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BEYOND CANDOR

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Are opinions honest or accurate accounts of judges' reasons for decision? Many scholars doubt that judges are both honest and accurate, though they dispute whether judges are lying or misled. On one point, however, the academy has mostly united: if judges are either

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misled¹ or duplicitous,² they should become aware of and disclose the real reasons for their decisions.

I propose we reconsider this consensus position. Perhaps judges should be candid but not introspective. By candid, I mean never being consciously duplicitous. Candid opinions do not offer reasons judges know do not persuade them.³ By introspective, I mean critically examining one's mental states to avoid any self-deception or error.⁴ Behavior is nonintrospective if it cannot be done by someone who is aware of its nature. In this article, I consider whether judges ought to decide candidly but nonintrospectively.⁵

Demands for introspection were prevalent among the legal realists, who complained that judges did not understand their own decisions.⁶ The realists urged judges to recognize and to disclose the motivations

1. See, e.g., J. FRANK, *LAW AND THE MODERN MIND* (1930); Binder, *On Critical Legal Studies as Guerrilla Warfare*, 76 GEO. L.J. 1, 29 (1987); Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 865 (1988); Watson, *Some Psychological Aspects of the Trial Judge's Decision-Making*, 39 MERCER L. REV. 937 (1988); Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 579-92 (1982).

2. See Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721 (1979); D. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987). But see M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 27 (1964) (admitting that while judicial candor might be best in theory, courts are political agencies and "politics is the art of the possible here and now."); Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 249-57 (1983) (arguing that calls for candor in the judicial process ignore the mitigating effects of legal fictions on judicial incompetence and bad faith); Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 411-12 (1989) (arguing that calls for judicial candor are premature until the judicial decisionmaking process is better understood).

3. I ignore the question of failure to disclose fully all of the reasons that persuade.

4. Although I adopt the word "introspection" for convenience, I do not mean to adopt its psychologically or philosophically controversial associations. I do not commit myself to a theory of knowledge or truth that requires a single truth about one's mental states. I also do not assume that we in fact gain knowledge about our mental function from some special process of internal viewing, rather than from making inferences from our own behavior. See Nisbett & Wilson, *Telling More than We Can Know: Verbal Reports on Mental Process*, 84 PSYCHOLOGICAL REV. 231 (1977). There are strong reasons for thinking that perfect access to our own mental states is not possible. By introspection, I mean only attempting (by whatever process we in fact use) to examine our mental states in a critical way in order to improve our beliefs about them.

5. This article does not join issue directly with David Shapiro, who defends judicial candor against five reasons for judges to lie — continuity, collegiality, fear of the effects of knowledge, tragic choices, and moral duties. I do not consider whether judges ought to lie. See D. Shapiro, *supra* note 2. I focus on whether judges should introspect. Shapiro avoids this topic: "A judge . . . fulfills any requirement of candor when he believes what he is saying . . ." *Id.* at 734. "I do not mean to include self-deception within the scope of this inquiry." *Id.* at 732.

6. Thurman Arnold saw legal discourse as a tool for denial and rationalization:

[W]e must consider institutions . . . as living organisms, not dissimilar to human personalities, molded by habit, shaken by emotional conflicts, turned this way and that by words, constantly making good resolutions which affect them but not in the way that the terminology of the resolutions might indicate, and never quite understanding themselves . . . because of the necessary illusions with which they must surround themselves to preserve their prestige and self-respect.

T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 25-26 (1935) (emphasis added); see also *id.* at 33-38.

Jerome Frank found the myth of certainty attributable to a child's need for control over the

that the judges deny, and rationalize by appeal to doctrine.⁷

Some Critical Legal Studies (CLS) critics attempt to induce introspection.⁸ By demonstrating that judges are either mistaken or lying about their decision process, critics would compel judges to abandon current practices as dishonest and harmful.⁹ These modern critics demand introspection both because they think that a legal system in which some participants misunderstand their roles cannot be justified, and because they believe that false judicial beliefs lead to less desirable decisions.

I have reservations about attempts to induce judges to develop perfectly accurate views of their tasks. Although I think judges are not so misled as CLS writers allege, it seems to me possible that judges hold inaccurate beliefs about their jobs, and that a legal system including such beliefs could be justified.

