edwards, J., dissenting).

461. See id. at 499 (Edwards, J., dissenting). Edwards wrote that “the panel here subjected the term ‘diversity’ to a rhetorical attack which, in my view, misstated the limited way in which the concept of ‘diversity’ functions in this case.” Id. (Edwards, J., dissenting). Edwards clarified that the case involved an interest in programming diversity, an interest which he noted that the Supreme Court endorsed in a 1990 case and did not eliminate in Adarand. See id. at 499-500 (Edwards, J., dissenting).

462. See id. (Edwards, J., dissenting).
passed in the law of Title VII, whereas general skepticism about "diversity" neglected the Supreme Court's specific treatment of programming diversity and ignored that the Court's treatment of such diversity had survived Adarand. 463

Edwards' concluding point was that the court's equation of EEO rules with racial classifications "disserved the development of anti-discrimination doctrine." 464 Analogy to Title VII, one piece of anti-discrimination law, permitted Edwards to emphasize the theme of law as a process of development over time, and to imply that the majority opinion was a hasty product of anxiety about affirmative action. For Edwards, law develops in steps aided by analogy's inspection of similarities and differences between a current problem and the resources of the past. The panel's unfocused attack on the EEO rules and insufficient attention to the Title VII analogy suggested both a vulnerability to personal preference and an undisciplined neglect of the case's place in a larger picture.

Another case in which Judge Edwards used analogical reasoning to isolate a narrow yet legally supportable view of social fact was *Sierra Club v. EPA*, 465 in which the D.C. Circuit examined whether an Environmental Protection Agency ("EPA") regulation exceeded the authority of the Clean Air Act's transportation conformity requirements. 466 Since 1970, the statute had required that State Implementation Plans for achieving compliance with National Ambient Air Quality Standards include plans for controlling the contribution of transportation activities to air pollution. 467 In 1977, Congress had prohibited federal agencies from financing, licensing, or approving any activity not in conformity with a State Implementation Plan, and, in 1990, Congress had gone further by establishing "a comprehensive transportation conformity program." 468

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463. See id. (Edwards, J., dissenting).
464. Id. at 500 (Edwards, J., dissenting).
465. 129 F.3d 137 (D.C. Cir. 1997).
467. See *Sierra Club*, 129 F.3d at 138.
468. See id. The court noted that these requirements "were 'largely ... ignored by the agencies required to apply [them]." Id. at 140 (citing 136 CONG. REC. S16,972 (daily ed. Oct. 27, 1990) (statement of Sen. Baucus)) (alterations in original).
469. Cumberland, *supra* note 466, at 511 (citing 42 U.S.C. § 7506(c)(1) (1994)). The court noted: Section 176(c), as amended, integrates the Clean Air Act with the transportation planning process by conditioning federal approval and funding of transportation activities on their demonstrated compliance with applicable SIPs .... Prior to approval of applicable SIP control strategies, transportation activities must comply with interim requirements by showing that the proposed activity will contribute to emissions reductions. *Sierra Club*, 129 F.3d at 138.
The EPA issued regulations to implement the comprehensive program in 1993. In 1995, the agency promulgated additional rules, including one that provided a "grace period" exempting transportation activities in certain areas from compliance with State Implementation Plans for a twelve-month period. The Sierra Club challenged the legality of the grace period, and the D.C. Circuit, in a unanimous decision authored by Judge Edwards, struck down the grace period as contrary to the plain meaning of the statute.

By "plain meaning," Edwards did not mean that the statute explicitly precluded a grace period. Edwards meant that Congress, in amendments to the Clean Air Act enacted after promulgation of the challenged rule, said nothing whatsoever about a grace period, and that legislative silence "cannot be read to imply that the EPA can create such an exemption via administrative rule." To bolster this conclusion, that Congress' meaning was plain even if only implicitly so, Edwards engaged in analytical reasoning, finding his base points in two circuit precedents. In both, the court had invalidated "administrative narrowing of clear statutory mandates." Without elaborating, Edwards apparently found that administrative narrowing, in the sense of limiting the situations to which a regulation would be applicable, was similar to administrative grace, in the sense of granting a temporal dispensation from regulatory compliance. But what was the relevant similarity? Edwards did not say. In fact, the differences were arguably more apparent at first blush: narrowing the scope of permissible regulation may be quite different from simply delaying a regulation's effect for a year. But the two instances were similar insofar as each involved an administrative lessening of impact (by scope and timing, respectively) in the context of legislative silence about whether lessening of impact was permissible. And it appeared that the process of examining his base point cases led Edwards again to a discovery of social fact, here an understanding of legislative reality: that Congress knows well what it is doing when it provides for the scope of applicability of environmental regulation. Thus, without a clear sign of legislative authority for regulatory narrowing, the court quite plausibly drew the legal conclusion that Congress did not intend to delegate such

470. See Sierra Club, 129 F.3d at 138-39.
473. Id.
474. Id. (citing Sierra Club v. EPA, 992 F.2d 337, 343-45 (D.C. Cir. 1993); Hercules Inc. v. EPA, 938 F.2d 276, 279-81 (D.C. Cir. 1991)).
authority. Armed with this "fact" produced by close consideration of the base point cases, Edwards reasoned that if administrative narrowing could not be squared with legislative intent of the governing statutes in the prior cases, administrative grace in the present case suffered from the same incapacity.

