4 Making Law

[Whether it is desirable that the judges’ power and practice of making Law should be concealed from themselves and the public by a form of words, is a matter into which I do not care to enter. The only thing I am concerned with is the fact. Do the judges make Law? I conceive it to be clear that, under the Common Law system, they do make Law.]
—John Chipman Gray

Legislating from the Bench

In the common law tradition, judges make law. This may seem a fairly innocuous, if not self-evident, statement, yet somehow it remains controversial. Nevertheless, for purposes of this chapter and this book, I assume, as Gray did, a basic level of agreement that a fundamental part of a common law judge’s institutional role is to create and alter legal standards in the course of resolving legal disputes. In this chapter, I focus on the way that law is made in the course of the judicial process and the role of the judge as an individual in that process. To do so, I concentrate on a few cases in which the law-making function of judges as individuals may be observed in practice.

The familiar concerns about judges “legislating from the bench,” in all their various forms, are unfounded for one of two reasons. If the concern about “judicial” legislation is meant to express the view that judges do not or should not make law, then it is an argument against the common law as a legal system, not an argument against judges operating within that system. If the concern about judicial “legislation” is meant to express the view that judges do not or should not make law in the same way that legislatures do, then it is tautologically true. It is not only true that judges should not make law in this fashion, as I discussed in chapter 2, judges cannot make law in
this fashion. Judges can only establish legal norms in the course of resolving legal disputes in the context of legal cases through the articulation of legal conclusions justified by universalizable expressions of legal doctrine. Judges can only establish legal norms in the course of resolving legal disputes in the context of legal cases through the articulation of legal conclusions justified by universalizable expressions of legal doctrine. A judicial decision must be expressed and justified in legal form as a legal source grounded in legal argument. The formal and institutional constraints that govern judges mean that where judicial law making is concerned, “developing the law is a different thing from making it in the legislative sense, and one which is subject to rationally persuasive argument using materials from established law.”

Judges and legislators function in entirely different institutional contexts and under entirely different institutional constraints. Legislators are not supposed to be impartial; they are supposed to act on behalf of the constituents who elected them. There are many reasons legislators may vote for legislation that do not necessarily indicate their approval of the substance of the legislation, and many ways legislators are expected to be directly accountable to the electorate. In contrast, when a judge writes or signs a judicial opinion, it is understood to be his approval of the substance of the opinion he signed. And judicial independence assumes that judges must be responsive to the parties in a case and responsible to the public in rendering legal judgments, but judges are not supposed to be accountable to the electorate in the manner of legislators.

More generally speaking, many of the institutional constraints that govern judicial decision making do not apply to legislators or legislation. For example, the constraints of jurisdiction, justiciability, and the judicial obligation to decide cases in legal form by reference to legal sources are significant institutional restrictions on judges. None of these constraints applies to legislators, and they function to ensure that judges cannot and will not decide cases simply on the basis of their own subjective preferences. But this also should not lead us to assume that the subjective element in judicial decision making is illegitimate or undesirable.

Changing Law

The common law judicial process involves resolving legal disputes in accordance with preexisting legal forms and sources, but also through a process that requires judges to reach and express their judgments in a manner that is both subjective and intersubjective. This dynamism derives from the circumstances in which common law judges function as institutional actors and the nature of the common law judicial process. The problem is not that
there is a subjective element to judging. The problem is that we think this is a problem.

In an effort to analyze more fully the role of subjectivity in the formulation of legal judgments, this chapter involves sustained consideration of some judicial decisions. In seeing these cases as examples of the subjective and intersubjective dynamics of common law adjudication, and in relating the discussion of this chapter to the different forms of objectivity discussed in chapter 2, it is helpful to consider common law judging as a form of nonergodic decision making.\(^\text{18}\)

In an ergodic system, there is a discoverable underlying structure to the system that will allow us to develop an analytic or theoretical model that can systematically and consistently explain and predict the operation of the system.\(^\text{19}\) In the world of the physical sciences, ergodicity is usually assumed and accepted. For reasons I have explained in connection with legal objectivity and various attempts to model judicial decision making, it is a mistake to view the common law as an ergodic system.\(^\text{20}\) The common law is nonergodic because through the course of resolving legal disputes by reference to existing legal sources, judges’ efforts “to render their environment intelligible result in continual alterations in that environment and therefore new challenges to understanding that environment.”\(^\text{21}\) So through the process of making law as they decide cases, judges concurrently attempt to understand their legal world as they find it and, through some of their judgments, develop and change the law that will be understood in the future.

