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The Persistence of Proximate Cause: How Legal Doctrine Thrives on Skepticism

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The Persistence of Proximate Cause: How Legal Doctrine Thrives on Skepticism

THE PERSISTENCE OF PROXIMATE CAUSE: HOW LEGAL DOCTRINE THRIVES ON SKEPTICISM

JESSIE ALLEN[†]

ABSTRACT

This Article starts with a puzzle: Why is the doctrinal approach to “proximate cause” so resilient despite longstanding criticism? Proximate cause is a particularly extreme example of doctrine that limps along despite near universal consensus that it cannot actually determine legal outcomes. Why doesn’t that widely recognized indeterminacy disable proximate cause as a decision-making device? To address this puzzle, I pick up a cue from the legal realists, a group of skeptical lawyers, law professors, and judges, who, in the 1920s and 1930s, compared legal doctrine to ritual magic. I take that comparison seriously, perhaps more seriously, and definitely in a different direction, than the realists intended. Classic anthropological studies reveal several telling structural similarities between traditional proximate cause analysis and ritual magic. Moreover, it seems that in diverse cultural contexts, magic not only survives skeptical exposure, it feeds on it. Drawing on the anthropological literature, I propose that exposing doctrinal indeterminacy functions as a kind of ritual unmasking that ultimately increases rather than diminishes the credibility of doctrinal analyses. The Article concludes by considering how unmasking doctrinal indeterminacy works to strengthen faith in doctrine and by raising some questions about the implications for law’s legitimacy. Does unmasking doctrine only further mask judicial power? Or can ritual theory help us see some potential legitimate value in maintaining doctrine as the form of legal decision making, even as we acknowledge doctrine’s inability to determine legal outcomes?

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INTRODUCTION

[T]here is a relation between faith and skepticism . . . that has escaped notice in some classic illustrations of magical healing . . . in that the success of such ritual lies not in concealing but in revealing trickery

—Michael Taussig¹

Legal concepts do not decide cases. Lawyers, law teachers, and judges themselves acknowledge that judges do not mechanically apply legal doctrines.² Opinions vary on the extent of doctrine's indeterminacy from the observation that "doctrine [is] insufficient to explain judicial decisions"³ to the blunt accusation that doctrines are "lies."⁴ But most

1. Michael Taussig, *Viscerality, Faith and Skepticism: Another Theory of Magic*, in IN NEAR RUINS: CULTURAL THEORY AT THE END OF THE CENTURY 221, 221 (Nicholas B. Dirks ed., 1998).

2. See, e.g., James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 196 (2011) ("[N]o serious analyst would today contend that the decisions of the justices of the Supreme Court are independent of the personal ideologies of the judges."); Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 50–51 (2010) ("[M]ost everyone accepts some version of the claim that law is indeterminate."); Frank Sullivan et al., *Three Views from the Bench*, in WHAT'S LAW GOT TO DO WITH IT? 328, 330 (Charles Gardner Geyh ed., 2011) ("Judicial decision-making is not syllogism."); Steven J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 767 (2009) (pointing out that judges exercise discretion and in many cases make law and that this view of judging is so widely shared that "it is virtually impossible to find anybody who disputes it today"); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 469 (1990) (explaining that the view that judges make, rather than find, legal outcomes "has dominated American legal education for over half a century").

3. Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 793 (2009); see also EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949) ("In an important sense legal rules are never clear.").

participants in legal culture agree that doctrinal formulas do not independently produce legal outcomes.⁵ Nor is this realistic view confined to legal practitioners. Recent research indicates that the American public understands judicial decision making as a process that involves political choices.⁶ Apparently “we are *all* realists now.”⁷ It is no longer controversial, if it ever was, to say that concepts like due process, privity, and proximate cause, and the formal doctrines that elaborate them are indeterminate.⁸ And yet, doctrine remains the central and distinctive mode of legal process. Judges continue to go through doctrinal analyses *as if they did* determine outcomes. Lawyers continue to make doctrinal arguments and to couch policy concerns in doctrinal terms. Law professors continue to teach doctrinal formulas, albeit with plenty of skeptical commentary.⁹ And whenever there is a new nominee to the U.S. Supreme Court, she is required to publicly profess her strict adherence to doctrine as the sole legitimate method for deciding legal questions.¹⁰

It seems that doctrine revealed is not doctrine debunked. My question is, Why not? Why doesn't indeterminacy disable legal doctrine? Why do we persist in using a method to decide legal cases that we acknowledge cannot actually make decisions? In this Article, I look at this problem in the context of tort doctrines of proximate cause, and I suggest a possible explanation for—or at least a new perspective on—the survival of formal doctrinal analysis in a skeptical age.

4. Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 156 (1994).

5. See sources cited in *supra* note 2. Even a rare avowed formalist who argues that doctrines should be used to decide cases believes that judges today take an instrumental policy making approach to adjudication at least some of the time and that it would be “just plain silly” to claim that doctrine could determine the outcome of every case. Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 166, 170 (2006). Another defender of formal legal reasoning nevertheless acknowledges that “the self-reporting of judges probably exaggerates the effect of formal law on their decisions.” FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 140–41 (2009).

6. In a recent survey asking how the U.S. Supreme Court decides cases, 57.3% of respondents “agree that judges actually base their decisions on their own personal beliefs.” Gibson & Caldera, *supra* note 2, at 207.

7. Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467 (1988) (emphasis added) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960* (1986)). *But see* SCHAUER, *supra* note 5, at 144 (asserting that the “all” is an “egregious exaggeration”); BRIAN TAMANAHA, *LAW AS A MEANS TO AN END* 132 (2006) (noting that most legal academics do not identify as either realists or formalists but do view law as a means to achieving policy ends, as the realists advocated).

8. See, e.g., Brian Z. Tamanaha, *The Realism of Judges Past and Present*, 57 CLEV. ST. L. REV. 77, 79 (2009). Tamanaha has argued persuasively that judges' skeptical attitudes about doctrinal determinacy long predate the realist critiques of the twentieth century. *Id.*

9. Law professors perennially sigh over students' naïve demands for determinate doctrinal formulas, but as Lawrence Solum points out, most final exams nevertheless wind up testing students' mastery of the very doctrinal formulas we have mocked. Solum, *supra* note 5, at 168.

10. See, for example, Justice Sonya Sotomayor's statement during her confirmation hearings saying that “[i]t's not the heart that compels conclusions in cases, it's the law.” Ari Shapiro, *Sotomayor Differs With Obama On 'Empathy' Issue*, NPR (July 14, 2009, 5:32 PM), <http://www.npr.org/templates/story/story.php?storyId=106569335>.

To really look at the contradictory combination of doctrine and skepticism, one has to avoid both denial—the assumption that somehow what appears to be contradictory must not be contradictory because it is so common—and polarization—insisting that the contradiction between doctrinal faith and doctrinal skepticism must be resolved. If unalloyed belief in doctrinal determinism is unrealistic, so is the opposing position that legal doctrine is nothing but an empty disguise. At the least, neither pure faith nor pure skepticism captures the experience of most legal practitioners. For most judges and lawyers, I daresay the habits of doctrinal thought and language seem qualitatively different from other forms of decision making, yet these same legal practitioners openly discuss doctrine's indeterminacy.

We need a new way, then, to understand the persistent combination of doctrine and skepticism in modern legal practice. In the 1920s and 1930s, the legal realists, a group of skeptical lawyers, law professors, and judges, compared legal doctrine to ritual magic.¹¹ In this Article, I take that comparison seriously, perhaps more seriously, and definitely in a different direction, than the realists intended. When the realists called doctrinal analysis “magic” words,¹² they generally meant that judges and lawyers were engaged in a fraud or fantasy.¹³ To realist critics, doctrinal reasoning mirrored the naïve or duplicitous magical practices of primitive cultures that they assumed were devoid of modern doubts about magic's efficacy. According to some anthropological accounts, however, magic in other cultures is often characterized by an interplay of faith and skepticism.¹⁴ I find the combination of illusion and revelation described by ethnographers of magic strikingly similar to the puzzling mixture of doctrine and realism in adjudication. In this Article, I use those accounts to investigate how doctrinal practice and doctrinal skepticism manage to exist side by side in legal practice.

Of course, it is farfetched to compare modern adjudication to ritual magic. But the goal of this comparison is quite down to earth. I want to come to terms with the contradictory combination of doctrinal and skeptical analysis that characterizes legal practice. I maintain that the combination of doctrine and skepticism in judicial opinions is not satisfactorily

11. See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 11–12 (1930); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935); Leon Green, *The Duty Problem in Negligence*, 28 COLUM. L. REV. 1014, 1016–17 (1928).

12. See, e.g., Cohen, *supra* note 11, at 820.

13. The exception was Thurman Arnold. In two books he published in the 1930s, *The Symbols of Government* (1935) and *The Folklore of Capitalism* (1937), Arnold explored the “symbolic,” “ritual,” “ceremonial,” and “ideal” character of legal theory and practice in ways that did not denigrate those practices. See also Keith J. Bybee, *The Rule of Law Is Dead! Long Live the Rule of Law!*, in *WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE* 306, 312–16, 317–21 (Charles Gardner Geyh ed., 2011); Jessie Allen, *A Theory of Adjudication: Law as Magic*, 41 SUFFOLK U. L. REV. 773, 803–05 (2008).

14. See, e.g., Taussig, *supra* note 1. See generally E.E. EVANS-PRITCHARD, *WITCHCRAFT, ORACLES, AND MAGIC AMONG THE AZANDE* *passim* (abridged ed. 1976).

explained either by the realist view of doctrine as fraud, or by what I take to be the current mainstream view that doctrinal reasoning is incomplete but can be redeemed by combining it with policy analysis.¹⁵ Comparing the doctrine–skepticism combination in modern legal practice to magic–skepticism in other cultures does two things. First, it is a way to make strange the ordinary—to help us recognize that the situation we take for granted merits critical investigation.¹⁶ Second, the comparison with ritual magic allows me to draw upon the observations and insights of anthropologists who have explored the puzzling combination of practice and skepticism in other social contexts.

Even with the benefit of comparative anthropology, however, it is not obvious why purportedly determinate decision-making techniques should survive once they are unmasked as indeterminate. Moreover, in a democratic society, there is reason to be particularly concerned about this contradiction: In a government “of laws and not of men,”¹⁷ judges’ continued use of apparently indeterminate doctrinal techniques threatens the legitimacy of their legal decisions. After all, at the most basic level, law is supposed to provide a way to make decisions based on something other than individual choices.¹⁸ A judicial technique that only *seems* to determine outcomes threatens both this basic principle and the democratic norm of transparency.¹⁹ Nevertheless, legal scholarship’s main approach to the contradiction between realism and doctrinalism today is uncritical acceptance.²⁰ This Article confronts the realist challenge in one of law’s

15. See RICHARD A. POSNER, HOW JUDGES THINK 376 (2008) [hereinafter POSNER, HOW JUDGES THINK]; Hans A. Linde, *Courts and Torts: “Public Policy” Without Public Politics?*, 28 VAL. U. L. REV. 821, 841–42 (1993) (noting a “generational change in style” from the first *Restatement of Torts* in 1935 and the drafts of the third Restatement; the first two made no policy justifications, but drafts of the third have given policy rationales to explain various tort doctrines); Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 2–5 (1996) [hereinafter Posner, *Pragmatic Adjudication*].

16. The playwright and director Bertolt Brecht adopted a stylistic technique that he called the “*verfremdungseffekt*,” literally translated as the “making strange effect.” Brecht’s goal was to prevent his audience from accepting his plays as a naturally unfolding series of events and thus to engage the audience’s critical political judgment of the action on stage.

17. 4 JOHN ADAMS, “*Novanglus Papers*” No. 7, in THE WORKS OF JOHN ADAMS 106 (AMS Press ed., 1971) (1851).

18. See Bybee, *supra* note 13, at 306 (“[T]he rule of law, in its essence, is a matter of requiring people to ‘look outside [their] own will for criteria of judgment.’” (alteration in original) (quoting LIEF H. CARTER & THOMAS F. BURKE, REASON IN LAW 147 (7th ed. 2007))).

19. Transparency is generally considered to be one of the fundamental norms of democracy. For example, see Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 888 (2006), who describes transparency as “defined broadly as a governing institution’s openness to the gaze of others,” and as a “fundamental attribute of democracy.” However, Fenster goes on to analyze the many problems and complications with realizing the virtue of transparency. See *id.* at 889–92.

20. Of course there are exceptions. Some critics continue to attack the use of doctrinal reasoning as hypocritical or delusional. See generally DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE] (1997); PIERRE SCHLAG, THE ENCHANTMENT OF REASON *passim* (1998). And, recently, a few scholars have begun to call attention to the combination of realist attitudes and doctrinal forms and to propose new approaches to understanding their coexistence. See KEITH J. BYBEE, ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW 4–6, 32–33 (2010); Bybee, *supra* note 13, at 306–07; Nourse, *supra* note 3, at 792; Solum *supra* note 5, at 207–08; Tamanaha *supra* note 8, at 85–88, 90–91.

most problematic doctrinal areas— proximate cause—and offers new ways to understand the uneasy combination of doctrine and skeptical critique that characterize judicial decision making.

The Article proceeds in four parts. Part I establishes proximate cause as a particularly extreme example of doctrine that has hung on despite longstanding skepticism about its ability to decide or even constrain legal outcomes. Indeed, even those who might challenge my assessment of widespread doctrinal skepticism would likely agree that proximate cause doctrines are dubious. All three *Restatements of Torts* have presented traditional proximate cause tests as deeply vexed.²¹ For over a century, these doctrinal formulas have been characterized as too flexible to determine liability.²² Yet courts deciding negligence issues routinely invoke proximate cause, asking whether a plaintiff's injury was "foreseeable" or the "direct" consequence of a defendant's conduct. More important, judges sometimes criticize the tests of proximate cause as indeterminate and confusing *in the same cases* where they struggle to apply those doctrines. For example, an 1876 Supreme Court opinion notes "the oft-embarrassing question, what is and what is not the proximate cause of an injury," and then proceeds to the doctrinal analysis.²³

21. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM 6 special note (2010) (taking an explicit "[s]cope of [l]iability" approach and explaining that the term "proximate cause" is an "especially poor one to describe the idea to which it is connected," i.e., limited liability, and is only included because its use remains widespread in practice and scholarship); RESTATEMENT (SECOND) OF TORTS § 435 cmt. d (1965) (discussing the frequent impossibility of reconciling an actor's inability to foresee accidents *ex ante* and a court's ability to declare them foreseeable *ex post*); RESTATEMENT (SECOND) OF TORTS § 435 cmt. e (1965) ("It is impossible to state any definite rules by which it can be determined that a particular result of the actor's negligent conduct is or is not so highly extraordinary as to prevent the conduct from being a legal cause of that result."); RESTATEMENT (FIRST) OF TORTS § 433 cmt. e (1934); RESTATEMENT (FIRST) OF TORTS § 433 cmt. f (1934). *But cf.* H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW 79–102 (1st ed. 1959); Mark F. Grady, *Proximate Cause Decoded*, 50 UCLA L. REV. 293, 301 (2002) ("The two major doctrines of proximate cause, direct consequences and reasonable foresight, are not mutually exclusive; instead, they represent different perspectives, both of which can sometimes apply to the same accident. The best way to approach proximate cause is to break it down into these two perspectives and then to subdivide the pieces. Each of the perspectives contains distinct paradigms.").

22. See *Am. Sheet & Tin Plate Co. v. Urbanski*, 162 F. 91, 94 (3d Cir. 1908) ("The varying circumstances of each particular case make it difficult, if not impossible, to lay down any general rule, or establish any test, by which the legal proximate cause of an event may be distinguished from the remote cause that is outside of legal cognizance."); *Evansville Veneer & Lumber Co. v. Clayton*, 78 N.E. 1045, 1047 (Ind. Ct. App. 1906) ("[T]he issue of proximate cause is considered an issue of fact although its determination sometimes requires the application of difficult and obtuse rules of law."); *Lewis v. Flint & P.M. Ry.*, 19 N.W. 744, 748–49 (Mich. 1884) ("[A]pplication of the rule that the proximate and not the remote cause is to be regarded, is obscure and difficult in many cases . . ."); *Huffman v. Sorenson*, 76 S.E. 183, 186–87 (Va. 1953) ("Proximate cause is a concept difficult to define and almost impossible to explain conclusively. Each case must be decided upon its own facts and circumstances."); *Scobba v. City of Seattle*, 198 P.2d 805, 809–11 (Wash. 1948) ("[I]t is often difficult to apply the rule [of proximate cause] to any given set of facts . . ."). See generally LEON GREEN, RATIONALE OF PROXIMATE CAUSE *passim* (1927); Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211 *passim* (1924).

23. *Milwaukee & St. Paul Ry. v. Kellogg*, 94 U.S. 469, 474–75 (1876).

Part II takes off from the realists' critique of doctrinal "word ritual"²⁴ to compare aspects of proximate cause analysis with magical practices in other cultures. Before tackling the role of skepticism in both contexts, I identify some similarities between doctrinal practices and magic. For the legal realists, proximate cause was a paradigmatic example of law's magic words,²⁵ and it turns out to be possible to identify a number of magical techniques from other cultures in judges' use of proximate cause doctrines. Among other things, the familiar proximate cause tests of foreseeability and direct connection mirror associations of similarity and contagion that are thought to produce magical effects.

Part III makes the case that incorporating skepticism into doctrinal analysis actually strengthens doctrinal practice. I argue that the skeptical critique of proximate cause resembles a ritual unmasking that increases, rather than diminishes, practitioners' power. What the anthropologist Michael Taussig calls "the skilled revelation of skilled concealment"²⁶ is part of many a magic ritual in other contexts. The comparison with magic therefore suggests a possible solution to the mystery of proximate cause's persistence in the face of equally persistent criticism. If revealing illusion is part of how magic works, revealing proximate cause doctrines' indeterminacy similarly may strengthen, rather than disrupt, the power of adjudicative magic.

