

# Strategizing Strategic Behavior in Legal Interpretation

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## I. INTRODUCTION

This Essay is part of a larger work that proposes a theory of the political effects of the American social practice of organizing lawmaking through distinct adjudicative and legislative institutions. The main question addressed is the role of political ideology, in the simple sense of "liberalism" and "conservatism," in the part of judicial activity that is best described as lawmaking. I argue that ideological projects of this familiar kind pervasively influence judicial lawmaking, but that ideologically oriented legal work is different from ideologically oriented legislative work. I address the grand question of the meaning and effects of adjudication in society through the development of these differences.

It is sometimes plain that judges experience themselves as constrained by the materials to reach particular solutions, without regard to or contrary to their own legislative preferences. But they *always* aim to generate a particular rhetorical effect: that of the legal necessity of their solutions without regard to ideology. They work for this effect against our knowledge of the ineradicable possibility of strategic behavior in interpretation, by which I mean the externally motivated choice to work to develop one rather than another of the possible solutions to the legal problem at hand.

The overall project is to examine the impact of adjudication, thus conceived, in an ideologically divided society. A basic idea is that much ideological conflict is about the rules of law. Judges play a large role in developing the rules of law. But whether they are ideological "actors" is disputed. Having concluded that they are indeed ideological actors, at least some of the time, I ask how the organization of a significant amount of rule making activity through actors whose ideological role is disputed affects the outcome of ideological dispute.

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I define an ideology as a universalization project of an intelligentsia that sees itself as acting "for" a group with interests in conflict with those of other groups. Liberalism and conservatism are the primary examples of American ideology. An important characteristic of these ideologies is that they have both a similar general structure and similar argumentative elements so that the difference between them is in the way the elements are deployed or "spoken" with respect to a range of issues.

With respect to any particular legal question, we can identify the "stakes" for the participants who understand the question in ideological terms. These may or may not be distinct from the stakes as the legal parties understand them (defining the rules governing police searches may be a minor aspect of the defendant's strategy but the major question for "civil libertarians").

The legal representatives of the ideological intelligentsia argue the issues to legislatures, to executive and administrative officers, and to judges and juries. We can classify legal issues in a rough way as issues involving either rule making (and interpretation) or fact finding, with a significant intermediate category of "mixed" questions (such as, was the defendant "negligent"?).

This Essay is about "questions of law" rather than "of fact," and about the place in the court system, the appellate level, where judges have top level formal authority to decide such questions. It is the activity of appellate courts that is most clearly an instance of lawmaking that disposes ideological stakes, but is carried out in a situation of dispute as to whether the decisionmakers are (or should be) ideological actors.

The lawmaking activity of judges takes place in the context of a structure of legal rules—in the face of a particular gap, conflict or ambiguity in this structure. Judges resolve interpretive questions through a form of work that consists of restating some part of this structure, and then deploying a repertoire of legal arguments to justify their solutions. An important mode of ideological influence in adjudication comes from the interpenetration of this specific, technical rhetoric of legal justification and the general political rhetoric of the time.

We can at least guess at the difference it makes to the total corpus of law that so much of it is made by judges pursuing ideological projects under these peculiar interpretive constraints. This diffusion of lawmaking power reduces the power of ideologically organized majorities, whether liberal or conservative, to bring about significant change in any subject matter area heavily governed by law. It empowers the legal fractions of intelligen-

tsia to decide the outcomes of ideological conflict among themselves, outside the legislative process. And it increases the appearance of naturalness, necessity, and relative justice of the status quo, whatever it may be, over what would prevail under a more transparent regime. In each case, adjudication functions to secure both particular ideological and general class interests of the intelligentsia in the social and economic status quo. (I will refer to these summarily as moderation, empowerment, and legitimation effects.)

In order for this larger project to make sense, we have to be able to answer the question: How can the judge be ideological? How can the judge be ideological, more specifically, if he accepts that he is bound to be a faithful interpreter of the laws, bound to do "law's bidding" if it conflicts with his ideological preference? Within American legal culture, informed observers practice a hermeneutic of suspicion regarding the claim that legal discourse, and particularly legal policy argument, is autonomous from ideological discourse. This Essay is in that tradition.

It attempts to reconstruct the situation of the judge from the inside, so to speak, asking how the judge experiences and responds to the body of legal materials when he has a clear ideological preference for an outcome. A crucial goal is to identify the strategies through which the judge can maintain his own internal belief, and his audience's belief, that he is fulfilling his duty of interpretive fidelity in spite of the fact that his actions "shape" or "move" the law in one ideological direction or another.

An inquiry into how judges can be ideological should be of interest even for adherents of the various theories of how judges can be and should be "neutral." None of these theories even suggests that all or most American judges act according to their precepts, and a judge who accepts one of them will often be uncertain how to apply it. Even if one of the theories is right as a description of how judges ought to reason to outcomes in ideologically charged cases, it seems very likely, given the actual state of the bar and bench's understanding of law, that judges constantly experience themselves as having to make strategic choices.

The strategic choices involve deciding how to deploy the work of legal research and reasoning. Fidelity to law kicks in only when there is law to be faithful to. Any legal actor, advocate or judge, can influence what that law "is," through legal work. Very few legal practitioners have strong theories of how the law requires one to deploy one's resources for defining the law. If they are lawyers, they suppose that it is legitimate to

deploy their resources to shape law to favor their clients. For them, strategic behavior in choosing how much to work at legal interpretation and in what direction is an everyday matter; it does not violate the duty of fidelity to law because it is constitutive of the law to which one is faithful.

We often speak as though things were altogether different within the process of judicial decision. It seems wrong for the judge to claim that *for him* fidelity to law kicks in only when he has made some law to be faithful to. But, of course, law clerks write opinions that are "result oriented," in the sense that a rule choice is dictated by the judge, and their job is to produce the best legal case they can in support of it. And judges themselves, when they work in panels, often find themselves in the position of having to produce the best argument they can for a rule choice that differs significantly from the one they regard as most in accord with interpretive fidelity.

Here we will be dealing with what one might call the core case in which adjudication is supposed to be nonstrategic—motivated solely by the duty of fidelity—the case in which a single judge decides a question of law. It is a common belief, supported by a not inconsiderable social science literature, that judges, in this situation, often can and do work to make the law correspond to "justice," or to some other "legislative" ideal, and that they direct this work under the influence of their ideological preferences.<sup>1</sup> But it is an equally common belief that this work is constrained by the legal materials.

It is always *possible* for the judge to adopt a strategic attitude toward the materials, to try to make them mean something other than what they at first appeared to mean, or to give them one to the exclusion of other initially possible meanings. On the other hand, it is *never necessary* that he do this and *never certain* that he will succeed if he tries. Finally, it is *not usually possible* to know whether a particular decision came out differently, as a result of the judge's adopting a particular work strategy, than it would have come out if he had adopted some other strategy.

It is always possible to behave strategically in the sense of trying to make a particular rule interpretation look good. There is no definition of the rule of law that could prevent judges from making this effort, and it is at least plausible that the rule of law requires judges to make the effort at least some of the time.

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1. *E.g.*, BARBARA M. YARNOLD, *POLITICS AND THE COURTS: TOWARD A GENERAL THEORY OF PUBLIC LAW* (1992).

A judge who habitually behaves strategically vis-à-vis the materials may be insensitive to specifically ideological implications or work hard to banish them from his consciousness. He may have an agenda that we would characterize as personal or idiosyncratic rather than ideological. Such a judge has to use the discourse and listen to the arguments while somehow not understanding the situation the way others do, but things like that happen all the time.

It isn't necessary to behave strategically at all. Many judges seem to approach the materials with the belief that they must mean something and to have little talent or inclination for legal work. They may experience closure at the end of a process that looks like random search, just grabbing onto the feeling when it hits them. They may repress or never have acquired the ability to strategize.

From our point of view, the input of these judges into judicial rule making is uninteresting (though we might speculate about how their nonstrategic behavior will map in relation to the behavior of judges who are political actors). It is quite important to distinguish this ideologically random behavior both from unselfconscious rule following and from constraint. It is not unselfconscious rule following because the judge knows there is a question of law and is trying to find an answer. It is not constraint because constraint means resistance to an attempt to make the materials mean something in particular.

That you can always behave strategically doesn't mean that you can always change a rule that at first appeared to be binding, or that you can always take what looks like an open question and show that the liberal side was clearly right, or whatever. You can always work at manipulation, but you may fail to achieve your objective.

It might be that there are no "real" opportunities for strategic behavior. Maybe judges do as a matter of fact sometimes adopt the strategic *attitude*. But whenever they do so, they might be either deluding themselves about what's really going on, because the law guides them behind their backs and constrains them in the end to the right answer, or acting in bad faith in the strong sense of transgressing the role constraint of interpretive fidelity.

I don't think it possible to refute this possibility except by an appeal to the history of critique and reconstruction. And this history, to my mind, establishes only that it is plausible that ideologically focused work constantly changes the meaning of the materials—that successful instances of strategic behavior are

frequent. Judges often produce a convincing meaning for the legal materials different from the convincing meaning judges with the opposite work agenda would have produced (or did produce in a dissent). In what follows, I try to strengthen this hypothesis through a description of three kinds of agenda that judges pursue strategically. I will introduce my three typical characters first as they might be described by someone interested only in predicting their behavior, someone using the common-sense notion of an ideological "preference."

## II. IDEOLOGICAL PREFERENCES

A liberal or conservative ideological preference is a tendency to choose legal rules associated with liberalism or conservatism. A preference may be obvious or hard to discern; it may be acknowledged or denied; and it may be conscious, unconscious or half-conscious. A preference, in common usage, is more than a factual pattern (though sometimes economists use it in this very limited sense). When we impute a preference, we suppose we are giving an explanation or an interpretation of patterned action, by attributing it to a psychological disposition of the actor.

