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The Next Century of Legal Thought

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THE NEXT CENTURY OF LEGAL THOUGHT?

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Virtually all of twentieth-century legal thought has been shaped by the legal realist confrontation with formalism. The legal realists of the 1920s and 1930s—along with such predecessors as Holmes, the early Roscoe Pound, Wesley Newcomb Hohfeld, Arthur Corbin, and Walter Wheeler Cook—relentlessly attacked the formalist belief that general concepts and rules could provide a logical, reliable means for deciding cases. As Robert Gordon suggests, much of the realist program can be capsulized in two of Holmes's famous slogans: "'Think things not words,' and 'General propositions do not decide concrete cases.'"[1] To these two we may add yet another of Holmes's maxims: "The life of the law has not been logic: it has been experience."[2]

Legal realism had many strands, most of which are evident in law and legal education today. The residue of the realist preference for legislative discretion and administrative decision making can still be glimpsed in constitutional law. The realist emphasis on "social policy" analysis and the open balancing of competing interests, together with their insistence on purposive reasoning, are now familiar, highly conventional parts of mainstream judicial decision making—"albeit in a form that bears precious little resemblance to the far subtler version that the Realists seemed to have had in mind."[3] The realist concern for inquiry into empirical and social facts as a basis for reforming law is reflected on the left in the law and society movement and on the right in the law-and-economics movement. The realists' rule and

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1 Robert W. Gordon, *American Law Through English Eyes: A Century of Nightmares and Noble Dreams*, 84 GEO. L.J. 2215, 2224 (1996) (reviewing NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995)). The latter maxim is originally from Holmes's famous dissent in *Lochner v. New York*, 198 U.S. 45, 76 (1905).

2 OLIVER WENDELL HOLMES, THE COMMON LAW 5 (1963).

3 Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 522 (1987); *see also* Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 504 (1988).

fact skepticism, and the concomitant sense that the deductions of formalist jurisprudence were just masks for decisions reached on other grounds, can be seen in critical legal studies's ("cls") reassertion and reinvigoration of the claims that law is political and indeterminate. Finally, the related instrumentalism and consequentialism of the realists can be seen (in sometimes extreme form) in the political polarization of the academy—where there is a fairly distinct right and left that mostly talk past each other—and in the various movements of identity-politics theory.

What is largely missing today is careful attention to what we might call the "epistemic" dimension of legal realism. Of course, each of the realists' current heirs have epistemological positions and commitments. But, as reflected in all three of Holmes's *aperçus*, the antiformalism and anticonceptualism of the legal realists represent a particular claim about the role of abstraction in human reasoning and about the way in which humans think, categorize, and learn. In fact, neither Holmes nor Llewellyn was an epistemological nominalist. As Tom Grey points out, "much of Holmes' actual work was devoted to the abstract and conceptual ordering of doctrine into a structured and coherent system," which smacks uncomfortably of the "doctrinal legal 'logic' . . . that Holmes so famously contrasted with 'experience.'"[4] In a similar vein, my colleague Clark Remington nicely documents Llewellyn's struggle with the problem of generalization in writing the Uniform Commercial Code.[5] As William Twining notes, for Llewellyn it was chiefly a question of finding the *right* level of generalization.[6]

Not only in his later discussion of situation-sense, but also in his earlier work, Llewellyn was particularly alert to the importance of categorization to law. Thus, he observed that "if there is any slightest doubt about the classification of the facts—though they be undisputed—the rule cannot decide the case; it is decided by the classifying."[7] At the same time, Llewellyn, like Holmes (so, too, Felix Cohen—though the trajectory of his thought ran in a different direction) had assimilated the lessons of the American

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4 Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 816 (1989).

5 *See* Clark A. Remington, *Llewellyn, Antiformalism and the Fear of Transcendental Nonsense: Codifying the Variability Rule in the Law of Sales*, 44 WAYNE L. REV. 29 (1998).

6 *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 369 (1973).

7 K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 8 (1934); *see also* K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 138 (1930) [hereinafter BRAMBLE BUSH]. On the relationship between situation-sense and categorization, see KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 122, 268, 427 (1960) and STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (forthcoming 2001) (manuscript at ch. 8, on file with author).

pragmatists and understood that our categories and generalizations have no meaning outside our practices and activities—that is, outside of experience. Thus, Llewellyn summarized the legal realist movement with the observation that:

> We have discovered that rules *alone*, mere forms of words, are worthless. We have learned that the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, *mean* anything at all.[8]

In this passage, Llewellyn clearly proclaims not the radical indeterminacy of rules, but rather the grounding of legal meaning in experience.[9]

The cls critique, in contrast, took a different, more political tack and asserted the *radical* indeterminacy of legal concepts and rules. This is exemplified in Duncan's work, including the current book.[10] The skeptical claim was endemic to cls, whose adherents often asserted that "in every interesting case, lawyers can generate plausible, conventional legal arguments on both sides of the question."[11]

I want to stress that this was both a tactical and epistemological mistake (and one largely responsible for the often thoughtless rejection of cls *tôut court*). It is a mistake for the simple reason that it hardly suffices to show that alternative arguments are *plausible* when, as every lawyer worth her salt knows, the name of the game is *persuasion*. Whether one is litigating a case or counseling a client, the challenge of the lawyer's craft is to devise ex ante (i.e., with predictability) a position that will prevail ex post. To do *this*, a lawyer must construct an argument or draft a document that will convince some subsequent set of legal decision makers to take the desired action. Indeed, even on the most cynical view of judicial decision making—in

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8 BRAMBLE BUSH, *supra* note 7, at 12.

9 Compare Peter Gabel's observation:

> [The meaning of rights] is *contingent* in the sense that it is rooted in the particularity of a concrete, lived experience, and *determinate* in the sense that it is expressive only of the existential quality of this experience, as this quality might be realized in its universality through an infinite number of particular, historical instances.

Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1590 (1984).

10 *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE (1997) [hereinafter CRITIQUE].

11 Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 624 n.40 (1988); *see also* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 819 n.119 (1983).

which the judge merely invokes some plausible doctrinal argument to justify a decision made on other (presumedly political) grounds—the lawyer is nevertheless engaged in the endeavor of persuasion. Much the same is true for judges, who must persuade other legal actors, whether they be colleagues on an appellate bench, the judges of a higher court, or the general audience of lawyers, legislators, and citizens. None of this could occur (indeed, the entire enterprise would be futile) unless there were some shared set of understandings that made it possible to gauge the likely course of the decision-making process.

