Clarence Thomas and the Tough Love Crowd

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Published by NYU Press

Roberts, Ronald Suresh.
Clarence Thomas and the Tough Love Crowd: Counterfeit Heroes and Unhappy Truths.
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Can We Judge Judges?

Who did you bury to become enforcer of the law?
—Audre Lorde, The Marvelous Arithmetics of Distance

Justice Thomas is at the start of a term that could easily exceed forty years. The following discussion will bypass numerous opportunities to prove Thomas wrong on specific points of legal doctrine in order to provide an enduring critique, beyond ephemeral doctrinal skirmishes. Additionally, this approach reflects the important argument presented in the next section: doctrinal debate does not determine the results of Supreme Court cases. In every interesting case, there are various views that Thomas might competently adopt. Thomas’s chosen doctrinal paths will frequently seem quite wrong, but the moral complaint will be based on the very availability of the other doctrinal line of reasoning. Wherever Thomas, ostensibly unhappy, follows controversial doctrine to results he avowedly laments, he drops the ball.

There are lots of objections to judging judges in this way. First, this approach may seem to violate the idea that law is a scientific, technical, or professional skill ideally separate from moral concerns. Judges are known to have moral and political beliefs, but, the argument goes, they shouldn’t allow these beliefs to influence their performance as professionals. This rhetoric of judicial restraint as a professional ideal is still powerful in talk about law. Yet we ought to oppose the ideal of judicial restraint, not because it is inherently undesirable in principle, but because it is admittedly unattainable in practice and FOR THAT REASON undesirable in practice. The conventional wisdom that urges us to strive for all sorts of abstract ideals (in law and elsewhere) while in the same breath admitting that those ideals are unattainable is positively harmful. Such foredoomed striving obscures injustices that less grandiose ideals might
Every principle that is admittedly unattainable in practice is also immediately suspect *in principle* since it is likely to be a distraction from meaningfully improving our practices. At the very least, admittedly unattainable ideals ought to receive extremely close scrutiny. And judicial restraint, it turns out, cannot bear the weight of such a careful examination.

Second, passing moral judgment on anyone may itself seem presumptuous and even oppressive. Thomas himself has raised this objection throughout his career, and has continued to raise it since joining the Court. In a speech prominently published in the *Wall Street Journal* at the height of the Guinier affair and entitled "The New Intolerance," Thomas criticized a perceived black orthodoxy: "Is it really more laudable to make a man afraid to express his beliefs than it is to make him ashamed for the color of his skin?"

While the idea that this book might make Thomas quake is flattering, even encouraging, it is unlikely. Moreover, Thomas's underlying reasoning (the sanctity of self-expression) equally protects everyone's right to censure the conduct of others. It is the judges who have the power, and Justice Thomas has more than most.

Third, the present argument might wrongly be thought to single out black judges. A white judge, however, might have rhetorical civil rights commitments more conspicuous than her black colleagues. This rhetoric would then set the benchmark for our assessment of her. The cornerstone of evaluation is thus commitment, not pigmentation. Yet this does not mean that black judges have no special obligations. It is, in theory, conceivable that American black judges without a conspicuous commitment to American racial justice exist, or might exist. Such judges would be beyond the present criticism (though probably criticizable on broader humanitarian grounds). I, however, know of no such judge. Certainly, Clarence Thomas is not such a judge. Thomas consistently voices a sense of America's unjust racial past and subscribes to a conspicuous rhetoric of redress. His rhetoric, not his pigmentation, is the basis for moral criticism. This answers the following objection: "Why are you holding Justice Thomas to a higher standard than the other, white Justices? The other Justices can choose to be liberal or conservative, average or great, pro-business or pro-people. So what if Justice Thomas chooses to be conservative, average, pro-business?"

The response is that Thomas has made no such choice. He has not chosen conservative ideology as an end in itself regardless of its impact on racial justice. He has not chosen pro-business over pro-people. His point is always ostensibly that racial justice is better served by his agenda.
In a sense other than the sense that it intends, however, this last objection ("why a higher standard?") contains an important insight. The objection assumes that Justice Thomas is not committed to racial justice. It assumes that the contours of Justice Thomas’s jurisprudence reflect the contours of a pro-business agenda. If this is accurate, Justice Thomas must either persuade us that the interests underlying a pro-business agenda are actually identical with racial justice, properly understood, or else he must admit that his rhetoric of racial justice has been conquered in practice—that he has been led to mistake the prerogatives of other interests for the imperatives of racial justice.

Thomas and the Rule of Law

There are seemingly lots of problems with holding judges morally accountable for their decisions. First, Thomas, like all Supreme Court justices, will often depend on the research and writing of law clerks. Can he be held responsible for his decisions? Easy answer: he supervises and is responsible for decisions that he signs. Authoring Supreme Court (or other judicial) opinions is an extremely self-conscious exercise. The justices review opinions very closely and where they disagree with even the smallest details, they indicate that disagreement. If they agree with the result of the case but not with the underlying reasoning—or vice versa—they say so. They may join all but the objectionable parts of the decision, or may write a separate concurring opinion. If they disagree with the result they dissent, again with or without an opinion. Where other justices also dissent, the whole range of choices (joining a dissenting opinion in full, in part, writing separately) repeats itself. In this manner Supreme Court opinions reflect extremely nuanced coalition-building exercises. No one ever signs anything by accident. In Conroy v. Askinoff Thomas joined the entire majority opinion with the exception of a single footnote. In another case Justice O’Connor joined all of Souter’s opinion except “the sentence to which n. 29 is attached.” When a justice sits out a case, we hear about it: “Justice Thomas and Justice Ginsberg took no part in the consideration or decision.” Supreme Court justices are thus firmly bound for purposes of moral assessment by everything to which they lend their name.

Second, law is found, not made. A Supreme Court justice is only a funnel through which law expresses itself. The claim that Thomas is responsible for law would be both inaccurate and improper, because law is a science in
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which correct answers are compelled by technical rules. A justice’s job is to set aside her personal ethics and to provide professional readings of those rules. Any ethical critique of a sitting judge must reckon with this influential idea that judges follow legal rules, not personal morality. This idea is the flip side of the ideal of judicial restraint. Judicial restraint urges that judges ought ideally to follow rules, not morality. The present point urges that since judges follow rules, not morality, ethical assessment of judges, including Justice Thomas, is misplaced. However, popular ways of talking about law exaggerate the hurdle posed by this argument. Much that passes under the banner of the rule of law rests not on impartial law but on value judgments, judicial acquiescence, and sloppy scholarship. This objection nevertheless raises law’s liveliest controversy and requires extensive discussion. It would disallow moral assessment of a Supreme Court justice.

Why Law Absolutely Must Bind Judges

The peculiar constraint called “law” is essential to justify the everyday work that courts do. If judges are only politicians, we have no reason to pay them any more attention than we would pay the average congressional windbag acting in her personal capacity. When judges talk, people listen, and controversy ends in a crucial sense, even as it continues in other senses. Law happens. Judges settle what action the state will permit or demand in heated disputes. The loser listens not because she comes to see the moral soundness of her opponent’s case, but often simply to avoid punishment. This punishment, or threat of punishment, would be easy to justify if judges speak a peculiar impartial (“legal”) truth that is free of the moral, political, and opportunistic differences that separate the plaintiff and the defendant. Such impartial decisionmaking would in turn make it acceptable for other officials to use force in inflicting the judges’ decisions on the parties. That, ideally, is law’s special leverage. Underneath the classical ideal of the rule of law is a desire to escape, in the words of landmark constitutionalist A. W. Dicey, “the rule of men.” If we haven’t escaped the rule of persons, the traditional enterprise of law collapses in a crucial sense. Law loses its ability to command automatic and universal obedience. It loses its claim to flow from neutral principle. Law loses its peculiar leverage. Most importantly, Thomas loses the scapegoat that law’s leverage would provide. He loses a moral alibi. He can’t claim that law automatically dictates the results of cases without any action by him. There might still be numerous reasons why Thomas follows
a rule, but these reasons would now be of the same political, strategic, or personal sort that the rule of law was supposed to move us beyond. If law’s leverage has collapsed, Thomas is brought into the fray and is open to ethical assessment, just like the rest of us.