In Part I, I consider whether judges might hold inaccurate beliefs that make them more candid and constrained. I suggest that even if theories of neutral decisionmaking are incomplete and inaccurate, a legal system in which judges hold these beliefs about their own behavior could have advantages. If many judges believe that they can, should, and do decide almost all cases by following the law, they might behave differently than they would if they held more accurate

world, which after infancy is displaced by belief in a father's omnipotence, and which still later is filled by belief in the certainty of the law. See J. FRANK, *supra* note 1, at 141-42.

Max Radin held a similar, though less psychological view. See Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 360 (1925) ("Practical as we profess to be, we have buttered our parsnips with fine words so much, it is sometimes hard to find the succulent vegetable under the oleomargarine.").

7. Arnold saw that these mechanisms could not work once people recognized them as such: [T]he philosophy which is here represented is not, and cannot be, a philosophy which will work pragmatically for intellectuals. . . . Folklore which is frankly recognized by a people to be folklore is from that moment no longer folklore. Its magic is gone, and a new folklore, which is not so recognized, must arise.

T. ARNOLD, *supra* note 6, at 237. Arnold dismissed these functions as inappropriate, and seemed to yearn for introspection. See *id.* at 229; cf. J. FRANK, *supra* note 1, at 157 ("[A]lthough fear of legal uncertainty leads to this concealment, . . . [t]he concealment has merely made the labor of judges less effective."); Radin, *supra* note 6, at 360 ("I want them taken for what they are, for the poetry of the law chanted to fill our hearts with the proper juristic ardor before the battle begins; but we should see to it that the bards and poets are carefully led to the side-lines when the conflict is on.").

8. American CLS scholars often seem to adopt a version of immanent (or internal) critique from the Frankfurt school theorists. The traditional notion was simple: demonstrate that people's conception of something does not conform to that thing in the world, in hopes that the people will then abandon or modify their conception once confronted with the conflict. See Brosnan, *Serious But Not Critical*, 60 S. CAL. L. REV. 259, 332-38 (1987). Recent followers of the Frankfurt school have been careful to point out that this tactic will only work in special circumstances. See, e.g., R. GEUSS, *THE IDEA OF A CRITICAL THEORY* 76 (1981) (critical theory will only work if actors adopt it as their "self-consciousness.").

9. See, e.g., Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

beliefs. They might behave so as to facilitate repression and denial, because their self-esteem depends on maintaining the belief that they decide as they think they ought to decide. I suggest that such psychological mechanisms preserve candor and help law to constrain decisions.

In Part II, I assume that inaccurate beliefs preserve candor and help law constrain, and I inquire whether we should prefer such a system to one with completely introspective judges. I suggest that encouraging judges to understand their decision process better, if effective at all, could be harmful, would probably not succeed, and even if successful might not be worth doing.

I do not pretend that nonintrospection is ideal. I see it as the least bad option available, if somewhat inaccurate internalized beliefs preserve constraint and candor. In Part III, I discuss the dilemma facing legal teachers and scholars if inducing people to hold true beliefs has bad consequences.

In sum, I make four points in this article. Descriptively, I remind legal theorists that judges decide in complicated ways that might be illuminated by psychological accounts of denial and rationalization, or cognitive dissonance, and that might include holding and sustaining inaccurate beliefs. Normatively, I argue that judges holding inaccurate beliefs about their decisions might decide better than they would with a clearer understanding of their actions. Philosophically, I suggest that if a system including judges who hold inaccurate beliefs has sufficient benefits, we should consider carefully whether such a system could in principle be justified. Editorially, I point out that by failing to consider the benefits of false beliefs, and the difficulty and harm of trying to destroy them, critical scholars have advocated imprudent tactics given their stated political goals.

I. IS THE BELIEF IN LAW PARTIALLY SELF-FULFILLING?

In this Part, I argue that law might constrain more, and judges might be more candid, if judges and others believe slightly inaccurate or oversimplified accounts of decisionmaking. I also explain how and why judges might maintain such beliefs.