When inquiring into the existence of a preference in this psychological sense, we consider past choices among what we think were alternative possible legal rules, and we also use the evidence of the judge's choice among available argument bites or rhetorical modes that have ideological connotations. There are legal arguments that directly or analogically translate general political into legal discourse. The rhetoric of self reliance is conservative, that of sharing liberal. These are markers from which we infer ideological preferences.

I think that when Holmes expressed "doubt whether judges with different economic sympathies might not decide . . . [a particular] case differently when brought face to face with the issue,"<sup>2</sup> he was using a notion like that of a preference. What he said was provocative because the notion that adjudication should exclude ideology means the exclusion of preferences of this kind.

When we believe that a judge has an ideological preference, say for liberal or conservative rule choices, we often speak of "ideological motives" for and "ideological influences" on particular outcomes. I use these expressions with some misgivings because

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2. Oliver W. Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 8 (1894).

they are ambiguous in two ways. First, they can be established only by interpretive procedures, rather than proved or substantiated through more positive methodologies. Second, they do not mean that the actor has an internal commitment to the ideology as a project, but only a preference or predisposition to choose the outcomes that are associated with it.

While a pattern of liberal outcomes can be "proven" if we have a sufficiently tight definition of liberalism, the imputed preference or disposition or "sympathy" cannot. But proof is also unnecessary for the purposes of this particular inquiry. People impute "ideological motives" to actors all the time, in the sense of preferences. In my larger work, I argue that a "hermeneutic of suspicion," or search for the hidden ideological motives in judicial opinions that present themselves as technical, deductive, objective, impersonal, or neutral, has been for a hundred years the most important characteristic of American debates about adjudication.

In legal discourse, the evidence for this imputation of motive is almost never a "smoking gun" in the sense of an admission of intent. In judicial opinions, judges *always* "deny," in the common sense of the term, that they are acting out of ideological motives. That is, they explicitly claim the outcome—their disposition of a case by choosing one particular resolution of a question of law or of rule definition, rather than another—was reached by following impersonal interpretative procedures that exclude the influence of their personal ideologies. This is obviously a matter of convention and tells us little about what is "really" going on.

In most cases, the only basis for imputing preference, motive, or influence is "interpretative," meaning that the opinion makes more sense if we interpret it as ideologically motivated than it does if we take it at face value. You can't "prove" that it makes more sense; you can only argue your interpretation by showing that the opinion is contradictory or inconclusive when taken on its own terms, but seems at least intelligible if not persuasive when understood in terms of ideological preferences. There is no attempt to show by direct evidence what the judge was thinking. It is not a question of proof, but of the plausibility of a "reading."

The second ambiguity in the notion of an ideological motive is related to the first. I asserted, many years ago, that Sir William Blackstone had an "apologetic motive" in describing the English legal system. Some readers inferred that I was arguing a conspiracy theory of the type liberal and conservative theorists have often detected in Marxist accounts of capitalist institutions.

I was perhaps arguing that legal discourse was a deliberate mystification, cloaking a capitalist ideological agenda in neutral terminology in order to mislead the masses about what was really going on.<sup>3</sup>

But one can assert, and I meant to assert, an ideological preference, or motive, or influence, without asserting that the actor subscribes to the ideology as a project, with an inner commitment to it as something to further or defend against its opponents. The preference and the actions that it motivates or influences is no more than a predisposition in the making of choices in particular cases. The actor might be well described as much more than predisposed in choice situations—as a true believer, for example, or an “ideologue,” or “politically correct.” But labeling an actor as committed rather than merely predisposed requires a lot more evidence, and evidence of a different kind than just a pattern of outcomes and the use of ideologically identifiable argument bites.

In a later part of this Essay, I suggest that the best way to understand ideological preferences in judicial conduct is as half-conscious, or in Sartrean “bad faith.” Again, I think the idea of a half-conscious disposition—one that is “denied,” in Anna Freud’s sense, by the judge to himself, rather than either “repressed” outright or consciously conspiratorial—fits the common-sense usage of American political discourse. We speak of a judge’s liberal or conservative ideological “bias” in just this sense of half-conscious orientation. And we don’t think it necessary to “substantiate” the imputation except through the interpretative technique described above.

### III. THREE JUDICIAL TYPES

#### A. *The (Constrained) Activist Judge*

Lawyers analyze some judges as constrained activists, meaning that’s the picture they (the lawyers) have of how these judges operate, a picture they use in predicting what these judges will do. Here’s my version of the lawyers’ picture. Suppose that the judge, on first exposure to the case, has a clear sense of what the applicable common-law rule is and how to interpret it. But suppose that if she were a legislator she would not want this rule applied to cases like this one, and would change it (either prospectively or retrospectively) by adding an exception.

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3. See Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205, 210–11, 234, 237 (1979).



Further suppose that if asked to explain her discontent with "the law," and the direction in which she would change it, she would offer a policy critique of the rule and a policy justification of her proposed exception that you would identify with "conservative ideology." Finally, suppose that this judge has a similar conservative policy critique of lots of other rules and that she never or almost never criticizes the rules in a way that makes her sound like a liberal.

This judge has no intention of disobeying the law. What makes her a constrained activist is that she puts a great deal of time and energy into working out a legal interpretation different from the one that first appeared best. She does this in every case where the law seems "too liberal" to her. Sometimes she is successful and sometimes not. When she fails, she ungrudgingly chooses a rule that differs from her legislative preference. In other words, whichever rule she finally chooses to apply to the case will represent the best legal interpretation she can find for the materials. She writes opinions that are both formally "legal" and reflect her honest belief that the law "requires" the outcome she has reached.

I am calling this judge activist because she has an "extra-judicial" motive, namely the achievement of a just outcome, for preferring one result to another across a wide range of cases and works to make that result law. Note that this form of activism is oriented to *the legal rules*. The judge has a rule that she prefers to the one she thinks she may have to apply, rather than just a party she wants to win.

In the course of her work, the judge goes back and forth between the case for her new legal interpretation and the best case against it, in the spirit of fidelity to the materials. But she is doing this with a goal: the goal of establishing that her preferred legislative solution is the correct legal solution. In pursuit of this goal, she has been anything but neutral in using her resources. She has spent a lot of time inventing a strategy, digging through the books, keeping an eye out all the time for random bits of stuff that might be useful in building her argument.

In developing the best argument against her position, her motive has been defensive. That is, she has tried to think what someone who was as determined to uphold the first impression as she is to upset it would say to her alternative. When she is satisfied that she has a good answer to the objections she can think of, she stops her inquiry and goes on with the affirmative task of buttressing her own position, thinking up another objec-

tion to refute.

True, she has undergone in this process a good-faith risk of being persuaded to the opposite side. She has really and truly opened herself to the possibility that each argument for her first impression is right and determined to give in to it if she can't answer it. But it is still the case that she has an identifiable "project," a direction she is going in (to change the unfair rule into a fair one). From her point of view, it will be a defeat if (as often turns out) she just can't find a way around the unfair rule.

Now suppose the activist has a legislative sense of what would be best, but anticipates at the beginning of the interpretive process that there is no clearly best answer from the internal perspective of fidelity to the materials. She works away at finding the interpretive strategy that will overcome this first impression by establishing that fidelity requires the conservative outcome she chose on legislative grounds.

If she comes to the conclusion that the law requires the "wrong" interpretation, she will struggle against the conclusion, but submit to it if she can't come up with a good legal argument to the contrary. If she ends up with a sense that the arguments for alternative interpretations are evenly enough balanced so that there is an element of choice in deciding between them, she decides according to her (predictably conservative) sense of what is just in the circumstances and writes an opinion making the best case she can that that result was legally required.

The claims here: First, many judges are constrained activists, and they do a lot of important lawmaking through adjudication. Second, the results the conservative constrained activist judges come up with are different from those of the liberals with the same approach. It makes a big difference how you deploy your resources among alternative work strategies in response to your initial reaction to the materials. Liberal judges who work hard and well will find good, even apparently (to them) conclusive reasons for liberal solutions to questions of interpretation. Conservative judges will come out the other way.

Third, if the conservative judge succeeds through work in making the conservative outcome look required, we might say that she has changed the rule of law from what it initially appeared to be. This change was *permitted* by the materials, since otherwise the judge would not, at the end of the process, be operating under the constraint of fidelity in interpretation. But it was not *mandated* or required by them. The law did seem to

speak to the judge, in the first instance, generating seemingly of its own force an experience of certainty about what it required. But "it" didn't tell the judge to change it, or into what to change it.

### *B. The Difference Splitting Judge*

The logic of the Court's precedents suggests that peremptory challenges should be abolished entirely because the right to vote on juries is a fundamental political right. But Justice O'Connor once again tried to split the difference by suggesting in a concurring opinion that defendants and civil litigants, but not prosecutors, should be able to continue to discriminate against jurors on the basis of sex.

Justice O'Connor is a highly intelligent lawyer with sensible political instincts. . . . [S]he seems to believe that by rejecting the extreme conservative and liberal position in each case, and trying to stake out a judicious compromise, she is acting as a voice of principled moderation.<sup>4</sup>

The posture of the difference splitting judge is, from the point of view of the outside observer, more passive than that of the constrained activist. He has a developed sense of the way groups pursue ideologized conflict through adjudicative rulemaking. He is oriented to this aspect of adjudication in just the same way as the other participants. But he uses this understanding to work out what the "ideologues," his constrained activist colleagues, would see as the optimal liberal and conservative rule interpretations and then choose an interpretation that lies in between. This is possible because the ideological structure of the materials is a thing of continua. The liberal rule and the conservative rule are polar, and in between there are a series of "moderate" positions.

This is not inconsistent with the "either/or," "on/off," or binary character of adjudication. It is true that one party or the other wins, but there will generally be several rule interpretations under which the plaintiff wins and several that produce victory for the defendant. The difference splitting judge is concerned with the rule structure, rather than with the particular parties. What I mean by difference splitting is choosing a rule formulation, an interpretation rather than a party, that is "moderate" from the ideological point of view.