The skeptical critique derives its force from the conventional understanding of law as a matter of prescription. On this view, for law to operate as law there must be some disciplining external constraint on the discretion of the legal decision maker. It could be an objective quality of the legal materials—that is, of the facts and holdings of the cases—or a higher-order reason for the differing characterizations (the proverbial "principle" or "metatheory"). But once legal decision making is understood as a process of persuasion, it is quite irrelevant that legal materials are indeterminate because they are subject to different interpretations. Legal materials do not decide cases, people do. Constraint, therefore, can exist only within the collective decision-making processes of some actual community of people.[12] Because judges, too, are dependent on the structures of social meaning that make communication possible, their range of *effective* operation is restricted by the complex social webs they inhabit and that, in turn, inhabit them. Constraint, in other words, is internal and relative.

Duncan's earlier work, *Freedom and Constraint in Adjudication: A Critical Phenomenology of Judging*, seemed more attuned to this insight.[13] By conceptualizing judicial decision making as work-in-a-field, Duncan seemed to be offering a way to move beyond both the formalist accounts of decision-according-to-rule and cls accounts of law-as-politics. "Here," one thought, "is a significant addition to the realist project." But, despite his insight, the lessons Duncan drew remained overly simplistic: First, the mere fact that decisions are not determinate as suggested by the model of deduction tells us nothing important about whether those decisions are sufficiently regular and predictable to do the work

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12 *Cf.* Thomas S. Kuhn, *Second Thoughts on Paradigms*, *in* THE STRUCTURE OF SCIENTIFIC THEORIES 459-60 (Frederick Suppe ed., 1972) ("A paradigm is what the members of a scientific community, and they alone, share. Conversely, it is their possession of a common paradigm that constitutes a scientific community of a group of otherwise disparate men.").

13 *See* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology of Judging*, 36 J. LEGAL EDUC. 518 (1986).

we expect of law. Second, Duncan concluded (as he does in the current book) that there is no way to predict when a body of precedent will yield one particular field structure or another. Consistent with his current argument about the effects of different work strategies, Duncan maintained that there is no way to know that one didn't miss "the catch that releases the secret panel" which would have led to a different outcome.[14] Yet, nowhere are these skeptical conclusions supported by argument; for Duncan, it has always been enough that this seems simply to be true.[15]

Duncan's recent *A Critique of Adjudication*[16] ("*Critique*"), I am sorry to say, does nothing to dispel these shortcomings. To the contrary, it seems to step back from the sophistication of the earlier account to offer a chastened, but cruder, version of the indeterminacy and law-is-politics critique. It is chastened in that Duncan no longer makes any global claims of indeterminacy. Instead, he claims only that local demonstrations of indeterminacy are often (nearly always?) possible.[17] It is cruder in three senses that I shall explore below (though not necessarily in order): First, the underlying ideology now said to be masked by the indeterminacy of legal rules is only garden variety Democratic liberalism and Republican conservatism. Second, Duncan quite surprisingly resurrects the supposed power of logical deduction. Third, (and relatedly), the current treatment is cruder in the way it reifies the conventional dichotomy between subjectivity and objectivity.

In *Critique*, Duncan affirms that judges committed to the ideal of interpretive fidelity will often feel that they are constrained by the text and by the reactions they expect from others: "What a given judge will do in a case depends on what she thinks will 'fly' as 'good legal argument' in the minds of others, as well as on what she herself thinks about the matter."[18] He also affirms that judges sometimes reach a point of "closure," at which they are reasonably certain both that they have reached the right result and that no additional analysis would change the outcome. But this, Duncan says, does not prove that the law was determinate: "That everyone unselfconsciously adopted a view, or no one objected, isn't

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14 *Id.* at 561; CRITIQUE, *supra* note 10, at 169-70.

15 *See, e.g.*, Duncan Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503, 506 (1981) ("[L]iberal rights theory . . . is wrong and incoherent. This is just *true*, as far as I can tell, and no amount of lamenting the consequences of his fall will put Humpty Dumpty back together again."). Similar statements can be found throughout Duncan Kennedy's latest book. *See generally* CRITIQUE, *supra* note 10.

16 CRITIQUE, *supra* note 10.

17 *See id.* at 311-12, 349.

18 *Id.* at 161.

evidence that the outcome was determinate in any sense we are interested in."[19]

The reason, he explains, is:

> [T]here are gaps, conflicts, and ambiguities, that these are a function of legal work as well as of the materials the judge works with, that the experience of "freedom" to shape the legal field is common, and that one cannot say with certainty that when closure occurs it is a product of a property of the field rather than of the work strategy adopted under particular constraints.[20]

Indeed, Duncan goes further:

> The question "does this question of law have a determinate answer?" is therefore meaningless if it is a question about *the question of law*, rather than a question about the interaction between a particular, situated historical actor and this particular question of law situated in this particular field. Because determinacy is a complex function of work as well as of facts and materials, a function of an interaction, it makes no sense to predicate determinacy or indeterminacy of the question as it exists independently of the particular actor who is trying to answer it.[21]

It should be apparent that Duncan's argument is structured according to the conventional dichotomy between subjectivity and objectivity. The giveaway is his remark that even complete agreement on a legal issue would not provide evidence that the outcome was determinate "*in any sense we are interested in.*"[22] What sense would that be? Presumedly, it would have to be a sense in which *the law itself*—that is, independent of any particular actor—determined the answer (though he has already pronounced that inquiry meaningless). In fact, that is precisely what Duncan means. He describes deduction as "the paradigm case of constraint or determinacy or legal necessity."[23] One might have thought this was just internal critique. But Duncan devotes an earlier passage to the rehabilitation of deductive reasoning in law: he maintains that "a good part of legal reasoning is deductive"[24] and that the legal realist critique of formalism was not a critique of deduction per se, but of a systematic tendency to overestimate the power of deduction.[25] This last statement is almost surely wrong.

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19 *Id.* at 170.

20 *Id.* at 396 n.2.

21 *Id.* at 170 (emphasis added).

22 *Id.* (emphasis added).

23 *Id.* at 164.

24 *Id.* at 101.

25 *See id.* at 103-07.