But Edwards did not finish there; his opinion continued for four additional pages. Perhaps in view of the fact that the statute was silent about specific agency authority to enact a grace period, Edwards addressed the EPA's own arguments from precedent and analogy. In considering whether the case was relevantly similar to, or different from, the cases invoked by the agency, Edwards again engaged in the analysis of particulars, the hallmark of analogical reasoning. First, he examined the agency's argument that since the challenged regulation was "similar" to a grace period explicitly provided in the statute, the challenged regulation was not ultra vires. Edwards thought the analogy unpersuasive, finding the statutory grace period relevantly different in that it pertained not to an exemption from compliance but to interim procedures for showing compliance. He then rejected a second analogy—that the statute gave the agency discretion to determine the "frequency" of conformity determinations and, hence, implicitly authorized the challenged grace period—on much the same ground. Finally, he rejected another analogy—that the challenged grace period was akin to relief from "retroactivity" approved in a prior case. "This is a ridiculous claim," Edwards wrote, an "absurdity." He cited cases rejecting the idea that regulations are invalid simply for "unsett[ing] expectations and impos[ing] burdens on past conduct." Again, Edwards appeared to rely on the "social fact" yielded by analogical reasoning—that Congress knows, if nothing else, the problems of industrial transition to new environmental regulation and will provide relief if it sees fit.

475. See id. at 141.

476. See id. Edwards added that even if the statutory provision resembled the agency's grace period rule, the court would have all the more reason to hold "against the validity of creating additional exemptions via administrative rule," citing a previous case for the proposition that "when a statute lists several specific exemptions to the general purpose, others should not be implied." Id. (citing Sierra Club v. EPA, 719 F.2d 436, 453 (D.C. Cir. 1983)) (emphasis omitted).

477. See id. at 141-42.

478. See id. at 142.

479. Id. at 143.

480. Id. (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 269-70 n.24 (1994) and citing DIRECTV, Inc. v. FCC, 110 F.3d 816, 826 (D.C. Cir. 1997)).

481. See id. at 143 (noting that "although it is certainly within Congress's power to provide such grandfathering provisions, neither administrative agencies nor courts may do so in the absence of clear statutory authority").
For Edwards, then, analogical reasoning appears to serve the traditional purposes that scholars have associated with this form of thought. But it serves another purpose as well. Analogy's search for relevant connections among cases encourages the discovery of social fact which underlies a prior case and which can form a persuasive, even compelling, ground for treating a new case—a case underscored by the same social fact—the same way. Naming the social reality that underlies a legal doctrine and entering that perception into the dialectic of decision is part of the process of Bildung followed pervasively by Judge Edwards. In a climate of doubt about law's relationship to justice, he seeks the social reality that generates legal decisions. When he tells the EPA, "This is a ridiculous claim," he urges the agency not necessarily to see things his way, but to fashion stronger arguments based on more intensive efforts to see and grapple with social fact and its connection to relevant law.

Another case in which analogy led Judge Edwards to a declaration of a social fact, which in turn suggested a legal principle, is Hutchins v. District of Columbia. Sitting en banc, the D.C. Circuit upheld the constitutionality of the District's Juvenile Curfew Act of 1995. The statute "bars juveniles 16 and under from being in a public place unaccompanied by a parent or without equivalent adult supervision from 11:00 p.m. on Sunday through Thursday to 6:00 a.m. on the following day and from midnight to 6:00 a.m. on Saturday and Sunday, subject to certain enumerated defenses." A group of minors, parents, and a local business challenged the statute on a host of constitutional grounds. A plurality of the court ruled that the statute "implicate[d] no fundamental rights of minors or their parents;" even assuming the presence of fundamental rights, the court found no constitutional violation. On the issue of parental rights, the plurality stated:

[I]nsofar as a parent can be thought to have a fundamental right, as against the state, in the upbringing of his or her children, that right is focused on the parents' control of the home and the parents' interest in controlling, if he or she wishes, the formal education of children.

482. 188 F.3d 531 (D.C. Cir. 1999).
483. See id. at 534.
484. Id. at 534 (citing D.C. CODE ANN. §§ 6-2182, -2183 (1996)).
485. E.g., Fifth Amendment Due Process and Equal Protection rights to freedom of movement; Fifth Amendment Due Process right to raise one's children; First Amendment rights of freedom of expression and assembly; Fourth Amendment right to be free from unreasonable searches and seizures, and unconstitutional vagueness. See id. at 535.
486. Id. at 534.
487. Id. at 540-41.
The plurality added: “It does not extend to a parent’s right to unilaterally determine when and if children will be on the streets—certainly at night[;]” such determinations were deemed “not among the ‘intimate family decisions’ encompassed by such a right.”

