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## Democracy and Determinacy: An Essay on Legal Interpretation

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# Democracy and Determinacy: An Essay on Legal Interpretation

ALLAN C. HUTCHINSON\*

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## I. INTRODUCTION

In the great dance of life, lawyers feign to play the supporting role of the troubadour. It is their professional responsibility to play and to sing the music by which people negotiate their way through life; it is a humble, but essential, calling. In earlier times, people were not able to compose their own legal tunes nor were they able to indulge in jurismusical criticism. Indeed, they had no choice but to dance to the favored choruses of those who called the legal minstrels' tune. But as people lose the sense that law is the imperfect echo of a heavenly choirmaster or the approximate aria of an enlightened Reason, troubling questions are being asked. In an era of purported democratic sensibilities and aspirations, the origins and legitimacy of law's lyric and rhythm are no longer accepted nor assumed; the relation between "Law's Song," its legal singers, and the identity of its composer increasingly are being questioned. In particular, there is a growing suspicion that lawyers are the singers *and* the composers of "Law's Song." As a critical and Yeatsian-inspired musicologist might put it, "How can we know the song from the singer?"<sup>1</sup>

Despite common understandings about the political character of law, there remains a core belief that law retains an essential degree of

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1. See Yeats, *Among School Children*, in *THE COLLECTED POEMS OF WILLIAM BUTLER YEATS* 212 (1940) ("O body swayed to music, O brightening glance,/ How can we know the dancer from the dance?"). See also A. LINDOP, *THE SINGER NOT THE SONG* (1953).

hermeneutical autonomy. Legal interpretation can and should be performed in a manner that distinguishes it from the more open-ended ideological debates that are the stuff of political struggle. The halcyon days of an unself-conscious formalism, characterized by an apparent reliance on a mechanical algorithm or logical parthogenesis, are long gone. Nevertheless, there still remains a tenacious commitment and aspiration to "bounded objectivity"<sup>2</sup>—the idea that there is a difference between "Law's Song" and those lawyers who happen to be singing it at a particular time. When lawyers or judges hold forth on what the law is, it is claimed that they are not singing their own songs, but rather that they are mouthing the words of the Law. Although the music of the Law is neither disembodied nor alien, and although judges are not perceived to be "incapable of moderating either its force or rigour,"<sup>3</sup> "Law's Song" is still treated as much more than the accumulated babble of lawyers' competing voices over time. It is more of an abiding symphony than an ephemeral cacophony.

Borne and practiced in politics, the idea is that the voice of the Law somehow manages to retain a distinct accent and idiom that addresses politics, but is not entirely spoken for by politics. Just as "Law's Song" is not optional, and can be coercively imposed, the independence and impartiality of its formal songsters are paramount: "[their] authority and immunity depend upon the assumption that [they] speak with the mouth of others."<sup>4</sup> Similarly, legal reasoning is both depicted and received as a special mode of interpretive activity that exists within and because of ideological conflict, but that is distinguishable in some nontrivial way from other, more overtly ideological modes of interpretive activity. Legal reasoning then is something more than simply what lawyers happen to say or sing. Indeed, if it was only that, it would warrant neither greater nor lesser respect and deference than that which ideologues, steelworkers, and accountants say or sing.

In this essay, I challenge both the traditional portrayal of the lawyer's role and its legitimacy. In order to provide a convincing justification for the crucial distinction between law and lawyers, it must be shown that the doctrinal materials that comprise the law cannot offer determinate guidance in the resolution of most legal cases. In a

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2. See, e.g., R. DWORKIN, *LAW'S EMPIRE* (1986); Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982).

3. See C. MONTESQUIEU, *THE SPIRIT OF LAWS* 159 (T. Nugent trans. 1949) ("[T]he national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour."). See also *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 738, 866 (1824) (Marshall, C.J.).

4. Hand, *Mr. Justice Cardozo*, 52 *HARV. L. REV.* 361 (1938).

political and legal system that claims to be democratic, such impersonal constraints on the important activities of unelected officials is vital to that system's continued legitimacy and appeal. This need is particularly acute in the area of constitutional adjudication. By deploying a deconstructive variant of the "indeterminacy critique," I show that a demonstration of determinacy cannot be made and that, consequently, the law is irredeemably indeterminate. In other words, I argue that legal interpretation is thoroughly political because its performance and product can never be detached from the identities and interests of the interpreters. In short, the prestige and authority of lawyers is unfounded both in political theory and in political practice.

Furthermore, an explanation of the law's indeterminacy does not hasten the demise of democracy, as many traditional writers seem to predict. This is merely a scare-tactic designed to underwrite and warrant their own tenuous assertion of power. The indeterminacy critique is fatal to the legitimacy of the current adjudicative enterprise, but it is not damaging to democracy. Although indeterminacy jeopardizes any mode of objective decisionmaking, it does offer an understanding of how ordinary citizens can and must be entrusted with increased responsibility and authority in the name of democratic empowerment. In order to focus this Essay's challenge and critique, I concentrate on some recent writings by Richard Posner that, in their efforts to present a workable theory and application of legal interpretation, are emblematic of the false aspirations and real shortcomings of contemporary jurisprudence.

## II. THE POSNERIAN POSTURE

Doctrinal analysis remains the primary work of the law student, professor, practitioner, and judge. The task of the lawyer is portrayed as similar to that of the warehouseperson. Law comprises a great storehouse of rules, principles, and similar normative goods that are individually catalogued and systematically shelved. During the course of business, goods shift in and out of the warehouse in response to the quantity and quality of legal trade. Apart from keeping the detailed inventory, these doctrinal analysts must ensure that incoming norms are screened and sorted so that the existing stock is not contaminated by unsuitable or errant goods. At any time, however, experienced scholars can point to a principle or set of rules that is appropriate for resolving a particular litigated dispute. In addition, the doctrinal analysts must be able to perform a thorough stock-taking and present a workable account of the totality of normative goods

housed. An exhaustive survey is precluded, however, by the open-ended character of such goods and the brisk nature of legal trade.

It is not that doctrinal analysts necessarily deny that law's warehouse has an underlying prescriptive theme or grander normative unity. Instead, they do not consider elucidation of this theme or normative unity to be part of their job description. Instead, they feel that they already have ample work cut out for themselves in conquering the technical details that are a part of their own chosen alcove of the doctrinal warehouse. There is nothing necessarily inconsistent about doctrinal analysts accepting that economics or philosophy might be valuable to a broader understanding of their warehousing craft, or to an improved organization of the warehouse in general. Rather, they simply do not think that it is their responsibility to pursue such inquiries; in fact, some die-hards go so far as to insist that such digressions make a worse lawyer.<sup>5</sup> Indeed, under the traditional division of jurisprudential labor, this pursuit falls squarely within the duties of legal theorists—to provide a larger and more integrative view of law, to evaluate its performance, and to fathom its relation to other disciplines.

This contemporary project takes many diverse shapes and sizes. Many turn to the humanities for inspiration and find recent writings in political and moral philosophy to be precisely what the jurisprudential doctor ordered.<sup>6</sup> Some prefer the social sciences and find intellectual succor in the models of the economists or sociologists.<sup>7</sup> Others resort to the study of language itself and take comfort in its hermeneutic possibilities.<sup>8</sup> Still others attempt to combine the insights of different disciplines.<sup>9</sup> In raiding these other disciplines, however, legal theorists maintain an often-neglected, but shared, informing ambition: they seek to supplement the doctrinal analysts' understanding of the law by revealing the internal rationality or normative underpinnings of the law. They do not forsake the doctrinal analysts, but inform their craft with a higher purpose and critical edge.<sup>10</sup> Thus, although some doctrinal analysts strive to reveal the

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5. See Parker, *Legal Scholarship and Legal Education*, 23 OSGOODE HALL L.J. 653 (1985).

6. See, e.g., D. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986).

7. See, e.g., R. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

8. See, e.g., J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984).

9. See, e.g., R. DWORKIN, *supra* note 2.

10. For instance, the writings of Charles Fried have been enriched with the teachings of moral philosophy. Fried acknowledges an intimate and crucial relation between law and morality, insisting that "law is a moral science and that judges, in determining the law, decide as moral agents." See Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335, 336 (1980). Similarly, his more focused study of contract law

law's own internal luminescence, others seek to light up law with an external battery of floodlights that draw their energy from a nonlegal source. Both strategies are attendant with great risk. Not only do they chance the result that the light will be so searingly bright that its distortions will blind onlookers to much that is important in law, but also that the light will be mistaken for that which is to be illuminated. In short, the law's phosphorescence amounts to little more than the reflected radiance of the theorists' own normative lights.<sup>11</sup>

In three recent essays,<sup>12</sup> Richard Posner sets out to demonstrate that law is no longer an autonomous discipline. Appointing himself the champion of interdisciplinary study, he chastises those law professors who resist its call to academic arms and, instead, cling to an anachronistic understanding of law. For Posner, the last quarter of a century has evinced a decline in lawyers' faith that law is and should be an autonomous discipline in the sense that "the only essential preparation for a legal scholar was the knowledge of what was in [authoritative legal texts—judicial and administrative opinions, statutes, and rules] and the power of logical discrimination and argumentation that came from close and critical study of them."<sup>13</sup> Although the work of the doctrinal analyst rightly will remain at the core of legal education and practice, the work of the modern Posnerian jurist must be informed by both the insights and the methods of other disciplines. Like an incongruous combination of the gallant Dutch boy and the vainglorious Canute, "conventionalists" hope to stem the flood of interdisciplinary study only through dint of their own legal presence and craft.<sup>14</sup> In contrast, Posner believes that only when the dry earth of legal learning is irrigated by interdisciplinary study will it become the rich loam of social justice: to believe otherwise is to risk legal culture being blown away by the crass winds of political history.

Although Posner chooses to look to the discipline of economics

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is devoted to a defense of the "promise principle" as the moral basis of contract doctrine. See C. FRIED, *CONTRACT AS PROMISE* (1981). On the other hand, Anthony Kronman has drawn freely on the liberal branch of political philosophy to advance the traditional understanding of contract law. See Kronman, *Contract Law and The State of Nature*, 1 J. L. ECON. & ORG. 5 (1985); Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

11. For an extended critique of this difficulty, see Hutchinson, *That's Just The Way It Is: Langille on Law*, 34 MCGILL L.J. 145 (1989); Hutchinson, *The Importance of Not Being Ernest*, 34 MCGILL L.J. 234 (1989).

