A SOCIAL THEORY OF LEGAL PRECEDENT

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ABSTRACT

Why do judges commonly predicate their own decisions on earlier decisions authored by others? What makes those otherwise discrete and separate decisions of the past nonetheless hang together and form a powerful system of reference for subsequent cases? While the legal justification for legal precedent remains remarkably limited, a leading account attributes this ostensibly puzzling authority to its efficiency-enhancing properties. However, conservation of judicial resources can hardly motivate judges to abide by past decisions. Moreover, the consequentialist nature of the rationalist explanation tends to exaggerate the predictive force of legal precedent. No legal precedent guarantees a particular court ruling, even though an overarching logic of judicial efficiency might suggest such direction. In an effort to fill this analytical gap, this Article reconstructs legal precedent as a socio-anthropological phenomenon, that is, as "ritual." The central claim of this Article is twofold. First, legal precedent is explicable in cultural terms, such as symbol and language; second, legal precedent holds a structural-systemic value because it exists for its own sake. This novel approach to legal precedent, this Article argues, can enrich the mindsets of legal scholars and practitioners and help them expand their discursive horizons, so as to produce globally relevant decisions. This Article applies the new framework to the jurisprudence of the World Trade Organization ("WTO") in order to reconfigure the boundaries of legal precedent in a global dimension.

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I. INTRODUCTION

How do judges decide cases? Some flip coins,[1] while others follow their personal credos.[2] Some judges reach their decisions solely by adhering to applicable statutes, their consciences, or the merits of cases.[3] Leaving aside various theories behind these answers, one indisputable characteristic of judicial decisionmaking is the consistent reference to past decisions. For example, one empirical study shows that the U.S. Supreme Court always cites at least one precedential decision to support its position.[4] Behind this ostensible certainty, however, precedent remains a legal enigma. Why must judges commonly predicate their own decisions on earlier decisions authored by others? What makes those otherwise discrete and separate decisions of the past nonetheless hang together and form a powerful system of reference for subsequent cases?

Surprisingly, the legal justification for this sweeping authority is limited.[5] Legal precedent may appear contradictory according to the conventional view that the existence of a formal command is the quintessential nature of law.[6] However, no extrinsic authority seems to unambiguously license precedent.[7] In particular, under international law, no treaties command international judges to cite and follow previous opinions.[8]

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[1] *See* William G. Blaire, *Flip of Coin Decides Jail Term in a Manhattan Criminal Case*, N.Y. TIMES (Feb, 2, 1982).

[2] *See* Christopher Zorn & Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 J. POL. 1212, 1212 (2010) (finding robust empirical support for the contention that the ideologies and policy preferences of federal judges impact their decisions at higher levels in the judicial hierarchy); Erwin Chemerinsky, *Ideology, Judicial Selection, and Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 643, 644 (1989) (suggesting that prospective judges should be evaluated based on their ideology).

[3] Regarding criticsim of precedent along these lines, see Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1184–85 (1999) (discussing potential flaws of analogical reasoning attached to precedent-following, such as replacing judges' own observations and intituions with past erroneous decisions); Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 80–81 (1996) (warning that following precedent may result in following morally unjustifiable decisions of the past).

[4] *See* Michael J. Gerhardt, *The Limited Path-Dependency of Precedent*, 7 J. CONST. L. 903, 967 (2004).

[5] *See* Laurence Goldstein, *Some Problems About Precedent*, 43 CAMBRIDGE L.J. 88, 91 (1984); *see also* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 821 (1994) (observing that the foundation of precedent is more uncertain than our uncritical attitude). Even in the United Kingdom, the motherland of common law, the legal authority behind *stare decisis* remains unclear. After the "1966 Practice Statement," the House of Lords officially denied the binding rules of precedent. [1966] UKHL 1 W. L. R. 1234.

[6] *See* Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 RATIO JURIS 164 (2016) (discussing the connection between law and coercion in many important ways). This Article mainly addresses the "horizontal" precedent. The "vertical" precedent refers to a lower court's *mandatory* adherence to a higher court's past decision on the same legal question. *See* FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 36–37 (2009). For example, under the *state* common law in the United States, a lower court in a state is legally required to follow precedent of a higher court in that state. *See* State v. Pedro, 201 P.3d 398, 406 (Wash. Ct. App. 2009); McClung v. Emp. Dev. Dep't, 99 P.3d 1015, 1019 (Cal. 2004); Patterson v. Gladwin Corp., 835 So. 2d 137, 153 (Ala. 2002). *See also* Romualdo P. Eclavea & Sonja Larsen, 20 AM. JUR. 2D CTS. § 138 (2018). Therefore, in this narrow exception of vertical precedent, one may locate an extrinsic authority of precedent.

[7] John M. Walker, Jr., *The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?*, STAN. L. SCH. CHINA GUIDING CASES PROJECT (Feb. 29, 2016), https://cgc.law.stanford.edu/commentaries/15-John-Walker [https://perma.cc/F28Q-GCCX]; *see also* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 661–62 (1999).

[8] Mulilateral, Charter of the United Nations and Statute of the International Court of Justice, art. 59, June 26, 1945, 59 Stat. 1031, T.S. No. 993 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.") [hereinafter ICJ Statute].

In response, some legal scholars have sought an extralegal justification for legal precedent. Notably, following in the footsteps of Benjamin Cardozo,[9] law and economics literature has advanced the "efficiency" thesis to justify precedent.[10] According to these scholars, only efficient opinions are upheld and constitute precedent, while less efficient ones are overruled.[11] Legal precedent also prevents fruitless litigation by guiding private parties to settle and, therefore, conserves judicial resources.[12] Moreover, rising certainty derived from following precedent contributes to the overall efficacy of the entire judicial system.[13] From this standpoint, it might be more significant that the law is settled than that it has been settled correctly.[14]

However, this rationalist line of reasoning is not entirely satisfying, as it leaves serious blind spots with respect to the phenomenon of legal precedent. Judges continue to uphold precedent even when it is not clear that they gain anything by doing so,[15] and even if they believe that earlier decisions were

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[9] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case.").

[10] *See* Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 654 (2000) (discussing the efficiency thesis of precedent by examining the "costs of stare decisis"); *see also* Robert Cooter, Lewis Kornhauser & David Lane, *Liability Rules, Limited Information, and the Role of Precedent*, 10 BELL J. ECON. 366 (1979). *Cf.* Richard A. Posner, *Values and Consequences: An Introduction to Economic Analysis of Law* 6–7 (Coase-Sandor Inst. for L. & Econ., Working Paper No. 53, 1998) (arguing that economics "reveals a 'deep structure' of law that exhibits considerable coherence."). *See generally* Paul H. Rubin, *Why Is the Common Law Efficient*?, 6 J. LEGAL STUD. 51 (1977).

[11] Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1015 (1990).

[12] Zenon Bankowski, D. Neil MacCormick, Lech Morawski & Alfonso Ruiz Miguel, *Rationales for Precedent*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 481, 490 (D. Neil MacCormick & Robert S. Summers eds., 1997); Robert S. Summers, *Departures from Precedent*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 519, 520 (D. Neil MacCormick & Robert S. Summers eds., 1997) ("Judges would be constantly called upon to reinterpret, and to reweigh and rebalance the same arguments, ad hoc, even in the substantially similar cases, thereby forfeiting the efficiencies of a precedent system in which initial decisions settle points of law for subsequent cases."). This rationalist account of precedent (*stare decisis*) originates from the common law system. Paul A. David, *Why Are Institutions the 'Carriers of History'?: Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 STRUCTURAL CHANGE & ECON. DYNAMICS 205, 205, 216 (1994) (viewing that "sequential adaptations to changing local conditions" through precedent would eliminate rulings that generated the inefficient use of economic resources by exposing them to private litigation); *see also* Rubin, *supra* note 10. *See generally* John C. Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 J. L. STUD. 393 (1978).

[13] *See* Meredith Crowley & Robert Howse, *US–Stainless Steel (Mexico)*, 9 WORLD TRADE REV. 117, 126 (2010); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005). The same logic has been applied to the common law system in general. *See* Alan Devlin, *Law and Economics*, 45 IRISH JURIST 165, 196 (2011) (advocating the common law approach and how it encourages efficiency). *But see* Nuno Garoupa & Carlos Gómez Ligüerre, *The Evolution of the Common Law and Efficiency*, 40 GA. J. INT'L & COMP. L. 307, 309, 326 (2012) (observing that "[t]he identification of the efficiency of the common law is much more intricate and multifaceted than anticipated by the literature.") *See generally* Woraboon Luanratana & Alessandro Romano, *Stare Decisis in the WTO: Myth, Dream, or a Siren's Song?*, 48 J. WORLD TRADE 773 (2014).

[14] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting); Frederick Schauer, *Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy*, 3 PERSPS. PSYCH. SCI., 454, 455 (2008). In a similar manner, international tribunals may be said to function as gap-fillers in interpreting originally ambiguous texts, and eventually contributing to the general efficacy of international legal systems. *See* Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT'L REL. 33, 38–39 (2008); Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 VA. J. INT'L L. 103, 112 (2011) (distinguishing between concrete "rules" and vague "standards").

[15] *Cf.* JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 92 (1995) [hereinafter SOCIAL REALITY].

wrongly decided.[16] Even when judges do overturn a particular precedent, conservation or efficient allocation of judicial resources could hardly be a main motivation.[17] Moreover, the consequentialist nature of the rationalist explanation tends to exaggerate the predictive force of precedent.[18] No precedent guarantees a particular court ruling, even though an overarching logic of judicial efficiency might allude to such direction.

In an effort to fill such an analytical gap, this Article reconstructs legal precedent as a socio-anthropological phenomenon, that is, as "ritual," and pursues its symbolic meaning. In this sense, legal precedent may be defined as an evolving pattern of meaning-complex developed through a stream of court decisions.[19] Legal precedent *qua* judicial ritual emerges within a social field (the legal community) through social interactions.[20] It is the culture and history of a given legal community that establishes a unique ritualistic structure symbolized by precedent.[21] Previous court decisions are recognized not necessarily because they are useful; rather, they become useful because they are recognized in the first place.[22] Judges and practitioners accept and observe precedent because they believe that other judges and lawyers follow it.[23] This is how legal precedent customarily guides the actions of jurists: they follow precedent as they *practice* it.[24]

Through formal, repeated, and rule-governed procedures, legal precedent represents the collective minds of a given legal community. It is a narrative writ large in which members of a legal community[25] "tell themselves about themselves."[26] For example, the symbolic meanings of *Brown v. Board of Education* both represent and construct the American understanding of racial discrimination.[27] Approached this way, precedent

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[16] Schauer, *supra* note 14, at 455.

[17] Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1047 (2013).

[18] Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 414 (2010). *See also* Krzysztof J. Pelc, *The Politics of Precedent in International Law: A Social Network Application*, 108 AM. POL. SCI. REV. 547, 549 (2014) (arguing for a "causal" force of international precedent toward subsequent particular court decisions).

[19] *See* ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF THE STRUCTURATION 15, 25 (1984).

[20] *See* Robin Stryker, *Rules, Resources, and Legitimacy Processes: Some Implications for Social Conflict, Order, and Change*, 99 AM. J. SOCIO. 847, 849 (1994); Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 407 (1999).

[21] *See* Edelman et al., *supra* note 20, at 406–07 (arguing that "the content and meaning of law is determined within the social field that it is designed to regulate"); *see also* Stryker, *supra* note 20.

[22] I draw this insight from CLAUDE LEVI STRAUSS, THE SAVAGE MIND 6 (George Weidenfield & Nicolson Ltd trans., 1962).

[23] *See generally* PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966).

[24] *See* PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE (Richard Nice trans., 1977).

[25] *See* CATHERINE BELL, RITUAL: PERSPECTIVES AND DIMENSIONS 66 (1997). *See generally* Clifford Geertz, *Religion as a Cultural System*, *in* THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 87 (1973) [hereinafter INTERPRETATION OF CULTURES].

[26] Clifford Geertz, *Deep Play: Notes on the Balinese Cockfight*, *in* THE INTERPRETATION OF CULTURES: SELECTED ESSAYS, 412, 448 (1973).

[27] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954). *See generally* AUSTIN SARAT, RACE, LAW AND CULTURE: REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* (1997) (observing lingering legal and cultural legacies of *Brown* in the contemporary American society). *Brown* may be deemed an example of what Michael Gerhardt refers to as a "super precedent," which "seep[s] into the public consciousness, and become[s] a fixture of the legal framework." Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205, 1223–24 (2006); *see also* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 148, 169–70, 183–84 (2008) (discussing the symbolic significance of foundational cases, such as *Brown*). *Brown* effectively overruled the "separate but equal" doctrine under *Plessy v. Ferguson*, 163 U.S. 537

mediates the past, present, and future of a legal reality on a given issue. Legal precedent is capable of transcending the immediacy of a given case and its particular legal meaning in a spatiotemporal dimension.[28] Even jurists who were not directly involved in a past dispute can still access and exploit its experience and meaning. Likewise, even those involved in a future dispute can "bring[] back" and "mak[e] present" past experience and meaning preserved in precedent.[29]

In sum, legal precedent is a "generative mechanism" that structures a distinct phenomenon of constant references to preexisting court decisions in similarly situated disputes.[30] It sustains itself through its self-enforcing structure.[31] A set of precedents, and the social reality it represents, instantiates a preexisting normative structure that remains largely taken for granted. Likewise, precedent empowers—or disempowers for the same reason—judges and practitioners by virtue of its symbolic authority, even if the precedent does not have formal binding force.[32] As long as judges refer to past decisions for their meaning-generating needs, the technical legal nature (mandatory or persuasive) of those decisions is of little significance.[33]

The socio-anthropological approach to legal precedent adopted in this Article carries two significant implications. First, the symbolic understanding of precedent opens a new door for legal comparativism. Legal precedent encompasses varying legal traditions, as it might be captured by the generic notion of "reasoning with previous decisions."[34] While legal precedent, in the form of *stare decisis*, is characteristic of the common law system, it also plays a parallel (if not identical) role in interpreting legal

(1896) by unanimously ruling that isolated educational facilities solely for racial minorities are intrinsically unequal and violate the Equal Protection Clause of the Fourteenth Amendment. *See* Frederick Schauer, *Generality and Equality*, 16 L. & PHIL. 279, 280 (1997). For a comparable court decision in the context of the European Union law, see Case 26/62, Van Gend en Loos v. Netherlands Inland Revenue Administration, 1963 E.C.R. 10. In this landmark case, the European Court of Justice held that an individual (Van Gend en Loos) could challenge the Dutch government's breach of the European Community treaty (the reclassification of an imported chemical product into a higher tariff category) directly in the Dutch court. *See* Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2434–36 (1991) (describing the paramount role played by *Van Gend en Loos* in the constitutionalization of European Community Law, which had been largely unnoticed when the decision was issued).