Judge Edwards found the plurality’s formulation of parental rights “much too narrow.” He turned to a number of Supreme Court precedents for the proposition that “a parent’s stake in the rearing of his or her child surely extends beyond the front door of the family residence and even beyond the school classroom.” The precedents supplied base points for analogical reasoning: They declared a parent’s right to govern “the custody, care and nurture of the child,” the “strong tradition of parental concern for the nurture and upbringing of their children[;]” “the interest of a parent in the companionship, care, custody, and management of his or her children”; and “the liberty of parents and guardians to direct the upbringing and education of children under their control.” These precedents, in Edwards’ view, taught that parents have rights to control their children’s rearing and nurture both at home and at school; Edwards argued that by analogy parents have the same liberty to control their children’s care, custody, and management “outside the home and school.” Hence the law required close scrutiny as to whether the curfew law infringes that liberty. In the process of making this analysis—sorting through the similarities between freedoms acknowledged in prior cases and freedoms posited in the current case—Edwards arrived at another declaration concerning “reality.” As in the cases analyzed above, close comparison of cases allowed him to arrive at an understanding of social fact:

Such a view [that a parent’s right is limited to child-rearing within the house] would come as a stunning surprise to countless parents throughout our history who have imposed restrictions on their children’s dating habits, driving, movie selections, part-time jobs, and places to visit, and who have permitted, paid for, and supported their children’s activities in sports programs, summer camps, tutorial coun-

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488. Id. at 541. For the purposes of discussion in another part of its opinion, the plurality “assume[d] a substantially broader formulation” of parental rights but did not elaborate on what the formulation entailed. Id. at 545 n.7.
489. Id. at 549 (emphasis omitted).
490. Id.
491. Id. (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
492. Id. (quoting Wisconsin v. Yoder, 406 U.S. 205, 232 (1972)).
493. Id. at 550 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).
494. Id. (quoting Pierce v. Soc’y of Sisters, 268 U.S. 510, 534-35 (1925)).
495. Id.
suling, college selection, and scores of other activities, *all arising outside of the family residence and school classroom.* To ignore this reality is to ignore the Supreme Court's admonition in *Yoder* that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." 496

Just as race is a social fact, and transitional requirements are part of the reality, known to Congress, of environmental regulation, Edwards here signaled a reality, linked explicitly both to precedent and experience, that informed for him the scope of parental rights.

Edwards expressed a similar concern for disregard of parental rights in an earlier case, *Action for Children's Television v. FCC.* 497 The FCC had promulgated rules implementing the Public Telecommunications Act of 1992, 498 which banned indecent speech on radio and television during the hours of six a.m. until midnight. 499 A majority of the court upheld the indecency rules, finding that they were narrowly tailored actions serving two compelling governmental interests: supporting parental supervision of children and protecting the well-being of minors. 500

In a dissenting opinion, 501 Judge Edwards asked whether the two governmental interests were not "irreconcilably in conflict," since parents may differ from the FCC in defining indecency and since parents may handle children's exposure to indecent programming in a way that deviates from the regulatory solution. As in the curfew case, Edwards referenced precedents in which the Supreme Court protected parental rights, and he argued that those cases were relevantly similar to the case before him. 503 In building the analogy, Edwards noted that the essence of parenting is to rear children as "[parents] see fit and to inculcate them with their own moral values." 504 Again, analogical reasoning led Judge Edwards to a statement of sociological fact that led to the invocation of

496. *Id.* (quoting *Yoder*, 406 U.S. at 232) (emphasis added).
497. 58 F.3d 654 (D.C. Cir. 1995).
499. *See Action for Children's Television*, 58 F.3d at 656. The full court reheard the panel decision, which held that the Federal Communications Commission's ("FCC") order implementing the statute violated the First Amendment. *See Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993). Judge Edwards was on the panel and concurred specially in the court's decision on rehearing. *See id.* at 183-86.
501. *See id.* at 670-83.
502. *Id.* at 678.
503. *See id.* at 679.
504. *Id.*
the principle that government should refrain from infringing upon the parental realm except in the rarest of circumstances.505 Is judicial articulation of social fact an effort to impose a partisan or personal view on a case in order to reach a desired outcome? Or is it precisely the opposite of that? Declarations of fact arising out of Edwards’ analogical reasoning may constitute an effort to resist imposing a personal bias by searching for the perspective on reality suggested by a comparison of cases. This reading of Edwards’ use of analogy suggests an ethic of judging in a time of widespread and quite tempting disbelief in the neutrality of law. Edwards’ ethic is an effort to see whatever social fact can be learned from a body of precedent in the process of deciding and justifying the disposition of a difficult current case.

Edwards’ approach to judging represents the work of a subtle believer. It is a jurisprudence of canny hope, wry faith. But does hope of this kind come with blindness as well? Can a search for social fact omit too much of political life to be persuasive? The next section addresses these questions.

C. Belief and Blindness?

One of Judge Edwards’ colleagues virtually accused Judge Edwards of political unreality in Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods.506 In that case, the Secretary of Agriculture named nineteen individuals to a new federal advisory committee created to consult with the two cabinet Departments—Agriculture and Health and Human Services—on matters relating to food safety.507 The members were professors, state officials, employees of food research firms, federal agency employees, and employees of private food companies.508 Public Citizen complained that the membership did not include “consumer representatives with public health expertise,” and filed suit alleging that the committee’s composition violated provisions

505. See id. In the same case, Edwards engaged in additional analogical reasoning on another matter: whether broadcasting should continue to be considered different from other communications media for purposes of determining the standard of review of content regulation. See id. at 672-77. The physical distinction between broadcast and other media—that broadcasting made use of the scarce resource known as the electromagnetic spectrum, while other media did not—for decades had provided a rationale for more invasive content regulation of broadcast licensees than that permitted for the print medium. Edwards explored the traditional disanalogy between broadcasting and other media and determined that it was no longer supportable. See id.