12. See Posner, *Conventionalism: The Key to Law as an Autonomous Discipline?*, 38 U. TOR. L.J. 333 (1987) [hereinafter *Conventionalism*]; Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987) [hereinafter *Decline*]; Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988) [hereinafter *Skepticism*].

13. *Decline*, *supra* note 12, at 763.

14. See *Conventionalism*, *supra* note 12, at 338-39.

for doctrinal guidance, he is engaged in the same apologetic enterprise as the conventionalists whom he scorns.<sup>15</sup> His project operates at a different level of generality than the conventionalists', but it has the same scope and ambition. Both the conventionalists and the interdisciplinarians recognize the debilitating force of the realist critique. At the same time, however, they accept that the ostrich-like response of doctrinal analysts has been inadequate. Like the conventionalists, Posner offers a more abstract and broader variant of traditional scholarship; doctrinal analysis is simply its limiting mode. Indeed, legal theorists of a conventionalist or interdisciplinary persuasion are the apologetic twins to their unreflective doctrinal siblings. The family of traditionalists desire to salvage legal study and practice from the deep, dark void of Critical Legal Studies in which "law is politics." The disagreement is not a simple dispute of left-right politics in the customary sense; the matter goes much deeper. The profound methodological discontinuity between the traditionalists and the Critics speaks to the fact that debates about legal epistemology are the continuation of ideological warfare by other, more esoteric, means.<sup>16</sup>

Although Posner encourages a skeptical attitude towards law and legal reasoning, he does not deny that there are legal rules, nor more importantly, does he deny that judges can and should follow them.<sup>17</sup> Although there is a lack of any distinctive method of legal reasoning, for Posner this is more an inconvenient irritation than a debilitating omission. For Posner, judges must exercise discretion in deciding difficult cases, although most legal questions "are not difficult . . . [and] can be answered syllogistically."<sup>18</sup> In order to overcome this shortcoming in recalcitrant cases, Posner maintains that a solution for the law's marginal indeterminacy can be found in the economic analysis of law, which is "the closest thing to formal logic in

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15. This paper is very North American in focus and concern. It does not claim to reflect or deal with the neo-positivism of much of the traditional jurisprudential thought in the United Kingdom. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* (1961) and J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (1970). Such work is more interested in establishing the formal criteria for legal validity than in justifying the legitimacy of doctrinal analysis; it is about conceptual soundness, not normative worth. A belief in law's immanent rationality or social justice is not required. See L. GREEN, *THE AUTHORITY OF THE STATE* 63-121 (1988).

16. See Hutchinson, *Part of An Essay on Power and Interpretation (With Suggestions on How to Make Bouillabaisse)*, 60 N.Y.U. L. REV. 850, 861-66 (1985).

17. *Skepticism*, *supra* note 12, at 834, 862. See also Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1115 (1981) ("Many economic analysts of law, such as myself, are very interested in cases, and when we use economics to reconcile and distinguish cases, we are carrying on the tradition of the doctrinal analysts."). Of course, I do not claim that rules do not exist. I do not think, however, that they exist or operate in the way Posner and others do. See *infra* pp. 564-67.

18. *Skepticism*, *supra* note 12, at 890.

law . . . [and may be] properly regarded as a school of legal formalism."<sup>19</sup> Consequently, the latent determinacy of the law can be excavated and exhibited by interdisciplinary study. Nevertheless, although economic analysis is touted by Posner as the salvation of the common law and its indeterminacy, he does not believe that law is economic nor that economics is law; each has a separate existence and provenance. Thus, economic analysis is a way of understanding law, but it is not synonymous with law.

Although this characterization of law as an autonomous entity—an entity whose hidden determinacy can be illuminated by economic analysis—is a constant theme in Posner's work, it is especially evident in his very recent monograph on tort law. This monograph's major objective is to persuade the reader that Anglo-American tort law is best understood and explained as an institutional effort to promote the efficient allocation of resources, in the sense of the optimal reduction of accident damages and avoidance costs. Posner is at pains to point out that his claim possesses the status of positive analysis, rather than the status of normative prescription. Indeed, it is not necessary to believe in the moral worth of "wealth maximization" to accept that it might provide the most cogent description of tort law in terms of coherence and unity. Posner, in fact, concedes that significant areas of the common law, such as comparative negligence and the defense of custom, do not conform to this economic logic: these are the product of other generative forces.<sup>20</sup> In short, his whole argument and analysis is based firmly on the belief that the law thrives, develops, and changes independently of his economic model. Thus, his work "accepts the existence, validity and importance of legal doctrine, although it seeks to explain it in economic terms."<sup>21</sup>

The disagreement between Posner and the conventionalists therefore is a false fight and nothing more than an in-house struggle. Posner, in fact, is deeply committed to the traditional ideal—that "Law's Song" is more than the preferred jingle of extant lawyers. I will demonstrate this by discussing his view of the judge's appropriate and legitimate role. Moreover, although Posner's analysis is not dissimilar to the conventionalists, his approach is more different from that of the

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19. *Id.* at 834-35. See also, Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 185 (1986) ("The modern exemplar of formalism in the common law is the positive economic analysis of the law.").

20. *Skepticism*, *supra* note 12, at 835-36.

21. W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 8 (1987). I deal later with the imagined and defended separation of positive analysis and normative prescription. See *infra* pp. 555-56.



Critics than he cares to think. The conventionalist and the interdisciplinarians work the same autonomist street; they simply operate on different sides of this traditional thoroughfare. In contrast, the Critics claim that the legal roadway runs all over the ideological map and that, in reality, the highways and byways represent favored political routes. In the remainder of this Essay, I complete and push through on the skeptical stance—"astringent, irreverent, unsentimental, non-nonsense"<sup>22</sup>—that Posner and his fellow autonomists embrace, only so that they can smother it better. To illustrate the practical bite of the critique, I use the case of *Miller v. Jackson*<sup>23</sup> as a focus. Finally, I suggest a democratic response to the incorrigibility of indeterminacy.

### III. THE JUDICIAL FUNCTION

The replacement of black-letter law with black-letter theory should not come as a surprise. Contemporary legal theory is a more sophisticated continuation of the traditional search for Coke's "artificial reason and judgment of law."<sup>24</sup> The Realist critique of the 1920's and 1930's was, at best, only an interlude in the long-running drama of legal formalism. Posner's suggestion that the Realist challenge has been defeated is wishful thinking on his part. His assessment that it has been "absorbed" by traditional scholarship, however, is nearer the mark.<sup>25</sup> At its height, Realism toppled the regnant rule-formalism in order to create a better path to a full political realization of the formalist ideal. Ideologically and practically wedded to the reform program of New Deal liberalism, the Realists effected a pragmatic shift of institutional focus, rather than a thorough rejection of formalism: they sought to replace judge-dominated legal science with bureaucracy-wielded policy science. As such, Realists' attacks were never intended to amount to more than a palace revolution. Straining the truly radical insights and implications of the Realist critique through a traditional sieve, contemporary scholars have served up a thin gruel of neo-formalism.

Although any faith in a crude, jurisprudential algorithm has been largely abandoned, there is still a fervent commitment and aspiration to the possibility of resisting the radical claim that "law is politics." Interdisciplinary study is not necessarily more liberating nor less narrowing; the shift from ratio decidendi to Pareto optimality is of dubious merit. Posner and his ilk remain the true heirs of Coke. As if

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22. *Skepticism*, *supra* note 12, at 829.

23. 1977 Q.B. 966 (C.A.).

24. See *Prohibitions Del Roy*, 12 Co. Rep. 65, 77 Eng. Rep. 1342 (1607).

25. See *Conventionalism*, *supra* note 12, at 335; *Decline*, *supra* note 12, at 761.

responding to a latter-day James I, Ronald Dworkin summarizes the modern stance: "law . . . is deeply and thoroughly political . . . [b]ut not a matter of personal or partisan politics."<sup>26</sup> The task of scholars is to uncover the immanent rationality that runs deep within the common law. The role of interdisciplinary study is neither to supplant legal reasoning nor to provide a substitute for legal wisdom, but instead to locate and understand them better. In delving into the foreign fields of other scholarly disciplines, the hope remains constant. There is no desire to open up or turn over the legal project to the subversive messages of some of those toiling in the anthropological or sociological soil of radical study. The objective of this extra-legal adventure is to complete the autonomists' program of legal theory, not to undermine its validity or its success.<sup>27</sup>

The force of this commitment to understanding law and its study as autonomous is revealed in the literature on adjudication. The primary and self-imposed task of legal theorists is to explain and suggest how judges can make the law responsive to changing social demands and, at the same time, retain democratic legitimacy. How can judges engage in politics in a distinctly "legal" manner? The realization that, without an organizing and informing political vision, legal reasoning is reduced to a desultory game of catch-as-catch-can is part of the received conventional wisdom. Legal theorists recognize that the larger questions of political justice must be addressed by any serious account of legal development, and that adjudication is quintessentially political both in performance and product. They insist that legal doctrine contains an immanent political rationality or vision of social justice that renders judicial practice coherent and legitimate. They have no truck with the claim that judge-made law is an ideological enterprise. By adhering to this intrinsic ideal, it is contended that judges can avoid engaging in the more open-ended exchanges of ideological debate and therefore retain their vaunted democratic independence.

Posner's views and arguments on the judicial role are very much in line with this traditional thinking. His work is fueled by an implacable desire to resist the disturbing charge that law is "politics." In his book entitled *The Federal Courts*,<sup>28</sup> Posner adumbrates a proposed model of judicial behavior. Although the details of this proposal need not be pursued, its general shape and substance are revealing. Posner accepts that a judge has vast discretion and that "the irresponsible

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26. R. DWORKIN, *A MATTER OF PRINCIPLE* 146 (1985).