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4. Jeffrey Rosen, *Make Up Our Mind, Justice O'Connor*, N.Y. TIMES, Dec. 26, 1995, at A21.

From the point of view of an observer trying to predict his behavior, the difference splitter is *controlled by* ideology, albeit the ideologies of others, even though he eschews any ideological commitment. The reason for this is that what he predictably splits is the difference between other people's ideological positions. He lets the ideologues decide him indirectly by setting up a choice and then refusing it by choosing the middle.

### C. *The Bipolar Judge*

The bipolar judge combines traits from the other two. Sometimes he works hard to develop a strong liberal position on an issue, seeming like a constrained activist. But in the next case, he comes out just as strongly for a conservative position, also like a constrained activist, but of the opposite commitment. The outside observer understands him to have the project of putting together a judicial career that splits the difference, rather than an opinion in a particular case that does so.

His opinion in a given case will be hard to tell from what a constrained activist judge on the same side would produce, except that it will not be looking forward to promoting the liberal or conservative project over a range of cases. (Though the bipolar judge may well have made up his mind on one side or the other for a whole field of law and so work with just as much sense of long-term strategy *for that field* as an activist colleague.)

What makes this judge bipolar is that he has a consistent tendency to alternate between the ideologies over time. Suppose you are a practicing lawyer appearing before him with an ideologically charged case at a moment when he has come out as a liberal several times in a row. There is a much greater probability that he will go for a conservative rule interpretation in your case than there would be if that very same case had come before him at the end of a string of conservative opinions.

There may be many particular aspects of the case that you can predict will appeal to his particular judicial temperament, or his previous pattern of alternation between the sides. But it is also true that his judicial temperament has a general structure independent of these particulars: he is bipolar. He does not in fact belong to an ideological camp. But like the difference splitter, we predict his behavior on the basis of our knowledge of other people's ideological productions. The productions of others define the alternatives between which he fluctuates. Unlike the difference splitter, he "lets himself go" and participates actively in constructing the very ideological positions of which he is at

the same time "independent." His liberal opinions influence the evolution of the liberal "side," just as his conservative opinions influence conservatism. But having jumped in, he backs off. Being independent turns out to be another form of compromise.

#### IV. INTERPRETING STRATEGIC BEHAVIOR

We might, of course, respond to a recognition of strategic behavior by trying to figure out, in each case, what the true interpretation was, as opposed to that which happened to lie along the strategic path adopted by the constrained activist, the difference splitter, or the bipolar judge. We might ask, in other words, how the rule chosen is different from what it would have been had judges "just interpreted" the legal materials.

I have argued elsewhere that it is methodologically incoherent and practically impossible to make the "just interpret" analysis unless one has what we lack: some other criterion of legal correctness than the plausible deployment of the argumentative tools that legal culture makes available to judges trying to generate the effect of legal necessity.<sup>5</sup> Lacking any independent criterion, I don't think it makes sense to ask how these judges' outcomes differ from what they would have been had they "just interpreted" the law.

As I indicated in the Introduction, my plan is to use my three models of the judge as ideological strategist as elements in a theory of the difference it makes to liberal/conservative conflict that so much of our law is made through an adjudicative process within which liberalism and conservatism are not supposed to play a role. The idea is to contrast the status quo not with an imagined situation in which judges "just interpret," but with an equally imaginary situation of legislative supremacy.<sup>6</sup>

With this in view, the rest of this Essay takes up two problematic aspects of the description I've given of judicial strategy. The first question is whether the idea of ideology as liberalism or conservatism can work as an explanation of what judges do, and the second question is whether it is possible to account for

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5. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 547-48 (1986).

6. My basic ideas are (a) that ideologically motivated legislative regime change is moderated by the work of opposing constrained activists, difference splitters, and the bipolar when the regime has to be judicially elaborated, (b) that fractions of the liberal and conservative intelligentsia are empowered through adjudication to colonize parts of the legal rule structure that they couldn't influence through legislation, and that (c) the denial of ideology in adjudication has a diffuse legitimating effect.

constrained activist, difference splitting, and bipolar activity without resorting either to the idea of conscious deceit or to the idea of utter unconsciousness.

A. *The Critique of Ideology as an Explanatory Concept*

My use of the notion of an ideology in my presentations of the constrained activist, the difference splitter, and the bipolar judge is obviously problematic. The ideological projects of liberal and conservative intelligentsia figure in my discussion as a "behind" that is "revealed" when we discover the plasticity of legal reasoning.<sup>7</sup> But the mere substitution of ideology for legal reasoning as an explanation of outcomes is open to the critique that ideology is no more determinate than what it replaces.

In other words, my approach seems to require us to believe that there is an important difference between understanding legal outcomes as the result of applying a neutral method of adjudication and understanding them as the result of pursuing ideological projects. The strategy seems to be one of exposing the indeterminacy of the discourse's surface level in order to get at the "real" level, which is ideology.

But the ideologies are themselves just "texts" that each individual judge will have to interpret before she can decide what is "required" by her presupposed political commitment. Saying that the judge is a liberal constrained activist doesn't tell us what liberalism "requires" in any particular case because of the possibility of strategic behavior within the process of ideological interpretation.

The judge will consult the "principles" and "values" that supposedly underlie or inform liberalism, by contrast with conservatism, and then consider some list of canonical examples of the principles and values in action. The problem is that the ideologies as systems of discourse, and the people who develop them to meet the endless flow of new issues, are open to critique as internally inconsistent or contradictory. While within each project there is a constant push to reconcile contradictions and develop theories of what makes or should make the ideolo-

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7. I hope the reader will remember that I did not attempt to prove that legal reasoning could never produce closure or that the experience of boundness is mere illusion. My goal was only to show that there are gaps, conflicts, and ambiguities, that these are a function of legal work as well as of the materials the judge works with, that the experience of "freedom" to shape the legal field is common, and that one cannot say with certainty that when closure occurs it is a product of a property of the field rather than of the work strategy adopted under particular constraints.

gies internally coherent, there is no consensus either about how to do this or about whether it has been achieved.

In this situation, it makes sense to ask what "determines" the liberal or the conservative position on a new issue: say, on-campus hate speech. If each ideology employs the same very abstract principles (rights, majority rule, the rule of law, Judeo-Christian morality, free market with safety nets, for example), and each switches back and forth between a small set of lower level arguments (for and against paternalism, for substantive or formal equality, for example), then it would appear that it will be an open question how to apply the ideology when a new case arises.

Unfortunately, this understates the difficulty of deciding what liberalism and conservatism "are." It is not only that the sides switch back and forth, say between favoring paternalism in the bedroom and self-reliance in the boardroom, etc., it is also that liberals and conservatives are each committed to not "going too far" to the left or right.<sup>8</sup> Liberals carry their commitments to substantive economic equality and formal status equality only to a point, and at that point they quite abruptly "flip" and re-join their adversaries in the name of moderation.

They begin to speak, say, of children, in a rhetoric that is paternalistic and sentimental rather than rights oriented and egalitarian, and they speak of the dangers of "leveling" or "class war" or even mere "redistribution" in economic policy. At this point, they sound like conservatives, except that they "draw the line" further to the left. Conservatives are the same on the other side: at some point, when the safety net has been, from the liberal point of view, all but abolished, conservatives draw back from the abyss and adopt the very welfare state rhetoric they have been busily denouncing as crypto-communist.

This means that there are two dimensions of potential incoherence that constantly threaten each camp: There is (a) the problem of reconciling positions in different domains (for conservatives, their antipaternalist economic rhetoric with their paternalist social issue rhetoric) and (b) the problem of explaining, within a given domain, why they draw a particular line rather than "taking the position to its logical extreme" (for liberals, why they don't favor the outright redistribution of wealth, for example).

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8. NORBERTO BOBBIO, *DESTRA E SINISTRA: RAGIONI E SIGNIFICATI DI UNA DISTINZIONE POLITICA* (Donzelli ed., Rome 1994).

In short, the occasions for strategic behavior in choosing an interpretation of one's own ideology will be at least as numerous as those for choosing an interpretation of the legal materials. Suppose the issue is university regulation of hate speech on campus. There is the liberal commitment to civil liberties and the liberal commitment to racial justice. There are all the particular instances of liberal defense of communist speech, however "hateful," and of liberal advocacy of strong rules against racial and sexual harassment in the workplace.

Suppose that on first examination the liberal constrained activist sees his own liberal ideology as "requiring" invalidation. If she "doesn't like" this result, she can go to work to restate the liberal principles and values and reconfigure the liberal precedents so that the outcome changes. Maybe she will be unable to come up with a convincing liberal case against the regulations and will end up feeling "bound" by ideology to a result she doesn't like. But maybe the hard ideological work will lead to a sense that the case can go either way for a liberal, or a sense that any good liberal has to support the regulations.

Of course, we could say that liberal ideology "really" required either one result or the other. A judge might think that liberalism required regulation of hate speech, but we might conclude that he would be wrong because liberalism prohibits it. If we had a lot of confidence that the ideologies have this kind of bite when correctly applied, we could use the notion of an ideological project as an explanation of judicial outcomes even though we might have to acknowledge that judges sometimes make mistakes.

The internal critic of this use of the notion of an ideological project may not be able to "prove that it can't be done." But she will point persistently to internal flaws in extant demonstrations of how liberal or conservative principles apply in practice. Then there are all the cases in which supposedly determinate liberal reasoning is unresponsive to alternative versions of liberalism that have apparently equal claim to legitimacy.

Within the ideological "camps" there are diverse groups with different positions, and even different "subideologies." We sometimes see this in terms of the underlying communities on which they draw. Liberal Republicans of the old WASP gentry kind, with their progressivism on civil rights and social issues combined with probusiness, antiregulatory sentiment, are very different from libertarians, Jewish neoconservatives, white middle American social issue fundamentalists, and black conservatives. Feminists, Rainbow coalitionists, civil libertarians, liberal union



activists, and environmentalists, to name a few, coexist within the liberal camp.