**Law Doesn’t Bind Judges**

Law’s leverage has collapsed. The neutral view of legal process has been thrown into serious question. Most lawyers now accept that legal doctrine is manipulable; that legal concepts frequently do not dictate particular results in actual cases; and that legal rules are “indeterminate” and therefore do not bind judges in the peculiar way that would shield them against ordinary moral criticism. The claim that law doesn’t bind judges is, however, complex. It is frequently misunderstood by its opponents and its meaning is hotly contested even among its adherents. The key question, for the present analysis of judges as moral actors, is how much choice judges have. Is Thomas ever blocked by a thing called “law”? Perhaps not.

Judges may be blocked by many considerations, but a thing called law is never one of them. Much that we call law is merely an ordinary combination of strategic reasoning and value judgments. This kind of reckoning is certainly a constraint; but it is not the peculiar constraint that the thing called law needs to be. It is, rather, the same sort of thing that congressional windbags deal with every day. This kind of reckoning lacks the special leverage law needs in order to wall its empire off from the rule of men. It fails to give a judge the scapegoat she needs in order to escape ordinary moral criticism. If legal rules don’t bind judges, then legal disputes are like our other disputes. If legal disputes are like our other disputes—if judges are like the rest of us—then we can advance ordinary moral criticism of the work they do.

**Why Some Lawyers Still Think Law Binds Judges**

[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel and even shocking, ought not to conclude our judgment.


The *Lochner* case gave its name to an entire era of what is commonly called judicial activism. The Supreme Court struck down minimum-wage
legislation in the name of freedom of contract, and the case is fodder for both the Right and the Left. To the left *Lochner* shows that judicial neutrality is a myth. To the right, *Lochner* shows that judicial restraint (the idea that rules bind and ought to bind judges) is everybody’s friend, not just a reactionary fetish. What gets lost in such arguments is that both judicial restraint and judicial activism derive their meaning from some preexisting judicial culture. Abstract argument over the desirability, in principle, of one or the other judicial posture is thus useless. A more useful way of looking at the issue is to ask about the legitimacy of particular judicial cultures. The rhetoric of reasonableness and rationality is, for instance, prominent in the *Lochner* decision. If judges, today and in the *Lochner* era, are drawn from a relatively narrow band of society’s privileged, how do we justify giving them control over the concepts of reasonableness and rationality that are so central to the law that governs everyone? And if we can’t justify their control, what is the binding force of what they think law is?

The fact that legal decisions, even in areas of intense political controversy, can frequently be predicted by those in the legal community is often assumed to enhance the legitimacy of judicial decisionmaking. But it should have the opposite effect. It should trigger alarm bells and make us wonder about oversimplification. It should give us pause, not speed us to accept “legal” results.

Most lawyers admit that legal rules have fringes (“penumbra”) of uncertainty within which judicial discretion and personal values come into play. But they argue that legal rules also have core meanings and that there are clear cases in which judges have no meaningful discretion. They often assume that fringe cases are rare, and that even in fringe cases there are other constraints (such as legislative intent) limiting a judge’s room for maneuver. Such arguments reawaken the idea that law is relatively apolitical and essentially binds judges. Such arguments reawaken the idea that the intrusion of politics in legal practice is regrettable and, fortunately, containable.

Such arguments, however, confuse the claim that legal rules don’t determine legal results with the claim (which nobody need make) that legal outcomes are random. Those who argue this way assume that to say that law doesn’t bind judges is to say that judicial decisions are random (e.g., depend on a judge’s breakfast), and so they think they can prove that law binds judges by pointing out that the results of cases are frequently predictable. But this predictability can be explained by the prevalence of a conven-
tional wisdom. And this prevalence doesn’t in itself recover law’s lost leverage, doesn’t restore the judge’s scapegoat, doesn’t establish that law binds judges in the lost, traditional sense. All it does is shift attention to the legitimacy of the prevalent legal culture. Who cares, for instance, if it was predictable in Munich in 1938 that the legal culture would expect expropriation of Jewish property whenever the issue arose before a court? If law bound judges in the peculiar mechanical sense, such expropriation would follow automatically without meaningful space for individual reflection by a judge. Legal doctrine, however, always requires judges to work toward legal conclusions. “The official who feels ‘bound’ reasons from nonexistent ‘grounds’ and hides from herself the fact that she is exercising power.”5 If laws don’t bind, judges make choices even in reaching the expected or predictable result. Our ordinary moral reasoning may then seize on such acts of choice in a way that would not be available were it true that rules dictate results. If, in practice, the law appears simpler than ordinary moral reasoning outside of law, something funny is happening.

Something Funny Is Happening

That all valuations of law are moral judgments, that legal philosophy is a branch of ethics, that the problem which the judge faces is, in the strictest sense, a moral problem, and that the law has no valid end or purpose other than the maintenance of the good life are propositions which jurists are apt to resent with some acerbity. . . . It is submitted that [the contrary] tenets of current juristic faith spring from an indefensible view of the nature and scope of ethics and tinge current legal criticism with a peculiar confusion.

—Felix Cohen, The Ethical Basis of Legal Criticism, 1931

It is nearly seventy-five years since Felix Cohen, a central figure in American legal realism, wrote these words. Nevertheless, thoughtful lawyers continue to enforce increasingly baroque separations of law and morality. Cohen’s ethical legal-realist message has largely disappeared in modern legal academia. In today’s legal community, ethics is a charming and diluted embellishment on the practice of law, rather than its governing impetus. Today ethics is corralled into a series of bar association “canons” that provide a set of protocols or a kind of etiquette to be consulted only when the practitioner wishes to resolve minor questions of lawyerly propriety. In Felix Cohen’s picture, by contrast, moral evaluation would be the very engine room of the
law, its primary animating force. Today, this aspect of Cohen’s thought has been effectively muted.

Sometimes this silencing of ethics is accomplished by straightforward revisions of history. One commentator reports, for instance, that Felix Cohen advocated a “new objectivism based on the facts of social science” and that he “essentially silenced” the “idea that facts are contingent on one’s interpretive framework.” Wrong. As in the epigraph above, Cohen was emphatic that ethical evaluation was the only way to escape “a horrible wilderness of data” because “we shall never understand the facts as they are.” Cohen was emphatic that “the postponement of the problem of values is equivalent to its repudiation.”

Such revisionism is, moreover, central to some funny happenings among lawyers today. A bunch of progressive lawyers, presenting themselves as savvy theorists, work hard to demonstrate that they have learned the lessons of legal realism. Yet they ultimately suppress realism’s most attractive insights. These lawyers venture into debates outside law and return with the news that arguments about law’s nonbindingness are not really a problem for current practices of law. They suggest that the individual lawyer’s “situatedness” in the practice of law rebuffs many of the arguments about law’s unbindingness. Although the effect of their arguments is to dampen the prospects for political change, these lawyers claim to be progressives. They view law’s unbindingness as a problem because it seems to condemn us to endless rounds of meaningless and politically quiescent critique about whether and what kind of legal activism to support. However, their response compounds, rather than solves, this problem. A problem with the legal system, posed sharply by Druccilla Cornell, is “the erasure of its own mystical foundation of authority so that the system can dress itself up as justice” (emphasis added). Rather than exposing these mystical foundations, this bunch of lawyers lapses into a tidy project of legal reform. Their project sometimes bears a far greater resemblance to the nineteenth-century legal positivism of Jeremy Bentham than they seem willing to admit. They say that fancy arguments about law’s unbindingness overstate the implications of skepticism. Their researches outside law convince them that the current state of philosophical debates outside of law provides a basis for greater certainty and bindingness within law. They ultimately argue that despite law’s unbindingness, judicial decisionmaking is legitimately constrained. They admit that law does not constrain judges in the sense that would render law
apolitical or unproblematically legitimate. Rather, they claim to find legitimate constraint in a value-generating culture, an authoritative science, the nature of the experience of judging, or the brute factual existence of a practice called "adjudication." These several sources of legitimacy for law all understate the degree of controversy within the practice of law, and all proceed upon the unexamined assumption that legitimate consensus about the meaning of legal rules exists within legal practice. This imagined consensus oppresses the dispossessed whose voices are often, by definition, beyond its scope. The following sections criticize this bunch of lawyers. They are a cultural tyrant, a quack scientist, a café crit, and an English professor who enjoys legal debates (a fish out of water). Their work, despite their progressive intentions, shores up the mystical foundations of law's authority.