A. *Transparent Justification*

Before making these arguments, I should explain a philosophical difficulty with the project. Even if I can identify benefits to judges holding inaccurate views, and show that attempts to induce judges to hold more accurate views would make the world worse, some philoso-

phers would conclude that I did not *justify* a method of deciding cases. Although my argument might be persuasive, it is not transparent, and is therefore unacceptable to them.

A reason or justification is nontransparent if, when people whose behavior it concerns accept it, they become less able to act in the way that the reason justifies.¹⁰ By contrast, a transparent reason or justification will not induce people whose behavior it justifies, if they come to accept it, to act less justifiably in the justification's own terms.¹¹

The following story illustrates this distinction:

Anne was lost in the woods, and crying for her parents. "Stay here," I told her, as I set off to find them. I soon discovered another child (dressed just like Anne) screaming in pain. A tree had fallen on her legs. I couldn't lift the tree. So I went to look for help.

A man and woman appeared, and I motioned for them to follow me to the fallen tree. They stopped, hurriedly told me about their daughter Anne, and asked me why they should follow.

Two responses came to mind: first, a child is hurt and needs help; second, their daughter is safe and nearby, so they need not ignore the first reason as less important than their own concerns. But before I could offer these reasons, I remembered the huge tree, and realized that it was too large even for three to lift. I despaired of finding any reason for them to follow.

Suddenly an idea came to me. I had read that parents afraid for their children's welfare sometimes perform otherwise impossible acts of strength. Perhaps we could help the child if the couple mistakenly believed that Anne was beneath the tree. So I decided that the couple should help me for a third reason: they could save a suffering child using the strength brought on by their false belief that the child under the tree was Anne. Of course, I could not tell them the third reason, because informing them that their false belief made them useful would have deprived them of the very strength that enabled them to help.

The third reason in this story is nontransparent because convincing

10. I do not enter the debate on the philosophical question "what is a justification?" Some writers contend that the purpose of justification is to convince. If a reason is nontransparent, it cannot justify. See, e.g., J. ELSTER, *SOUR GRAPES* 91 (1983). Derek Parfit takes the opposite position:

It is not the aim of a theory to be believed[,] . . . but to be true, or to be the best theory. . . .

. . . .

. . . If the best theory was [nontransparent], telling us to believe some other theory, the truth about rationality would be depressingly convoluted. It is natural to hope that the truth is simpler: that the best theory would tell us to believe itself. But can this be more than a hope? Can we assume that the truth *must* be simpler? We cannot.

D. PARFIT, *REASONS AND PERSONS* 24 (1984) (emphasis in original). Without offering new arguments, I adopt Parfit's position in this article.

11. This use of the term "transparency" follows Bernard Williams. See B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 101-10 (1985) (explaining why some forms of utilitarianism are not transparent, and identifying both Sidgwick and Hare as "Government House Utilitarians" who support nontransparent theories).

the couple to use the strength brought on by their mistake would have incapacitated them from helping.

Some philosophers believe that any legitimate justification must be transparent.¹² Most legal philosophers agree. Justifications of judging have always presumed that judges can and should believe the justification.¹³

In this article, I explore a contrary view.¹⁴ Only a nontransparent

12. S. BOK, LYING 97-98 (1978); J. SMART & B. WILLIAMS, UTILITARIANISM FOR AND AGAINST 123, 139 (1973); B. WILLIAMS, *supra* note 11, at 101-02; Devine, *The Conscious Acceptance of Guilt in the Necessary Murder*, 89 ETHICS 221, 223-24 (1979); see J. ELSTER, *supra* note 10, at 91-100 (noting that for some political institutions, their main benefits, as seen *ex post*, are by-products that cannot be achieved if they are consciously aimed at by the members of a society, and citing Tocqueville's *Democracy in America* as an attempt to evaluate institutions in this way). Elster seems, however, to reject such benefits as possible justifications because "constitution-makers . . . cannot coherently invoke them in public." *Id.* at 92. Elster elsewhere call this "excess of will." See J. ELSTER, SOLOMONIC JUDGMENTS 18-20 (1989). Rawls and Elster attribute insistence on transparency to Kant. See J. ELSTER, *supra* note 10, at 92; J. RAWLS, A THEORY OF JUSTICE 133 & n.8 (1971). Transparency is not valued only by liberals, but by many radicals as well. B. WILLIAMS, *supra* note 11, at 101; see, e.g., R. GEUSS, *supra* note 8, at 63-75.