506. 886 F.2d 419 (D.C. Cir. 1989).
507. See id. at 420.
508. See id.
of the Federal Advisory Committee Act ("FACA").

That statute required that membership of advisory committees "be fairly balanced in terms of the points of view represented and the functions to be performed." A divided panel affirmed the district court's dismissal of the suit.

Judge Silberman ruled for dismissal on grounds that the Secretary's appointment decision was non-reviewable under the Administrative Procedure Act and because Public Citizen lacked standing to sue. On the issue of reviewability, Judge Silberman's position was that Congress had provided no meaningful standard for courts to use in determining whether a particular advisory committee was "fairly balanced." Because "the relevant points of view on issues to be considered by an advisory committee are virtually infinite," Judge Silberman believed that "the judgment as to what constitutes an appropriate or 'fair' balance of those views must be a political one." He could "conceive of no principled basis for a federal court to determine which among the myriad points of view deserve any representation on particular advisory committees." Sounding like a critical legal theorist of sorts, Judge Silberman noted that "given the possible range of points of view on virtually any subject, an effort to reduce points of view to a few categories—as if they were political parties—is quite artificial and arbitrary." Asked by Public Citizen to apply a "direct interest" test from one of the court's precedents under FACA, Judge Silberman declined, stating that: "[T]he line between those with 'direct interests' and those with indirect or tangential ones is hopelessly manipulable." Such line-drawing would be both inappropriate and "crude": He forcefully rejected the prospect of "crudely dividing committee members into political, social, or economic status groups and then comparing the appointments with the status groups of those seeking representation[]."

For Judge Edwards, in contrast, application of FACA's requirement that advisory committees be "fairly balanced" did not necessitate politi-

509. See id. (citation omitted).
510. Id. at 422 (quoting 5 U.S.C. app. 2, § 5 (1988)).
511. See id. at 419-20.
512. See id. at 426-32.
513. See id. at 426-27.
514. Id. at 426.
515. Id.
516. Id. at 427.
517. Id.
518. Id.
cal rather than legal decision-making. Judge Edwards predictably began with precedent: well-established decisional law declaring a presumption of judicial review of executive action and establishing the circumstances under which the presumption could be rebutted. He also cited Supreme Court authority for judicial fidelity to the presumption of review even "in the face of a diffuse statutory directive." He then focused on FACA itself, particularly on its purpose "to constrain executive discretion" and "to ensure 'public accountability' on the part of the Executive Branch," suggesting a definite role for judicial review of actions taken under the statute. For Edwards, the vagueness of the statutory language did not reflect a legislative intent to leave FACA decisions wholly in the hands of executive discretion; more plausibly, the language alerted courts to the appropriateness of deference in the exercise of review.

Having found the issues justiciable, Judge Edwards applied an analytic framework derived from circuit precedent under FACA, examining the advisory committee's "mandate" and asking whether consumer representation was implicated by the mandate. In FACA's legislative history, he located an example of an advisory committee deemed not balanced for lack of representation of consumer and other viewpoints to address a given mandate. Reasoning by analogy, he found that balance in the current case required consumer representation. He again used analogical reasoning to determine whether the committee as currently composed was balanced in the relevant sense. He concluded that it was not.

Doggedly immersing himself in precedent, statutory text, legislative history, and analogical reasoning, Edwards was able to reach and decide the case on the merits. But was he naively blind to the problems of justiciability? Was Judge Silberman right that the court should resist being drawn into disputes requiring crude line-drawing based on inde-
terminate categories? Is Edwards' ideal of "principled adjudication" undermined by reaching the merits of this case?

The Article will hold off answering these difficult questions while it examines In re Charge of Judicial Misconduct or Disability,529 another case in which Edwards might well be accused of ignoring the dangerous political "reality" of a case and treating the matter as if it were simply about "law." In a decision for the D.C. Circuit Judicial Council, Judge Edwards examined complaints of judicial misconduct against Judge David Sentelle.530 Judge Sentelle was a member of the Special Division which, pursuant to the Ethics in Government Act of 1978,531 appointed Kenneth Starr to be Independent Counsel for the Whitewater investigation.532 After the Special Division appointed Mr. Starr, the Washington Post disclosed an incident that had taken place before the appointment.533 The Post reported that, while the Special Division was considering Attorney General Janet Reno's request for the appointment of Robert B. Fiske to be Whitewater independent counsel, Judge Sentelle lunched in the Senate cafeteria with critics of Mr. Fiske, Republican Senators Helms and Faircloth.534 In the aftermath of the Post's story, complaints were filed against Judge Sentelle, alleging that he had engaged in improper contacts and communications with the Senators in violation of ethical canons, that he should recuse himself from further connection with the Whitewater matter, and that his conduct amounted at least to the appearance of impropriety.535 As Chief Judge of the circuit, Judge Edwards received the complaints. The question for Judge Edwards was whether Judge Sentelle had engaged in conduct ""prejudicial to the effective and expeditious administration of the business of the courts.""536

