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COHERENCE, HYPOTHETICAL CASES, AND PRECEDENT

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Coherence accounts of practical reasoning in general, of which legal reasoning is a particular case, postulate the existence of a theory, sought in deliberation, which best displays as coherent the relationships among specific reasons for action which conflict in application to the case to be decided. These relationships are discovered in part by consideration of the way in which the same conflicting reasons apply in other cases, the resolution of which is settled. Ronald Dworkin's account of legal reasoning in *Law's Empire* is an example of a coherence account. Coherence accounts provide elements of various familiar conceptions of practical reasoning, such as the Rawlsian conception of reflective equilibrium as the outcome of a process of mutual adjustment between theory and intuition, and the decision-theoretic conception of rationality in terms of adjustment between data about preferences, criteria of choice, and principles of consistency.¹ I have elsewhere discussed the general rationale and motivation for coherence accounts of practical reasoning, illustrated the process of seeking coherence through deliberation with both legal and ethical examples, abstractly characterized the search for coherence accounts of practical reasoning, illustrated the process of seeking coherence through deliberation with both legal and ethical examples, abstractly characterized the search for coherence, and considered various problems to which the abstract characterization gives rise.² In this paper I shall:

* Fellow in Philosophy and University Lecturer, St Edmund Hall, Oxford. for helpful suggestions and comments on earlier drafts that saved me from various errors and unclarities. I am grateful to Ronald Dworkin, Mark Greenberg, and Joseph Raz: needless to say, responsibility for all remaining errors is entirely my own.

1. See John Rawls, *A Theory of Justice* (Cambridge, Mass. Belknap Press of Harvard University Press, 1971); and Ralph L. Keeney and Howard Raifata, *Decisions with Multiple Objectives: Preferences and Value Tradeoffs* (New York, Wiley & Sons, 1976).
2. See my *Natural Reasons* (New York, Oxford University Press, 1989), chapters 4, 10, 11, 12, etc. Many background issues about the nature and objectivity of coherentist practical reasoning are raised by the argument of this article which I cannot here address at length in *Natural Reasons*. They include: the need for substantive constraints on the description of the problem in terms of conflicting reasons, the relationships of these constraints to the structure and process of coherentist deliberation and the explanatory character of the resulting theories, the nature and limitations of the authority of theories about conflicting reasons, and many others.

First, briefly set out my abstract characterization of deliberation as a search for coherence;

Second, consider various further examples of legal and ethical reasoning and indicate briefly the way in which they provide instances of my general coherentist characterization of deliberation;

Third, point out the generally similar roles within coherentist accounts of practical reasoning of settled actual cases and settled hypothetical cases as data to be accounted for the sought-after theory or principles;

Fourth, present and objection to coherence accounts of legal reasoning in particular discussed by Kenneth Kress, who argues that they may give rise to retroactive application of legal principles when new cases are decided between the occurrence of the events litigated and litigation of them (the problem of intervening cases); and

Finally, consider various possible response to Kress's argument. I shall briefly evaluate and put aside the possible responses of giving intervening cases prospective effect only, and of accepting intervening case retroactivity as not so bad. I shall then go on to diagnose the source of the problem of evaluating the relationships among concept of coherence, hypothetical cases, and the doctrine of precedent. I will show that the weaker coherentist requirement of treating like cases alike within practical reasoning in general is not sufficient to give rise to the problem of intervening cases, but that the stronger requirement imposed by the doctrine of precedent within legal reasoning in particular is necessary for the problem to arise. The distinction between the weaker and stronger requirements turns on the asymmetrical treatment of actual and hypothetical cases by the doctrine of precedent, by contrast with their symmetrical treatment in coherentist practical reasoning in general. However, I shall then argue that, when this asymmetry is properly understood, neither is the doctrine of precedent by itself sufficient to give rise to the problem of intervening cases, but only does so when the intervening legal decision is not *ex ante* a correct, and that the role of hypothetical cases in coherentist practical reasoning in fact limits the problem of intervening case retroactivity. I shall conclude, following suggestions made by Dworkin, that intervening case retroactivity does not present a problem for coherence accounts such as his in particular.

I. An Abstract Characterization of deliberation, and Coherence Functions

Our subject matter is deliberation about what to do when the reasons that apply to the alternatives conflict. The alternatives may be possible individual actions (e.g. keeping one's promise and risking someone's life, or breaking it and avoiding risk to life), or possible judicial actions (e.g. holding that a statute violates the Equal

Protection Clause, or that it does not). The reasons that apply to the alternatives may be of various kinds, depending on the context of deliberation. An individual may deliberate about his own conflicting self-interested reasons, when no one else is significantly affected by the alternatives, or about a conflict involving the interests of others; the applicable reasons may be ethical, aesthetic, etc. A judge deliberates about conflicting legal reasons: legal doctrines, precedents, rights, principles, policies, as expressed within various legal practices and institutions, by cases, statutes, a constitution, legal scholarship, etc.

Coherence accounts claim that to say a certain alternative ought to be done is to say that it is favoured by the theory, whichever it may be, that gives the best account of the relationships among the various specific reasons that apply to the alternatives in question. Which theory is in fact the best theory, which best displays the applicable reasons as coherently related, is not specified by a coherence account *per se*. Rather, it is left to deliberation to discover what the best theory is. A coherence account merely claims that what ought to be done is whatever alternative the best theory, whatever that is, favours. Thus the deliberator's task is to discover the theory that best displays coherence. Deliberation involves a process of constructing hypotheses about the content of what I call a 'coherence function', which represents the theory sought and which takes us from alternatives ranked by specific reasons to all-things-considered rankings of alternatives. Of course the coherence function must meet certain conditions, and the all-things-considered ranking must meet certain conditions. For example, the latter ranking should not be intransitive. However, I shall not be considered the full range of these conditions in this article, but only those embodied in the requirements of treating like cases alike and of the doctrine of precedent.³

The process of deliberation can be analysed into five stages. At the *first* stage, we specify the problem. We try to arrive at a characterization of the alternatives at issue, and to determine what various specific reasons apply and how they rank the alternatives. We here exercise our abilities to perceive the world in terms of ethical, or legal, or other reason-giving concepts. (This is the issue spotting stage familiar to law students; however, there is much more to legal deliberation than issue spotting.) Assuming the reasons that apply conflict, that is, rank the alternatives at issue differently, we proceed to the *second* stage, and examine more carefully the various specific reasons that apply. Perhaps when we consider the purpose of one reason, it will turn out to have

3. For discussion of such conditions, see my *Natural Reasons*, *ibid.*, ch. 12.

a rather different import than we originally thought in this particular case. At any rate, at this stage we develop and firm up our local conceptions of the various specific reasons that apply, without yet trying to arrive at a global conception of their relations to one another.

A the *third* stage we begin gathering data, by looking for other issues to which the conflicting reasons examined at stage two apply. In particular we are looking for settled cases. They may have actually been decided, or may be posed as hypothetical issues, the resolution of which can be taken as evident. By a 'settled' case, I mean a case which, if actual, is such that its resolution is clear to the relevant decision-maker or decision-makers, and which, if hypothetical, is such that its resolution would be clear to the relevant decision-maker or decision-makers were the case to be considered. (That

a resolution of a particular case is or would be clear does not mean that it cannot be mistaken; settledness in particular cases is a matter of what is or would be believed to be correct, not necessarily of what is correct. However, it is of the nature of a coherentist account of what should be done, in terms of coherence with settled cases in general, that not all settled cases can be mistaken. I will return to this point below.) Thus, at least as a conceptual matter, not all actually decided cases are settled, and some settled cases are hypothetical, not actual (see section 8 below for more on this use of 'settled'). We may give settled actual cases more weight than settled hypothetical cases, or we may give them equal weight. The doctrine of precedent in law gives settled actual cases more weight than settled hypothetical cases, though usually only when the settled cases are those of the same court or higher courts of the same jurisdiction; actual cases of lower courts or courts of other jurisdictions may be treated on a par with settled hypothetical cases. However, as we shall see, this difference in weight may only be significant under certain circumstances.

the *fourth* stage is the heart of the deliberative process. At this stage we engage in all-out theorizing, looking for hypotheses which account for the resolutions of issues we found at stage three. That is, we are trying to formulate hypotheses about the relationships between the conflicting reasons under various different circumstances resented in the stage three cases, which account for those resolutions. To this end we examine the stage three cases for distinctive circumstances or dimensions which seem to enhance or diminish the weight of one of the conflicting reasons in relation to the other. When

we have formulated such an hypothesis, we try to test it, by going back to stage three and looking for further settled cases in which the same reasons apply and in which the circumstances identified by the hypothesis are present. We thus go back and forth between stages three and four, looking for settled actual

and hypothetical cases that help us to refine our hypotheses about the relationships between the conflicting reasons in various circumstances.

Finally, at the *fifth* stage, we work out the consequences of the best hypotheses we have arrived at for the original case at issue. That is, we apply that hypothesis about the relationships between the applicable reasons to the circumstances present in the case at issue. This hypothesis is a partial specification of a coherence function, which takes us from the rankings of alternatives involving various circumstances or dimensions by the conflicting reasons to an all-things-considered ranking.

This characterization of deliberation can be pictured in terms of a *deliberative matrix*. The data gathered at stage three can be represented as follows, where in each row, alternatives are ranked above or below one another by the applicable reasons.