[28] *See* BERGER & LUCKMANN, *supra* note 23, at 37–39.

[29] *Id.* at 54–55.

[30] *Cf.* ROY BHASKAR, A REALIST THEORY OF SCIENCE 16 (1975). This Article acknowledges the protean usage of precedent. It may also indicate a particular set of court decisions on a particular topic (such as the *forum non conveniens*) that collectively constitute a distinct family of case law. It may even mean an individual court decision that comprises such case law. *See* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS WITH REMARKS ON PRECEDENTS AND AUTHORITIES 193 (1839) (defining a precedent as "a case, having happened previous, yet being analogous to, or, in its characteristic points, the same with another before us.").

[31] GIDDENS, *supra* note 19, at 25–26, 179–80.

[32] This type of authority (power) is close to the "structural" and "productive" power under the taxonomy of Michael Barnett and Raymond Duvall. Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 INT'L ORG. 39, 43 (2005).

[33] *See* Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1943–44 (2008) (observing that "if an agent is genuinely persuaded of some conclusion because she has come to accept the substantive reasons offered for that conclusion by someone else, then authority has nothing to do with it"); Chad W. Flanders, *Toward A Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 59 (2009) (arguing that "the difference between the respect owed to precedential decisions and that owed to decisions with a merely persuasive authority turns out to be more a difference in degree than a difference in kind.").

[34] *See* Jan Komárek, *Reasoning with Previous Decisions: Beyond the Doctrine of Precedent*, 61 AM. J. COMP. L. 149, 151 (2013).

codes, as seen in jurisprudence constante in the civil law system.[35] Moreover, it is a vital element of norm-making in certain areas of international law, such as the law of the WTO.[36] Indeed, legal precedent appears salient in international law, despite the fact that international law lacks the centralized, sophisticated, legal-institutional complex found in domestic law. Concomitantly, different styles and substances of various precedents across jurisdictions may generate comparative insights. This opportunity for trans-judicial dialogue sheds critical light on the contemporary controversy about whether domestic courts could use foreign and international precedent. When courts refer to one another's decisions, such as domestic courts citing foreign or international law, they can enrich and enlighten the judicial process, at home and abroad.[37] Courts can expand their discursive horizons beyond parochial boundaries and empower judges to produce decisions that have global relevancy.

The second implication of the socio-anthropological approach is that it helps us to embrace new legal challenges, such as artificial intelligence ("AI"). A sophisticated set of algorithms, which is capable of learning as it digests big data, may master a hidden mechanical logic of precedent and

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[35] D. Neil MacCormick & Robert S. Summers, *Further General Reflections and Conclusions*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 531 (1997) (noting the existence of precedent even in the current French legal system) [hereinafter MacCormick & Summers, *Conclusions*]. Of course, different *types* of precedent might work differently in an empirical sense. The U.S. Supreme Court treats constitutional precedent differently from statutory precedent. *See* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 426 (1988); *see also* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179 (2014) (observing that Supreme Court decisions tend to enjoy a stronger precedential effect than other statutory and common law decisions). In general, precedent in constitutional adjudication tends to operate differently from precedent in common law adjudication. *See* Gerhardt, *supra* note 4, at 907, 941. Moreover, one might view that in civil law countries precedent is "the unavoidable result of existing legal rules," rather than the "intellectual gratification associated with creative legal thinking." Barbara Luppi & Francesco Parisi, *Judicial Creativity and Judicial Errors: An Organizational Perspective*, 6 J. INST. ECON. 91, 97 (2010).

[36] Pelc, *supra* note 18, at 548 (arguing that political and legal actors recognize the binding effect of WTO precedent even if it is not formally binding); *see generally* Dana T. Blackmore, *Eradicating the Long Standing Existence of a No-Precedent Rule in International Trade Law—Looking Toward Stare Decisis in WTO Dispute Settlement*, 29 N.C. J. INT'L L. 487 (2003) (acknowledging the function of precedent in the WTO system as information transfer between judges and litigants beyond the common law *stare decisis*).

[37] *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192–93, 213 (2003) (describing a "transjudicial dialogue" as a certain kind of communication between judges from different jurisdictions generated when they read and cite one another's opinions); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1307 (1999) (emphasizing constitutional learning from other countries' experience); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 424–25 (2003) (calling judicial dialogue a "conversation" that "involves many more forms of interaction and interpretation"); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 443 (2003); *Id.* at n.15 (highlighting and advocating the interpenetration of domestic and international legal systems via judicial communication); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 45, 56 (2004) (arguing that the transnational legal process creates "interlinked rules of domestic and international law"); Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT'l L. 265, 278–79 (2009) (observing that international judicial dialogue tends to enhance the legitimacy of international law); Ken I. Kersch, *The Supreme Court and International Relations Theory*, 69 ALB. L. REV. 771, 776 (2006) (pointing out that judges can benefit from participating in the judicial globalization process); Melissa A. Waters, *Normativity in the "New" Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT'L L. 455, 460 (2007) (suggesting that judicial dialogue plays a key role in "determining both how international legal rules are shaped and how they are internalized into domestic legal systems"). *But see* ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES (2003) (criticizing the prevalence of international law in the United States as a liberal political agenda); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1176 (2007) (arguing that undomesticated international law should not guide constitutional interpretation in the United States).

accurately predict the outcome of a future case by using "litigation analytics."[38] Does this mean that law is all about scientific precision, both in its operation and prediction? Do we need to endorse the premise that contemporary advancements of AI define the future of law,[39] no matter how apocalyptic such a future might be?[40] It is significant to note that, no matter how accurately AI may predict the outcome of future cases, AI is still incapable of elucidating the meaning of precedent.[41] Law, including legal precedent, requires a hermeneutic process in making sense of itself. For instance, what counts as compliance? Although machines may compute, they cannot interpret, at least not as humans do.[42]

It is this human side of law and legal process that this Article highlights through a socio-anthropological approach to legal precedent. If the future of law still concerns a matter of the human, by the human, and for the human, jurists need to know how language, ritual, and custom structure legal decisions in an iterative fashion.[43] Only then can we appreciate the true value of AI in the legal sphere and determine what AI can and cannot (or should not) do. Justice cannot be algorithmically generated, as discursive patterns differ from mechanical patterns.[44]

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[38] Jane Wakefield, *AI Predicts Outcome of Human Rights Cases*, BBC NEWS (Oct. 23, 2016), https://www.bbc.com/news/technology-37727387 [https://perma.cc/H755-M8QL] (reporting that an AI system accurately predicted the outcome of cases from the European Court of Human Rights seventy nine percent of the time); Sarah A. McCormick, *The Use of AI in Predicting Legal Outcomes*, LEGAL BUS. WORLD (Feb. 10, 2017), https://www.legalbusinessworld.com/post/2017/02/10/the-use-of-ai-in-predicting-legal-outcomes [https://perma.cc/GTK4-GNGS] (reporting that machines get smarter as they process more data); Shivali Best, *Justice by Algorithm: AI Predicts the Results of Supreme Court Trials Better Than a Human*, DAILY MAIL (May 5, 2017), https://www.dailymail.co.uk/sciencetech/article-4476718/Machine-learning-algorithm-predicts-Supreme-Court-outcomes.html [https://perma.cc/27MY-WRR9]; John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3041–42 (2014) (opining that AI is "the single most important phenomenon with which the legal profession will need to grapple in the coming decades"). Regarding the "litigation analytic," see Robert Ambrogi, *And the Legal Technology Word of the Year Is . . .*, ABOVE THE L. (Dec. 11, 2017), https://abovethelaw.com/2017/12/and-the-legal-technology-word-of-the-year-is [https://perma.cc/DF9X-DMGW].

[39] *See* Gary E. Marchant, *Artificial Intelligence and the Future of Legal Practice*, 14 ABA SCITECH LAW. 20, 21 (2017) (arguing that only those who are well-versed in AI will succeed in the future).

[40] *See* Ryan Calo, *Artificial Intelligence Policy: A Primer and Roadmap*, 51 U.C. DAVIS L. REV. 399, 401, 431 (2017) (addressing dystopian threats that AI might pose in the future).

[41] Melanie Mitchell, *Artificial Intelligence Hits the Barrier of Meaning*, N.Y. TIMES (Nov. 5, 2018), https://www.nytimes.com/2018/11/05/opinion/artificial-intelligence-machine-learning.html [https://perma.cc/A624-EEH9] (concluding that artificial intelligence could not "crash the barrier of meaning" in the foreseeable future).

[42] *See* Sergio David Becerra, *The Rise of Artificial Intelligence in the Legal Field: Where We Are and Where We Are Going*, 11 J. BUS. ENTREPRENEURSHIP & L. 27, 28 (2018) (arguing that the legal system will always need lawyers despite the advancement of AI); Natasha Lomas, *What Do AI and Blockchain Mean for the Rule of Law?*, TECH CRUNCH (May 12, 2018), https://techcrunch.com/2018/05/12/what-do-ai-and-blockchain-mean-for-the-rule-of-law [https://perma.cc/NL5F-2T7W] (observing that humans will need to determine whether AI is sound or not for the legal purpose); Marie Boran, *Making a Case for Artificial Intelligence in the Legal Profession*, IRISH TIMES (June 21, 2018, 4:05 AM), https://www.irishtimes.com/business/technology/making-a-case-for-artificial-intelligence-in-the-legal-profession-1.3533815 [https://perma.cc/S2CV-67QM] (doubting that AI could address certain important issues, such as justice). *Cf.* Kay Firth-Butterfield, *Artificial Intelligence and the Law: More Questions than Answers?*, 14 ABA SCITECH L. 28, 28 (2017) (maintaining that we need a more concrete definition of AI before attempting to regulate in the area of AI).

[43] In this context, law schools may offer more humanities subjects, such as literature, history, and philosophy. *See* Martha C. Nussbaum, *Cultivating Humanity in Legal Education*, 70 U. CHI. L. REV. 265 (2003) (arguing that U.S. law schools should teach students more humanities subjects to train them as more critical and competent thinkers and problem-solvers).

[44] *See* Lyria Bennett Moses & Janet Chan, *Using Big Data for Legal and Law Enforcement Decisions: Testing the New Tools*, 37 U.N.S.W. L.J. 643, 646 (2014) (raising concerns for justice outcomes when

Against this background, this Article proceeds in the following sequence. Part II unpacks the concept of judicial ritual by delineating its main symbolic features. Legal precedent provides a symbolic universe in which jurists make sense of themselves and their surroundings by constructing a holistic legal "image-world."[45] Various legal artifacts, such as legal tests and doctrines embedded in precedent, form a symbolic structure that permits some actions but deters others. Part II also explains the communicative traits of legal precedent by analogizing them to "language." Both precedent and language, as mediums of communication, reproduce their corresponding social worlds and represent relevant social realities. Part III then repacks the earlier symbolic notion of judicial ritual by highlighting its structural-systemic dimension. Legal precedent as judicial ritual holds an intrinsic value.[46] It exists "for its own sake."[47] The structural-systemic view of precedent emphasizes its operational regularity that can be observed externally, with or without any internal, subjective justification. Legal precedent established through adjudication maintains the homeostasis of a legal system. It offers an opportunity for "social catharsis" as the ritual channels grievances and resolves conflicts in a methodical fashion.[48] In this sense, legal precedent "persist[s] . . . for no better reason[s] . . . than that so it was laid down in the time of Henry IV."[49] Based on observations in Parts I and II, Part IV applies the symbolic framework of legal precedent to the WTO jurisprudence, which demonstrates exemplary profiles of judicial ritual. Both the WTO tribunal and disputing members of the WTO consistently refer to previous tribunal decisions, although they are not required to do so legally. This Article concludes that a ritualistic understanding of precedent reminds us that law is a "humanistic endeavor," which warrants a pedagogical shift in the current law school curriculum.[50]

II. UNPACKING LEGAL PRECEDENT

This Part begins by introducing the "ritual-like" characteristics in legal precedent, such as formalism, repetitive patterns, and its performative nature. Legal precedent as judicial ritual projects a "symbolic universe" that defines members' worldviews and identities in a legal community. Legal precedent also assumes the role of language as members of a legal community disseminate symbolic values and knowledge through it. Here, socialization is an important mechanism through which an objectivated set of ritualistic

relying heavily on "algorithmically derived extra-legal factors"). *See also* Chris Chambers Goodman, *AI/Esq.: Impacts of Artificial Intelligence in Lawyer-Client Relationships*, 72 OKLA. L. REV. 149, 179 (2019) (observing that "fairness is not mathematically quantifiable").

[45] *See* ERNST CASSIRER, THE PHILOSOPHY OF SYMBOLIC FORMS 77–78 (Ralph Manheim trans., Yale Univ. Press 1955) (1955); *see also* Rakesh K. Anand, *Toward an Interpretive Theory of Legal Ethics*, 58 RUTGERS L. REV. 653, 684–86 (2006).

[46] *See* Frits Staal, *The Meaninglessness of Ritual*, 26 NUMEN 2, 9–11 (1979); TZVETAN TODOROV, THEORIES OF THE SYMBOL 163–64 (1982); Hans H. Penner, *Language, Ritual and Meaning*, 32 NUMEN 1, 6–7 (1985).

[47] Penner, *supra* note 46, at 5.

[48] *Cf.* MAX GLUCKMAN, ORDER AND REBELLION IN TRIBAL AFRICA 110–36 (1963) [hereinafter GLUCKMAN, ORDER AND REBELLION].

[49] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

[50] *See* Guido Calabresi, *Introductory Letter*, 1 YALE J.L. & HUMAN. vii, vii (1988) (viewing that a humanistic turn "feeds" law); Melissa Murray, *Law Schools for Poets*, 3 CAL. L. REV. CIR. 1, 5 (2012) (underscoring the humanities' many potential values in legal pedagogy and arguing for integrating the humanities into the law school curriculum).

knowledge, in the form of doctrines or other legal narratives, is retrojected to the subjective consciousness of members and constitutes members' codes of conduct.