A Cultural Tyrant?

I feel: These people are in a great hurry to separate out lunatics.
—Stanley Cavell, The Claim of Reason

It's a good thing I don't allow myself to be influenced.
—Ludwig Wittgenstein, Culture and Value

Professor Joan Williams, in her article "Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells," distances herself from the unsophistication of previous attacks on those who argue that law does not bind judges. Her effort, ostensibly based on Wittgenstein, is to furnish the sophisticated defense of law's bindingness that those others have failed to provide. Proponents of law's unbindingness are described, in her account, as "irrationalists." Yet Williams's Wittgensteinian defense of law's bindingness renders Wittgenstein entirely unrecognizable. Williams sums up her critique of the irrationalists:

The irrationalists, girded with Derridaen/sic/ learning, jump from the long-established tenet that law does not function by internal logic to the conclusion that law is therefore radically indeterminate, and can be argued for any given position. This rhetorical structure sets up a false dichotomy between two alternative conclusions: Either one believes the liberals' [objectivity] analysis or one adopts the irrationalists' view of law as radically indeterminate.

Joan Williams's third way would reject both these extremes in favor of a Wittgensteinian approach that uses "the concept of culture to explain the
human experience of certainty." She urges that Wittgensteinian forms of life provide "our" law with a degree of certainty sufficient to ward off irrationalist attack. She says that law's doctrinal discourse is "an integral part" of Wittgensteinian "forms of life." Her aim, then, is to bring certainty in law. Citing, without specific references, Roberto Unger's *Passion* and his *Law in Modern Society*, she writes, "The point that doctrine in particular, and law in general, sharply constrain the scope of choices defined as 'thinkable' has been developed by some critical legal scholars."  

This casual and baffling reference to Roberto Unger's work is, however, not the main basis of Williams's claim that culture gives law certainty. Williams places principal reliance on Stanley Cavell's work, *The Claim of Reason*, mistakenly assuming that Cavell's Wittgenstein helps her to resist the argument that law is unbinding. Williams correctly says that Cavell has "aptly stressed how deep and unconscious the agreements are that ground" human communication. But Williams takes this to mean that law is, after all, binding. This step wholly misreads both the substance and spirit of Cavell's work. Cavell expressly argues that legal criteria and the Wittgensteinian criteria on which Williams seeks to rely are different ("disanalogous") in a crucial sense.  

Williams's conclusion that a shared culture helps law bind is, moreover, wholly inconsistent with the spirit of Cavell's enterprise. Williams's view suggests that culture disciplines deviants, and Williams throughout refers to her opponents as "irrationalists." Her criticism is, unmistakably, a call for cultural conformity within the legal profession. Worse, she simply *posits* such conformity and makes it the *basis* for law's bindingness. Wittgenstein's work, in contrast, is preoccupied with the fragility of human communication, with how easily such communication might simply not exist. Ironically, Cavell's book is, in large measure, a *defense* of Wittgenstein against the cultural tyranny that Williams would attribute to Wittgenstein.  

Moreover, even if Cavell's Wittgensteinian criteria were relevant to law (which, expressly, they are not), they would certainly not solve the disagreements that Williams takes them to solve. Cavell is clear that when deep, instinctual mutual attunement is absent between persons, the only recourse is a disappointed withdrawal, an acknowledgment that communication has failed: "I am thrown back upon myself; I as it were turn my palms outward, as if to exhibit the kind of creature I am, and declare my ground occupied, only mine, ceding yours." Ceding ground once instinctive agreement fails is an unlikely prescription for a practice of deciding court cases. It is wonder-
fully anarchist rather than, as Williams takes it to be, restorative of order. And where Williams understands Wittgensteinian criteria as solving the problem of skepticism in law, Cavell emphasizes that “since criteria and skepticism are one another’s possibility, criteria cannot be meant to refute skepticism; on the contrary they show skepticism’s power, even something one might call its truth. I sometimes think of this theme as our disappointment with our criteria.”  

Thus, Williams is only halfway correct when she says, “The ultimate message of the new epistemology is not ethical relativism, but that ethical choices are ours to make [yes], and that we must accept responsibility for the constraints and choices we have embodied in our law [no].”

Name a single slave who must accept responsibility for the embodiment, in the 1787 Constitution, of the three-fifths rule! Joan Williams’s “we” is ethnocentric. Blameworthiness waits upon the power to choose. There can be no responsibility without representation. Where there are injustices embedded in the forms of life that, Williams says, rescue a concept from indeterminacy, the subjects of those injustices precisely deny the apparent sharedness of the concept. Given Williams’s progressive rhetoric, our differences are, in abstract terms, dwarfed by common concerns. But when this view is expressed in the only relevant terms—the identification of law in particular cases—we inhabit different universes. For Williams, “Since our choices about [legal] doctrine constrain the scope of our conversations about vital issues, and delimit future sense and nonsense, they are important choices indeed” (emphasis added).

Williams’s critique here lurches toward traditional legal positivism, in which legal rules somehow exist (as determined by purportedly shared current practices) and the reformer’s role is to subject this found law to moral criticism. For Williams, the reformer’s criticism, while desirable, remains essentially separate from what law is for the time being. Yet mightn’t one rather transgress Williams’s comfortable line between sense and nonsense? Such transgression is especially tempting and entirely viable since Williams’s distinction between sense and nonsense is learned through a renounceable process:

If you break the rules consistently enough, you have ceased to play the old game and you have invented a new one. For me this describes the series of sensations one experiences when studying the history of legal doctrine. Initially the rule patterns seem foreign, the connections bizarre, and the lines drawn quite maddeningly arbitrary. Gradually, arduously, things fall into place, until at last one greets a new case without the initial, wrenching sense of disorientation and surprise.
This confessional moment provides nothing less than a glimpse of cultural indoctrination. Anxiety and disorientation give way, as if by epiphany, to a reassuring sense of inclusion in “legal” discourse. While Williams sneers at her opponents as “irrationalists,” Stanley Cavell, on whom Williams purportedly relies, asks, “Who is crazy? I do not say no one is, but must somebody be, when people’s reactions are at variance with ours? ... If I say ‘They are crazy’ or ‘incomprehensible’ then that is not a fact but my fate for them”16 (emphasis added).

What gets entirely lost in Williams’s work is the need to justify, to legitimise prevailing legal culture (if such exists), given its impact on others. As it stands, Williams’s resort to ostensibly shared legal culture in order to solve intractable moral controversy elevates violence over ethics. Legal interpretation deals always in the currency of violence. Important ethical questions are effectively suppressed in Williams’s project, despite her good intentions. Joan Williams’s cultural fiat abuses extremely useful Wittgensteinian metaethics and harnesses them in an anomalous attempt to squelch skepticism.

A Quack Scientist?

The competence of the general public could be vastly improved by an education that exposes expert fallibility instead of acting as if it did not exist.

—Paul Feyerabend, Against Method

Another doubter of law’s unbindingness, Steven Winter, is inspired not by Wittgenstein but by the work of two impressive lawyers, and by something called “cognitive science.” Winter expressly presents his project as homage to both Felix Cohen and Robert Cover. Yet Winter ends by suppressing the prominent ethical strand of Cohen’s work, and by suggesting that Robert Cover is excessively antistatist. Something funny, then, is happening.