Rawls' publicity requirement includes transparency. Public justification must in fact be known or knowable by all members of a just society. See J. RAWLS, *supra*, at 133 ("They suppose that everyone will know about these principles all that he would know if their acceptance were the result of an agreement."); *id.* at 581.

13. The closest legal theorists have come to endorsing judicial delusion was the early writing on legal fictions. See, e.g., H. VAHINGER, THE PHILOSOPHY OF "AS IF" (C. Ogden trans. 1924). Vahinger notes that many disciplines, including law, rely on fictions — or acting "as if" something known to be false were true. He saw that it is a nearly universal human tendency, in order to acquire the benefit of those fictions with a minimum of psychological stress, actually to come to believe them. This process Vahinger called an ideational shift from fiction to dogma. *Id.* at 124-34. Despite noticing the importance of fictions, and noticing that they are very difficult to use without coming to believe them, Vahinger maintained that accepting the fictions as true was a weakness that would eventually be overcome. *Id.* at 132. Therefore, despite identifying many benefits of what I call nontransparency, Vahinger never came to accept it as a justification. See Samek, *Fictions and the Law*, 31 U. TORONTO L.J. 290 (1981) (discussing Bentham's, Vahinger's, and Fuller's accounts of legal fictions).

Fuller attributes to Vahinger a strong admiration for the benefits of mistaken thought. See L. FULLER, LEGAL FICTIONS 118 (1967) ("Vahinger likens thought to the process of walking. Walking consists in a series of falls, each arresting and compensating the other just in time. So thinking consists in a series of mutually opposed mistakes.").

Martin Shapiro has suggested that even if the Supreme Court is engaged in discretionary political activity, it should not necessarily say so in public: "It would be fantastic indeed if the Supreme Court, in the name of sound scholarship, were to disavow publicly the myth upon which its power rests." M. SHAPIRO, *supra* note 2, at 27. Because Shapiro does not make clear whether he wants the Court to lie, or not to become aware of its own manipulation, I cannot say whether he supports a nontransparent theory, or one that is truly nonpublic. See *infra* note 16.

14. Some support for nontransparent justification appears in legal and philosophical literature. See D. PARFIT, *supra* note 10, at 3-49 (Acknowledging that transparency is desirable, but that the best theories of morality and rationality might be such that their goals will be best achieved if people aim at something besides the goals dictated by the theory. When this is true, he calls a theory "indirectly self-defeating."); Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (suggesting acoustic separation between how the criminal laws operate, and how most people believe they operate); G. CALABRESI & P. BOBBIT, TRAGIC CHOICES 20-28, 50, 78-79, 134 (1978); G. CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW (1985); H. SIDGWICK, THE METHODS OF ETHICS 413 (1962); J. SMART & B. WILLIAMS, *supra* note 12, at 50-53; Alexander, *Pursuing the good — Indirectly*, 95 ETHICS 315 (1985); Harrison & Mashburn, *Jean-Luc Godard and Critical Legal*

justification can support the position that judges should hold inaccurate beliefs about their roles. My justification approves behavior such as denial, which, like strength induced by error, works best if the individual can avoid noticing that she is doing it.¹⁵ Judges might be disabled by complete understanding of their acts, in much the way Anne's parents would have been.

By considering whether judges should hold inaccurate beliefs, I do not suggest that we should abandon a requirement related to transparency that is sometimes called publicity: justifications must be acceptable to any rational individual as a reason for action.¹⁶ The justification I offer is public in this sense. It could be offered to and accepted by any rational individual, including a judge. Nontransparent justifications must not be offered in some circumstances because they might be accepted and therefore self-defeat.

I do not support anything like Plato's noble lie.¹⁷ Plato advocated leading people to have false views of their origin to justify class distinctions. His lie was not public in the sense that it would not be acceptable to those deceived. Further, I do not advocate actively trying to deceive judges. I suggest only that we should not try to induce them to introspect.