But anthropological accounts of magic do not offer any definite explanation of *how* skepticism works to strengthen magical practices. I propose that in both magical and judicial settings, revealing illusion may be a way to incorporate and transcend doubts about the authenticity and efficacy of an obviously artificial practice. When practitioners reveal artifice, they articulate and embrace doubts about the efficacy of those techniques. In so doing, practitioners relieve their own, and their audience's, need to suppress those doubts in order to accept magic or legal practice as authentic and valuable. Instead of working to hold off skepticism, the participants and audience are freed to concentrate on the skill of the magical or legal practitioner as he struggles with an admittedly dubious technique to produce results that appear legitimate. Instead of a conflict between practitioners' attempts to maintain illusion and skepticism about authenticity, the judge or magician joins skeptics in recognizing the limits of his practice, freeing them to marvel at the skill with which he uses those same, limited formal techniques to produce results that are recognizably magical or legal. Selective exposure of practical artifice may thus inspire overall confidence in the practitioner's efforts to circumvent illusion and deliver real results. From this perspective, doc-

24. Green, *supra* note 11, at 1016.

25. *See id.* at 1022; Cohen, *supra* note 11, at 820.

26. Taussig, *supra* note 1, at 222.

trinal tests like proximate cause exist in part to be debunked. But do such revelations tend to legitimize or delegitimize legal power?

In Part IV, I conclude by offering some thoughts about the differences between the magical and legal contexts, and about how the ritual unmasking of doctrinal indeterminacy affects law's legitimacy.

I. THE PERSISTENCE OF PROXIMATE CAUSE

There may be no legal term in as widespread usage as proximate cause that has been as excoriated as it has.

—Restatement (Third) of Torts²⁷

The language of proximate cause is remarkably resilient. For over a hundred years, lawyers, judges, and juries have analyzed whether a defendant's negligent conduct was the "proximate cause" of a plaintiff's injury (and so a source of liability) based on the "foreseeability" of the injury, or its "direct," "natural," or "continuous" connection with the negligence. For nearly as long, these doctrinal tests, and the term "proximate cause" itself, have been criticized as irrational and confusing.²⁸ Over the years, there have been many highly developed attempts to clarify proximate cause doctrines and to rationalize them as determinate tests of liability.²⁹ All these Herculean efforts have failed.³⁰ Generations of respected critics have argued that doctrinal proximate cause is simply beside the point, or worse, that it obscures and interferes with whatever evaluative analysis actually does, or should, determine liability.³¹ Wheth-

27. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 29 reporters' note cmt. b (2010).

28. Empirical studies indicate that jurors often think they have been asked to determine whether a defendant's act was the "approximate" cause of the plaintiff's harm. See Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1353 (1979) (finding almost one-fourth of subjects misunderstood instruction on proximate cause in this fashion); see also 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE LAW OF TORTS* 744 (2d ed. 1986) (arguing that treating scope of liability as a matter of proximate cause "prevents clarity of thought and meaningful analysis"); JOSEPH A. PAGE, *TORTS: PROXIMATE CAUSE* 6 (2003) (describing proximate cause as a "cryptic expression"); Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 106-08 (1911) (collecting critiques of proximate cause usage and characterizing it as the source of "infinite confusion and error").

29. See, e.g., Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 636 (1920); Grady, *supra* note 21, at 293-94; HART & HONORÉ, *supra* note 21.

30. "Modern tort theorists have lavished seemingly boundless attention on the problem of explaining proximate cause, but the consensus of law students and others is that proximate cause remains a hopeless riddle." Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 49-50 (1991).

31. See GREEN, *supra* note 22, at 76-77; W. PAGE KEETON ET AL., *PROSSER AND KEATON ON TORTS* 263 (5th ed. 1984); RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM 6 special note (2010); Joseph W. Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 COLUM. L. REV. 16, 36 (1909); Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 544 (1962); Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1011 (1988).

er they view negligence liability as based on unexamined personal preferences or a rational application of social and economic policies, most analysts agree that the doctrinal approach to proximate cause cannot produce predictable results. There have been three *Restatements of Torts*, and not one of them has embraced the traditional language of proximate cause.³² Yet the doctrines endure. And instead of displacing the doctrines, the criticisms appear in some of the same cases that deploy doctrinal analysis.

A. Proximate Cause Doctrines: Foreseeability and Continuity

Most courts adjudicating negligence claims involving harm perceived to be in some way extraordinary engage in doctrinal proximate cause analysis.³³ They apply some combination of two standard doctrinal tests that purport to determine when a defendant is still liable to the plaintiff for the injuries despite the unusual way the defendant's action contributed to the plaintiff's harm, or the unusual type or amount of harm. Commentators generally agree that standard doctrinal proximate cause covers two traditional doctrines: foreseeability and direct continuity.³⁴ Courts analyze and describe the causal connections and remedial ramifications of defendants' conduct by analyzing (1) the foreseeability of the plaintiff's injury and (2) the extent to which the injury was the direct, continuous, or natural result of the defendant's risky behavior, or whether other factors "intervened" to "break the causal chain."³⁵ For

32. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 (2010) ("An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."); RESTATEMENT (SECOND) OF TORTS § 431 (1965) ("The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."); RESTATEMENT (FIRST) OF TORTS § 431 (1934). The most recent Restatement expresses some frustrated wonder at this state of affairs:

Although the term "proximate cause" has been in widespread use in judicial opinions, treatises, casebooks, and scholarship, the term is not generally employed in this Chapter because it is an especially poor one to describe the idea to which it is connected. See § 29 comment *b*. Hence, this Chapter is entitled, "Scope of Liability." . . . Nevertheless, to communicate clearly with judges, lawyers, and academics who understand limitations on liability under the proximate-cause rubric, the term is included in a parenthetical following the Chapter's title. The Institute fervently hopes that the Restatement Fourth of Torts will not find this parenthetical necessary.

RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM 6 special Note (2010).

33. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. f (2010); Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1042 (2001).

34. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 reporters' note cmt. b, (2010); Kelley, *supra* note 30, at 52; Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 996 (2001).

35. See *Kellogg v. Chicago & Nw. Ry.*, 26 Wis. 223, 253–54 (1870); RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 reporters' note cmt. b (2010); Kelley, *supra* note 30, at 52; Kelley, *supra* note 33. Most commentators frame the tests as "foreseeability" and "directness," or "direct connection," or "direct consequences." Most commentators also seem to segregate "natural and continuous" from "direct"; perhaps viewing foreseeability and directness as two different glosses on the more general "natural and continuous" analysis. I read "natural and continuous" and "di-

instance, in a famous case from 1968 that still appears in the proximate cause chapter of torts casebooks,³⁶ the Second Circuit concluded that “recovery was properly denied on the facts of this case because the injuries . . . were too ‘remote’ or ‘indirect’ a consequence of defendants’ negligence.”³⁷

Judges generally articulate the proximate cause issue as a factual question, and most standard jury instructions have a section on proximate cause that draws on one or both of the doctrines of foreseeability and direct connection.³⁸ So, for instance, the New York pattern jury instructions explain, “If you find that a reasonably prudent person would not have foreseen an act of the kind committed by [a third person] as a probable consequence of the defendant’s negligence, then the defendant is not responsible for the plaintiff’s injuries and plaintiff may not recover.”³⁹ Alternatively, the Florida jury instruction counsels, “Negligence is a legal cause of [injury] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [injury], so that it can reasonably be said that, but for the negligence, the [injury] would not have occurred.”⁴⁰

Some commentators identify a historical trend in which courts have shifted away from the direct continuity test to focus on foreseeability.⁴¹ For example, Jane Stapleton explains that “[h]istorically . . . there have been two alternative general rules The directness rule extends to all outcomes, even if not foreseeable, so long as they are the ‘direct’ result of the tortious conduct. The more popular modern rule is that of foreseeability: freakish, ‘unforeseeable’ outcomes are outside the scope of liability.”⁴² Although this comment might suggest that the shift to foreseeability represents some form of rationalizing progress, and a narrowing of liability, Stapleton herself points out that it is widely recognized that in

rect” as two ways of stressing the concept of continuous events, and “foreseeable” and “probable” as expressing the concept of imaginable events.

36. See, e.g., VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 442–43 (3d ed. 2005); JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 322 (2004).

37. *In re Kinsman Transit Co.*, 388 F.2d 821, 824 (2d Cir. 1968).

38. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. b. (2010).

39. New York Pattern Jury Instructions: Civil 2:72 (3d ed. 2012).

40. Florida Standard Jury Instructions: Civil CLE 4-1 § 401.12(a) (2010).

41. See, e.g., Deanna Pollard Sacks, *Constitutionalized Negligence*, 89 WASH. U. L. REV. 1065, 1131 (2012) (“Foreseeability of harm is the cornerstone of modern proximate cause analysis.”); Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 FORDHAM L. REV. 1241, 1278 & n.220 (2011) (“Today, almost all states use either the foreseeability test or the scope of the risk test,” which “essentially ask the same question,” whereas previously “[t]he most common test was the directness test.”); Keith N. Hylton, *Property Rules, Liability Rules & Immunity: An Application to Cyberspace*, 87 B.U. L. REV. 1, 31 (2007) (stating that previously courts focused on intervention that broke the chain of causation, but “[m]ore modern cases tend to rely on the general concept of foreseeability”).

42. Stapleton, *supra* note 34.

many cases either test will generate “or can be made to produce” the same result.⁴³

When one looks at the cases, conceptual and chronological separations between the two doctrines break down.⁴⁴ Many judicial opinions—both early and recent—combine the concepts of direct continuity and foreseeability as two aspects of the proximate cause analysis.⁴⁵ In fact, since courts began discussing proximate cause, they have employed both direct continuity and foreseeability and complained about both. For instance, in 1876 the United States Supreme Court explained:

The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? . . . [I]n order to warrant a finding that negligence . . . is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.⁴⁶

This nineteenth century case thus effectively combines foreseeability with the test of continuity.⁴⁷ Rather than an alternative or limitation to the standard of direct continuity, in this approach foreseeability is part of what *defines* direct connection.⁴⁸

43. *Id.* (“[I]t is widely acknowledged that in practice both approaches produce, or can be made to produce, the same results . . .” (citing RICHARD A. EPSTEIN, *TORTS* 264 (1999); Kelley, *supra* note 30, at 52, 94; William J. Powers, *Reputology*, 12 *CARDOZO L. REV.* 1941, 1948 (1991)).

44. So, for instance, in another case classically included in torts casebooks, Judge Henry Friendly explained: “The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are ‘direct,’ and the damage, although other and greater than expected, is of the same general sort that was risked.” *In re Kinsman Transit Co.*, 338 F.2d 708, 724 (2d Cir. 1964); *see also* *Linder v. Bidner*, 270 N.Y.S.2d 427, 429–30 (App. Div. 1966); JOHNSON & GUNN, *supra* note 36, at 439–40; GOLDBERG, SEBOK & ZIPURSKY, *supra* note 36, at 311–20.

45. *See, e.g.*, *Milwaukee & Saint Paul Ry. v. Kellogg*, 94 U.S. 469, 475 (1876); *Williamson v. Liptzin*, 539 S.E.2d 313, 319–20 (N.C. Ct. App. 2000) (“Foreseeability is but one element of proximate cause Other equally important considerations include . . . whether there is a direct connection without intervening causes” (internal quotations marks omitted)).

46. *Kellogg*, 94 U.S. at 475.

47. *Id.* at 474.

48. Many old cases combine foreseeability and direct connection in their proximate cause analyses. *See, e.g.*, *Harris v. Union Pac. Ry.*, 13 F. 591, 592 (C.C.D. Colo. 1882) (“Proximate cause . . . must [be] the natural and ordinary result of the cause; or, in other words, the question here may be stated to be whether a reasonably prudent and cautious person ought to have apprehended that the injury might result from the act which was done.” (internal quotation marks omitted)); *Ultima Thule v. Benton*, 110 S.W. 1037, 1038 (Ark. 1908) (“It is generally held that, in order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.” (quoting and adopting *Milwaukee & Saint Paul Ry. v. Kellogg*, 94 U.S. 469, 475 (1876)) (internal quotation marks omitted)); *Kleinberg v. Lyons*, 148 S.E. 535, 539 (Ga. 1929) (“[I]n order to hold the defendant liable, the evidence must show either that the act of the defendant complained of was the sole occasion of the injury, or that it put in operation other causal forces, such as were the direct, natural, and probable consequences of the original act, or

Although the modern cases often talk more about foreseeability, they typically still mix that concept with the idea of unbroken continuity, as courts have been doing for a very long time.⁴⁹ In recent cases, concepts of direct connection and unbroken causal chains remain active.⁵⁰ Foreseeability has received more attention from academics in recent years and is often presented as a rationalizing improvement that is gradu-

that the intervening agency could have reasonably been anticipated or foreseen by the original wrongdoer.”); *Guinan v. Famous Players-Lasky Corp.*, 167 N.E. 235, 243 (Mass. 1929) (“The injury must be the direct result of the wrongful act. By direct and proximate cause is not meant that the cause of agency which is nearest in time or place to the result is necessarily to be chosen. It will not be considered too remote if, according to human experience, the defendant ought to have foreseen that the intervening act was likely to happen.”); *Lane v. Atlanta Works*, 111 Mass. 136, 139–40 (1872) (“The act of a third person, intervening and contributing a condition necessary to the injurious effect or the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury.”); *Galveston v. Sweeney*, 6 Tex. Civ. App. 173, 178 (1894) (“[P]roximate cause’ is . . . such an act, wanting in ordinary care, as actively aided in producing the injury, as a direct and existing cause. It need not necessarily be the last or sole cause, but it must be a concurring cause, such as might reasonably have been contemplated as involving the result, under the attending circumstances.”).

49. See, e.g., *Jarosh v. Van Meter*, 105 N.W.2d 531, 537 (Neb. 1960) (“To constitute proximate cause, . . . the injury must be the natural and probable result of the negligence, and be of such a character as an ordinarily prudent person could have known, or would or ought to have foreseen might probably occur as the result.” (quoting *Steenbock v. Omaha Cnty. Club*, 195 N.W. 117, 118 (Neb. 1923)) (internal quotation marks omitted)); *Welsh v. Zuck*, 218 N.W.2d 236, 240 (Neb. 1974) (“[A] person is not legally responsible for an injury if it would not have resulted but for the interposition of an efficient intervening cause, which he should not have reasonably anticipated.”); *Wyatt v. Gilmore*, 290 S.E.2d 790, 791 (N.C. Ct. App. 1982) (“Foreseeability is only one element of proximate cause, [others include] whether the cause is . . . likely to produce the result; whether the relationship between cause and effect is too attenuated; whether there is a direct connection without intervening causes; . . . and whether there was a . . . continuous sequence between the cause and the result.”); *Thompson v. Presbyterian Hosp., Inc.*, 652 P.2d 260, 263–64 (Okla. 1982) (“The general rule is that the causal connection between an act of negligence and an injury is broken by the intervention of a new, independent and efficient cause which was neither anticipated nor reasonably foreseeable.”); *Medina v. Air-Mite Devices, Inc.*, 515 N.E.2d 770, 773 (Ill. App. Ct. 1987) (“The causal connection between the defective product and the injury will only be broken if the intervening acts or omissions of a third party are improbable or unforeseeable, and, thus, superseding.”).

50. See, e.g., *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 828–29 (Del. 1995) (“[A] proximate cause is one ‘which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.’ . . . The mere occurrence of an intervening cause . . . does not automatically break the chain of causation In order to break the causal chain, the intervening cause must also be a superseding cause, that is, the intervening act or event itself must have been neither anticipated nor reasonably foreseeable by the original tortfeasor.” (quoting *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1990))); *Gibbs v. Hernandez*, 810 So. 2d 1034, 1037 (Fla. Dist. Ct. App. 2002) (blending a “natural, direct and continuous sequence” requirement with foreseeability); *Hassan v. Begley*, 836 N.E.2d 303, 308 (Ind. Ct. App. 2005) (“The key to determining whether an intervening agency has broken the original chain of causation is to determine whether, under the circumstances, it was reasonably foreseeable that the agency would intervene in such a way as to cause the resulting injury.”); *Edwards ex rel. Fryover v. Anderson Eng’g, Inc.*, 251 P.3d 660, 665 (Kan. Ct. App. 2011) (“[T]he acts or omissions of these defendants were entirely ‘too attenuated’ to be a usual, likely, or legally cognizable cause of [the plaintiff’s] fatal injuries. . . . [N]egligent acts of others . . . broke the connection between the initial negligent acts and the harm caused. . . . These intervening acts or consequences cannot be said to be foreseeable.”); *Crowe v. Shaw*, 755 A.2d 509, 512 (Me. 2000) (finding that proximate cause may be proven if “the injury or damage was either a direct result or a reasonably foreseeable consequence of the negligence”); *Am. States Ins. Co. v. Caputo*, 710 N.E.2d 731, 735 (Ohio Ct. App. 1998) (“Proximate cause is an act or failure to act, which in the natural and continuous sequence directly produces the damage, and without which it would not have occurred. Cause occurs when the damage is the natural and foreseeable result of the act or failure to act.”).

ally displacing “an even vaguer and more amorphous limit on liability.”⁵¹ But the history is much more troubled, mixing doctrines of continuity and foreseeability with critiques of both.

B. Critiques of Proximate Cause

Alongside the continued use of proximate cause doctrines, skepticism abides. And just as the tests of directness and foreseeability do not fit readily into a narrative of progress, longstanding criticism has failed to generate a developmental shift away from doctrinal proximate cause analysis. Rather than displacing doctrine, the critiques coexist. Sometimes the conflict between doctrine and skepticism is presented as an argument between courts and the academy.⁵² But that division fails to capture the extent to which the application and critique of doctrine intermingle and thrive alongside one another. Academics rationalize the doctrines they critique, and judges have long recognized and acknowledged that doctrinal proximate cause analyses are problematic.⁵³

There is an astonishingly broad consensus that the standard doctrinal inquiries are deeply flawed to the point of disutility. Moreover, criticism of proximate cause is nearly as old as the doctrines.⁵⁴ There are two primary critiques: (1) the doctrines are indeterminate; and (2) doctrinal proximate cause mixes empirical and normative analysis (and tends to obscure the normative part). These two main criticisms had crystallized

51. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM, § 29 cmt. e (2010).

52. “No subject separates torts scholars from practitioners more than proximate cause.” Richard L. Cupp, Jr., *Proximate Cause, the Proposed Basic Principles Statement, and Products Liability*, 53 S. C. L. REV. 1085, 1085 (2002).