27. For further discussion of this intellectual history, see A. HUTCHINSON, *DWELLING ON THE THRESHOLD: CRITICAL ESSAYS ON MODERN LEGAL THOUGHT* 23-30 (1988).

28. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

judge will twist any approach to yield the outcomes that he desires."<sup>29</sup> He cautions, however, against engaging in result-oriented, idiosyncratic, or partisan decisionmaking; it is only reprobate judges who indulge their political preference too freely. Apart from such qualities as self-discipline, logical analysis, common sense, and fair-mindedness, Posner advises an informed deference to "values that are widely, though usually they will not be universally, held."<sup>30</sup> Whereas the doctrinal analyst struggles to fit the appropriate rule to the facts in a hard case, the theoretically informed judge is able to point to a suitable value or set of values.

In defending this depiction of the judicial function, Posner contrasts it with examples of judicial action and theorizing that do not meet the demands of democratic legitimacy. He is particularly harsh on Chief Justice Warren's practice and conception of adjudication. In Posner's view, activism that comprises the brazen elevation of personal ethical imperatives to the status of a natural law of the Constitution leads to a performance of the judicial craft that is "ever more partisan and parochial, lawless, and finally reckless."<sup>31</sup> By way of underlining the illegitimacy of this approach, Posner indicates how such a free-wheeling attitude easily can be taken advantage of by those, like Mark Tushnet, who want to read the Constitution in line with their favored political stance.<sup>32</sup> Like the conventionalist, it is "the horror of indeterminacy and of the collapse of law into politics"<sup>33</sup> that galvanizes Posner's project of autonomist scholarship. Insofar as he does not act as an unbridled economist when he practices legal theory, it is surely the case that Posner does not think of himself—whatever he actually does—as a law-and-economist at large when he fulfills the role of judge on the United States Court of Appeals for the Seventh Circuit. Indeed, he maintains that such an attempt would be "quite silly and futile,"<sup>34</sup> for it would undermine judges' standing among their peers and be counter-productive.

One of the major problems with Posner's arguments is that, in

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29. *Id.* at 287.

30. *Id.* at 222.

31. *Id.* at 214-15.

32. *Id.* at 218-19. See Tushnet, *Following The Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 783 (1983) (arguing that "[c]onstitutional theory is essentially a concomitant of liberalism."); Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

33. *Conventionalism*, *supra* note 12, at 340.

34. See Posner, *Wealth Maximization and Judicial Decision-Making*, 4 INT'L REV. L. & ECS. 131 (1984). For a fascinating analysis of the extent to which there is a link between Judge Posner and Professor Posner, see Culp, *Judex Economics*, 50(4), L. & CONTEMP. PROBS. 95 (1987).

regard to his conventionalist foes, the arguments prove too little. The resort to conventional morality or generally-held values is so indeterminate and manipulable that it can support a host of conflicting interpretations; consensus evaporates in those very instances of controversy when consensus is needed most. Indeed, the resort to such allegedly consensual norms is the standard move of almost all contemporary legal theorists.<sup>35</sup> Although there is disagreement over the nature of the raw materials from which warehoused values are to be derived or manufactured and the ability of judges to fulfill their store-keeping duties effectively, theorists from Fried through Kronman to Dworkin make similar methodological moves to defend their preferred notion of legitimate judicial reasoning. Thus, in order to give his own ideas a modicum of epistemological respectability, Posner must extend the same methodological courtesy to other competing theories. In doing so, however, he undercuts the claim of his theory to any particular priority either in explanatory or in normative terms. Moreover, he robs it of any critical bite. Although Posner can validly claim that "economic efficiency" offers a plausible account of legal doctrine, he cannot assert that it possesses exclusive authority.

On the other hand, although Posner's attempt to ground his own theory of responsible adjudication proves too little in terms of the conventionalists' position, the attempt proves too much to provide an effective response to the Critics' claims. Posner's apparent need to consult the indistinct lights of an elusive, conventional morality introduces a debilitating indeterminacy to his theoretical proposals. In short, although Posner attempts to distinguish himself from the conventionalists and the Critics, he succeeds in doing neither. The Posnerian niche of legal theory is a nonexistent place between a rock and a hard place. Rather than demonstrate that adjudication is a determinate exercise, his arguments actually manage to support the claim that "law is politics" and place him in the derided ranks of "facile skepticism" and "left-wing nihilism."<sup>36</sup> It is to the Critics' arguments that I now turn.

#### IV. LAW-AS-POLITICS

In an important sense, the disclosure that the rivalry between Posner and the conventionalists is a contrived family-feud among the autonomists is secondary to a more significant undertaking.

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35. See Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063 (1981).

36. *Conventionalism*, *supra* note 12, at 353; *Decline*, *supra* note 12, at 766; and *Skepticism*, *supra* note 12, at 889.

Throughout, the main thrust of this Essay is to challenge and reject the treasured distinction between law and politics. In its place, I offer a different answer to the question of what is the relationship between law and politics. By "politics," I do not mean simply conflicts over the exercise and control of government power; this is only a subspecies of a larger genus. Rather, I use the term to refer to the actual or latent conflicts over all the terms and conditions—social, economic, institutional, passionate, or whatever—of our collective and individual lives.<sup>37</sup> In addition, by "law," I do not mean all phenomena that can be considered legal; my focus is more restricted. Although I consider law to be both an analytical category and a practical activity, my inquiry is directed to the work of courts and lawyers, regardless of whether they are dealing with the common law, statutes, or constitutional norms. This Essay makes no claims about the work of legislatures or constitutional conferences. Accordingly, my concern is with the relation between the larger world of politics and the smaller sphere of doctrinal development, especially in the development of the common law.

Without a workable and convincing separation of law and politics, the legitimacy and prestige of courts and legal doctrine is undermined. In defending this crucial distinction, however, it is important to understand what claims are and are not being made; the nature of the distinction and its modern articulation are of a very particular kind. As the writings of Posner and his conventionalist colleagues demonstrate, the reality that law and lawyering has a substantial political component is not denied. Indeed, it is a matter of trite learning, not only among legal theorists, but also within the more general legal community. All lawyers concede that legal activity, whether it pertains to legislation, litigation, or law-enforcement, arises in broadly political circumstances, and that it has some political consequences. In short, law is widely treated as a major player in the game of life.

Notwithstanding this relationship, the law-and-politics critique assumes that there exists a method of thinking about law and politics as independent and separable entities that is both possible and desirable. Not only must it satisfy the constraints of immanent or transcendent rationality, but it must also meet the demands of political justice. Although I do not think that such an achievement is attainable, it suffices to say that this immaculate position has not been attained to date. The idea that the many different judges in many different places might all be operating unknowingly under the influence of one "invisible hand" or "mind" is a coincidence that stretches the bounds of

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37. See R. UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* 10 (1987).

credulity to the breaking point. The idea that this unifying mentality happens to be the same as the theorists who make this discovery is surely too much even for the most credulous among the academic establishment. Consequently, although our existence in the law school and the legal community at large may demand a focus on legal matters, it does not follow that law and lawyering must be treated as a distinct manner of thinking and acting. Because legal theorists deal with what lawyers do, it does not mean that they must elevate it to a privileged category of human activity with a special epistemological and ontological status. Although federal parliamentarians/congresspersons are not provincial/state representatives, it does not follow from this fact that their basic identity as politicians is different in any normative or critical sense.

At a general level, law and politics interact and interpenetrate in manifold and mutually generative ways. Law is not only a political artifact of the first order, it is also a primary artificer of its political context. Legal interpretation is a thoroughly political phenomenon and activity. The life of the law is more than logic and less than our total experience.<sup>38</sup> Of course, this does not mean that, because law and politics are fully implicated in one another, they replicate each other in a simple or undistorted fashion. Rather, this implies that there is no form of social life "out there" independent of the law that constitutes and structures it. Nor is there any law "out there" that is independent of the society that generates and defines itself through that law.<sup>39</sup>

It is extremely difficult, if not impossible, to describe a state of affairs without drawing on the lexical imagery of legal relations. As a white man, father, husband, worker, property owner, etc., my life is saturated with and organized around different legal ideas. To dismiss them as fictions, as some tend to do,<sup>40</sup> is wrong. Although law works to impoverish the richness of my life by reducing it merely to legal relations, it does play a significant role in formulating my own self-image and derivative patterns of consistent behavior. The act of representing the world to which law applies is already thoroughly informed and constituted by the forms and structures of legal thinking. Law does not function as an independent variable in a complex social equation, but constitutes some of the very fibres and sinews of social life. It is not possible to think or act as a lawyer without taking

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38. Apologies to Justice Holmes. See O.W. HOLMES, *THE COMMON LAW* 1 (1923).

39. See Frug, *The Ideology of Bureaucracy in American Law*, 97 *HARV. L. REV.* 1276 (1984).

40. See, e.g., L. FULLER, *LEGAL FICTIONS* (1967).

a political stand or having a vision—no matter how unconscious or crude—of the collective and individual possibilities for human development.

The practical operation of the law is illustrative of how lawyers (and laypeople) treat the law's conceptual apparatus and discursive categories as natural, and how, in the process, they confer the status of the real and concrete on the abstract and metaphorical. For instance, when deciding whether a contract exists between two parties, lawyers speak and act as if they are looking for a "contractual thing" in a drawer full of social events and circumstances. It is assumed that, if all the facts are known, "the contract" will somehow spring forth and bring the dispute to a demonstrable close. As all law students know, however, a contract is an idea, not a thing; it is an abstract construction within a socio-historical context. A contract exists in the realm of metaphysics, not in the world of physicality; a written contract is not the contract, but simply evidence of the contract.