It is difficult to see how this characterization squares with any fair reading of Holmes or Llewellyn or, for that matter, John Dewey.[26]

Moreover, when Duncan describes a judge's anxiety over the fact that different work strategies may produce different legal rules, he says the problem arises because there are no *intralegal criteria* by which to choose between them. When Duncan discusses legal education, he observes that "the student learns no *metadiscourse* that permits necessitarian choice between necessitarian discourses."[27] When he acknowledges that the expected reactions of others act as a constraint on the judge, he pronounces it "a peculiar kind of constraint, because the judge is a participant and can affect the community's reaction to the interpretation in question, rather than having simply to register it *as an immovable, external fact.*"[28] When he acknowledges but then discounts the judge's experience of closure as evidence of determinacy, he maintains that those experiences provide no warrant to think that they "are 'reflections' of an external reality, or truth of the matter, that exist independently of their own efforts."[29]

In other words, constraint only counts as constraint if it is an independent, objective property of the materials themselves, like the physical obstruction of the trees that impede one's movement through the forest of law. As soon as one introduces the subjectivity of a human actor, it becomes a "peculiar" constraint because the judge is now a participant who may affect the outcome in untold ways. Once one introduces subjectivity, "it makes no sense to predicate determinacy or indeterminacy of the question as it exists independently of *the particular actor who is trying to answer it.*"[30]

Not only does Duncan reify the subject/object dichotomy in this thoroughly conventional way, but he explicitly eschews any analysis of the social factors that might stabilize meaning. "My approach," he explains, "neither answers nor rejects, but rather defers or brackets, the question of what, if anything, lies behind ('in' the legal materials) the experiences of openness and closure.... We can explore the 'surface,' rather than trying to penetrate the depths."[31] But what if we did not confine ourselves

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26 *See* John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 22 (1925) ("No concrete proposition ... follows from any general statements or from any connection between them.").

27 CRITIQUE, *supra* note 10, at 366 (emphasis added).

28 *Id.* at 161 (emphasis added).

29 *Id.* at 170.

30 *Id.* (emphasis added).

31 *Id.* at 171.

to the surface? What if we were to ask what lies beneath those experiences of openness and closure? What if we were to take seriously the notion that the relative determinacy of law is, to paraphrase Duncan, a question about the interaction between particular situated historical actors and particular questions of law situated in particular social fields?

The answer is that, if we did, we would be picking up the unfinished realist project, particularly as exemplified by Llewellyn's work. And that would lead us immediately to the current work in cognitive science. For, if we take seriously the insight—common to Holmes, Llewellyn, Kennedy, and even Posner—that law is something that judges *do*, then we must look at how humans actually reason and how that process plays out in judicial (and other official) decision making. To ask how a judge reaches a point of closure or why people (including judges) find some characterizations more convincing than others is to inquire into what makes the most sense to them under the circumstances. It is to inquire into the nature of their categories and concepts—for it is our categories and concepts that define our expectations and, in so doing, shape what we find believable, judge accurate, and experience as cogent, compelling, convincing. This, after all, was Llewellyn's point when he observed that it is not the rule, but rather the classification of the facts that decides the case.

In short, the revivified realist project would take up the question of the role of cognition and categorization in law. It would examine the relationship between the "vital memory of a multitude of concrete instances" and what it takes "to make any general proposition, be it rule of law or any other, *mean* anything at all."[32]

Duncan is wary of this project because he fears that it will just return us to another obfuscatory formalism. One can see why: If we were to approach law from this perspective, we would find that judges (and other lawmakers) necessarily operate under significant constraints. Even so, Duncan would be wrong to fear such an account. In revealing the operative constraints of law, a cognitive account would necessarily expose the way in which those structures of constraint are deeply, ineradicably *political.*

A profitable place to begin is with Duncan's observation that judges are situated historical actors grappling with legal questions in particular historical fields. Duncan implies that, because legal

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32 BRAMBLE BUSH, *supra* note 7, at 12. For a recent effort that takes up but fails to illuminate this question, see ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000), *reviewed in* Steven L. Winter, *Making the Familiar Conventional Again*, 22 MICH. L. REV. (forthcoming 2001).

decisions are a function of this complex interaction, they are somehow unreliable or subjective. But, just the opposite is true. To paraphrase Merleau-Ponty, it is because of our historical inherence that we have whatever degree of determinacy we may have.[33] The fact that determinacy is a function of a complex interaction means only that determinacy is a complicated phenomenon. One can shrug one's shoulders in the face of complexity. Or, one can take up the challenge and try to map the complex patterns of constraint and indeterminacy in a way that proves useful.[34]

Indeed, to talk about a *particular* actor trying to answer a legal question is to confuse social construction with solipsism:

> If we could . . . cut the *solus ipse* [the self alone] off from others and from Nature . . . there would be fully preserved, in this fragment of the whole which alone was left, the references to the whole it is composed of. In short, we still would not have the *solus ipse*.[35]

When judges first approach any task, they confront a sedimented field of concepts and categories that they too have internalized. Meaning is a shared social phenomenon that constrains how we as embodied, culturally situated humans understand our world. We are all familiar with Unger's observation "that every branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals."[36] *But this is true of every category*. Even "simple" concepts such as "park," "mother," and "lie" incorporate normative assumptions about the conventional roles, proper social functions, and appropriate behaviors governing that particular corner of social life. Because these modes of being constitute how judges *think*, they cannot be dispensed with by any simple act of will or mere political desire; the one thing judges cannot bracket is the vital elements of their own thought processes. Consequently, their thought processes will reproduce all the regularities of social categorization, including, most importantly, the phenomena of prototype effects, motivation, framing, and other gestalt processes.[37]

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33 *See* MAURICE MERLEAU-PONTY, SIGNS 109 (Richard C. McCleary trans., Northwestern Univ. Press 1964) (1960) ("[W]hatever truth we may have is to be gotten not in spite of but through our historical inherence.").

34 As indicated above, I think that Duncan's earlier work is best understood as an effort of that sort.

35 MERLEAU-PONTY, *supra* note 33, at 173-74 (discussing Husserl).

36 ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 8 (1986).

37 *See* WINTER, *supra* note 7, at chs. 4, 6, 8.

Even so, one could argue that the categories will nevertheless underdetermine a decision in any given case. After all, no system of categorization, however extensive, could provide the answers to all legal questions. It does not follow, however, that judges are therefore free to operate in the interstices in any way they please. The existing categories may be modified or extended; the judge may innovate. But innovation remains a form of behavior governed by rules. Even the most groundbreaking legal changes take place only within the constraints defined by the compositional structure of the conceptual material and the motivating context of judicial action. What was true of Holmes's formulation of "the marketplace of ideas" and Hughes's reconceptualization of Commerce Clause doctrine is true a fortiori of the mine-run case where the judge wishes to push the law in one direction or another.[38]

Legal decision making could thus be characterized as relatively constrained or (if one prefers) as moderately indeterminate. But it would be more accurate still to say that the law is indeterminate in more or less predictable ways. Legal materials rarely provide a single "right" answer to a legal question. But, despite the ineluctable flexibility of legal materials, legal decision making is nevertheless regular, systematic, and largely predictable.