	Reason X	Reason Y	Resolution, considered	all-things-
case at issue:	alt a alt b	alt b alt a	?	
settled actual cases	alt d alt c	alt c alt d	alt c alt d	
	alt e alt f	alt f alt e	alt e alt f	
settled hypothetical case	alt g alt h alt j alt i etc.	alt h alt g alt i alt j	alt h alt g alt j alt i	

I present the matrix with only two conflicting reasons, X and Y, merely for convenience; there is no restriction on the number of reasons that may be represented. (Indeed, multi-dimensional conflicts give rise to the interesting theoretical questions.⁴) During stage four the alternatives are analysed and more fully characterized in terms of various circumstances and dimensions of the cases which may help to explain their resolution. These circumstances may be represented by adding propositions, p, q, etc, to the alternatives in each row. The content of such a proposition may be quantitative or non-quantitative. A hypothesis would then take the form: ‘Reason X tends to outweigh Reason Y when it is the case that p, while Reason Y tends to

4. Which I pursue in *National Reasons*, *ibid.*, chs 12 and 13.

outweigh Reason X when it is the case that q; when it is the case that both p and q, but not r, Reason X has more weight, but when r is present as well, Reason Y has more weight', and so on.⁵

Two points of clarification may be helpful. First, I do not in this article aim to give a full account of what is distinctive about legal reasoning in particular, but rather to consider what follows about legal reasoning from the fact that it has the general features of practical reasoning, understood along coherentist lines. My examples in the next section are intended to illustrate the application of the coherentist account of practical reasoning in general to legal problems, rather than consider the distinctively legal doctrine of precedent in the context set by a view of legal reasoning as having the general features of coherentist practical reasoning. This is important to understand for purposes of my discussion below of the problem of intervening cases, since my eventual responses to Kress in sections 7 and 8 turns on the features that legal reasoning shares with practical reasons in general, on a coherentist view of it, with respect to the role of hypothetical cases. Such general features of coherentist practical reasoning limit the effects of the distinctively legal doctrine of precedent in giving rise to intervening case retroactivity, and thus illuminate the source of the problem. But I would certainly not claim that the generally coherentist character of legal reasoning as a kind of practical reasoning plus the features of precedent I consider provide a full account of what is distinctive about legal reasoning in particular; this is not my purpose. Second, I would expect the account and illustrations of practical reasoning to be controversial to the extent they represent a kind of deliberative rationality with respect to conflicting ends, values or reasons, the possibility of which has often been denied, for example, in favour of a view of practical reasoning as exclusively instrumental, or in favour of more radically sceptical or

5. This schematization, applied to legal deliberation, may be compared to the employed by the programme HYPO, developed by Edwina Rissland and her student Kevin Ashley, and discussed in a Harvard Law School seminar conducted by Rissland on artificial intelligence and legal reasonings, Autumn Term 1987. See Kevin D. Ashley, *Modelling Legal Argument: Reasoning with Cases and Hypotheticals*, PhD dissertation, 1987, University of Massachusetts, Dept of Computer and Information Science. While there are many differences in detail between the two approaches, I do not believe there is any incompatibility in principle between them. The role of HYPO's stage four. Perhaps I try to say a bit more than Rissland and Ashley do about the role of hypotheticals in reaching legal conclusions, in that the answers to hypothetical questions feed back into the resolution of the case at issue via the coherence function, but again I do not believe that what I say is incompatible with their approach. Perhaps the most striking difference is that over whether to use favourableness to conflicting legal doctrines or favourableness to plaintiff as opposed to defendant, as the basic means of organizing the data. Often, within a narrowly limited area of the law, such as trade secrets law, plaintiffs will typically represent one legal doctrine, and defendants another, so that the two organization may have advantages when one comes to generalize beyond a narrow limited area of the law, so that legal doctrines directly rather than by plaintiff's and defendant's positions, one may hope to keep theoretical score as one moves from one area of law to another in which the same doctrines apply, and to bring insights about the relationships between legal doctrines from one area to the next.

Of course, different ways of perceiving what legal doctrines apply will yield different analyses, but that is the way the law is, and an analysis which reflects this relativity of conclusions to starting point may be illuminating. Moreover, we can in principle start with as many different legal doctrines as we think may be relevant; again, there is no need to restrict the number of reasons weighed against one another by the coherence function to two.

nihilistic views about practical rationality (in the legal context, consider certain views associated with the critical legal studies movement, or parodies thereof). However, I cannot join these issues here.

2. Some Examples of Legal and ethical Deliberation Analysed

I have elsewhere considered in detail and at length a legal illustration of this general account of practical reasoning, the stages of deliberation, and the deliberative matrix. That discussion involved deliberation about the relationships between the conflicting legal doctrines of estoppel and of consideration in cases now usually covered by the doctrine of promissory estoppel.⁶ I will not here give another lengthy and detailed illustration, but rather will give several sketchy illustrations. I hope in the former discussion to have persuaded readers that my account can be made to work in detail. In this discussion I rather aim to persuade readers that the account applies readily and intuitively in a wide range of cases. Accordingly I shall not work out the details of my applications here, but shall merely briefly indicate how the framework of my account would fit the examples.

Let us begin with the case of *California v Carney*.⁷ In *Carney*, Fourth Amendment issues were raised by a warrantless police search of a motor home, parked in a downtown San Diego parking lot. The police had reason to believe that Carney, the owner of the motor home, was exchanging marijuana for sex acts. They observed a young boy enter the motor home and leave again an hour and a quarter later. On questioning by the police, the boy said that such an exchange had just occurred. The police then knocked on the door, and when Carney came out they entered the motor home without a warrant and found marijuana. A further search of the vehicle at the police station revealed more marijuana, in cupboards and in the refrigerator. The parking lot where the warrantless search occurred was a short distance from a courthouse where a warrant could easily have been obtained.

The case and its oral argument, rich in hypothetical cases, have been analysed by Edwin Rissland to illustrate the idea of a 'dimension', which is used by the case-based reasoning programme HYPO to generate hypothetical cases.⁸ My treatment of the case essentially adapts her analysis to my framework, and illustrates, I believe, the compatibility of my framework and the notions of a deliberate matrix and a coherence function, with Rissland's dimension-based analysis. As she points out, *Carney* is a case in which

6. See *Natural Reasons*, op. cit., ch. 11.

7. *California v Carney*, 105 SCt 2066 (1985).

8. Op cit. n. 3.

there is a conflict between a citizen's expectations of privacy, protected by the Fourth Amendment's prohibition of unreasonable searches and seizures, and the responsibilities and desires of the police to investigate and control drug use and other prohibited actions. Thus, the first row of our matrix for the case at issue involves at least two kinds of legal reasons: I shall refer to them as reasons of Privacy, and reasons of the Police Power. The alternatives in the case at issue are to allow or to disallow the warrantless search of the motor home in *Carney* under the Fourth Amendment. reasons of Privacy would favour disallowing the search, while reasons of the Police Power would favour allowing it. We want to discover how reasons of Privacy and reasons of the Police Power are related to one another with respect to warrantless searches. Settled actual cases at the next several rows of the matrix tell us that reason of Privacy are augmented relative to those of the Police Power in circumstances in which the warrantless search at issue is of someone's home;; if we sum up these circumstances in proposition p, we can hypothesize that Privacy is augmented relative to the Police Power when it is the case that p. By contrast, settled cases tell us, the Police Power is augmented relative to Privacy when the warrantless search at issue is of a vehicle; if we sum up the latter circumstances in proposition q, we can hypothesize that Privacy is diminished relative to the Police Power when it is the case that q. We have thus begun to specify a coherence function which weighs Privacy against the Police Power in various circumstances.

While these hypotheses about the relations between Privacy and the Police Power are well supported by settled cases, they really only set the stage for the *Carney* problem, since the motor home in *Carney* is both a home and a vehicle. We need a finer analysis of relevant circumstances in order to resolve the conflict in this case. Thus we look for other settled cases, actual or hypothetical, in which there two reasons come into conflict, in circumstances in which the home-vehicle distinction is difficult to draw. On the basis of such cases, we try to arrive at a hypothesis that will help police to draw the home-vehicle distinction in a reliable and straightforward way in cases in which aspects of both home and vehicle are present; that is, we would like to find a 'bright-line' distinction, which will not require police officers to make excessively subtle or difficult determinations. We will try various hypotheses about the relevant circumstances, or dimensions of cases, and will test them against various actual and hypothetical cases.

The fact that the thing to be searched is a vehicle seems to augment the Police Power reason relative to those of Privacy in part because it is inherently mobile, such that requiring a warrant would leave it time to 'get away' and would greatly frustrate legitimate exercises of the Police Power, and also because vehicles are

not usually used as homes, and thus not the objects of normal expectations of privacy. These hypotheses are developed and tested in oral argument by reference to hypothetical cases in which vehicles are also homes, but some of which are more inherently mobile, or more home-like than others, owing to varying circumstances and dimensions. The presence of wheels is obviously dispensable to inherent mobility in the case of most boats, with respect to which presumably reasons of the Police Power predominate. Nor is the presence of wheels decisive in the case of motor homes with wheels but which are not self-propelling and which are permanently connected to utilities supplies, with respect to which presumably reason of Privacy predominate. Location in a temporary parking lot as opposed to a permanent motor home park strengthens the case with respect to inherent mobility and hence with respect to the weight of Police Power reasons. But a counter-example to that hypothesis would seem to be the case of someone very poor who cannot afford a permanent spot for his vehicle but lives in it behind curtain, on the move from day to day. The presence of the normal accoutrements of a home, such as a refrigerator, in a vehicle, may strengthen reasons of Privacy; but again we would seem to have a counter-example when the refrigerator is used solely to store marijuana, as seemed to be the case in *Carney*, and not for home-like purposes.

From among these various circumstances and dimensions of hypothetical cases, the best hypothesis will focus on objective factors that are straightforward for the police to ascertain before deciding whether to search without a warrant or not (as the contents of a refrigerator are not), so as to provide police with 'bright-line' guidance. This is because the investigation needed to apply an excessively subtle distinction will make for a prior, unprincipled defeat of reasons of Privacy, while a strong presumption in favour of home-likeness to accommodate all unusual uses of vehicles as homes would in effect eliminate the vehicle exception to the warrant requirement and would thus excessively compromise the Police Power. Thus the need for bright-line guidance in effect provides a way for the theory to get around the apparent counter-example to inherent mobility hypothesis provided by the poor person who live sin his car. The case does not really provide a counter example, after all, since the police cannot tell that such unusual vehicles are homes without privacy-infringing investigation; and it is already settled by the vehicle exception that the alternative of disallowing searches of *any* vehicles which might possibly be homes has been ruled out. The majority opinion in *Carney* indicates in effect that the best hypothesis makes the relation between reasons of Privacy and those of the Police Power in cases involving vehicles that may be homes turn on objective indications of mobility and use for transportation, rather than on the more difficult-to-ascertain home-like uses of the vehicle. If the presence

of the former characteristics is expressed by proposition r, the majority's hypothesis, which they implicitly regard as supported by the hypothetical cases considered, in light of the need for bright-line guidance, is that when it is the case that r, as it was in *Carney*, reasons of the Police Power outweigh reasons of Privacy, and thus support the warrantless search at issue. By contrast, the dissenting opinions seem to prefer a hypothesis which gives more of a role to the home-like character of the place in strengthening reasons of Privacy.