An important point to see here, which the ergodic/nonergodic distinction helpfully underlines, is that there may be ergodic processes that function within a nonergodic system.\(^\text{22}\) Connecting this observation to the discussion of the previous chapters, we find the functionally effective and formal elements of the judicial process recur consistently and serve as a mode of normalizing and translating the structure, language, and outcomes of judicial decisions in the common law tradition. Judicial decisions recognizably and predictably exhibit these properties, which allow them to be evaluated by the appropriately constituted community.\(^\text{23}\) These serve as ergodic elements of the broader system.

The broader common law system is nonergodic, however, because an intrinsic aspect of that system is its designed capacity to change through the evolution of innovative doctrinal norms initiated and improved through judicial decisions.\(^\text{24}\) These innovative decisions through which these norms develop often begin with the subjective response of a judge responding to the case before her and rendering a judgment that then changes the law.
through the intersubjective process of evaluation and reception. The adaptive capacity of the common law allows the law to respond to changing social and political circumstances through a reasonably and reliably stable form of decision making, grounded in authoritative sources and modes of reasoning, so that case outcomes are recognizably legal, even when the outcome is that the law has changed.

This chapter looks at examples of these cases. I limit myself to examining just three changes of existing law prompted by the responses of judges to entrenched legal rules: (1) the rejection of caveat emptor in favor of a duty on the part of sellers in real estate transactions to disclose latent material defects, (2) the recognition of a civil claim for racial discrimination in public accommodations, and (3) the elimination of the so-called marital exemption from prosecution for rape. In each of these cases, judges were confronted with legal doctrines that came to be understood over time as substantively indefensible. Each of these cases involves a reaction by judges to the unfairness of the law they were asked to apply, and the expression of a new legal norm through a judgment that was then adopted generally by the relevant legal community. The examples can easily be multiplied.

**Weintraub v. Krobatsch: The Duty to Disclose**

Natalie Weintraub was selling her house and Donald and Estella Krobatsch wished to purchase it. The Krobatsches walked through the home, liked it, and signed a contract on June 30, 1971, to buy it from Mrs. Weintraub for $42,500. In accordance with the contract, the Krobatsches paid a 10 percent deposit to Mrs. Weintraub and indicated that they “had inspected the property and were fully satisfied with its physical condition, that no representations had been made and that no responsibility was assumed by the seller as to the present or future condition of the premises.”

On August 25, 1971, in the evening, the Krobatsches entered the house after Mrs. Weintraub had moved out but prior to closing on the sale. They were horrified “to see roaches literally running in all directions, up the walls, drapes, etc.” The Krobatsches immediately sought rescission of their contract with Mrs. Weintraub.

Mrs. Weintraub refused to rescind the agreement and sued the Krobatsches for the amount of their deposit ($4,250) as damages for breach of contract. The Krobatsches and Mrs. Weintraub then filed cross-motions for summary judgment. At oral argument, the Krobatsches’ attorney argued that the extent of the infestation belied any claim by Mrs. Weintraub that she was unaware of the infestation. The Krobatsches argued that this
amounted to a fraudulent concealment or nondisclosure, which justified their rescission of the contract.

For her part, Mrs. Weintraub argued that any obligation she might have had as the seller of the property was obviated by the plain language of the contract signed by the parties. According to that contract, the Krobatsches manifested their acceptance of the property in its then-existing physical condition. Mrs. Weintraub argued that once the contract was executed, the venerable principle of caveat emptor shifted all legal responsibility for the condition of the property onto the Krobatsches.

The trial court denied the Krobatsches’ motion and granted Mrs. Weintraub’s motion for summary judgment, and the Appellate Division affirmed. In the lower courts’ view, it did not matter if Mrs. Weintraub was aware of the roach infestation of the home she sold because the Krobatsches assumed all responsibility for the condition of the home when they signed their contract with Mrs. Weintraub.

The Supreme Court of New Jersey reversed the lower courts’ ruling. That court accepted the Krobatsches’ argument that they were entitled to a trial on the issue of whether Mrs. Weintraub was aware that her home was infested and fraudulently failed to disclose the infestation to the Krobatsches. In doing so, the court first cited existing New Jersey precedent establishing that “silence may be fraudulent” and may impose an obligation of disclosure on a party to a contract. The court then addressed Mrs. Weintraub’s argument that even if she had been aware of the infestation, she had no duty to disclose this condition of the home, or any other, to the Krobatsches because the obligation to discover property defects rested entirely on the purchaser.