My definition of an ideological project allows for conflict or incoherence among the theoretical premises, and for inconsistency among practices and between theory and practice. It also allows for fluid "membership" in the project and for disagreement about who is in and who out. None of this is inconsistent with the experience of closure, but it certainly makes it implausible to claim that liberal or conservative ideology will yield a tighter explanation of outcomes than neutral interpretation of the law.

Indeed, the parallel between ideology and legality suggests an inquiry into how people's false belief in the determinacy of their own ideological positions inflects the course of democratic politics. And then we could go behind ideology to try to find out how judges decide, for example, that they "don't like" being opposed to regulation of campus hate speech, even though it at first appears to them that their own liberalism requires that opposition.

For example, we might follow Jerome Frank and resort to explanation in terms of "judicial temperament."<sup>9</sup> Then we could explain temperament in terms of childhood experience. But each level, from legality to ideology to temperament, requires "the subject" to interpret and permits interpretive strategy based on the level behind. (Though at each level there are also experiences of closure, of constraint by the text.) At each level, the attempt to persuade us that what happened was caused or required by the text will come up against the objection that the same text could have yielded the opposite outcome had the actor pursued a different interpretive strategy.

It might at first appear that the infinite regress of interpretation simply invalidates each "behind" in turn, so that "explanation is impossible." This doesn't seem right to me. To treat the ideologies as "projects" is to acknowledge or assert the incoherence of their theory components, hoping that we will nonetheless be able to distinguish liberalism and conservatism for our particular purposes because there are factors other than internal coherence that "stabilize" them.

By a stabilizer, I mean something that contributes to our sense that we are talking meaningfully when we say that someone "is" a liberal, or that a position "is" liberal, or that "liberals,

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9. JEROME FRANK, *LAW AND THE MODERN MIND* 69-76, 111-14 (1930).

but not conservatives, face a hard choice on a particular issue." The basic idea is that the project is an entity stable enough to be useful in analysis because it is more than a theory: it is also a self-conscious group activity with a history and a practical dimension.

Some of the stabilizers that allow us to think we know what we are talking about when we talk about liberalism and conservatism are the following:

(i) Self-conscious consensus: It's liberal to come out a particular way on a new issue if liberals say it's liberal, and we are reassured if conservatives say it's liberal too.

(ii) History: It's a liberal position if people who called themselves liberal thought at some point in the past that it was entailed by liberal premises and incorporated it into their program as such.

(iii) Structural position vis-à-vis alternatives: It's liberal if it is situated between a well-defined conservative position and equally well-defined communist or anarchist positions; it's conservative if it is situated between a well-defined liberal position and fascist or ultrafree market positions.

(iv) Local coherence: It's liberal if it is so close to a lot of similar, well-defined liberal positions that it would be bizarre to go the other way, given how much is settled in the vicinity.

I hope it's obvious that I'm not claiming anything faintly "scientific" or "objective" about this way of using the terms ideology, liberalism, and conservatism. There will be plenty of room for disagreement, after meticulous application of all the tests I've laid out, about whether any particular person or position is one thing or the other.

For the observer pursuing the critical social theory project, what needs to be explained is *the event* (the judicial choice of a rule), and each level of textuality "behind" the event is helpful. As critical observers, we sometimes feel we "know what is going on," to the extent of explanatory closure, through the process of multiplying the levels available to make sense of the judge's action. As long as we don't expect more of the effort to explain than these experiences of closure, the infinite regress presents opportunities for richer description and more intelligent response, rather than a methodological disaster.<sup>10</sup>

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10. No *rationalist* version of explanation can be "saved" by interpolating a "text/event" distinction at the last minute. But that is not the goal. The point in the text is that we will sometimes reach explanatory closure, in the sense that we feel constrained, by our theory of why the case came out the way it did, to respond in a

To my mind, this kind of critique is threatening, not to explanation in the abstract, but to the particular kind of explanation through ideology that leftists have wanted, for leftist reasons, to build into critical social theory. My hypothetical attack on my own use of the concept of ideology is just the latest incident in a continuing attack on this leftist intention. My theory was designed to withstand this attack, in the manner of the last paragraph.

I think, in other words, that the moderation, empowerment, and legitimation effects can be plausible consequences of adjudication even if it is conceded that liberalism and conservatism are no more determinate as explanations of outcomes (rule choices) than the rule of law, and even if we won't do any better by going back another level. The *occasional* sense of explanatory closure that this kind of ideological interpretation of adjudication produces seems to me a plausible basis for doing things in pursuance of the left project, even if it will often be the case that liberalism and conservatism are useless for more ambitious explanatory purposes.

#### B. *A Psychology of Strategic Behavior*

We could treat my descriptions of typical judges as empirical hypotheses about patterns of outcomes. We might try to verify them using our own "external" definitions of liberal and conservative outcomes, making case-by-case determinations of what we think the constraints imposed by interpretive fidelity "really" were, and then identify judges as constrained activists, difference splitters, and bipolar without any reference at all to their states of mind while judging. It should already be clear why this doesn't seem a plausible course to me. First, external definitions of liberalism and conservatism are hard to come by. Second, I don't think it is possible to determine what the constraints imposed by interpretive fidelity "really" were.

Alternatively, we could see what the judges do as conscious strategy, or as strategy pursued truly unconsciously, as repressed strategy. I think each of these alternatives is sometimes useful. But I have chosen a fourth path. In my description the judges

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particular way. If we feel constrained to the conclusion that the judge chose as she did because she felt constrained by her understanding of her own liberalism, then it will make sense to offer her an alternative version of liberalism, to invest energy in internal critique. If we think she was bribed, or hates the particular class of plaintiffs, this strategy will appear a waste of time, *and we will act accordingly*. This pragmatist version of explanation is enough for me.

are half-conscious. This is the characteristic posture of mediating a conflict by denial, or "bad faith." Such a description seems to me more realistic as a matter of fact than either consciousness or unconsciousness, but there is more at stake in this choice of strategy than the endlessly intriguing question of what judges think they're doing.

Another reason for insisting on the psychology of denial or bad faith is that if *judges* are able to operate without confronting openly the problematic character of their role, it is more plausible that no one else confronts it either. The ideological element is a kind of secret, like a family secret—the incestuous relationship between grandfather and mother—that affects all the generations as something that is both known and denied. This is a collective, social psychological phenomenon with political consequences (the moderation, empowerment, and legitimation effects). It could occur even if judges were conscious ideological manipulators deceiving a public that wanted to be deceived, but it would then have the instability of any conspiracy that involves many thousands of people and has to constantly renew itself by recruiting new Grand Inquisitors.

My way of looking at it is to start with the psychology of denial in an individual judge and then suggest mechanisms by which the psychology of the actor in the story gets adopted by the audience for the action. Judges keep the secret, even from themselves, in part because participants in legal culture and in the general political culture want them to. Everyone wants it to be true that it is not only possible but common for judges to judge nonideologically. But everyone is aware of the critique, and everyone knows that the naive theory of the rule of law is a fairy tale, and those who know fear that the sophisticated versions of contemporary jurisprudence aren't much better.

### *1. Denial: Not Just a River in Egypt*

What does it mean to refer to the judge as "denying"? There has to be something more involved than a familiar speech act: When asked whether his performance was influenced by ideology, he responded, "it was not." Denial in the sense that interests us is a speech act motivated in a particular way. We impute denial, meaning that we choose a psychological interpretation of the act. As with the initial imputation of an "ideological motive" to a judge, there is no way to "prove" or "verify" that the judge is denying.

This usage of "denial" originated in psychoanalytic theory, in Freud's interpretation of jealousy,<sup>11</sup> for example. However, Anna Freud gave it a whole new lease on life,<sup>12</sup> and it has passed into the American popular discourse of daytime talk shows and twelve-step programs ("He's been in denial about his drinking for years" or "She's been in denial about his cheating for years"). My version is adapted from both these sources, and from the related ideas of bad faith and cognitive dissonance, for the particular purpose at hand. This kind of interpretation of judicial psychology has a legal realist genealogy.<sup>13</sup>

We use the word denial as an interpretation of a piece of behavior that is not itself in question: we agree about what was said or thought, and want to figure out what was "behind" it. We feel the need to go "behind" because we (the interpreter and the audience for the interpretation) agree on two things.

First, we agree that what the actor has said is a misrepresentation of his own desire, emotion, opinion, or intention, or of important external facts about his situation, but in the special sense of a "refusal to acknowledge," "refusal to recognize," "refusal to admit." The denial requires something like "refusal" because it presupposes that there is evidence for the thing denied, or an assertion of it by someone other than the actor. When I say that judges "deny" the role of ideology in their decisions, it is implicit that, in my view, ideology does play a role in fact—the denier is always wrong.

Second, we agree about what the misrepresentation is *not*:

(i) It is not merely conventional, as when you ask the termi-

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11. See SIGMUND FREUD, *Certain Neurotic Mechanisms in Jealousy, Paranoia and Homosexuality*, in *SEXUALITY AND THE PSYCHOLOGY OF LOVE* 151, 160-70 (Philip Rief ed., 1963).

12. 2 ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENSE*, *THE WRITINGS OF ANNA FREUD* 69-92 (Cecil Baines trans., International Univs. Press, Inc. 1966) (1937).

13. Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 297 n.6, 298 n.7 (1990). My approach differs both from the earlier realist versions and from his not in my definition of denial, but in the specification of what is being denied and why. Altman's specific psychology of judging seems to me largely vitiated by his failure to distinguish clearly between (a) "applying a rule" and (b) "following the law" in the work of interpretation (rule choice), and by his related failure to distinguish clearly between what he calls activism and what he calls manipulation. His development of the parallel between defense mechanisms and cognitive dissonance is helpful, but there doesn't seem to be enough difference between the vocabularies to merit incorporating cognitive dissonance theory into the discussion, beyond the mention in the text. Altman's reconstruction of "the CLS position" on indeterminacy, *id.* at 333-47, is even more outlandish than his self-described "caricature" of my position, *id.* at 309 n.48.

nally ill patient "how are you?" and he responds, "I'm fine, how are you?" When judges write their opinions in the language of legal necessity, this is just a convention; when we say that they are engaged in denial, we mean that they at least partly believe the convention.

(ii) It is not a conscious, deliberate, strategic misrepresentation, not a lie designed to deceive an audience without the speaker having any belief at all in its truth (judges are not consciously trying to deceive us about ideology in adjudication).

(iii) It is not a cognitive glitch or random error. We may reach this conclusion because we have more data than the statement itself, as in, "I am not mad,' he screamed, veins bulging." Or the speaker might repeat the misrepresentation after "dismissing" feedback or new data that the audience believes would "normally" cause him to correct it, new data in the form, for example, of a devastating critique of adjudication.

If these conditions are fulfilled, it is common practice to look for a "psychological" explanation. By this I mean an explanation that attributes the persistence of the misrepresentation to the needs or desires of the speaker. The kind of need or desire in question is both specific and complex. We call it denial when we have the idea that if the speaker recognized the truth about an external fact, or about his own desire, emotion, opinion, or intention, he would experience painful anxiety. The motive for denial is to prevent or get rid of this anxiety.

There is yet another level, another "behind": what causes the anxiety, or would cause it absent denial, is an intrapsychic "conflict," in the sense of a painful choice. It might be conflict between contradictory desires, or between conscience and desire, or between a desire and fear of the consequences of acting on the desire, or just between contradictory versions of reality, where that choice has important implications, and so on.

In common usage, denial is the verbal manifestation of a particular kind of wishful thinking. The wish is that an anxiety-producing conflict, one the audience has decided is "real," should disappear. The speaker resolves the conflict and dispels the anxiety by "falsely" getting rid of one of the two conflicting elements, for example by denying anger in a situation where one ought not to feel anger, or by denying that one feels a compulsion to drink because admitting it would require one to decide whether or not to stop.

## 2. *The Three Types of Judges as Deniers*

What follows is an imaginative reconstruction of my three

types of judges as deniers. It is an interpretation based on the evidence of opinions read in their historical context, plus a little time spent at judicial conferences. I am not saying that all judges deny the role of ideology, or that those who deny do so all the time, or even that all judges are influenced by ideology. As I said above, some judges are better understood as clueless, or as devoted to agendas that aren't ideological at all in the sense in which I've been using the term. Others are best understood as random, or as operating on the basis of truly unconscious motives that are hopelessly complex and also inaccessible. And in many, many cases, judges experience themselves as constrained by the text, so that their liberal or conservative or difference splitting or bipolar strategic inclinations turn out to be irrelevant to the outcome, at least from their own point of view.

So long as we suppose that a significant number of judges are constrained activists, difference splitters, and bipolar, and that they have made a lot of important law that is best accounted for by these ideological postures, the analysis should be interesting. Even if you think that there is always a legal right answer that is the same whatever your "personal" ideological position, it should be interesting if you also think that some judges some of the time behave in the ways described.

The *constrained activist* accepts the constraint of interpretive fidelity. But when she thinks this obligation will require her to reach an unjust result, or when she sees open texture, she works to change the meaning of the materials in the direction of what we have decided is her own ideology. When she writes her opinion, she obeys the convention that requires her to present the outcome as fully determined by the materials and her reasoning. To the charge that the rule of law means no ideology in judging, her reply is an opinion that denies that ideology had anything to do with it. She offers no account of the role of ideological strategy in her work process.

I've had conversations with three sophisticated constrained activist judges, two liberal and one conservative, in "private," so to speak. The two liberals denied, in the mode of Cardozo, that ideology played any role at all in their decisions, although they heartily agreed that technical reasoning was often indeterminate; that policy was a constant influence; that they were perceived as judicial liberals and often as "partisan"; and that liberals, but not conservatives, had supported their most important judicial initiatives.

Both liberal judges also said that they tried to shape the law "in response to the development of the society." They

thought liberal responses to sociolegal problems, such as products liability or landlord tenant issues, corresponded better than conservative ones to the "needs" of society. They therefore chose those responses, with humble recognition that they might well be wrong. This didn't make them ideological actors, in their own minds, because they remained free agents, deciding each policy question on the merits, without any loyalty or inner commitment to the ideology they were implementing over time. The conservative judge was much more "cynical." He saw his liberal brethren as unselfconscious or hypocritical and gave a sardonic, but also uneasy description of his battles with them.

The liberal constrained activists seem to me to be in denial or bad faith because their explanation of how they are independent of ideology is an evasion of rather than a response to the critique. Both liberals and conservatives, like the activist judges, are formally committed to putting into effect the rules that they respectively see as responding to the evolution of society and meeting its needs. What divides them ideologically is that they have sharply different interpretations of "society," "evolution," and "needs." We don't hesitate to call a person a liberal or a conservative with no more basis than that they consistently adopt the interpretation that one or the other "camp" has evolved, over time, as an application of the shared general principles (rights, majority rule and the rule of law, Judaeo-Christian ethics, market economy with safety nets) to each particular question that implicates social need and development.

True, these judges could be ideological in a stronger sense. They might "believe" in liberalism or conservatism as doctrines and be committed to working both to improve them and to ensure their practical triumph in the world. It is fair for them to deny that they are ideologues or partisans in this stronger sense. But the charge that concerns us in the critique of adjudication is not that judges are committed, but merely that ideology influences adjudication.

If the judge admits that over time she has consistently found liberal solutions to be more just than conservative ones, and consequently has chosen to make them into law, she has admitted enough to validate the critique. The bland persistence in affirming independence when one's vote is highly predictable is a perfect example of bad faith.

There are two kinds of *difference splitters*. One type is an ideological moderate and splits the difference as a constrained (centrist) activist. This judge's legislative preferences correspond to the results he works to bring about through adjudication. He



is a denier and in bad faith to the extent he claims that all he is doing is "calling them as he sees them," without any commitment to a camp, because what we mean by ideological influence in adjudication is consistent orientation to a set of results, rather than partisanship or true-believerism.

The more interesting type of difference splitter has internalized a strong norm against activist behavior of any type. His idea of his role is that it forbids acting like his colleague, who is a "knee-jerk conservative," and also like his colleague who is a "knee-jerk centrist." He believes in one of the various theories of his role that excludes an ideological motivation for the work of legal reasoning, even if constrained. He may be a reasoned elaborator of the Hart and Sacks school, or a Dworkinian or a positivist or a feminist pragmatist, or he may adhere to the activists' view that the judge should make law evolve to meet the "needs of society."

His practice does indeed represent a version of neutrality, since his "personal" or legislative politics, which may be liberal or conservative or centrist, don't influence how he comes out. He splits the difference even when he thinks that result is monstrous and would never vote for it if he were a legislator. Ideology has no internal, commitment-based influence on his behavior. It influences him only because he allows the ideological positions of others to determine his position by setting up the difference that he splits.

But not even the most revisionist advocates of the rule of law believe that judges should consistently choose the path of ideological moderation, against their intuitions of justice when necessary, but rather that they should be in some sense nonideological. From the point of view of the critique, ideology is no less an influence if it comes in only through the back door, so to speak, by structuring his alternatives.

The *bipolar judge*, like the difference splitter, comes in two variants. He may be an activist by personal or legislative commitment, first on one side and then on the other. In this case he is in pop psychological terms "schizophrenic." He is open to the critique that he is in bad faith on each side of his split personality because on each side he is an activist. Or he may be best interpreted as acting on an implicit but untenable theory of judicial neutrality: to wit, that so long as he isn't consistently liberal or conservative he isn't ideological.

Like the other two, he wants to be interpreted as doing just what he is supposed to, that is, calling them as he sees them, without an ideological commitment. He is exempt from the

charge of having a commitment to moderation because in any given case he can go all the way with the liberals or the conservatives. The way he decides a particular case is to keep an open mind as long as possible, listening attentively to the arguments on both sides, starting from his own understanding of himself as neither a liberal nor a conservative nor a moderate, but a "free agent."

This is his problem: he has a commitment to his idea of himself as a free agent, but he would doubt that commitment in himself if he found himself coming out too often on one side or the other. And since he is proud of his independence and thinks others recognize it, he may be influenced not just by his own but by what he thinks his audience's ideas are about what proportion of liberal and conservative decisions you need in order to sustain the free agent claim.

This type of bipolar judge differs from the constrained activist because he doesn't start out asking whether he would favor the obvious interpretation of the rule if he were a legislator. He doesn't see his role that way at all. What he does is to listen to counsel or other judges putting forward their arguments for ideologically organized alternatives and try to figure out which one best "fits" the body of materials. He adopts first one point of view and then the other. Finally, he commits himself. But the commitment is ideologically patterned over time so as to keep him independent.

The nonactivist difference splitter, as I have described him, is an ideological moderate who believes that moderation is not ideology. The nonactivist bipolar judge calls them as he sees them, but turns out to see them under the constraint that he must be able to appear to himself, over time, as neither a liberal nor a conservative, no matter how he would react to the merits without that constraint.

Both types are classic bad-faith actors, because they deny both to themselves and to others something that they know perfectly well is going on. They couldn't possibly accomplish their highly patterned strategic interventions unless *some* part of their minds, some part very close to the surface, was constantly picking up the ideological implications of "every move they make." But they have a much trickier, more sophistic response to the charge that they are ideological than the constrained activist has. They point to their difference splitting or long-run bipolar opinions and ask us to believe that they are actually outside ideology.