Winter would subordinate Robert Cover’s relentless focus on state violence, and Felix Cohen’s relentless emphasis on ethical choice, to a discipline called “cognitive science.” Winter’s effort has in turn given new hope to those, like Stephen Carter, Margaret Radin, and Frank Michelman, who would justify the legal system through a pleasant-sounding but quietly oppressive myth of orderly societal dialogue ostensibly open to all voices. These dialogists think that Winter has usefully outlined the “prereffectively cognitive structures” that might provide a basis for the shared vocabulary
they need to launch their own theory of society in conversation. While these dialogists have been persuasively criticized for ignoring dispossessed voices, Winter’s work has given them new hope.

Winter’s work, like that of Joan Williams, presents itself as theoretically savvy. Winter carefully disavows any argument that the cognitive process he outlines is objective in the sense that it represents transcendental truth. He nevertheless suggests that language and cognition are “empirical constructs” that can be investigated in a manner meaningful for legal practice. He thinks that a “competent model of human knowledge” can be developed. And this competent model would, usefully, govern all our activism:

These are not merely academic issues of only epistemological concern. For many, the absence of grounding or foundations is a liberating phenomena, a momentary opening for other ways of being or other forms of life. They think they see a plasticity in the constructed nature of our cultural forms that permits dramatic, unconstrained social transformation. For those of us who perceive the injustice of the current social order, this is a seductive vision because it suggests a clear shot at effective social change. But it is mistaken, doomed to failure because it does not understand or take into account the constraints of the cognitive process, dependent on experience for the raw materials of the models by which it constructs the world. Because many (maybe even most) idealized cognitive models are grounded in social experience, these “raw materials” are often themselves cultural constructions shaped by normative social processes. In this way, our very ability to construct a world is already constrained by the cultural structures in which we are enmeshed. (Emphasis added)

This is an extraordinary grab for the mantle of expertise. Winter would discipline utopian enthusiasts with his reliable scientist’s eye. He sneers at “the vogue misidentification of the arbitrary with the socially contingent” and at the mistaken assumption “that the lack of objective foundations means that there are no constraints.” His project is to map these constraints and to deliver untutored activists from their misguided urges for dramatic change. Winter will guide us safely through the “sedimented meanings” and “stabilized matrices” that comprise the legal landscape. His knowledge will help activists be shrewd strategists because “in the end, the effective practice of constitutional politics cannot rely on purely interpretive efforts. For the ultimate persuasiveness of these interpretations will depend on their ability to take root in the actual experiences and institutions of the culture.”

At one level this is a laudable call to broad-based social activism and a useful recognition that law is written not merely in ink, but in the currency of blood. Winter might be read, innocuously enough, as reminding us of the limits of formal and institutional initiatives in effecting profound social
transformation. But Winter is in fact more ambitious. He thinks his theory can guide our actual practices both of advocacy and of judging.

Winter repeatedly trumpets his own legal expertise, to which, it is clear, unbridled activism would best defer. Winter’s task is “to explore the ‘magic chasm,’ to characterize the nuances and contingencies in ways that are usefully predictive and that enable more considered action” (emphasis added). Winter, struck by the intricate role of “interaction, imagination, and self-reflection” in law as in other human activity, is concerned to provide “an understanding of these complex phenomena [that] will be instrumentally useful to advocates interested in effectuating change” (emphasis added). He boasts that “as a lawyer, I have happily consulted theory and self-consciously constructed arguments calculated to increase my chances [of prevailing in a case].” Winter withholds specific examples of his courtroom prowess only “for fear that the reader might crack under the weight of yet another immodesty.” Winter’s theory promises to lead us to good arguments, away from bad ones, in particular cases. In the courtroom, science is invoked to sort among available, coherent, already intelligible arguments and weed out the wrong (i.e., unpersuasive) ones:

Within any given stabilized matrix, there will be intelligible counterarguments that are not persuasive. In that case, it will be possible to challenge the dominant position without seeming to violate the rules of the game. It can nevertheless be predicted that the challenge will be unsuccessful.

This passage reflects the extent of Winter’s commitment to the notion that legal decisions are those that will not unsettle (his version of) the legal community. Winter’s alleged predictive ability remains trite once his predictions are uncontroversial, so the interesting point is that where lawyers disagree, Winter thinks he has a special tool. Winter would transform familiar clashes of “professional judgment” into clashes of “Intuition versus Knowledge,” in which his knowledge wins. One might easily, in such a case of disagreement, ensnare Winter in an interminable argument over the accuracy of any particular prediction of his that an intelligible counterargument would necessarily fail. One easily sees analogies with self-censorship, self-deselection, failures of confidence. Winter’s science might easily blind advocates to the possibility of spectacular and unanticipatable success. We have no startling 1803 Supreme Court decision holding slavery unconstitutional. Perhaps we ought to have had one.

It is even more revealing to set aside advocates for judges. Winter concedes that predictably unpersuasive legal arguments will yet be linguistically
and doctrinally coherent (will not seem "to violate the rules of the game"). This concession—that unpersuasive argument isn't always gibberish—crucially undermines Winter's claim that something called a "stabilized matrix" constrains a judge and so constrains what law is. A judge might well choose a counterintuitive ("improbable") but conceptually coherent outcome. This freedom is, indeed, at the heart of the argument that law does not bind judges:

If someone's considered judgment is that an existing rule or a prevailing interpretation of current law is bad (inefficient, unjust, immoral or bad policy), she can almost always construct a plausible, conventional legal argument supporting her interpretation of the law.21

Moreover, Winter's clinical language of "cognitive science" and its attendant "topographic map of the sedimented social field" obscures questions of ethics and of legitimacy. He reassures us, "Sedimentation, however, is not stasis. Sedimentation is simultaneously conservative of past experience and an invitation to a sequel."22 But if this past experience was heinous, a judge might rather not conserve it. In Winter's preferred mode of constitutional change (spectacularly labeled "trimorphic constitutionalism"), judges may not ever proceed faster than with all deliberate speed:

The relentless processes of social and cultural construction produce new sedimentations that are first institutionalized in social practice and then concretized as constitutional rules. In its highest form, trimorphic jurisgenesis is marked by a moment of conscious, situated reflection in which the Court probes the development of and experience with these social norms before transmitting them into constitutional commands.23 (Emphasis added)

One is startled that, on Winter's account, a judge's resort to a felt legitimate, conceptually coherent, ethically preferable interpretation of law must wait until Winter's cognitivist paraphernalia detects her cultural truth as institutionalized (in some unspecified fashion other than enactment as law) in social practice. Winter, like Joan Williams, sees the conversation about societal values as separate from, and prior to, the conversation about what law "is." Yet, Winter's "stabilized matrices" are not a constraint on a judge, once she can conceptualize an ethical outcome (because a judge may disregard the advocate's probabilistic reckonings and reach a surprising result). Winter thus has no legitimate means, scientific, theoretical, or otherwise, by which to constrain a surprising or improbable decision to which a judge is committed. At best, Winter must resort to a form of unreliable strategist's
prophesy: if the judge outruns society’s shared cognitive forms, Winter might counsel, her attempt to change law will be undermined in fact and fail in the end. Even if such prophecy is potentially accurate, a judge may have nothing to lose by enacting legitimate improbable law. At worst, her decision will dissolve into conformity with the governing stabilized matrices. At best, Winter is wrong and an ethical and legitimate ruling spawns progeny.

Alternatively, Winter might appeal to the notion that his approach is democratically superior. But isn’t it often precisely the job of the Court, on constitutional questions, to decide the limits of majoritarianism? And anyway, the question of what really is the majority will at the moment of judicial decision is as unbinding as the legal-doctrinal questions themselves.