I also do not argue that judges should avoid self-conscious decisionmaking. Self-consciousness means having and trying to use a theory about the nature of one's actions. Nonself-conscious judging would demand that judges simply decide cases without holding any view about how they should decide. Indeed, some critics do seem to believe that judges need no theory of decisionmaking, either because theory is unrelated to practice, or because judicial decisionmaking is

Studies (Because We Need the Eggs), 87 MICH. L. REV. 1924 (1989); Railton, *Alienation, Consequentialism, and the Demands of Morality*, 13 PHIL. & PUB. AFF. 134 (1984); Waldron, *Particular Values and Critical Morality*, 77 CALIF. L. REV. 561, 566 n.15 (1989) (quoting A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (R. Campbell & A. Skinner eds. 1976)) ("By pursuing his own interest [the individual] frequently promotes that of the society more effectually than when he really intends to promote it."); Weyrauch, *Law as Mask — Legal Ritual and Relevance*, 66 CALIF. L. REV. 699 (1979); cf. D. HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 118 (Open Court Publishing Co. ed. 1953) (1777) (The "truth of any proposition by no means depends on its tendency to promote the interests of society; yet a man has but a bad grace, who delivers a theory, however true, which, he must confess, leads to a practice dangerous and pernicious. . . . Why dig up the pestilence from the pit in which it is buried?").

15. See *supra* note 7.

16. See, e.g., S. BOK, *supra* note 12, at 105-06. Nietzsche is often cited as among the only thinkers to reject even this minimal requirement for publicity, because he suggested that some people need not be offered justifications. See Gaus, *Subjective Value and Justificatory Political Theory*, in JUSTIFICATION: NOMOS XXVIII 241, 255-58 (1986). Rawls' notion of publicity includes both publicity in Bok's terms and transparency as I am using the term. See J. RAWLS, *supra* note 12, at 133.

17. See PLATO, THE REPUBLIC *414b.

nothing but an exercise in power that could not be affected by theories held by judges.¹⁸

I hold the opposite view. Judges should be self-conscious. They do and ought to have views about their roles as judges. These theories affect their decisions. Opposing introspection means only that these role conceptions need not always be consistent with a perfectly accurate view of a judge's own mental process.

B. *Partially Self-Fulfilling Beliefs*

Some critics contend that law constrains judges little or not at all. Rules already announced limit a judge's decision no more than if the relevant rule were "do as you like."¹⁹ This position presupposes the radical indeterminacy of both rules and higher order legal values.

Rather than rehearse all the arguments against indeterminacy,²⁰ I argue here that certain judicial failures to introspect might help make law more constraining, because the belief in law is partially self-fulfilling.²¹ By "partially self-fulfilling," I mean something that is false, but that becomes closer to being true because people believe it.²²

I argue that law becomes more or less constraining depending on individual judges' beliefs about law, judges' role conceptions, and ex-

18. See, e.g., S. FISH, *DOING WHAT COMES NATURALLY* 465 (1989) (arguing that "[t]he removal of critical self-consciousness from the list of possible ways of acting does not deprive anyone of anything").

19. See, e.g., Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 819 n.119 (1983).

20. See, e.g., Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989); Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

21. For accounts of self-fulfilling beliefs, see S. BRAMS, *PARADOXES IN POLITICS* 53-77 (1976); *SELF-DEFEATING BEHAVIORS* (R. Curtis ed. 1989); J. ELSTER, *ULYSSES AND THE SIRENS* 106 (1984); R. JONES, *SELF-FULFILLING PROPHECIES* (1977); R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 421-36 (1957); R. ROSENTHAL & L. JACOBSON, *PYGMALION IN THE CLASSROOM* (1968); Berger, Connor & McKeown, *Evaluations and the Formation and Maintenance of Performance Expectations*, in *EXPECTATION STATES THEORY* 27 (J. Berger, T. Connor & M. Fisek eds. 1974); Krishna, *"The Self-Fulfilling Prophecy" and the Nature of Society*, 36 AM. SOC. REV. 1104 (1971); Watzlawick, *Self-Fulfilling Prophecies*, in *THE INVENTED REALITY* 95 (P. Watzlawick ed. 1984).