I will say more about why this is so in a moment. First, note that this position is quite different from the center/periphery model advanced by H.L.A. Hart (and so feared by Duncan).[39] For Hart, the law consists in a core of settled meaning and a periphery in which the judge is free to "legislate."[40] But, extension or innovation in the peripheral cases is highly constrained both by the conceptual materials and by the social contexts that are constitutive of meaning. Conversely, Hart's settled meanings are but prototype effects that are themselves dependent on context and purpose. Consequently, the core meanings that Hart claims are "law in some centrally important sense"[41] are frequently unsettled by adventitious changes in social practices and

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38 *See id.* at ch. 10.

39 *See* CRITIQUE, *supra* note 10, at 177 ("[I]t is not, I hope, hope, hope, just what the Brits have been saying all along."). I believe I was the first to suggest that Duncan's position was closer to Hart's than he would care to admit. *See* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1180-83, 1196-98 (1989) (referring to the section entitled "Structured Indeterminacy, or 'Duncan Kennedy Meets H.L.A. Hart'").

40 H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-15 (1958).

41 *Id.* at 614.

conditions. As a historical matter, moreover, these changes have often taken place in the very teeth of the law. The center and periphery, in other words, are both constrained by the social contexts and processes that constrain and enable meaning. In both cases, moreover, the law that can effectively be made is, in a centrally important sense, a socially contingent artifact or epiphenomenon.

Which brings us to persuasion. Duncan is exactly right when he says that the question whether a particular legal issue has a determinate answer is simply unintelligible if it is a question about law *in the abstract*. But, instead of pursuing that insight, Duncan brackets everything but the "surface" question of the legal materials themselves. This is not just a blind alley; it is *irrelevant*. To paraphrase Duncan: It makes no sense to predicate the determinacy or indeterminacy of a legal question as it exists independently of the particular *community* that is trying to answer it. Constraint is a social phenomenon that can exist only within the collective decision-making processes of an actual group of people.

A lawyer with actual hands-on experience would never make such a mistake. For, if there is one thing that practicing lawyers certainly know, it is that the life of the law is not logic but *persuasion*. At each and every turn in the process, the participants are trying to persuade one another to take a particular action on the basis of a particular interpretation of the relevant events and a particular normative/legal understanding. The law that emerges from this process is a social product—that is, the product of an interaction between particular, situated historical actors. It is not—and, as Robert Cover points out, can never be—the work of a single "heroic" judge trying to advance a particular political or social agenda.[42] It follows that any theory of law that takes seriously the insight (common to Holmes, Llewellyn, Posner, and Duncan) that law is not a "thing" but an activity that judges do, must take into account the role of persuasion in the decision-making process.

On the standard account of law, persuasion is a distorting factor that introduces capricious elements that make the law less

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[42] *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1612 (1986). Cover explains:

> The legal philosopher may hold up to us a model of a hypothetical judge who is able to achieve a Herculean understanding of the full body of legal and social texts relevant to a particular case, and from this understanding to arrive at the single legally correct decision. But that mental interpretive act cannot give itself effect. The practice of interpretation requires an understanding of what others will do with such a judicial utterance . . . .

Id. (citations omitted).

predictable. A lawyer may sway a judge or jury with eloquence; the decision maker may be swept along by an advocate's appeal to sympathy or some other emotion. The conventional view is that this is an unfortunate reality for which the proper antidote is a more dispassionate exercise of reason. But, then, conventional legal theorists must think this way because they have no concept of constraint outside the discipline of rationalizing principle and criterial logic.[43] Everything else is *subjective*.

As Stanley Fish points out, however, this conventional view faces a conceptual conundrum:

> The success that rhetoric may have in turning the mind away from purely rational considerations is a function as much of tendencies in the mind as it is of pressuring forces external to the mind; an illegitimate appeal can hardly have an effect if there is nothing to appeal to.[44]

It makes no sense, Fish observes, to talk about reason free from the appeal of interest and emotion unless there are minds free of interest and emotion. But, "were every preconception, acquired belief, assumed point of view, opinion, bias, and prejudice removed from the mind, there would be nothing left with which to calculate, determine, and decide."[45] Reason, in other words, is a faculty of situated historical actors. Consequently, it cannot be abstracted from the contexts, perspectives, and understandings that constitute those actors as such.

The conventional view is self-contradictory in another, more profound way. The central concern of conventional legal theory is to avoid subjectivity in legal decision making. It requires reason to do so because it does not recognize any other kind of constraint. On this model, persuasion represents the antithesis of reason—and thus is understood to exacerbate the danger of subjectivity—because it appeals to extrarational considerations. Fish's provocative and perceptive rejoinder is that these considerations are not outside of reason, but constitutive of it. We can press the point further still: If persuasion works only to the extent that the decision maker already shares the values being appealed to, then it is hard to see in what sense the resulting process could be classified as "subjective." Quite the contrary, persuasion is by definition an *intersubjective* process. This is true not only in the trivial sense that it takes two to occasion persuasion, but also in the more

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[43] *See* ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 36, 46 (1996).

[44] STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 517 (1989).

[45] *Id.* at 518.

important sense that persuasion can proceed only on the basis of shared values and perspectives. And that, as will be recalled, is precisely what the conventional view was trying to secure in the first place.

There is an obvious rejoinder. Before addressing it, however, it will be helpful to consider the problem from the opposite perspective (i.e., from the perspective of the advocate who wants to lead a decision maker in a particular direction). He could rely solely on reason to constrain the decision maker in the desired direction. If he is hell-bent on winning, he may succumb to the temptation of using rhetoric and other persuasive devices to trump reason. Or so the conventional view would have it.