In addressing Mrs. Weintraub’s argument, which rested on long-established principles of property and contract law, the Supreme Court of New Jersey extensively reviewed existing precedent from New Jersey and several other jurisdictions. One aspect of this analysis is particularly pertinent to my argument. The court considered the Massachusetts Supreme Judicial Court’s decision in Swinton v. Whitinsville Savings Bank. In Swinton, the Massachusetts court held that a seller could not be held responsible for failing to disclose to a buyer that his home was infested with termites. Since the case involved a seller’s deliberate silence but no affirmative misrepresentation, the Massachusetts court concluded that the burden rested with the buyer to locate any hidden defects in the property he was planning to purchase. The Swinton court based its reasoning upon the familiar distinction between what might be morally right and what was legally required. William Prosser described the Swinton ruling as “singularly unappetizing.”

In its analysis of Swinton, the Weintraub court questioned whether it still
represented the view of the Massachusetts Supreme Judicial Court and, even more important to my argument, expressly rejected the principle of the Swinton decision: “we are far from certain that it [Swinton] represents views held by the current members of the Massachusetts court. In any event we are certain that it does not represent our sense of justice or fair dealing and it has understandably been rejected in persuasive opinions elsewhere.”38 In rejecting the Swinton doctrine, the New Jersey Supreme Court replaced a rigid caveat emptor rule with an affirmative duty to disclose material latent defects. Weintraub established that in New Jersey, a seller is now “under a duty to disclose a material latent condition, known to him but unobservable . . . [to the buyer, where] in the circumstances ‘it would be a wholly inequitable application of caveat emptor to charge her [the buyer] with knowledge of it.’”39

The broader legal community’s intersubjective reception and validation of Weintraub can be seen in several ways. The duty to disclose was widely adopted in place of caveat emptor by other state courts after Weintraub was decided,40 the ruling has been expanded particularly in residential cases to cover implied warranties of habitability for leaseholds and new construction,41 and the decision has been widely praised by commentators.42 Weintraub exemplifies the importance of judicial responses to the law as a fundamental element of the common law process in which judges sometimes change and make law through the issuance of judgments that are then evaluated by the larger legal community. The language used by the Weintraub court in expressing its rejection of Swinton’s caveat emptor standard is, in this respect, simultaneously striking and familiar. But even though this language is not unusual, it should not go unnoticed. These choices of language are useful indicators of the individual reactions and values of the judges who make up the courts. And the use of this sort of language in judicial decisions evinces the intrinsic relationship between the personal reactions and perspectives of individual judges and the incorporation of these reactions and perspectives within the formal articulation of legal standards in their judgments.

Browning v. Slenderella Systems of Seattle: Discrimination in Public Accommodations

The Civil Rights Act of 196443 is widely perceived as finally establishing that private owners of public accommodations44 cannot discriminate against customers on the basis of their race.45 The 1964 Act is also widely perceived as “the greatest legislative achievement of the civil rights movement.”46 The
1964 Act was not, however, the first effort to respond through the law to racial discrimination in public accommodations. Prior to 1964, some state court judges began to recognize a civil claim against businesses that discriminated on the basis of race. An excellent example of this judicial response is *Browning v. Slenderella Systems of Seattle*.47

Ola Browning entered Slenderella salon on March 5, 1956, gave her name, and was asked to take a seat and wait for her appointment. After waiting almost two hours and watching women repeatedly arrive and be waited on before her, Mrs. Browning asked the salon manager if she would be served. The manager replied, “We have never served anybody but Caucasians and I just know you won’t be happy here.” When Mrs. Browning asked why she was given an appointment, the manager replied, “Well, you know by phone we have no way of knowing you were colored.”48

Mrs. Browning sued Slenderella for “embarrassment, humiliation, mental anguish and emotional shock” that she suffered as a result of being refused service by the salon due to her race. Sitting en banc, the Supreme Court of Washington affirmed the judgment in favor of Mrs. Browning. The court determined that the salon and its actions were covered by the Washington public accommodation statute: “Every person who denies to any other person because of race, creed, or color, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any public resort, accommodation, assemblage, or amusement, shall be guilty of a misdemeanor.”49