A. RITUALIZING THE JUDICIAL PAST

Originally, the concept of ritual had been reserved primarily for religion or other "sacred" categories of human activities, as seen in the classical works of Emile Durkheim.[51] Yet modern anthropologists, such as Max Gluckman, extended this narrow notion to embrace a broad spectrum of relationships in various social institutions.[52] Ritualization can be seen as a particular way of shaping social dynamics or a "complex sociocultural medium variously constructed of tradition, exigency, and self-expression."[53] In like manner, Murray Edelman insightfully juxtaposes a modern administrative institution with primitive ritual. To Edelman, a modern administrative mechanism mitigates social tension and uncertainty by resolving adversarial conflicts through policies and decisions.[54] In doing so, it performs the same function as those rituals in primitive societies (the "rain dance, the victory dance, and the peace pipe ceremony") that symbolized "contending forces that occasion widespread anxiety and a resolution that is acceptable and accepted."[55]

Approached this way, legal precedent exhibits certain ritual-like properties.[56] First, legal precedent as judicial ritual requires "formalism." Legal precedent develops and evolves out of adjudicative events guided by formal, that is, "legal," principles and procedures.[57] How one can claim determines what can be claimed.[58] It is legal arguments based on rights, obligations, and legal precepts—and not political or emotional appeals—which run those adjudicative events and contribute to the production of precedent. Second, legal precedent demonstrates an invariably "repetitive" pattern, which is characteristic of ritual. Repetitive acts of referencing past decisions reinforce the normative frames and codes of conduct instantiated by judicial ritual.[59] Not only an institution of precedent itself—a customary habit of referencing—but also the contents (legal rules) of a given set of precedent channeled through this institution need little "additional verification over and beyond its simple presence."[60] Third, legal precedent is "performed" in that both disputants and judges reference and exploit past

[51] In this discussion, I draw mainly on Max Gluckman, *Les Rites de Passage*, *in* ESSAYS ON THE RITUAL OF SOCIAL RELATIONS 20–24 (Max Gluckman ed. 1962); *see also* BELL, *supra* note 25, at 39.

[52] *See generally* Gluckman, *supra* note 51.

[53] BELL, *supra* note 25, at xi.

[54] MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 61 (1972).

[55] *Id.*

[56] Here, I draw on BELL, *supra* note 25, at 138–72.

[57] *Cf.* FREDERIC L. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING vii–viii (2d ed., 1993) (observing that an international organization's legal personhood leads us to employ legal claims and principles in investigating the everyday operations of the organization).

[58] *See* BELL, *supra* note 25, at 139.

[59] *See* ERVING GOFFMAN, INTERACTION RITUAL: ESSAYS ON FACE TO FACE BEHAVIOR (1967). *See also* Fabien Gélinas, Clement Camion, Karine Bates & Emily Grant, *Architecture, Rituals, and Norms in Civil Procedure*, 32 WINDSOR Y.B. ACCESS JUST. 213, 216–17 (2015); Andrew J. Cappel, *Bringing Cultural Practice Into Law: Ritual and Social Norms Jurisprudence*, 43 SANTA CLARA L. REV. 389, 472 (2003).

[60] BERGER & LUCKMANN, *supra* note 23, at 37.

decisions publicly. Markedly, performing such a ritual transcends its originally limited social context as it eventually reifies a holistic, totalizing ideal.[61] A particular set of precedents, while used in a particular dispute, goes beyond an episodic adversarial dimension and ultimately speaks to the ideal of the rule of law.[62] Characterizing legal precedent as judicial ritual leads us to unearth its ontological property, that is, "symbolic universe." Legal precedent instantiates a unique socio-legal reality within a given community.[63] In this symbolic universe, the intersubjective meaning of a member's action is understood in relation to other members and to the community as a whole if such action conforms to symbolic forms carried by precedent.[64] These symbolic forms, which include various legal tests, doctrines, or legal narratives, reflect a particular way of observing and organizing the world in a given legal community.[65] Thus, an English barrister may find German court proceedings unnatural, and vice versa. Lawyers from different jurisdictions who work in the same tribunal, such as the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), often experience a communication breakdown.[66]

While a given set of legal precedents in a particular legal community may be rife with sophisticated tests or doctrines, beneath these legal technicalities run certain symbolic values endemic to the community. Legal precedent *qua* judicial ritual does not simply regulate, that is, prescribe or proscribe, particular behaviors of the members of a legal community. Rather, over time, precedent constructs their symbolic traits, such as worldviews or collective identities, which constitute members' code of conduct at a cultural level.[67] Consequently, precedent is self-referential and immune to falsification.[68] There could hardly be observation-neutral patterns of behavior detached completely from the ratification of those ritual participants.[69] Ritual is to be constructed, not to be collected and analyzed as empirical data.[70] Actual invocation of symbolic values sustains their effectiveness.[71] Those "who accept it verify it by their own experience."[72] In

[61] *See* BELL, *supra* note 25, at 160–69. *Cf.* DON HANDELMAN, MODELS AND MIRRORS: TOWARDS AN ANTHROPOLOGY OF PUBLIC EVENTS 81 (1998).

[62] *See* Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUM. 141, 160 (2001) (approaching the rule of law ideal from a symbolic perspective). *Cf.* Gélinas et al., *supra* note 59, at 220 (contending that both ritual and judicial architecture "communicate symbols of justice").

[63] *See* MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATION IN GLOBAL POLITICS 6–7 (2004) (observing that an international organization can create its own "social reality" based on norms).

[64] *See* 1 ALFRED SCHUTZ & THOMAS LUCKMANN, THE STRUCTURES OF THE LIFE-WORLD 2, 70 (Richard M. Zaner and David J. Parent trans., Northwestern University Press 1989).

[65] *See* BELL, *supra* note 25, at ix.

[66] *See* Kai Ambos*, International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?*, 3 INT'L CRIM. L. REV. 1, 18–34 (2003) (explaining conflicts in ICTY trials stemming from diverging legal traditions from the Common Law and the Civil Law system).

[67] *See generally* Martha Finnemore, *International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy*, 47 INT'L ORG. 565, 567 (1993); MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996).

[68] EDELMAN, *supra* note 54, at 97.

[69] John McDowell, *Wittgenstein on Following a Rule*, 58 SYNTHESE, 325, 325–26 (1984).

[70] BELL, *supra* note 25, at 21.

[71] McDowell, *supra* note 69.

[72] EMILE DURKHEIM, ELEMENTARY FORMS OF RELIGIOUS LIFE 438 (Joseph Ward Swain trans., Allen & Unwhin 1915).

this sense, precedent "is not a body of empirical propositions but a way of being and experiencing."[73]

According to rationalists, social actors may follow precedent for utilitarian reasons, such as efficiency (saving judicial resources) or to avoid any negative consequences (losing a case). This regulative motivation to conform to past similar decisions is conceivable even without ritual. By way of analogy, many drivers observe speed limits out of fear of being ticketed. Yet it is ritual that converts this regulative motivation into a constitutive one.[74] Ritual, as fully internalized, alters actors' identities such that conforming behaviors are simply taken for granted, even without strategic calculation. One can imagine that a certain group of drivers may observe speed limits simply because they believe safe driving, *qua* ritual, is simply the right thing to do, even without the possibility of getting caught by the police. Likewise, once past decisions are internalized among members of a legal community and enter into their "subsidiary awareness,"[75] symbolic values underlying those decisions exercise symbolic authority vis-à-vis those members.[76] When a factual-legal pattern of a future legal dispute corresponds to that particular precedent, such precedent monopolizes symbolic authority in justifying or legitimizing "institutionally appropriate rules of conduct."[77] Thus, legal precedent works as a symbolic gravitational force that prescribes some actions while proscribing others[78] by developing certain perceptional categories ("schemata of perception")[79] in legal relations.

Significantly, legal precedent's symbolic power could not exist in a vacuum. Institutionalization of judicial ritual through sophisticated procedural norms and expansive bureaucracy tends to legitimize and protect the normative integrity of precedent from politically charged criticism.[80] As Pierre Bourdieu observed, the "legal consecration" of court decisions provides those decisions, and a particular set of precedent made out of them, with symbolic capital that is necessary for the precedent to prevail over diverging points of view on the same issue.[81] This legitimizing effect may explain the characteristically compliant pull of precedent, with or without its formal status, that is, whether it is officially binding. In particular, in most international dispute resolution systems that lack a formal binding force of

[73] GRAHAM RICHARDS, PSYCHOLOGY, RELIGION, AND THE NATURE OF THE SOUL: A HISTORICAL ENTANGLEMENT 9 (Robert W. Rieber ed., 2010).

[74] *Cf.* VICTOR TURNER, THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL 30 (1967).

[75] MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY 64 (1962).

[76] *See* Mara Loveman, *The Modern State and the Primitive Accumulation of Symbolic Power*, 110 AM. J. SOCIO. 1651, 1656 (2005).

[77] BERGER & LUCKMANN, *supra* note 23, at 83. *See* Joseph Conti, Symbolic Power and the Global Stateness of the World Trade Organization 4–25 (Oct. 21, 2013) (unpublished manuscript) (on file with author) [hereinafter Symbolic Power].

[78] This type of power is close to the "structural" and "productive" power under the taxonomy of Michael Barnett and Raymond Duvall. Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 INT'L ORG. 39, 43 (2005).

[79] Omar Lizardo, *The Cognitive Origins of Bourdieu's Habitus*, 34 J. THEO. SOC. BEHAV. 375, 377 (2004).

[80] EDELMAN, *supra* note 54, at 100.

[81] Symbolic Power, *supra* note 77, at 22.

legal precedent, such symbolic power tends to explain why sovereign countries still abide by precedent.[82]

B. TOWARD A LANGUAGE OF JUDICIAL RITUAL

Legal precedent is capable of turning an actual ritualistic event (dispute) into an abstract pattern of knowledge (case law) detached from subjective and particularized experiences.[83] This typified meaning schema in turn enables members of a legal community to reproduce precedent. Thus, legal precedent is a medium that helps members express and communicate their social world as a language does.[84] By speaking a language, the speaker not only makes herself understood but also understands the world through that language. Speaking a language, just like playing a game, is "practical," representing the "form[s] of life" of a given linguistic community.[85] English distills American (or British) culture; Mandarin captures the Chinese culture. It is this practical aspect of language that makes an action what it is,[86] and, to jurists, the language of precedent operates as a "personal experience."[87]

Legal precedent as language must continue to be invoked and articulated by subsequent interlocutors. If precedent remains unarticulated, it will soon be forgotten.[88] On that account, ritualization cannot be separated from "semanticization."[89] The ritual of precedent evolves into a system of effective signals which mediate past, present, and future adjudicative events. Legal precedent, as a repository of past judicial decisions in their crystalized form, disseminates basic categories of pertinent legal behaviors.[90] The communicative role of precedent is essential in transforming a mere stock of ritualistic knowledge into a normative guide accompanied by a sense of

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[82] *See e.g.*, Saipem SpA v. People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Provisional Measures, ¶ 67 (Mar. 21, 2007)

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases.

See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, 2008 I.C.J. Rep. 412, ¶ 53 (Nov. 18) ("[W]hile [its previous] decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so."). *See generally* Harlan Grant Cohen, *Theorizing Precedent in International Law*, *in* INTERPRETATION IN INTERNATIONAL LAW 268 (Andrea Bianchi et al. eds. 2015) (documenting and theorizing a wide use of legal precedent in many areas of international law).

[83] For this part of discussion on typicality and social knowledge, I draw on SCHUTZ & LUCKMANN, *supra* note 64, at 233–35.

[84] *See* Jack Sidnell, *An Ethnographic Consideration of Rule-Following,* 9 J. ROYAL ANTHROP. INST. 429, 430 (2003).

[85] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 23 (3d ed., G.E.M. Anscombe trans., Basil Blackwell 1968) ("the *speaking* of language is part of an activity, or of a form of life.") (emphasis in original)); *see also* Joshua Foa Dienstag, *Wittgenstein Among the Savages: Language, Action and Political Theory*, 30 POLITY 579, 599–600 (1998) (observing that "forms of life" manifest through practices, rather than theories).

[86] John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 32 (1955). In a similar line, Emanuel Adler and Vincent Pouliot define practice as a "socially meaningful pattern of action." Emanuel Adler & Vincent Pouliot, *International Practices: Introduction and Framework*, *in* THE PRACTICE TURN IN INTERNATIONAL RELATIONS 6, 9 (Emanuel Adler & Vincent Pouliot eds., 2011).

[87] DURKHEIM, *supra* note 72, at 435.

[88] RICHARDS, *supra* note 73, at 9.

[89] *Cf.* EDWARD O. WILSON, SOCIOBIOLOGY 110 (1975).

[90] *See generally* EDMUND LEACH, CULTURE AND COMMUNICATION: THE LOGIC BY WHICH SYMBOLS ARE CONNECTED (1976).

obligation. Precedent provides members of a legal community with a practical guide for future actions as well as evaluative criteria in approving or disapproving of particular actions.[91]

Here, "socialization" retrojects precedent, as the objectivated reality, into jurists' consciousness.[92] Only through such socialization does precedent "become[] subjectively meaningful" in those legal actors' minds.[93] Insofar as a linguistic practice is in operation, legal actors' full liberty to act outside of the realm of such practice largely disappears.[94] Precedent "exists in and through the [linguistic] practice of citing it and invoking it in the course of training, in the course of enjoining others to follow it, and in the course of telling them they have not followed it, or not followed it correctly."[95] Therefore, learning precedent is not so much learning abstract knowledge as performing the ritual oneself, that is, "learning-in-working."[96] It also means learning how to become a true member of a given legal community, that is, how to behave appropriately as a jurist in that legal community.[97] They often need to become familiar with all the images and symbols accompanied by the language of precedent.[98] To learn and discuss *Marbury v. Madison*[99] means more to understand the value of judicial review in the democratic governance of the United States than simply to know about the Judiciary Act of 1789 or a writ of mandamus.