But the practicing lawyer knows, and a moment's reflection will confirm, that eloquence and the emotional appeal are no more reliable than logic. Neither work in the abstract; both depend for their efficacy on the values, beliefs, and understandings of the decision makers to whom one must appeal. To take a particularly strong example, consider the situation faced by Thurgood Marshall in 1952 as he stood to make the closing argument in Walter Lee Irvin's capital rape case.[46] The trial was the concluding chapter of an incendiary racial episode that began in 1949 when Irvin, Shepherd, Greenlee, and Thomas (all African Americans) were accused of raping a seventeen-year-old white woman near Groveland, Florida.[47] Thomas was shot to death during the course of his arrest.[48] The remaining defendants were transferred to the state prison to save them from a lynch mob—though, as the reported opinions reflect, they were first savagely beaten by the sheriff (and illegal confessions were probably obtained).[49] In the ensuing mob violence, the homes of Shepherd's parents and other Black residents were burned. Most of the Black residents fled or were evacuated for their own safety. The National Guard was called in to restore order; two days later the 116th Field Artillery had to be mobilized as well.[50] The entire story (including alleged confessions that were never introduced at trial) was meticulously reported by the local papers under such headlines as "Night Riders

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46 *See Florida Killer Reprieved*, N.Y. TIMES, Jan. 5, 1952, at 28; *Groveland, Fla.*, N.Y. TIMES, Feb. 17, 1952, § IV, at 2; Richard H. Parke, *2d Race-Case Jury, All White, Chosen*, N.Y. TIMES, Feb. 13, 1952, at 33; Richard H. Parke, *Irvin Is Convicted, Sentenced to Die*, N.Y. TIMES, Feb. 15, 1952, at 42 [hereinafter *Sentenced to Die*]; Richard H. Parke, *Irvin Says Florida Planted Evidence*, N.Y. TIMES, Feb. 14, 1952, at 28 [hereinafter *Planted Evidence*].

47 *See Groveland, Fla.*, *supra* note 46.

48 *See id.*

49 *See* Shepherd v. Florida, 341 U.S. 50, 51 (1951) (Jackson, J., concurring).

50 *See id.* at 53.

Burn Lake Negro Homes" and "Flames from Negro Homes Light Night Sky in Lake County."[51]

The United States Supreme Court reversed Irvin's and Shepherd's convictions, and remanded the cases for a new trial.[52] Shepherd was shot to death and Irvin wounded by the local sheriff as they were allegedly trying to escape.[53] At that point, Marshall (then Director-Counsel of the NAACP Legal Defense Fund) personally undertook Irvin's defense on retrial. The capstone of the defense, which according to the *New York Times* "brought gasps from several hundred white and Negro persons in the Marion County courtroom," was the testimony of a Miami forensic expert.[54] He concluded that the (by then inexplicably lost) plaster casts of the defendant's footprints taken at the scene of the crime had been fabricated by the sheriff: the casts were convex (toes and heels curving downward) as if the impressions had been made by shoes with shoe trees in them, whereas an actual footprint would have been concave (the toes curling upward).[55] In his summation, Marshall acknowledged that an acquittal would be a "pretty tough proposition" given the sensational nature of the case. Nevertheless, he eloquently appealed to the jury to remember that federal, state, and local laws were all designed to assure fairness before the courts without regard to race.[56] The all-white jury emerged from their deliberations quickly. As they entered the jury box, the foreman turned to the juror next to him and said in a voice loud enough to be heard throughout the hushed courtroom: "That Nigger was good!"[57] Moments later he pronounced the verdict: Guilty, without recommendation of mercy.

Some would, no doubt, be quick to point out that if ever there was a case that needed the dispassionate exercise of reason as a safeguard against prejudice and injustice, this surely was it. But while this fits well with conventional rule-of-law virtues, it does not quite jibe with the facts. If the story shows anything at all, it shows that reason cannot guarantee anything like the constraint that law claims to offer. And for a simple reason: Even a *legitimate* appeal can hardly have an effect if there is nothing to appeal to.

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51 *Id.*

52 *See id.* Greenlee, the youngest, received a life sentence and decided not to appeal.

53 *See Groveland, Fla., supra* note 46; Richard H. Parke, *Racial Trial Shift Barred in Florida*, N.Y. TIMES, Feb. 12, 1952, at 22.

54 *Planted Evidence, supra* note 46.

55 *See id.*

56 *See Sentenced to Die, supra* note 46.

57 Telephone Interview with Jack Greenberg, Professor of Law, Columbia Law School (June 1999).

Others might object that the overt racism of the jury makes this an unrepresentative case. But precisely because it is an extreme case, the story helps us see the dynamic at work in every case: What is true for reason is true for eloquence; both must find receptive ground if they are to do any work at all. To be effective, the advocate must not only know the audience, but also be able to speak to it. Persuasion, in other words, is constrained by what the audience already believes.[58] Let us call this (with all intended irony) "the iron law of persuasion."

We can now return to the point deferred above: The obvious objection to my argument is that nothing about the process of persuasion, as I have so far described it, protects us from the idiosyncratic decision maker. The fact that a lawyer (in this case, the prosecutor) has succeeded in convincing a particular decision maker (here, a white Southern jury) is no guarantee that the decision accords with any values that the rest of us share. As a logical matter, it means only that those particular actors happen to share the same values.

Though the logic is impeccable, the conclusion is wrong. The flaw lies in its faulty premise, which presupposes an atomized picture of adjudication. But legal decision making *never* occurs in a social vacuum (Irvin's death sentence, for example, was later commuted by Governor Collins). Judgments are subject to appeal; every decision depends for its efficacy on the compliance either of an unhappy losing party or of an enforcement official who must be willing to take coercive, sometimes violent action, and all cases stand as potential precedents for future decisions. Thus, a truly idiosyncratic decision risks reversal, recalcitrance, or irrelevance. It remains true that nothing stops the rogue judge from deciding any way he or she wants. Judges are nevertheless constrained to the extent that they expect to be effective. And make no mistake about it: judges *do* expect to be effective. It follows, as Cover observes, that "[l]egal interpretation . . . can never be 'free'; it can never be the function of an understanding of the text or word alone. . . . Legal interpretation must be capable of transforming

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[58] To be clear, I am not arguing that people can never be persuaded to change their beliefs, only that one must be able to refer to some other aspects of their beliefs, values, and understandings in order to effect that change. Thus, one cannot persuade a bigot to embrace racial equality as long as he persists in seeing Blacks as inferior or does not regard equality as an important social or moral value. Persuasion is nevertheless possible if one can bring the bigot to see Blacks as humans just like himself (or those he loves), or if one can convince him of the instrumental benefits of equality (or the concomitant costs of inequality).

itself into action; it must be capable of overcoming inhibitions against violence in order to generate its requisite deeds . . . ."[59]

Judges know that a purely political decision will not succeed unless it appeals beyond the judge's "personal" preferences to some larger set of values shared by the wider audience. Duncan concedes as much when he acknowledges: "What a given judge will do in a case depends on what she thinks will 'fly' as 'good legal argument' in the minds of others . . . ."[60] But the point is broader: What a given judge will do in a case depends on what she thinks will fly with the much larger constituency to which she must appeal for both her legitimacy and efficacy. Duncan's response is that when judges deny the ideological in adjudication, they are practicing bad faith in a conscious or half-conscious attempt to maintain their legitimacy by cloaking political decisions behind a facade of legal necessity. My own experience of judges is rather different. Those judges that I have observed close-up were all too aware—sometimes to the point of painful self-consciousness—that their decisions were constrained by the public's perception. But you needn't take my word for it. The point is confirmed both by logic and by direct evidence.