### 3. *Psychologizing vs. Dialogue*

We don't get to psychologizing American judges until we have decided that, at least for the moment, there's no point in continuing our investigation of their views on the merits, and, indeed, that there is no point in further dialogue with them on their own terms, because, for the moment, it is more interesting to figure out why they say what they say, on the assumption that it's wrong, than to investigate further whether it is wrong. It can be pretty infuriating to be treated this way, if you see your persistence in your view as well founded, indeed as an example of the "reality principle" at work.

But the mere adoption of the psychologizing posture doesn't close off the possibility that there is no misrepresentation, that the view we're about to psychologize is correct. We can keep an open mind on the merits, see what we get when we psychologize, and go back to debate on the merits the next time a judge or a legal theorist produces an account of a decision, or of adjudication in general, that claims to have excluded the ideological. That's where I am now: I don't claim to have shown that it is impossible to exclude the ideological, or to have shown that it is always present, etc. But I don't believe the accounts that say either that it always can be or that it is absent. So for the time being it seems worthwhile to psychologize.

And, of course, it's easy enough to psychologize in the opposite direction. Radicals have commitments to the presence of ideology in adjudication that it would be hard to give up. From my point of view, the insistence that law is always and everywhere ideological, "socially constructed through and through," etc., involves as much denial (of the mechanical) as the opposite position. I see myself here as the representative of the reality principle, in the form of my own theory, which is as hostile to global critiques of objectivity in law, whether from the old Marxist or the postmodern angle, as it is to the claim that judges can always be and are in fact usually neutral.

## V. JUDGES AS DENIERS

### A. *Is Denial Unconscious?*

When you say "I'm not mad," or "My ideology had nothing to do with it," and we think you're denying, rather than being polite, lying, or making a random mistake, it's hard to decide what to call your relationship to the true fact, your true intention, your true emotion.

When we are mistaken about the facts, in a random, unmotivated way, we say that we are "not conscious" of the true facts. In lying, we are "conscious" of the facts. In repression, as it figures in Anna Freud, the repressed impulses are really and truly "gone": "But the ego of the child who has solved her conflicts by means of repression, with all its pathological sequels, is at peace."<sup>14</sup> Denial is a much less drastic mode of defense, which takes a less massive investment of energy, and, like the other nonrepressive defense mechanisms, has "to be brought into operation again whenever there is an accession of instinctual energy."<sup>15</sup> The judge has to deny his ideological role every time someone asserts it, or evidence suggests it, rather than being able to get rid of it once and for all by a single act of repression.

But the adjective "unconscious" seems very odd applied to denial as I've defined it. There is a problem in saying you're unconscious of a fact or of an inner state when you muster a lot of energy to "keep from knowing" it. When we say that we are dealing with motivated error or wishful thinking we are saying that there is some part of the psyche that registers the possibility of the unpleasant truth, and then mobilizes to keep from knowing it. The very thing we mean by denial in the psychological sense is that what is involved is more than the mere speech act, and the "more" we interpret as a strategy to deal with an anxiety-producing conflict. This presupposes that the "strategist" in the story knows more than the obtuse performer of the speech act of denial. As Sartre puts it:

To be sure, the one who practices bad faith is hiding a displeasing truth or presenting as truth a pleasing untruth. Bad faith then has in appearance the structure of falsehood. Only what changes everything is the fact that in bad faith it is from myself that I am hiding the truth. Thus the duality of the deceiver and the deceived does not exist here. Bad faith on the contrary implies in essence the unity of a *single* consciousness. . . . It follows first that the one to whom the lie is told and the one who lies are one and the same person, which means that I must know in my capacity as deceiver the truth which is hidden from me in my capacity as the one deceived. Better yet I must know the truth very exactly *in order* to conceal it more carefully—and this not at two different moments, which at a pinch would allow us to re-establish a semblance of duality—but in the unitary structure of a single project. How then can the lie subsist if the duality which conditions it is

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14. FREUD, *supra* note 12, at 48.

15. *Id.* at 50.

suppressed?

. . . We have here an *evanescent* phenomenon which exists only in and through its own differentiation. To be sure, these phenomena are frequent and we shall see that there is in fact an "evanescence" of bad faith, which, it is evident, vacillates continually between good faith and cynicism: Even though the existence of bad faith is very precarious, and though it belongs to the kind of psychic structures which we might call "metastable," it presents nonetheless an autonomous and durable form. It can even be the normal aspect of life for a very great number of people. A person can *live* in bad faith, which does not mean that he does not have abrupt awakenings to cynicism or to good faith, but which implies a constant and particular style of life. Our embarrassment then appears extreme since we can neither reject nor comprehend bad faith.<sup>16</sup>

Sartre's purported way out of the dilemma doesn't seem to me to work. But for our purposes it seems enough to say that the denier is half-conscious, or conscious and unconscious at the same time, or that the ego wills its own unconsciousness of something that it must therefore in some sense know.

#### B. Denial as a Collective Phenomenon

The idea that the legal actors in a given legal culture can engage in collective denial with respect to the true nature of legal institutions is one with a long pedigree in legal history and sociology. The classic version of the problem is that of explaining "legal fictions." Here, from Henry Maine's *Ancient Law*, is a description of the phenomenon of denial in Roman law:

It may be affirmed then of early commonwealths that their citizens considered all the groups in which they claimed membership to be founded on common lineage. What was obviously true of the Family was believed to be true first of the House, next of the Tribe, lastly of the State. And yet we find that along with this belief, or, if we may use the word, this theory, each community preserved records or traditions which distinctly showed that the fundamental assumption was false. . . . Adverting to Rome singly, we perceive that the primary group, the Family, was being constantly adulterated by the practice of adoption, while stories seem to have been always current respecting the exotic extraction of one of the original Tribes and concerning a large addition to the houses made by one of the early kings. The composition of the state, uniformly assumed to be natural, was nevertheless known to be in great measure artificial. This conflict between belief or theory and notorious

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16. JEAN-PAUL SARTRE, BEING AND NOTHINGNESS: AN ESSAY ON A PHENOMENOLOGICAL ONTOLOGY 49-50 (Hazel E. Barnes trans., 1956) (footnote omitted).

fact is at first sight extremely perplexing; but what it really illustrates is the efficiency with which Legal Fictions do their work in the infancy of society. The earliest and most extensively employed of legal fictions was that which permitted family relations to be created artificially, and there is none to which I conceive mankind to be more deeply indebted.<sup>17</sup>

A psychological interpretation of denial has two quite distinct parts. The first is the decision to interpret the speech act as a misrepresentation that is not merely conventional, and neither a lie nor a random error. This is Maine's "conflict between belief or theory and notorious fact." The second is to choose a particular conflict or conflicts as the cause of the anxiety that denial gets rid of in the particular case. In the case of adjudication, it is one thing to decide that the denial of the ideological in judging is a misrepresentation of this kind, and quite a different thing to successfully interpret the denial as the product of specific conflicts. Maine, in the quotation above, makes no serious effort at explanation on this second level, appealing instead to the "efficiency" of fictions in the "infancy of society."

The conflicts that plausibly motivate denial in the theorists of Roman society or in judges and their public are not the highly particularized vicissitudes of the instincts that sometimes seem useful in explaining neurotic symptoms or even severe individual pathology. The modern pop psychology of defense mechanisms, however, isn't tied to individual life history in this way. To my mind, what made Anna Freud not merely a competent synthesizer of her father's work but an important innovator was, first, her sharp distinction between repression and less drastic defenses, second, the normalization of the defense mechanisms as factors in psychological life, and third, her insistence on a long list of different kinds of conflict against which we defend.<sup>18</sup>

These three moves make possible our pop psychology of defenses, which has nothing particularly "Freudian" about it. In this version of ego psychology, as in that of Sartre, and in cognitive dissonance theory, defense is no longer closely tied to sexuality in general or to the Oedipus complex in particular. Defenses are a technology of self-protection, but at the same time the mechanisms through which the subject constructs a "truth."

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17. SIR HENRY J.S. MAINE, ANCIENT LAW 76-77 (Ernest Rhys ed., J.M. Dent & Sons, Ltd. 1917) (1861).

18. See FREUD, *supra* note 12, at 44-50.

Their use in understanding individual or collective phenomena is perfectly consistent with poststructuralist epistemological and ontological skepticism about a reified unconscious or a "reality principle."<sup>19</sup>

If many judges are denying the role of ideology in their decision processes (and some of them are lying), it seems plausible to look for something common to their situation that produces a conflict, rather than to a million idiosyncratic versions of the Oedipus complex.

### *C. Denial as a Response to Role Conflict*

It is a very common intuition that if judges deny the ideological in their decision processes, when in fact ideology is present, it is because they are violating a role constraint and don't want to admit it. This fits the behavior of constrained activists, difference splitters, and the bipolar into the common mold of weakness of will or cheating, things all of us deny all the time.

I don't mean, myself, to deny that judges sometimes experience constraint by the text, and then decide against the constraint, violating their oath of fidelity to the legal materials. It is even possible (who knows?) that the main impact of ideology on judicial lawmaking is through this kind of behavior. To the extent that is the case, the study of judicial lawmaking's impact on our political process is the study of how judicial deviance, or norm violation, plays out in the moderation, empowerment, and legitimation effects I mentioned above.

But it seems obvious to me that there is more to the denial of ideology in adjudication than a cover-up of deviance. It seems obvious that the constrained activist, the difference splitter, and the bipolar judge are responding to a bind. It is true that many, many people condemn them out of hand, on the ground that they should "just say no" to ideology. In this view, the minute they are influenced in their decisions by their own or anyone else's legislative preferences (a.k.a. personal ideologies), they are out of line.