This way, legal precedent provides litigants and judges with a primary cultural premise from which they can deduce particular legal conclusions.[100] They tend to follow precedent as if ordinary people automatically adhere to the grammar and syntax of their language, irrespective of their subjective views.[101] Concomitantly, they employ precedent-based arguments and reasoning intersubjectively, that is, based on a firm expectation that others will understand such arguments and reasoning and respond in kind. Thus, just like language, legal precedent enables discourse between various interlocutors.[102] In the same vein, precedent "clarif[ies] the range of possible

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[91] *See* H.L.A. HART, THE CONCEPT OF LAW 57, 255 (2d ed. 1994). The analytical focus in this Article does not necessarily lie in the use of language in precedent or the definition of certain terms in precedent. *See generally* Timothy Endicott, *Law and Language*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014). Rather, the linguistic framework employed here is intended to elucidate the cultural role of precedent itself as a language in three critical ways. First, precedent *qua* language is an effective communicative medium for community members as precedent displays a common behavioral standard or justification. HART, *supra* note 91, at 57; Endicott, *supra* note 91. Second, precedent also tends to construct their behaviors, realities and identities. Third, precedent as text needs to be interpreted. BELL, *supra* note 25, at 62.

[92] *See* BERGER & LUCKMANN, *supra* note 23, at 60–61.

[93] *Id.* at 149.

[94] Rawls, *supra* note 86, at 24.

[95] DAVID BLOOR, WITTGENSTEIN, RULES AND INSTITUTIONS 33 (1997); *see* Brian Bix, *The Application of Wittgenstein's Rule-Following Considerations to Legal Theory*, 3 CAN. J. L. & JURIS. 107, 112 (1990) (observing that a linguistic practice also results from "commonalities in our training and in our nature").

[96] *Cf.* John Seely Brown & Paul Duguid, *Organizational Leaning, and the Communities-of-Practice: Toward a Unified View of Working, Learning, and Innovation*, 2 ORG. SCI. 40, 41 (1991).

[97] *Id.* at 48.

[98] *See* BERGER & LUCKMANN, *supra* note 23, at 105.

[99] Marbury v. Madison, 5 U.S. 137 (1803).

[100] Regarding a typical deductive process of legal reasoning, see Anita Schnee, *Logical Reasoning "Obviously,"* 3 J. L. WRITING 105, 106–07 (1997).

[101] *See* RICHARD NOBLES & DAVID SCHIFF, A SOCIOLOGY OF JURISPRUDENCE 8 (2006). *Cf.* CARLETON KEMP ALLEN, LAW IN THE MAKING 161–62 (7th ed., 1964).

[102] *See* Gerhardt, *supra* note 4, at 968.

outcomes" rather than directly controlling them.[103] Even "talking to myself" instantaneously brings up a whole legal world around me.[104] This reproduction, or reification, enables a precedential system to accumulate meaning and experience, preserve them, and transmit them to other interlocutors.[105] This is why legal precedent forces interlocutors into its distinct patterns.[106] Judges and lawyers rationalize their interactions through typified patterns provided by precedent, at least within a given legal community, to the extent that a given legal issue is concerned. In this sense, a set of case law can be regarded as an "operative paradigm,"[107] which essentially provides that thematic *nomos* with its systemic existence.[108]

As a unique set of typifications, precedent manifests a linguistic perception of a settled legal reality regarding a certain type of issue. In a litigation setting, case law projects various speech acts by interlocutors, such as a claim (by a complainant), a rebuttal (by a defendant), and a ruling (by a judge), against the background of a relevant preexisting set of patterns at a higher level of abstraction, such as legal doctrines. For example, in a common law system, the doctrine of *forum non conveniens* reproduces a normative reality regarding a subtle balance between two symbolic values of convenience and justice. When judges invoke this doctrine, they instantiate that particular reality as they balance two opposing factors, such as one in favor of a plaintiff (convenience), and the other in favor of a defendant (undue hardship).[109] This objectified structure (*langue*) transcends contextual varieties of numerous speech acts (*parole*) performed by judges and litigants in any given dispute.[110] All in all, precedent "bridges different zones with the reality of everyday life and integrates them into a meaningful whole."[111]

Notably, the reproduction of legal precedent *qua* language also takes place in a non-litigation setting. Lawyers and judges internalize precedent without additional scrutiny, and this precedent becomes part of the legal background against which they operate. For example, *Washington v. Davis* shapes a subjective legal reality of U.S. jurists as that precedent permeates the national debate on racial discrimination in the United States.[112] The Supreme Court held that the D.C. Police Department's recruiting procedures

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[103] *Id.* at 977.

[104] *See* BERGER & LUCKMANN, *supra* note 23, at 54.

[105] *Id.* at 52.

[106] *See id.* at 53.

[107] NICHOLAS GREENWOOD ONUF, WORLD OF OUR MAKING: RULES AND RULE IN SOCIAL THEORY AND INTERNATIONAL RELATIONS 14 (1989) (defining an "operative paradigm" as "ensembles of human practices . . . seen as coherent in furthest degree are taken as having a natural objective reality.").

[108] SOCIAL REALITY, *supra* note 15, at 59.

[109] *See* Edward L. Barrett Jr., *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 420 (1947).

[110] While precedent is tantamount to language (*langue*), each bout of legal discourse, such as a claim or argumentation before a court, can be deemed a "signifier," à la Ferdinand de Saussure, in that it forms an individual speech (*parole*) or speech act. *See generally* FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Roy Harris ed., 1983). Such signifiers are often characterized by what Gottlob Frege called "denotations" (*Bedeutung*) as distinguished from a "signified," which is meaning or sense (*Sinn*). *See generally* GOTTLOB FREGE, ON SENSE AND REFERENCE (1892). John Searle advances a similar dyad: *syntax* as a linguistic structure and *semantics* as a content of meaning. SOCIAL REALITY, *supra* note 15, at 99.

[111] BERGER & LUCKMANN, *supra* note 23, at 54.

[112] *See* Washington v. Davis, 426 U.S. 229 (1976). I thank Carolyn Shapiro for drawing my attention to this particular example.

did not feature any discriminatory intent and therefore were racially neutral employment measures.[113] As a well-established precedent on racial discrimination in the nation, *Washington v. Davis* sheds light on the social reality shared by everyday people, rather than displaying its own particular reality.[114] In other words, the *Washington v. Davis* Court transmuted its distinct reality reified by that specific dispute, between then D.C. mayor Walter E. Washington and two Black applicants, into the collective U.S. legal reality. Now, *Washington v. Davis* as U.S. precedent on racial discrimination typifies this originally subjective experience, and simultaneously "anonymizes" the experience; any future lawyer whose case falls into the same category may duplicate the original experience of the *Washington v. Davis* litigants and judges through this particular precedent.[115] In this sense, the objective *Washington v. Davis* reality is retrojected into a subjective reality to a future U.S. lawyer as a collective experience.[116] Under these circumstances, U.S. laywers could take the propositions embodied by *Washington v. Davis* for granted and may not be particularly attentive to them. Indeed, they may not appear to actually follow it in a conscious and effortful way. At this juncture, it might be pointless to talk about the causal relationship between the precedent and allegedly precedent-following actions.[117]

C. SUMMARY

A ritualistic invocation of legal precedent presupposes the existence of a symbolic universe in which members of a legal community form and perform such precedent in an iterative fashion. When fully internalized, legal precedent constitutes the collective identity of jurists and shapes their behavioral patterns in their everyday legal lives. By the same token, legal precedent serves as an intersubjective medium of communication between jurists by providing them with a grammar and syntax of their discourse. They act upon each other based on a firm expectation that others will understand precedent-based arguments and reasoning and respond in kind. Thus, just like language, legal precedent enables discursive interactions among various interlocutors and, at the same time, illuminates the scope of conceivable outcomes of such interactions, instead of directly determining them.

III. REPACKING LEGAL PRECEDENT

While the ritual of legal precedent functions as a symbolic medium that carries with it symbolic values of a legal community, it can also be said to exist for its own sake. This Part tackles the latter dimension of precedent. As a social structure, judicial ritual tends to maintain its internal homeostasis as it responds to external stimuli that often threaten its symbolic existence. Niklas Luhmann's systemic approach to law sheds critical light on this macro dimension of judicial ritual. At the same time, however, a cautionary note on

[113] See *id.* at 245.
[114] *See* BERGER & LUCKMANN, *supra* note 23, at 54–55.
[115] *See id.* at 53.
[116] *See id.* at 78–79.
[117] *See* SOCIAL REALITY, *supra* note 15, at 127.

the risk of over-ritualization is in order. Over-emphasizing the structural-systemic dimension of precedent may cause jurists to lose sight of the inevitable need for judicial agency in addressing the particularities of legal disputes.

A. MACRO SOCIOLOGY OF LEGAL PRECEDENT

From a structural standpoint, precedent can be deemed to possess its own ontology separate from the individual actions (speech acts) of judges and litigants.[118] Legal precedent does not owe its existence to any inherent merits of particular decisions.[119] As Claude Levi Strauss appositely observed, the "structuring" exhibits its own validity regardless of contents or subjects that would imply it.[120] It is an "intransitive" object[121] existing and acting independently of agencies within it, not the "aggregate consequence of individual choice[s]."[122] Yet its existence does exercise certain controls over members of a given legal community to the extent that it effectively guides the actions of those members.[123] This macro sociology tradition may help illuminate international courts' *mega*-function of global integration beyond the narrower, particularistic, problem-solving function of an individual court often touted by the political science scholarship.[124]

As discussed above, legal precedent as judicial ritual instantiates core symbolic values that define a given legal community. Maintaining an "official" reality by performing such ritual, that is, by following precedent, is the most fundamental function of a legal institution or community: survival.[125] Failing to perform such ritual destabilizes the institution or community's organizational equilibrium and creates anxieties within it.[126] Precedent as judicial ritual secures the unity and integrity of the legal community as it stabilizes jurists' expectations and identities.[127] From the social perspective, the collective goal of dispute resolution is to reinstate effective social homeostasis by channeling the expression of grievances and ending them.[128]

In the face of a potential threat to the official symbolic universe, precedent may impose legal boundaries on social behaviors in two different

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[118] *See* Mikael Rask Madsen, *The Sociology of International Law: An Introduction*, *in* LAW SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOR OF ROGER COTTERRELL 241, 244–46 (Richard Nobles & David Schiff eds., 2014).

[119] Bankowski et al., *supra* note 12, at 488.

[120] LEVI STRAUSS, *supra* note 22, at 8.

[121] BHASKAR, *supra* note 30, at 16.

[122] THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 2 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

[123] *See* EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD AND SELECTED TEXTS ON SOCIOLOGY AND ITS METHOD 52 (Steven Lukes ed., W. D. Halls trans., Free Press 1982). This is what Talcott Parsons described as a "super-ego" element. TALCOTT PARSONS, THE SOCIAL SYSTEM 150 (1951).

[124] *See generally* Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49 (2013).

[125] S*ee generally* A. R. RADCLIFFE-BROWN, STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY (1939); READER IN COMPARATIVE RELIGION: AN ANTHROPOLOGICAL APPROACH 36–38 (William A. Lessa & Evon Z. Vogt eds., 1979).

[126] Lessa & Vogt, *supra* note 125, at 36–38.

[127] *See* BELL, *supra* note 25, at 25, 37; *see also* Geoffrey P. Miller, *The Legal Function of Ritual*, 80 CHI.-KENT L. REV. 1181, 1187 (2005) (conceiving ritual as a form of social control).

[128] *See* BELL, *supra* note 25, at 38. *Cf.* GLUCKMAN, ORDER AND REBELLION, *supra* note 48, at 110–36.

ways. First, legal precedent, as a set of *general* scripts, guides legal subjects, be they individuals or states, to stay within the realm of the official legal reality. Second, precedent, as a set of *special* scripts, controls courts' decisions within the acceptable purview of its pre-established symbolic meaning. Accordingly, any dispute may be likened to a "social drama" in which social tensions are brought up, processed and eventually resolved.[129] Disputants may hold a subjective symbolic universe through their own interpretation of texts and contexts related to a given legal situation. Often, a subjective reality may diverge from an official one institutionalized by the legal community to which a party belongs. In that case, the court addresses such divergence in a ritualized procedure and helps the estranged party reintegrate into an official reality.[130] This collective refutation of the alternative reality is tantamount to a "ritual purification."[131]

Failing to observe a judicial ritual results in an "inferior cognitive status,"[132] that is, "violation," and stigmatization as "violator."[133] This symbolic stigmatization is one of many aspects of judicial ritual that protect an official symbolic universe from alternative ones. Adjudication, besides merely settling private, adversarial disputes, often plays a bigger, *social*, role in bulwarking the fundamental symbolic values of a given legal community from possible encroachments.[134] Indeed, confining the adjudicative role to private satisfaction embodies a "sociologically impoverished universe."[135] The symbolic concept of violation is a ritualistic step toward resocialization of the violator to restore the original symbolic universe as well as its reaffirmation vis-à-vis the other members of the community.[136]

A precedent is comprised of a thematic set of judicial opinions extracted from similarly situated disputes. As a particular formulated expression of legal canons, it represents a discernable factual-legal pattern.[137] In a typical court setting, various speech acts[138] (such as claims, arguments, enquiries and responses) between interlocutors (such as plaintiffs, defendants and judges) construct a decision. If we had only one single court decision per precedent, all that matters would have been those speech acts themselves. However, given that a precedent usually consists of multiple court decisions, grasping it *qua* structure would not require an investigation of the litigants' and judges' actual dispositions behind those speech acts, which might not be

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[129] *See generally* Victor Turner, *Social Dramas and Stories About Them*, 7 CRIT. INQ. 141 (1980).

[130] *See* ADAM KUPER, ANTROPOLOGY AND ANTHROPOLOGISTS: THE MODERN BRITISH SCHOOL 156–57 (3d ed. 1983).

[131] BERGER & LUCKMANN, *supra* note 23, at 176.

[132] *Id.* at 83.

[133] Miller, *supra* note 127, at 1128.

[134] *See generally* Sungjoon Cho, *Global Constitutional Lawmaking*, 31 U. PA. J. INT'L L. 621 (2010) [hereinafter *Global Constitutional Lawmaking*].

[135] Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & HUM. BEHAV. 121, 122–24 (1982).