Equal Protection cases raised under the US Constitution are a fertile source of illustrations of the coherentist framework, as the jurisprudence of varying degrees of relationship to various state interests served by challenged classification lends itself immediately to representation within a deliberative matrix. In discussing several such cases I shall not stop to assign labels, p, q, etc., to the propositions employed in hypotheses about the relationships among the conflicting reasons in various circumstances. I shall merely identify the general categories of reasons in play, and try to draw out the hypotheses about the relationships between the reasons in play that are implicitly tested by appeal to various settled cases. It should be evident, however, how labels could be assigned and hypotheses located within a deliberative matrix. In Equal Protection cases one category of legal reasons is provided by the Equal Protection Clause itself: reasons of Nondiscrimination, which oppose legal classifications which fail to treat similarly situated citizens in similar ways. Further categories of reasons are provided by whatever state interests are supposed to be served by the challenged classification.

In *Parham v Hughes*,⁹ for example, the father of an illegitimate child challenged a law which prevented him from recovering for the wrongful death of his child, where an unmarried father who had filed papers to legitimate the child, or the mother of the illegitimate child, would have been allowed to recover. If he could be regarded as similarly situated with other parents of illegitimate children who were allowed to recover for wrongful death, then reasons of Nondiscrimination would favour striking the statute down. However, the state considered that it had an interest in promoting the integrity of the legitimate family unit, and that reasons of Legitimacy favoured restricting recovery for wrongful death to unmarried fathers who had filed to legitimate their children and unmarried mothers. The implication seems to be that such a restriction would provide incentives to unmarried fathers to file to legitimate their children and unmarried mothers. The implication seems to be that such a restriction would provide incentives to unmarried fathers to file to legitimate their children. moreover, the state also claimed to have an interest in avoiding difficult problems

9. 441 US 347, 99 SCt 1742 (1979).

of proof of paternity, and that reasons of Provability favoured the restriction of wrongful death suits for the death of children born illegitimate to fathers who had filed to legitimate and mothers, whose identity would rarely be in doubt. Thus we seem to have a conflict between reasons of Nondiscrimination, on the one hand, and reasons of Legitimacy and of Provability, on the other.

The court held that this state scheme did not violate Equal Protection or Due Process by discriminating against unmarried fathers relative to unmarried mothers, because fathers and mothers of illegitimate children are not similarly situated since, under Georgia law, only fathers *can* by voluntary unilateral action make an illegitimate child legitimate. That is, the plurality opinion seems implicitly to support the hypothesis that when it is the case that men and women are not similarly situated *owing to a difference in their legally imposed abilities and status*, that difference may provide a basis for a statutory classification which does not constitute invidious discrimination, such that, when such a classification is related in the right way to the right kinds of state interests, the latter outweigh reasons of Nondiscrimination.

The dissent appeals to a hypothetical case to refute the plurality's hypothesis. Justice White writes:

There is a startling circularity in this argument. The issue before the Court is whether Georgia may require unmarried fathers, but not unmarried mothers, to have pursued the statutory legitimization procedure in order to bring suit for the wrongful death of their children. Seemingly, it is irrelevant that as a matter of state law mothers may not legitimate their children, for they are not required to do so in order to maintain a wrongful-death action. That only fathers *may* resort to the legitimization process cannot dissolve the sex-discrimination in *requiring* them to. Under the plurality's bootstrap rationale, a State could require that women, but not men, pass a course in order to receive a taxi license, simply by limiting admission to the course to women.

In the taxi licence hypothetical, men and women would not be similarly situated, owing to their differing legally imposed abilities, i.e. their differing abilities to enroll in the course. But here it is clearly absurd to suppose that this prior discrimination, unscrutinized, could provide a justification for further discrimination in the form of a statutory classification requiring only women to pass the course in order to get a licence. Thus the hypothetical case provides a counter-example to the plurality's hypothesis. The implication of the dissenting opinion is that the embedded distinction must itself be scrutinized, and not merely taken as given. In *Parham*, the embedded distinction was one with respect to the ability to file papers to legitimate: only men were able to do so. It is hard to see how a rule making it impossible for women to file papers to legitimate children serves either the state interest in promoting the legitimate family unit or in avoiding proof of paternity issues. Permitting women to file as well as men would have no adverse effects whatsoever on either of these state interests.

The dissent goes on to appeal to another counter-example, this time a type of actual rather than hypothetical case, to the hypothesis that reasons of Legitimacy outweigh those of Nondiscrimination if allowing members of one class but not another to sue for wrongful death serves the state interest in promoting the integrity of the legitimate family unit. The dissent points out that unmarried mothers and fathers who file to legitimate but remain unmarried defy the integrity of the legitimate family unit, just as do fathers who fail to file, but the former are allowed to sue for wrongful death while the latter are not.

In *Craig v Boren*, the question was whether a statute prohibiting the sale of weakly alcoholic beer to males under 21 and females under 18 constituted denial to males aged 18 to 21 of equal protection of the law. On behalf of the statute it was urged that statistical evidence about the relative tendencies of males and females aged 18 to 21 to drink and drive supported the gender line. Thus we have a conflict between reasons of Nondiscrimination and the state interest in Preventing Drunk Driving. The Court rejects the hypothesis that reasons of Nondiscrimination can be overcome by the interest in Preventing Drunk Driving when the latter is served by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups'. In doing so it appeals to hypothetical variations on the *Craig v Boren* statute involving statistically supported ethnic or racial lines instead of gender lines aimed at alcohol regulation. The assumption made is that such ethnic or racial lines would not be acceptable, despite statistical support, and that reasons of Nondiscrimination would predominate in such cases: 'In fact, social science studies that have uncovered quantifiable differences in drinking tendencies dividing along both racial and ethnic lines strongly suggest the need for application of the Equal Protection Clause in preventing discriminatory treatment that almost certainly would be perceived as invidious.' The Court illustrates its comments with reference to statistical evidence to the effect that Jews, Italian Catholics, and black teenagers tend not to be problem drinkers, in contrast to whites and North American Indians.

Finally, consider the uses of hypothetical and actual cases in ethical argument, as illustrated by the debate between Stephen Pepper and David Luban over whether lawyers in an adversary system should help their clients to do legal but unethical acts. Pepper argues that under many circumstances the answer is 'yes'. He argues roughly as follows. We hold the value of individual autonomy to be more important than getting people to do the ethically right act in a wide range of cases; for example, we allow that people should have the legal power to disinherit a child for marrying outside the faith, even though we may agree that it would be wrong to do so. Individual autonomy in our complex society requires, in many cases, legal assistance;

only with the help of lawyers can people, in many circumstances, be 'first class citizens'. Therefore lawyers should give their clients the legal help required for individual autonomy even when it permits them to do unethical acts.

Luban replies by arguing that, while it is true that, since exercising autonomy is good, helping people exercise autonomy is good, this is only half the story. 'The other half is that since doing bad things is bad, helping people do bad things is bad. The two factors must be weighed against each other, and this Pepper does not do'. That is, Pepper's general hypothesis that when helping someone to do a legal but unethical act is favoured by reasons of autonomy, reasons of autonomy prevail, is too crude. Luban appeals to an analogous hypothetical case to defeat the unqualified hypothesis:

Compare this case: The automobile, by making it easier to get around, increases human autonomy; hence, other things equal, it is morally good to repair the car of someone who is unable by himself to get it to run. But such considerations can hardly be invoked to defend the morality of fixing the getaway car of an armed robber, assuming that you know in advance what the purpose of the car is. The moral wrong of assisting the robber outweighs the abstract moral goodness of augmenting the robber's autonomy,¹⁰

Not only may reasons of autonomy sometimes be outweighed by the wrongness of the act in question, but even if the balance of reasons favours allowing the agent to do the unethical act himself, it does not necessarily follow that it will also favour helping him to do it. The balance between autonomy and conflicting reasons may be struck differently in different circumstances, i.e. with respect to omitting to prevent as opposed to positively aiding.

Another argument Pepper makes is that allowing lawyers to weigh the wrongness of acts and thus act as screens to filter out certain legally permissible acts is to submit individuals to 'rule by an oligarchy of lawyers'.¹¹ The implication of the term 'oligarchy' is that such weighing and screening by lawyers would constitute an elitist centralization of ethical decision-making highly threatening to the value of individual autonomy, and that, when this would be the result, reasons of autonomy should prevail. Luban offers a counter-example to this implied hypothesis:

...there is no oligarchy of lawyers, actual or potential, to worry about. An oligarchy is a group of people ruling *in concert*, whereas lawyers who refuse to execute projects to which they object on moral grounds will do so as individuals, without deliberating collectively with other lawyers. The worry about a hidden Central Committee of lawyers evaporates when we realize that the committee will never hold a meeting, and that its members don't even know they are on it. An analogy will clarify this. No doubt throughout history people

10 David Luban, 'The Lysistratian Prerogative: A Response to Stephen Pepper' [1986], *American Bar Foundation Research Journal*, at 639.

11. Stephen Pepper, 'The Lawyer's Amoral Ethical Role: A Defence, A Problem, and Some Possibilities' [1986], *American Bar Foundation Research Journal*, at 617.

have often been dissuaded from undertaking immoral projects by the anger, threats, and uncooperativeness of their spouses. It would scarcely make sense, however, to worry that this amounts to subjecting autonomous action 'to rule by an oligarchy of spouses'. There *is* no oligarchy of spouses.