The *Browning* decision is a notable judicial innovation in antidiscrimination law. First, and most obviously, the terms of the applicable statute create only criminal penalties for a violation. Nevertheless, the Washington Supreme Court determined that the statute “while penal in form, is remedial in its nature and effect and gives to the person wrongfully discriminated against a civil remedy against the person guilty of wrongful discrimination.”50 The court reached this conclusion while acknowledging that “a civil action for damages for such discrimination is rarely resorted to in this state” due to the existence of administrative remedies and criminal penalties.51

Second, the *Browning* court also explained that in the absence of any physical harm, a judgment for civil damages resulting from the tort of intentional infliction of emotional distress requires “severe emotional distress.”52 To determine whether the defendant’s conduct was sufficiently likely to cause sufficiently severe distress, the appropriate inquiry was whether “the prohibited conduct is conduct which in the eyes of decent men and women in a civilized community is considered outrageous and intolerable.”53 Although the court observed that Mrs. Browning was not publicly humiliated
because no one else was aware that she was denied service, and even though
the employees of the salon “were courteous” to Mrs. Browning “at all
times,” the majority of the court ruled that “we have no difficulty in find-
ing that the conduct of the defendant was ‘outrageous.’” Although the in-
dividual distress that results from this conduct is, as the court said, “subject-
ive,” the court went on to conclude that “knowledge of human nature tells
one” that there are predictable and shared responses to conduct of this
kind. The judges in the Browning majority concluded that the salon’s act of
racial discrimination itself (no matter how courteously or privately inflicted)
was sufficient to establish a civil claim for damages under Washington’s pub-
lic accommodation statute (despite its criminal form) because that conduct
is outrageous, as a matter of law, when engaged in by a business that falls
within the bounds of the statute. The judges’ shared knowledge of human
nature was sufficient for them to understand the distress that this discrimi-
nation caused Mrs. Browning.

Three members of the Washington Supreme Court dissented in Browning. In his dissenting opinion, which was joined by Justice Ott, Justice Mallery stated that “the majority opinion violate[d] the thirteenth amendment
to the United States constitution. . . . When a white woman is compelled
against her will to give a negress a Swedish massage, that too is involuntary
servitude.” Mallery held the view that private discrimination was a consti-
tutionally protected liberty and he concluded that Slenderella was a private
business and not a public accommodation:

No public institution or public utility is involved in the instant case. The
Slenderella enterprise was not established by law to serve a public pur-
pose. . . . There is a clear distinction between the nondiscrimination en-
joined upon a public employee in the discharge of his official duties,
which are prescribed by laws applicable to all, and his unlimited freedom
of action in his private affairs. . . . This right of discrimination in private
businesses is a constitutional one.

Although he did not articulate the legal basis for his opinion, in determining
that Slenderella could not be penalized for its racial discrimination, Mallery
seems to have maintained the traditional state action/private action distinc-
tion that is traced to the Civil Rights Cases.

Mallery’s dissent helps accentuate the importance of the majority’s
opinion in Browning. Prior to the 1964 Act and the United States Supreme
Court rulings upholding it, many people shared Mallery’s view. In fact, Mal-

lery’s dissent in *Browning* was cited by Strom Thurmond as support for his opposition to the 1964 Act. Nevertheless, the majority of the justices of the Supreme Court of Washington were willing to recognize the harm of and claim for emotional distress caused by a business that serves the public but refuses to serve a black customer simply because she is black. And the justices in *Browning* based their ruling on an interpretation of the public accommodations statute that was informed by their shared response to the discrimination Mrs. Browning suffered. They incorporated and translated that subjective response through a legal judgment that provided a remedy for the legal wrong of intentionally inflicting emotional distress. The *Browning* majority also distinguished between shared responses to the defendant’s actions that informed their legal judgment and shared sympathies with the plaintiff that were an inappropriate basis for determining the amount of damages she should be awarded.

The *Browning* judgment developed the legal doctrine of their jurisdiction and anticipated and supported broader developments in the law of the United States. Neither the fact that the *Browning* judgment was innovative nor the fact that the judgment was grounded on the shared subjective responses of the judges undermines the contribution the court made to the law. As the Supreme Court of Washington did in *Browning*, the Supreme Court of the United States rejected the “involuntary servitude” argument with respect to the 1964 Act and rejected the notion that private ownership creates an absolute constitutional “right” to discriminate against customers on the basis of their race. And as support for its ruling, the United States Supreme Court referenced the thirty-two states that had enacted public accommodations laws, including the Washington statute enforced in *Browning*.