Similarly, property does not comprise the tangible objects in the physical world, but the abstract relation between such visible effects and people.<sup>41</sup> Thus, although born of historical expediency and sustained by political convenience, legal categories, such as contract and property, take on a life of their own and begin to paralyze the lawyers' imagination. Unlike the life of the so-called natural world, social activity responds to these conceptual metaphors and replicates itself in approximate accord with them. The life of law and lawyers is not unaffected by prevailing ideas about what that life should or ought to be. Not only does this give the law a patina of plausibility and coherence, it also allows lawyers to refer to "reality" as confirmation of the naturalness and inevitability of prevailing legal structures and its underlying values. The fact that this process occurs unconsciously makes it no less political. Indeed, it makes it much more effective. Definitions of law and its component parts therefore are not referential facts, but political claims and ideological appropriations.<sup>42</sup>

## V. ON INDETERMINACY

Under the rubric "law is politics," the Critics take a very differ-

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41. See Leff, *Contract as Thing*, 19 AM. U.L. REV. 131, 157 (1970) (property is "a sort of vector analysis with time coordinates [of a bundle of forces]"); see also Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); and Hohfeld, *Some Fundamental Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

42. For a more extensive discussion of this process, see Cohen & Hutchinson, *Of Persons and Property: The Politics of Legal Taxonomy*, 14 DAHLHOUSIE L.J. (forthcoming, 1989).

ent view of the epistemological status and methodological validity of law's claim to determinacy. Legal doctrine does not conform to any simple, internal rationality, nor is it reducible to a cluster of external organizing principles. Although there is clearly an inseparable and organic relation between law and politics, there is no single exposition of that relation that is valid for all time and all societies. Any explanation is itself indeterminate; its character and implications vary with the context.<sup>43</sup> Although they may offer opinion and evaluation, they do not make claims about whether doctrinal materials necessarily and universally determine results, nor whether those results are necessarily and universally good or bad. They oppose any kind of functionalist or instrumentalist account of the relation between law and politics, whether it comes from the right, left, or center of the political spectrum. Law is "neither a ruling-class game plan nor a repository of noble if perverted principles . . . [but] a plastic medium of discourse that subtly conditions how we experience social life."<sup>44</sup>

With imagination and industry, legal materials can be organized to support and justify incompatible outcomes. The fact that the general drift of these outcomes corresponds to the orientation of status quo thinking and values is not determinative; indeed, it is not a matter of doctrinal rationality, but simply a question of political orientation. The socio-economic context is itself largely indeterminate and requires no particular rule for its continued survival. Although a shift in the whole regime of legal rules (e.g., contract and property) will be significant, the existence or shading of particular rules (e.g., the postal rules and the finders' rules) will not be crucial. Moreover, in the same way that the socio-economic context underdetermines law, that very same law overdetermines the possible outcomes to any legal dispute. There is a general and pervasive indeterminacy that plagues all attempts, not simply jurisprudential ones, to explain social events and to fix social knowledge.

Even when there appears to be a consensus on the existence of any particular rule, nothing necessarily flows from that concession. Whether a rule exists and what it means are entirely different inquiries. Although they are not entirely unrelated, the issues give rise to a different set of conceptual and normative concerns; a person's ability to identify the French language is of little help in determining what any particular example of it means. Rules do not operate as impersonal and dispositive forces in social conflicts. Their existence and meaning are more often the consequences, as opposed to the causes, of

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43. See Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888 (1988).

44. Gordon, *Law and Ideology*, 3(1) *TIKKUN* 14, 15 (1988).



a particular resolution. Furthermore, even if there is a consensus on the meaning and existence of a particular rule, either there is always another rule that competes for application or the dispute can be reclassified into another doctrinal field, such as from tort to property or tort to contract.<sup>45</sup> Indeterminacy infiltrates all levels and dimensions of the law, energizing and debilitating the interpretive process and the search for meaning.

The effort to identify one definitive and normative explanation of that regime is defeated by the fact that a theory will not be able to achieve the appropriate mix of analytical generality and historical particularity. It runs the risk of overinclusion or underinclusion. A theory that merely describes the extant details of legal practice will not be able to predict the direction and nature of doctrinal change; it will cease to be useful at the very time that its assistance is most required—the identification and resolution of hard cases. On the other hand, a theory that attempts to move beyond such detailed description will run into two major obstacles. First, it will be unable to account for a sufficient range of present legal data and thus lose its descriptive power. Second, it will be compatible with various combinations of legal materials that comprise existing legal doctrine and fail to deliver on its predictive promise. As Posner's efforts to justify a theoretical account of responsible adjudication reveal, a solution to this normative dilemma is agonizingly elusive.<sup>46</sup>

Contrary to the traditional view of stability in the law, the law is, in fact, a locus of conflict. There are a host of different interpretations competing for descriptive and predictive superiority, but none is able to claim final and absolute victory. Insofar as uncontested interpretation is only possible when there is a preexisting and shared set of values, the competing and contradictory forces at work in forging a legal doctrine foreclose the establishment of the necessary consensus. Accordingly, legal doctrine is not a reflected embodiment of one indwelling and sufficient theory; rather, it is the formal site for the attempted, but unattainable blending and reconciliation of competing theories. The temporary accommodations that are made are more the result of political expediency than of moral purity. Although one theory may tend to dominate and infuse the law with its guiding principles, a competing theory will constantly challenge it and provide a debilitating set of counterprinciples. At times, the tension will precipitate doctrinal crisis; while at other times, the friction will be subdued and relatively untroubling. Whether muted or manifested, however,

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45. See Cohen & Hutchinson, *supra* note 42, at 12-15.

46. See *supra* pp. 909-11.

it fuels and informs doctrinal development. The particular trajectory charted and followed, at least in part, will be a function of the larger historical forces that impinge on the legal and judicial enterprise.<sup>47</sup> Consequently, in this general sense, law is merely another arena for the stylized struggle over the terms and conditions of social life. In sum, law is politics.

## VI. THE TRADITIONAL RESPONSE

As the Critical position gains intellectual ground, a number of misunderstandings drift (or push) into popular circulation. The most persistent and pervasive of these misunderstandings of the Critics' position are that law does not matter, that all cases can be decided either way, that judges act out of purely subjective preference, and that lawyers consciously manipulate doctrine. Although these misapprehensions are attributable to a whole range of prestigious sources, they are nicely brought together in a short article by Alvin Rubin.<sup>48</sup> By confronting them, I hope to clarify the claim that "law is politics" and to strengthen the charge that the law is indeterminate.

A commonly expressed opinion is that the Critics are devoted to the view that "doctrine means nothing."<sup>49</sup> It is suggested that the Critics maintain that legal doctrine is so fundamentally indeterminate that it possesses hardly any meaning at all and has no magnetic pull on the resolution of particular disputes. Each case is imagined to be scribbled on a clean slate and can be decided in, at least two incompatible ways. This version of the nonautonomist position is a *reductio ad absurdum*, exaggerating the consequences of a rigorous skepticism, ignoring the historical point of the critical inquiry, and taking the political edge off the critique. It is definitely not the

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47. This is not to downplay the importance of these forces or the need to explore their precise operation. The focus of this paper, however, is on the doctrinal consequences of their impact. For a general study of these wider issues, see J. GRIFFITH, *THE POLITICS OF THE JUDICIARY* (3rd ed. 1987).

48. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307 (1987). These sources include: S. BURTON, *INTRODUCTION TO LEGAL REASONING* 188-93 (1985); Ackerman, *Law, Economics and the Problem of Legal Culture*, [1986] DUKE L. J. 929 at 936-39; Brosnan, *Serious But Not Critical*, 60 S. CAL. L. REV. 1205 (1985); Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203 (1985); Nelson, *An Exchange on Critical Legal Studies Between Robert W. Gordon and William Nelson*, 6 LAW & HIST. REV. 139, 157-68 (1988); Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986); Williams, *Critical Legal Studies: The Death of Transcendence and the New Langdells*, 62 N.Y.U. L. REV. 429 (1987); and Fiss, *Law Proclaimed in THE CAMBRIDGE LECTURES* 1985, 103 (F. McArdle ed. 1987).

49. Rubin, *supra* note 48, at 309. Owen Fiss forcefully and sophisticatedly posits this opinion. See Fiss, *supra* note 2, at 740 (describing Critics as the new nihilists).

nonautonomists' case that there can be no general consensus on the shape and substance of past doctrine, nor that the resolution of particular cases cannot be confidently predicted. To ignore such facts is to counsel a dangerous other-worldliness. It is the case, however, that the law fails to meet its own proclaimed standards of rational justification and cognitive clarity. Law is indeterminate, but it is neither arbitrary nor entirely unpredictable. Unsupplemented by external influences and values, legal doctrine can never by itself determine the "correct" and "unique" answer to any particular dispute. Any fragile consensus about meaning or any confidence in prediction does not arise from within doctrine, but is given to doctrine from without.

Legal doctrine is not simply "out there." It is always in need of collective retrieval and re-creation. The past is unknowable in and of itself. The past has passed and was what it was, but it is up to those that follow to decide what it will become: the future of the past is a present and continuing responsibility. Tangled in a skein of fact and fancy, history can never be excavated in its pristine immediacy. Rather, it can only be experienced second hand. Consequently, meaning is always provisional because it is always open to reinterpretation, and always conditional because it is only knowable from an interpretive perspective. Legal reality is the historical function of the ideological commitments that comprise a legal community at any given time, a community whose identity and expression is itself an interpretive artifact that is never "self-present as a positive fact."<sup>50</sup> Thus there simply does not exist a necessary and adequate connection between legal outcomes and doctrinal materials.

None of this is intended to deny the shared sense of doctrinal intelligibility that everyone experiences at some time. Indeed, in the theoretical interrogation of "shared meaning," there is an implicit and unavoidable reliance on the practice of shared meaning.<sup>51</sup> What it is intended to do is to show that there can be no law without interpretation, no interpretation without judges, and no judges without politics. The crux of the matter is not the existence of institutional meaning and general predictability, but the source and authority of the normative reading offered or supposed. On what basis can one reading be privileged over another? Legal doctrine need not be as it is; it always contains the resources for its own reinterpretation and revisioning. Doctrinal consistency and regularity are not attributable to law, but

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50. See Cornell, *Institutionalization of Meaning, recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1207 (1988); see also S. FISH, *IS THERE A TEXT IN THIS CLASS?* (1980); Yablon, *The Indeterminacy of Law: Critical Legal Studies and the Problem of Explanation*, 6 CARDOZO L. REV. 917 (1985).