Luban seems to accept for the sake of argument that screening by a true Central Committee might well be intolerable. But if weighing and screening by spouses does not constitute an elitist centralization of ethical decision-making highly threatening to the value of individual autonomy, it is not clear how this can be regarded as the result when we substitute 'lawyers' for 'spouses'. Indeed, Luban suggests that informal social pressures are an essential complement to legal rules in regulating harmful behaviour. (Note that I am not here endorsing Luban's conclusions, but only using his arguments to illustrate certain characteristic features of deliberation.)

3. Hypothetical Cases as Thought Experiments

The role of the settled cases appealed to in the above examples of deliberation is analogous in some respects to the role of data in scientific theorizing. In both areas, that is, one looks both for relevant data, or clear cases, and for generalizations that account for what seems to be clearly the case (though of course such apparent clarity is not infallible in either area), and uses the latter generalizations to make determinations about further cases. In neither area is the best account of the data deductively entailed by the data. Nevertheless, in both areas the data in some sense determines the best theory (or theories, in the case of a tie or moderate degree of underdetermination of theory by data). The best theory (or theories – I will hereafter omit the qualification, but it continues to apply) is some function of the data, in the sense that if the best theory were other than what it is, the data would have to be different in some way. This is just another way of saying that situations that are relevantly similar in respect of data must be treated consistently in theoretical respects, or, more briefly, that like cases should be treated alike. With respect to legal deliberation, this general consistency requirement is that cases relevantly similar, in respect of applicable legal doctrines and distinguishing circumstances, should be similarly resolved.

Of course, the analogy should not be strained; some of the general roles of ethical and legal deliberation and theorizing are very different from those of scientific theorizing. Scientific theories are used to predict what will happen on the basis of causal theories that account for what has happened in well-designed experiments, and sometimes also for what it is thought would have happened under significant counterfactual circumstances. The basis for scientific hypotheses are thus experimental data and sometimes

intuitions gathered in ‘thought experiments’, such as Einstein’s famous thought experiments about flashlights emitting beams of light in trains travelling at close to the speed of light. Scientific hypotheses generate predictions which are then tested against the results of further experiments.

By contrast, ethical and legal deliberation can hardly be described as having the role of predicting what will be done on the basis of causal theories. Rather, it has a normative role: to give guidance in extending consistently to the case at issue a series of settled ethical or legal judgments about what should be done when the applicable ethical or legal reasons conflict. Its normative hypotheses thus aim to account for clear resolutions of past cases in which the relevant reasons stood in conflict, and also for clear resolutions of significant hypothetical cases, designed to test the relationships between the conflicting reasons. Deliberative hypotheses are used to generate not mere predictions of decisions and actions, but decisions and actions themselves; hypotheses cannot be tested against the very decisions and actions they generate. Rather, they are tested against cases, both actual and hypothetical, in which the right answer about how a conflict of reasons should be resolved is settled.¹²

Despite the differences between scientific, causal theorizing, and deliberative, normative theorizing, it is important to recognize the way in which both kinds of theorizing are responsible to the data to be explained. The requirement that the sought-after hypothesis explains the data can be seen as the source of the deliberative requirement of consistency, the general requirement that like cases be treated alike. Some philosophers have regarded it as puzzling how one could hold that both:

- (1) the right answer about which alternative should be done is not entailed by the non-evaluative facts about the alternatives (*non-reductionism*: what should be done does not reduce to non-evaluative facts about the alternatives)

and:

- (2) one must treat cases alike in respect of non-evaluative facts alike, so that if there is a difference between two cases in respect of what should be done, there must be some difference between them with respect to the non-evaluative facts about the alternatives as well (*supervenience*: what should be done supervenes on non-evaluative facts about the alternatives).

While there is no logical incompatibility between (1) and (2), the puzzlement about how they can both hold can be expressed by asking: if the right answer is not entailed by the non-evaluative facts, then what is the source of the requirement that cases alike in non-evaluative respects be treated alike?¹³ However, recognition

12. I do not suggest that scientific, ethical or legal deliberation are to be understood instrumentally rather than realistically; it is common ground between instrumentalism and realism that theoretical propositions should be able to be used in practical roles, e.g. to predict, explain or guide. I am concerned here to avoid overstating the analogy between the practical roles of scientific and deliberative theorizing rather than to take a position on the further issues that divide instrumental and realistic views of theories.

13. See, of example, Simon Blackburn, *Spreading the Word* (Oxford, Clarendon Press, 1984), ch. 6.

of the way in which right answers to questions about what should be done reflects hypotheses that are required to explain the data about settled cases provides a response to this puzzlement. The best theory about the data is not entailed by – cannot be deduced from – the data. Nevertheless, it is essential to the notion of a theory responsible to data that the best theory, whatever it may be, treats like cases alike. The source of this requirement is the essential explanatory aspirations of theories: a theory the content of which varies independently of the data it purports to account for to that extent does no explanatory work. This remains true even though the best theory is not entailed by the data.¹⁴

Thus, the requirement that like cases be treated alike has its source in the theoretical nature of judgments about what should be done when reasons conflict, which is highlighted by coherence accounts. Moreover, the data to which theories about what should be done are responsible are settled cases, both actual and hypothetical. If in general the role of settled cases in deliberation is somewhat analogous to that of experimental data in scientific theorizing, then the role of hypothetical cases in particular may be regarded as somewhat analogous to that of thought experiments.¹⁵ It is important for our understanding of the requirement that like cases be treated alike that we include settled hypothetical cases, cases the answer to which would be clear were they to arise, as well as settled actual cases among the data to be explained. For reasons that will emerge in what follows, this is particularly important in the case of legal deliberation, where the general requirement that like cases be treated alike must be distinguished from the further specific requirement imposed by the doctrine of precedent. My examples in the previous section make clear that, since legal deliberation and argument often turn not merely on settled actual cases but also on settled hypothetical cases, effective legal reasoning often requires one to discover or construct revealing hypothetical cases¹⁶; a coherence account provides a framework for understanding the function of hypothetical cases in legal reasoning. Hypothetical cases are not merely posed by lawyers and judges, but answers to questions about how they should be resolved are often taken for granted in a way which the argument of the case at issue depends on. The answers to hypothetical cases may be implicitly assumed rather than explicitly stated, but nevertheless they are often depended on in the reasoning of opinions, in a way that may be explicitly

14. For further discussion of supervenience, irreducibility and explanation, see my *Natural Reasons*, op. cit., ch. 14.

15. The effective postulation of hypothetical case thus has something in common with effective experimental design.

16. I do not suggest the existence of a positive professional obligation imposed on court or counsel to discover or construct hypothetical cases, but a normative requirement that arises from characteristic features of legal reasoning as a species of practical reasoning. It may be that my account of the latter is particularly influenced by characteristic features of the legal system in the United States, such as the prominent role of the posing of ‘hypos’ in Supreme Court oral argument, in legal education.

represented within a deliberative matrix. This is to say that legal hypotheses are responsible to data about settled hypothetical cases as well as settled actual cases; both are among the cases with respect to which the requirement that like cases be treated alike must be understood. Nevertheless, as we shall see, the doctrine of precedent imposes a further constraint on legal deliberation in giving actual settled cases more weight than that of hypothetical settled cases for purposes of determining what counts as treating like cases alike.

4. **Kress on Coherence Accounts and Retroactivity: the Problem of Intervening Cases**

In an interesting article entitled 'Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decision', Kenneth Kress argues that the role within coherence theories such as Dworkin's of coherence with past decisions and deference to precedent makes for retroactive applications of the law. In Kress's view, retroactivity may occur if settled law changes between the occurrence of the events being litigated and the adjudication of them, since at adjudication the most coherent account of settled cases will be responsible to actual cases decided after the occurrence of the events litigated.

What Kress calls the 'ripple effect'

...depends upon legal rights being a function of settled law and upon the temporal gap between events being litigated and their eventual adjudication. Judicial decisions often change the settled law. Often, if not always, the settled law will be changed between the occurrence of events being litigated and their eventual adjudication. In consequence, a litigant's rights will sometimes also be changed. If changes in the settled law change the dispositive legal right, a litigant who would have prevailed given the legal rights existing at the time of the occurrence will lose because he no longer has that right at the time of adjudication. The opposite is true of the opposing litigant.

This is retroactive application of the law.¹⁷

I shall refer to the problem Kress identifies as the problem of intervening cases. Kress regards this as a particularly serious problem for Dworkin's rights-oriented version of a coherence account of legal reasoning, since Dworkin works his account up in the course of criticizing Hart's account for the scope it gives to judicial discretion and for the retroactive applications of the law which judicial discretion involves.

However, Kress regards the problem as generalizable: it applies to any coherence account which is conservative in the sense that it adheres to the dominant conception of precedent. According to the latter, legal truths depend in part on prior legal decisions. The general form of the problem is that the best theory about settled law may change between the time the events occurred and the time they are litigated, owing to

17. (1984) 72 *Cal LR* 369, at 380.

intervening legal decisions. ‘The mere historical fact of a prior decision influences the decisions in later cases, and thus the law, because it enlarges the settled law with which later decisions must cohere.’¹⁸ This is in effect just to say that the prevalent conception of precedent gives more weight to settled actual cases than to settled hypothetical cases for purposes of determining what counts as treating like cases alike.

5. A First Response: Prospective Application

What is the correct response to or diagnosis of the problem of intervening cases? Let us first briefly consider and dismiss, with Kress, the possibility that present legal practice should be changed so as to base legal decisions on law settled at the time the events adjudicated occurred rather than at the time of adjudication. Kress suggests that to give decisions only prospective effect in this way is particularly appropriate when decisions are legislative in character; as he puts it: ‘The doctrine of prospective overruling is the legacy of legal realism, the doctrine that maintains that judges legislate’. However, Kress considers and rejects this possible response to his problem, on theoretical grounds and on pragmatic grounds (such as the difficulties of determining which events are relevant for purposes of dating the law to be applied). I find his pragmatic arguments against this line of response fairly persuasive.¹⁹

18. Kress, *ibid.*, at 400.

19. At 386–7: ‘It is unlikely that the revised ... theory could be developed in detail, or utilized by judges if it could for several reasons. First, the possibility of temporally extended events and transactions raised difficult problems in determining the date of the law to be applied. These problems are compounded if several related but separable transactions are being litigated and there are multiple issues. The prospect of applying the law at different times to different, but related aspects of a complicated transaction raises unappealing complexity. Further and perhaps insuperable complexity arises if it is possible to analyze the overall transaction in multiple ways into different temporal components. Unless we can be sure that one temporal analysis will be superior to all others, we will need rules to choose among the various analyses. More important, it is unclear what precedential effect should be given to a decision that applies law from many time periods, law that by definition differs from the law that would be applied to an event that occurred at the time of adjudication if litigated at the time.’