Judge Edwards found ""no basis whatsoever for proceedings against this judge.""537 In a decision characteristically grounded in precedent, constitutional and statutory text, as well as analogical reasoning, Ed-

529. 39 F.3d 374 (D.C. Cir. 1994).
530. See id. at 375.
534. See In re Charge of Judicial Misconduct, 39 F.3d at 377; Schneider, supra note 533.
535. See In re Charge of Judicial Misconduct, 39 F.3d at 377.
536. Id. at 375 (citation omitted).
537. Id. at 383.
wards ruled that Sentelle’s challenged conduct was a function of the Special Division’s appointment power under Article II of the Constitution. As such, his conduct was not related to, and could “have no direct prejudicial effect on,” the “business of the courts,” as long as “the ‘business of the courts’” was defined “as the exercise of Article III judicial power.” Judge Sentelle’s conduct could not even have “an indirect prejudicial effect” on the business of the courts, according to Judge Edwards, because exercise of the appointment power of the Special Division is not required by any statute, court decision, or ethical canon to be “a cloistered, apolitical judicial ‘proceeding.’” Edwards had no doubt that the members of the Special Division were privileged to “consult[] with others regarding candidates for appointment.” He analogized the Special Division’s power to consult under the Appointments Clause to the President’s own unquestioned power to consult in appointments. Acknowledging the probable views of “members of the public, the press, and even the legal community,” that judges of the Special Division were obliged to keep “the appointment process out of the world of partisan politics,” Judge Edwards could find no law or legal support for the claim that the Special Division may not consult. The social fact that he discovered was starkly straightforward: that the process of selecting an independent counsel, as then regulated by law, was not “pristine,” but political to the core.

This complex opinion has its share of critics. In the context of Judge Edwards’ body of judicial and scholarly writings, however, the opinion’s thoroughly professional analysis and insistence on its own legitimacy as a legal decision are hardly surprising and worthy of respect.

538. See id. at 378.
539. Id. at 378-79 (emphasis omitted).
540. Id. at 379, 382 (emphasis omitted).
541. Id. at 380.
542. See id. (citing Justice Kennedy’s concurrence in Public Citizen v. United States Dep’t of Justice, 491 U.S. 440, 482-89 (1989), which noted that the “[a]pplication of FACA would constitute a direct and real interference with the President’s exclusive responsibility to nominate federal judges”).
543. Id. at 381.
544. See id. at 382.
545. Professor Krotoszynski calls it “a rather remarkable opinion,” “extraordinary” in its “gross misunderstanding of the standard of conduct that one reasonably should expect of an Article III judge.” Krotoszynski, supra note 532, at 450, 453. “[A]t worst, [the opinion] helps to confirm the cynical view held by some within the academy that judging is little more than an exercise in politics.” Id. at 453. Judge Edwards’ opinion received criticism when it was reviewed by the full Judicial Council. See In re Charge of Judicial Misconduct or Disability, Nos. 94-8 & 94-9 slip op. At 4-9 (D.C. Cir. Dec. 30, 1994) (Tatel & Kessler, JJ., each writing separately). Nevertheless, the Council affirmed.
however one regards the outcome. Edwards' clear goal was to render a decision of what he took to be law; he realized that the decision was destined for unpopularity but he defended it as faithful to proper and traditional legal conventions. He bristled at the suggestion that he might "'feel uncomfortable' [in] reviewing the conduct of' a judicial colleague.\(^{546}\) as if to reinforce that the rule of law was his sole consideration. He relied faithfully on the Supreme Court's decision in *Morrison v. Olson*\(^ {547}\) for its account of the appointment power of judges under the Ethics in Government Act,\(^ {548}\) and he relied on other legal sources for his understanding of the political scope afforded to those exercising constitutional appointment power.\(^ {549}\) Simply put, his holding was that, in this context, law permits politics—that Judge Sentelle's lunch and other contacts, jarring though they were, did not violate the statute.

The force of Edwards' argument faltered only once, at the end of the opinion, when he departed from legal sources and reformulated the "social fact" that had been this theme, i.e., that the independent counsel appointments process was inherently political. This time, however, his statement of that fact was tenuous. He compared the suggestion Judge Sentelle may have received informally in the Senate cafeteria to the suggestion made formally by the Attorney General (that Robert B. Fiske be appointed).\(^ {550}\) However, rather than concluding that the political diversity of suggestions pointed to the inherently political nature of the process, this time Judge Edwards stated that the luncheon suggestions "should not expose the selection process to an anti-administration taint, any more than the Division's consideration of an Attorney General's recommendation should expose it to a charge of pro-administration partiality."\(^ {551}\)

The import of this statement was unclear: did it mean that opposing political moves in the selection process "even out," so that charges of taint and partiality were useless or somehow non-descriptive? Or, contrary to earlier statements in the opinion, did it mean to suggest that the selection process was not inherently political after all? Also unsettling was the comparison between the lunch suggestion and the Attorney General's formal request, with its unexplained implication that the two occasions were more relevantly similar than different.