53. See, e.g., *Am. Sheet & Tin Plate Co. v. Urbanski*, 162 F. 91, 94 (3d Cir. 1908) (“The question of proximate cause is likely to lead us into undue refinements and subtlety of disquisition, if we do not guard ourselves therefrom, by taking a common sense view point from which to consider the happenings of ordinary and everyday life. The varying circumstances of each particular case make it difficult, if not impossible, to lay down any general rule, or establish any test, by which the legal proximate cause of an event may be distinguished from the remote cause that is outside of legal cognizance.”); *Evansville Veneer & Lumber Co. v. Claybon*, 73 N.E.2d 698, 700 (Ind. App. 1947) (“[P]roximate cause is considered an issue of fact although its determination sometimes requires the application of difficult and obtuse rules of law.”); *Hoover v. Wagner*, 189 So. 2d 20, 27 (La. Ct. App. 1966) (“[T]he various definitions and tests of proximate cause are inadequate to afford a definite and invariable rule whereby a line can be drawn between those causes which the law regards as sufficiently proximate and those which are too remote”); *Lewis v. Flint & P.M. Ry.*, 19 N.W. 744, 748 (Mich. 1884) (“The application of the rule that the proximate and not the remote cause is to be regarded, is obscure and difficult in many cases, but not in this.”); *White v. Diaz*, 854 N.Y.S.2d 106, 106 (App. Div. 2008) (“The resolution of proximate cause issues has been troubling courts and legal scholars for centuries”); *Fannin v. Cubric*, 255 N.E.2d 270, 278 (Ohio Ct. App. 1970) (“The term, ‘proximate cause,’ is often difficult of exact definition as applied to the facts of a particular case.”); *Huffman v. Sorenson*, 76 S.E.2d 183, 186 (Va. 1953) (“Proximate cause is a concept difficult to define and almost impossible to explain conclusively. Each case necessarily must be decided upon its own facts and circumstances.”); *Scobba v. City of Seattle*, 198 P.2d 805, 810 (Wash. 1948) (“Making [a proximate cause] determination is something like drawing ‘a line between night and day.’”).

54. See, e.g., Bingham, *supra* note 31, at 25 (arguing that any question beyond the initial but-for causation question is not a causal question at all and formulating that question in causal terms is misleading because “[i]t naturally induces misapprehension that the inquiry in any concrete instance concerns only some subtle distinction between different kinds of causes in the ‘chain of causation’”).

by at least the 1920s in the writings of the legal realists, although proximate cause doctrines were questioned long before that time.⁵⁵ The critiques are radical. Many analysts assert directly that foreseeability and continuity have little or nothing to do with the social, economic, and moral values that actually do, or should, determine negligence liability. Despite their apparent conflict, both the doctrines and criticism of proximate cause remain central to tort theory.

The most recent serious attempt to reform proximate cause language in negligence law came in 2010 with the publication of the first volume of the *Restatement (Third) of Torts*, a definitionally mainstream source of tort commentary.⁵⁶ Eschewing the term proximate cause, the Restatement reporters proposed assessing the “scope of liability”⁵⁷ under a “risk standard”⁵⁸ they deem superior to the traditional tests of direct continuity, broken and unbroken causal chains, and foreseeability that they acknowledge most judges and juries still undertake.⁵⁹

It was the legal realists, who in the 1920s and 1930s put forward the most direct and sustained critiques of proximate cause, pointing to the flexibility of doctrinal tests and suggesting alternative, overtly value-laden approaches for balancing policy considerations regarding liability.⁶⁰ The realists argued that neither direct continuity nor foreseeability—and for that matter no test involving “cause” in the usual sense of the word—could account for the liability outcomes in cases where courts

55. GREEN, *supra* note 22, at 76–77.

56. *See generally* RESTATEMENT (THIRD) OF TORTS ch. 6 (2010).

57. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. d (2010) (“Central to the limitation on liability of this Section is the idea that an actor should be held liable only for harm that was among the potential harms—the risks—that made the actor’s conduct tortious. The term ‘scope of liability’ is employed to distinguish those harms that fall within this standard and, thus, for which the defendant is subject to liability.”).

58. *Id.* (“[T]he jury should be told that, in deciding whether plaintiff’s harm is within the scope of liability, it should go back to the reasons for finding the defendant engaged in negligent or other tortious conduct. If the harms risked by that tortious conduct include the general sort of harm suffered by the plaintiff, the defendant is subject to liability for the plaintiff’s harm. . . . The standard imposed by this Section is often referred to as the requirement that the harm be ‘within the scope of the risk.’ . . . For the sake of convenience, this limitation on liability is referred to in the remainder of this Chapter as the ‘risk standard.’”).

59. *Id.* at § 29 cmt. e (“Currently, virtually all jurisdictions employ a foreseeability (or risk) standard for some range of scope-of-liability issues in negligence cases. When properly understood and framed, the foreseeability standard is congruent with the risk standard At least some courts have employed language that veers closer to the formulation of the risk standard provided in this Section than does a foreseeability test. . . . The primary alternative rule to the risk standard for limiting a tortfeasor’s liability is the direct-consequences test.”).

60. Critiques of proximate cause go back even farther. In 1870, Nicholas St. John Green, one of Holmes’s colleagues on the Harvard faculty, attacked the direct continuity doctrine as a “dangerous metaphor.” NICHOLAS ST. JOHN GREEN, *Proximate and Remote Cause*, in *ESSAYS AND NOTES ON THE LAW OF TORT AND CRIME* 124 (1933) [1870], *reprinted in* 5 *KAN. CITY L. REV.* 114, 124 (1937). For St. John Green, the notion of a continuous causal “chain” was a “pure fabrication of the mind.” *Id.* He pointed out that the idea of a sequence of individual causes linking each to each did not correspond to the way the world actually worked, and that in order to maintain that fiction, courts were relegating some actual causes to the status of background “conditions.” *Id.* at 125. His solution, however, was itself doctrinal—he advocated the foreseeability doctrine. *Id.* at 129.

talked about proximate cause. In an early influential article, Henry Edgerton criticized both direct continuity and foreseeability as ambiguous.⁶¹ Edgerton saw these concepts as simply too flexible to meaningfully restrain a judge's liability analysis.⁶² Regarding "direct" cause, Edgerton asked, "Is not directness a matter of degree?" Answering his own question, he explained:

In most cases . . . the connection between the defendant's act and the plaintiff's injury may well be regarded . . . as involving a single step, or as involving several steps. The question is simply how far one's taste will take him in the subdivision of what is indefinitely, or infinitely, subdivisible. Tastes differ.⁶³

Edgerton recognized foreseeability as a similarly plastic concept:

Is the "foreseen danger" a danger of the intervention of the identical force which does intervene, or is it enough if there is danger of the intervention of a force of similar character; and if the latter, how closely similar must it be?⁶⁴

Thus, the basic indeterminacy of doctrinal proximate cause, which bedevils judges, academics, and law students to this day, was fully articulated over eighty years ago.

The most tenacious realist critic of proximate cause was Leon Green. As far as he was concerned, doctrinal analysis of foreseeability and direct continuity ignored the policy questions judges should and did consider in negligence cases.⁶⁵ The term "cause" properly referred to only a narrow range of empirical questions and not to the normative issues of responsibility that proximate cause analysis usually included.⁶⁶ According to Green, judges' resort to "metaphysical" doctrinal reasoning in such cases covered up what were really judicial determinations of "public policy, a balancing of interests, with the conclusion that it is better to deny protection to the interest involved under such circumstances than it is to undertake to give compensation under all the difficulties of the case."⁶⁷ The real question was the "scope of protection" of the legal

61. See generally Edgerton, *supra* note 22 *passim*.

62. *Id.* at 211.

63. *Id.* at 215.

64. *Id.* at 231.

65. Leon Green, *Contributory Negligence and Proximate Cause*, 6 N.C. L. REV. 3, 3, 20 (1927) ("The attempt which common law courts have made to resolve every major problem of legal liability in tort into terms of causal relation marks the most glaring and persistent fallacy in tort law."); see also GREEN, *supra* note 22, at 76-77; Kelley, *supra* note 30, at 98 (citing LEON GREEN, JUDGE AND JURY 265-67 (1930)).

66. GREEN, *supra* note 22, at 2-5 ("[T]he abortive efforts which have been made to solve the inquiries of prime importance in terms of causal connection cannot be exaggerated. The deplorable expenditure and stupendous waste of judicial energy which has been employed in converting this simple problem into an insoluble riddle beggars description.")

67. Leon Green, *Causal Relation in Legal Liability—In Tort*, 36 YALE L.J. 513, 532 (1927) (citations omitted).

rule or norms on which the claim was based.⁶⁸ That policy determination had nothing to do with cause or with metaphorical connections between plaintiff and defendant, whether articulated in terms of direct causal chains or foreseeability: "This problem, however phrased, is one of balancing of interests."⁶⁹

To Green, proximate cause was pure illusion—a fallacy that obscured or displaced the real analyses that courts should and did make. "[T]he myth of 'proximate cause,'" he said, "finds its only rivals in those of theological origin."⁷⁰ Courts were using these "fantastic" doctrines to "do . . . under the guise of 'proximate cause' what should have been done by way of defining the scope of protection" the law provided, an analysis that was properly conducted by overtly balancing a number of different policy concerns.⁷¹

Green did not pull punches. Courts' focus on foreseeability in proximate cause determinations was "stupid" because it repeated a test already used to determine negligence in the first place.⁷² The "confused" doctrinal approach was a "wretched" approach to liability "inexcusably perpetrated by intelligent judges and utterly devoid of scientific foundation."⁷³ Their "use of all those weighted phrases as 'remote,' 'unforeseen,' 'intervening agencies,' 'independent agencies,' and a score of others" were "meaningless as solvents" and only functioned to "provide a smoke screen behind which the court can retire from an awkward position."⁷⁴

For the realists, then, doctrinal determinacy was simply false—a fraud or a fantasy. They were (mostly) willing to do away with it in favor of a more overt and rational version of what they believed judges were *really* doing anyway, namely policy analysis. Green offered a list of factors for courts to consider when deciding negligence liability, and acknowledged that the ultimate balance a court would strike would depend on judges' individual points of view.⁷⁵ Edgerton embraced indefiniteness as a necessary reality of what he saw as an individual decision-

68. *Id.*

69. *Id.*

70. GREEN, *supra* note 22, at 136. Green's arguments are wonderfully free of the kind of academic circumspection that characterizes so much legal academic prose today. In another bracingly direct description, he called proximate cause "a bogey, the sort of thing found only in children's story books—a sort of child's mind creation." *Id.* at v.

71. *Id.* at 77; *see also* Green, *supra* note 11, at 1034 (listing and discussing the five factors that should be overtly balanced—administrative, ethical or moral, economic, prophylactic, and justice—and discussing the administrative factor). *See generally* Leon Green, *The Duty Problem in Negligence Cases*, 29 COLUM. L. REV. 255, 255–84 (1929) (discussing the remaining four factors).

72. GREEN, *supra* note 22, at 76.

73. *Id.* at 77.

74. *Id.* at 76–77.

75. Green, *supra* note 11, at 1034 (listing and discussing the five factors that should be overtly balanced—administrative, ethical or moral, economic, prophylactic, and justice—and discussing the administrative factor).

making process.⁷⁶ He was prepared to rely on judicial “intuition” and “instinct” as the best available methods of legal analysis.⁷⁷

Of course, there is a tremendous price to pay for such a shift. Moving from doctrine to policy means giving up on the central legal concept of decisions produced by something other than the decision maker’s conscious choice. It means accepting decision making that, however well reasoned, is the result of exactly those kinds of deliberate choices. No wonder, then, that many legal decision makers and scholars today embrace the realist view of doctrinal indeterminacy but are unwilling to accept the realist solution of replacing doctrinal analysis with straightforward policy reasoning.⁷⁸

Certainly there are serious jurists and commentators who do not share the realist view of doctrinal indeterminacy in general. Regarding proximate cause, however, there are few serious rebuttals.⁷⁹ Yet despite near universal agreement that proximate cause doctrines are empty, many judges and law professors continue to proceed *as if* those doctrines were capable of determining, or at least contributing meaningfully to, legal outcomes that are then subjected to realist criticism. Often, a doctrinal analysis is followed by questions about whether the results of that analysis fit with the equities in the particular case and broader policy considerations. Indeed, these days the unspoken view often seems to be that doctrinal formulas constitute the basic method for legal decision making, producing inchoate results that are augmented and completed by the decision maker’s policy analysis.⁸⁰ Where doctrines are acknowledged to be indeterminate, however, this is problematic.

76. Edgerton, *supra* note 22.

77. *Id.* at 242–43 (quoting Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 951–52, 956–57 (1923)).

78. But note that even the original realists did not always follow their prescriptions. Jerome Frank, for instance, served as a judge on the U.S. Court of Appeals for the Second Circuit, where his judicial opinions sometimes deride legal doctrines and rules. *See, e.g.*, *United States v. Rubenstein*, 151 F.2d 915, 923 (2d Cir. 1945) (Frank, J., dissenting) (“[O]ur legal concepts often resemble the necks of the flamingos in Alice in Wonderland which failed to remain sufficiently rigid to be used effectively as mallets by the croquet-players.”). Nonetheless, many of his opinions blend doctrine and policy. *See, e.g.*, *Hentschel v. Baby Bathinette Corp.*, 215 F.2d 102, 106–12 (2d Cir. 1954) (Frank, J., dissenting) (engaging in traditional doctrinal proximate cause analysis, though asserting that “[n]o foggier phrase . . . could be contrived for use in negligence cases,” and upon finding injury was foreseeable, adding a policy-based argument to find it unconscionable to allow manufacturers to escape liability on grounds of a threat to free trade or undue liability burdens).

79. Indeed proximate cause is sometimes used as an object lesson for students about the extent of doctrinal indeterminacy. For instance, one longtime torts professor told me that she always brings her crystal ball to class when she teaches proximate cause.

80. *See* TAMANAHA, *supra* note 7; L.H. Larue, “Neither Force Nor Will,” 12 CONSTITUTIONAL COMMENTARY 179, 181 (1995) (“[N]one of us believes that our judges are ‘bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.’” (citing THE FEDERALIST No. 78, at 396 (Alexander Hamilton) (Max Beloff ed., 1987))); W. Bradley Wendel, *Jurisprudence and Judicial Ethics* 1 (Cornell Law Faculty Publ’ns. Paper 96, 2007), http://scholarship.law.cornell.edu/lrsp_papers/96 (“American lawyers and judges do not regard it as improper to rely on ‘policy’ arguments, which are, in effect, middle-level principles of political morality that play a role in justifying legal decisions.”); Felix Frankfurter,

In the case of proximate cause, doctrines of foreseeability and direct connection are simply too malleable to determine a result—initial or final—in a particular factual legal problem.⁸¹ Shifting doctrinal reasoning to the first step in a purported combination doctrine–policy analysis thus fails to add any meaningful constraint on the ultimate decision. Indeterminate doctrines cannot furnish an initial result to be tweaked by policy any more than they can furnish the final liability determination. Moreover, even assuming that doctrine and policy theoretically could be mixed with integrity, the fact remains that most judges express their decisions almost entirely in terms of doctrine even when, as in *Derdiarian v. Felix Contracting Corp.*,⁸² they acknowledge that policy must play a role.⁸³ Indeed, proximate cause is the rare doctrinal area where judges openly acknowledge that policy plays a role.⁸⁴ At the very least, this suggests that many, if not most, judicial practitioners view the mixture of policy and doctrine as problematic, even when they are willing to assert its necessity.

C. Proximate Cause Case Law's Intermittent Combination of Doctrine and Critique

Courts continue to engage in doctrinal proximate cause analysis. From time to time, though, in the midst of that analysis, judges point to proximate cause doctrines' inability to determine liability. Again, this is not a new or even a post-realist phenomenon. In 1876, the U.S. Supreme Court referred to the "embarrassing question" of proximate cause and acknowledged "that the rule is difficult of application."⁸⁵ A hundred years later, in *Derdiarian*, the New York court was even more direct:

Chief Justices I Have Known, 39 VA. L. REV. 883, 905 (1953) (noting that judges must bear "allegiance to nothing except the effort to find their path through precedent, through policy, through history, . . . to the best judgment"); James D. Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 BROOK. L. REV. 323, 333–34 (1971) (arguing that judges will use public policy to decide cases and advocating that judges' remain candid and clear when they do so).

81. Examples of cases in which doctrines do appear to determine results often involve obvious quantitative questions (e.g., whether a deadline has expired). See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000). Though even here there are always equitable arguments available that the deadline should not apply in this particular-case and legal interpretive arguments that the text that codifies the deadline was not "intended" to apply in such cases.

82. 414 N.E.2d 666, 670 (N.Y. 1980).

83. *Id.* at 670; see also *Williamson v. Waldman*, 696 A.2d 14, 19 (N.J. 1997); *Scobba v. City of Seattle*, 198 P.2d 805, 810 (Wash. 1948).

84. See, e.g., *Ashley Cnty. v. Pfizer, Inc.*, 552 F.3d 659, 671 (8th Cir. 2009) ("Proximate cause is bottomed on public policy as a limitation on how far society is willing to extend liability for a defendant's actions."); *Mosley v. Arden Farms Co.*, 157 P.2d 372, 375 (Cal. 1945) (Traynor, J., concurring) ("[P]roximate cause' . . . is ordinarily concerned . . . with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct."); *Fandrey ex rel. Connell v. Am. Family Mut. Ins. Co.*, 680 N.W. 345, 360–61 (Wis. 2004) (concluding that recovery was out of proportion to the culpability of the defendant homeowners and would place an unreasonable burden on similarly situated tortfeasors); *Martinez v. Lazaroff*, 411 N.Y.S.2d 955, 957 (App. Div. 1978) (explaining that proximate cause serves to place reasonable limits on the liability of an actor as a matter of public policy to avoid burdening human activity in ways that would do little to prevent freakish accidents).

85. *Milwaukee & St. Paul Ry. v. Kellogg*, 94 U.S. 469, 474–75 (1876).

“The concept of proximate cause, or more appropriately legal cause, has proven to be an elusive one, incapable of being precisely defined to cover all situations.”⁸⁶

Indeed, the *Derdiarian* court expressly invoked the view that proximate cause stands in for judicial policy making, explaining that the doctrine’s “elusive[ness]” is, “in part, because the concept stems from policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct” and depending on the facts of the individual case, “a variety of factors may be relevant.”⁸⁷ Note that the court first suggests that “policy considerations” are internal to doctrinal proximate cause analysis.⁸⁸ So far, so good, because this is how doctrine and policy *do* fit together. The idea is that doctrine encapsulates policy choices and enforces those choices through tests that *replace* decision makers’ individual policy judgments. The problem comes in what follows: the court acknowledged that, as Henry Edgerton and Leon Green argued, in any given case the application of proximate cause doctrines depends on “a variety of factors.”⁸⁹ Thus, individual policy judgments come back in as the judge decides which factors are relevant. Nevertheless, *Derdiarian* proceeded to a full-fledged doctrinal analysis.