51. See Derrida, *Signature Event Context*, 1 GLYPH 172 (1977).

are attributable instead to the politics of lawyers. Although every case could be decided doctrinally in contradictory ways, the relatively homogeneous values of lawyers and judges ensure that some results will be much more likely than others. The reconstructive potential of the law can never be squeezed out by its present actuality; closure of doctrinal openness is only bought at the price of intellectual self-delusion and philosophical puzzlement. Accordingly, the truth is that doctrine is not nothing; it is a special kind of something. It means nothing until it is interpreted, and although it will always have meaning, its meaning will be determined by those who interpret it.

A second misunderstanding, that flows from the first, is that, if there is any validity to the Critics' claims, it only has force in cases "which are unusual, indeed exceptional."<sup>52</sup> This argument relies on the familiar distinction between easy and hard cases: although the vast majority of cases will be straightforward and capable of disposition through the uncontroversial application of precedent, a small minority of cases will raise novel or contested issues requiring a more creative approach that goes beyond the mere application of precedent. Thus there remains disagreement, even within the traditional ranks, over the extent to which judges in hard cases are constrained by doctrine in its larger sense.<sup>53</sup>

The easy/hard case distinction is more of a deferral of the autonomy issue than a definitive resolution of it. The difficulty centers on the method by which such a distinction is to be made and on that method's origin and normative status. In order to maintain intellectual credibility, that distinction must be defensible in terms of its necessary and internal legal pedigree, and not as the creature of contingent and external political considerations. To do otherwise would be to recognize that law is driven by politics and, as such, to deny the autonomy of law from politics. This is exactly what reliance on the easy/hard case distinction does. Moreover, this maneuver points out a more general infirmity in the attempt to defend a law-politics separation. If law is valued because it is separable from politics, it can only be because it is politically desirable to have such a separation. The autonomy of law cannot be intrinsically valuable; it must be justified by reference to nonlegal values. In short, the law-politics distinction is thoroughly political in its character and ambition.<sup>54</sup>

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52. Rubin, *supra* note 48, at 309.

53. See H.L.A. HART, *supra* note 15, at 121-32; R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1979).

54. This argument is analogous to the critique of the substance/process distinction in constitutional theory. See, e.g., L. TRIBE, CONSTITUTIONAL CHOICES 9-20 (1985).

When analysis is pushed beyond the simple invocation of the easy/hard case distinction, its political nature is plain. Within the doctrinal and juristic materials, a hard case is one in which the application of precedent leads to a conclusion that is unacceptable because, for example, it is out of step with conventional views of justice. This means that the easy case is one in which the conclusion is acceptable. It follows therefore that easy cases are not decided by purely doctrinal promptings, but are merely couched in doctrinal language: it is the prevailing ideas of "acceptability" that decide the case. Consequently, although it is true that most cases are easy, it is not because existing rules dispose of them. It is because their disposition by the rules is considered to be acceptable.<sup>55</sup> In effect, then, all cases are hard in the sense that they demand, no matter how unreflective or taken-for-granted, an initial appeal to extra-doctrinal considerations of acceptability. Easy cases are one kind of hard case, and any defense of adjudicatory autonomy premised on their independence is destined to fail.

The other common misunderstanding is that the Critics hold that "decision-making is pure result-selection followed by rationalization."<sup>56</sup> This view posits that judges are consciously manipulative ideologues who combine, in Machiavellian manner, with their colleagues to implement a clear and self-serving scheme of social injustice. To associate the Critics with such a crude view of human decisionmaking and motivation is to ignore their sophisticated articulation of the operation of legal ideology. The ascription of such judgmental self-consciousness to individual actors is a feature of the very political philosophy that the Critics are most at pains to discredit and dislodge. The whole critical enterprise is devoted to abandoning the dichotomous view that law is either the reflection of pure reason or the exercise of pure power. Instead, it contends that reason and power are inseparable and that each informs and provides the context for the other.

To be plausible, any critical theory of adjudication must be able to account for the constraints felt by judges. It cannot discard the real experience that decisionmakers have of being compelled by doctrine to reach particular results. Nevertheless, this existential fact does not require a denial of ideology. Its most important function is to offer a framework for formulating a personal identity and self-understanding, including the idea that we are independent operatives

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55. For a fuller account of this argument, see Hutchinson & Wakefield, *A Hard Look at 'Hard Cases': The Nightmare of A Noble Dreamer*, 2 OXFORD J. LEGAL STUD. 86 (1982).

56. Rubin, *supra* note 48, at 312.

in the social world. Indeed, legal consciousness operates so effectively precisely because it persuades the "rulers" as well as the "ruled" that the judicial function is a constrained and impersonal exercise of official authority. It is just as flawed to propose that the lawyer is everything as it is to suggest that the law is everything. Although there are instances of overt manipulation, legal doctrine amounts to more than the residual traces of the judicial mind's unconfined free-play. The posited distinction between "that to be interpreted" (doctrine) and "that which interprets" (lawyer) cannot be sustained.<sup>57</sup> Neither doctrine nor lawyer exclusively controls meaning; each is implicated by and in the other. Both doctrine and lawyer are shaped by their political milieu; they interact and interpenetrate to generate legal discourse and its reality. Judgement and values are neither the objective essences of an intelligible world nor the subjective fantasies of a chaotic existence. They are the contingent effect of varied and overlapping economies of intellectual, social, and political thought.

#### VII. A MILLERS' TALE

The proof of any theoretical pudding is in the tasting. This is as true for the Critics' position as it is for Posner's and the other traditionalists. The major argument that must be defended is that law is different from politics in that the application of legal reasoning to particular problems makes an appreciable difference to the problem's resolution. If these cases are left to the ebb-and-flow of ideological exchanges, the autonomists' argument must be that the outcome will be different. Of course, it is not necessary to show that the result will be different in every case, only that there will be a difference in a statistically significant number of cases. Also, the autonomists must be able to demonstrate that this difference is attributable to a reliance upon legal reasoning, and not to the political preference of the legal reasoner. In short, the law per se must make a difference.

For the traditional claim to pull any epistemological weight, its proponents must show that law is a rational discipline, and not merely a convenient battery of technical rationalizations. Doctrinal justification must be more than conventional apparel for naked political preference. Furthermore, the demonstration that any particular decision is wrong or errant will not be sufficient to support their arguments. Indeed, those who believe in law's determinacy presumably must accept a difference between being a bad judge and not being a judge at all. Rather than concentrating on identifying the criteria of legitimate

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57. See Kennedy, *Toward A Phenomenology of Adjudication*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* (A. Hutchinson and P. Monahan eds. 1987).

legal reasoning, it more instructive to put the usual questions in a slightly different way: What might not amount to a legal analysis of the facts and the doctrinal matters in a particular dispute? And what might not count as a judicial resolution of them?

In order to substantiate these criticisms, and to join substantive issue with Posner and the conventionalists, I discuss the case of *Miller v. Jackson*.<sup>58</sup> This case deals with the vexing issue of "coming to the nuisance"—whether it is a defense to an otherwise successful action in nuisance that the offending state of affairs existed prior to, or at the time of, the plaintiffs' acquisition of the land. Although it is generally agreed that this is not a defense, there still thrives a vibrant debate about its precise scope, application, and meaning.<sup>59</sup> After summarizing the facts, holding, and reasoning of that decision, I critique Posner's account of the rule and offer my own "critical" reading of the judgments. My aim is not to show that there is no rule nor that there is no better or worse result in specific circumstances. Instead, I aim to establish that the doctrine does not by itself preclude or require any particular outcome, and that no one result is uniquely preferable to any other. Context and circumstance are crucial.

In *Miller*, the plaintiffs, the Millers, lived on a housing estate which recently had been built by a cricket club on its grounds.<sup>60</sup> Cricket had been played on the grounds for about seventy years.<sup>61</sup> As a result of the Millers' complaints, the club erected a high fence to prevent balls from invading the Millers' garden.<sup>62</sup> This proved to be no real defense, and according to the Millers, the situation became so intolerable that they felt obliged to vacate their home whenever a game was played.<sup>63</sup> Finally, they sought an injunction to restrain the playing of cricket.<sup>64</sup> The club contended that it had done everything possible to prevent such occurrences: the fence was as high as wind conditions allowed, and it had offered to install armored glass in the

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58. 1977 Q.B. 966 (C.A.).

59. See *Sturges v. Bridgman*, 11 Ch.D. 852 (1879) and *Ensign v. Walls*, 323 Mich. 49, 34 N.W.2d 549 (1948). Some of the best of the academic literature includes Baxter & Atree, *Legal Aspects of Airport Noise*, 15 J. L. & ECON. 1 (1972); Calabresi & Hirschhoff, *Toward A Test for Strict Liability in Tort*, 81 YALE L. J. 1055 (1972); Elickson, *Alternatives to Zoning*, 40 U. CHI. L. REV. 681 (1973); Epstein, *Defenses and Subsequent Pleas in A System of Strict Liability*, J. LEGAL STUD. 165 (1974); and Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

60. *Miller*, 1977 Q.B. at 968.

61. *Id.* at 969.

62. *Id.*

63. *Id.* at 970.

64. *Id.* at 969.

Millers' house.<sup>65</sup> The club denied, however, that its activities amounted to an unreasonable interference with the Millers' enjoyment of their property.<sup>66</sup> Moreover, it insisted that it had taken all reasonable measures to protect the Millers.<sup>67</sup>

Although the Millers were successful at first instance, the Court of Appeal upheld their claim for damages, but refused to grant an injunction against the playing of cricket.<sup>68</sup> The reasoning of the judges is all over the doctrinal map. Lord Denning, M.R., concluded that there was no negligence and no nuisance, but agreed that the club should pay the Millers \$800 for past and future damages.<sup>69</sup> At the other extreme, Geoffrey Lane, L.J., held that there was both negligence and nuisance, and that an injunction should be granted, but as a consoling gesture to the club, he postponed its issuance for twelve months in order to allow for the location of a new ground.<sup>70</sup> Finally, Cumming-Bruce, L.J., who occupied a middle position, concluded that there was both negligence and nuisance, but refused to grant an injunction and only awarded damages of \$800.<sup>71</sup> Accordingly, although the Millers won their action and recovered \$800 in damages, cricket was still played and balls continued to pepper their garden.