[136] For example, the WTO's dispute settlement system encourages WTO members to participate in this process of symbolic confirmation by maintaining lower thresholds for both filing a complaint and joining as a third-party. *See* Sungjoon Cho, *How the World Trade Community Operates: Norms and Discourse*, 13 WORLD TRADE REV. 685, 698 (2014) (observing lenient requirements for standing (*locus standi*) for both complainants and third parties under the WTO dispute settlement mechanism).

[137] *See* GIDDENS, *supra* note 19, at 21.

[138] To be more precise, these are called "perlocutionary acts" that are a special kind of speech act intending to generate certain cognitive effects, such as persuasion. *See generally* JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969).

significant in and of themselves. The context, not the content, of utterances seems to matter.[139] Here, we need some structural model of explaining the operation of precedent.[140]

Note that in the civil law jurisdiction, as well as under public international law, a court's (tribunal's) decision itself does *not* bind subsequent decisions. Yet, despite the lack of formal *stare decisis*, civil law courts and international tribunals often follow past decisions in similarly situated cases.[141] This habitual adherence to precedent, even in the absence of formal legal obligation, warrants a macro-sociological analysis of the structure.[142] From the macro perspective that this Article explores, the structure of precedent is "recursively implicated in a social reproduction."[143] A subjective exploitation of precedent via interpretation may be a "second-order phenomenon, one that could come into play only against a *background* of understanding."[144] Thus, interpretation is not entirely based on a given semantic content, such as text; it is also guided by "routines"[145] or deeply embedded worldviews.[146]

In sum, elements of such mega-function include conflict resolution, lawmaking, and stabilization of normative expectations, as echoed in works of various sociologists, in particular Niklas Luhmann,[147] to which this Article now turns.

B. OF A SYSTEMIC FRAMEWORK

Niklas Luhmann's systemic account of a legal system's communicative structure sheds critical light on the structure of precedent.[148] According to Luhmann, a social system[149] integrates all "communication" through a

[139] GIDDENS, *supra* note 19, at xxx.

[140] In this Part, this Article largely draws on traditional "functionalism," which highlights the "orderliness and stability" of a given social system. Although functionalism is often described as outdated, its insights still merit serious attention as it is "often employed without being explicitly recognized as such." BARRY BARNES, THE NATURE OF POWER 37 (1988).

[141] *See* Frank Emmert, *Stare Decisis: A Universally Misunderstood Idea*, 6 LEGISPRUDENCE 207 (2012) (arguing against both the "overstatement of the binding effects of precedent in common law" and the "understatement of the relevance of precedent in civil law").

[142] BERGER & LUCKMANN, *supra* note 23, at 183.

[143] GIDDENS, *supra* note 19, at xxxi.

[144] Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837, 1846 (1994) (emphasis added).

[145] JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS (2d ed. 1993).

[146] SOCIAL REALITY, *supra* note 15, at 131–32 (relating his concept of "Background" to Wittgenstein's later work and Pierre Bourdieu's "habitus").

[147] *See* Madsen, *supra* note 118, at 245–46.

[148] HANS-GEOG MOELLER, LUHMANN EXPLAINED: FROM SOULS TO SYSTEMS 32 (2006). My adoption of Luhmann's systems theory for the sake of this Article is purposely selective. It is not my intention to subscribe to his theory, which is itself quite complex, on the whole. Nor do I approve every aspect of his theoretical constructs. For a similar position, see, e.g., Stephen Diamond, *Autopoiesis in America*, 13 CARDOZO L. REV. 1763, 1763 (1992) ("Skeptical of theory, American intellectual pluralists like to admire autopoiesis for some insights, but not for its universal structure."); David E. Van Zandt, *The Breath of Life in the Law*, 13 CARDOZO L. REV. 1745, 1760 (1992) ("[T]he autopoietic theory of law adds little to our empirical understanding of the operation of the legal system.").

[149] Here, I mean by "system" the same terminology used in "systems theory" along the tradition of Talcott Parsons and Niklas Luhmann. This terminology should be distinguished from Jürgen Habermas' particularistic use of system. A Habermasian system is an instrumental mechanism "uncoupled" from and supplementary to the lifeworld in which an original form of communication occurs. This system, such as the economic and political system, responds to complexities of modern society and achieves certain functional (material) goals (productivity and efficiency) that the lifeworld is incapable of satisfying due to inherent obstacles of communicative actions such as dissents. *See* Jürgen Habermas, *The Theory of*

virtuous circle of positive expectation and complexity reduction.[150] Thus, order and stability are essential properties, in particular for a system to secure its own survival,[151] although not necessarily to meet moral necessities.[152] From a structural-systemic perspective, communication can be understood as orderly and sequential information processing among operational units with a given jurisprudential system, rather than reflective dialogue or other verbal or non-verbal interactions among individuals. To communicate in a legal discourse is to apply binary (legal versus illegal or acceptable versus unacceptable) "symbols of validity" or "codes."[153] Therefore, order may be achieved in a system as social actors internalize the aforementioned communicative logic, even in the absence of any external influence, such as a threat of sanction.[154]

If we apply Luhmann's systems theory to precedent, communication assumes a functional unit of any case law. For example, a defendant may *understand* a plaintiff's claim only because the latter *announces* certain *information* in that claim within the structural confines of a precedent.[155] It is a largely patternized unit process of "announcement-information-understanding"[156] that collectively forms an operational closure of precedent. What users of precedent subjectively observe is not an essential part of communication itself: communication just happens as an operational event.[157] What matters here is an *event* that acts as a communication. Even though a certain user of precedent may speak intentionally, it is the "unintended consequences" that reproduce such precedent by "systematically feed[ing] back to be the unacknowledged conditions of further acts."[158] This is the so-called "composition effect" ("It is, as it were, everyone's doing and no one's").[159] Here, a neurobiological analogy illustrates this structural operation via communication. A neuro-communication known as a synaptic transmission transpires in a similar operational pattern: a presynaptic neuron releases (announces) certain

Communicative Action, *in* 2 SYSTEM AND LIFEWORLD: A CRITIQUE OF FUNCTIONALIST REASON (Thomas McCarthy trans., Beacon Press 1987); Mathieu Deflem, *Introduction: Law in Habermas' Theory of Communicative Action, in* HABERMAS, MODERNITY AND LAW 1–20 (Mathieu Deflem ed., 1996).

[150] NIKLAS LUHMANN, TRUST AND POWER (T. Burns & G. Poggi eds., H. Davis, J. Raffan & K. Rooney trans., Wiley 1979); Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419, 1423 (1992) ("Seen as an operation, it [communication] cannot leave the society as the system that integrates all communications, for no system can operate outside of its own boundaries, and communication cannot be noncommunication.") [hereinafter *Operational Closure and Structural Coupling*].

[151] *See* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 337–39 (1947); *see also* Jurgen Habermas, *Between Facts and Norms: An Author's Reflections*, 76 DENV. L. REV. 937 (1999) (discussing "law as institution").

[152] *Cf.* David Lyons, *Formal Justice, Moral Commitment, and Judicial Precedent*, 81 J. PHIL. 580 (1984).

[153] Madsen, *supra* note 118, at 226–27.

[154] *See* ONUF, *supra* note 107, at 129; *see also* TALCOTT PARSONS, THE STRUCTURE OF SOCIAL ACTION 382 (1937); HART, *supra* note 91, at 218.

[155] MOELLER, *supra* note 148, at 32 (citing NIKLAS LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT 86 (1997)).

[156] The original citation from Luhmann is "Mitteilung—Information—Verstehen." *Id.*

[157] *Id.* at 7, 22. "'Mr. Justice X decided Y' is a communication that has been possible since the evolution of the courts. But 'Mr. Justice X decided Y because he is a fascist, or because he has an infantile personality' is not a communication that the legal system can generate as an account of a decision." NOBLES & SCHIFF, *supra* note 101, at 83.

[158] GIDDENS, *supra* note 19, at 8.

[159] *Id.* at 10.

neurotransmitters (information), which a postsynaptic neuron accepts (understands) via receptors.[160]

In sustaining the operational integrity of precedent, a unique division of labor exists among interlocutors. Their different roles ("status-function"), such as plaintiff, defendant, and judge, are performed against the "Background" of a given legal system.[161] Their actions, such as making a complaint, defending a measure, and issuing a decision, are socio-cultural in the sense that such actions are guided by institutional facts—such as an underlying normative structure including precedent—not by physical forces.[162] Each speech act, such as an argument, is intended to fit "world-to-words."[163] Guided effectively by precedent, a member of a given legal community understands a certain action or inaction, both of themselves and of other members, finds acceptable or unacceptable meaning in such action or inaction, and therefore either accepts or rejects it.[164] Another interlocutor, be it another lawyer or judge in a subsequent similar dispute, may also heed the original member's observation and disseminate it to other members of the same community. This dense network of information transmission consolidates shared normative grounds among interlocutors by reaffirming the preexisting precedent.[165]

The effect of such exchange is cumulative and enduring. From a holistic perspective, this is how a legal system selectively admits an acceptable action or inaction into the system as it screens the action or inaction through the edifice of precedent and concludes whether a measure in question is legal or not. This self-sustaining operational closure, which is called "autopoieticity,"[166] is critical in sustaining a precedential system. "Jurisprudence as self-description requires one to look at the operations within the legal system that are structured and stabilized by general communications that present the legal system to itself."[167] If a judge ever employs a totally new legal source different from past decisions, or if the judge invokes no source at all as they rely purely on their own personal, if not arbitrary, wisdom, a precedent *qua* system would not exist. For a system to exist, communication within it must operate in a closed manner, relying on preexisting normative reference points, such as past decisions.[168] Interestingly, the precedential system embeds an autopoieticity that neutralizes the cognitive burden that may afflict users of precedent. Indeed, any social structure remains largely invisible in practice because members of

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[160] *See generally* CELLULAR AND MOLECULAR BASIS OF SYNAPTIC TRANSMISSION (Herbert Zimmermann ed., 1988).

[161] *See* SOCIAL REALITY, *supra* note 15, at 39, 93.

[162] *Id.* at 39.

[163] JOHN R. SEARLE, EXPRESSION AND MEANING 14 (1979); ONUF, *supra* note 107, at 92.

[164] *Cf.* George P. Fletcher, *Law as Discourse*, 13 CARDOZO L. REV. 1631, 1634 (1992).

[165] *See generally* David Lockwood, *Social Integration and System Integration*, *in* EXPLORATIONS IN SOCIAL CHANGE (George K. Zollschan & Walter Hirsh eds., 1964) (discussing "normative functionalism").

[166] *See* Richard Nobles & David Schiff, *Introduction* to NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 8 (Fatima Kastner et al. eds., 2004); *see also* BLOOR, *supra* note 95, at 68 (discussing "meaning finitism" and observing that "between reference to an independent reality, and having no reference at all, we have self-reference, i.e.[,] reference to a reality, but a reality which is dependent on the very acts of reference that are directed at it").

[167] NOBLES & SCHIFF, *supra* note 101, at 86.

[168] *See* Harry Eckstein, *A Culturalist Theory of Political Change*, 82 AM. POL. SCI. REV. 789, 795–96 (1988).

a given society largely take it for granted. In other words, the social structure exists only because its members believe it to exist.[169] Judges and litigants seldom dispute this intellectual foundation. Most of the time, this "metaphysical burden" behind the reality of a precedential system, to which its precedent belongs, is too light for its members to sense, if at all.[170] Unlike physical ("brute") facts, a precedential system as social ("institutional") facts is basically self-referential since the *belief* in their existence, and practice therefrom, is constitutive of its very existence.[171] Whereas Mount Everest is always there, whether we believe it or not, a precedential system is here only because members of a legal community believe it to be. There is no Archimedean point from which members of a legal community may appraise the operation of their own precedent in an entirely detached manner.

In most domestic legal systems, this metaphysical burden is almost nil for two main reasons. First, both the density and frequency of legal interactions naturalize a variety of legal institutions, such as money or driver's licenses. Second, the political process, including election or legislation, legitimizes such institutions. In contrast, these two conditions are met only partially, if ever, in the *international* sphere. Hence, more questions, more controversies, and more resistance exist with respect to institutional facts in an international organization—such as decisions issued by international tribunals—than in the domestic sphere. Nonetheless, under certain circumstances, the first condition is met so powerfully that members of an international organization barely suffer metaphysical burdens of their own social reality, even without fulfilling the second condition. This Article argues that such an exception is seen in the WTO. The contemporary prominence of the WTO in the everyday economic life of its member countries has been well documented.[172]

Conceivably, one might be tempted to locate a quandary in this macro, structural approach. If every single judge is guided by precedential structure, would that mean that the structure really *determines* their decision? How could one falsify such a proposition? Perhaps every decision might be equally made out to depart from the structure.[173] This paradox of indeterminacy appears to be a logical corollary to the self-referencing nature of a precedential system. Importantly, precedent is "rationally structured" but

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[169] SOCIAL REALITY, *supra* note 15, at 1.

[170] *Id.* at 4.

[171] *See id.* at 32–33; *see also* BARNES, *supra* note 140 (observing that the nature of normative order is basically self-fulfilling).

[172] *See generally* SUNGJOON CHO, THE SOCIAL FOUNDATIONS OF WORLD TRADE: NORMS, COMMUNITY AND CONSTITUTION, 1–43 (2015) (discussing the world trading "community," comprised not only of trading nations but also of individual economic players) [hereinafter THE SOCIAL FOUNDATIONS OF WORLD TRADE].

[173] This is "Wittgenstein's paradox." WITTGENSTEIN, *supra* note 85, ¶ 201

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.