Derdiarian is still heavily cited in New York case law⁹⁰ and included in torts casebooks.⁹¹ The plaintiff was a workman injured at a street construction site. He sued his employer-contractor, claiming that the saw-horse-type barricade protecting the site was a negligently insufficient safety precaution.⁹² After reciting the bizarre facts—an epileptic driver lost consciousness and careened into the work area, hitting the plaintiff and a kettle of boiling hot liquid enamel, which splattered and ignited his body into a fire ball⁹³—the court proceeded to a doctrinal analysis that combines the concepts of foreseeability and unbroken continuity.⁹⁴ Analyzing whether the epileptic driver’s seizure was “a superseding cause which interrupted the link between [the defendant contrac-

86. *Derdiarian*, 414 N.E. 2d at 670.

87. *Id.*

88. *Id.*

89. *Id.*

90. *See, e.g.*, *Merino v. N.Y. City Transit Auth.*, 675 N.E.2d 1222, 1222 (N.Y. 1996); *Mirand v. City of New York*, 637 N.E.2d 263, 266 (N.Y. 1994); *Gordon v. E. Ry. Supply, Inc.*, 626 N.E.2d 912, 915–16 (N.Y. 1993); *Kriz v. Schum*, 549 N.E.2d 1155, 1159–61 (N.Y. 1989); *Goldsmith Motors Corp. v. Chem. Bank*, 838 N.Y.S.2d 631, 632 (App. Div. 2007); *Soomaroo v. Mainco Elevator & Elec. Corp.*, 838 N.Y.S.2d 119, 120 (App. Div. 2007); *Terry v. Danisi Fuel Oil Co.*, 837 N.Y.S.2d 256, 257 (App. Div. 2007); *Fordham-Coleman v. Nat’l Fuel Gas Distrib. Corp.*, 834 N.Y.S.2d 422, 427–28 (App. Div. 2007); *Flynn v. Compton*, 833 N.Y.S.2d 782, 783 (App. Div. 2007); *Pierre v. Lieber*, 829 N.Y.S.2d 665, 666 (App. Div. 2007).

91. *See, e.g.*, *JOHNSON & GUNN, supra* note 36, at 394–96; *VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ’S TORTS* 336–38 (Robert C. Clark et al. eds., 12th ed. 2010).

92. *Derdiarian*, 414 N.E.2d at 669.

93. *Id.*

94. *Id.* at 670–71.

tor's] negligence and plaintiff's injuries,"⁹⁵ the court explained that "liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence."⁹⁶ If the epileptic driver's negligence in breaking through the barricade was "not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct," it might be "a superseding act which breaks the causal nexus."⁹⁷ But the court declined to rule that a "superseding cause . . . interrupted the link between" the defendant's negligence and the plaintiff's injuries, reasoning that a jury could reasonably conclude "that the foreseeable, normal and natural result" of the defendant contractor's negligent failure to provide better barricades "was the injury of a worker by a car entering the improperly protected area."⁹⁸

The application of *Derdarian's* doctrinal analysis in subsequent cases wholly confirms the view that proximate cause is an "elusive," that is, indeterminate, concept.⁹⁹ Consider two cases involving injuries caused by dives into shallow swimming pools. In *Boltax v. Joy Day Camp*,¹⁰⁰ a twenty-year-old man who knew the depth of the water and was "knowledgeable about the general dangers of diving" nevertheless dove head-first from a lifeguard chair into the shallow end of a pool.¹⁰¹ He alleged that the defendant day camp that ran the pool knew young people were using the pool in the evenings and negligently continued to allow them to gain entrance to its pool with dangerously low water and a lifeguard's chair at the shallow end.¹⁰² The court, quoting, inter alia, *Derdarian*, dismissed the case.¹⁰³ The plaintiff diver's "reckless conduct" was an

95. *Id.* at 671.

96. *Id.* at 670.

97. *Id.*

98. *Id.* at 671.

99. See, for example, the following cases, each of which cites *Derdarian*, and yet on arguably similar facts produces opposite liability results, finding no proximate cause: *Rodriguez v. Hernandez*, 830 N.Y.S.2d 780, 781-82 (App. Div. 2007) (concluding that it was not foreseeable that such a crash was likely to occur where plaintiff driver lost control of his vehicle after collision caused him to crash into a shoddily built shed constructed by the city, one piece of which fell through the windshield and pierced plaintiff's thigh); *Allstate Ins. Co. v. Fleury*, No. 5:99-CV-1261, 2007 WL 1200137, at *3-4 (N.D.N.Y. Apr. 20, 2007) (holding that defendant was not liable for damage resulting from a tree on defendant's property touching power lines that caused an electric back feed setting fire to plaintiff's home because defendant could not have reasonably foreseen such a result); *Haughton v. T & J Elec. Corp.*, 765 N.Y.S.2d 664, 666-67 (App. Div. 2003) (upholding summary judgment for defendant university and electrical company, finding that the plaintiff handyman-employee was the proximate cause of his own injuries because checking a circuit box during a campus blackout without protective gear was an intervening act cutting off the university and company's negligence in mislabeling live wires in the circuit box); *Marengi v. N.Y. City Transit Auth.*, 542 N.Y.S.2d 542, 543-44 (1989) (reversing jury verdict for the plaintiff who was injured when a New York City subway conductor re-opened the doors to allow a rushing commuter to board the train and knock over and injure the plaintiff, finding the rushing commuter's actions an unforeseeable, superseding act and citing public-policy concerns).

100. 490 N.E.2d 527 (N.Y. 1986).

101. *Id.* at 528.

102. *Id.*

103. *Id.*

“unforeseeable superseding event,” said the court, that absolved the defendant pool owners of liability in the accident.¹⁰⁴

Three years later, however, the same court allowed another pool case to go forward. In *Kriz v. Schum*,¹⁰⁵ a teenage girl sued the manufacturers and distributors of a pool and pool slide, and the contractor who installed them both.¹⁰⁶ The girl was told by the pool’s owner that it was safe to dive from the pool slide, which was set between the deep and shallow ends of the pool.¹⁰⁷ Indeed, her host exhorted her to dive, informing her that it was a “ritual” for everyone to enter the pool the first time by diving from the top of the slide.¹⁰⁸ Moreover, the accident took place at night, the host had neglected to turn on the pool light, and the plaintiff had removed her contact lenses, so she could not see the depth of the water.¹⁰⁹ The court rejected the slide manufacturer’s proximate cause argument, holding that the lack of posted warnings and the slide’s design and placement between the deep and shallow parts of the pool “were causative factors” in her injuries.¹¹⁰ This time, the court explained, again quoting *Derdiarian*, that “[i]n these circumstances, a superseding act does not break the causal nexus unless it is ‘an intervening act . . . extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant’s conduct.’”¹¹¹ The court noted the opposite result in *Boltax*, and acknowledged that the host’s conduct here may have been reckless, but held that neither his conduct nor the plaintiff’s decision to take a blind dive into a dark, unfamiliar pool were “extraordinary and unforeseeable so as to break the causal chain.”¹¹²

There are aspects of these cases that might make their results equitable, and even predictable, but they have nothing to do with foreseeability or continuity. The *Boltax* plaintiff precluded from recovery was an adult man and a trespasser.¹¹³ Arguably his own fault in the accident would have made it unfair to tag the pool owner—a children’s day camp—with damages.¹¹⁴ The *Kriz* plaintiff was another story: a teenage girl pressured by another teenager to take a ridiculous risk. As between the girl who succumbed to peer pressure to do something stupid and the companies who built, sold, and installed the equipment that facilitated her unfortunate stunt, it was arguably fairer and more economically

104. *Id.*

105. 549 N.E.2d 1155 (N.Y. 1989).

106. *Id.* at 1158.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1160–61.

111. *Id.* at 1161 (quoting *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 670 (1980)).

112. *Id.* at 1161.

113. *Boltax v. Joy Day Camp*, 493 N.Y.S.2d 590, 590 (App. Div. 1985).

114. *Id.*

sound to shift the cost to defendants who surely knew that accidents involving their equipment would happen occasionally and nevertheless went on building and marketing pools and slides, and who could presumably internalize the cost of liability by increasing their products' costs.¹¹⁵

It is not possible, however, to say that the relative foreseeability or directness of the accidents in *Boltax* and *Kriz* can account for their disparate results.¹¹⁶ Whether the defendants could foresee what happened to the plaintiffs depends entirely on the level of generality at which one frames the events to be foreseen. Likewise, the directness of the connection between the plaintiffs' injuries and defendants' acts depends on framing rather than on a consistent analysis. Instead of doctrine internalizing certain values and determining the liability result accordingly, the tests of foreseeability and direct connection are so flexible that they invite the decision maker to adjust the level of generality to make the liability result reflect the decision maker's views about equity and the best social policies under the circumstances. As Edgerton observed eighty years earlier, whether one finds a direct connection between the defendant's conduct and the plaintiff's injury in this type of case is a matter of "taste."¹¹⁷ The New York pool cases are far from atypical in their use of proximate cause doctrines to reach results that seem utterly unpredictable on the basis of those doctrines. Indeed, as the Restatement reports, in jurisdictions across the country those doctrines continue to be employed in negligence cases to produce disparate results in apparently similar circumstances.¹¹⁸

115. Of course, this analysis is one basis for strict liability for product "defects."

116. See sources cited *supra* note 99.

117. Edgerton, *supra* note 22, at 215.

118. Compare *First Springfield Bank & Trust v. Galman*, 720 N.E.2d 1068, 1073-74 (Ill. 1999) (reversing jury verdict for plaintiff and finding defendant not the proximate cause of death of a student killed crossing the street mid-block where defendant had parked his tanker truck in a no-parking zone very near a school just as it was letting out—blocking oncoming traffic's view and partially blocking the driving lanes and pedestrian's view of oncoming traffic—because the student's jaywalking was the sole cause of the accident), with *Biel v. City of Bridgeview*, 781 N.E.2d 555, 561-64 (Ill. App. Ct. 2002) (reversing summary judgment for defendant city, where plaintiff's decedent was struck and killed while jaywalking late at night, badly intoxicated, stumbling, and nearly senseless, but street lamps at the location were out and had been for some time, making it foreseeable that such injury could result). Compare *Maroulis v. Elliott*, 151 S.E.2d 339, 344-47 (Va. 1966) (affirming jury verdict for plaintiffs where an accident began when a car driving in the wrong direction caused first car of the group to swerve off the shoulder, leading second car to collide at high speed with the car driving in the wrong direction and third car to brake to avoid hitting second car, but defendant driver of fourth car did not brake fast enough and slammed into the back of the second car and thus was the proximate cause of a substantial portion of the injuries), with *Edlow v. Arnold*, 415 S.E.2d 436, 438-39 (Va. 1992) (affirming jury verdict for defendant where plaintiff traveling on an icy road stopped to pick up a passenger at an intersection and defendant's car struck plaintiff's car from the rear, and defendant testified that she saw the stopped car five to six car lengths ahead but did not apply the breaks until two car lengths away, despite the icy conditions). Compare *Gardner v. City of San Jose*, 57 Cal. Rptr. 176, 180-81 (Ct. App. 1967) (upholding jury verdict for the plaintiff because city had created a dangerous trap—whereby drivers would assume they had the right of way—by constructing but not properly maintaining a subterranean pedestrian walkway under a busy street, leading to it being poorly lit, smelling of urine, and covered in obscene graffiti, so that the plaintiff, a fifteen-year-old girl, rather than use the subterranean walkway,

So we are left with an even deeper puzzle than the one presented in the standard story. There is no real evidence of any rationalizing trend toward greater doctrinal clarity and predictability. Even courts that continue to rely on proximate cause doctrines acknowledge their indeterminacy. And yet, proximate cause persists.

II. THE MAGIC OF PROXIMATE CAUSE

No other formula has found so much affection in the chambers of final authority; none other so nearly does the work of Aladdin's lamp.

—Leon Green¹¹⁹

I want to pick up a cue from the realists who criticized proximate cause to suggest a new way to understand the doctrines' mysterious resilience. More than one realist observed that proximate cause doctrines were like a form of legal "magic" or "ritual."¹²⁰ I propose to take that comparison seriously. Using anthropological accounts from a variety of cultural contexts, I will sketch some ways in which legal doctrines, and particularly the doctrines of proximate cause, resemble magic practices. It might seem that uncovering connections between doctrine and magic would only confirm the critique of proximate cause as judicial fakery and add to the mystery of its longevity in the face of such criticism. But I will argue (in Part III below) that a particular shared feature of doctrine and magic may account for both practices' staying power. Strangely, that common feature involves exposing the practices' inability to produce independent results. Incorporating skepticism about proximate cause into judicial decisions that employ proximate cause doctrines resembles a technique of magic in other cultures—what anthropologist Michael Taussig calls "the skilled revelation of skilled concealment."¹²¹ There is a double surprise here. First, the realists' comparison of doctrine to "magic words" turns out to be accurate in more literal and complex ways than one might expect. Second, skeptical revelations perpetuate rather than destroy both magic and doctrine.

A. *The Realist Insight: Doctrinal Magic Language*

Leon Green's comparison of negligence doctrines to ritual and magic is an example of a more general realist theme.¹²² Foundational realist

crossed the street and was struck and severely injured), *with* *Moritz v. City of Santa Clara*, 87 Cal. Rptr. 675, 677–78 (Ct. App. 1970) (upholding summary judgment for city where a pedestrian struck by a vehicle in a crosswalk argued that the crosswalk, located between a parochial school and a shopping center, created a trap because it was marked as a school crossing so that after school hours drivers would assume they had the right of way).

119. Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEXAS L. REV. 471, 471–72 (1950).

120. See, e.g., Cohen, *supra* note 11; Green, *supra* note 11, at 1016.

121. Taussig, *supra* note 1, at 222.

122. See generally Jessie Allen, *Magical Realism*, in *LAW AND MAGIC* 195, 195–208 (Christine Corcos ed., 2010); Allen, *supra* note 13, at 796–97.

texts criticize doctrinal reasoning, precedential reliance, and formal court procedures as a kind of illusionistic, legal magic.¹²³ The realist description of the connections between law and magic generally has been dismissed as a rhetorical device. But the realists' own writings make clear that they considered the affinity between adjudication and ritual magic a practical—and wholly corrupting—reality.¹²⁴

For Green, judges' application of the proximate cause tests of direct connection and foreseeability was "a sort of necessary ritual."¹²⁵ More generally, Green attacked doctrinal reasoning as "legal theology which requires substituting a *symbolic* phrase . . . for the judgment required of a judge in giving or denying the protection of government to the interest involved."¹²⁶ Such doctrinal "[w]ord ritual," he declared, "has always been one of the primary methods of law administration,"¹²⁷ and "[w]e can scarcely realize the part which sacred words, taboo words, magic words, continue to play in our law."¹²⁸ Among Green's realist contemporaries, Jerome Frank attacked doctrinal reasoning as a childish belief in the automatic oracular power of legal formulas, and Felix Cohen offered a list of doctrinal terms that functioned as "magic 'solving words,'" including proximate cause.¹²⁹

B. *The Techniques of Legal Magic*

Following up the realist comparison of law and magic, I reviewed anthropological accounts of magic in other cultures and compared them with the structures of modern adjudication. In a previous article, I enumerated five such structural similarities that I called (1) enacting performance, (2) heightened formality, (3) temporal play, (4) performativity, and (5) transformative analogy.¹³⁰

Very briefly, both adjudication and magic ritual transform reality through *enacting performances*, real-time rituals that aim to protect, restore, or change something about the prevailing social circumstances.¹³¹ Like other rituals, adjudication's performances (trials, hearings, sentencing, etc.) are characterized by a formal structure that is unusually rigid (compared with other interactions in the surrounding society) and a rather transgressive approach to time. As in magic, the *heightened formality* of law is not just ceremonial. Legal efficacy is bounded by formal

123. FRANK, *supra* note 11, at 12 ("legal myth"); Cohen, *supra* note 11 ("legal magic"); *id.* at 820 ("magic solving words"); Green, *supra* note 11, at 1016 ("word ritual").

124. See Cohen, *supra* note 11, at 809-11; *id.* at 820; FRANK, *supra* note 11, at 181-82; Green, *supra* note 11, at 1016.

125. Green, *supra* note 65, at 9.

126. Green, *supra* note 11, at 1030.

127. *Id.* at 1016.

128. *Id.*

129. FRANK, *supra* note 11, at 18-20; Cohen, *supra* note 11, at 820.

130. Allen, *supra* note 13, at 779-80.

131. *Id.* at 781-83.

limits on time and place: for instance, a given piece of information may be centrally important in a legal decision or utterly beside the point, depending on whether it is received by the decision makers in one or another room in the courthouse, or on Tuesday instead of Monday.¹³² Yet, alongside rigid temporal restrictions on evidence, common law allows or even requires *temporal play* that ignores ordinary temporal limits. Judges transgress chronology to argue with or adopt judicial reasoning from long ago and treat the words of their precedential ancestors as though they had been spoken yesterday.¹³³ The language of both legal doctrinal analysis and magic spells has a tendency to narrow the range of terms used and to imbue particular repeated words and sequences of words with multiple layers of meaning, condensed symbolic references, and associations to complex narratives that only practitioners recognize. Moreover, like magic spells, the words of judicial opinions are often structured as descriptions but distinguished by their *performativity*: they create the realities they describe.¹³⁴ Finally, magical or legal performative speech acts often accomplish their work through *transformative analogies* that link legal cases or ritual enactments.¹³⁵

C. Proximate Cause's Affinities with Ritual Magic

1. Heightened Formality and Condensed Symbolic Meaning

A comparison with anthropological studies confirms the realist insight that doctrinal “word jugglery” has something in common with the formal language of magic spells. Bronislaw Malinowski’s early twentieth-century study of the Trobriand Islanders of Papua New Guinea is a seminal work on magic.¹³⁶ Analyzing the language of Trobriand magic, Malinowski noted that a spell’s words “are short, cutting, pithy expressions, each standing for its own cycle of ideas, for a sentence or even a whole story.”¹³⁷ Likewise, the realists describe doctrinal terms as condensing complex combinations of facts and evaluative judgments. These were Felix Cohen’s “magic ‘solving words,’” and “proximate cause” was one of them.¹³⁸ Such terms, said Leon Green, are “designed to reduce to a single word a network of ideas.”¹³⁹

The terms of Trobriand magic are common words (or variants of common words) that have acquired additional ritual meanings. For instance, the word “papapa” means “flutter” in ordinary Papuan usage, but

132. *Id.* at 783–84.