The fact that the judges' reasoning and conclusions are so evidently at odds with one another confirms little, but it does offer a rich set of textual materials with which to work. Although some might want to criticize a particular judgment as unsound or impolitic, it is difficult to suggest that any of the three judgments does not amount to legal reasoning or cannot be justified in terms of the existing doctrinal materials. Legitimacy or validity is not the issue; the issue is one of wisdom and cogency. Although each judgment can claim to be a plausible performance of the judicial craft, each renders somewhat transparent the assertion that law is a constrained mode of decision-making. Of course, it could be contended that, if one of the judges explicitly and exclusively had decided the case on the basis that the playing of cricket should be promoted ahead of all other activity, he would not be acting judicially. Instead, he would be deciding in line with his own personal values and preferences.<sup>72</sup> At best, however,

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65. *Id.* at 970, 977.

66. *Id.* at 972.

67. *Id.* at 971.

68. *Id.* at 989.

69. *Id.* at 982.

70. *Id.* at 987.

71. *Id.* at 989.

72. *See supra* pp. 548-49. It does not take a cynical or even close reading between the lines to speculate that Denning's judgment might well be an example of such a cricket-loving rationalization. *See Miller*, 1977 Q.B. at 976-82.



this merely shows that a decision that is not couched in the language of the law does not deserve the label "legal." This is neither a particularly devastating charge nor an interesting revelation. For it to be so, it has to be demonstrated that the decision is not motivated by "non-legal" considerations and then framed in the conventional rhetoric of legal argumentation. It surely is the case that demagogues do not become democrats because they dress the same. Rationalization is not reasoning.

The Critics clearly would be wrong if they argued that it is not the generally stated rule that "coming to the nuisance is no defense to nuisance." This, however, does not dispense with the indeterminacy claim. Rather, it simply offers a site at which to locate and begin the deconstructive excavation. Indeed, Posner's discussion of the rule and his implicit acceptance of its uncontroversiality establish the ground for such an opportunity. Although it is easy to state the existence of the rule, it is much more difficult to explain its meaning and scope. Posner's own illustrations of the problems associated with applying the rule in different factual situations undermine, rather than reinforce, his autonomist commitments. He provides clear confirmation of the Critics' major claims: that there is a large gap between a general rule and particular result, that the gap can only be filled with extra-legal considerations, and that these considerations will be the determinative factor in any decision. All in all, his arguments give modern emphasis to the traditional sentiment that the law of nuisance "is immersed in undefined uncertainty."<sup>73</sup>

Posner approves of the "no defence" rule not simply because it is the law, but because it is defensible as a matter of sound economic policy. When interpreted as placing liability on the party who can avoid competing resource uses at the least cost, it enhances the maximization of wealth by ensuring that patterns of resource use are not "frozen," and that the possibility of changing use is reflected in the investment decisions of land developers.<sup>74</sup> Nevertheless, Posner cautions that "rejecting 'coming to the nuisance' is the efficient rule provided costs are calculated on the correct ex ante basis."<sup>75</sup> For example, when a long-established polluting factory is gradually engulfed by encroaching suburban developments, the relevant balancing is not between the relative moving costs of the factory and the suburbanites; it is between the moving costs of the factory and the cost at which the suburbanites could initially locate elsewhere.

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73. *Brand v. Hammersmith Ry.*, 1867 L.R.-Q.B. 233, 247 (Ex. Ch.) (Erle, C.J.).

74. See W. LANDES & R. POSNER *supra* note 21, at 50.

75. *Id.* at 51.

Of course, the outcome of this balancing depends upon the particular costs in each case. In the example that Posner uses, as the factory's costs are less than the suburbanites', the result is that there is no nuisance and, consequently, that the factory can continue its operation (and pollution). This means that, in these particular circumstances, "coming to the nuisance" is a very real and effective defense that is in flat contradiction to Posner's support of the common law's rejection of the defense. Posner compounds this dissemblance in his discussion of the familiar case of *Spur Industries Inc. v. Del E. Webb Development, Co.*<sup>76</sup> In *Spur Industries*, the court held that the defendant's activities constituted a nuisance, but rather than issuing an injunction against the defendant, or ordering him to pay damages to the plaintiff, the court ordered the plaintiff to pay the defendant's moving costs.<sup>77</sup> Posner supports this "ingenious" decision on the basis that it "creates an incentive for the party coming second . . . to go elsewhere instead if its costs of locating elsewhere, prior to its locating next to the nuisance, would be lower than the cost to the defendant of moving."<sup>78</sup> This is an express negation of the common law rule and a demonstration of its indeterminacy, not an account of its determinate explication and application.

Nevertheless, although Posner manages to reject the general rule in the course of his professed support for it, it could be contended that the economic rule of "least cost-avoider" is sufficiently determinate to deflect such criticisms. This response fails for at least two reasons. First, the deeper and more ideological difficulty is that any calculation of allocative efficiency is always dependent upon contestable and therefore indeterminate assumptions about the prior distribution of resources. The value of any particular resource is inextricably and complexly linked to whether or not a person already possesses it and what other resources they might already possess.<sup>79</sup> Second, the "least cost-avoider" rule is open to exactly the same objections as the "no defence" rule. The major stumbling block is the notorious difficulty of isolating and quantifying the relevant costs with the necessary degree of confidence and precision. Not only will much depend on the level of transaction costs, but the respective costs of the parties are

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76. 108 Ariz. 178, 494 P.2d 700 (1972).

77. *Spur Industries, Inc. v. Del E. Webb Development Co.*, 108 Ariz. 178, 184-86, 494 P.2d 700, 706-08 (1972). For an acknowledgement that this decision is inconsistent with the common law rule, see Prichard, *An Economic Analysis of Miller v. Jackson*, in *THE CAMBRIDGE LECTURES 1985*, 71 (F. McArdle ed. 1987).

78. W. LANDES & R. POSNER, *supra* note 21, at 51.

79. See M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 114-50 (1987); Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

so detailed and so interdependent that their calculation is always speculative and hypothetical. For example, who are the relevant parties? Are they the plaintiff, the suburbanites at large, or the developer? What amounts to a cost? Who or what decides cost in a particular case? When is valuation to occur? In short, general theoretical plausibility is confounded by specific factual malleability. As Posner himself has remarked, "the exactness which economic analysis rigorously pursued appears to offer is, at least in the litigation setting, somewhat delusive."<sup>80</sup>

All of these observations of Posner's analysis can be brought together in considering his likely response to the *Miller* case. By his lights, anything is possible and all bets are on. The looseness of his "least cost-avoider" interpretation guarantees that any outcome can be justified and supported—the continuance of cricket, the continuance of cricket with payment of damages, the prohibition of cricket, and the prohibition of cricket with compensation for relocation. The crunch question is which costs are to be included in the social calculus. It is surely the case that the economic variables can be selected and quantified to ensure very different computations of the economically optimal result. Indeed, more to the point, there is no technical or objective manner in which to assign or formulate such costs. Some values will be overlooked, while others will receive disproportionate attention.<sup>81</sup> Is it the costs of the Millers that are to be tabulated? Is it the accumulated costs of all the neighboring landowners? Or, instead, is it the initial relocation costs of the developer of the residential estate that should be assessed? What about those neighbors who view the proximity of the cricket club as a benefit? Is the valuation to be based on general market prices? Or, rather, is it the Millers' idiosyncratic costing that should prevail? Do the club's costs include the inconvenience to the players, spectators, and their opponents? How is such disappointment to be quantified? Is tradition or local culture to count at all?

Once the "appropriate" costing and calculation is completed, Posner presumably would write the decision in his favored style of judicial reasoning. Moreover, whatever outcome he arrives at, the decision will simply be a card to be played in the continuing game of bargaining and behavior modification; the law will not be the arbiter of the dispute, but will only be a factor in the workings of the market. In theory, for example, the club could "buy out" any injunction awarded to the Millers, or the Millers could "bribe" the club to con-

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80. See *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194, 1201 (7th Cir. 1982).

81. See A. SEN, ON ETHICS AND ECONOMICS 29-57 (1988).

tinue their cricket elsewhere. This raises another thorny problem of valuation, namely, wealth effects: is the relevant figure the amount the Millers would be willing to pay to the club to stop the cricket, or is it the amount the Millers would be willing to accept from the club to permit the cricket? In answering these riddles, the so-called traditional virtues of doctrinal predictability, determinacy, and integrity are ransomed to the cause of a spurious and crude political instrumentalism. The law becomes the agent of the market rather than its principal, and legal theory becomes the tool of the marketeer.

### VIII. A DECONSTRUCTIVE RETELLING

This critique of Posner can be generalized and tied to a broader theory of legal interpretation, known as deconstruction.<sup>82</sup> Although it has come to be used as a general catch-all for any unconventional criticism of law and legal theory, it is a very subversive and profound form of philosophical critique. Its target is the whole edifice of Western metaphysics. Its practitioners do not want to eject its present incumbents and occupy the building themselves; they seek to demolish it so that no one can live within it. In jurisprudential terms, the ambition is to show that law and legal doctrine are not and cannot be informed by an overarching "rationality." It is not that legal doctrine is irrational, nonrational, or meaningless, nor is it any more or less rational than any other mode of thought or reasoning.<sup>83</sup> On the contrary, deconstruction shows that law is "of a piece" with other forms of social knowledge. There is no Rationality, but there are many rationalities, and each is as historically conditioned, politically specific, and socially constructed as the other.

Deconstruction is not a philosophy, but is, instead, a theoretical strategy for displacing traditional philosophy, especially its insistence upon the existence of a stable foundation for "truth" and "knowledge." For the deconstructionist, however, referentiality and meaning are not so much nonexistent as profoundly problematic. The attempt to demonstrate and defend any theory of embodied meaning is ruthlessly revealed as leading into a black hole of historical deferment. No interpretation is right or wrong, and no mode of linguistic signification can achieve interpretive hegemony. Deconstruction does

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82. For an extended introduction to deconstruction as a mode of legal critique, see Hutchinson, *supra* note 27, at 34-41. For a more technical and less radical account, see Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743 (1987).