In response to realist attacks on determinacy, some writers have suggested that these attacks could be self-fulfilling. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 84 (1962); F. HAYEK, *THE CONSTITUTION OF LIBERTY* 206 (1960) ("If the ideal of the rule of law is a firm element of public opinion, legislation and jurisdiction will tend to approach it more and more closely. But if it is represented as an impracticable and even undesirable ideal and people cease to strive for its realization, it will rapidly disappear.").

22. Some people have suggested that individual beliefs about the likelihood of a marriage surviving are partially self-fulfilling. See, e.g., G. BECKER, *A TREATISE ON THE FAMILY* 224-25 (1981); cf. J. ELSTER, *supra* note 10, at 7. I expect that there are some states of the world that can only, or at least most easily, be brought about by many people believing that the world is something like, but not exactly like, it is. If so, then partially self-fulfilling beliefs might be (nontransparently) justified as needed to bring about such states of affairs.

pectations about law held by observers in various positions of power. I find that judges who believe law can and should constrain are more constrained by law than judges who do not think law should constrain, though less than the first group believes they are constrained. Belief in law is thus somewhat self-fulfilling. Nonintrospection might make law more effective, because the judicial beliefs and role conceptions that permit law to constrain most effectively are not completely accurate.²³

I suggest that judges follow rules and implement principles in part because they believe that they can and should do so, that they might overestimate the frequency with which this is possible, that this overestimation increases the chance that law constrains judges, and that a clearer understanding could decrease constraint and candor. First, however, I explain why judges might hold such false beliefs, how they sustain them, and why these beliefs affect behavior.

1. *The Psychology of Self-Fulfilling Beliefs*

People sometimes fail to notice that their desires and behavior do not match their ideals. Psychoanalysts call the mental mechanisms that permit this defenses.²⁴ Cognitive theorists talk of dissonance reduction.²⁵ Despite important disagreements among members of these schools, they agree that people tend to find strategies to avoid examin-

23. There is currently a debate as to whether public choice interpretations of legislation should be stated in public. This debate mirrors the question I address in this paper. See, e.g., Brennan & Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179, 185-86 (1988) ("As scientists, we consider it our purpose to destroy myths. But we should recognize that the 'myths of democracy' may be essential to . . . stable political order."); Kelman, *"Public Choice" and Public Spirit*, 87 PUB. INTEREST 80, 93-94 (1987) ("Cynical descriptive conclusions about behavior in government threaten to undermine the norm prescribing public spirit. The cynicism of journalists — and even the writings of professors — can decrease public spirit simply by describing what they claim to be its absence. Cynics are therefore in the business of making prophecies that threaten to become self-fulfilling That is the tragedy of public choice."); Masliah, *The Economics of Politics and the Understanding of Public Law*, 65 CHI-KENT L. REV. 123 (1989).

24. See, e.g., A. FREUD, *THE EGO AND THE MECHANISMS OF DEFENSE* (1966); J. SANDLER & A. FREUD, *THE ANALYSIS OF DEFENSE: THE EGO AND THE MECHANISMS OF DEFENSE REVISITED* (1985); N. HAAS, *COPING AND DEFENDING: PROCESSES OF SELF-ENVIRONMENT ORGANIZATION* (1977). Many scholars have suggested that judging can be understood in psychoanalytic terms. See, e.g., A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* (1971); J. FRANK, *supra* note 1; A. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* (1967); H. LASWELL, *POWER AND PERSONALITY* 65-88 (1948) (psychoanalyzing three judges); C. SCHOENFELD, *PSYCHOANALYSIS AND THE LAW* (1973); A. WATSON, *PSYCHIATRY FOR LAWYERS* 129, 133, 187 (1968); Ormrod, *Judges and the Processes of Judging*, in *JUBILEE LECTURES CELEBRATING THE FOUNDATION OF THE FACULTY OF LAW, UNIVERSITY OF BIRMINGHAM* 181 (1981); Schroeder, *The Psychoanalytic Study of Judicial Opinions*, 6 CALIF. L. REV. 89 (1918); Watson, *Some Psychological Aspects of the Trial Judge's Decision Making*, 39 MERCER L. REV. 937 (1988); Winick, Gerver & Blumberg, *The Psychology of Judges*, in *LEGAL AND CRIMINAL PSYCHOLOGY* 121, 136-38 (H. Toch ed. 1961).