Bereft of jargon, Winter’s scientific descriptive legal theory is premised on an arational and prescriptive commitment to a peculiar ideal. Winter starts out determined to “describe the underlying, unconscious structure of how we think about law” and to show that “awareness of this structure can help us think about the normative questions that confront us.” Winter says the “central insight” of his approach is “that human knowledge is grounded in our direct physical and social experience with the world, but is elaborated indirectly, largely by means of metaphor and the extension of idealized cognitive models.”

Setting aside the problematic assumption that there’s a common grounding for the various forms of human knowledge; the further problematic assumption that everyone shares a unitary direct physical and social experience; and the problematic distinction between direct and indirect experience, the cornerstone of Winter’s research into human knowledge is something called an idealized cognitive model (ICM). Human cognition is, Winter says, embodied, not arbitrary, and therefore (a further non sequitur) attention to ICMs will yield “a sense of knowledge and meaning as neither arbitrary nor determinate, but rather as systematic and imaginative.” The ICM is a “folk” theory or cultural model that we create and use to organize our knowledge. It relates many concepts that are inferentially connected by means of a single conceptual structure that is meaningful as a whole. For example, our understanding of the words “buy,” “sell,” “cost,” “goods,” “advertise,” “credit,” and the like, are made meaningful by an ICM of a commercial transaction that relates them together as a structured activity. The use of any of these words individually evokes the entire picture or model, the ICM—a sort of holistic, standardized account.

Winter then claims that, within law, our ICMs structure our experiences of the core bindingness and peripheral unbindingness of legal rules. One
could, in response, illustrate that this notion of shared ICMs merely adds another level of controversy (what is “our” ICM?) to sufficiently interminable legal debates (do rules have core instances?). But, even if one charitably assumes the cogency and sharedness of ICMs, the question of allegiance to the ICM must be separately answered. Winter admits that the conclusion ICM = LAW is neither an instinctual or preconscious attunement (like Cavell’s Wittgensteinian criteria) nor a logical and necessary entailment (like algebra). Allegiance to ICMs is, ultimately, a matter of conscious and deliberative commitment. Winter says,

When the facts of a case display a good fit with the particular ICM motivating the precedent or legal principle, most legally trained observers committed to applying the rule will experience the rule as having sufficient structure to constrain decision. (Emphasis added)

He continues,

The reader will note that I deliberately refrain from making any claim of determinacy. . . . No matter what one’s jurisprudential stance, it should be common ground that people, not rules, decide cases. The question is only about the degree of meaningful structure that the rules provide. Even where decisionmaking is understood as highly structured, it is a human process involving human agents, human will, and human commitment to an ideal called Law.24 (Capitalization original, emphasis added)

This important confession is suppressed in a footnote and Winter does not seem to grasp how far his concession (people, not rules, decide cases) destabilizes his assertion (rules provide meaningful structure). To illustrate: a judge wants what she thinks is a just result, and must reach it by using a conceptually coherent legal argument. Given unbindingness of rules, such an argument is usually discoverable. The just result may, however, violate expectations (the ICM) and may violate any commitment to the peculiar ideal called Law. The judge reflects on the illegitimacy of the ICM, of the sedimented meanings it reflects, and of the legal conclusion it prescribes. She has a commitment, say, to an ideal called Justice. Assume she has a second commitment, to the ideal called Law (setting aside, for now, its fatal peculiarity). She faces these conflicting commitments and makes an ethical choice to reach the just result. She then structures her decision in the required legal language. The ICM has only provided “meaningful” structure on some definition of meaningfulness other than: that which determines the result of the case. One is thus forced to conclude that, for Winter, meaningful constraint based on an ICM requires not merely a commitment to an ideal called Law, but a commitment to that peculiar ideal above any and all competitors.
Indeed, one can go further. An ethical judge need not conceptualize her decision as a choice between an ideal called Law and one called Justice. She may wish to retain the semantic prize (the designation Law) for herself. Her decision, she says, reflects the authentic commitment to the ideal called Law. At this point Winter is out in the cold. He cannot resist this view without treating the ICM as legally sacred. What he dressed up as an allegiance to an ideal called Law reduces to an allegiance to the ICM, to the notion that options the ICM renders thinkable are the truly legal options.

Winter’s allegiance to ICMs might, even now, appear somehow more rational than our judge’s ethical choice. Indeed, Winter will probably claim that if his cognitive stuff is ignored in the cause of supposedly moral decisionmaking, our judge’s efforts will be self-defeating. We must, therefore, reveal Winter’s expertise as unsalvageable quackery.

Cognitive Quackery

[1.] Within a legal/cultural community or subculture that shares the same contextual non-neutral assumptions, a system of meaning like constitutional law will work. [2.] Judges, no less than others, are situated in and dependent upon the structures of social meaning that make communication possible. [3.] Although this situatedness will not yield anything like determinacy, the stabilized matrices within which the judges operate will have already demarcated the arguments and counterarguments they will recognize as persuasive. [4.] And this means that, in a conservative era, the stabilized matrix will already be legally secure from penetration by the very arguments and positions that those on the liberal-to-left of the political spectrum would want to urge on the Court. [5.] Hence, the quandary of constitutional theory in a conservative era.25

This passage adequately summarizes the background assumptions that must hold if Winter is to sustain his predictions that, sometimes, morally preferable arguments are precluded by the stabilized structures of legal thought.

Yet sentence 1 assumes inconceivable consensus—and its mildly hypothetical tone has entirely disappeared by the time Winter announces, in his last sentence, a real-life “quandary.” Alternatively, this sentence envisages plural subcultures but conveniently assumes that each constitutes its own judicial system.

Sentence 2 clearly assumes a uniform and monolithic society (“the structures of social meaning”). Moreover, it makes an assertion (judges rely on a broader context for communicative intelligibility) that, even if accurate, is irrelevant to legal controversy. In court, the question is, Which among the
already intelligible arguments before the court ought to prevail? Intelligible communication, in general, may thus be conceded without damaging the argument that law, in court, is unbinding. Sentence 2 is thus wholly logically independent of sentence 3—although Winter appears to think otherwise.

Sentence 3 itself illustrates the familiar slippage from a concession of law’s unbindingness to a contradictory assertion of surviving, demarcated constraint. There is no constraint if the legitimacy of the alleged demarcations is denied by the judge. Sentence 3 implausibly assumes that all judges share a uniform view of which arguments are persuasive.

Sentence 4 suggests an implausibly homogeneous conservative era that determines our stabilized matrices and excludes liberal-left legal arguments. This radically understates controversy among judges. It also assumes an extraordinarily tight link between political eras and persuasive legal argument (did the “Reagan era” really influence Thurgood Marshall’s conception of a persuasive legal argument?). Finally, this sentence overindulges the journalese of “political eras.” Do such “eras” exist? Or do politicians (the presidents who appoint the justices) win and lose elections because of imponderables like “the economy” or irrelevances like personal charm or strategic acumen? Noam Chomsky, writing in the very year (1988) in which Winter’s “Cognitive Stakes” piece appeared, admonished a student interviewer for assuming that conservatism was prevalent:

[Conservatism] is by no means prevalent. It might be prevalent among the elite groups, but that’s not too surprising because it is an ideology that favors the transfer of the resources from the poor to the rich, power for the privileged and so on. Among the general public it has never been particularly popular. In fact, Reagan’s popularity has by no means been unusually high, judging from the polls. Furthermore, the public has been strongly opposed to every major element of the Reaganite program with very rare exception. Through the 1980s for example, the polls have shown the public has been strongly in favor of social rather than military spending. In general, the public has continued in a long slow drift towards a New Deal-style, welfare kind of social democracy.26

Winter seems to have succumbed to a jurisprudential version of Susan Faludi’s Backlash, in which ill-researched trend journalism and other cultural flotsam persuaded some activists that the price of feminism was too high, and that the feminist agenda had alienated mainstream female America.

Sentence 5 thus introduces a fake quandary.