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546. *In re Charge of Judicial Misconduct or Disability*, 39 F.3d at 381 n.6.
548. See id. at 659.
549. See *In re Charge of Judicial Misconduct or Disability*, 39 F.3d at 381-82.
550. See id. at 382.
551. Id.
Public Citizen v. United States Department of Justice and the disposition of the complaint against Judge Sentelle suggest several conclusions. In the first case, Edwards insisted that one can do law (enforce FACA) without doing politics; in the second case, he insisted that sometimes one has to do law (exonerate Judge Sentelle) without doing politics. In the first, he resisted the temptation of modern legal culture to see politics everywhere, certain that he could apply FACA without becoming lost in the unprincipled wilderness feared by Judge Silberman. In the second, it seemed that he did see politics everywhere—in Judge Sentelle's behavior, in the moral certainties of the complainants, in the expected stout condemnations of the media—and he invoked the law almost as a shield from the furies. The question is whether he saw too little of the politics in the first case, and too much of it in the second. In neither, however, did he alter his approach of faith in what law and legal reasoning can contribute. The cases considered together represent the response of a sophisticated judge to both conservative (Judge Silberman in Public Citizen) and liberal (complainants in Sentelle) insistence on the need to defer to political realities. The response that one can discern in Judge Edwards' handling of these cases is simply that in such circumstances the court must first explore legal realities. For better or worse, these are decisions centrally based on faith in law. If that faith is excessive, it is perhaps explainable as a response to excessive doubt on the other side, a felt need to counterbalance the weight of critique.

D. Belief and Justice

This Article has been exploring the nature of judging practiced by a judge who believes in law's enterprise but has no illusion about the vulnerability of adjudication to caprice and political manipulation. This Article concludes with analysis of a case in which Judge Edwards' concept of judicial conscience led to a passionate critique of his court's doctrinal move in the field of qualified immunity.

In Crawford-El v. Britton, the D.C. Circuit addressed requirements for suits against public employees for constitutional torts. An inmate sued a correction officer for misdirecting boxes of the inmate's personal belongings, including legal materials, while the inmate was in transit between institutions. The plaintiff sought damages under 42

554. See id. at 815.
U.S.C. § 1983, alleging that the officer violated his constitutional right of access to the courts. In a motion for summary judgment, the officer invoked qualified immunity, arguing that the inmate had failed to meet the D.C. Circuit’s doctrine applicable to damages actions against officials of government. After a “long and tortured” history in the trial and appellate courts, the case reached the D.C. Circuit en banc, which held that a plaintiff in a constitutional motive case must establish motive by clear and convincing evidence in order to survive a motion for summary judgment. The majority selected this difficult standard out of concern for “the social costs of damages litigation against officials.”

Judge Edwards’ repudiation of the court’s standard was intense, calling the decision “judicial activism at its most extreme,” an attempt to “render impossible all Bivens-type civil rights actions that turn on the intent of government officials.” On this view, the court’s position was lawless, equivalent to Merrick’s leveling message of despair on the verandah of Rose Cottage. Edwards responded first with a counter-statement of purpose in the form of a motto from Justice Frankfurter: “[T]he only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so.” This invocation of a “trained” practice of judging was of course consistent with Edwards’ sense of the necessity of Bildung—the formation of legal judgment based on watchful immersion in, and wary respect for, legal tradition and professional convention, including a grasp of social and legal circumstances that recommend doctrinal change in some cases and

556. See id.
557. See id.
558. See generally James C. Wrenn, Jr., Passing the Buck: The Supreme Court’s Failure to Clarify Qualified Immunity Doctrine to Protect Public Officials from Frivolous Lawsuits, 22 HARV. J.L. & PUB. POL’Y 1031 (1998).
559. See Crawford-El, 93 F.3d at 815. A plurality held that the standard of proof must be met before a plaintiff proceeds to discovery. See id. at 820.
560. Id. at 821. The majority identified such costs as “the conventional costs of litigation, the diversion of the officials’ time, deterrence of able persons from even accepting public office, and the chilling of officials’ readiness to exercise discretion in the public good.” Id.
561. See id. at 847-54 (Edwards, J., concurring in judgment). Edwards concurred in the majority’s ultimate decision to remand the case to the trial court but of course for entirely different reasons.
562. Id. at 847 (Edwards, J., concurring in judgment).
563. Id. at 854 (Edwards, J., concurring in judgment).
564. Id. at 847 (Edwards, J., concurring in judgment) (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 535 (1947)) (alteration in original).
recommend against it in others. The rest of his opinion was a tour de force of legal justification, detailing why the circumstances of Crawford-El counseled definitively against the majority's doctrinal change.