See especially Kress’s note 77, commenting on the line of criminal procedure cases involving prospective-only application. Kress distinguishes the ‘more common form’ of prospective-only application, which nevertheless applies intervening decisions to pending cases from the more extreme form that would be necessary to avoid rippling effects retroactivity, which would deny the ‘new’ rule to pending cases as well. For the ‘more common form’, see *Linkletter v Walker*, 381 US 618 (1965), which did apply the intervening decision to pending cases.

It may be objected to Kress that he has not addressed the line of criminal procedure cases subsequent to *Linkletter* which explicitly discuss the application of intervening decisions to pending cases. See *Stovall v Denno*, 388 US 293 (1967), *Denno v us*, 394 us 244 (1969), especially Justice Harlan’s dissent; *Shea v Louisiana*, 470 US 51 (1985), especially Justice White’s dissent. The Court divide over the problem of intervening cases, and moreover, seems to change its own position. *Stovall* and *Desist* come down in favour of nonretroactivity by refusing to apply the intervening decisions to pending cases in which the relevant events of police conduct occurred prior to the intervening decisions. However, Justice Harlan’s dissent in *Desist*, favouring precedent over nonretroactivity, becomes the Court’s position in *She*, where Justice White dissents, arguing on nonretroactivity grounds. A nice self-referential problem of intervening cases about the problem of intervening cases, the logic of which I will not even attempt to untangle!

In reply, it should be kept in mind that the degree to which the Court is willing to consider and countenance intervening cases retroactivity in the criminal procedure context, where police reliance, which cuts in favour of criminal defendants, may not be acceptable in general, that is, where the intervening case might cut against criminal defendants and undermine their reliance rather than police reliance, or where it might change the positions of civil litigants. It would be interesting to develop an

However, if Kress's own objections to giving intervening cases prospective effect only are persuasive, his problem is not just a problem for coherentists; it cannot be avoided by 'frank' assimilation of adjudication to legislation. Moreover, even if we assume for the sake of argument that the correct response to the problem of intervening cases is to give them prospective effect only, I am not persuaded that this response would be inconsistent with a coherence account. To the extent that retroactivity is the concomitant of a conception of precedent that gives more weight to actual than hypothetical cases, a coherentist could argue that it is the fact that actual decisions may change the law, through the operation of precedent, that makes prospective application appropriate. But this law-changing effect of precedent should not be confused with 'legislative' discretion to make law for the case at hand; these are two logically distinct issues. That is, the occurrence of a judicial decision may change what the law requires from that point on, through the operation of precedent, even though the judge had no antecedent discretion as to how that case should be decided.²⁰ Even if only mistaken intervening decisions can change the law, as Dworkin urges (see section 8) below, nevertheless a mistaken decision that changes the law through the operation of precedent is logically distinct from quasi-legislative discretion to make new law.

So, if the correct response to the problem of intervening cases is prospective-only application, a coherence account is not thereby defeated, since there is no inconsistency between a coherence account and this response. On the other hand, Kress's pragmatic reasons against this response to the problem are equally valid given legislative accounts of judicial reasoning. So if this response is ruled out, it is not only coherence accounts that are left with a problem. Let us thus suppose, for the sake of argument, that the prospective-only response to the problem of intervening cases is to be ruled out (but for a qualification relating to changes in settled cases with extra-judicial sources, see the end of section 7 below).

6. A Second Response: It Is Not So Bad

Consider a second possible response envisaged by Kress to the problem of intervening cases, namely, that of accepting the retroactivity in question as, for one reason or another, not all that bad. And at any rate, a

integrated view of retroactivity doctrine within and without the criminal procedure context, and to try to isolate the special effects of the criminal procedure context on retroactivity doctrine, but I cannot do so here.

20. Kress does allow for this type of view, at 386; he does, at 382, distinguish judicial discretion from judicial creation of law.

coherentist might add, the problem of intervening cases is not a problem for coherence accounts in particular, since they will still involve less retroactivity than accounts of adjudication as *ex ante* discretionary do.²¹

Just how objectionable would intervening case retroactivity be? Perhaps coherentists should not regard it as a matter for particular concern. Kress offers Dworkin something like this possible position in a footnote (though in fact this is not Dworkin's response to the problem):

Dworkin believes that the unfairness of retroactive application of Law is not fully explained by the rule of law requirements to give prior notice, satisfy justified expectations, and the like. . . . Dworkin must take this position because the controversial nature of right answers even when they exist means, as Dworkin admits, that right answers often cannot be demonstrated and therefore often are not known in advance. Dworkin's objection to retroactivity appears to focus on the importance of giving a principled justification for enforcing judicial decisions. Dworkin's concern with retroactivity derives from the belief that creating and applying new rights at the time of adjudication cannot be given a principled justification. Arguably, therefore, ripple effect retroactivity with its consequential disruption of expectations and failure to provide notice is not the kind of retroactivity that would concern Dworkin.²²

Though Kress's article was published before *Law's Empire*, this suggestion seems reasonably consistent with Dworkin's views in *Law's Empire* about respect for precedent and coherence as expressing the integrity and personification of the community. On the above suggestion, people would simply be on notice that their claims were subject to requirements of coherence with possible intervening precedents. Perhaps one could justify the retroactivity to people on the grounds of their membership in a community with the virtues of integrity, which unfortunately entail such retroactivity. People could of course try, perhaps through their lawyers, to anticipate intervening precedents as best they could, by identifying any relevant settled hypothetical cases. But the possibility would remain that an unsettled hypothetical case might become a decided actual case and thus create an unanticipated intervening precedent.

We might fill out this possible line of response further. I claimed there is no inconsistency between admitting that the mere fact that a judge has decided a case may change the law and claiming that in deciding it he has no discretion. Perhaps the mere fact that the judge has decided the case changes the law, not through an exercise of discretion, but as a result of his efforts to discover the right answer. The retroactivity problem may arise because in law, as is not the case in science, the mere fact of theorizing by a judge itself counts as a further piece of data for later theorizing. But perhaps SO long as the judge can give a principled justification for his decision, even if it was not reliably predictable, the change to the law

21. This *in quoque* on behalf of coherence accounts seem to be borne out by the Court's oscillation between precedent and nonretroactivity in *Stovall*, *Desist* and *Shea*, op. cit., where the issues do not arise as a consequence of any particular theory of adjudication.

22. Kress, op. cit., at 384.

represented by his decision is not arbitrary. Recognizing such changes, it might be argued, is itself supported by the considerations of coherence and community integrity that support respect for precedent. People know that the legal system gives weight, in this timeless sense, to intervening precedents, even if they do not know that they are ahead of time. Is this really any more objectionable than not knowing the right answer itself ahead of time?

Of course, we accept that it may be hard to determine what the best account of settled cases would say about the case at issue, before it is decided. What the best theory really is, and how it bears on the case at issue, may be quite controversial.²³ But these are epistemological problems, not problems of true retroactivity; changes in our knowledge of the law should be distinguished from changes in the law. It simply is often extremely difficult to know what the law requires; perhaps only the best lawyers know for sure, and we cannot afford them. But nevertheless we are held to the law, and we must do the best we can to understand what it is. It is unfortunate, and gives rise to unfairness, that the law is so complex and difficult, and that access to it so expensive and restricted; but again these are not problems of true retroactivity. It might be objected that if from a litigant's practical point of view the effects of the 'mere' epistemological problem and those of 'true' retroactivity are much the same, and we can live with the former, then the latter cannot be so bad. But the stubborn intuition remains that true retroactivity is somehow more profoundly unfair than are the effects of the epistemological problem. Let us therefore, for the sake of argument, also put the 'not-so-bad' response aside.

7. **The Source of the Problem: Coherentism vs Precedent**

Consider what features of a system of decision-making are necessary or sufficient to give rise to the problem of intervening cases. As we have seen, coherence accounts of practical reasoning give settled cases an important role as the data, so to speak, to which the theories or principles sought in deliberation are responsible. Moreover, coherence accounts impose a general requirement with respect to settled law of treating like cases alike (which I will sometimes refer to as 'the weaker requirement'). That is, legal truths are a function of, among other things, settled law;²⁴ resolution of the actual case at hand must be consistent with the resolution of comparable settled cases. While, concerning any particular settled case, it is possible that the

23. This paper is not intended to address the problem of whether systematically wicked law is really law; on the see, for example, Ronald Dworkin, *Law's Empire* (London, Fontana Press, 1986), at 102–8.

24. Kress, *op. cit.*, at 380.

best theory of settled cases may show that it is mistaken, if theoretical coherence overall with settled cases is the standard, then it is not possible for all settled cases to be mistaken; hence coherentist consistency involves a certain element of conservatism. However, while these elements are present in coherence accounts of legal reasoning in particular, they are not sufficient to give rise to the problem of intervening cases or any distinctive issues about retroactivity. The latter only arise in virtue of a further requirement (that I will sometimes refer to as 'the stronger requirement', since it is not entailed by the weaker requirement), imposed by the doctrine of precedent in the legal context in particular, namely, that actual settled cases are to be given more weight, in virtue of having actually been decided by a court, than hypothetical settled cases, or, in Kress's words, that 'prior decisions are to be accorded weight which may influence the outcomes in later cases merely by virtue of the fact that the decisions have occurred'.²⁵ Since the stronger requirement *imposed* by the doctrine of precedent is not a necessary feature of all coherence theories, Kress is wrong to the extent that he suggests that the prospect of intervening case retroactivity arises for all coherence theories.²⁶

Decision theory provides one illustration of coherentist reasoning minus the stronger requirement of precedent; within decision theory, coherence with settled preferences provides a standard for the determination of problematic preferences, but settled preferences about actual alternatives that have issued in actual decisions are not given greater weight in principle than settled preferences about hypothetical cases. Consideration of decision theory, in which no problem of intervening cases arises, will thus help to bring into focus the way in which the problem depends on the stronger requirement of precedent.