The particular focus of this conventional concern has always been on appellate courts, in particular, the Supreme Court. Likewise, Duncan's *Critique* is a critique of appellate lawmaking. He explicitly defends this narrow focus against the criticisms of more sophisticated sociological analyses that emphasize the hands-and-feet practices of judges, lawyers, sheriffs, clerks, and other low-level officials.[61] Common sense has it that the higher the court, the greater its freedom to act—hence Justice Jackson's famous quip that the Supreme Court is "not final because we are infallible, but we are infallible only because we are final."[62]

But, the conventional wisdom has it exactly backwards: The higher the court, the greater the constraints on its actions. For it should be apparent that the higher the court, the larger the audience that must be persuaded. This is true from the outset: The trial judge decides alone (though he or she can only *act* in concert with others). The appellate judge, in contrast, must first convince one or more colleagues to join together to form a majority. The opinion that ensues must speak to an audience that becomes larger as the court's authority increases. The wider the audience, the more the court's decisions are constrained by the need to appeal to

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59 Cover, *supra* note 42, at 1617.

60 CRITIQUE, *supra* note 10, at 161.

61 *See id.* at 65-68, 266-80.

62 Brown v. Allen, 344 U.S. 443, 540 (1954) (Jackson, J., concurring).

common values and understandings in order to persuade those affected that its decisions are indeed correct. In a society where "law" is synonymous with objective delineations of right and wrong (which, as far as I can tell, includes all Western societies), a court can only produce that automatic, tacit sense of validity if its judgments conform to the most conventional values of the culture. Like the "lowest common denominator" factor at work in popular culture, the court's need to appeal to the masses forces it to act within the most mainstream values and understandings.

In a sense, this observation is not particularly new. It was implicit in Llewellyn's notion of situation-sense, and it is the ultimate lesson of a brilliant, but much-neglected article that Jan Deutsch published thirty years ago.[63] In a dazzling deconstruction of Herbert Wechsler's concept of neutral principles, Deutsch demonstrated that it makes no sense to talk about consistency, generality, or principle in judicial decision making *except* as a function or artifact of the cultural and historical understandings that reign at any given moment.[64] Deutsch first observed that a principle will be understood as "neutral" only if it is sufficiently general. But he then demonstrated that there is no logical or objective way in which to specify the correct level of generality for a given principle. Famously, Wechsler had argued "that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[65] Wechsler's examples of unprincipled, "ad hoc" decisions were hypothetical cases in which claims were approved or disapproved solely because they were "put forward by a labor union or a taxpayer, a Negro or a segregationist, a corporation or a Communist."[66] Deutsch pointed out, however, that it is logically possible to have a consistently applied, general rule that all claims brought by labor unions or those exercising the right of free speech should win. Such rules would still be "neutral," in the sense defined by Wechsler, because they would not, in Wechsler's words, "turn on the immediate results,"[67] but rather on "standards that transcend the case at hand."[68]

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63 *See* Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

64 *See id.* The focus of Deutsch's analysis is on Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

65 Wechsler, *supra* note 64, at 15.

66 *Id.* at 12.

67 *Id.*

68 *Id.* at 17.

If it nevertheless seems self-evident that a decision making "principle" always to prefer the claims of African Americans would be an illegitimate one, it is not for lack of support in positive law. After all, Deutsch observed, the express purpose of the Thirteenth, Fourteenth, and Fifteenth Amendments was to protect the newly freed slaves.[69] Rather, the intuition "rests on our society's deep-seated aversion to attaching legal consequences to the fact of group membership vel non," an aversion that Deutsch attributed to the need of a heterogeneous society to avoid the divisive consequences of distrust.[70] In other words, the perception that a particular rule is not sufficiently general really expresses a value judgment about the content of the proposed principle. And this value judgment is itself a historically contingent artifact—in this case, the product of our "melting pot" heritage. But, if "the historical context may well determine the proper classification of a given principle," then:

> [A] neutral principle becomes one that is perceived as adequately general in terms of the historical context in which it is applied. The question that such a reformulation raises, however, is this: perceived as adequately general by whom? The answer can be derived from the fact that the legitimacy of the principle approving all Negro claims was ultimately traced to a deeply held social aversion to the attaching of legal consequences to memberships in groups.... Adequate generality in a judicial decision—neutrality, if you will—is, therefore, that degree of generality perceived as adequate by the very society that imposes the requirement of adequate generality to begin with—that same public whose agreement that the principle approving all Negro claims is illegitimate serves to make Wechsler's illustrations persuasive.[71]

Today, the point about the circularity of neutral principles—like the argument that there is no logical or objective way to determine the right level of generality for a legal principle—would most likely be taken as an argument that the law is indeterminate. Indeed, that is exactly how Deutsch's students (of whom, incidentally, Duncan was one) have since presented it.[72] But the precise point of Deutsch's argument is that social values and understandings constitute what counts as "neutral" and "principled." (That is the import of his reference to "adequate generality in a judicial decision" as "neutrality, if you will.") Thus, a more sophisticated reading would recognize in Deutsch's

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69 *See* Deutsch, *supra* note 63, at 193-94.

70 *Id.* at 194-95.

71 *Id.* at 195.

72 *See* Tushnet, *supra* note 11.

circularity a Hegelian reflexivity of the sort described by Charles Taylor,[73] and articulated with great clarity in Merleau-Ponty's observation that man "thinks in terms of his situation, forms his categories in contact with his experience, and modifies this situation and this experience by the meaning he discovers in them."[74] Deutsch made this point again at the close of his article when he argued that "the phenomenon of the internalized community agenda" best explains the constraints experienced by all political actors:

> [I]f we inquire into the source of the particular set of existing checks and balances or ask why the actors accept the constraints represented by those checks and balances, we are led directly to the community agenda of alternatives: the consensus that defines the existing set of checks and balances and whose internalization by the actors results in the acceptance of the constraints that it imposes.[75]

Thus, Deutsch concluded the article with the observation that constraints on the Court could be disclosed "only by examining the extent which individual Justices have internalized the community consensus that defines the Court's sphere of competence."[76]

The point about the "circularity" of values is a profound one. For present purposes, however, I want to highlight a different, but related, aspect of the argument. The passage closes with the observation that Wechsler's illustrations of illegitimate deviations from "neutrality" are persuasive because they appeal to deep-seated social values against group preferences (values that, if anything, are more deeply entrenched now than when Wechsler and Deutsch wrote their articles). What this means, however, is that the cogency of Wechsler's argument for neutral principles—like that of the geocentric view of the universe prior to Copernicus and Galileo, Newtonian physics prior to Einstein and Böhr, or rationalism today—stems from the automatic sense of validity that arises when someone insists on a truism. What is perceived as detached and objective is just the familiar "what everybody knows" or, in Wallace Stevens's words, the "stiff and stubborn, man-locked set" of conceptions that constitute our reality.[77] If the

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73 *See* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 306-08 (1989) (describing the relation between ideas and practices as "plainly circular").