This paradox leads some scholars to retain a skeptical view of rule determinism. *See* SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982). *But see* Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L.J. 485 (1996) (arguing that Wittgenstein was in fact critical of rule-skepticism and recognized no gap between a rule's meaning and its application that would require justification).

not necessarily "rationally determined."[174] In the course of all judicial discourse, both litigants and judges systematize their reasoning through an unremitting process of reference to past opinions, which, in turn, edifies precedent.[175] After all, any precedential system is made out of itself. It "observes" itself by self-providing points of reference as well as a sense of obligation.[176]

In sum, precedent *qua* system "takes on a force of its own"[177] and reconstructs ostensibly inconsistent parts into a meaningful whole.[178] This integrative ideal[179] is a key element of any operable system.[180] Indeed, an ideal of legal coherency and integrity is characteristic of all precedential systems, ranging from the English common law to the European Union ("EU") law.[181] As discussed above, the operational regularity of precedent does not countenance semantic justification. One may make such observation even when one does not fathom, or approve, its inner meaning.[182] It is as if Lilliputians described Gulliver's watch by observing that "out of the right Fob hung a great Silver Chain with a wonderful kind of engine at the Bottom."[183]

C. THE PERILS OF OVER-RITUALIZATION

While the aforementioned structural-systemic approach to judicial ritual demonstrates its homeostatic function within a legal system, it may conjure up an over-ritualized version of precedent and therefore over-justify its operational function.[184] A holistic, systemic reflection may justify an institution of precedent in a *general* sense as an essential property of any legal system. Nonetheless, the ritual of precedent may not warrant a *particular* application of such institution to a given case.[185] The application of precedent requires a judicial agency, such as judges, who can adopt flexible schemes through which to reinterpret old patterns in order to effectively address contradictions between an existing template and a new situation.[186] Judicial agents do not "adhere slavishly to a [ritualistic] script"

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[174] NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 271 (1978).

[175] This type of paradox of indeterminacy derived from self-referencing dates back to the Greek philosopher Epeminides, and more recently to Gödel's Incompleteness Theorem. *See* PAUL DAVIES, GOD AND THE NEW PHYSICS 93–94 (1983).

[176] *See* D. Neil MacCormick & Robert S. Summers, *Introduction*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 1 (D. Neil MacCormick & Robert S. Summers eds., 1997) [hereinafter MacCormick & Summers, *Introduction*]; *see also* NOBLES & SCHIFF, *supra* note 101, at 8 (emphasizing the "self-description" and "self-observation" aspects of jurisprudence).

[177] MacCormick & Summers, *Conclusions*, *supra* note 35, at 543.

[178] *See* MacCormick & Summers, *Introduction*, *supra* note 176, at 10.

[179] *See* J. Bengoetxea, *Legal System as a Regulative Ideal*, 33 ARSP-BEIHEFT (H-J. Koch & U. Neumann eds., 1994).

[180] The foundation of this integrative ideal may be expressed in different terms. For example, natural law theorists may locate such ideal in human reason, and positive law theorists, in a sovereign command or public authority. *See* Gerald J. Postema, *Roots of Our Notion of Precedent*, *in* PRECEDENT IN LAW 11–15, 31 (Laurence Goldstein ed., 1987).

[181] Bankowski et al., *supra* note 12, at 486–87.

[182] *See* RUPERT CROSS & J. W. HARRIS, PRECEDENT IN ENGLISH LAW 213 (4th ed. 1991).

[183] *Id.* at 232, quoting JONATHAN SWIFT, GULLIVER'S TRAVELS.

[184] *See* Rawls, *supra* note 86, at 3, 10; *see* EDGAR F. CARRITT, ETHICAL AND POLITICAL THINKING 65 (1947).

[185] *See* Rawls, *supra* note 86, at 11.

[186] *Cf.* JEAN COMAOFF, BODY OF POWER, SPIRIT OF RESISTANCE: THE CULTURE AND HISTORY OF A SOUTH AFRICAN PEOPLE 1 (1985); *see also* BELL, *supra* note 25, at 82–83.

supplied by precedent.[187] They adopt necessary changes in judicial ritual (precedent) while still preserving a sense of legal continuity.[188]

One may conceive of two ways to overcome these risks of over-ritualization. One way is to declare the absence of relevant precedent. One might reasonably imagine a situation in which a court's technical adherence to precedent might lead to an unjust decision against the merits of a particular case. In that situation, a judge might need to discontinue referring to a systematic benefit of sustaining an institution of precedent to avoid an unfair outcome in the case at hand.

For example, suppose that a doctor sought a compensation for his treatment of an infant without her parents' prior authorization.[189] Since the doctor could not acquire the parents' permission in a timely manner, he proceeded with the necessary treatment out of fear of any permanent injuries to the patient. Here, a common-law court could rule against the doctor if it faithfully followed the typical contract-law precedent. After all, there was no explicit or implicit contract between the doctor and the parents regarding treatment of the infant. At the same time, however, the court could also rule in favor of the doctor if it suspended the operation of the precedent and instead relied on equitable principles. Obviously, the latter would be a more plausible outcome than the former, considering the ideals of social justice and fairness.

The alternative is to interrupt the operation of precedent itself by suspending the entire adjudicative process. Settlement is a good example. Settlement may achieve the same goal as judicial ritual in that it effectively puts an end to grievances. Nonetheless, settlement can create flexible terms and conditions, as it is free from the symbolic command of precedent. Admittedly, precedent might still influence those terms and conditions, as disputants often settle in the shadow of precedent.[190] Moreover, in public litigation, where the outcome concerns a systematic issue beyond the bilateral interests of the parties concerned, a private settlement may invite claims from third parties who desire to engender a fresh dispute.[191]

D. SUMMARY

From a structural standpoint, legal precedent exhibits its own validity, existing and acting independently of both the agencies within it and the particular decisions produced by those agencies. The self-sustaining operational closure (autopoieticity) of legal precedent requires us to look at

[187] *See* Marc Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOCIO. 481, 487 (1985).

[188] *See* BELL, *supra* note 25, at 251.

[189] In this example, I draw on Greenspan v. Slate, 12 N.J. 426, 430 (1953); *see also* RUDOLPH B. SCHLESINGER, COMPARATIVE LAW: CASES-TEXTS-MATERIALS 3–6 (Rudolph B. Schlesinger et al. eds., 6th ed. 1998).

[190] *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). *See generally* Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002);

[191] *Cf.* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1289 (1976) (attributing the "demise of the bipolar structure" to one of the characteristics of *public* law litigation as opposed to private law litigation); Henry P. Monaghan, *Constitutional Adjucation: The Who and When*, 82 YALE L.J. 1363, 1371 (1973) (observing that constitutional litigation as "public actions" might not involve private rights).

the operations within the legal system that are structured and stabilized by general communications that present the legal system to itself. For a system to exist, communication within it must operate in a closed manner, relying on preexisting normative reference points, such as past decisions. Nonetheless, the aforementioned structural-systemic approach may create an over-ritualized version of legal precedent and therefore over-justify its operational function without due respect to a particular application in a particular situation. Thus, the practice of legal precedent requires a judicial agency that can adopt flexible schemes with which to reinterpret old patterns to effectively address contradictions between an existing template and a new situation.

IV. THE WTO PRECEDENT: A CASE STUDY

This Part employs the aforementioned symbolic approach to legal precedent in grappling with why and how WTO case law operates effectively. As widely reputed, the WTO exhibits an effective dispute resolution mechanism, which is a rarity among international organizations. It is the rich case law that powers the adjudicative engine of the WTO. In this regard, applying the judicial ritual thesis to the WTO example will help us better understand not only the particular operation of the WTO precedent but also the general symbolic meaning of legal precedent itself. This Part first examines the symbolic authority of WTO precedent and then discusses the traits of the language in it. Finally, this Part seeks to comprehend WTO precedent from the structural-systemic standpoint.

A. THE SYMBOLIC AUTHORITY OF WTO PRECEDENT

WTO precedent is a crystallized form of judicial ritual that has been performed for the past seven decades since its predecessor, the General Agreement on Tariffs and Trade ("GATT"),[192] initiated the "panel" system, an impartial third-party dispute resolution apparatus. Usually, a panel is comprised of three external individuals (panelists) whose professional credentials range from trade diplomats to trade law scholars. As the new WTO dispute settlement mechanism ("DSM")[193] introduced an appellate mechanism in 1995, both disputants may appeal an original panel decision to the Appellate Body, which renders a final judgement on the original dispute. Although both a panel report and an Appellate Body report only bind, in a narrow legal sense, disputants (a complainant and a defendant) in a particular dispute, they are still widely invoked in similarly situated subsequent cases, forming an institution of persuasive precedent in a given issue area.

As the institution of precedent has emerged, its normative contents and the symbolic values they represent shape the actions of WTO members, such as filing complaints before the WTO DSM. Although each course of such

[192] General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194.

[193] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 10-2, 10-3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

action is also subject to many contingent factors, including political calculations, WTO precedent still engenders the terms of those contingencies. WTO precedent often intervenes in domestic court decisions, albeit indirectly. It is a known fact that U.S. trade courts, such as the Court of International Trade and the Court of Appeals for the Federal Circuit, often reference WTO case law on relevant or overlapping legal issues, such as trade remedies.[194] Such influences may translate to the symbolic authority of WTO precedent in that it shapes actions of social actors even without any material incentives. Those social actors, such as WTO panelists, government officials, private parties, and even non-governmental organizations, actually reference WTO precedent. In every situation, they attempt to justify their arguments based on the WTO precedent. They are doing this in a practical, not deliberate, manner.

Suppose that Country Y bans the import of Country X's lumber on the grounds that the lumber was harvested in an environmentally harmful way, while Country Y's domestic lumber is freely marketed. A trade representative from Country X might interpret Country Y's ban in terms of WTO case law. To Country X, this is a typical "like-product" situation informed by relevant sets of WTO precedent such as *Spanish Coffee* and *Shochu II*. In *Spanish Coffee*, a GATT panel ruled that Brazilian unwashed Arabica coffee and Colombian mild coffee are "like" products, despite certain "organoleptic differences resulting from geographical factors, cultivation methods, the processing of the beans, and the genetic factor[s]" between the two.[195] The panel reasoned that these differences, which often lead to different aroma and taste, would not justify different treatment between the two for the purpose of GATT non-discrimination principles, especially considering that coffee beans are often blended[196] Likewise, in *Shochu II*, the WTO Appellate Body held that Japanese shochu and European vodka are like products, despite some subtle differences due to different manufacturing processes and consumption styles between the two.[197]

According to this non-discrimination precedent, Country Y shall not discriminate against Country's X's lumber based merely on the different production method: lumber is lumber. In other words, the fact that lumber is harvested in an environmentally harmful way would not alone automatically distinguish such lumber from other kinds harvested in an environmentally friendly manner.[198] WTO precedent typifies Country X's symbolic understanding, which is, in turn, transferred to Country Y as a like-product claim in terms of the aforementioned case law. Country Y then subsumes Country X's claim under certain symbolic categories (*Spanish Coffee and Shochu II*) shared by its fellow WTO members.[199]

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[194] *See* Sungjoon Cho, Transnationalizing the Judicial Sphere (Nov. 20, 2013) (unpublished manuscript) (on file with author).

[195] Report of the Panel, *Spain—Tariff Treatment of Unroasted Coffee*, ¶ 4.6, L/5135 - 28S/102 (Apr. 27, 1981), GATT BISD 28S/102 (1981).

[196] *Id.* ¶ 4.6–4.7.

[197] Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WTO Docs. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996) [hereinafter *Shochu II*].

[198] Regarding criticisms on this position, see Robert L. Howse & Donald H. Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 EUR. J. INT'L L. 249 (2000).

[199] *See generally* BERGER & LUCKMANN, *supra* note 23.

Notably, as WTO precedent becomes richer and more complex, so does the breadth of its symbolic categories. The Appellate Body has recently begun to list *all* relevant sets of precedent that it uses in any given decision. For example, the Appellate Body report in the *United States—Certain Country of Origin Labeling (COOL) Requirements* listed a total of fifty cases that it referenced in its decision.[200] These cases range from an Appellate Body decision made in 1996 (*Shochu II*) to one issued more recently (*Tuna II* in 2012).

These concepts of symbolic categories and symbolic authority also help us understand how a WTO member internalizes WTO precedent. For example, in a series of WTO disputes concerning a particular calculative methodology in determining dumping margins ("zeroing"), a certain symbolic category was formed in an incremental yet empowering fashion. The zeroing methodology had been immensely popular both in Europe and in the United States since it tended to inflate dumping margins and therefore made it easy for domestic authorities to impose antidumping duties on foreign imports.[201] Nonetheless, the symbolic authority emanating from this newly formed symbolic category (anti-zeroing case law) effectively shaped WTO members' behavior, even under domestic political pressure. For example, the EU abandoned its own zeroing practice immediately after the Appellate Body initiated the anti-zeroing precedent in *EC—Bed Linen* and began to employ the same practice exercised by the United States.[202] The United States was eventually forced to abolish its zeroing practice despite fierce opposition from domestic steel companies that had long enjoyed the zeroing practices's protectionist effects.[203] Thus, the WTO norms' symbolic gravitational force tends to warp a domestic legal force field. Although WTO norms might not directly determine the detailed content of a domestic legal system, the former could still shape terms on which the latter operates.

In sum, the effective operation of the GATT and WTO DSM with an impressive record of compliance by losing parties and, consequently, the successful development of GATT and WTO case law, appear to be enough to presume that symbolic authority brought by the WTO precedent indeed works. Although rationalists tend to attribute such success to the fear of retaliation, that alone might not fully explain why WTO talks have suddenly become salient in the U.S. Congress, more recently than in the past.[204] Indeed, this is a sea change considering that a decade ago the U.S. Congress was totally dismissive of the WTO tribunal itself.[205]

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[200] *See* Appellate Body Report, *United States—Certain Country of Origin Labeling (COOL) Requirements*, WTO Docs. WT/DS384/AB/R, WT/DS386/AB/R (circulated June 29, 2012).

[201] *See Global Constitutional Lawmaking*, *supra* note 134.

[202] Tilman Krüger, *Shaping the WTO's Institutional Evolution: The EU as a Strategic Litigant in the WTO, in* THE EUROPEAN UNION'S SHAPING OF THE INTERNATIONAL LEGAL ORDER 169, 178 (Dimitry Kochenov & Fabian Amtenbrink eds., 2014).

[203] *See Global Constitutional Lawmaking*, *supra* note 134, at 630–31; Sungjoon Cho, *The WTO Appellate Body Strikes Down the U.S. Zeroing Methodology Used in Antidumping Investigations*, ASIL INSIGHTS (May 4, 2006), https://www.asil.org/insights/volume/10/issue/10/wto-appellate-body-strikes-down-us-zeroing-methodology-used-antidumping [https://perma.cc/TYM3-QHHM].