This litany of misdescription is not something Winter can easily disavow. The stable “cognitive baseline” (Winter’s phrase) furnished by this picture enables Winter’s misreliance on the work of Thomas Kuhn. Winter urges
that law functions like Kuhn’s picture of “normal science.” Kuhn’s normal science is a mopping-up operation in which normative controversy is absent because the scientific community has (rationally but firmly) converged on shared norms. Whether or not this alleged consensus legitimately exists within the practice of physical science, law is undoubtedly different. Law minus controversy is bullshit. Paul Feyerabend has commented that the casual appropriation of key terms from Thomas Kuhn’s work has spawned “various forms of pseudoscience” and “encouraged a lot of trash.” Numerous of Winter’s turns of phrase, together with the uninhibited way in which he invokes Kuhn’s terms—such as “normal science” and “paradigm shifts”—in manifestly controversial contexts, suggest that Winter’s work belongs in this category. Thomas Kuhn criticized naïve “textbook presentation[s]” of scientific progress in which “one by one, in a process often compared to the addition of bricks to a building, scientists have added another fact, concept, law, or theory” to our knowledge. Winter, in contrast, ultimately sees cognitive science as exactly the incremental, cumulative, and teleological process of knowledge accumulation that Kuhn set out to debunk. Winter sets out to “reconceptualize law in light of what we are learning about the human mind.” Winter assures us that “recent developments in cognitive theory make it possible to describe the underlying, unconscious structure of how we think about law” (emphasis added). Winter refers to the alleged progress of cognitive research from 1970 to 1980 through its culmination in the late 1980s—exactly when, happily, he decided to write his own article. Moreover, even if this alleged progress in the field of cognitive science is admitted, even if it is granted that the cognitive research resembles Kuhn’s picture of normal science, it hardly follows that the practice of law, too, resembles normal science. Winter ultimately concedes,

In the postscript to the second edition [of *The Structure of Scientific Revolutions*], Kuhn expresses some surprise over the application of his theory beyond science. He thinks that his account makes science more like other disciplines, but that science is still significantly different from other disciplines.

Clearly it is time for Winter to sit up straight and deal decisively with this direct hit from the very source on which he so heavily relies. Kuhn’s idea of normal science has itself been criticized for understating controversy in the physical sciences. Kuhn’s critics deny that the alleged normalcy exists. Whether those critics are correct or not, Kuhn himself doubts that other disciplines share science’s uncontroversial normal periods. And of all the extrascientific disciplines that might be said to resemble Kuhn’s normalcy,
law is perhaps the least likely candidate. Yet instead of vigorous argument in favor of an analogy of law and normal science, Winter leaves us this hunch (relegated to a footnote):

My own sense is that the legal community, especially the legal academy, bears significant parallels to the scientific community as Kuhn describes it. Both rely on standardized textbooks for initiation into the profession; both enjoy substantial insulation from the laity; both concern day-to-day puzzle solving; and both display quite similar internal communal structure.

Winter would here describe a legal academy governed by standardized textbooks. Yet is the *Alchemy of Race and Rights* such a standardized textbook? Moreover, isn’t the Bendaresque “insulation from the laity”—which Winter would dignify as a defining trait of legal academia—arguably the legal academy’s biggest problem? Kuhn himself explicitly argued that law is different from the physical sciences because law’s primary raison d’etre is external social need. Winter’s announcement that legal practice is, factually or ideally, insulated from the laity reflects a disquieting comfort level with unfortunate and reformable features of some law schools. Winter would erase questions about the legal practice and the legal academy that others are struggling to place on the agenda.

Moreover, Winter has by this stage of his argument abandoned the production of topographic contraptions to guide legal advocates through sedimented social fields. He has momentarily fled advocacy to focus on the legal academy. Even there, his language of normal science vastly understates controversy over the nature of legal education—a subject that currently generates frequent and heated debates and symposia. “Quackery” is thus no overstatement. Winter’s invocation of Thomas Kuhn’s normal science in legal practice is counterprogressive hocus pocus.27

**Cognitive Science in Law Is Wrongheaded**

Beyond the particular problems with Winter’s effort, cognitive science is unlikely ever to solve the question of what law is, or to dictate one legal strategy over another. Winter throughout asserts that his theory is based on “empirical evidence from the cognitive sciences.” Winter urges that language is an empirical phenomenon that can be usefully studied by a (cognitive or other) science. Such assertions are not necessarily wrong, but they might be. It might be that the mind is inherently unstudiable (can it adequately study itself?). And this possibility deprives Winter of the mantle of expertise that he
needs. Moreover, even granting the questionable assumption that language and cognition are available to descriptive inquiry in some sense, it does not follow that they can be meaningfully studied with available analytical tools. Moreover, even if language is empirical, cognition might not be. And even if cognition is empirical, language might be the wrong path to it. Winter overlooks such stuff. Winter, additionally, shows no sustained awareness of the arguments that might foredoom his project:

Granted the form of our sensibilities supplies the conditions of the possibility of knowledge; why not give an empirical basis to all empirical science by investigating the specific structure of our senses? There have been endless variations of this naturalist-reductionist dream. Each would ground all knowledge in an empirical theory of perception.

(Emphasis added)

Even if Winter were to discover a persuasive picture of human cognition, we would not be bound by his conclusions if we didn’t like their political or ethical implications. As Michel Foucault has said,

The analysis of actual experience is a discourse of mixed nature: it is directed to a specific yet ambiguous structure, concrete enough for it to be possible to apply to it a meticulous and descriptive language, yet sufficiently removed from the positivity of things for it to be possible, from that starting-point, to escape from that naiveté, to contest it and seek foundations for it.

Thus, while a somehow rectified version of Winter’s effort might perhaps excavate a plausible picture of the nature of human cognition, it can never arrive at a binding picture: “What is given in experience and what renders experience possible correspond to one another in an endless oscillation.”

The effort to give law authority by seeking shared whirlings within the skull is inherently wrongheaded.

A Café Crit?

In a tremendous feat of legal scholarship called “Roll Over Beethoven,” Duncan Kennedy and Peter Gabel, prominent Café Crits, debate the place of grand theory in progressive legal activism. Gabel champions a general theory of life that he thinks will help activists and permit a more authentic politics. Kennedy rejects this as “abstract bullshit.” The men, it appears, disagree. But upon closer examination Kennedy, too, emerges as a disciplinarian. Both men claim the right to tutor the movement. Both claim that they can discern what makes law and society tick. This Café Crit claim, if believed, would demoralize those who lack these men’s tutelage. Those without
their wise guidance might believe themselves to lack some special insight. Café Crit vanguardism, taken seriously, might paralyze the rest of us.

Kennedy appears to renounce such a vanguardist role when he dismisses Gabel’s “fantasies of controlling the world by thinking about it.” Yet Kennedy’s objection is ultimately not to Gabel’s taste for authoritative investigation, but merely to the level of abstraction at which Gabel would conduct it. Kennedy’s quest is not to abandon authoritative description, but to abandon Gabel’s hyperabstraction because, Kennedy believes, it precludes accurate description. Kennedy instead pursues a “locked-down” and “concrete” version of Gabel’s descriptive project. Yet Kennedy’s concrete truth seeking remains very like Gabel’s bullshit, as Gabel himself remarks.

Kennedy remains a vanguardist because his concern with concrete description is itself not a simple task of neutral investigation. Kennedy’s concrete description is itself mired in values and in interpretation. Kennedy claims to deliver concrete experience, not mere impression. Yet his every account of concrete legal experience is already freighted with his debatable value judgments, and these might offend an ethical judge.

The flaws in Kennedy’s concrete descriptive effort are clear in a judicial discretion discussion that he published two years after “Roll Over Beethoven.” In the later article, “Freedom and Constraint in Adjudication: A Critical Phenomenology,” Kennedy set out to describe the process of legal reasoning, again emphasizing his distaste for abstraction. However, Kennedy’s ostensibly concrete examination of law’s unbindingness itself proceeds on a meager abstraction: an invented judge. Through this nameless judge Kennedy sets out to describe the nature of the constraint that law exerts. Let’s call Kennedy’s protagonist Judge Winthrop.