**R. v. R.: The Marital Rape Exemption**

In the same way that the importance of *Weintraub* and *Browning* cannot be fully appreciated without considering the law that they addressed and altered, the impact of *R. v. R.* can be best understood by beginning our discussion with *R. v. J.* In *R. v. J.*, which was decided less than a year before *R. v. R.*, the Crown Court was asked to consider whether a husband could be guilty of raping his wife after the couple had separated but before they were formally divorced or judicially decreed to be separated. The specific legal question raised by the defendant in *R. v. J.* was whether the inclusion of the word “unlawful” in section 1(1)(a) of the Sexual Offences (Amendment) Act of 1976 should be taken to indicate Parliament’s intention to maintain the marital
rape exemption in British criminal law. The statutory provision read: “[A] man commits rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it.”68 The exemption was traditionally derived from Matthew Hale’s statement in History of the Pleas of the Crown: “[T]he husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up this kind unto her husband which she cannot retract.”69

In effect, the defendant’s argument in R. v. J. was that the court had to assume that Parliament included the word “unlawful” in the 1976 Act for a reason, and the only possible reason Parliament could have for including that word was to distinguish the actions criminalized by the statute from acts of nonconsensual sex that were historically exempted as “lawful,” which could only involve the rape of a wife by her husband. The Crown argued in response that even if Hale’s characterization of the law was accurate at the time it was made, the understanding of the marital relationship had developed in the intervening centuries and could no longer be taken as an adequate basis for maintaining the marital exemption in English law.70

The Crown Court accepted the defendant’s argument in R. v. J., with evident reluctance. The court determined as a matter of statutory interpretation that “There is a presumption against surplusage in a statute. The defence urge that there is no other situation to which the word ‘unlawful’ could possibly refer. One only has to read the subsection and ask what circumstances could make sexual intercourse with a woman who did not consent to it lawful, and there can be only one answer.”71 In addition, the court was strongly influenced by a paper on “Rape within Marriage” in which the Law Commission had just recently indicated that the marital exemption had been preserved in the 1976 Act. In the court’s view, “The position is crystallised as at the making of the Act and only Parliament can alter it. . . . I would wish to add my voice to those who urge that Parliament should take steps to abrogate the general rule, as it is already being urged to do, but that at present I feel bound by authority to come to the decision I have since I have to interpret the law as it is.”72

Judges have different views of their own ability to make and change the law, of course. R. v. J. was decided by a trial court. R. v. R. was decided by the highest court in the UK judicial system. The House of Lords73 took a very different view from the Crown Court of its independent authority and responsibility to develop the law through its decision in R. v. R.74

The facts of R. v. R. can be summarized briefly. The couple were married
in August 1984. They had a son in 1985. On October 21, 1989, after marital difficulties and a prior two-week separation, the wife moved with their son to her parents’ home and left a letter for her husband indicating her intention to file a divorce petition. Two days later, the husband spoke with the wife on the phone and stated that he, too, would investigate divorce proceedings. On November 12, 1989, the husband forcibly entered the home of his wife’s parents (who were out of the house) and forcibly attempted to have sexual intercourse with his wife. He choked her with both hands, but was unable to rape her. He was arrested, charged with rape and assault, tried, and then pled guilty to the attempted rape of and assault on his wife.

On appeal, the husband argued that § 1(1)(a) of the 1976 Act precluded, as a matter of law, a criminal charge against him of raping his wife. The Court of Appeal sustained his conviction. In upholding the Court of Appeal’s ruling, the House of Lords eliminated the marital rape exemption from English law. Lord Keith summarized the House’s judgment in this passage:

It may be taken that the proposition [of Hale] was generally regarded as an accurate statement of the common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. . . . [O]ne of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one to which the wife must be the subservient chattel of the husband. . . . On grounds of principle there is now no justification for the marital exception in rape.  