[204] *See e.g.*, Rossella Brevetti, *Business Coalition Asks Congress to Take Immediate Action on COOL*, BLOOMBERG (Oct. 30, 2014, 9:00 PM), https://news.bloomberglaw.com/international-trade/business-coalition-asks-congress-to-take-immediate-action-on-cool [https://perma.cc/B2J6-VX35].

[205] *See* Gary G. Yerkey, *Sen. Baucus Calls WTO 'Kangaroo Court' with Strong 'Bias' Against the United States*, INT'L TRADE REP. (BNA), 19 ITR ISSUE NO. 39 (2002).

B. THE LANGUAGE OF THE WTO PRECEDENT

The WTO precedent, *qua* language, provides idealized schemata through which WTO members can grapple with the trade reality around them. As WTO cases pile up, these meaning patterns continue to reproduce themselves, becoming further sedimented and forming an expanded and more complex version of WTO language. The *public* nature of WTO precedent *qua* language is characteristic of the fact that it is a cultural product of the WTO community.[206] Even though disputants prefer settlement via negotiation to adjudication, they are still subject to the symbolic gravitational force of WTO precedent. They could not simply create their own private language for which to dispose of the original dispute however best suits their interests. Even the terms of their settlement must still conform to WTO precedent because the settlement will eventually concern *other* WTO members.[207] No private WTO language, if ever, might alter WTO precedent.

Two paradigmatic non-discrimination (national treatment) cases under the WTO DSM (*Shochu II* and *Asbestos*) demonstrate how WTO precedent may shape patterns of arguments by other disputants in subsequent cases. In *Shochu II*, Japan levied a lower tax on its local liquor (shochu) than on Western liquors—such as whisky and vodka—imported from Canada, the United States, and the EU. The WTO Appellate Body ruled that shochu and vodka are indeed like products on the grounds that both of them are transparent spirits made from similar raw materials and that they serve the same end uses. Therefore, the WTO Appellate Body held that a higher tax rate on vodka than on shochu constituted discrimination.[208] This particular decision entered into a stream of WTO case law on discrimination the moment it was published in 1996. Onwards, most of the subsequent discrimination decisions by the WTO tribunal, including *Korean Soju* (1999)[209] and *Chilean Pisco* (2000),[210] have referenced *Shochu II*.

Asbestos offers another type of non-discrimination case law. In one case, France banned the importation of asbestos from Canada due to its carcinogenic risk. Based on *Shochu II*,[211] Canada argued that the Canadian asbestos and the French asbestos substitutes (such as PCG fibers) were like products since consumers would perceive these two products to serve the same end uses, such as fire resistance.[212] Here, the Canadian argument would render the French ban discriminatory since the like French products had been marketed without any restrictions. In contrast, the EU, representing France, argued that the end use should not be the sole criterion for determining like products.[213] In particular, the EU contended that the unique fibrous texture

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[206] *Cf*. WITTGENSTEIN, *supra* note 85, ¶ 244–71.

[207] John Jackson states that an adopted WTO panel or the Appellate Body decision binds *all* WTO members. *See* JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO INSIGHT ON TREATY LAW AND ECONOMIC RELATIONS 163–65 (2000).

[208] *See Shochu II*, *supra* note 197.

[209] Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, ¶¶ 110, 114, WTO Docs. WT/DS75/AB/R, WT/DS84/AB/R (adopted Feb. 17, 1999).

[210] Appellate Body Report, *Chile—Taxes on Alcoholic Beverages*, WTO Docs. WT/DS/87/AB/R, WT/DS/110/AB/R (adopted Jan. 12, 2000).

[211] Panel Report, *European Communities—Measures Affecting the Prohibition of Asbestos and Asbestos-Containing Products*, ¶ 3.414, WTO Doc. WT/DS135/R (adopted Apr. 5, 2001).

[212] *Id.* at ¶ 3.422.

[213] *Id.* at ¶ 3.435.

of asbestos, which is linked closely to its carcinogenic risk, distinguishes it from its benign substitutes, such as PCG fiber, which hold a different chemical structure and therefore carry no public health risk.[214]

Eventually, the Appellate Body sided with the EU. Invoking *Shochu II* as well, the Appellate Body first underlined that the purpose of the national treatment principle in the WTO is "to avoid protectionism in the application of internal tax and regulatory measures" and "to provide equality of competitive conditions for imported products in relation to domestic products."[215] Then, the Appellate Body struck down the decision of a lower tribunal that asbestos and its substitutes—including PCG fibers—were like products. The Appellate Body opined that carcinogenicity is a "defining" physical property of asbestos, which is not shared by its substitutes, such as PCG fibers.[216]

Now, suppose that Mexico exports tequila to Australia. Australia imposes a higher rate of excise tax on tequila than on its domestic beer because tequila and beer are totally different products, given their different production methods, consumer perception, and so forth. Also suppose that the Australian government wants to discourage overconsumption of tequila by imposing higher tax rates. Here, the WTO precedent on non-discrimination, such as *Shochu II* and *Asbestos*, is likely to shape legal arguments submitted by Mexico and Australia. While both countries share the same WTO language, or the same stock of social knowledge within the WTO system, their practical application of that language—what they actually end up saying—may differ on account of their diverging motivations. Specifically, Mexico, as an exporting country, is likely to reference *Shochu II*, which found violation in an importing country's internal measure. In contrast, Australia, as an importing country, will likely invoke *Asbestos*, which was sensitive to policy goals of an importing country. Nonetheless, what matters most is that relevant sets of WTO precedent, just like language, organize ways in which these two countries will engage in the legal reality around them from their own perspectives. Moreover, beause they share the same stock of social knowledge, Mexico can make itself understood, or communicate its legal position, to Australia, and vice versa.

C. A SYSTEMIC FRAMEWORK OF WTO PRECEDENT

Scholars widely observe that rich sets of case law developed by the WTO tribunal are indeed tantamount to common law.[217] However, public international law in general, and the WTO law in particular, stipulates that any decision of an international tribunal is legally "binding" only to directly involved disputants.[218] Other WTO members have no legal obligation

[214] *Id.* at ¶ 3.430.

[215] Appellate Body Report and Panel Report, *European Communities—Measures Affecting the Prohibition of Asbestos and Asbestos-Containing Products*, ¶ 97, WTO Doc. WT/DS135, (adopted Apr. 5, 2001) [hereinafter *Asbestos* AB Report].

[216] *Id.* at ¶ 114.

[217] *See notably* Joseph H. H. Weiler, *Cain and Abel—Convergence and Divergence in International Trade Law*, *in* THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? 3–4 (Joseph H.H. Weiler ed., 2000); *see also* Sungjoon Cho & Jürgen Kurtz, *Legalizing the ASEAN Way: Adapting and Reimagining the ASEAN Investment Regime*, 66 AM. J. COMP. L. 233 (2018).

[218] ICJ Statute, *supra* note 8; Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 14, WTO Doc. WT/DS8/AB/R (adopted Oct. 4, 2006)

whatsoever to follow that decision.[219] Nor does some formal doctrine, such as *stare decisis*, connect those different decisions and weave them into a coherent, systemic set of precedent. Then why did WTO precedent not simply drift apart or remain a discrete set of individual cases? How did those different decisions hang together and emerge as a coherent set of jurisprudence? Indeed, this is puzzling from a legal perspective since international law presupposes a formal disconnection between those separate decisions. Thus, at least within the pure legal realm, employing solely legal concepts and principles, one cannot fully capture an institution of precedent.[220]

In the face of this legal puzzle, the aforementioned socio-anthropological approach may help explain how WTO precedent provides a ritualistic structure that effectively shapes individual speech acts by legal actors, such as parties' arguments and the WTO tribunal's reasoning.[221] At this juncture, it is imperative to pay due attention to an institutional avenue for GATT and WTO precedent, that is, the DSM, which is the main engine of the GATT and WTO precedent. The WTO dispute settlement system has been praised as "the jewel in the crown" of the organization for its unique success.[222] During the first decade of its operation, the WTO tribunal (panels and the Appellate Body) adjudicated three times more cases than the International Court of Justice ("ICJ") has done in the latter's half-century of existence.[223] In fact, however, the framers of the GATT never envisioned a formal dispute resolution system.[224] The GATT provides no textual grounds for any institutionalized form of dispute resolution other than contingent bilateral consultation. Even after a panel system emerged in the 1950s, its prototypical nature was not so much adjudication as it was arbitration.[225] Yet, as more panel reports were issued and reference to those reports was routinized, an institution of precedent gradually emerged. As the organizational complexity increased with proliferating members and disputes, the early bilateral

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> Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.

[219] *See* Zhu Lanye, *The Effects of the WTO Dispute Settlement Panel and Appellate Body Reports: Is the Dispute Settlement Body Resolving Specific Disputes Only or Making Precedent at the Same Time?*, 17 TEMP. INT'L & COMP. L.J. 221, 234–35 (2003) (observing that the WTO tribunal generates de facto precedents).

[220] *See, e.g.*, RAYMOND WACKS, PHILOSOPHY OF LAW: A VERY SHORT INTRODUCTION 56–57 (2006).

[221] Regarding a similar approach, see, for example, Harlan Grant Cohen, The Sociology of International Precedent (May 10, 2014) (unpublished manuscript) (on file with author) (applying Pierre Bourdieu's "field" theory to precedents in the area of international criminal law).

[222] *See* Sylvia Ostry, *Future of the World Trade Organization*, BROOKINGS TRADE F. 1, 173 (Apr. 15, 1999), https://www.jstor.org/stable/25063141 [https://perma.cc/2S3F-F52A]. In the twenty years after its creation, a total of 500 disputes have been filed under the WTO dispute resolution system in contrast with a total of 300 cases under the old GATT system in the latter's half a century operation. *WTO News: WTO Disputes Reach 500*, WORLD TRADE ORG. (Nov. 10, 2015), https://www.wto.org/english/news_e/news15_e/ds500rfc_10nov15_e.htm [https://perma.cc/95HM-CJW6].

[223] *See* Sungjoon Cho, *Of the World Trade Court's Burden*, 20 EUR. J. INT'L L. 675 (2009).

[224] *See generally* A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM (Gabrielle Marceau ed. 2015).

[225] *See* Christina Schröder, *Early Dispute Settlement in GATT*, *in* A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM 141–43 (Gabrielle Marceau ed., 2015).

contractarian model could no longer adequately capture the structural operation of the GATT system.[226]

Furthermore, a critical shift in hermeneutical focus from the material consequences of a violation to the violation itself paved a firm pathway for jurisprudential development as panels focused on legal doctrines recycled and reproduced through precedent. In the early days of the GATT, a panel focused on whether a defendant's violation caused any damages ("nullification or impairment"), such as loss of exports, to a complaint.[227] Yet subsequent panels concentrated on the collective (public) nature of remedy, that is, the violation itself, rather than its commercial effects.[228] As long as a measure in question was confirmed to be a violation, panels would presume that the complainant incurred damages therefrom.[229]

With these organizational customs (*aquis*) of the GATT or WTO system sedimented and codified over the past six decades, the DSM channels and exhibits the practical (taken-for-granted) consciousness of WTO members. Each decision automatically acquires a "status function"[230] as part of WTO precedent, regardless of its substantive merits, only because it was ritualized under the DSM. Even an appeal is self-referential within the confines of the DSM, and finality provides legitimacy.[231] Likewise, there is no "persistent objector" under the DSM[232] as the DSM entertains no normative veto of a particular WTO member's proposal based on its own judgement on the WTO tribunal's decision.[233]

Against this background, the WTO structure denotes a social order that translates into consistency in a legal system of which precedent is an important part. Consistency represents two main properties of well-operating legal systems: security and predictability. The WTO Dispute Settlement Understanding ("DSU") provides that "the dispute settlement system of the

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[226] *See* THE SOCIAL FOUNDATIONS OF WORLD TRADE, *supra* note 172, 86–119 (discussing the evolution of the GATT and WTO from a contract to a "community"); Pascal Lamy, *Lamy Cites "Very Broad Confidence" in WTO Dispute Settlement,* WTO NEWS (June 28, 2012), http://www.wto.org/english/news_e/sppl_e/sppl240_e.htm [https://perma.cc/F7FQ-RRFE] ("It was not always possible to rely on the personal experience of trade diplomats to explain the sometimes rather obscure legal passages that their predecessors had crafted.").

[227] Report of the Panel, *Italian Discrimination against Imported Agricultural Machinery*, ¶ 17, L/833 (Oct. 23, 1958), GATT B.I.S.D. (7th Supp.), at 60 (1959) (discussing "whether the operation of the Law No. 949 had caused *injury* to the United Kingdom *commercial interests*, and whether such an injury represented an *impairment of the benefits* accruing to the United Kingdom under the General Agreement") (emphasis added).

[228] *See generally* Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 U. PITT. L. REV. 763 (2004).

[229] *See* Report of the Panel, *United States—Taxes on Petroleum and Certain Imported Substances*, ¶¶ 5.1.3–5.1.12, L/6175 (June 17, 1987), GATT B.I.S.D. (34th Supp.), at 136 (1987); Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1876 U.N.T.S. 154, art. 3.8 ("In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment.") [hereinafter WTO DSU].

[230] SOCIAL REALITY, *supra* note 15, at 41.

[231] *Cf.* "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (quoted in RICHARD H. GASKINS, BURDEN OF PROOF IN MODERN DISCOURSE 242 (1992)).

[232] Regarding the notion of "persistent objector," see JAMES A. GREEN, THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW 1–17 (2016).

[233] WTO DSU, *supra* note 229, at art. 17.14 ("An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.").

WTO is a central element in providing security and predictability to the multilateral trading system."[234] In the same vein, a WTO panel ruled that

> [p]roviding security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators.[235]

The fact that security and predictability are the WTO's paramount goals as a legal system reaffirms the "nonagentive" function[236] of the WTO precedent, which refers to the structural coordination of legal actions among WTO members. The existence of WTO precedent means that the WTO tribunal will "resolve the same legal question in the same way in a subsequent case."[237] Certain procedural features under the DSU, in particular, the compulsory jurisdiction[238] and the automatic adoption rule,[239] accord functional alacrity to the WTO system by minimizing potential operational blockades.[240] Security and predictability, as structural properties, also create a hierarchical order between different layers of the WTO tribunal, a panel and the Appellate Body. The Appellate Body ruled that

> [t]he Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.[241]
>
> We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system, as explained above.[242]

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[234] *Id.* at art. 3.2.