Judge Winthrop is a Café Crit jurist from Boston. He has what Kennedy calls a vocation of social transformation, and this guides his decisionmaking. But Winthrop’s is a patrician activism. He cannot shake the idea that law binds judges, even if only pseudo-objectively. These limitations undermine his progressive intentions.

The Moral Force of Law?

Judge Winthrop’s patrician sensibility binds him with certain reverences that make Negro Crits giggle—kind of like barristers in horsehair wigs. Kennedy refers to “the elemental normative power of any outcome reached by people I identify with. Because I think they were up to the same thing I am up to,
whatever they came up with has in its favor my initial sense that it's probably what I would have come up with too."

Kennedy doesn’t square this reverence with Judge Winthrop’s belief that the rules in force were simply imposed in the self-interest of those in power. Others might not think the dead greyhairs were “up to the same thing” as them. Like Audre Lorde, others might instead embrace the heretical actions that so many old ideas disapprove. Kennedy’s Judge Winthrop is different: “I identify with these ought-speakers. I respect them. I honor them. When they speak, I listen. I even tremble if I think I am going against their collective wisdom. They are members of the same community working on the same problems. They are old; they are many.”

Kennedy quickly adds that it’s no good telling Judge Winthrop that this stuff is irrational. Reverence just is Judge Winthrop’s response to his forefathers in the law. Kennedy starts out emphasizing that meaningful talk about judging requires some “grounding in a specific imagined situation,” and he sets out to describe the processes of an imaginary judge’s mind. Yet Kennedy doesn’t expressly present Winthrop as his own ideal jurist. It is reasonably clear that “Kennedy” is not identical with “Judge Winthrop.” This gives Kennedy apparent wiggle room in tight spots. Kennedy’s project is “descriptive,” but his judge is not real; Kennedy’s judge is imaginary, but Kennedy’s project is ostensibly not “prescriptive.” Kennedy may thus personally disavow Winthrop’s foibles and claim that through Winthrop he is merely providing a descriptive account of the typical, not ideal, judge’s way of being in the world.

Kennedy concedes that the law will not necessarily have the power to persuade everyone. It may sometimes seem odd (even, perhaps, to Winthrop), like “yesterday’s newspaper.” Yet Winthrop’s reverence is unshaken. Kennedy neglects that to endow his fictional typical judge with arbitrary reverences under the banner of a “fact” is already to endorse those reverences. “Fact” is an honorific label. Whatever it attaches to is removed from controversy and fixed as a ground rule. Kennedy’s descriptive effort thus grants Winthrop’s reverence leverage in law, and ignores the need for him to justify each violence he inflicts.

Despite the generally nongrandiose and colloquial tone of Kennedy’s “phenomenology” of judging, his descriptive ambitions resemble Steven Winter’s more baroque quackery. When Kennedy calls Winthrop’s forefather reverence part of the “normative power of the field,” he is playing moot court. When Kennedy talks about the moral force of law, someone giggles.
When lawyers pronounce Kennedy a progressive, Jonathon Swift giggles, too.

The Physical Constraint of Law?

Reverence for the forefathers aside, Kennedy’s Judge Winthrop is also constrained by the fact that law is like “a physical medium.” When Kennedy argues that law is like potter’s clay, he wants to resist the view that “‘law’ is one thing or another and can be treated as a kind of block contributing to a larger edifice.” Equally, however, Kennedy argues that what the judge’s project can be (what her pot can look like) is limited by the legal medium (the clay):

Law constrains as a physical medium constrains—you can’t do absolutely anything you want with pile of bricks, and what you can do depends on how many you have as well as on your other circumstances. In this sense, that you are building something out of a given set of bricks constrains you, controls you, deprives you of freedom.

Kennedy argues that infinite judges may fashion infinite pots, but they’ll never make one you can smoke—because the material they work with just isn’t combustible. Kennedy then accurately identifies the “absolutely basic question”: “whether there are some outcomes that you just can’t reach so long as you obey the internal rules of the game of legal reasoning . . . ‘things you just can’t make with bricks’ or silk purses you can’t make with this particular sow’s ear.”

Kennedy answers that indeed there are some outcomes you just can’t reach with a thing called law. He asserts that one must abide by certain constraints if one wishes to “legalize” one’s position. What makes Kennedy’s argument interesting is its disarming denial that there is anything inevitable about moments of constraint. Kennedy emphatically denies that the legal materials themselves uniformly (or at all) dictate the outcomes of cases. On another day, in another mood, with his adrenal glands fired up instead of opting out, Judge Winthrop might have happened upon the line of reasoning he needs. Just not today.

The problem with this is that, if we take it seriously, any constraint on a judge becomes a matter of personal energy, not of the medium of law. Of course the personal energy is applied in the area of law, so any personal failure will also be in that medium. But this is identical with constraint on personal effort in any arena. Perhaps Tolstoy had bad days in the “medium” of Russian language. To say that the constraint of law is as much a property
of the medium as it is a product of individual exhaustion, talent, etc., is thus both accurate and uninteresting. It is uninteresting because what the rule-of-law ideal requires is a peculiar constraint that enables it to claim that judges are above the fray. Tolstoy hasn’t a police force at his disposal. Winthrop does. If the only constraints on Winthrop are his mood and his materials, why do his materials, rather than Tolstoy’s, get to tell the police what to do?

Most basically, Kennedy’s assertion that there are things you “just can’t do with bricks” implicitly assumes that the prevailing range of tricks with bricks is a legitimate range of tricks. He doesn’t consistently question the “internal rules of the game of legal reasoning.” This is a strange failure given Judge Winthrop’s own insistence that the rules often were set down in the narrow and illegitimate self-interest of those in power. Winthrop and Kennedy slide into the assumption that particular acts within the game are justified by the very existence of the game. This would be the case if law were the automatic and impartial set of rules that Café Crits have shown it not to be. Café Crit work generally deprives law of its leverage. Yet Kennedy, via Winthrop, gives it back, gratis. Winthrop ultimately behaves as though “law” provides judges with reasons to act in ways that would be excluded by their overall moral calculus but for “the law.” Others might, rather, refuse to ignore the legal-ethical observation that Winthrop’s bricks are built of blood and flesh. Others might prefer the following criteria of the good legal brick: “The stone that the builder refused / Shall always be the head cornerstone” (Bob Marley, “Cornerstone,” in Songs of Freedom, Disc 2, track 6[a] [Island Records, 1993]). “Our forefathers” are a more motley bunch than Kennedy’s Winthrop assumes. Judges must justify each pain, each death—or else decline to inflict them.

A Fish out of Water?

Stanley Fish would like to be known simply as an expert on John Milton. He has nevertheless been an instructive and long-serving participant in debates about law’s unbindingness. Yet Fish’s distance from legal practice repeatedly leads him to understate the legitimate place of controversy in legal practice and repeatedly leads him away from a potentially powerful argument in favor of ethical law: the argument that a presiding judge’s moral conclusions are always, almost inherently, rendered in the language of the law. Fish always stops short of that argument.

Uberactivist judges might claim that the legal rules and the legislative
history are bad and that judges are free to ignore those bad building blocks and instead follow their own unfettered moral preferences. Such judges juxtapose (bad) law against (good) preferences and choose the latter. Such judges unnecessarily undercut their own legal position by declining to claim that their ethical view of the appropriate outcome is legitimate as law. A better argument might be that a Supreme Court justice’s opinion in deciding a case is always and inherently law. Stanley Fish has come close to arguing that this is indeed the case. He has argued that theuberactivist is an invented evil.

Fish makes the general point, that the uberinterpreter is an invented evil, in a variety of contexts, including an extended exchange with Ronald Dworkin. Dworkin argues that the enterprise of law resembles the authoring of a chain novel by successive generations of authors. For Dworkin, each new author is free to take the enterprise in new directions but is also constrained, by what has gone before, from enacting her own arbitrary preferences. Fish replies that since the question what is the enterprise of law? can itself only be answered by the individual judge’s interpretation, the constraint Dworkin envisages is nonexistent. If the new author is constrained at all it must be by something other than the evident nature of the legal enterprise, since that nature is far from evident and is itself a product of the new author’s interpretation.