Suppose a decision theorist is trying to help a decision-maker arrive at decisions about certain difficult issues where his criteria of choice or goals conflict. The decision theorist aims to discover the decision-maker's indifference curves with respect to those conflicting criteria or goals in order to help him to make the decision among the actual alternatives that places him on his highest indifference curve. To do this the decision theorist must depend on data provided by the decision-maker about what his preferences clearly are or would be in various cases which are easier for him to decide about than the case at issue is. These cases

25. Kress, *op. cit.*, at 400.

26. At 398: '...since nothing in the argument has relied on the details of any coherence theory, it should be clear that ripple effects will occur in all coherence theories...'. See also 371: 'The ripple effect will occur in any coherence theory with a principle of conservation. In adjudication, precedent provides the conservative element.' However, compare his concessions to the distinction between coherence theories in general and the legal doctrine of precedent in particular at the very end of the article, 401–2. It is possible that, despite the way Kress introduces his problem by reference to coherence theories in general, not just in law (369–70), the remarks quoted above should be interpreted as restricted to legal contexts, which involve the doctrine of precedent in particular. But my primary purpose is to address Kress's interesting problem on the merits, and the substantive issues I consider arise however Kress's remarks are interpreted.

need not all involve feasible alternatives; some may be purely hypothetical. The exercise is one of extrapolating consistently from the set of settled preferences to a determination of the case at issue. Perhaps some of the settled preferences of the decision-maker are outliers and cannot be regarded as consistent with the rest within any theoretically acceptable representation of the decision-maker's preference space; such settled preferences may be disregarded as 'mistakes'. But it is of the nature of this exercise that there cannot be too many such mistakes. Settled preferences are here the data for which the decision theorist's representation of the decision-maker's preference space must account. Theories may tell us that some of the data they aim to account for are suspect or corrupt, and must be disregarded, but ultimately theories are supported by data. The basis for regarding some settled preferences as mistaken is their failure to cohere with the rest; thus there cannot be a basis for regarding too many of them as mistaken (though, of course, just what counts as 'too many' is difficult to specify).

The conservatism of this interpretative exercise is also attributed by a coherence account to legal reasoning: not too many settled cases can be regarded as mistakes, or the basis for regarding them as mistaken is itself undermined. However, these elements of conservatism do not entail that settled actual cases should be given more weight than settled hypothetical cases, and hence they are not sufficient to give rise to the problem of intervening cases. The mere fact that a decision-maker actually makes an intervening decision between the time at which certain events occur and the time at which he must face a further problematic decision about those events does not alter the set of settled cases with which his second problematic decision must cohere. (Of course a change of mind does alter the set of settled cases; but this is a different matter.) A settled case may be equally settled, whether actual or hypothetical. More generally, the set of settled cases does not coincide with the set of actual cases. Not all actual cases are settled (some are problematic), and not all settled cases are actual (some are hypothetical).²⁷

If the stronger requirement of adherence to precedent were not imposed on legal reasoning in addition to the weaker elements of conservatism imposed by a coherence account and shared with decision theory, no problem of intervening cases would arise in law either. To see this, consider a revisionary conception of the law as equally responsible in principle to both settled actual and settled hypothetical cases, so that the change of a settled case's status from hypothetical to actual between occurrence of the events litigated and their

27. Compare Kress on the analogy between legal and scientific theorizing, at 392n, and on the character of settled law, at 278. My use of the term 'settled' here does not coincide with his, but I believe that something like my use is essential to convey what is distinctive about coherentist views of practical reasoning, and of legal reasoning in so far as it is species of practical reasoning.

adjudication cannot via precedent change the law about the later case. Such a revisionary conception of the law is compatible with a generally coherentist approach to practical reasoning, but it omits the distinctively legal doctrine of precedent. Now whether a case is settled or not does not depend on whether it has actually been decided; a settled case is equally settled whether its current status is actual or hypothetical, and retroactivity does not arise in the way Kress envisages.

Kress considers the possibility that the law does not change purely in consequence of legal decisions, but points out that this would be to purchase unchanging right answers at the cost of dispensing with the doctrine of precedent. He writes: 'Judicial decisions change the settled law' and: "To deny that law and legal rights change at all in response to new decisions is to deny that legal rights are, at least in part, determined by settled law".²⁸ While I think he is correct to regard the denial of any change of law in response to new actual decisions as giving up the doctrine of precedent, nevertheless, it is logically possible to hold that legal rights are, at least in part, determined by settled law, without holding that a change in a case's status from hypothetical to actual is *per se* a change from unsettled to settled. It is just this logical space that is occupied by the revisionary conception of law we are now considering, which in effect does not incorporate the doctrine of precedent as we know it. Of course, new legal decisions may reflect extra-judicial changes in the settled *law*. But absent extra-judicial changes, under the revisionary conception new legal decisions would not change settled law, though they might change our awareness of it.

Kress further points out that, within Dworkin's theory at least, 'While at each point in time, there are right answers to all or nearly all legal issues, the right answer that is given may not be the same as that which would be given at another point in time, in consequence of changes in institutional history'. However, giving hypothetical and actual settled cases equal weight would *not* mean that the law cannot develop and change, but merely that such developments and changes, in both actual and hypothetical cases, would reflect *extra-judicial* developments and changes in institutional history, social practices, etc.²⁹ Cases that were unsettled might become settled as the law develops, in response to extra-judicial developments. But under the revisionary conception a case would not change from unsettled to settled *merely* by becoming the subject of a judicial decision and changing status from hypothetical to actual.

I emphasize that I have invoked this revisionary conception of law not in order to endorse it, of course, but merely to illustrate my claim that the problem of intervening cases does not arise from the coherentist

28. At 380, 393.

29. See and compare Kress, *op. cit.*, at 392–4.

character of legal reasoning *per se*, but rather from the further distinctive asymmetrical treatment of actual and hypothetical cases by the doctrine of precedent in particular. The point of the distinction between coherentist practical reasoning absent the doctrine of precedent and legal reasoning with the doctrine of precedent is not to suggest we should respond to Kress's problem by doing away with precedent, but rather to contribute to diagnosing the source of the problem. This distinction is important because it is the general character of consistency and conservatism with respect to hypothetical as well as actual cases in coherentist practical reasoning, which legal reasoning shares and which the doctrine of precedent does not eliminate but rather supplements, that supports the view I go on to assert in section 8 below, namely, that the special role of precedent in legal reasoning only makes a difference when the decided cases appealed to as precedent were not *ex ante* correct.

It may be objected that intervening case retroactivity would occur even under the revisionary conception of law, so long as the law is subject to change such that coherence with intervening, newly settled cases may be invoked to justify legal decisions about events that occurred before the change. Perhaps the objector will admit at this point that it would not matter whether the change in settled cases occurs within the category of actual or hypothetical cases; it need not be the result of a change in status from hypothetical to actual. But so long as the possibility of change in the set of settled cases is admitted, even though the initiation of change is distributed across actual and hypothetical cases, it may be claimed that the problem of intervening cases would remain.

Advocates of coherence accounts are not committed to denying that the law may change. However, they may wish, as Dworkin does, to deny that judges should initiate such changes, as opposed to trying to discover what the best theory of settled law requires. (There is nothing analogous to this division of labour between the judiciary and other, law-making, branches of government, in the ethical and decision-theoretic versions of the pursuit of coherence. In these latter cases, the deliberator plays the legislative as well as the judicial role; his decisions may reflect changes of mind that originate changes in the set of settled cases. At the same time, there is no problem of retroactivity, although if someone changes his mind about what he should have done after doing it, he may well regret having done it.) On the view that the judicial role is to discover the law, not to make it, changes in judicial perception of the content of settled cases, whether actual or hypothetical, ought to reflect extra-judicial legal developments, such as changes in social practices and

customs with constitutive bearing on the law,³⁰ or in legislative or administrative background. Such extra-judicial developments put members of society on fair notice, and changes in legal theory which reflect such intervening changes should in principle be applied prospectively only.³¹ However, legislative and administrative changes usually *are* applied prospectively only. Moreover, changes in social practices usually occur gradually enough that worry about such a change intervening between the time of the events litigated and their adjudication may often seem contrived and artificial. Perhaps there are occasionally abrupt, revolutionary changes in social practices, but they are surely unusual. Perhaps in these unusual cases changes in settled hypothetical cases which reflect the change in social practice should in theory be given effect prospectively only (although there may be practical difficulties in identifying such cases and the time of the change of social practice involved). Such exceptions would have a rationale in the extra-judicial source of the change, and could be admitted without threatening the normal judicial practice to the contrary. Thus, extra-judicial changes in law do not threaten my claim that the problem of intervening cases does not arise from the coherentist character of legal reasoning *per se*, but rather from the distinctive asymmetrical treatment of actual and hypothetical cases by the doctrine of precedent in particular.

In summary, the purely coherentist revisionary conception of law as Jacking the stronger requirement, imposed by the doctrine of precedent, would support the following argument. Either cases intervening between the occurrence of events and their adjudication reflect intervening extra-judicial changes in settled law or they do not. If they do, the prospective-only application of the new legal hypotheses supported by the newly settled law is appropriate for the same reason that prospective-only application is appropriate for legislative decision-making, namely to avoid the unfairness of retroactivity. In such circumstances, we have

30. See Ronald Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977), at 40–2.

31. An example would be given by a slight variation of the sequence of events in *California Federal Savings and Loan Association v Guerra*, 107 S Ct 683 (1987). In *Cal Fed*, a pregnant worker's employer brought suit seeking a declaration that a California statute requiring employers to provide leave and reinstatement to employees disabled by pregnancy was pre-empted by the federal statute, Title VII which prohibited sex discrimination. The court upheld the California Statute, although in the 1976 case of *General Electric Co v Gilbert*, 429 US 125, 97 S Ct 401, it had interpreted Title VII in a different manner reasoning that discrimination against pregnant persons was not sex discrimination because many non-pregnant persons are female. In 1978 Congress expressed its disapproval of the *Gilbert* reasoning by amending Title VII to make clear that it is intended sex discrimination to include discrimination against pregnant persons. The employer she was ready to return to work she was told her job had been filled and there was no available positions. She filed a complaint under the California statute and her employer brought a suit seeking a declaration that the state was pre-empted by Title VII's ban on sex discrimination. The case was decided in 1987.