[235] Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, ¶ 7.75, WTO Doc. WT/DS152/R (adopted Jan. 27, 2000).

[236] SOCIAL REALITY, *supra* note 15, at 123.

[237] Appellate Body Report, *United States—Final Antidumping Measures on Stainless Steel from Mexico*, ¶ 160, WTO Doc. WT/DS344/AB/R (adopted Apr. 30, 2008) [hereinafter *Stainless Steel from Mexico*]. Here, the Appellate Body quoted Hirsch Lauterpacht, who argued that following precedents "is imperative if the law is to fulfil one of its primary functions, i.e. the maintenance of security and stability." Hirsch Lauterpacht, *The So-Called Anglo-American and Continental Schools of Thought in International Law*, 12 BRIT. Y. INT'L L. 31, 53 (1931).

[238] WTO DSU, *supra* note 229, at art. 23.1 ("When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.").

[239] *Id*. at rt. 17.14.

[240] *See* Girogio Sacerdoti, Precedent in the Settlement of International Economic Disputes: the WTO and Investment Arbitration Models 11 (Jan. 15, 2011) (unpublished manuscript) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1931560).

[241] *Stainless Steel from Mexico*, *supra* note 237, at ¶ 161.

[242] *Id.* at ¶ 162.

In sum, the operation of the WTO DSM tends to illustrate the social structure of WTO precedent. Order, security, and predictability are all essential structural properties of WTO precedent. It represents the WTO version of "rule of law."[243] Then how do these structural properties actually manifest themselves in practice? In other words, how could previous WTO case law shape the outcome of a subsequent WTO dispute and eventually ratify the precedential structure by closing its self-referential loop? Here, if we conceptualize a particular WTO dispute as a social fact, that is, a single big event or a collection of small events, we may apply a systemic approach to grappling with how the WTO precedential structure reveals itself in action, which will be discussed below.

This structural understanding of WTO precedent warrants the application of Luhmann's systems theory to the WTO example. As discussed above, a systemic view of precedent marginalizes the subjective motivations behind communication between users of precedent. Instead, communication becomes objectively meaningful in the systemic analysis because it just happens as an operational event[244] which can be displayed, observed, and abstracted.[245] Because communication constitutes a functional unit of a WTO dispute, a WTO member may understand another member's claim only because the latter announces certain information in that claim wrapped around and within the ritualistic confines of a preexisting precedent.[246] It is this pattern of process ("announcement-information-understanding")[247] that collectively forms an operational closure of precedent.

Suppose that the United States requests (*announces*) a consultation to the EU as the former argued that the latter's ban on the importation of cloned beef violated the WTO rules. Here, the United States' initial communication assumes a negative (illegal or disenabling) code within the context of the relevant set of WTO precedent, in particular the *Hormones* and *Hormones II* case law that shares a similar factual-legal pattern (food safety).[248] In this series of disputes, the WTO tribunal struck down the EU's import ban on the United States' hormone-treated beef because it lacked scientific justification. Upon the United States' request, the EU would have two choices. First, it might react to the United States' initial communication by generating its own responsive communication within the context of WTO precedent. Second, the EU might simply elect not to respond at all. However, the EU's nonresponse would certainly prompt the United States to initiate a different mode of communication with the WTO: it would soon file a formal complaint before the DSM.

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[243] Bankowski et al., *supra* note 12, at 488.

[244] MOELLER, *supra* note 148, at 7, 22.

[245] *See* RICHARD J. BERNSTEIN, THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY 145 (1976).

[246] MOELLER, *supra* note 148, at 32 (citing NIKLAS LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT 86 (1997)).

[247] The original citation from Luhmann is "Mitteilung—Information—Verstehen." *Id.*

[248] *Hormones* and *Hormones II* concern the EU's ban on the importation of U.S. beef on the grounds that such beef would pose health risks since it was treated with growth promotion hormones. *See generally* Appellate Body Report and Panel Report, *European Communities—Measures Concerning Meat and Meat Products* (*Hormones*), WTO Doc. WT/DS26/AB/R (adopted Feb. 13, 1998); Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute* (*Hormones II*), WTO Doc. WT/DS320/AB/R, (circulated Oct. 16, 2008).

In the first scenario, in which the EU decided to respond to the United States' initial communication, the EU's responsive communication would also assume either a negative or positive code, depending on the factual circumstances and the corresponding WTO case law. The EU would either accept the United States' complaint, admitting that its import ban was illegal, or reject it, defending the ban as legal under the GATT Article XX or the Agreement on Sanitary and Phytosanitary Measures (the "SPS Agreement"), that is, as a legitimate regulatory intervention to protect human health against any potential risks, such as carcinogenicity. For example, in *Asbestos*, the WTO tribunal upheld the EU's import ban on Canadian asbestos for public health reasons.[249]

In the aforementioned hypothesis, the United States' request for consultation (precomplaint) is an utterance that contains the United States' assessment of the EU's ban based on the former's interpretation of relevant WTO case law. In turn, the EU may reply to the United States' utterance only after it understands information on the United States' position against the backdrop of relevant WTO case law. Of course, the EU might fail to understand, or might misunderstand, the United States' interpretation of a given WTO dispute in law and in fact. Yet perfectly shared understanding is not a necessary condition for communication.[250] After all, communication will beget subsequent communication. In this highly regularized process of communication, the DSM ritual processes complex sets of information regarding both countries' involvement in this particular event (dispute) in a way that is meaningful and appropriate within the context of the WTO precedent.

Importantly, the whole operation of a WTO dispute is subject to contingencies. What creates communication is a coincidence of information and self-reference, both of which are perceived as contingent in a recursive process in which past steps are linked to future ones.[251] In the abovementioned hypothesis, the initial bout of communication from the United States may be understood as a combination of a particular complaint from the U.S. industry (information) and relevant WTO case law (self-reference). Both elements are contingent in the sense that neither the original complaint itself nor the United States' invocation of a particular precedent is inevitable. If the Office of the United States Trade Representative ("USTR") observes that it would have no chance of winning under its own reading of the WTO case law, there would be no communication with the EU in the first place. Of course, if political circumstances, public opinions, or financial situations would not motivate the U.S. dairy industry to lobby its case to the USTR in the first place, there would be no communication, either.

[249] In this case, the WTO Appellate Body upheld the French ban on the importation of Canadian asbestos products due to their carcinogenic risks. *Asbestos* AB Report, *supra* note 215.

[250] *See* NIKLAS LUHMANN, THE REALITY OF THE MASS MEDIA 97 (William Whobrey trans., 2000); MOELLER, *supra* note 148, at 217.

[251] *Operational Closure and Structural Coupling*, *supra* note 150, at 1424.

D. SUMMARY

The remarkably effective operation of the DSM, evidenced by an impressive record of compliance by losing parties, warrants a symbolic authority brought by the WTO precedent. The language of WTO precedent provides idealized schemata through which WTO members can grapple with their collective trade reality. This *public* nature of WTO precedent is characteristic of the fact that it is a cultural product of the WTO community. No private WTO language borne of bilateral settlement, if ever, might alter WTO precedent. Concomitantly, the operation of the WTO DSM illustrates a social structure of WTO precedent characterized by essential properties such as security and predictability. It represents the WTO version of the rule of law. Previous WTO case law shapes the outcome of subsequent WTO disputes and eventually ratifies its precedential structure by closing the self-referential loop. After all, the WTO precedential structure reveals itself in action, as seen in *Shochu II* and *Asbestos*.

V. CONCLUSION

This Article characterizes precedent as judicial ritual that effectively shapes legal actions of jurists. The ritualistic foundation of precedent is evidenced by the fact that jurists continue to recycle and reproduce case law in a self-referential manner. The ritual of precedent constitutes a symbolic universe (*nomos*) in which legal actors make sense of themselves and their legal surroundings. Precedent as a social structure also exists for its own sake as it stabilizes a given legal system. In exploring a symbolic understanding of precedent, this Article employs an analogy of language based on its role in disseminating social knowledge comprising the contents of judicial ritual. As a case study, this Article then applies this socio-anthropological approach to WTO case law.

To follow precedent is to embrace a preexisting judicial ritual by retaking old pathways.[252] Yet this path-dependency is also accompanied by occasional path-breaking. Any set of precedent may be both an outcome and condition of legal action. Precedent (structure) and legal actors (agency) are "mutually constitutive."[253] Therefore, what characterizes precedent is praxis. WTO precedent not only constrains but also empowers WTO members.[254] WTO precedent stands "in and through the practice of citing it and invoking it in the course of training, in the course of enjoining others to follow it, and in the course of telling them they have not followed it, or not followed it correctly."[255]

Importantly, while lawyers and judges do follow precedent, precedent alone cannot predict or identify the outcome of a future dispute. True, precedent may "provide[] for the generalized capacity to respond to and

[252] *See generally* ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE (2004); MARTIN M. SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION (2002).

[253] Vincent Pouliot, *"Sobjectivism": Toward a Constructivist Methodology*, 51 INT'L STUD. Q. 359, 363 (2007).

[254] SOCIAL REALITY, *supra* note 15, at 27–29 (distinguishing between "regulative" and "constitutive" functions).

[255] *Cf.* BLOOR, *supra* note 95, at 34.

influence an indeterminate range of social circumstances."[256] Yet only its application in a given dispute might concretize its actual meaning in that dispute. Thus, judicial agency is inevitable for the prospective norm-enunciation of a given set of precedent.[257] In particular, in the face of a novel dispute, precedent alone, even with big data analytics' allegedly uncanny predictive power, cannot competently resolve it.[258] Moreover, the internal coherence of precedent is not always guaranteed. To the extent that precedent does not substantively cohere, its invisible hermeneutical force upon its users is inevitably limited.[259] After all, what remains coherent might not be the content of precedent but the very practice of following it.

Ritualizing the judicial past also evokes the pre-Langdellian connection between law and the humanities in legal education.[260] The judicious harnessing of judicial ritual requires "humanizing" lawyers whose task can be guided by a humanistic approach in the law school curriculum.[261] For example, the hermeneutical aspect of law and literature scholarship can inform interpreting legal precedent as text.[262] Likewise, humanistic knowledge can equip lawyers with an intellectual acumen that facilitates critical reconstruction of legal precedent in a way that keeps abreast of the new reality[263] and even changes it, if necessary.[264]

Finally, the symbolic approach of this Article is to checkmate the widely pervasive "scientism" in the contemporary legal thoughts.[265] Does precedent exist mainly to help potential litigants manage litigation risk in a predictable, and therefore cost-efficient, manner? If so, could, or *should*, machines (AI) replace human intuition and values? Indeed, this is part of a bigger issue. The current generation is facing the same conundrum as Edmund Husserl when he lamented the mathematization of the European society in his famous "crisis" thesis a century ago.[266] Uncritical subscription to scientism or a

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[256] Giddens, *supra* note 19, at 22.

[257] *See generally* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); *see also* Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172 (1891) (defending judicial legislation against its "sense of reproach").

[258] Siegfried Fina & Irene Ng, *Big Data & Litigation: Analyzing the Expectation of Lawyers to Provide Big Data Predictions When Advising Clients*, 13 INDIAN J.L. & TECH. 1, 7 (2017) (arguing that, given the evolving nature of law, the predictive force of big data analytics tends to be limited, especially when facing new issues or claims in litigation).

[259] *See* Daniel C. Lynch, *International "Decentering" and Democratization: The Case of Thailand*, 48 INT'L STUD. Q. 339, 344 (2004).

[260] *See* Stacey A. Tovino, *Incorporating Literature into a Health Law Curriculum*, 9 MICH. ST. J. MED. & L. 213, 225 (2005) (describing former Harvard Law School Dean Christopher Columbus Langdell's efforts to decouple law and literature in the 1870s).

[261] *Id.* at 229–30.

[262] *Id.* at 230.

[263] *See* Rebecca Flanagan, *The Kids Aren't Alright: Rethinking the Law Student Skills Deficit*, 15 BYU EDUC. & L.J. 135, 147–51 (2015) (linking the dearth of law graduates' "critical thinking skills" to the "decline of a liberal arts education"); Richard E. Redding, *The Legal Academy Under Erasure*, 64 CATH. U.L. REV. 359, 375 (2015) (arguing that bringing liberal arts education to legal education can produce better and more creative lawyers).

[264] Ariela J. Gross, *Teaching Humanities Softly: Bringing a Critical Approach to the First-Year Contracts Class Through Trial and Error*, 3 CALIF. L. REV. CIR. 19, 22–23 (2012) (arguing that teaching humanities to law students can nurture their critical insights necessary for "advocates for change").

[265] *See* SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 331 (2d ed. 2005) (referring to the "belief that the methods of natural science, or the categories and things recognized in natural science, form the only proper elements in any philosophical or other enquiry").

[266] Regarding Edmund Husserl's "crisis" thesis, see, EDMUND HUSSERL, THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY 212–13 (David Carr trans., 1970); *see also* MARVIN

"theoretical attitude" neglects the "lifeworld" (*Lebenswelt*) which we actually experience intersubjectively as human beings.[267] Note that hyper-globalization has brought an ever-increasing level of anxiety in human relations, which is a human reality, not one encoded by machines. After all, it is culture, symbol, and ritual which play an essential role in making sense of our legal existence. Constructing precedent as judicial ritual can offer a powerful therapeutic response to the law's ever-increasing inclination toward the mechanical.

FARBER, THE FOUNDATION OF PHENOMENOLOGY: EDMUND HUSSERL AND THE QUEST FOR A RIGOROUS SCIENCE OF PHILOSOPHY 306 (1943).

[267] HUSSERL, *supra* note 266, at 108–09; *see also* Charles Taylor, *Language and Society*, *in* COMMUNICATIVE ACTION: ESSAYS ON JÜRGEN HABERMAS'S THE THEORY OF COMMUNICATIVE ACTION 24 (Axel Honneth & Hans Joas eds., 1991) ("Subjects acting communicatively always come to an understanding in the horizon of a lifeworld . . . formed from more or less diffuse, always unproblematic, background convictions . . . [it] serves as a source of situation definitions that are presupposed by participants as unproblematic . . . . The lifeworld also stores the interpretive work of preceding generations".).