Lord Keith’s reference to the adaptive capacity of the common law might not seem all that remarkable. He was, however, writing in a legal system that traditionally treats absolute legislative supremacy as the fundamental principle of its constitution. Consequently, the House’s decision to alter or deviate from the established meaning of a fairly recent legislative enactment is noteworthy. Lord Keith concluded his judgment by stating that the Act did not prevent the House from eliminating the marital exemption:

The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and that the use of the word in the subsection adds nothing. . . . I am therefore of the opinion that s 1(1) of the 1976 Act presents no obstacle to this House declaring that in modern times the supposed marital exception in rape forms no part of the law of England. . . . ‘The remaining and no less difficult question is whether, despite
that view, this is an area where the court should step aside to leave the matter to the parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.\textsuperscript{77}

In the United Kingdom, much more than in the United States, judges are reticent about asserting their authority to change the law, particularly in cases, such as \textit{R. v. R.}, in which a UK court declines to enforce a parliamentary statute. This judicial reticence results from the doctrine of parliamentary sovereignty and the correlative assumption that judicial review permits UK courts only to ensure the effectuation of parliamentary intentions in administrative action rather than the evaluation of parliamentary legislation for compliance with the British constitution.\textsuperscript{79} Nevertheless, the House of Lords determined in \textit{R. v. R.} that it possessed an independent institutional authority to eliminate a manifestly outdated and unjust rule from English law, and Lord Keith described issuing the judgment as the duty of the judges who heard the case.\textsuperscript{80} Moreover, their Lordships recognize the judgment in \textit{R. v. R.} as developing or making new law,\textsuperscript{81} and this judgment was widely welcomed and intersubjectively validated by the legal community\textsuperscript{82} and the broader community.\textsuperscript{83}

According to Nicholas Barber, \textit{R. v. R.} represents a “clear example” of a case in which UK “judges have changed a statute because the statute conflicts with their own moral convictions.”\textsuperscript{84} He observes that even “though the judges may be unable to admit that the law had changed, commentators at the time had little doubt that \textit{R v R} was an example of judicial law-making, and that a statute had been changed contrary to the will of the enacting Parliament.”\textsuperscript{85}

Law in the Making

In \textit{Weintraub} and \textit{R. v. R.}, judges responded to the unfairness of the existing rules they were asked to enforce by changing the law; in \textit{Browning} the judges responded to the absence of a civil remedy for discrimination in public accommodations by developing the law. In all three cases, the judges determined that long-standing doctrines were inconsistent with the judges’ understandings of fairness and equitable treatment under the law. In the three cases, caveat emptor, public accommodations, and the marital exemption insulated the respective defendants from any legal accountability for their
wrongdoing. In each case, the existing legal rules operated as absolute bars against claims by people harmed as a result of the defendants’ actions. In all three cases, judges changed the law by adopting new rules that allowed those harmed by a seller’s deliberate failure to disclose a material latent defect in her property, a business’s racial discrimination, and a husband’s sexual assault of his wife to pursue their claims. And in all three cases, the defendants were held legally responsible for their actions.

In each of these cases, the judges’ individual sense of justice comes through in the expression of new legal standards in property, tort, and criminal law. These cases support my argument for three reasons. First, these cases demonstrate that common law judges routinely make law in the modification of existing legal standards and in the formulation of new legal principles. Second, particularly in Browning and R v. R., the judges did not understand themselves to be precluded from contributing to the development of the law as a result of legislative enactments. Third, these cases are useful examples of the incorporation of judges’ values and perspectives within formal legal judgments that were communicated to the communities in which these courts functioned. In all three cases, the decisions demonstrate, in language and tone, the personal reactions and convictions of the judges who decided the cases. Far from undermining the validity or efficacy of these opinions, these reactions and convictions were central to the improvements each court made to the law of its jurisdiction and to the lives of those who were governed by these decisions.86

 Judges writing individually or on behalf of a panel conventionally refer to themselves as “the court.” But the relationship between the court as a legal institution and the court as an institution constituted by individual judges should always be kept in mind. It is valuable for judges to speak in an institutional voice in articulating legal standards and in resolving legal disputes. It is also important to recognize when judges speak in an individual voice in reacting to a defect in the law and in acting to correct it through the development of the law. Weintraub, Browning, and R. v. R. represent revealing, and not at all unique, instances in which the courts spoke both in an institutional and in an individual voice, by articulating new legal standards as a response to the unfairness of the law as the judges found it. By referring expressly to “our sense of justice and fair dealing,” “knowledge of human nature,” and “our duty,” the judges in these cases expressed their shared subjective responses within their formal judgments, which were then evaluated and validated by their legal communities, and they transformed the law.