Now suppose that between the *Gilbert* decision in 1976 and the 1978 amendment to Title VII events like those disputed in *Cal Fed* occurred, but only came to trial after the *Cal Fed* decision. Then *Cal Fed* would have the status of an intervening case. However, it would have been following an extra-judicial initiation of an addition to the settled law, namely, the amendment of Title VII in 1978. Under these circumstances it would seem that the legislative change should be given prospective effect only.

judicial reflections of extra-judicial legal developments, not judicial law-making.³² Cases that articulate such developments and incorporate them within a coherent legal theory may change what we believe the law to be, but they do not in themselves change the law, any more than an illuminating new scientific theory changes the truth about what the best theory is merely by changing our beliefs about what it is. On the other hand, if the intervening cases do not reflect extra-judicial changes, then either they are settled or they are not. The mere fact that they have been actually decided does not resolve this question. If an intervening case is not settled, the fact that it has been decided between the occurrence of events and their adjudication does not change the settled law. The fact that the case has been explicitly considered and decided *per se* does not make it a case that is clear to the relevant decision-makers. Moreover, it may have been a settled case before it was decided, if its resolution would have been clear had it been considered. That is, either the intervening case is not settled, despite being actual, or is settled, and was before it was decided. Either way, there is no retroactivity. Thus the coherentist character of the revisionary conception of law as merely requiring that like cases be treated alike and that hence not too many settled cases be regarded as mistaken is not sufficient to give rise to the problem of intervening cases; in addition, the doctrine of precedent is necessary.³³

8. The Source of the Problem: Precedent vs Mistake or Underdetermination

There thus seems to be a – perhaps surprising – tension between the doctrine of precedent, on the one hand, and the requirements of fairness which make retroactivity objectionable, on the other. But perhaps the doctrine of precedent is not sufficient to give rise to the problem of intervening cases either, though necessary. It seems clear that the revisionary coherentist conception of law I sketched in the last section, under which no distinction of weight at all is drawn between settled actual and settled hypothetical cases, involves a substantial departure from the doctrine of precedent as we know it. Nevertheless, the doctrine of precedent as we know it is compatible with the significant influence of settled hypothetical cases; it does not require that status as actual and status as settled coincide. Because of this, the argument that applied to the revisionary conception of law to show that intervening case retroactivity would not arise may be available, at least under certain circumstances, in a legal system that does incorporate the doctrine of precedent. I will briefly consider some cases to illustrate the point that status as actual and status as settled do not in fact coincide. I will then go on to try to sharpen the diagnosis of the intervening case retroactivity. I shall argue,

32. As in the variation on *Cal Fed*, *ibid*.

33. Cf. Kress, *op. cit.*, at 401–2.

largely following suggestions made by Dworkin, that only actual intervening decisions that are ex ante mistaken, or at least not uniquely correct (in cases of underdetermination), but which the doctrine of precedent nevertheless presumptively constitutes as judicially-initiated changes in the law, give rise to retroactivity.

Not all actually decided cases are settled; indeed, some actual cases, even some that are settled, may be mistaken,³⁴ in virtue of their failure to cohere with other settled, including actual, cases. Dependence on some actual cases, is avoided, even if they have not been explicitly overruled as mistaken, because they are highly controversial, and/or considered uncertain, dubious, or poor authority. Moreover, the doctrine of precedent may not treat actual cases of courts of other jurisdictions as settled. An example of an intervening actual case which was nevertheless not settled is that of *Brown v Porcher*.³⁵ In *Brown*, the US Court of Appeals held that the construal of a South Carolina statute to disqualify any claimant who voluntarily left her most recent employment because of pregnancy violated a federal statute providing that no person shall be denied unemployment compensation under state law solely on the basis of pregnancy. *Brown* was decided in 1981; the US Supreme Court denied certiorari in 1983. In 1980, however, events had already occurred which gave rise to the closely related case on the same issue of *Wimberly v Labor and Industrial Relations Commission*, which went up on appeal through the Missouri court system to the Missouri Supreme Court (in 1985), and eventually reached the US Supreme Court (in 1987).³⁶ The Missouri Court of Appeals had followed *Brown*, despite reservations concerning the soundness of its reasoning; but the Missouri Supreme Court reversed, declaring that it had never subscribed to the notion that Missouri state courts were bound to follow the decisions of lower federal courts in construing federal statutes.³⁷ The Missouri Supreme Court declined to follow *Brown*. 'We do not mean to suggest that a lower federal court's construction of a federal statute is wholly irrelevant. The courts of this state should "look respectfully to such opinions for such aid and guidance as may be found therein" ... In some circumstances it may be appropriate for a state court to defer to long established and widely accepted federal court interpretations of federal statutes'. But it evidently felt that *Brown* was not a settled case in this sense. The US Supreme Court eventually resolved *Wimberly* in favour of the Missouri view and against *Brown*. But the point to be made here is not that *Brown* was

34. As Kress admits, at 378.

35. 660 F2d 100 (1981), cert denied, 459 US 1150, 103 SCt 796 (1983). Perhaps various abortion cases provide other current examples.

36. 107 SCt 821 (1987).

37. Justice Donnelly, concurring in the result, denied that US Supreme Court decisions interpreting the US Constitution are binding on the states.

mistaken; perhaps it was correct. It is rather that *Brown*, the intervening case, did not change the settled law because it was not a settled case, from the perspective of the Missouri Supreme Court. Thus, whether or not *Brown* was correct, the best theory about settled law, which should determine the outcome in the similar case which comes to trial after *Brown*, was not altered by the intervening case. If the result in *Brown* were to have been upheld as the correct result, there would have nevertheless been no retroactive application of the decision in the intervening case, since, as the Missouri Supreme Court implied, it was not a settled case. Continuing uncertainty about the right answer is just that, not retroactivity.

Furthermore, there are many settled hypothetical cases which are more deeply entrenched and would be more difficult to justify regarding as mistaken than many actual cases: we are lucky that such cases have remained hypothetical rather than actual. They have not become actual, in some cases, because the flagrant violations of rights they would involve luckily have not occurred in our communities. But they are nonetheless clearly settled for being hypothetical. A good example is found in Justice Marshall's eloquent dissent in the recent case of *US v Salerno and Cafaro*. The majority had upheld a statute permitting the denial of bail altogether in certain cases against Due Process and Excessive Bail Clause challenges, on the grounds in part that the statute is a regulatory rather than a punitive measure. Justice Marshall writes:

The ease with which the conclusion is reached suggests the worthlessness of the achievement. The major premise is that '[u]nless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on "whether an alternative purpose to which [the unrestricted] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."' The majority finds that "Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals', but instead was pursuing the "legitimate regulatory goal" of "preventing danger to the community".... Concluding that pretrial detention is not an excessive solution to the problem of preventing danger to the community, the majority thus finds that no substantive element of the guarantee of due process invalidates the statute.

Justice Marshall produces a settled hypothetical case as a counter-example to the majority's hypothesis about the punitive/regulatory distinction. He goes on:

This argument does not demonstrate the conclusion it purports to justify. Let us apply the majority's reasoning to similar, hypothetical case. After investigation, Congress determines (not unrealistically) that a large proportion of violent crime is perpetrated by persons who are unemployed. It also determines, equally realistically, that much violent crime is committed at night. From amongst the panoply of 'potential solutions', Congress choose a statute which permits, after judicial proceedings, the imposition of a dusk-to-dawn curfew on anyone who is unemployed. Since this is not a measure enacted for the purpose of punishing the unemployed, and since the majority finds that preventing danger to the community is a legitimate regulatory goal, the curfew statute would, according to the majority's analysis, be a mere

'regulatory' detention statute, entirely compatible with the substantive components of the Due Process Clause.³⁸

He regards the absurdity of this conclusion as a settled aspect of the law, and nonetheless settled for the fact that the case envisaged is merely hypothetical. Here is a settled hypothetical case that is more entrenched, and less likely to be regarded as mistaken by the best legal theory, than many actual cases.

We have considered two cases in which the dissenting opinions appeal persuasively to hypothetical cases to defeat hypotheses on which the majority opinion seems to turn, *Parham* and *Salerno*. Suppose for the sake of argument that these decisions were mistaken up to the time of the decision, or *ex ante mistaken*. Nevertheless the doctrine of precedent tells us we cannot assume them to be *ex post* mistaken; we cannot infer an *ex post* mistake from an *ex ante* mistake because the fact of the actual decision may change the law. It is possible that an *ex ante* mistake is so serious that the enormity of the mistake outweighs its precedential force, and it remains a mistake even *ex post*; but the mere fact of the decision has loaded the balance against this possibility. A mistake must be more serious, must be more deeply incoherent with the settled law, including hypothetical as well as actual cases, to be an *ex post* mistake than to be an *ex ante* mistake; the difference is a matter of degree, a matter of how much must be uprooted to accommodate the law to the mistake.

We see then that the doctrine of precedent permits determinately *ex ante* mistaken decisions to change the law;³⁹ such decisions, as intervening cases, may give rise to retroactivity. Of course, the doctrine of precedent is not addressed to mistakes in particular; it does not perversely dignify *ex ante* mistaken actual decisions as opposed to *ex ante* correct actual decisions by presumptively constituting only the former as law henceforward. But precedential force is not needed to constitute an *ex ante* correct decision as correct *ex post*; in this respect it is redundant (though of course it may feature non-redundantly in the reasoning from previous precedents that makes the decision *ex ante* correct). No special method of transition between *ex ante* standing and *ex post* standing is needed in the case of correct decisions; precedent has no law-changing work to do in these cases. Since resolutions that are *ex ante* correct all things considered do not conflict with one another to begin with, increasing the weight of a correct settled case as it changes from hypothetical to actual makes no difference. Of course, courts may not *know* whether the actual cases they defer to as having precedential force were *ex ante* mistaken or not. Nevertheless, we may issue a challenge: how, on coherentist

38. *US v Salerno* 107 SCt 2095, 2107–2108 (1987).