83. Irrationalists, like Paul Feyerabend, remain trapped within the very system they criticize and claim to reject. See P. FEYERABAND, *AGAINST METHOD* (1975). A studied irrationality in which "anything goes" is the mirror image of the opposed Rationality and is guilty of the same reductionist and totalizing tendency.

not erase meaning or deny intentionality. Rather, it perpetually postpones and de-centers them, depriving them of any privileged or original authority. It foils any orderly attempt to achieve progress or knowledge, or simply to recover meaning by denying that there ever can be philosophical closure to the vertiginous attempts at historical appropriation. Nonetheless, deconstruction is not randomly or wantonly destructive. It takes the subject of its critique and, working to collapse it from within, deconstructs the constructs of its philosophy to better reveal their "constructedness."

In order to understand and control the world, traditional thinking employs a set of enabling distinctions that are treated as natural and obvious, distinctions such as objective/subjective, reason/emotion, or mind/body. This means that any coherent and cogent account of fixed meaning and grounded knowledge must not only explain the precise and stable relationship between these oppositions, but also find a way of talking about them that is itself precise and stable. Traditional thinking claims to accomplish this by privileging one account over the other, and by granting it epistemological authority. In contrast, deconstruction goes behind these hierarchical dichotomies and shows that they have a history, and that they are far from natural or obvious. Operating from inside the traditional paradigm, deconstruction unravels and lays bare the contradictory, inescapable, and warring forces that both constitute and confound the common sense meaning of words and texts. A good example of this is the historically constructed and contested distinction of male/female that is used to justify a whole set of conceptual and social practices.

Moreover, these duplicitous dualities of consciousness cannot be sustained. The unprivileged "other" disrupts and undermines its privileged partner. Although it is a necessary contrast to it, it is also a contradiction of it. So interrelated are each to the other that the one not only makes the other possible, but contributes to its negation: "Neither/nor, that is, simultaneously either or."<sup>84</sup> In short, what is excluded is implicated in, and essential to, what is included: philosophy depends on the very history that it is at pains to deny. The metaphysical dream of providing a solid foundation for "Truth" and "Knowledge" is doomed to failure by its own lights. More important, however, the deconstructive technique is not intended simply to reverse the hierarchical order and place, for instance, community over individual or woman over man in terms of epistemological authority. It is to be understood as rejecting entirely the dichotomous and pas-

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84. J. DERRIDA, POSITIONS 43 (A. Bass trans. 1981).

sive mode of thinking about the world in favor of a more engaged and active way of truth-making.

The three judgments in *Miller* offer a rich textual diet on which the hungry deconstructionist can feast.<sup>85</sup> In particular, Denning's judgment is an opportunity par excellence for the deconstructionists to show their analytical stuff. It is a textbook example of the "flipability" of supposedly opposite categorizations and the arbitrary prioritization of one term over the other. The deconstructive challenge is to describe the process by which this occurs and the interests that it serves. As such, the critique is a simple laying bare of contradiction's insidious existence at the heart of doctrinal being. Denning's efforts to negotiate the public/private distinction set the stage perfectly for such a description:

[I]t is our task to balance the right of the cricket club to continue playing cricket . . . as against the right of the householder not to be interfered with . . . . There is a contest here between the interest of the public at large and the interest of a private individual. The public interest lies in protecting the environment by preserving our playing fields in the face of mounting development, and by enabling our youth to enjoy all the benefits of outdoor games, such as cricket and football. The private interest lies in securing the privacy of his home and garden without intrusion or interference by anyone . . . . As between their conflicting interests, I am of the opinion that the public interest should prevail over the private interest.<sup>86</sup>

It takes little imagination to realize that Denning's pouring of social wine into the conceptual bottles of public and private interests can be of a very different kind. The playing of cricket can be as "private" a matter as sitting out in the sun, and the security of people's homes can be as "public" a matter as the preservation of playing fields. Although the "flipability" of Denning's characterization is plain and simple in *Miller*, it is possible to make such a switch in any situation. In short, the raw materials of life do not present themselves to policymakers immutably divided into natural categories of social interest. The world is not a given; it is constantly being made and

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85. In writing the remainder of this section, I benefitted enormously from a lecture and unpublished paper by Frank Michelman. See Michelman, *Miller v. Jackson En Critique* (Nov. 1985) [hereinafter Michelman, *En Critique*] (on file at the University of Miami Law Review).

86. *Miller*, 1977 Q.B. at 981-82. Geoffrey Lane makes passing reference to the need to balance public and private interests and seems to favour private over public. See *id.* at 986. For an extended critique of the public/private distinction, see Hutchinson, *Mice Under a Chair: Democracy, Courts and the Administrative State*, 39 U. TORONTO L.J. (forthcoming, 1989); Hutchinson & Petter, *Private Rights and Public Wrongs: The Liberal Lie of The Charter*, 38 U. TORONTO L.J. 278 (1988).

remade. Seeds of fact reap a rich harvest of values only when cultivated by ideological gardeners. Denning's depiction of the contestants is a prescriptive act of creation, rather than a descriptive report of detachment.

Having established the competing interests and assigned the litigants to their respective sides of the balancing scales, Denning then proceeds to place his thumb on the side of public interest. In such public/private contests, he seems to assume that it is axiomatic that "the public interest should prevail over the private interest."<sup>87</sup> The whole judgment is given over to establishing a rhetorical climate in which the prevalence of the public interest seems obvious and natural. Denning, however, offers no reason as to why this conclusion should be treated as self-evident. Indeed, he begs the very question that his analysis is supposedly directed towards answering—when and why does the public interest prevail over private interest? When it comes to the decisional crunch, the Master of the Rolls hides behind declaratory platitudes—"[o]n taking the balance, I would . . . ,"<sup>88</sup> and "[a]s between their conflicting interests, I am of the opinion . . ."<sup>89</sup>—eliding any explanatory reasoning. His judgment draws its appeal and cogency, if any, from his efforts to tap the political sensibilities and sympathies of his intended audience, rather than from the logical rigor of its doctrinal analysis.

The style and phrasing of Denning's offering is structured by the contradictory impulses of "progress" and "tradition." Although his judgment is voiced predominantly in the accent of a progressive preference for calculations of public interest in matters of competing land-use, there is a more subtle idiom of traditional rhetoric that runs alongside and is often intertwined with the more dominant tone. At the same time that he refuses "to approach this case with the eyes of the judges of the 19th century"<sup>90</sup> and insists that "it should be approached on principles applicable to modern conditions,"<sup>91</sup> he is adamant that temporal priority is deserving of legal precedence.<sup>92</sup> He frequently and pejoratively contrasts the cricket club's long-standing contribution to the community with the Millers' status as "newcomers."<sup>93</sup> In this consummate exercise in judicial craft, Denning manages to couch a defense of vested property rights in the language of

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87. *Miller*, 1977 Q.B. at 982.

88. *Id.* at 981.

89. *Id.* at 981-82.

90. *Id.* at 978.

91. *Id.* at 981.

92. *Id.*

93. *Id.* at 976-81.

social progress. For all of his rhetorical support of progress and public interest, the driving force behind the decision is the conservative desire to preserve the status quo: "I would agree [with Lord Reid's dictum that '[i]f cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all'] if the houses or road was there first, and the cricket ground came there second."<sup>94</sup> Of course, to reach the same result, Denning could have run a more straightforward traditional defense of vested interests, but this would have robbed the decision of much of its success as a rhetorical exemplar.

Cumming-Bruce and Geoffrey Lane take a tack different from Denning's, but still manage to ground themselves on the shoals of contradiction. The particular dilemma that they perceive, and from which they seek to escape, is that between precedent and equity or, in grander terms, between positive law and natural law. It is a manifestation of the tension between the desire for stability and certainty and the simultaneous urge for flexibility and maneuverability. At the heart of this dilemma is the acceptance that justice demands, as an institutional matter, both the general embrace of rule-driven adjudication and the occasional departure from it, i.e., "the rules transcend the case as immediately experienced, the insight is immanent in it."<sup>95</sup> The challenge for judges therefore is to decide in which particular circumstances the general rules are either to be observed or to be overlooked. The traditional response by which to contain and mediate this contradiction has been the regular, but unconvincing, resort to "discretion."

For both Cumming-Bruce and Geoffrey Lane, their personal sympathies lay with the cricket club, whose officials they found to be "candid and forthright,"<sup>96</sup> rather than with Mrs. Miller, whom they thought verged on the "neurotic" and "obsessive."<sup>97</sup> They both agreed, however, that existing doctrine seemed to mandate a result in the Millers' favor.<sup>98</sup> This presented them with the classic contest between the pull of precedent and the lure of justice. Geoffrey Lane opted to follow the rules laid down.<sup>99</sup> In doing this, however, he did not act against justice, but in the name of justice.<sup>100</sup> He collapsed the

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94. *Id.* at 977 (quoting *Bolton v. Stone*, 1951 A.C. 850, 867 (Lord Reid)).

95. Michelman, *En Critique*, *supra* note 85, at 5.

96. *Miller*, 1977 Q.B. at 984.

97. *Id.* at 983-89.

98. *Id.* at 987 (Geoffrey, Lane, L.J.); *id.* (Cumming-Bruce, L.J.).

99. *Id.* at 986.