We should condemn them, in this view, even though they accept the rule of law as a constraint, meaning that where they

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19. The pop psychological usage is nonetheless different from hers in at least three important ways: for her, denial always refers to anxiety-producing external facts, whereas repression is directed at anxiety-producing internal impulses; denial is a normal mechanism of defense only in childhood, becoming symptomatic in adulthood; and she was a true believer in Freud's basic concepts, rather than agnostic in the post-Freudian mode.

experience a particular rule interpretation as unbudgeable by argument, they declare it the law even though they think that as a legislative matter it is wrong. And we should condemn them even though, when there is open texture, they don't impose the rule interpretation they prefer as a legislative matter unless they can argue in good faith that it is the solution supported by the most plausible legal argument.

This is all very well, but in the conventional view it is not enough: they should categorically exclude their ideological preferences, and "stick to the law," or "just interpret the law." The rule of law is not a constraint, in this view, but a source of guidance. The question is whether the judge accepted the guidance, no matter how difficult it may have been to figure out what it was, or, on the contrary, took guidance from something else.

The alternative view—historically associated with British positivism and radicalized in legal realism and critical legal studies—is that the judge faces not a conflict between his role and his illegitimate desires, but a genuine "role conflict." There is a contradiction between the norms that are supposed to govern his behavior. In this view, the motive for denial is not guilt at deviance, but the anxiety produced by the dilemma of not being able to do the right thing no matter how hard you try, because you are being told to do two opposite things at the same time. The denial of the ideological resolves the conflict by making it appear that the role definition is coherent rather than contradictory.

Again, I am not arguing that all judges decide ideologically, and I think it likely that some judges have nothing to deny. These judges don't experience the conflict that my three types experience. My much more limited claim is that it is plausible that constrained activists, difference splitters, and the bipolar experience role conflict which motivates denial, as well as or rather than a conflict between their will to ideological power and their roles.

To say they experience role conflict is to say that it would be problematic for them to exclude ideology because there is something in their understanding of the judge's role that seems to push to include it. I think that in fact judges, and actors in a range of similar positions, do often experience a conflict of this kind—roughly between the overarching general goal or standard proposed to them and the particular rules that supposedly further the goal but sometimes seem to conflict with it. For judges, the goal is "justice under law," and the conflict is between that



idea and the categorical exclusion of the "personal," in the sense of the ideological, from the decision process.

For these judges, I imagine, it doesn't seem possible to say that justice under law means no more than law application. First, they are very much aware that their task is to decide "questions of law," meaning questions of rule definition, and that these are questions of interpretation, rather than of application of rules to disputed facts. Second, they are very much aware that "the law" as it appears at the end of the decision process is a function of the work they do on the legal materials, and that different work strategies are likely to produce different law—different legal rules—with no intralegal criteria available to indicate which work strategy is correct.

These judges, I imagine, feel that what they are supposed to do, what their role requires them to do, when the law appears to depend on what work strategy they pursue, is to consult their conception of justice, perhaps concretized as rights, values, or needs. But, I imagine, they also feel that they can't bring the idea of justice to bear on a dispute without allowing ideology to enter the decision process. They don't want it to enter and wish it wouldn't. They may even believe that if only they could figure out how, they could exclude it. But as they experience it, the minute you start talking of justice, you have a contested concept, and the contest is the familiar one between liberal and conservative conceptions of just social order, that is of just legal rules.

These judges are in a bind. Their sense of justice is inescapably an ideological one, in the sense that an outside observer would easily categorize the judge as either a liberal or a conservative on the basis of his answer to what justice required in the circumstances. The only alternative to ideological justice, once strategic behavior has become a possibility, seems to be random decision. Random decision violates the role definition of "justice under law" even more seriously, the judge might suppose, than pursuing justice in the shadow of ideology.

In the description I've just given, my goal was to suggest what in fact might motivate judges to deny the ideological in adjudication, rather than "just saying no" and getting rid of it. It may be an accurate description of what some judges experience, even if we conclude that there is in fact a nonideological method for deciding questions of law. If this method exists, judges ought to employ it, but they may be ignorant of it or unable to make it work in particular cases.

In my view, a judge who experiences role conflict is "right" because there really is a conflict built into his role so that his

only alternative to denial is to acknowledge that he can't do his job in the way he is supposed to. The conflict is "real," in my view, because there is no extant theory that plausibly explains how the judge can decide, once he is conscious of the possibility of strategic behavior in interpretation, in a way that excludes ideology, supposing that his sense of justice is congruent with an existing ideology.

Dworkin, for example, says two things to the judge: there are no criteria outside legal argument for determining the rightness of rule choices,<sup>20</sup> and the judge should deploy his own "political philosophy" (which may be liberalism or conservatism),<sup>21</sup> both in the analysis that searches for legal determinacy through fit, and in resolving gaps, conflicts, and ambiguities that persist in spite of that effort.<sup>22</sup> Although he uses the language of "right answers," Dworkin offers no comfort at all for those who propose to resolve the judge's role conflict by having him "just say no" to ideology.

In this light, the judge's denial of the ideological has the very specific content that Sartre identified with bad faith, because the misrepresentation is of oneself as a machine, as interpreting mechanically rather than strategically. Bad faith in this sense exploits the truth (according to Sartre) that human subjectivity is at the same time factoid, just a thing in the world, and transcendent, in motion past its apparent fixity, free. Here, the judge misrepresents himself as factoid, or mechanical, seeming to himself to comply with the role requirement that he be that through and through, in spite of his experience of constraint by the text as a sometime thing, always unpredictably subject to dissolution by legal work.

## VI. MOTIVES FOR THE PUBLIC TO DENY IDEOLOGY IN JUDGING

So far, we have denial as a way to escape role conflict. But why doesn't the judge respond by saying, "My role has an internal conflict, so it needs to be redesigned"? Why don't academic critics help the judge off the hook by suggesting that we are forcing him into hypocrisy? One way to extend the analysis is to ask what reasons there are for people outside the role to deny the ideological in judging, to act as codependents in the judge's denial. The answer can't be role conflict for these outsiders,

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20. RONALD DWORKIN, A MATTER OF PRINCIPLE 171-74 (1985).

21. *Id.* at 181.

22. See RONALD DWORKIN, LAW'S EMPIRE 254-66 (1986).

since they aren't playing the role. But they can nonetheless have investments in the nonconflictual character of the role, in the possibility of playing it without ideology having a place in the decision process.

Two types of investment in the notion of judging without ideology suggest themselves: (a) people may want to believe in it because not believing in it would induce anxieties based on the centrality of judges in the political system, and (b) people may want to believe in it because belief fulfills, at a distance, at a social remove, a pleasurable fantasy about the possibilities of being in the world.

### *A. Fear of the Consequences*

There is an apologetic motive for believing in the rule of law as a guide rather than a restraint. If one believes that it is possible to exclude ideology, then even if one is invested in the idea that our system is "basically" a good one, albeit in need of reform (i.e. if one is either a liberal or a conservative), it is easy to deal with the idea that judges often allow ideology in rather than just saying no to it. This insight simply requires us to reform the judiciary, to get judges to obey role constraints that "everyone" agrees are valid. Denouncing the tyranny of the judiciary can be a staple of both liberal and conservative politics without threatening "the system" in any way.

But if the critique is correct, this is shadow play, however satisfying as such, because there is no coherent account of how judges whose sense of justice is ideologized can do what their role, defined as keeping ideology out, requires them to do. And since it is hard to imagine how we could exclude people who have this kind of "fallen" sense of justice from the judiciary (especially if we have "fallen" ourselves), "the system" seems flawed in a quite basic way, rather than just subject to the inevitable corruption of judicial deviance.

In short, this kind of critique arouses anxiety in part because it is delegitimizing. It undermines the broad Liberal consensus not just about how society should be but about how it pretty much, with warts, is organized, namely in accord with the principles of individual rights, majority rule, and the rule of law. It suggests that, appearances to the contrary notwithstanding, it isn't organized that way in fact, and won't be even after reform of the judiciary. It couldn't be, given the empirical reality of strategic behavior in interpretation, and the difficulty of imagining how it could be eliminated.

A second motive, a second kind of investment in the notion of the rule of law as a guide rather than a mere constraint, derives from liberal and conservative commitment to diverse particular judge-made legal rules. The liberal stake in the non-ideological character of adjudication might be summed up by the question, "Don't you think *Brown v. Board of Education* was legally as well as ideologically correct?" Liberals and conservatives have many commitments of this kind to the specifically legal correctness of their favorite important judicial decisions. The news that *Brown* was just a manifestation of liberal ideology, in the sense that it was no more legally, as opposed to morally, correct than *Plessy v. Ferguson*, is bad news for liberals, and the motive for denying it is obvious.

Yet another reason to deny the critique is the fear that if it were valid, and if judges fully understood it, they would tyrannize us worse than they do already. This is the notion that belief in the rule of law as a guide, rather than as a mere constraint, is a beneficent illusion, a myth with good social consequences. For the reasons already stated, I think Scott Altman, in his article preaching this fear, is wrong to think that even the judge who fervently believes the myth can unselfconsciously "follow the law."<sup>23</sup> But I don't think the critique can deny that greater judicial sophistication *might* (a) increase strategic behavior at the expense of ideologically random behavior and (b) induce some judges to "cheat," by which I mean disregarding experienced constraint by the text.

I'm not going to pile speculation on speculation by trying to assess to what extent these imagined dangers of the demystification of judging are realistic. My intuition is that people who want to believe in rights and the rule of law, and liberals who want to believe in the justice of desegregation, will go on believing even if they accept the critique of judging, and that greater sophistication on the part of judges would probably have little effect on the content of judge made law. But who knows? I assert only that fear of the consequences motivates denial of the critique.