39. Compare Kress's claim at 394 that 'wholesale and final determination of the truth or falsity of all possible legal propositions leaves no room for the operation of the dominant notion of precedent'.

assumptions, could the precedential force of a decision, other than one reflecting extra-judicial legal developments, change the *law* itself, as opposed to our *beliefs* about it, if that decision were *ex ante* correct?

This in effect is Dworkin's response to the problem of intervening cases. He argues as follows.⁴⁰ He does consider that integrity requires us to give weight to the fact that a case was actually decided so, even if it was decided wrongly. Either an intervening case is wrongly or rightly decided. Suppose it is wrongly decided. Then it will indeed change the law retroactively, and for the worse, since it was wrongly decided. That is one reason it is so important for judges to reach the right answer! We can accept that there is objectionable retroactivity in this case, but that is not a consequence of the coherentist account of adjudication, or of the doctrine of precedent, but rather of the fact that the wrong answer was reached. Suppose, on the other hand, that the intervening case was rightly decided; then we are presented with a challenge. How could a correct decision in an intervening case make for retroactive change of the law?⁴¹ could the affirmation of a correct hypothesis itself change hypotheses in subsequent cases from right to wrong or vice versa? It might make the correct answers to later cases more evident or predictable, but this is not what Kress needs for his claim; retroactivity involves a change in the law, not merely a change in our beliefs about the law.

For the moment put aside the possibility, which I will return to, that the correct decision (not merely our beliefs about it) was *ex ante* underdetermined rather than mistaken. To claim, following Dworkin, that precedent only makes a difference given an *ex ante* mistake does not amount to saying that precedent does not make any difference to the way people *should* reason about the law. One can hold that decided cases do

40. In discussion.

41. Kress gives an example, in which the force of precedent is conceived in a mechanical way to involve counting the number of steps required for privity of contract, which he claims is a paradigm case of coherentist reasoning. See 382–3. However, it can be dismissed as not an example of Dworkin, or more generally, coherentist reasoning at all since it does not involve consideration of the reasons or principles that support particular results.

Some implicit support is founded in Supreme Court case for Dworkin's view that a correct decision in an intervening case does not change the law. In the criminal procedure context, see in particular the dissent by Justice Harlan and Justice Fortas in *Desist*, *op. cit.* Justice Harlan writes: '...If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced. Anything else would belie the truism that it is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case. It is only if each of our decisions can be justified in terms of this fundamental premise that they may properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature'. See also H. Schwartz, 'Retroactivity, Reliability and Due Process' (1966) 33 *U Chi LR* 719, at 748–9. In *Hanover Shoe v United Shoe Machinery Corp*, an antitrust case, the US Supreme Court discussed the intervening case issue explicitly writing: 'The theory of the Court of Appeals seems to have been that when a party has significantly relied upon a clear and established doctrine, and the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply prospectively only.' The Supreme Court, however, did not find before it a situation in which there was a clearly declared judicial doctrine upon which a party had relied and which was overruled in favour of a new rule. The intervening cases in question did not indicate that the issues they decided were novel, or that they involved a departure from an earlier line of case or the need for innovative principles. 'Whatever development an antitrust law was brought about was based to a great extent on existing authorities and was an extension of doctrines which had been growing and developing over the years.' See *Hanover*, 392 US 481, at 496–9 (1968).

and should make a difference to the way people should reason, via the doctrine of precedent, *though they are ex ante mistaken*, even if one also holds that they make a difference only when they are *ex ante* mistaken, since they must be either correct or mistaken, and if they are correct their actually being decided makes no difference. The argument for the latter qualification derives from the role of hypothetical cases in coherentist practical reasoning in general; precedent is an additional special feature of legal reasoning, but it does not eliminate the general role of hypothetical cases in legal reasoning as a special case of practical reasoning.' Precedent does and should make a difference to correct reasoning about what the law is, and this is why, in part, the problem of retroactivity does arise. Reasoning from an *ex ante* mistaken precedent is not itself mistaken simply because of the *ex ante* mistake.

The argument as to under what circumstances an intervening precedent can change the law may be elaborated as follows. Either the intervening decided case was *ex ante* correct or *ex ante* mistaken; moreover, either the corresponding hypothetical case was settled in the same way as the actual case was decided, or it was not so settled. Then there are four cases to consider. Suppose first that the decision was *ex ante* (but not *ex post*) mistaken in fact, but nevertheless settled, IC it was, or would have been, wrongly believed of the corresponding hypothetical case that the (in fact) mistaken decision would be the correct decision for such a case. False beliefs about the *ex ante* law have been replaced by true beliefs about the *ex post* law, made true because the law has changed, in virtue of an *ex ante* mistaken precedent that is good *ex post* law. The retroactivity problem arises with respect to what the law is (though not with respect to beliefs about the law), but that is due to the *ex ante* mistaken decision. Second, suppose that the decision was *ex ante* (but not *ex post*) mistaken, though not settled as a hypothetical case. In this case the law and beliefs about it may change as a result of the decision, but again retroactivity is associated with an *ex ante* mistaken decision. Third, suppose the decision was *ex ante* correct and settled. In this case there is change neither in the law nor beliefs about it, so no retroactivity problem can arise.

The fourth case is the interesting case: here the decision was *ex ante* correct, but the corresponding hypothetical case was not settled in accord with the correct decision. The truth about the law has not changed as a result of the correct decision, though what is believed about it may have changed (again, the change from hypothetical to actual does not *necessarily* entail a change from unsettled to settled, since a decided case may remain unsettled). If beliefs about the law do not change as a result of the correct decision, neither the law nor beliefs about it have changed, so it is hard to see how the correct decision in a subsequent case could

change. If beliefs about the law do change, it may be in one of (at least) two ways. On the one hand, they may have been undetermined before, and may now be settled in accord with the correct decision. Could this change in belief, absent a change in the law, be sufficient to change what the law is in a subsequent case? Whatever considerations they were in virtue of which the intervening decision was correct still obtain, and, to the extent they ever applied to the subsequent case, apply equally after the intervening case is decided. How could the mere addition of true beliefs about these unchanged considerations change the correct decision in the subsequent case, as opposed to making it more evident? On the other hand, beliefs about the law may have been mistaken before the intervening case, and they may have changed to accord with the correct decision in the case. How could this change from false to true beliefs about the intervening case change the law, as opposed to beliefs about it, in the subsequent case? It does not help to point out that according to a coherence account not too many settled cases can be mistaken, because we are now supposing the prior beliefs were false; if they were true, we are back to case three above, and there is no retroactivity. Whatever considerations they were in virtue of which the prior beliefs about the hypothetical version of the intervening case were false would apply also to the subsequent case, to the extent relevant. If we continue to assume that the law in the subsequent case was either determinately one thing or another at each point, and no change of law with respect to the intervening case was brought about by its correct decision, the challenge on coherentist assumptions still stands: how could a decision in the subsequent case be changed from correct to mistaken or vice versa merely as a result of a change in beliefs about the law in the intervening case from false to true, given no change in the law itself with respect to that case? Note that it is incorrect to object here that the determinacy assumption leaves no room for the operation of precedent, since we have seen that it does leave room for it in cases of mistaken decisions. What is at issue is whether precedent can make a difference given correct intervening decisions.

At this point we should consider the consequences of suspending the assumption of determinacy. If we allow that prior to a decision the right answer (not merely beliefs about it) may be underdetermined, then precedent may make a difference not just as a result of *ex ante* mistake, but also as a result of resolving *ex ante* underdetermination. Dworkin, of course, would resist the possibility of under-determination in arguing for his right answer thesis, so it does not, in the absence of an independent argument against the right answer determinacy thesis, help Kress make a case against Dworkin in particular. But some coherentists might

accept the possibility of underdetermination, so it is relevant to the general discussion with respect to coherentism.

Thus, from a theoretical point of view at least, intervening case retroactivity can be laid at the feet, not of coherentist legal reasoning, or even of the doctrine of precedent, but rather of mistaken decisions, and perhaps also of underdetermination of the law, to the extent a given version of coherentism admits this possibility. That legal mistakes are unfair to people is hardly news; the theoretical novelty and interest of the problem of intervening cases thus looks to diminish to the extent mistakes are its source. Moreover, the use of the problem as a means of criticizing Dworkin's version of coherentism in particular is limited by his rejection of the possibility of underdetermination. The general shape of my response to Kress with respect to the problem of intervening cases has been to draw out the consequences of a coherentist view of practical reasoning in general for legal reasoning and the doctrine of precedent in particular, which consequences limit intervening case retroactivity. The argument has proceeded by presenting a challenge to show how, *given the role of hypothetical cases within coherentist views of practical reasoning*, a correct, as opposed to *ex ante* mistaken or indeterminate, intervening case could give rise to retroactivity. Of course we may reject coherentist views and their consequences with respect to the doctrine of precedent altogether, but then we depart from Kress's subject matter. Note that my aim has not been to dispute the interest of the retroactivity problem which Kress has highlighted, but rather his conception of coherentism in general and Dworkin's version thereof in particular as the proper targets of the argument.

In pursuing my course of argument, however, I have at several points had to put considerable weight on the distinction between changes in the law and changes in our beliefs about the law in particular cases. Coherentism admits this theoretical distinction on a case by case basis, even though it ties the right answers and beliefs about them together globally in the way indicated in section 7 above, in that not too many settled cases can be mistaken. However, perhaps from a more pragmatic point of view, one more concerned with matters of notice and predictability, which may be closer to that of litigants and potential litigants, this distinction has been strained even so. Perhaps it is from this more pragmatic point of view that a distinctive problem about intervening cases arises.