100. *Id.* at 986-87.



distinction between law and equity by assuming that justice required strict obedience to the results of rule-application:

Precedent apart, justice would seem to demand that the plaintiffs should be left to make the most of the site they have elected to occupy with all its obvious advantages and equally obvious disadvantages . . . . If the matter were *res integra*, I confess I should be inclined to find for the defendants . . . . Unfortunately, however, the question is not open . . . . It may be that [the rule in *Sturges v. Bridgman*] works injustice, it may be that one would decide the matter differently in the absence of authority. But we are bound by [that] decision . . . and it is not for this court as I see it to alter a rule which has stood for so long.<sup>101</sup>

Whereas Geoffrey Lane arbitrarily conflated law and equity, Cumming-Bruce arbitrarily separated them.<sup>102</sup> He sought to demonstrate that discretion can be used to temper the rule without swallowing it; it is a matter of equity being ordered by the law, and discretion being required by the rules. Although justice requires that rules be followed, the rules also sanction the resort to discretion.<sup>103</sup> Thus his opinion was an implicit attempt to instruct Geoffrey Lane in the possibilities of legal doctrine and judicial craft. Agreeing with Geoffrey Lane on "his reasoning and conclusion upon the liability of the defendants,"<sup>104</sup> Cumming-Bruce relied upon the distinction between liability and remedy to escape the dilemma of contradiction:

There is authority that, in considering whether to exercise a judicial discretion to grant an injunction, the court is under a duty to consider the interests of the public . . . . So on the facts of this case a court of equity must seek to strike a fair balance between the right of the plaintiffs to have quiet enjoyment of their house . . . and the opportunity of the inhabitants of the village . . . to enjoy . . . a summer recreation . . . . It is a relevant circumstance which a court of equity should take into account that the plaintiffs decided to buy a house which . . . was obviously on the boundary of a quite small cricket ground . . . . There are here special circumstances which should inhibit a court of equity from granting the injunction claimed.<sup>105</sup>

This deconstructive reading of *Miller* hopefully has shown that legal doctrine is another combat zone over the terms and arrangements of social life. With varying degrees of sophistication, the three judges engaged in a rhetorical exercise that was intended to persuade

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101. *Id.*

102. *Id.* at 988-89.

103. *Id.* at 988.

104. *Id.* at 987.

105. *Id.* at 988-89.

both others and themselves that law is autonomous from the open-ended encounters of overt, ideological confrontation. In contrast, the responsibility of the critic is to counteract these attempts to de-politicize and de-historicize the judicial development of doctrine. By reinstalling politics and history into the legal enterprise, people may come to see that the determination of legal meaning involves an inevitable taking of sides. Law is neither separate nor separable from disputes concerning the kind of world there is and can be. Law is the historical residue of one kind of political struggle.

### IX. DEMOCRACY AND DETERMINACY

Nietzsche's apocalyptic announcement that "God is dead" echoed a truth that had been long grasped by most lawyers. The belief that law represented God's design never held much sway. It was conceded that law was a human artifact, and that it could never amount to much more (and was often much less) than a flawed distillation of divine wisdom. Despite this traditional acknowledgement, and modern protestations to the contrary, the enclaves of law remain "caves, for ages yet, in which His shadow will be shown."<sup>106</sup> Instead of dwelling on God's loss, jurists must rest content with "voicing the dictates of a vague divinity";<sup>107</sup> these pseudo-theological musings usually come veiled in the trappings of philosophy and economics. Although lawyerliness may no longer be next to godliness, dreams of hubris still fire the jurisprudential imagination. Abstract reflection is given priority over experiential engagement, and detached reason remains the touchstone for valid knowledge about ourselves, our situation, and the legal order. In the struggle for social justice, philosophy and science are preferred to democracy. As law is cast as an exercise in reason, lawyers are fated to become philosophers or social scientists, if law is to perfect itself and operate as a guide for the anguished democrat.

Even with a recognition that reason and power are connected, however, this self-image of the lawyer or legal theorist as a trader in eternal verities must be abandoned. As the high priest of law-and-economics, Posner and his flock must be defrocked. Indeed, this whole theoretical endeavor will have to undergo a radical reappraisal and reorientation. The philosophy of law must cease to be a task of

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106. 3 F. NIETZSCHE, *THE GAY SCIENCE* 108 (2 ed. 1887).

107. Hand, *supra* note 4, at 361. Even the most pragmatic of constitutional commentators affirm "repeated acts of faith" that law "has both boundaries and moral significance not wholly reducible to, although never independent of, the ends for which it is deployed." See L. TRIBE, *supra* note 54, at 4.

refined description and defined prescription; it must become a political project of deconstruction and reconstruction. The whole agenda of questions to be answered—What is law, and how is it different from politics?—is in need of redrafting. Loaded questions engender loaded answers; these particular questions assume that law is indeed different, and that the jurist's primary task is to explain how it is different. Archibald MacLeish had the measure of contemporary scholarship: "[w]e have learned the answers, all the answers; it is the question that we do not know."<sup>108</sup> The answers that Posner and the autonomists propose cannot be rejected out-of-hand. But they can be stripped of their false objectivity and treated as one more in a series of proposals to be debated and considered in the popular assemblies of democratic politics.

To traffic in philosophical disillusionment is not to indulge in a cheerless cynicism; it is neither nihilistic nor irresponsible. By encouraging people to understand themselves as the makers of decisions and not as the amanuenses of a received wisdom, they will begin to assume greater responsibility for the consequences of those decisions, and the ensuing society will become truly theirs. In this way, people will grasp that democracy is not about servitude either to philosophical tyrants, interpretive Popes, or legal emperors.<sup>109</sup> Instead, it is about personal participation and social solidarity. In a world of incorrigible indeterminacy, the sane response is neither despair nor defeat. It is the bold acceptance that decisionmaking is no more mysterious and no less complex than the rest of life. People must think, decide, and act in the same way in law as they aspire to do in the rest of their lives—through concrete and constitutive engagements in which the participants converse and act in a shared commitment to mutual enlightenment and continuing respect for the engagement's own ethical dynamic.<sup>110</sup> This recognition and aspiration will mean that democratic practice will have to be given priority over legalistic values. The devaluation of the Rule of Law, in a society in which it has come to signify rule by lawyers, is not an occasion to be lamented.

Within democratic communities, intelligible action is not an extended genuflection to the revealed truth of "Reason" or "Economic Efficiency." It is a situated act of constructive cooperation among ourselves. In all matters, decisionmaking will be more than

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108. A. MACLEISH, *The Hamlet of A. MacLeish*, in COLLECTED POEMS, 1917-1982 (1985).

109. See R. DWORKIN, *supra* note 2, at 407 (philosophers and emperors); FISS, *supra* note 2, at 755 (interpretive Popes).

110. See Hutchinson, *Talking the Good Life: From Liberal Chatter to Democratic Conversation in LAW AND COMMUNITY: THE END OF INDIVIDUALISM?* (A. Hutchinson and L. Green eds. 1989).

“the deliverance of a Reason so immanent that its own name is the only explanatory word it can utter.”<sup>111</sup> There will be a general sensitivity to the fact that rationality is less a guide or a limiting condition for individual action, and more an achievement and elaboration of social engagement. Within such an enlightened context, indeterminacy will not engender efforts to gloss over or theorize it away. It will be attended to in a spirit of collective humility. Eschewing the need for relief or escape from taking responsibility for life’s always difficult and often painful decisions, there is a sustaining satisfaction in people facing and resolving these decisions by themselves. Although it will be no less heated and contested, public policymaking can become a treasured creation of people’s own craft, and not the glossy product of legal chicanery. The appropriation of political discourse by a legal elite offends and inhibits the aspiration to progressive or egalitarian governance. In short, social justice will be brought about in spite of, not because of, lawyers.

In *Miller*, although all three judges mentioned it in passing, there was an overlooked democratic solution to the problem. An informed and electorally accountable body had already considered the issue. Lord Denning mentioned the matter of planning approval, but only to dismiss it as misguided:

I must say that I am surprised that the developers of that housing estate were allowed to build the houses so close to the cricket ground. No doubt they wanted to make the most of their site and put up as many houses as they could for their own profit. The planning authorities ought not to have allowed it. The houses ought to have been so sited as not to interfere with the cricket. But the houses have been built and we have to contend with the consequences . . . . [The cricket club] ha[s] spent money, labour and love in the making of [the cricket ground]; and they have the right to play on it as they have done for seventy years. Is this all to be rendered useless to them by the thoughtless and selfish act of an estate developer in building right up to the edge of it?<sup>112</sup>

Without speaking to the procedural niceties or substantive merits, it can be assumed that the development was neither entirely “thoughtless” nor “selfish.” Before the developers could proceed, they had to obtain planning permission. This would have had to be granted in accordance with established regulations, formulated policies, and required procedures. By ignoring this fact, the court substituted its own decision for that of the planning authorities. Moreover,

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111. Michelman, *En Critique*, *supra* note 85, at 14. See also J. DEWEY, *THE QUEST FOR CERTAINTY* 213 (1929).

112. See *Miller*, 1977 Q.B. at 976, 978.

it did so without troubling itself with either the details or reasoning of the planning authorities. The point, however, is not who made the "correct" or "right" decision; it is which is the most appropriate body, in terms of institutional competence and democratic legitimacy, to do the necessary balancing and compromising of competing interests. On both counts, a "less-than-ideal" municipal board is preferable to an "ideal-as-possible" judicial bench.

In a democratic society, law is another institutional site where the same contradictory impulses that constitute and challenge our individual selves can be openly addressed. In addition, as in our personal lives, any accommodation achieved in the response to indeterminacy must be self-conscious, tentative, and revisable. No signposts on life's journey will be found that are not of our own making. The realization might dawn that it is only possible to illuminate the way into the historical dark of the future by the clarity of our joint commitment and engagement. Rather than sight and pursue an imaginary light at the end of the historical tunnel—it will only be some philosopher's torch or economist's lantern—we therefore must look to each other. There is no shirking that responsibility; domination and thralldom are all that can be hoped for when it is believed that theological relief is at hand. The transcendental search will have to yield to a quest for greater participation and democracy.

In conclusion, therefore, it can be said that it is not so much that we can never know the singer from the song, but that we will always know "Law's Song" by its legal singers. Law is little more than the accumulated babble of lawyers' voices, a discordant overture in the key of established interests. If people are to make good on their democratic ambitions, they must resist the siren-song of the Law and its seductive, but ignoble, hymn to the status quo. Democracy is a lasting celebration of each person's musicality, and a joyful occasion to dance and sing to unheard melodies of life's possibilities. By obliging citizens to listen and move to legal tunes not of their own making, nor of their own wanting, they will remain "idle singer[s] of an empty day"<sup>113</sup> and dancers of a heavy step.

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113. W. MORRIS, *THE EARTHLY PARADISE* (1868).