74 MAURICE MERLEAU-PONTY, SENSE AND NON-SENSE 134 (Hubert L. Dreyfus & Patricia Allen Dreyfus trans., Northwestern Univ. Press 1964) (1948).

75 Deutsch, *supra* note 63, at 257.

76 *Id.* at 259.

77 WALLACE STEVENS, *Angel Surrounded by Paysans, in* THE COLLECTED POEMS OF WALLACE STEVENS 496, 497 (1971).

iron law of persuasion is that an appeal can hardly have an effect if there is nothing to appeal to, then its first corollary is that one can always persuade people to the truth of what they already believe. Deutsch's point is that one of the names we give to this experience of validity is "neutrality." Or, as Deutsch elsewhere observes, lawmaking by an astute judge such as Holmes works "as all good stories work, not by retailing the murky and confusing truth of how things are, but by confirming our felt certainties about how we know they should be."[78]

Deutsch's observation about the perception of neutrality that arises from conforming to the community's expectations points the way to a broader, more profound conclusion: In a society where the judiciary is expected to be neutral rather than political and to apply the law rather than make it, judges will be constrained to replicate the conventional understandings and values that characterize the culture. True, judges can always pretend that "the Law" is clear and that they are just conforming to its dictates. But this will not suffice if no one *believes* them. Perhaps everyone will simply accede to their authority (and, in societies more deferential to authority than our own, that might indeed be enough). Perhaps, as Duncan suggests, everyone will play along in one giant act of collective denial. But maybe they won't. In which case, the judge has an overwhelming incentive to find in the law just those things that the society at large will accept as neutral, principled, and right.

We have direct evidence of this very proposition in the plurality opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*.[79] Despite some of their personal misgivings, the plurality reaffirmed what it characterized as the "central holding" of *Roe v. Wade*.[80] It justified adherence to precedent on the ground that "overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."[81]

As the plurality explained: "The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what

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78 Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2270 n.159 (1989) (quoting Jan G. Deutsch, THE REALITY OF LAW IN AMERICA: AN INVITATION TO DIALOGUE 103 (1988) (unpublished manuscript on file with author)).

79 505 U.S. 833 (1992).

80 410 U.S. 113 (1973); *see also Casey*, 505 U.S. at 853.

81 *Casey*, 505 U.S. at 865.

the Nation's law means and to declare what it demands."[82] The plurality insisted that the "underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws."[83] But, consistent with Duncan's point that the law is a product of the work that judges do, the plurality conceded: "That substance is expressed in the Court's opinions."[84] Even so, the plurality identified an important constraint on its work:

> [O]ur contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently *plausible* to be accepted by the Nation.[85]

At first blush, this passage seems to confirm the strongest version of Duncan's thesis that judges are acting in bad faith.[86] After all, in place of decisions that are "beyond dispute" because "grounded truly in principle," the plurality offers a confidence game in which judicial decisions (or, what is much the same, their principled character) need only be "sufficiently plausible to be accepted by the Nation."[87] From a solemn declaration that judicial decisions must find their warrant in the Constitution and the law, the opinion moves quickly (all too quickly) to the concealment of doubt in self-conscious illusion: "The Court," we are told, "must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them . . . ."[88]

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82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.* at 865-66 (emphasis added).

86 Duncan finesses the question whether bad faith is a self-conscious phenomenon. Of judges, Duncan says "it seems enough to say that the desire is half-conscious, or conscious and unconscious at the same time, or that the ego wills its own unconsciousness of something that it must therefore in some sense know." CRITIQUE, *supra* note 10, at 200. Of Liberalism, Duncan says: "I mean to attribute a disreputable motive, albeit a half-conscious one, for this distortion." *Id.* at 294.

87 *Casey*, 505 U.S. at 866.

88 *Id.* at 865.

But, even the cynical reading of this passage confirms my argument: The plurality is self-conscious of its need to be persuasive. It knows that, if it is to retain its effectiveness as "the Supreme Court of a Nation dedicated to the rule of law," it must speak and act in ways that permit people to accept its opinions as principled. It can only do so, as Deutsch's argument makes clear, if its opinions accord with the expectations engendered by people's real-life norms. Consider, for example, Posner's observation with respect to the recent cases claiming a constitutional right to die:

> The Justices did not explain why they ducked the philosophical issue, but they had compelling practical reasons for doing so. The first is that given the balance between the opposing philosophical arguments as they would appear to most people . . . , the Court could not have written a convincing endorsement of either position; it would have been seen as taking sides on a disagreement not susceptible of anything normally remotely resembling an objective resolution.[89]

Thus, it would not matter even if Duncan is correct and judges are acting in bad faith when they claim that their decisions are required by legal principle: the need to make such claims credible will nevertheless operate as a constraint on what those positions can reasonably be. This constraint, moreover, will be operative regardless of the conscious bad faith or explicit political motivation of the judge.

But it is unclear whether Duncan is correct. While the cynical reading fits well with the text of the plurality opinion in *Casey*, it nevertheless presents a problem. Judges acting in self-conscious bad faith would never acknowledge so explicitly the conceptual sleight-of-hand inherent in "principled" decision making: When one is trying to pull the wool over people's eyes, it is usually advisable not to tell them so to their face. It is possible that the plurality's surprising candor is really a parapraxis, which would tend to confirm Duncan's claim that judges are in denial. But this reading would suggest a very strong sense of denial, one bordering on repression. The plurality, after all, seems utterly unselfconscious in disclosing that its decision is "grounded truly in principle" not because it is logically rigorous, but rather because the Justices have taken "care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them"[90] and because they have done so "under circumstances in

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89 Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1700 (1998) (discussing Vacco v. Quill, 521 U.S. 793 (1997) (rejecting the claim), and Washington v. Glucksberg, 521 U.S. 702 (1997) (rejecting the claim)).