133. *Id.* at 787–88.

134. *Id.* at 784–87.

135. *Id.* at 789–92.

136. See BRONISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC (Dutton & Co., Inc. ed., 1950) (1922).

137. *Id.* at 434.

138. Cohen, *supra* note 11, at 820 (internal quotations marks omitted) (providing other examples such as contract, property, fair value, and due process).

139. Green, *supra* note 11, at 1016 n.12.

when used in a canoe-magic spell the word stands for a phrase that refers to the special role of fluttering leaves in the decoration of canoes and evokes "native ideas about magical association between flutter and speed, and . . . the ritual use of pandanus streamers."¹⁴⁰ Such magical meanings are "intelligible only to those who are acquainted with the part played" by the words' referents in the magic rituals themselves.¹⁴¹ The word has its full ritual meaning "only if taken with the context of this formula, in connection with its aim, with the various associated ideas and customs."¹⁴² Another word in the same spell "is again an elaborate compound carrying the meaning 'to leave behind.'"¹⁴³ In Malinowski's contextual interpretation, "'leaving behind' undoubtedly refers to the other canoes which will be outrun by that of the reciter," but this association is unspoken.¹⁴⁴ Thus, each of these magical terms "stands alone and represents a self-contained cycle of ideas."¹⁴⁵

Compare courts' use of the term "proximate cause" and the associated doctrinal concepts and phrases: "superseding cause," "foreseeable cause," "intervening act," and "break the causal chain." Like the terms used in Trobriand canoe magic, these words and phrases have ordinary meanings that operate in their ritual use as well. In everyday usage, "papa" means "flutter" and "proximate" means "next" or "close."¹⁴⁶ But to the participants familiar with the use of these terms in magical and legal contexts, these words evoke different and more complex meanings, and condense whole statements and narratives in the context of those rituals.¹⁴⁷

140. MALINOWSKI, *supra* note 136, at 434-35.

141. *Id.* at 434.

142. *Id.* at 435.

143. *Id.*

144. *Id.*

145. *Id.* Similarly, Victor Turner observes that among the Ndembu people of South-Central Africa, important symbols that are used repeatedly as ritual focal points have "a 'fan' or 'spectrum' of referents, which are interlinked by what is usually a simple mode of association." VICTOR TURNER, *THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL* 50 (1967). For example, the "mudyi," or milk tree, exudes milky white sap, associated with breast feeding. It is the mythical location of the ancestress's founding of the Ndembu people and the site of girls' initiation rites. The tree thus connects the visceral, emotional experience of mother-infant intimacy with Ndembu matrilineal social structure. *Id.* at 20-22. For Turner, this combination of normative and sensory-emotional content is a definitional property of ritual symbols that works to charge the values rituals prescribe with emotional associations. *Id.* at 28.

146. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1828 (3d ed. 1986) [hereinafter WEBSTER'S] (defining "proximate" as "very near," "close," "soon forthcoming," or "next preceding or following").

147. Besides the term "proximate cause" itself, traditional proximate cause analyses deploy a raft of terms that could be added to the realist list of "magic solving words." Doctrinal analysis in general makes repeated use of words and phrases that have taken on a special meaning apart from their ordinary English usage to stand for a complex set of ideas and combine both factual and moral content. The magic words of proximate cause include "superseding cause," "superseding event," "superseding act," "intervening act," "independent intervening acts," "independent superseding cause," "direct cause," "foreseeability," "foreseeable," "unforeseeable," "foreseeable consequences," "foreseeable risk," "foreseeable cause," "causal nexus," "causal connection," "causal chain," and "chain of causation"—all of which appear, often repeatedly, in the cases.

Like a magician's use of the word "flutter" in a Trobriand canoe spell, a judge's statement that a defendant's act was the proximate cause of a plaintiff's harm both "stands alone and represents a self-contained cycle of ideas" that has been developed through the repeated use of that term in previous cases.¹⁴⁸ The statement is at once a description of the situation that led to the lawsuit, a judgment about the legal significance of that situation, and a statement that in this way the situation, and the legal case that arose from it, are connected with thousands of other situations and cases stretching back hundreds of years.

Likewise, the doctrinal language judges use to flesh out proximate cause analysis incorporates both ordinary meanings and meanings developed through specialized practice. In ordinary English, to "supersede" means to set aside or displace.¹⁴⁹ The dictionary lists "replace," "displace," and "supplant" as synonyms for "supersede." But one rarely encounters a proximate cause analysis that speaks of a displacing, supplanting, or replacing cause. Instead, the word "superseding" is repeated over and over. In *Derdiarian*, for instance, "superseding" appears once in the case summary,¹⁵⁰ twice in the "points of counsel"¹⁵¹ and four times in the body of the opinion as part of the terms "superseding act" and "superseding cause."¹⁵²

In legal practice, "superseding" carries connotations of power from another context. A "supersedeas" is a common law writ commanding a stay of legal proceedings, preventing the execution of some other writ or staying the enforcement of judgment.¹⁵³ In contemporary legal usage, a supersedeas¹⁵⁴ generally issues when a defendant posts a bond that prevents a victorious litigant from executing the judgment pending appeal. Judges' tendency to move back and forth between the Latinate term "supersedeas" and the English "supersede" is exemplified in this passage from a 1985 Alabama Supreme Court opinion: "The common law rule that an appeal automatically *superseded* the judgment, in and of itself,

148. MALINOWSKI, *supra* note 136, at 435.

149. WEBSTER'S, *supra* note 146, at 2298 (providing the following definitions of "supersede": "1 a: to cause to be set aside b: to force out of use as inferior 2: to take the place, room, or position of 3: to displace in favor of another").

150. *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 666 (N.Y. 1980).

151. *Id.*

152. *Id.* at 168–70.

153. BLACK'S LAW DICTIONARY 1479 (9th ed. 2009). Floyd Abrams tells this story of an attempt to obtain a writ of supersedeas to prevent enforcement of an injunction in *Pitt v. Playgirl, Inc.*, No. B114591 (Cal. Ct. App. Sept. 5, 1997): "Actor Brad Pitt obtained a preliminary injunction ordering the recall of an entire monthly issue of *Playgirl* magazine, which contained nude photographs of Pitt, and prohibiting further sales, distribution and dissemination of the issue. . . . [T]he magazine's petition for a writ of supersedeas, arguing that the photographs had been previously published by others all over the world and that the injunction was an unconstitutional prior restraint, was summarily rejected." Floyd Abrams & Gail Johnston, *Prior Restraints*, in COMMUNICATIONS LAW IN THE DIGITAL AGE 2011, at 489 (PLI Practice, Course Handbook, 2011).

154. WEBSTER'S, *supra* note 146, at 1161. The term comes from the Latin word for "you shall refrain." *Id.*

has been changed to the extent that an appeal does not ordinarily *supersede* the judgment in the absence of a *supersedeas* bond.”¹⁵⁵

“Superseding” is thus a word that imports a special kind of legal power. Like the Trobriand Islanders for whom the word “flutter” in a magic spell evokes the ritual use of pandanus leaves and “magical associations between flutter and speed,”¹⁵⁶ lawyers and judges familiar with the longstanding legal use of *supersedeas* writs hear in the phrase “superseding act” or “superseding cause” not only a description of a causal relationship in fact but an invocation of a specific legal technique for overcoming liability. Malinowski observes that when a word’s use in a magic spell triggers such contextual meanings and associations, “the word quivers with magical force.”¹⁵⁷ Likewise, for legal practitioners the term “superseding cause” calls to mind a *supersedeas* bond used to stay the execution of a legal judgment and so generates a frisson of legal power.

Of course, this sort of conflation of factual description and legal enactment in a single stroke is exactly what the realists sought to expose about doctrinal analysis. So far, then, my investigation of the similarities between judicial proximate cause analysis and magic seems only to reconfirm the realist critique of proximate cause—and all traditional doctrinal analysis—as irrational and false. Certainly it strengthens the critique that proximate cause analysis employs an argument by association that lacks both the definite logical connections claimed for doctrine and the straightforward policy judgments that the realists advocated.

2. Ancestral Bricolage

Both magic spells and legal opinions claim power from ancestral sources. In the Trobriand spell that Malinowski analyzed, the special magic terms are followed by a long list of the names of ancestors who are said to have lived in “the home of this magic.”¹⁵⁸ Anyone familiar with Anglo-American case law’s emphasis on precedent will recognize this pattern. For instance, in *Jackson v. Noel*,¹⁵⁹ another New York case citing *Derdiarian*, the writing judge inserted a list of previous proximate cause cases decided by his court after his assertion that a non-party’s conduct was a “superseding event” that severed the causal connection with the defendant.¹⁶⁰ As Annette Weiner observed of magic spells, “Not

155. *St. Regis Paper Co. v. Kerlin*, 476 So. 2d 64, 66 (Ala. 1985) (emphasis added).

156. MALINOWSKI, *supra* note 136, at 434–35.

157. *Id.* at 435.

158. *Id.*

159. 750 N.Y.S.2d 106 (App. Div. 2002).

160. *Id.* at 107 (“Rather, Peters’ conduct in leaving the roadway and driving his vehicle on to the grassy shoulder of the road in an apparent effort to avoid delay, was a *superseding event* which severed whatever causal connection there might have been between the incident between Hoang Le and the plaintiff, and Hoang Le’s alleged negligence.” (emphasis added)); see also *Dormena v. Wallace*, 723 N.Y.S.2d 72, 74 (App. Div. 2001); *Brocato v. Grippe*, 702 N.Y.S.2d 901, 901 (App.

only does the genealogy call on the assistance of the former owners, but it gives weight to the spell by demonstrating the successful history that the spell has had in effecting persuasion.”¹⁶¹ Sure enough, if one looks up the cases in *Jackson*’s string cite, one finds the exact verbal formula used by the *Jackson* court to establish the lack of proximate cause in that case.¹⁶²

Through the practice of citing precedential sources, the ancestral basis for the operative legal language is explicitly called out with each new usage. In law, as in magic, that basis is not optional. Without a connection to previous precedential cases, doctrinal words become mere expressions of the individual judge’s opinion and lack the authoritative legacy that gives those words their distinctive power. This focus on past use as opposed to future utility is one of common law adjudication’s most magical aspects. Distinguishing magic from modern scientific techniques, the anthropologist Claude Lévi-Strauss pointed out that magicians approach their work retrospectively.¹⁶³ Whereas science looks forward to invent new tools in order to develop new projects, magicians must “make do with ‘whatever is at hand.’”¹⁶⁴ Lévi-Strauss called this retrospective magical technique “bricolage,” after the French “bricoleur,” or “do-it-yourself man.”¹⁶⁵ Judges’ precedential practice shares this property of referring back to previous doctrinal uses and dragging forward into each new usage associations from the past. Thus, doctrinal proximate cause analyses are built up out of fragments of previous decisions, which retain some aspects of their previous identity even as they are redefined by their new usage.

The problem for a judge deciding a new case is that existing doctrine, as Lévi-Strauss observed of traditional magic, “bears no relation to the current project . . . but is the contingent result of all the occasions there have been to renew or enrich the stock or to maintain it with the remains of previous constructions.”¹⁶⁶ The premise of common law adju-

Div. 2000); *Shatz v. Kutshers Cnty. Club*, 668 N.Y.S.2d 643, 644 (App. Div. 1998); *Wright v. N.Y. City Transit Auth.*, 633 N.Y.S.2d 393, 394 (App. Div. 1995)). *Derdiarian* also uses this classic string-cite technique: “If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant’s conduct, it may well be a superseding act which breaks the causal nexus.” *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 670 (N.Y. 1980).

161. Annette B. Weiner, *From Words to Objects to Magic: ‘Hard Words’ and the Boundaries of Social Interaction*, in *DANGEROUS WORDS: LANGUAGE & POLITICS IN THE PACIFIC* 183 (Donald Lawrence Brenneis & Fred R. Myers eds., 1984).

162. *Brocato v. Grippe*, 702 N.Y.S.2d 901, 901 (Sup. Ct. 2000) (“[T]he conduct of Grippe, who was driving at an excessive rate of speed, was a superseding event which ‘severed whatever causal connection there may have been between the occurrence of the accident and the defendant’s alleged negligence.’” (quoting *Wright v. N.Y. City Transit Auth.*, 633 N.Y.S.2d 393, 394 (Sup. Ct. 1995))).

163. CLAUDE LÉVI-STRAUSS, *THE SAVAGE MIND* 18 (1966).

164. *Id.* at 17.

165. *Id.* at 16–17.

166. *Id.* at 17.

dication, however, is that doctrines developed in previous disputes can be used to determine the results in a new case. Indeed, as every Anglo-American law student learns, the doctrinal reasoning skill par excellence is the ability to look into factual descriptions from apparently dissimilar previous judicial opinions and come up with a way those facts can be "synthesized" and recategorized to relate to a new set of facts in the case to be decided. Likewise, magicians find ways to relate old spells to new situations. For instance, Malinowski described how the Trobrianders developed new magic spells for the commercial pearl fishing that arose in modern times,¹⁶⁷ a practice that at first seemed to Malinowski to contradict "the native dogma that magic cannot be invented."¹⁶⁸ The Trobrianders explained, however, that pearling spells are "really an old magic of shell fishing which refers to all the shells found at the bottom of the Lagoon."¹⁶⁹ According to the Trobrianders, they had not invented a new form of magic, they had simply made use of a latent power in traditional shell magic.¹⁷⁰

Like magic formulas, to be effective in novel situations, legal doctrines must be seen as exploiting a power that was always available or made available through previous use, as opposed to being dreamed up by the individual magician or judge who employs them. So judges and lawyers "discover" previously unused powers in old doctrines. The persuasive advocate identifies a "fact pattern" that links all the previous cases, or parts of them, in a way that allows her to claim that the doctrinal phrases used in the previous situations apply to the case at hand and produce the liability result she wants. Unsurprisingly, proximate cause cases often embed their doctrinal language in quotations from previous opinions by the court on which the writing judge sits. So, for instance, the swimming pool case *Boltax* begins with two quotations from *Derdiarian* that knit doctrinal language from that precedent into the new opinion.¹⁷¹ The second quotation appears in a sentence that includes the term "foreseeable consequence" and repeats the phrase "intervening act" twice, so that it appears first outside and then inside the quote from the precedential case.¹⁷² The effect is to link the judges' use of this term in the new case to its use by judicial ancestors in a previous case.¹⁷³ Like the Trobriand pearling spells' use of words previously used in traditional shell magic, the judicial practice of embedding doctrinal terms in quotations from previously decided cases signals that the power claimed for the

167. MALINOWSKI, *supra* note 136, at 402.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Boltax v. Joy Day Camp*, 490 N.E.2d 527, 528 (N.Y. 1986).

172. *Id.*

173. *Id.* ("When an intervening act also contributes to plaintiff's injuries, 'liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence.'" (quoting *Derdiarian, v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315 (1980))).

judicial analysis does not originate with the individual practitioner. Instead the words' effect comes from the practitioner's ability to access words that embody ancestral power and adapt them to address new problems.

3. Performative Speech Acts

Like magic spells, words spoken in legal proceedings not only say things, they *do* things. In the 1950s, J.L. Austin coined the term "performative" to describe utterances that, simply by being spoken in the appropriate context, accomplish an action.¹⁷⁴ Verdicts, blessings, and curses are all among the examples Austin gave.¹⁷⁵ So, for instance, when the jury says, "We find the defendant guilty," or the magician says, "I charm thy canoe," the words perform, rather than describe, the act they reference. Such utterances do not inform listeners that juries convict defendants and magicians cast charms; they convict and charm. For Austin, legal utterances were paradigms of performative speech acts.¹⁷⁶

Austin was the first to systematically explicate the performative aspect of language, *per se*. But the potential for language to perform actions rather than describe them had long been recognized, notably in both anthropological accounts of magic and the legal realists' critique of legal "magic." Bronislaw Malinowski observed that magic words with the syntax of descriptive statements are understood to have "creative power" to establish what they describe.¹⁷⁷ So, when a Trobriand magician says "the canoe flies" as part of a magic spell, he is not just describing a flying or speedy canoe. Nor, for that matter, is he expressing a wish that the canoe could fly. The magician's words are spoken to *make* the canoe speedy. A similar relationship of power exists between judges and doctrine.

The central realist insight about doctrinal analyses, proximate cause among them, is that judges' apparently descriptive statements actually construct, rather than simply report, legally significant connections. Rather than descriptions of factual scenarios, judges' assertions of a direct connection or a superseding cause are spell-like enactments of the legally significant connection or separation they articulate. The realist identification of legal word magic was primarily an identification of this performative aspect of judicial language. "A word is used by the savages," explained Jerome Frank, "when it can produce an action and not to describe

174. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 4-8 (1962).

175. *Id.* at 152, 159.

176. *Id.* at 153. Besides "acquitting" and "convicting," Austin included in his list of "verdictives" legal speech acts that were not assignments of final liability, for instance "find (as a matter of fact)" and "hold, as a matter of law." *Id.* at 152-53. Performative speech acts encompass many more ordinary contexts as well: for instance, agreeing, promising, or betting. *Id.* at 156-57.

177. STANLEY JEYARAJA TAMBIAH, MAGIC, SCIENCE, RELIGION AND THE SCOPE OF RATIONALITY 73-74, 80 (1990) (discussing BRONISLAW MALINOWSKI, THE LANGUAGE OF MAGIC AND GARDENING (1965)).

one, still less to translate thoughts. The word therefore has a power of its own, it is a means of bringing things about . . .”¹⁷⁸ Likewise, Frank argued, the “solving words” of doctrine “become substitutes for action.”¹⁷⁹

When a judge says that a plaintiff’s reckless dive into what he knew was the shallow end of a pool “was an unforeseeable superseding event,”¹⁸⁰ the doctrinal words appear to be describing the facts of the case. But from a realist perspective, what is really going on is the judicial construction of a legal status. The judge is not just reporting a factual relationship, he is constructing a relationship—in this case a lack of association—that has a legal effect. Even more obviously, a judge or jury’s conclusion that a defendant’s negligent act is the “proximate cause” of the plaintiff’s injuries is not so much a factual proposition about a real-world relationship as a performative speech act that connects the defendant’s conduct and the plaintiff’s injury in a way that creates legal liability for the defendant like the more overtly performative statement, “We find the defendant guilty.”