First, Edwards argued that the court's framework was an unnecessary intrusion into the existing landscape—for example, "the standard apparatus provided by the Federal Rules [of Civil Procedure] to enable trial judges in civil suits to differentiate meritorious claims from frivolous ones." Second, Edwards examined the practical effect of the court's new standard and suggested that it "would have a devastating impact on potential plaintiffs who already face substantial burdens in attempting to pursue civil rights claims." For this view, Edwards relied not simply on his own powers of prophecy, but on varied legal authorities, including a distinguished judge not known for liberal policy views (Richard Posner, Chief Judge of the Seventh Circuit), decisions in ten circuits, and scholarly articles. Third, Edwards argued that the court's decision was inconsistent with Supreme Court precedent, which in his view "never for a moment intended to insulate government officials from liability in all cases where the official's state of mind is a necessary element of the constitutional violation alleged." Fourth, Edwards relied on the lack of empirical evidence that the court's standard of proof was needed to relieve governmental officials of "intolerable litigation burdens." Fifth, Edwards found Crawford-El analogous to Supreme Court precedent involving claims against municipalities, a 1993 case in which the Court had rejected "heightened, judge-made standards to fulfill policy-related goals," and had given priority to amendment of the Federal Rules over "judicial interpretation." As in the instances of

565. See Barry Sullivan, "Not Unmindful of the Future": Some Reflections on Stability and Change, 52 WASH. & LEE L. REV. 323, 331-32 (1995) (discussing "the wisdom to distinguish between what needs to be conserved and what needs to be changed," and quoting LESZEK KOLAKOWSKI, MODERNITY ON ENDLESS TRIAL 70 (1990), on "the constant tension between structure and development").

566. Crawford-El, 93 F.3d at 849 (Edwards, J., concurring in judgment); see id. at 849 nn.2-6 (Edwards, J., concurring in judgment) (summarizing process of pleading and answering claim under Federal Rules of Civil Procedure 7(a), 8(c), 12(e), 15(a), 26(b), 56(f)).

567. Id. at 850 (Edwards, J., concurring in judgment).

568. See id. at 850-51 (Edwards, J., concurring in judgment). Edwards maintained "that Crawford-El's complaint would survive a motion for summary judgment under the rules adopted by every other court of appeals in the nation." Id. at 853 (Edwards, J., concurring in judgment).

569. Id. at 850 (Edwards, J., concurring in judgment) (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)).

570. Id. at 852 (Edwards, J., concurring in judgment).

571. See id. (citing Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993)).

572. Id. (Edwards, J., concurring in judgment).
analogue reasoning discussed earlier, Edwards arguably found in this base point case a pivotal "social fact": that law (the Federal Rules) already occupied the field, eliminating a legitimate creative role for the judicial branch.

Still not finished, Edwards argued next that another prominent Supreme Court decision was not analogous because of a highly relevant difference. Finally, he underscored the practical significance of the court's action by noting that the "experienced" trial judge in Crawford-El had found a jury question on the question of motive under the Federal Rules, in contrast with the court of appeals' action which would preclude the case from proceeding to discovery. Edwards concluded that the court, ignoring all these factors, had crossed the line noted by Justice Frankfurter. "Without any directive from Congress or mandate from the Supreme Court," the court in Edwards' view had proceeded to "run roughshod over the Federal Rules of Civil Procedure and invent new evidentiary standards that would make it all but certain that an entire category of constitutional tort claims against government officials—whether or not meritorious—would never be able to survive a defendant's assertion of qualified immunity." The court's path, he wrote, was "both unfathomable and astonishing."

In reviewing the D.C. Circuit's Crawford-El decision, five members of the Supreme Court shared Judge Edwards' sense of the importance of the case: that the heightened burden of proof at summary judgment would apply not only to inmates in actions against local officials but also "to all classes of plaintiffs bringing damages actions against any government official, whether federal, state or local," including claims of race and gender discrimination under the Equal Protection Clause and other constitutional claims. Echoing Judge Edwards, the Court ruled that neither precedent nor policy "warrant the wholesale change in the law" required by the D.C. Circuit, and that the court's action "stray[ed] far from the traditional limits on judicial authority."

It is hard to imagine a more effective example of legal discourse than Judge Edwards' interweaving of conceptual analysis and considerations of purpose in Crawford-El. His opinion is surely an example of

573. See id. at 852-53 (Edwards, J., concurring in judgment) (distinguishing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) on the ground that the defendant in that case, unlike the public official in Crawford-El, was the beneficiary of a constitutional right, the First Amendment).

574. See id. at 853 (Edwards, J., concurring in judgment).

575. Id. at 847 (Edwards, J., concurring in judgment) (emphasis omitted).

576. Id. (Edwards, J., concurring in judgment).


578. Id. at 594.
what has been called “pragmatic conceptualism,” the striving for analytic depth and “conceptual coherence” within a legal framework, at the same time “taking cognizance of the ever-evolving social world.” The opinion exemplifies Edwards’ practice of judging as decidedly other than mere policy preference, but rather as an approach “operat[ing] simultaneously inside and outside of the law.” His presumptive fidelity to “concepts, rules, and principles” reflects the insider’s perspective, while his “sense of the social, political, and economic context within which law functions” affords him an outside perspective as well. In quoting Frankfurter, Edwards signaled the centrality of “trained” legal reasoning. The nature of that training has been the theme of this Article. At first glance, it appeared to be an empty concept, involving truisms like the capacity to draw a line between adjudication and legislation, and the ability to recognize a difference between “firm application” and “riding roughshod.” Closer inspection, however, suggested that Edwards’ concept of training at its core is vocation, the development of powers of conceptual justification—the ability to draw lines based on reasons grounded in legal convention, especially the practice of analogical reasoning with its openings to the world of social reality. The use of analogy to arrive at important if modest discoveries of underlying fact about social relations constitutes the judge’s “training,” his cultivation of a wiser, if never wholly certain, belief. It can organize a mentality called legal conscience.


the best evidence we have for believing that legal conceptualism does not entail formalism. Even as he defended rules and principles, concepts and coherence, [Cardozo] ridiculed the idea that there is a ‘heaven’ of legal concepts, that law was a brooding omnipresence in the sky, and that the application of legal concepts involves logically deducing specific conclusions from abstract premises.