90 *Casey*, 505 U.S. at 865-66.

which their principled character is sufficiently plausible to be accepted" as such.[91]

What this suggests is not bad faith so much as cognitive dissonance. Ordinarily, the Court speaks and acts in ways that allow the Justices *themselves* to accept their reasoning as grounded truly in principle. But they can only do so when their conclusions are in accord with the prevailing understandings that they themselves have internalized. If in *Casey*, the plurality can be seen to struggle so painfully and self-consciously with the idea of principle in constitutional adjudication, it is because the plurality on some level grasps (though, perhaps only dimly) that it is unable in this case to do what it ordinarily does. The controversy over abortion means that there is no consensus, either of practice or values, that could support a perception of neutrality for any legal principle the Court would adopt.

Precisely because *Casey* is a controversial case, it forces open a window on the dynamic at work in every case. The plurality opinion unwittingly exposes the way in which the social constraint of persuasion operates even at the highest levels of lawmaking. Still, the lessons of *Casey* are decidedly mixed. On one hand, it reassures us that the social processes of constraint are at work even in the most controversial cases. On the other hand, *Casey* demonstrates the epistemic limits of law and legal reasoning. The insight that law is a socially contingent artifact or epiphenomenon implies that legal meaning is possible only to the extent that society enjoys a relative stability of context: When there is congruence in practices and consequent values—that is, when the social and legal categories are firmly motivated—then the courts will be able to articulate "principled" decisions that people will recognize as valid. By the same token, judges will experience the legal materials as "determinate" and their own legal reasoning as "principled." But, when social practices and values are controversial or in disarray, the legal rules and principles will be too. It follows that the law cannot resolve difficult, controversial cases in a way that is different or removed from the realm of politics.

It is important, however, not to misunderstand the import of the term "stability." Stability is not stasis, but rather a dynamic balance or equilibrium like that of a market or homeostatic system. Since we are speaking of a social system, stability is actually a dynamic pattern of interaction, reformulation, and adaptation. One might think that I have undermined my own

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91 *Id.*

argument—that is, that time and social change are destabilizing factors that would vitiate the constraints I have described. But this would be wrong: Precisely because the constraint of persuasion is itself a dynamic social phenomenon, it is responsive to, rather than vitiated by, social change.

In times of social change, the judges may modify or extend the existing categories. But, they nevertheless remain constrained by the need to articulate innovations that others will find persuasive as logical extensions of existing law. At a minimum, these extensions must comport with the compositional structure of the conceptual material with which the judges work. Otherwise, the innovations they propose will not seem reasonable. More importantly, legal changes must track the changes in people's real-life norms or they will not elicit the perception of validity and neutrality that sustains the law as such. As Llewellyn explained:

> If the change sanctioned by the judge keeps up more or less, but not quite, one then speaks of the law's mild conservatism. If the change on the judge's part is noticeably not keeping up, one then speaks of a crisis in decision making. And, finally, if the change on the judge's part is keeping up perfectly, neither judge nor layman realizes that any change has occurred . . . .[92]

In other words, controversy and heterogeneity, rather than change, undermine the social phenomenon of constraint. A dynamic cultural context, in contrast, enables legal change. But this does not make the law unstable or indeterminate because this enablement is simultaneously a constraint. Innovation is not a release from constraint but rather a function of it.

That constraint in law is a dynamic social phenomenon means that it is partial, rather than total. It often leaves the forensic space for the strategic, ideological behavior that Duncan is concerned to demonstrate. It is, in other words, a "peculiar" constraint because it does not provide determinate answers on the model of deduction. But the fact that constraint in law is a dynamic social phenomenon, rather than an immovable, external fact, should be a scandal only to those still operating within the two-dimensional framework of objectivity versus subjectivity. Duncan has proclaimed his disillusion, and with it, his conviction that the emperor has no clothes.[93] But to think that we would do any better if we replaced adjudication with more direct politics is

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92 KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 83 (Paul Gewirtz ed., Michael Ansaldi trans., Univ. of Chi. Press 1989) (1933).

93 Consider in this regard Deutsch's quip (in personal correspondence) that Wittgenstein was just a disappointed Platonist. Duncan's account of his own conversion experiences resonates well with this description. *See* CRITIQUE, *supra* note 10, at 312-14.

to labor under a self-defeating misconception. Turning from law to politics will not change who we are.

Once we recognize that constraint is not an all-or-nothing phenomenon, it becomes easier to see that different areas of law exhibit different degrees of stability. The degree of constraint in any given case—and, conversely, the forensic space for judicial improvisation—is not a matter of a priori theory. Rather, as skilled practitioners already know, it is something that can be mapped only after careful, context-sensitive investigation. Not all issues are as controversial as abortion. In many cases, social practices (and their concomitant values) will be sufficiently stable to enable reasoning that feels deductive in its certainty. In other cases, social practices may be as unsettled as the abortion question but without its notoriety. More obscure questions may claim the attention of only a small, specialized audience: the technical issues of federalism, for example, speak to little in people's real-life norms and, therefore, provide judges with greater leeway for strategic action.[94] But the relative (in)determinacy of law is not a unitary or universal matter. It is, rather, a function of where and when.

Still, it would be a significant mistake to think that it is only in cases of instability or obscurity that judges act ideologically. Duncan is concerned to show the overtly political motivations of judges as they apply their work strategies to the legal materials at hand. But this is surprisingly shortsighted for a radical; the earlier Duncan would never have set his sights so low. The truly radical insight is that judges are ideological precisely when they are *not* acting in an overtly political way. The insight that categorization is socially motivated means that categorization—including even the most straightforward, uncontroversial case of legal decision making—is always a normatively loaded process. Every category and every legal doctrine relies tacitly, if not explicitly, upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals. Two (only slightly) paradoxical conclusions follow. First, law works as "law" because the social processes of persuasion mean that judges will be constrained to replicate the most mainstream values and understandings. Second, and as a direct consequence, law is always ideological in the sense that it enforces (and reinforces) the dominant normative views of the culture. Indeed, the ideological dimension of law is most pronounced precisely when judges are acting in good faith, unaware of the normative entailments of the

[94] For typologies of the contexts that will support determinacy or create indeterminacy, see WINTER, *supra* note 7, at chs. 6, 9.

conceptual materials with which they work. *That*, precisely, is what makes adjudication a profoundly political activity. And it is just there that the next century of legal thought needs to begin.