4. The Contagious and Imitative Magic of Proximate Cause

If doctrinal analysis performatively creates connections that facilitate legal power, proximate cause doctrines make those connections in a particularly magical way. The standard proximate cause tests of foreseeability and direct connection mirror the classic pathways of sympathetic magic—similarity and contiguity.

The quintessential magical technique is establishing a relationship between otherwise unrelated persons, things, and events, so that acting on one can affect the other. Early on, anthropologists of magic observed that there were two basic methods of establishing such magical contacts: (1) contiguity or contagion, and (2) similarity.¹⁸¹ Sir Edward Burnett Tylor described such “magical associations.”¹⁸² He explained that some magic employs “[t]he simple idea of joining two objects with a cord, taking for granted that this communication will establish connexion or carry influence.”¹⁸³ So, for instance, a magical healer might fasten “one

178. FRANK, *supra* note 11 at 85. This passage from Frank is an almost exact quote from Bronislaw Malinowski. See Bronislaw Malinowski, *The Problem of Meaning in Primitive Languages*, in C.K. OGDEN & I.A. RICHARDS, *THE MEANING OF MEANING: A STUDY OF THE INFLUENCE OF LANGUAGE UPON THOUGHT AND THE SCIENCE OF SYMBOLISM* 322 (1923). Around the same time the realists noted that legal language was similar to magic in its performative force, Malinowski was likening Trobriand magic to law as a way to describe its performative aspect, comparing the power of magic words to the “creative power” of contracts and wedding vows. Both the realists and Malinowski made those observations well before Austin identified the common “performative” aspect of language.

179. *Id.* at 62.

180. *Boltax v. Joy Day Camp*, 490 N.E.2d 527, 528 (N.Y. 1986).

181. JAMES GEORGE FRAZER, *THE GOLDEN BOUGH* 12 (abridged ed. 1930); EDWARD BURNETT TYLOR, *THE ORIGINS OF CULTURE* 115–17 (Harper ed., 1958) (1871).

182. TYLOR, *supra* note 181, at 115–16.

183. *Id.* at 117.

end of a string to the ailing part of the patient's body" and then suck on the string for relief.¹⁸⁴ Another example is the familiar use of personal property or hair or nail cuttings to do magical harm to their owners.¹⁸⁵ In other cases, Tylor observed that the magical "connexion is that of mere analogy or symbolism," as when a "Zulu may be seen chewing a bit of wood, in order, by this symbolic act, to soften the heart of the man he wants to buy oxen from," or when Germans leave the locks and bolts in a dying man's house open so that his soul may escape and Cornishmen eat fish from tail to head to bring the other fishes' heads toward shore.¹⁸⁶

Another early anthropologist of magic, Sir James Frazer, identified two organizing principles in Tylor's examples: the "law of contact," which produced contagious magic, and the "law of similarity," which produced magical connections based on resemblance.¹⁸⁷ So, for instance, in Tylor's examples above, the nail cuttings, hair, and string work through the magic of contiguity or contagion, and the wood chewing, locks and bolts, and headfirst fish work through the magic of similarity or imitation. Though much of Frazer's theory of magic has fallen into disfavor, the associational principles of contiguity and similarity have been further developed by numerous subsequent studies of magic, ritual, and language.¹⁸⁸

The two doctrinal tests of proximate cause can be sorted into Frazer's categories.¹⁸⁹ The test of direct connection, in which the question is whether the "chain of causation" has been "severed" or remains unbroken, is a connection through contiguity. Foreseeability establishes a connection based on similarity. It is a test of the resemblance between the injury that materialized and the injury that the defendant should have seen coming as a result of her negligence. In magic, contiguity and similarity are like two pathways along which magical force can travel.¹⁹⁰ Likewise, in proximate cause analysis, legal power exercised by the court can only reach the defendant if one of these forms of association is established. In order to get legal power to flow from the court to the defendant, the plaintiff must establish that her injury was linked to the defendant's actions by contact (direct connection through a causal chain) or similarity (foreseeability).

184. *Id.*

185. *Id.*

186. *Id.* at 118–19.

187. FRAZER, *supra* note 181.

188. TAMBIAH, *supra* note 177, at 52–53 (calling the principles the "molten gold in Frazer's volcanic overflow"); Michelle Z. Rosaldo, *It's All Uphill: The Creative Metaphors of Ilongot Magical Spells*, in *SOCIOCULTURAL DIMENSIONS OF LANGUAGE USE* 177, 177–78 (Mary Sanches & Ben G. Blount eds., 1975).

189. *See generally* FRAZER, *supra* note 181, at 11–36.

190. *Id.* at 12.

III. THE SKILLED REVELATION OF SKILLED CONCEALMENT

Faith and skepticism are alike traditional.

—E.E. Evans-Pritchard¹⁹¹

The similarities between proximate cause analysis and the techniques of ritual magic were foreshadowed by the realist critique of doctrinal “magic words.” This takes us back to the original puzzle—Why have doctrines survived that critique? Why do judges continue to practice, and citizens continue to accept, doctrinal legal magic in the face of widespread recognition that, as the courts in *Milwaukee* and *Derdiarian* acknowledged, proximate cause “is not a question of science or legal knowledge,”¹⁹² but a matter of “policy considerations”?¹⁹³ If we know that doctrines do not determine the results in lawsuits, why do we continue to practice doctrinal analysis as if it were capable of independently producing results? Why doesn’t skepticism about doctrine do away with doctrinal practice?

Again expanding on anthropological studies, I want to suggest a strange possibility: Rather than discrediting doctrinal analyses, courts’ explicit recognition of doctrinal indeterminacy is keeping doctrine alive. In cultures where ritual magic is a common practice, skepticism about magical efficacy is not fatal to that practice. Indeed, at least one anthropological observer has concluded that not only does magic survive the exposure of illusion, it feeds on it.¹⁹⁴ I will argue that the exposure of doctrinal indeterminacy has been incorporated into judicial proximate cause analysis as a sort of ritual of unmasking, comparable to the role of skeptical revelations by practitioners of magic. That comparison suggests a partial explanation for the persistence of proximate cause. Like ritual magic in other cultures, rather than resisting skepticism, doctrinal practice finds a way to incorporate—and even to thrive on—skeptical attacks. But the anthropology of magic only takes us so far. We are left with two important questions—*How* does skeptical critique become incorporated

191. EVANS-PRITCHARD, *supra* note 14, at 107.

192. *Milwaukee & Saint Paul Ry. v. Kellogg*, 94 U.S. 469, 474 (1876).

193. *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 314 (1980); *see also* *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2642 (2011) (plurality opinion) (“As we have noted, . . . the phrase ‘proximate cause’ is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes.”); *Young v. Bryco Arms*, 821 N.E.2d 1078, 1090–91 (Ill. 2004) (finding that the doctrine of public nuisance does not encompass the novel claim of the plaintiffs owing to a public-policy determination because proximate cause is only a boundary used to set liability based upon notions of justice and policy); *Williamson v. Waldman*, 696 A.2d 14, 20 (N.J. 1997) (“Moreover, the limit of proximate cause is ultimately, an issue of law and similarly entails a consideration of public policy and fairness.”); *Palsgraf v. Long Is. R.R.*, 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting) (“What we do mean by the word ‘proximate’ is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.”).

194. Taussig, *supra* note 1, at 221–22.

in a way that ends up sustaining the practice it attacks, and how does the incorporation of skepticism affect the legitimacy of doctrinal practice?

A. Magic Coexists with Skepticism

It may seem strange to say that magic incorporates, let alone thrives on, skepticism. We tend to define cultures that practice magic as uncritical of those practices. Like the realists, we assume that practitioners of magic are either blindly gullible or deliberate fakers. But anthropological accounts of magic belie those stereotypes. Even Victorian anthropologists, who saw magic as the opposite of scientific truth (a kind of fraud or delusion), described a puzzling combination of faith and fabrication among magic's practitioners. Writing in 1889, E.B. Tylor mused:

Magic has not its origin in fraud, and seems seldom practised as an utter imposture. The sorcerer generally learns his time-honoured profession in good faith, and retains his belief in it more or less from first to last; at once dupe and cheat, he combines the energy of a believer with the cunning of a hypocrite.¹⁹⁵

Modern field anthropologists confirm the complex attitudes of practitioners but cast those attitudes as both less naïve and less dishonest. Mary Douglas, for instance, compared magic rituals with money.¹⁹⁶ She pointed out that like currency, magic performs its social role so long as the public has faith in it.¹⁹⁷ If I inform you that money is only paper, and thus worthless, that will not shake your belief in money's value or prevent you from using cash for purchases. Why not? Because you already know that money is "worthless" in this sense. But that does not mean that every time you use money to buy something you are engaging in a fraud or laboring under a delusion. You, and everyone with whom you conduct those transactions, understand that money has no "real" value but that it is nevertheless powerful. Likewise, magic's effectiveness as a social institution does not depend on a belief that false techniques are real.

The analogy to money is useful for pointing out that ritual can partake of a pretend or symbolic power without triggering accusations of hypocrisy or self-delusion. But it does not fully capture the tension between continued doctrinal practice and skepticism about doctrinal efficacy. At least since the nineteenth century, courts' practice of formal doctrinal adjudication and pronouncements about doctrinal objectivity have apparently conflicted with judicial acknowledgements of doctrine's failure to produce independent outcomes. Unlike our monetary system, legal practice is apparently fraught with overtly contradictory actions and

195. TYLOR, *supra* note 181, at 134.

196. MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO* 86 (Routledge Classics ed. 2002).

197. *Id.*

statements. Indeed, these contradictions about the role doctrine plays in determining legal outcomes are basic and longstanding.¹⁹⁸

Something much closer to the contradictions in our views of legal decision making appears in observations of magical rituals. In the early twentieth century, E.E. Evans-Pritchard spent years living with and studying the Azande in Sudan, producing one of the most highly regarded studies of ritual magic.¹⁹⁹ The Azande employ witch doctors to identify witches and heal the sick.²⁰⁰ Evans-Pritchard found that Azande do not necessarily believe that a witch doctor's medicine-induced trance and ritual dance determine his selection of the witches identified during the ritual. It was "not difficult to see that a witch-doctor's revelations are largely based on local scandal, and that to some extent he thinks out his answers to questions while dancing and strutting about."²⁰¹ And it was not only a visiting anthropologist who could see the non-ritual basis of the witch doctor's choices. Evans-Pritchard was quite clear that "*Azande are aware of this fact.*"²⁰² Moreover, Azande "not only know that witch-doctors can produce objects from the bodies of their patients by fraud, but also . . . are aware of the kind of fraud they employ."²⁰³ As Evans-Pritchard described it then, doubts about witch doctors' magical techniques are not marginal.²⁰⁴ Nevertheless, "this knowledge does not conflict with great faith in witch-doctors."²⁰⁵ He therefore concluded that "skepticism is included in the pattern of belief in witch-doctors."²⁰⁶

Evans-Pritchard hypothesized that the reason for this coexistence of doubt and faith is that though "Azande . . . state that many, even most witch-doctors are frauds," they believe that some "do actually produce remarkable cures."²⁰⁷ That explanation is extremely unsatisfying. After so much time spent detailing the pervasive recognition of the witch doctors' tricks, it is hard to see why Azande should nevertheless keep expecting that there are some real witch doctors, or for that matter, why they should continue to put up with the ones they know are "frauds."

Likewise, Franz Boas, in his classic study of Kwakiutl shamans in the Pacific Northwest, found widespread skepticism about magic power and never really explained the continued practice of magic despite that skepticism.²⁰⁸ Again, the tension between belief and skepticism is close

198. TAMANAHA, *supra* note 7, at 228; Solum, *supra* note 5.
199. EVANS-PRITCHARD, *supra* note 14, at vii.
200. *Id.* at 65-66.
201. *Id.* at 87.
202. *Id.* (emphasis added).
203. *Id.* at 107.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. FRANZ BOAS, THE RELIGION OF THE KWAKUTL INDIANS PART II, at 1 (Helen Codere ed., 1966) (1930).

to the surface and pervasive. Boas's Kwakiutl informant, George Hunt, himself a shaman, described how he was originally moved to study magic in an effort to test its authenticity: "I desired to learn about the shaman, whether it is true or whether it is made up and whether they pretend to be shamans."²⁰⁹ Not only was Hunt himself skeptical, he found plenty of others who shared his view that the shamans were faking it. "Have you not felt the quartz crystal of the liars, the shamans, the one that they referred to that was thrown into your stomach?" asks one man Hunt met on his quest.²¹⁰ When Hunt replies that he did not feel the magic, the man responds, "You will never feel it, for these are just great lies what the shamans say."²¹¹

Indeed, the Kwakiutl shamans themselves reveal their artifice, at least to one another.²¹² After Hunt "cures" a patient by pretending to suck the sickness out of the patient's body, another shaman begs him to reveal whether the "sickness" that stuck on his palm was real or "was it only made up," and shows Hunt the nail in the head ring that he uses to scratch his palm and produce blood when he pretends to suck out sickness so that "[a]ll these fools believe that it is truly biting the palm of my hand."²¹³ Boas concluded that the Kwakiutl are in no way innocent about the tricks entailed in their shamans' traditional magic, but they nevertheless retain a belief in "the 'true' power of shamanism."²¹⁴ For some reason, "[e]xposures do not weaken" that belief.²¹⁵

B. Rituals of Unmasking

Discussing Boas and Evans-Pritchard's findings, Michael Taussig argues that not only does magic survive skepticism, magic needs skepticism in order to thrive.²¹⁶ Taussig contends that the coexistence of faith and skepticism in cultures where magic is central is founded on "a deep-seated" but generally unarticulated "public secret as to the existence of a trick."²¹⁷ In the repeated skeptical exposures described by Evans-Pritchard, Boas, and others, Taussig finds a "meta-rite" in which magic is exposed as a trick and yet somehow not discredited.²¹⁸ He suggests that when skeptical observers call the authenticity of magic into question, magicians feed on that exposure: "[S]kepticism and belief actively cannibalize one another," he says, "so that continuous injections of recruits

209. *Id.* In an iconic text of early twentieth-century anthropology, Hunt, also known as Quesalid, describes his skeptical shamanism. *Id.*

210. *Id.* at 5.

211. *Id.*

212. *Id.* at 32–33.

213. *Id.* at 31–32.

214. FRANZ BOAS, KWAKIUTL ETHNOGRAPHY 121 (Helen Codere ed., 1966); Taussig, *supra* note 1, at 228.

215. Taussig, *supra* note 1, at 228.

216. *Id.* at 221.

217. *Id.*

218. *Id.* at 243.

like [Hunt], who are full of questioning, are required.”²¹⁹ But he never explains how the injection of skepticism feeds rather than disables magic, or for that matter why magic’s persistence does not eventually stifle doubt.

Nevertheless, Taussig contributes a crucial insight by emphasizing the extent of skeptical interactions in magic-laden cultures.²²⁰ In this way, he turns an aspect of magical practice that has generally been presented as a marginal exception into a central attribute. So, for instance, describing Evans-Pritchard’s project to learn the secrets of the witch doctors, Taussig remarks that the problem really is that there are no secrets.²²¹ According to Evans-Pritchard’s own descriptions, everybody knows the witch doctors are planting the bits of charcoal, splinters, black beetles, or worms that they then pretend to extract from their patients.²²² Despite this knowledge, however, direct revelations of the witch doctors’ trickery are at least sometimes regarded as shocking.

The complex effect of revealing magic trickery comes through in Evans-Pritchard’s description of a time when he exposed a witch doctor’s sleight of hand. During a healing ritual, Evans-Pritchard confronted the magician with the piece of charcoal the magician had planted so that he might later “extract” it from a sick man’s body.²²³ An apprentice was present, and Evans-Pritchard describes him as initially devastated by the trick’s revelation.²²⁴ “When he had recovered from his astonishment he was in serious doubt whether he ought to continue his initiation.”²²⁵ But then a very curious thing happened. A day or two later, the initiate “had completely recovered his poise and developed a marked degree of self-assurance” in his healing techniques, a level of confidence that he “had not shown before this incident.”²²⁶

Without being able to explain why the Zande initiate wound up more committed to his craft, law teachers may find his experience familiar. It seems to resemble the journey of law students, as it dawns on them that the doctrinal reasoning they are struggling to rationalize in the cases they read cannot be made to produce determinate results. An initial attitude of trusting belief in law’s reason is replaced by cynicism or alienation, which in turn gives way—in some students right away, in others gradually over time, in still others not at all—to mastery. Through law professors’ and the students’ own repeated skilled revelation of the skilled concealment of judicial sleight of hand, law students acquire that

219. *Id.* at 235.

220. *See id.* at 222.

221. *Id.* at 246.

222. EVANS-PRITCHARD, *supra* note 14, at 107.

223. *Id.* at 102–04; Taussig, *supra* note 1, at 243–46.

224. EVANS-PRITCHARD, *supra* note 14, at 104.

225. *Id.*

226. *Id.*

“mix of faith and skepticism” that Taussig argues is necessary to the practice of magic.²²⁷

Returning to the puzzle of proximate cause’s survival, judges’ repeated revelation of doctrinal indeterminacy looks a good deal like the ritual unmasking Taussig identifies in magic. Courts have for decades continued to practice doctrinal analysis in the face of revelations of doctrinal indeterminacy. The judges who combine the application and critique of proximate cause doctrines share with the Zande witch doctors and Kwakiutl shamans a tendency to reveal the tricks on which their practice is based. Moreover, in both magic and law, rather than being destabilized, the traditional practice survives and even thrives after its exposure as a trick.

It might at first appear that there is a crucial difference between the exposure of magical and doctrinal tricks. After all, in a sense, the trick of magic and the trick of doctrine have opposite results. Whereas magicians use tricks to appear more personally powerful, judges use doctrine to obscure their personal power. Magicians use tricks to make it look like they are causing effects that are not really their doing. In contrast, judges use doctrine to make it look like their liability determinations are *not* really their own doing, that the determinations are dictated by impersonal legal rules beyond their control. Magicians use tricks to boast of powers they do not have, while judges use tricks to hide power they really exercise.

With these differences in mind, it might seem that skepticism plays a different role in magic and in law. In one sense, this is true. The skeptical observer of magic says that the sorcerer who claims to be magically uniting or severing objects with his words is just talking. The realist observer of judicial decision making says that the judge who claims to be merely describing legally significant connections is actually doing something, namely making those connections, and thus setting in motion the coercive government force that backs those decisions. From a skeptic’s perspective, then, a magician is doing less than he claims; a judge is doing more.