Id. Goldberg’s description of Cardozo in many respects tracks this Article’s understanding of Judge Edwards.

580. Goldberg, supra note 579, at 1473 (discussing Cardozo).

581. Id. at 1473-74.
IV. CONCLUSION: THE MISSIONARY AND THE JUDGE

This study began by recognizing that an object of considerable intellectual interest at the moment of the millennium has been the nature of belief in all its dimensions. Contemporary thinkers across a range of disciplines have explored the dissolution of familiar attitudes of trust and certainty with respect to concepts as personal as the self, as profound as the spiritual realm, and as practical as law. Some thinkers indicate that the unraveling of belief can lead only to confusion, bad faith, or paralysis. Others intimate the possibility of new patterns of belief replacing the old, and new energies arising for the pursuit of political and social well-being. A key question for the more hopeful thinkers is whether the new understandings and energies they anticipate can realistically emerge as anything other than mere remnants of belief.

Paul Scott's fiction suggested a compelling answer. He portrayed the painful workings of consciousness when political upheaval based on social inequality casts extreme doubt on the continued viability of background principles—in Barbie Batchelor's case, the system of religious faith. As faith proves impotent, she clings to its remnants for a time, but the illusion fails. She survives, Scott suggests, only by the awakening of an analogical consciousness. She first discovers a connection between her own affliction and the afflictions around her; the surprising comparison gives her sharper vision, even the resolve to resume—and fulfill—her vocation as teacher. At the same time, she finds a principle of action in past models of moral resistance, and these models prompt her to act in kind. The experience of losing a former political and religious faith thus triggers an ethical process—halting, painful, yet ultimately noble because intensely human—of moving from formulaic creed to unblinking recognition of common humanity and the demands of moral responsibility.

Judge Edwards' articles grapple with the serious questioning of legal truths—particularly the distinction between law and politics. He recognizes the power of the questions; they force him to explore and refine his defense of judging as qualitatively different from the imposition of political will. But Judge Edwards' deepest response to critique is found in his judicial decisions. These decisions display three characteristics which the Judge shares with Scott's fictional character: the voice of a teacher, the method of analogy, and the conviction that although the mind's response to the loss of a former faith is necessarily incomplete, the response is nevertheless sufficiently sturdy to fuel and to give value to a chosen vocation.
Both Scott’s missionary and Judge Edwards began as teachers and remained true to the calling after leaving the classroom. Judge Edwards’ demanding opinions are lessons in a time of critique, instructions about the nature of reasoning, the rational force of argument grounded in concepts of law and social realities. Barbie, even in retirement, is ever ready to instruct the British on the duty to the unknown Indian. Confronting Merrick’s prescription for despair in the closed garden of Rose Cottage, she begins a tutelage on responsibility. As she hands him the allegorical picture of the Raj, she explains: “One should always share one’s hopes, . . . [The portrait] represents one of the unfulfilled ones. Oh, not the gold and scarlet uniforms, not the pomp, not the obeisance. We’ve had all that and plenty. We’ve had everything in the picture except what got left out . . . [T]he picture isn’t finished.”552 This conviction reverberates in Edwards’ Crawford-El opinion, particularly its concern for cases that would vanish under the court’s rule.

The Judge and the missionary also share analogy itself as an antidote to the passivity of doubt at large. Analogy permits action on modest grounds, allows dialogue to begin, prompts discussion of relevancies.553 It selects base points from the past and involves the analogist in the building, however slow and frustrating, of culture across generations. Respect for base points implies an “attitude of trusteeship on which the cultural world depends.”554 Rather than imprisoning the thinker in the past, analogy can fuel the will to make present decisions.

But the Judge and the missionary also share anxiety, an uncertainty about the faith that they have preserved at least in part. Judge Edwards becomes “less sanguine” about the good faith of courts when attracted to results.555 He agonizes over the ethical training of lawyers. The force of critique is undeniable, self-fulfilling; “result-oriented lawyering” is as threatening as “result-oriented decisionmaking.”556 Of Barbie’s fate, it is enough to say that she hardly sees fulfillment of any promise made by Britain to India or to itself.

Yet both persist, “head bowed, in the hailstorm,”557 conscience focused on the unfinished picture.

582. Scott, The Towers of Silence, supra note 115, at 382-83 (internal quotation marks omitted).
583. See Sunstein, supra note 421, at 743-44, 745.
584. Kronman, supra note 371, at 1056.
586. Id. at 865.