### B. *Overcoming Contradiction*

From my very specific ideological position, that of left wing modernism/post-modernism, there is a much more cosmic motive for denial, namely the contradictory character of our impulses

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23. See Altman, *supra* note 13, at 318-27.

and ideas. This notion of the "fundamentality" of the experience of contradiction is one of the defining traits of modernism and its sequelae, something like a premise, as is the longing for coherence as an autonomous force in human life. People want coherence for its own sake, at least some of the time, because it is a pleasure, it is release from a kind of terror. Rather than arguing this position, I'll let it be represented by these two quotations, the first from the first chapter of Freud's *Introductory Lectures on Psychoanalysis*, and the second from Anna Freud's *The Ego and the Mechanisms of Defense*:

It is important to begin in good time to reckon with the fact that mental life is the arena and battle-ground for mutually opposing purposes or, to put it non-dynamically, that it consists of contradictions and pairs of contraries. Proof of the existence of a particular purpose is no argument against the existence of an opposite one; there is room for both. It is only a question of the attitude of these contraries to each other, of what effects are produced by the one and by the other.<sup>24</sup>

To these three powerful motives for the defense against instinct (superego anxiety, objective anxiety, anxiety due to the strength of the instincts) must be added those which in later life spring from the ego's need for synthesis. The adult ego requires some sort of harmony between its impulses, and so there arises a series of conflicts of which Alexander (1933) has given a full account. They are conflicts between opposite tendencies, such as homosexuality and heterosexuality, passivity and activity, etc.<sup>25</sup>

This idea is familiar at the level of the coherence of desires or impulses: it is unpleasant to want or to want to be two contradictory things at the same time. The intellectual version of this is that it is unpleasant to acknowledge that one believes, or holds to two contradictory ideals at the same time, and that in particular cases what one does is choose in a nonrational way between them.

We might interpret the social construction of the figure of The Judge as the place where we most clearly develop the collective fantasy of overcoming the endless sense of internal doubleness or contradiction that Sartre presents in the paradoxical language of "being what one is not" and "not being what one is." In "justice under law," justice is transcendence, and so ungraspable, while law is facticity, the dead weight of the past,

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24. SIGMUND FREUD, *INTRODUCTORY LECTURES ON PSYCHOANALYSIS* 94 (James Strachey ed. & trans., 1966) (1916).

25. FREUD, *supra* note 12, at 60.

the compulsion of the text. Most Americans, I suppose, want The Judge to be like Sartre's version of the French cafe waiter, a person who does his job with a vengeance, rendering himself thing-like or factoid, a mere transmission belt for legal necessity. At the same time, they want to believe that law is justice, the product of The Judge's laser intuition, with no contradiction between the two elements.

At least some real judges, we imagine, want this too, but they have a problem, to which bad faith (theirs and their public's) is the response. They "know" that the facticity of law dissolves (sometimes) to the touch of legal work, *and* that their own sense of justice is less transcendent, less free, less their own, and more factoid, more mechanically ideological, than it "ought" to be. The bad faith consists in simultaneously exaggerating the extent to which they are bound (factoid, thing-like) as law applicers, and understating the extent to which they are mere ideologues when they are supposed to be exercising their (transcendent) "independent" judgment. In other words, the denial of the ideological, along with addiction to the drama of inquisition and condemnation for infidelity to law, can be seen as a response to the demand that role incumbents in general "be" their roles, and that judges in particular "be" their roles with a vengeance.

While it seems to me that the judge's role conflict is an instantiation of, or one of the constitutive manifestations of this particular existential complexity, there is no reason to reduce it to this complexity alone. For example, it may also be useful to see the judges as denying, on behalf of their public, for it, the problem that we have no coherent conception of justice, just an aspiration toward something we can't pin down, and that our practice of justice is endlessly contradictory. This is another way of saying that the whole point of the role of the judge is to affirm the possibility of escape from the ideological situation.

Liberals and conservatives share general principles, and find themselves equally contradictory in practice, though in service of different outcomes. The principles are brought to bear on the choice of legal rules through the medium of contradictory argument pairs, deployed by liberals and conservatives in opposite ways over the range of policy domains, with no explanation either of how they pick domains or of how they secure their boundaries against radicalisms of the left and right. The judge is like the ideologist in being a votary of justice, but should be unlike the ideologist in having an answer that is limited in scope to justice between the parties. In other words, the judge

should model for us the possibility of being outside this "fundamental" situation of contradiction.

### C. *Coercive Consensus Sustains Denial*

In order to generate an explanation of denial rooted in role conflict with attendant anxiety, we can add on the element of coercive consensus, as a stabilizer of the system. In other words, if most participants are engaged in denial in our psychological sense, then they will have a motive to sanction anyone who brings the bad news that it is merely denial, rather than reality, that adjudication does or could exclude ideology. The motive is to avoid the anxiety that will follow undoing of the defense. (This is a social equivalent of the patient's "resistance" to the undoing of a defense mechanism by a therapist.)

And if people sanction those who try to penetrate the denial, people will be hesitant to try; they will lie, or adopt denial themselves as an alternative to anxiety generated by the conflict between their desire to tell the truth as they see it and the fear of the unpleasure that truth telling will bring down on them.

## VII. PROJECTION OF IDEOLOGY AS A STABILIZER OF THE SYSTEM OF DENIAL

In the pop psychology of defenses, it has become a familiar idea that we sometimes project onto others the impulses or behaviors that we deny in ourselves. Trial judges who fear the anger of losing litigants, and appellate judges who fear the anger of those who disagree with the rules they make, have a motive to displace responsibility onto others—for example, the legislature or prior judges.<sup>26</sup> To the extent they feel guilty about their ideological contributions to lawmaking, they have a motive for the quite distinct operation of projecting ideological intentions onto others.

As I've been arguing, judges find themselves willy-nilly participants in the general cultural conception of judging as a situation of moral jeopardy in which the chief danger is the introduction of ideology into the decision process. It is not, we are supposing, psychologically tenable for judges and their public to respond that there is role conflict here, rather than a moral drama of corruption. They can't acknowledge that the rule of law is only a constraint, and not a guide, and that some of the

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26. Cf. Altman, *supra* note 13, at 305 n.29 (discussing alternate view of judicial denial).

time, at some very important times, it is a weak constraint, one that doesn't let them off the hook represented by their ideologized, "fallen" conceptions of justice.

In this situation, the stability of the system of denial may get an important support from the projection of symmetrical ideological motives onto one another by ideological opponents, followed by denunciation of those opponents for corruption. This "projective identification" involves a relationship, an emotional bond, with a person onto whom one has projected a desire or a characteristic, rather than a mere externalization. The notion seems to me helpful in interpreting the odd persistence in American legal culture of obsessive concern with and equally obsessive denial of the ideological, what we might call American critical legalism.

How could one "prove" a proposition like that of the last paragraph? One couldn't. But consider the following letter to the editor of the *Boston Globe* by a liberal participant in the intensely politicized battle over the confirmation of a conservative Harvard Law professor, Charles Fried, to the Supreme Judicial Court of Massachusetts. Because the letter quotes Fried, as well as denouncing him, it allows a glimpse of the symmetrical character of the projections, and it even contains a denunciation of the very impulse to analyze judges ideologically that it itself perfectly exemplifies.

Fried has had a distinguished academic career, but I do not believe he is an appropriate choice. He would bring an ideological predisposition and potential divisiveness to a court that has been free of both.

Fried was a committed servant of the so-called "Reagan Revolution," an agenda that had as one of its main goals the dismantling of the legal rights and remedies developed under Republican and Democratic administrations for violations of Title VII of the Civil Rights Act of 1964.

The goal was almost accomplished when Solicitor General Fried helped persuade the Supreme Court to abandon decades of precedent and gut the Civil Rights Act in a series of decisions in 1988 and 1989. The decisions were viewed as so destructive that Congress took the unusual step of overriding them by adopting the Civil Rights Act of 1991, restoring the law to the status it had before Reagan's Justice Department and Fried were so successful in subverting it.

Fried writes in his memoir:

"In many respects the courts themselves had become major bureaucratic actors, enthusiastically, self-consciously enlisting in the movement to substitute the judgments and values of the nonproductive sector of society—lawyers, judges, bureaucrats, politicians—for the self-determination of the entrepreneurs and



workers who create wealth. Egged on by aggressive litigators, the legal professorate, and the liberal press, the courts had become a principal engine for redistributing wealth and shackling the energies of the productive sector."

This jaundiced attitude toward courts and judges should be carefully weighed. Do you want to place on the SJC someone who subscribes to the extremist view that the courts are engaged in a plot to sabotage capitalism and redistribute wealth? Do we want someone who asserts that judges are part of the "nonproductive sector of society" to sit in judgment of other judges? Fried's nomination should be rejected.

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I find it useful, in understanding the way Brodin and Fried manage to do ideological analysis of the "other" while affirming the possibility of neutrality in general and their own neutrality in particular, to refer to Freud's classic analysis of neurotic (as opposed to "normal" and "psychotic") jealousy. Indeed, I think we critics should proudly affirm the analogy between our analysis of the ideological in adjudication and the Freudian tradition of hunting out sexual motives where people are most concerned to conceal them. Here, as elsewhere, the analysis has to be of the chastened variety that eschews pretensions to having found "the" truth of the phenomenon. It is still fun to read Freud on jealousy, substituting "neutrality" for faithfulness, "ideological motivation" for unfaithfulness, and "judging" for marriage.

The jealousy of the second layer, the *projected*, is derived in both men and women either from their own actual unfaithfulness in real life or from impulses towards it which have succumbed to repression. It is a matter of everyday experience that fidelity, especially that degree of it required in marriage, is only maintained in the face of continual temptation. Anyone who denies this in himself will nevertheless be impelled so strongly in the direction of infidelity that he will be glad enough to make use of an unconscious mechanism as an alleviation. This relief—more, absolution by his conscience—he achieves when he projects his own impulses to infidelity on to the partner to whom he owes faith. This weighty motive can then make use of the material at hand (perception-material) by which the unconscious impulses of the partner are likewise betrayed, and the person can justify himself with the reflection that the other is probably not much better than he is himself.<sup>28</sup>

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27. Mark S. Brodin, *Letter to the Editor*, BOSTON GLOBE, Aug. 28, 1995, at 10.

28. See FREUD, *supra* note 11, at 161.