Nevertheless, upon consideration, there is a crucial similarity. In both law and magic, classical practices obscure the fact that the practitioners are making choices. Both magicians and judges are manipulating practical techniques—whether spells or precedents, palmed bits of charcoal or analogies of direct connection—to produce effects. In both magic and doctrinal analysis, the techniques make it appear that something other than the practitioner’s individually motivated choices is producing the outcome. Because a judge has the power to bring about a decision that triggers state-sponsored violence, attributing that decision to external,

227. Taussig, *supra* note 1, at 245.

impersonal forces in one sense diminishes her personal power. But, of course, the realists' point was that the aura of legitimacy gained by masking personal choices ultimately leads to much *greater* political and institutional power for judges. Though judicial decisions are backed by government force, much of society's compliance with those decisions is achieved not by force or the threat of force but by voluntary adherence based on the notion that these decisions are the product of recognizably legal methods, not simply the unconstrained personal preferences of individual judges. The illusion that judges' decisions come about through impersonal legal formulas rather than personal choice increases the perceived legitimacy and legality of judicial decisions and thus, presumably, the likelihood that individuals and the public at large will abide by those decisions.

The idea that legal compliance is based on illusion raises serious issues of legitimacy. Later in this Article, I will sketch some preliminary thoughts about how we might consider those issues. For now, however, I want to set aside normative questions and continue to pursue the comparison of doctrine and ritual performance to see if it can help us to understand more about *how* doctrinal analysis continues to generate legal compliance even when practitioners and the public at large recognize that doctrinal determinacy is illusory.

It seems that the tension between practice and skepticism is aligned in magic healing and doctrinal legal analysis. The shaman sucks a bloody tuft of down from the patient's body and removes it to effect a cure, and the skeptic says the shaman had it in his mouth the whole time. The judge uncovers a direct connection between the defendant's negligence and the plaintiff's injury, and skeptics say she picked and chose among many available precedents to create that connection. In both cases, practitioners behave as if the decisive moves are brought about through a technique that accesses impersonal power that they engage and channel, while critical observation and practitioners' own declarations reveal that the practitioners are dictating the moves themselves. The question, then, is how, in both magic and law, those skeptical revelations amplify rather than destroy the practices they expose.

C. How Does Unmasking Work to Sustain Power?

[E]veryone knew that real dancers animated the unicorn costume.
That was part of the enchantment.

—Laurel Kendall²²⁸

Michael Taussig interpreted the revelation of the witch doctor's trick as emblematic of the role skepticism plays in keeping alive tradi-

228. Laurel Kendall, *Eye of the Dragon*, NAT. HIST., June 2007, at 48, 48.

tional practices of magical healing. He proposed that, before the revelation, knowledge of the trick was a “public secret,” something that “is known not to know.”²²⁹ Exposing the trick was then an “oblique ritual of exposure of the secret within the ritual of the witch-doctors.”²³⁰ Taussig concluded that there is a “need for rites of exposure built into rites of magic so as to strengthen magic itself”²³¹ and ultimately that “[m]agic is efficacious not despite the trick but on account of its exposure.”²³² But he never really explained *why* this should be so. How does magic, including doctrinal magic, not only survive skepticism but feed on it? Why should exposing an image of power as *only* an image make that image still more powerful? Why does unmasking the inability of shamans’ rituals to *really* pull objects from the bodies of the afflicted and the inability of judges’ doctrinal analysis to *really* determine who should pay for an afflicted person’s injury sustain, or perhaps even increase, confidence in the institutions and individuals that employ those techniques?

One possibility is that revelations of sleight of hand and acknowledgment of doctrinal indeterminacy amount to what social scientists call “inoculation” against criticism.²³³ Inoculation theory posits that it is possible to protect beliefs against outside criticism by confronting believers with a relatively weak challenge in advance of a serious critique.²³⁴ The idea, captured by the medical metaphor, is that a calculatedly weak initial challenge—the “inoculation”—stimulates the believer to mount a defense, a kind of ideological immunity, that she can later use to fend off actual attacks on her views.²³⁵ So, for instance, a salesman who has convinced a customer to order a relatively expensive product might end his pitch by pointing out that the customer’s friends and neighbors may say he has overpaid and by asking the customer how he will respond if that happens. The idea is that when the customer later encounters skepticism,

229. Taussig, *supra* note 1, at 242.

230. *Id.* at 243.

231. *Id.* at 244.

232. *Id.* at 222.

233. William J. McGuire, *The Effectiveness of Supportive and Refutational Defenses in Immunizing and Restoring Beliefs Against Persuasion*, 24 *SOCIOMETRY* 184, 184 (1961); William J. McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY VOL. I*, at 192 (Leonard Berkowitz ed., 1964) [hereinafter McGuire, *Inducing Resistance to Persuasion*]; William J. McGuire, *Persistence of the Resistance to Persuasion Induced by Various Types of Prior Belief Defenses*, 64 *J. ABNORM. & SOC. PSYCHOL.* 241, 241 (1962); William J. McGuire & Demetrios Papageorgis, *The Relative Efficacy of Various Types of Prior Belief-Defense in Producing Immunity Against Persuasion*, 62 *J. ABNORM. & SOC. PSYCHOL.* 327, 327 (1961) [hereinafter McGuire & Papageorgis, *The Relative Efficacy*]; William J. McGuire, *Resistance to Persuasion Conferred by Active and Passive Prior Refutation of the Same and Alternative Arguments*, 63 *J. ABNORM. & SOC. PSYCHOL.* 326, 326 (1961) [hereinafter McGuire, *Resistance to Persuasion*]; Demetrios Papageorgis & William J. McGuire, *The Generality of Immunity to Persuasion Produced by Pre-exposure to Weakened Counterarguments*, 62 *J. ABNORM. & SOC. PSYCHOL.* 475, 475 (1961) [hereinafter Papageorgis & McGuire, *The Generality of Immunity to Persuasion*].

234. McGuire, *Resistance to Persuasion*, *supra* note 233.

235. McGuire & Papageorgis, *The Relative Efficacy*, *supra* note 233.

he will be prepared to defend his purchase rather than cancel his order.²³⁶ Inoculation theory, originally proposed by William J. McGuire in the 1950s, has been tested and used in a variety of clinical and practical settings.²³⁷ The inoculation effect does not appear to depend on generating specific counterarguments. Challenges to one aspect of an idea seem to increase believers' ability to fend off later challenges, even when they are substantively unrelated to the initial challenge.²³⁸ However it works,²³⁹ inoculation seems to strengthen existing attitudes about everything from the dangers of smoking to the value of democratic government.²⁴⁰ Mounting a mild challenge apparently stimulates a defense of the criticized beliefs.

Could the persistence of magical and doctrinal practices despite skeptical attacks be explained by inoculation theory? In the inoculation scheme, isolated revelations of practitioners' illusory techniques build defenses against more sustained challenges to those practices.²⁴¹ For in-

236. See McGuire, *Resistance to Persuasion*, *supra* note 233 (presenting this theory in the abstract); Preston Campbell, *Inoculation, the Secret Persuasion Strategy to Lock Down Your Sales and Reinforce Decisions*, SALES MARKETING SECRETS (Dec. 4, 2012, 4:22 PM), <http://sales.artcony.com/2012/12/inoculation-the-secret-persuasion-strategy-to-lock-down-your-sales-and-reinforce-decisions/>.

237. McGuire utilized health truisms in his research that were generally held to be true by the vast majority of persons studied (e.g., that everyone should brush their teeth after a meal). *Id.* at 328. Other studies have greatly expanded the reach. See e.g., Mark M. Bernard, Gregory R. Maio, & James M. Olson, *The Vulnerability of Values to Attack: Inoculation of Values and Value-Relevant Attitudes*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 63, 67 (2003) (testing the widely held value of equality, rather than a truism, and finding essentially the same results as in McGuire's studies); Bobi Ivanov, Michael Pfau & Kimberly A. Parker, *Can Inoculation Withstand Multiple Attacks? An Examination of the Effectiveness of the Inoculation Strategy Compared to the Supportive and Restoration Strategies*, 36 COMM'C'N RESEARCH 655, 671 (2009) (finding that inoculation was superior to supportive and restoration strategies in an advertising context); Michael Pfau et al., *Efficacy of Inoculation Strategies in Promoting Resistance to Political Attack Messages: Application to Direct Mail*, 57 COMM'C'N MONOGRAPHS 25 (1990); Michael Pfau & Steve Van Bockern, *The Persistence of Inoculation in Conferring Resistance to Smoking Initiation Among Adolescents: The Second Year*, 20 HUMAN COMM'C'N RESEARCH 413, 413 (1994); Michael J. Ross & R. Scott Berger, *Effects of Stress Inoculation Training on Athletes' Postsurgical Pain and Rehabilitation After Orthopedic Injury*, 64 J. CONSULTING & CLINICAL PSYCHOL. 406, 408 (1996).

238. McGuire, *Inducing Resistance to Persuasion*, *supra* note 233, at 245; McGuire, *Resistance to Persuasion*, *supra* note 233, at 330; see also John A. Banas & Stephen A. Rains, *A Meta-analysis of Research on Inoculation Theory*, 77 COMM'C'N MONOGRAPHS 281, 281 (2010) (a meta-analysis of fifty-four cases testing the effectiveness of inoculation theory found no statistically significant difference in relative effectiveness of refutational same and refutational different inoculation messages).

239. McGuire, *Resistance to Persuasion*, *supra* note 233, at 326. McGuire postulates two potential ways it works, (1) that pre-exposure to the possibility of the belief being attacked leads the person to begin to develop defenses and reasons to hold the belief valid; and (2) pre-exposure to attack, along with the refutations of that initial small attack, lead the person to hold all subsequent attacks less impressive and less valid. In subsequent research, McGuire focused on and considered paramount the first reasoning. See generally McGuire, *Inducing Resistance to Persuasion*, *supra* note 233. But see Ronald W. Rogers & Donald L. Thistlethwaite, *An Analysis of Active and Passive Defenses in Inducing Resistance to Persuasion*, 11 J. PERS. & SOC. PSYCHOL. 301, 302, 307 (1969) (suggesting that it is the second possibility, that of making subsequent attacks less impressive, which is the stronger motivation in denying subsequent attacks).

240. See generally Pfau et. al, *supra* note 237 *passim*; Pfau & Bockern, *supra* note 237.

241. Papageorgis & McGuire, *The Generality of Immunity to Persuasion*, *supra* note 233, at 478.

stance, confronting the witch doctor with the palmed charcoal would stimulate believers in his power to mount defenses of that power's authenticity. Likewise, asserting that proximate cause is really about policy limits on liability (and thus implicitly that doctrines do not really determine proximate cause outcomes) would stimulate doctrinal practitioners to defend doctrinal determinacy. In this view, New York judges adjudicating negligence cases look to *Derdiarian* as a precedent and find there both an extended doctrinal analysis and a mild skeptical attack on doctrinal determinacy. According to inoculation theory, *Derdiarian*'s gentle critique would stimulate those judges' defenses of their own doctrinal practice. Perhaps, then, *Derdiarian*'s reference to the policy basis for proximate cause awakens defenses of doctrinal reasoning and so actually strengthens faith in proximate cause doctrines.²⁴² In this way, inoculation theory might explain both the puzzling persistence of proximate cause and how Taussig's "skilled revelation of skilled concealment" works to strengthen rather than diminish faith in magic.²⁴³

It has to be said, however, that the inoculation account does not neatly fit either magical or legal confrontations with skepticism. In particular, in both contexts overt defenses against skeptical attacks are strikingly absent. The Azande do not defend magic as real, and explicit arguments that proximate cause doctrines are really determinate are rare. Indeed, direct defenses of doctrinal determinacy in general are rare outside of certain institutional settings, for example, Supreme Court confirmation hearings. Magicians who practice sleight of hand and judges who use doctrinal techniques apparently feel no need to defend their practices; they simply maintain them. It is, of course, possible that believers in magic and doctrine are mounting unspoken defensive arguments in their heads, but there is no evidence that is the case.

Furthermore, the magical and legal examples differ from the inoculation paradigm in a way that inoculation theorists call crucial.²⁴⁴ According to inoculation theory, it is important that the believer confront the weak, "inoculating" argument before responding to sustained attacks.²⁴⁵ Otherwise, criticism will likely overwhelm belief before the believer has a chance to build defenses.²⁴⁶ But the revelation of the charcoal trick or the reference to the policy in *Derdiarian* came in the midst of sustained cultural recognition of the tricks they exposed. Indeed, the striking feature of both post-realist legal practice and the magical healing practices anthropologists describe is the longstanding and pervasive in-

242. *Id.* at 475 (discussing the social science underpinnings of immunity to persuasion theories).

243. Taussig, *supra* note 1, at 222.

244. McGuire & Papageorgis, *The Relative Efficacy*, *supra* note 233, at 333 (noting that pre-exposure to counterarguments must be monitored carefully so as not to overwhelm, rather than stimulate, the subject's defenses).

245. *Id.*

246. *Id.* at 333-34.

tensity of skepticism about the authenticity of those practices. Rather than believers facing a discrete, early challenge, practices and critiques of those practices seem to coexist side by side and even intertwine for generations. That structure does not fit the inoculation profile.

I want to suggest an alternative explanation for the persistence of magic and doctrine in the face of equally persistent skepticism. Unmasking the indeterminacy of magic and doctrine strengthens those practices because it brings into view the real wonder of practitioners' work with their techniques. Ritual practitioners sustain a contradiction, acting "as if" the ritual were real while constantly aware of the gap between ritual and reality.²⁴⁷ Being reminded that ritual order is make-believe may expose the gap and be momentarily shocking. But ultimately revealing ritual illusions is not destructive to ritual practice because the artificiality that is revealed was always understood to be present, even if that artifice was not fully articulated or openly acknowledged. Moreover, unmasking reorients our attention away from any lingering doubts or ambivalence about the techniques' authenticity and toward the way those techniques are being deployed in the particular case at hand.

By temporarily relieving any effort to act as if doctrinal analysis "really" works, unmasking allows participants to focus completely on the unfolding performance. Like other complex ritual performances, doctrinal analysis "requires coordination, circumspection, precision in practice, and a well-tempered attention to what one is about."²⁴⁸ The revelation that the practitioner's techniques are flawed and artificial does away with any need to circumvent our knowledge that a technique is not independently productive. It frees participants instead to identify with, appreciate, and criticize the genuine struggle of the practitioner who attempts to produce acceptably legal results with real effects by mastering an artificial technique.

In this view, the confrontation with artifice does two (related) things. First, it relieves any need for participants to pretend they believe that the symbolic techniques are real. Second, after confronting the "public secret" of the trick, participants can engage in or witness the genuine struggle to use the mastery of those artificial tricks to produce acceptable results. By calling attention to the trick, the practitioner effectively asserts that her performance of that trick will nevertheless be able to produce a result that we will recognize as authentically magical or legal. Indeed, the implicit claim is that the results of doctrinal or magical techniques will be superior to what could be achieved without the practitioner's craft, even if those techniques rely on illusion. The unmasking thus demands faith that the practitioner's performance of the practical tech-

247. As Seligman et al. put it, ritual exists in the subjunctive mode. ADAM B. SELIGMAN ET AL., *RITUAL AND ITS CONSEQUENCES: AN ESSAY ON THE LIMITS OF SINCERITY* 7–8 (2008).

248. *Id.* at xi.

niques, however artificial, is itself somehow valuable and can produce results superior to what the practitioner could create by eschewing the formal, artificial practices and approaching the problem directly and instrumentally.

The idea that an admittedly false technique could be superior to no technique at all may seem strange. In the legal context, it violates the value of transparency that is a core norm of both democracy and the rule of law.²⁴⁹ But consider a problem that realist critics of doctrinal obfuscation rarely acknowledge. Definitionally, in order to be a “legal” result as we understand that term, a decision must reflect something other than the decision maker’s point of view. As Keith Bybee puts it, the *sine qua non* of a legal decision is that the decision maker “look outside his own will” for the result.²⁵⁰ Indeed, the same need for an outside source of some kind is definitively part of the idea of “magic.” Given that requirement, it may be more “legal” to continue to practice an artificial, communally sanctioned technique even if that technique is understood to be incapable of producing the result without the conscious intervention of the practitioner’s own will. That is, given the choice between a process that openly and *only* relies on the practitioner’s own will and one in which the practitioner engages in a formal artificial technique on the way, as it were, to producing results through her own individual choices, it may be more “legal” to go through the artificial practice. I do not mean to endorse or condemn the legitimacy of such a process. I mean to use the term “legal” in a positive, descriptive sense. That is, I mean that a decision-making process that includes a technique that looks as if it produces externally dictated results may conform to our cultural definition of legality more closely than a process that straightforwardly eschews formal techniques in favor of transparent individual choice making.

In any case, as a descriptive matter, it seems a mistake to insist that because doctrine does not determine results, doctrinal analysis is not *really* part of legal decision making. E.E. Evans-Pritchard points out that a Zande witch doctor’s ritual dance is likely not the cause of his witchcraft determinations.²⁵¹ Yet the dance is still a significant part of the pro-

249. Regarding the centrality of transparency as a democratic value in multiple contexts, see *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3118 (2010) (Stevens, J., dissenting) (criticizing the majority’s historical analysis as capable of “smuggl[ing]” or “bur[ying]” subjective judgments, thus defeating the importance of transparency in adjudication); *Ballard v. Comm’r*, 544 U.S. 40, 62 (2005) (holding that the tax court could not exclude special trial judge reports from the record on appeal, the Court noted, “In comparison to the nearly universal practice of transparency in forums in which one official conducts the trial . . . and another official subsequently renders the final decision, the Tax Court’s practice is anomalous”); *Smith v. Doe*, 538 U.S. 84, 99 (2003) (noting that “[t]ransparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused”). See generally *THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD passim* (Ann Florini ed., 2007); EDWARD A. SHILS, *THE TORMENT OF SECRECY: THE BACKGROUND AND CONSEQUENCES OF AMERICAN SECURITY POLICIES passim* (1956).