25. See, e.g., L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957); R. WICKLUND & J. BREHM, *PERSPECTIVES ON COGNITIVE DISSONANCE* (1976).

ing internal conflicts and unpleasant facts. By invoking these theories, I do not mean to suggest that all or even much of judicial behavior is best understood in these terms. I suggest only that ego defense, dissonance reduction, or some other means of avoiding conflicts plays a role in legal decisionmaking.²⁶

Psychoanalytic theory supposes that people defend against unpleasurable affect caused by internal conflict.²⁷ Some recent theory suggests that defenses are used to reduce conflict, whatever its source, including defending against superego demands and prohibitions.²⁸ Accordingly, judges might fail to notice aspects of their jobs as a means of reducing guilt or shame when they do not meet moral demands they place on themselves. In psychoanalytic terms, two ways of not noticing — denial and repression — and three tactics for facilitating this failure to notice — rationalization, projection, and splitting — could help explain how and why judges avoid introspection.²⁹

26. On the importance of avoiding explanations of judicial behavior that rely on few variables, and the need for more complex theories, see Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7 (1983).

27. See, e.g., C. BRENNER, *THE MIND IN CONFLICT* 72 (1982). Traditionally, psychoanalysts thought that people defended only against conflict caused by unacceptable drive derivatives. See A. FREUD, *supra* note 24, at 58.

28. C. BRENNER, *supra* note 27, at 55, 75; Wallerstein, *Defenses, Defense Mechanisms, and the Structure of the Mind*, in DEFENSE AND RESISTANCE 201, 223 (H. Blum ed. 1985).

29. See C. BRENNER, *supra* note 27, at 120. Denial means "distortion of one's perception of . . . external reality." *Id.* at 77. Judges might fail to become aware of some aspects of their decisionmaking process, such as the extent to which they manipulate precedents and facts. Denial often refers only to gross distortions of perception. See L. SCHILLING, *PERSPECTIVES ON COUNSELING THEORIES* 31 (1984). I have in mind, however, a more subtle failure to notice one's own process of decision. See Willick, *On the Concept of Primitive Defenses*, in DEFENSE AND RESISTANCE, *supra* note 28, at 175, 194.

Repression is failing to become aware of one's own motivations or impulses. See G. SWANSON, *EGO DEFENSES AND THE LEGITIMATION OF BEHAVIOR* 116 (1988). Judges might repress to avoid noticing that they are sometimes motivated by moral and political views of their own, or by prejudices and sympathies, that they believe should not motivate them.

Rationalization entails offering a faulty, but somewhat plausible, account of why one is not motivated by an illicit drive, or engaged in an unacceptable activity, to avoid noticing that one is indeed doing the prohibited thing. See *id.* at 108. Some of the discussion in judicial opinions can be understood as rationalization. See J. FRANK, *supra* note 1, at 134-37; C. SCHOENFELD, *supra* note 24, at 77-79; Schroeder, *supra* note 24, at 93-95; Watson, *supra* note 24, at 948.

Projection is "[a] process by which an objectionable, internal tendency is unrealistically attributed to another person or persons . . . instead of being recognized as a part of one's self." G. SWANSON, *supra*, at 105. Some opinions attribute difficult decisions to the legislature, or to precedent, when it is clear that the judge had power to decide either way. This process can be understood as an attempt to avoid feeling responsible by attributing the decision to someone or something else. See C. SCHOENFELD, *supra* note 24, at 82; Watson, *supra* note 24, at 957; cf. R. COVER, *JUSTICE ACCUSED* 236-38 (1975) (discussing the false attribution of power to other authorities as a way some judges have decreased dissonance).

Splitting means stark separation of people and things into good and evil. See, e.g., M. KLEIN, *ENVY AND GRATITUDE AND OTHER WORKS* 1946-1963, at 1-24 (M. Khan ed. 1975). Although psychiatrists usually refer to splitting as a primitive defense typical of people with borderline personality disorders, there seems to be a common and much less dramatic defense in which people avoid noticing moral complexity that threatens their own simple moral views. Instead

I suggest that judges use these tactics to avoid internal conflicts, and to avoid noticing disturbing facts about themselves and about the world.³⁰ Taking responsibility for difficult and important decisions and acknowledging moral complexity is often unpleasant.