But, Fish continues, the new author’s ruminations are not unfettered in the dangerous sense Dworkin imagines. Dworkin’s analysis depends upon a conflict between a judge’s mere subjective preferences on the one hand and allegiance to the ongoing enterprise of law on the other. Dworkin wants to ensure that a judge is bound by the ongoing enterprise of law and so unable to head off in maverick directions. Fish responds that those who envisage this evil of unfetteredness must imagine that a judge might somehow decide a case in a way that had no relationship to the prior decisions. And Fish doubts that such feats ofuberactivism are possible, since any decision by a judge would have to be made in recognizably judicial terms.

Fish thus argues that any novel outcomes a judge reaches as a judge, once they are expressed in intelligible legal language, remain always and already “law.” Much hinges, however, on the meaning of Fish’s caveat (“intelligible legal language”). For an ideal judge, that caveat means that she will use law’s concepts as rhetorical gestures reflecting her ethics. She will welcome decisions that might startle certain members of the onlooking legal commu-
nity. This places the ideal judge at loggerheads with Fish. Fish has no stomach for startling the legal community. Fish believes that something called legal competence can be acquired through professional training, and that the legal community shares this training and is united in its competence. He believes that, once acquired, competence reduces controversy in rule applying. He therefore assumes a degree of consensus in rule applying among lawyers that, it turns out, is hard to defend.

In support of this assumed consensus, Fish offers only the unargued assertion that the essence of law is stability. Fish would hardly claim that this model of law as stability is politically (or otherwise) neutral, but he does claim that it is the prevailing practice of law. And that is an incorrect assertion. Detailed analysis of the Supreme Court case law of Justice Thomas and his colleagues demonstrates just how self-conscious and deliberate the pursuit of conflicting values is on the nation’s most esteemed tribunal.

Fish’s undue deference to claims of legal competence is clearest in his discussion of the work of Owen Fiss, a long-time denier of law’s unbindingness. Fish effectively criticizes—in a manner that replicates his analysis of Dworkin—Fiss’s faith that law constrains judges. Having thus Dworkined Fiss, Fish nevertheless asserts, in what is an odd move for him, that there is strong empirical evidence that a process called “adjudication” is possible. Yet Fish isn’t terribly clear about what adjudication is. Is it the sheer fact of decision rendered? Or is it the myth of uncontroversial decision rendered? Is it, rather, the myth of self-applying rules? Fish is clear, however, that gaining competence within this practice of adjudication is a learned process: the result of professional initiation into legal practice.

Ironically, Fish’s own distance from legal practice leads him to understate how much diversity there is within legal practice, including controversy over what it means to be a legal professional. Fish repeatedly assumes, always without sustained analysis, that the law-applying function of judges and the law-divining function of attorneys is both shared and near-instinctual. When Fish refers to the legal community’s “interpretive preunderstanding” of legal practice he is always, without argument, asserting shared interpretive preunderstanding. If lawyers’ rule applying were as reflexive and shared as Fish assumes, controversy could not be a pervasive feature of rule application. Yet it is.

Fish persuasively objects that Dworkin, Fiss, and others implicitly assume that one branch of any given legal-judicial controversy just is (or poten-
tially is) consistent with the enterprise of law, whereas other branches reflect illegitimate extralegal influences. Fish is most persuasive when arguing against this distinction between arguments internal to law and those external to it. Yet this pole of Fish’s analysis does not jibe well with his other idea—that there could be (and is), for the time being, a uniform practice of law of which one might somehow be a competent practitioner. In deferring to ostensible legal competence Fish indeed seems, as several critics have suggested, to assert that practices are monolithic—that the legal community is a homogeneous interpretive community. Fish is at his least persuasive when slithering away from this accusation. He collapses into dogmatic assertions about the supposedly essential nature of legal practice: “the very point of the legal enterprise requires that its practitioners see continuity where others, with less of a stake in the enterprise, might feel free to see change.”

This is an unfortunate slide into the doctrinaire Dworkinian rhetoric of “the legal enterprise” that Fish himself has previously debunked. And it trades on a stereotypical legal practitioner—the kind who has a large stake in the continuity of the enterprise as an end in itself. Doubtless this nicely trades on the vogue vilification of the Wall Street lawyer. But what of Cornel West, whose vision of a progressive legal practice is one designed to facilitate threats to the social order? Fish is forced to argue that you can’t both be a legal decisionmaker and have a primary stake in change:

The judge who has learned to read in a way that avoids crisis is a judge who has learned what it means to be a judge, and has learned that the maintenance of continuity is a prime judicial obligation because without continuity the rule of law cannot claim to be stable and rooted in durable principles. It is not simply that crisis would be disruptive of the process, but that crisis and disruption are precisely what the process is supposed to forestall. (Emphasis added)

Fish’s description of the practice of law as the pursuit of stability is not only dogmatic but flatly wrong. Much everyday corporate litigation practice aims to create uncertainty and instability where the law initially seems straightforwardly against one’s client. It is ironic that Fish—certain that practice is everything, and not himself a legal practitioner—nevertheless feels comfortable expounding, authoritatively, on “what it means” to practice law. Fish’s view that stability is the essence of legal practice is theoretical in exactly the sense that he so frequently disparages. It is an abstract speculation about a practice in which he is not immersed. Fish’s distance from the turbulence of legal practice, his view that stability is the essence of legal
practice, and the actual importance of instability in legal practice are all reflected in the following passage from his work:

As things now stand in our culture, a person embedded in the legal world reads in a way designed to resolve interpretive crises (although as Walter Michals reminds me, after he was reminded of it by a practicing lawyer, at some stages in the preparation and even the arguing of cases, the proliferating of interpretive crises is just the skill called for). 35

That parenthetical irruption devastates Fish’s nonparenthetical claims about the practice of law. The next chapter will show that the proliferation of uncertainty is a pervasive feature of legal practice, not only in the preparation and arguing of cases but also often in the judging of them. Supreme Court majority opinions in controversial cases are frequently deliberately vague, so as to keep a majority aboard for a desired result. When Justice White, retiring in 1993, wished the Supreme Court good luck in providing clear and crisp guidance to lower courts, he was speaking tongue in cheek and the legal community knew it. Law is splashy, not becalmed. Legal scholars have even put the inherent turbulence of law on a prescriptive footing, arguing (unattractively) that the ambiguity of law ought to be preserved because it enables multiple views to coexist within a single system of law. 36

Fish understates the place of controversy in legal practice and therefore overstates the usefulness of ostensible legal competence in settling contested legal questions. In entering debates over legal practice, Fish may be out of his depth.

**Judges Must Justify Pain and Death**

Legal interpretation takes place in a field of pain and death. . . . *The relationship between legal interpretation and the infliction of pain remains operative even in the most routine of legal acts. . . . The judges deal pain and death. . . . As long as death and pain are part of our political world, it is essential that they be at the center of our law.*

—Robert Cover, *Violence and the Word*

Law happens. Legal decisions, often predictable, are arrived at every day even on issues about which few people agree. Law is, in practice, simpler than the political and moral complexity in which it is enmeshed. Judges settle, every day and with violence, issues that you and I admit are reasonably open to question. How come they can do this?
Given the collapse of law’s leverage, the possibility of a general or systemic justification for the acts of violence ordered by judges has disappeared. Each judge must now justify, individually, each pain she imposes and each death she orders. Each judge is a moral actor. Yet many people forget this insight in their debates about what law “is.” Right now, progressive lawyers are playing moot court. What passes as progressive scholarship turns out to be cultural tyranny, cognitive quackery, café criticism, fishy business, or, worse, Tough Love lawyering: more complacent than the rest.