250. Bybee, *supra* note 13, at 306–07; see also CARTER & BURKE, *supra* note 18.

251. EVANS-PRITCHARD, *supra* note 14, at 87.

cess through which the Azande address injury and misfortune. The witch doctor probably relies on village gossip and personal observation to think out the answers to his questions “while dancing and strutting about.”²⁵² Likewise, judges’ decisions are determined by non-doctrinal factors, including their individual views of justice and the right policy choices, influenced by the surrounding culture. To some extent, then, their performance of adjudicating these questions through the application of doctrines is just so much legal “dancing and strutting about.”²⁵³ But as Evans-Pritchard insisted, on another level such rites *are* the method through which results are achieved.²⁵⁴ We might call that level *enactment*, to borrow a term from both law and ritual performance, expressing the idea that the formal public process itself, however artificial, affects the meaning of the results, even if it does not *cause* those results.²⁵⁵

As Catherine Bell has observed, a fundamental aspect of ritual is “the simple imperative to *do* something in such a way that the doing itself gives the acts a special or privileged status.”²⁵⁶ We can understand doctrinal analysis, like magical healing, as a shared, conventional creation, not as a reflection of individual practitioners’ internal state of mind or beliefs. “A witch ‘doctor dances the questions.’”²⁵⁷ On the level of ritual enactment, the dance remains important even if it does not causally determine the results. “An observer who recorded only questions put to the witch-doctors and the replies which they gave would leave out *the whole mechanism by which the answers are obtained . . .*”²⁵⁸ Likewise, a judge doctrinally analyzes the question. Even if that doctrinal analysis is not the cause of the judge’s liability decision, it remains in this sense the mechanism by which the case is decided.

From this perspective, setting aside the language of doctrinal proximate cause would remove a large part of the process that makes the judge’s liability decisions recognizably legal answers. This is so even if those answers are substantively determined by other factors—like the judge’s political views and the relatively sympathetic nature of the parties to the case. A witch doctor dances his questions and a judge goes through the motions of doctrinal analysis. As Evans-Pritchard saw, “[t]he

252. *Id.*

253. *See, e.g.,* SCHAUER, *supra* note 5, at 175 (“[T]he view that judicial opinions are largely about making a decision that was the product of choice and discretion appear as if it had been compelled by earlier cases and other legal materials is far more than just a widely held opinion—it is almost certainly the conventional wisdom.”).

254. EVANS-PRITCHARD, *supra* note 14, at 89.

255. As Frederick Schauer points out, in the legal context, doctrinal analyses that do not cause legal results may nevertheless be used to explain and give reasons for those results in doctrinal terms. SCHAUER, *supra* note 5, at 174–75.

256. CATHERINE BELL, *RITUAL: PERSPECTIVES AND DIMENSIONS* 166 (1997); *see also* SELIGMAN ET. AL., *supra* note 247, at 4 (quoting Catherine Bell for same proposition).

257. EVANS-PRITCHARD, *supra* note 14, at 89.

258. *Id.* (emphasis added).

full meaning” of a social practice in which such rituals take place “can only be grasped when this dancing is understood.”²⁵⁹

That observation brings us back to the question of how skepticism works with doctrine or dancing to strengthen rather than disable ritual practice. I want to suggest that it has something to do with a suspension of conflict. Ritual performance proceeds on two levels. We act as if it were real at the same time that we know ritual exists as a counterpart, or even opposite, of real life. In the moment of skeptical revelation, when the dancing or doctrinal analysis is called out as artifice, we recognize our own knowledge of the “public secret” that ritual is not reality. Relieved of the need to act as if the ritual is real, we can observe and evaluate the doctrinal or magical practice itself as an artificial technique that can be more or less effective depending on the particular problem and the practitioner’s specific approach. Moreover, because it brings the tension between artifice and reality to the surface, unmasking ritual or doctrinal artifice sets up a new conflict. It reveals the tension between the practitioner’s obviously flawed and limited technique and the ideal of a practice that could produce magical or legal results without individual human intervention. After the unmasking, we watch the magician or judge’s performance in a new way, freed from the effort to suspend disbelief. We no longer need to work to avoid recognizing the practitioner’s conscious intervention. Instead, we are freed to watch the practitioner wrestle with the artificial technique to produce results that are recognizably magical or legal. Rather than a false struggle to make artifice appear real, we can watch a real struggle unfold.

Once we are no longer required to treat doctrinal analysis as the *cause* of the legal outcome, we may be freer to appreciate its value as the *form* of that outcome. In this view, doctrinal analysis is a way of enacting a liability result that is separate from the will of the decision maker. That separation comes about not because the liability result was caused by something other than individual human intelligence. Instead, doctrinal techniques connect the result to a collective ideal of legality as an imagined and performed subordination of individual will to collective principles.²⁶⁰ Doctrinal analysis can be seen as an enactment (rather than a transparent expression) of the individual decision maker’s subordination to a formal, collectively approved legal process. This is a fundamentally ritual view of doctrine, but it is a rich view of ritual. Judges who

259. *Id.*

260. A related idea is found in Judith Resnik’s suggestion that legal process’s constraining effect on government power comes about in part through adjudication’s enactment of equality between powerful government officials and vulnerable individuals. Judith Resnik, *The Role of the Judge in the Twenty-First Century: Whither and Whether Adjudication*, 86 B.U. L. REV. 1101, 1103 (2006) (“The literal and material presence of adjudication stems in part from its performative qualities . . .”); see also Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 4 LAW & ETHICS HUM. RTS. 1, 6 (2011) (“[P]ublicity in courts disciplines governments by making visible how they treat both their judges and disputants.”).

acknowledge doctrines' instrumental uselessness arguably make the enactment of ritual subordination all the more powerful *as* ritual. They reveal the effort it costs the individual decision maker to enact that subordination properly.

Like the witch doctor's dance, doctrinal analysis is an act—a performance—that is complex and taxing for the practitioner. To some extent, the power of such a performance is at its zenith when a performer can simultaneously produce the required form and acknowledge the inevitable gap between form and reality. When we need not consider how convincing the performance is as a representation of reality, we can concentrate on the performance itself. As the theater director Julie Taymor explains, “[W]hen you get rid of the masking, then even though the mechanics are apparent, the whole effect is more magical. . . . It's not because it's an illusion and we don't know how it's done. It's because we know *exactly* how it's done.”²⁶¹

For instance, I vividly recall a play I saw years ago that piled one arcane and obvious theatricality upon another, with no concessions to naturalism.²⁶² The part of a grandmother was played by a young male actor in a crazy grey wig and wheelchair.²⁶³ At a certain point in the play, the grandmother gets some sad news. In response, the actor took a small plastic bottle from a pocket of his flowered house dress, uncapped the bottle, tilted up his face, and squeezed a couple of drops into each eye. After he carefully recapped and replaced the bottle, he sat upright and immobile, facing the audience, as tears, presumably precipitated by whatever substance was in the bottle, began streaming down his face. There was no question of the audience (or for that matter the actor) being fooled into believing that he was really crying, although of course he *was* really crying in the sense that real tears were really coming out of his eyes. There was no attempt to make us believe that those tears were caused by real feelings of sadness, or that there was anything real to be sad about. It was all deliberate artifice.

What could be more artificial than glycerin tears? Yet the image of the old lady weeping was in some way more affecting than it would have been if the actor had palmed the bottle and made it appear that his tears were caused by real sadness, or if an actress who actually looked the part of a grandmother had burst into tears in a way that looked or perhaps even was in some sense “authentic,” for instance, by recalling some sad event from her real life. With the artifice on full display, we were moved by something we knew was real—the actor's unmasked display of technique itself and, perhaps, by the gap between the limits of technique and

261. Daniel Mendelsohn, *Why She Fell*, NEW YORK REVIEW OF BOOKS, May 12, 2011, at 33.

262. The show was *Rumstick Road*, a theater piece created by The Wooster Group, circa 1977, directed by Elizabeth LeCompte.

263. It was the late great actor, Ron Vawter.

the complex reality of human feeling and the actor's effort to bridge that gap with nothing but artificial techniques. The wonder is that something so far from reality could nevertheless produce something so really affecting. Likewise, when a judge performing doctrinal analysis acknowledges directly that doctrine is not the real cause of her decision, we may find the doctrinal rationale for that decision more persuasive. We see the extent to which doctrinal analysis is a constraint, not because it can determine the outcome but because the judge who determines that outcome another way is nevertheless compelled to go through the doctrinal analysis publicly and to make that analysis as persuasive as possible. The compulsion to perform attentively, diligently, and persuasively itself becomes the basis of the subordination of the individual decision maker to the doctrine.

The power of these performances does not depend on a belief in a transcendent magical, emotional, or legal source. The performance does not persuade us because it fools us into believing that it is a sign of some other, bigger, more important, or more transcendent cause than the performer's art. Confronting the artificiality of the construction does not derail the drama, ritual, or doctrinal analysis but actually heightens the effect of the performance by simultaneously highlighting the performer's mastery and vulnerability. We witness the performing magician, actor, or judge struggle to manage the artifice of the technique and the gap between that technique and reality in order to produce results we can accept as authentic. The struggle can never be completely successful, but the struggle is genuine, and we can judge its results to be more or less satisfactory.

IV. DANCING DOCTRINAL QUESTIONS AND THE VALUE OF TRANSPARENCY

Exposing the artifice through which fallible individuals construct magical, dramatic, or legal results apparently gives those results power they never would have had if we were still in the realm of the unspoken public secret. But is that power legitimate? In particular, is it legitimate to increase legal doctrine's persuasive power without increasing doctrinal determinacy? It would require another lengthy article to fully examine the legitimacy issues that arise from exposing doctrinal indeterminacy while continuing to practice doctrinal analysis.²⁶⁴ In this final Part then, I will just offer some preliminary observations.

264. One might, of course, conclude that revelations of doctrinal indeterminacy have no significant effects on the legitimacy of doctrinal practice because they do not disturb that practice. In this view, even doctrinal judges' self-critiques are inconsequential because they do not deter the practice of doctrinal analyses. Thus the legitimacy of doctrinal decisions is simply whatever it would be without the skeptical critiques. I do not share this perspective. This entire Article springs from the observation that articulating critiques of doctrinal practice while continuing that practice is a puzzling and significant phenomenon.

It is not hard to see that if unmasking only preserves a misguided belief in doctrinal determinacy, then unmasking undermines the legitimacy of the formal legal process it preserves. I will outline that view briefly in what amounts to an extension of the realist critique of doctrine. There is another, contrary perspective, however, that I want to point out as well without either fully exploring or endorsing it. Through the lens of ritual theory, we might see the combination of doctrinal illusion and revelation as a morally complex practice that enacts both a ritual for subordinating individual choice to doctrine and the recognition that any such ritual depends on illusion. In this view, legal practitioners act *as if* their collective formal process defers individual choice while acknowledging the reality that individual choice is always involved in legal results.²⁶⁵ Although it is much harder to see how commitment to illusion can lead to legitimacy, I do not think that we can rule out altogether such a normative defense.

From the realists' instrumental perspective, the combination of doctrinal analysis with skepticism about doctrinal efficacy is at best incoherent and at worst deceptive. It obfuscates by pretending to come clean. It legitimizes the illegitimate by *inoculating* judicial decisions against realist skepticism. Ritual theory offers a response to, or perhaps a reorientation of, that realist critique exactly because it views ritual practice as not entirely instrumental. Anthropologists have long pointed to the interaction of belief and make-believe in ritual as a way to bring to the surface, traffic with, and symbolically reconcile conflicting social norms.²⁶⁶ We might see unmasking doctrinal indeterminacy as a ritual enactment of the apparently irreconcilable tension between objectivity and transparency in law. Our concept of law requires that legal decisions be based on something other than individual choice, but our understanding of reality is that no set of transcendental norms and doctrinal formulas is capable of removing individual choice from legal decision making. From this perspective, rather than perpetuating a fraud or delusion, ritually unmasking doctrinal indeterminacy enacts the problem of this contradiction. To be sure, it is not a solution to that problem. But neither is it only a hypocritical disguise.

A. The Realist View: Doctrinal Magic as False Illusion

If revealing doctrinal indeterminacy is ultimately a way to perpetuate naïve or cynical acceptance of doctrinal artifice as reality, it is obviously illegitimate. Considering that combining revelations of doctrinal

265. Cf. SELIGMAN ET AL., *supra* note 247, at 7–11.

266. Thurman Arnold, one of the original realists, argued that adjudication enacts similar kinds of reconciliation. THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* iii–v (1935) (describing a similar theory of reconciliation as the premise of his work); *see also* Allen, *supra* note 13, at 803–04 (compiling citations to Arnold's work supporting this reconciliatory theory); Bybee *supra* note 13, at 316–22 (analyzing Arnold's scholarship and reaching a similar conclusion).

indeterminacy with doctrinal analysis seems ultimately to strengthen the power of doctrinal practice, one can see that combination as another, more sophisticated form of duplicity. As Michael Taussig observed, “[I]n its unmasking, magic is in fact made even more opaque.”²⁶⁷ Unmasking the trick is basically another trick, a way of further masking power.

Undeniably, there is a way in which exposing the secret of doctrinal indeterminacy protects that secret. When a judge calls out the indeterminacy of doctrine but still relies on doctrine, she gains credibility for telling the truth and then proceeds to use that credit to obscure her responsibility for the decision. The revelation is a way to build trust. As one psychologist explains, revealing a weakness in your argument before making your strongest point disarms your audience: “By mentioning a downside, you establish yourself as a credible source of information.”²⁶⁸ The judge’s acknowledgment of her doctrinal technique’s indeterminacy right before launching into a complicated doctrinal analysis convinces us to let down our skeptical guard and accept her doctrinal approach. Paradoxically, the unmasking further masks. Momentary transparency about the uncertainty and subjectivity of the decision-making process winds up contributing to an illusion of overall objectivity. It produces a more advanced and more deeply dishonest form of the doctrinal charade that the realists criticized.

Realists consider doctrinal faith hypocritical or naïve. But there is a kind of hypocrisy or naiveté in the realist approach as well. Realism denies the complexity of the problem posed by the requirement that a legal decision must be based on something other than individual choice and the realistic understanding that individual choice is necessarily involved.²⁶⁹ The point that the realist critique often disregards is that any process that calls itself “legal” requires a commitment to decision making guided by something other than the decision maker’s own choices. When realists suggest that the solution to the problem of doctrinal illusion is simply to have judges spell out clearly their individual views of the policy factors that should determine the outcome, they ignore the magnitude of the legitimacy problem raised by that transparently subjective approach. Calling judges’ preferences “policy analysis” as opposed to “personal taste” does not change the fact that the realist response effectively does away with the most basic criterion of legality.

Jerome Frank used to rail against the idea that the desire for objective, determinate legal rules made the existence of such rules real.²⁷⁰ Just because you might like to have legal certainty doesn’t make it possible,

267. Taussig, *supra* note 1, at 241.

268. Peter Wilby, *Persuasion Is a Science*, NEWSTATESMAN (Feb. 26, 2007), <http://www.newstatesman.com/uk-politics/2007/02/politicians-cialdini-social>.

269. See SELIGMAN ET AL., *supra* note 247, at 107–08, for a similar point regarding what they call the “sincere” view.

270. FRANK, *supra* note 11, at 52–53.

he said.²⁷¹ But Frank offered no response to the legitimacy problem we face if we fall back completely on a transparently individual decision-making process with no formal collective structure. Just as the desire for magic carpets does not make them real, the reality of indeterminate, subjective judicial decisions does not make them legitimate. In a democratic society, it is not legitimate for legal decisions that direct government force to be made by tricks that create an illusion of rule-based determinacy. But neither is it legitimate to simply default to individual judicial choices. In this light, eschewing all formal doctrinal analysis in favor of transparent policy analysis would not necessarily provide a more legitimate resolution to the problem of doctrinal indeterminacy.

B. The Ritual View: Revealing Doctrinal Illusion Enacts the Problem of Legal Legitimacy

Perhaps ironically, the realists' own identification of affinities between doctrinal analysis and ritual magic points to a potential value of formal doctrinal practice. When a judge both deploys proximate cause doctrines and points to doctrinal artifice, she makes the trick transparent and exposes the rock-and-a-hard-place problem faced by courts after the realist critique. The judge who practices doctrinal reasoning while acknowledging its indeterminacy enacts both a commitment to impersonal "blind" legal decision making (as opposed to policy making) and the recognition that her own subjective attitudes shape her legal decisions.

As ritual, judges' exposure of doctrinal indeterminacy is a way for them to navigate between the Scylla and Charybdis of doctrinal fiction and realist skepticism. Given the requirement that a legal decision must be based on something other than personal choice, it is really not open to judges to give up all formal doctrinal practices. Continuing doctrinal practice without acknowledging its indeterminacy leaves judges open to the kind of "gotcha" moment Evans-Pritchard pulled off when he exposed the witch doctor's palmed charcoal. So judges expose their own artifice. Such exposure is obviously self-protective. At the same time, the judicial exposure of indeterminacy invites a different kind of critical scrutiny of legal decisions. It prompts us to inquire not only whether the judge correctly interpreted the proximate cause tea leaves but also whether his deployment of elastic proximate cause doctrines can be squared with both traditional practices of doctrinal analysis and social policy objectives in a way that can be properly characterized as a legal result.

A thoroughgoing realist would say that if we cannot have objective legal determinations, let us at least preserve legal transparency by making judges' subjective policy choices fully apparent. For a realist, the judge who acknowledges indeterminacy (and thus the impossibility of

271. *Id.* at 53.

legal objectivity) but refuses to make her policy analysis clear is only compounding the problem by adding dishonesty to indeterminacy. But from the perspective of ritual theory, mixing doctrinal practice with skepticism may be seen as enacting a continued commitment to both objectivity and transparency without denying the complexity, or perhaps the impossibility, of reconciling those values.

CONCLUSION

When the realists criticized doctrine as magic, they doubtless hoped to put an end to the doctrinal magic show. Instead, something much stranger has happened. Doctrinal analysis continues, but not because the realist critique failed. Nearly a hundred years after the realists contended that doctrines like proximate cause were just a bunch of “magic words,” both doctrine and skepticism about doctrine are still going strong. I have argued here that the realists’ comparison of law and magic may help us solve the riddle of doctrine’s survival in the face of doctrinal indeterminacy. We can see the apparently contradictory combination of doctrinal practice and skepticism as another version of magicians’ selective revelations of the illusions they construct. I have also offered some ideas about *how* such revelations might work to strengthen the practice they expose. The remaining questions are about efficacy and legitimacy. Does the comparison of law to magic offer any new reason to think the continued use of indeterminate doctrinal forms has something to contribute to a legitimate rule of law? Must we conclude that doctrine revealed is doctrine debunked? Or, if ritual theory can explain how skepticism and illusion coexist, might it also provide some basis for reconsidering and maintaining formal doctrinal practice?