My argument that belief in following law is somewhat self-fulfilling can invoke theories of defense. Ego defenses affect more than mental processes; they alter behavior.³¹ If superego demands and other conflicts lead judges to defend, such conflicts might also lead judges to decide differently.³² Judges accept an obligation to follow law. If they cannot always do so, defenses might permit them not to notice some of their failures to meet their ego ideal. Judges using these defenses might be more constrained by law than judges who are more conscious of failures to meet their ego ideal. Although an introspective judge might more flexibly choose when to follow law, I argue that problems such as weakness of will and other cognitive difficulties might lead an introspective judge to ignore law more often and in less desirable circumstances.

A parallel argument can be made using the language of cognitive dissonance.³³ The standard account of cognitive dissonance is that noticing how two cognitions conflict makes us uncomfortable.³⁴ Some recent interpretations focus on dissonance caused by conflicting impressions of the self, including noticing that one's behavior does not match one's self-image.³⁵ If the gap between a person's perceptions of

they simplify the situation to one obviously right position and one obviously wrong position. See generally D. LEVINE, *THE FLIGHT FROM AMBIGUITY* 12-13, 33 (1985); J. LOEVINGER & R. WESSLER, *MEASURING EGO DEVELOPMENT* (Jossey-Bass Behavioral Science Series 1, 1970). Legal doctrine, especially when it takes the form of rules, might facilitate a mild form of splitting. Consider how many times you have read a decision in which each of the applicable factors miraculously counsels ruling in favor of the winning party, or in which the judge need not select among competing rules, because the same party wins under all possible rules. Most judicial opinions are written as if the outcome were obvious, never permitting doubt or moral difficulty to appear. These rhetorical devices reinforce the tendency to avoid moral complexity. Applying rules requires reduction of complex situations into clear decisions. Some judges go far beyond the necessary simplifications when they apply rules.

30. See M. LERNER, *THE BELIEF IN A JUST WORLD* 20-21 (1980).

31. See, e.g., Wallerstein, *supra* note 28, at 205-08.

32. See, e.g., C. BRENNER, *supra* note 27, at 216-21 (connecting defense against superego demands with charitable behavior).

33. Robert Cover offers a cognitive dissonance theory of the behavior of some judges who decided fugitive slave cases. See R. COVER, *supra* note 29, at 226-38.

34. L. FESTINGER, *supra* note 25, at 3; see also R. WICKLUND & J. BREHM, *supra* note 25. For recent literature reviews, see Cialdini, Petty & Cacioppo, *Attitudes and Attitude Change*, 32 ANN. REV. PSYCHOLOGY 357 (1981); Cooper & Croyle, *Attitudes and Attitude Change*, 35 ANN. REV. PSYCHOLOGY 395 (1984).

35. In this respect, some modern dissonance theory is becoming more like ego-defense theory. See, e.g., Greenwald & Ronis, *Twenty Years of Cognitive Dissonance: Case Study of the Evolution of a Theory*, 85 PSYCHOLOGICAL REV. 53, 55 (1978); Steele & Lui, *Dissonance Processes as Self-Affirmation*, 45 J. PERSONALITY & SOC. PSYCHOLOGY 5 (1983).

her behavior and her ideals is large enough, creating sufficient discomfort, she will be motivated to reduce the discomfort using any of a number of tactics, three of which seem to me especially relevant: changing one's behavior to meet the ideal;³⁶ changing one's perceptions of the behavior so that it seems to meet the ideal;³⁷ and altering the ideal so that one's behavior now conforms to it.³⁸

Introspection might make judges uncomfortable. Cognitive dissonance theory explains why judges might mistakenly believe they succeed more often than they do: they have altered their perceptions of their activities to reduce the discomfort of failing to meet their ideals. The theory also explains why judges might be more constrained if they believe in the possibility and desirability of constraint: ignoring law too often or too blatantly would create discomfort. So they may alter their behavior to conform more closely to their ideals. Finally, dissonance theory explains why revealing the extent to which judges fail at their goals seems risky: if modifying their behavior or their perceptions of their behavior is difficult, they might alter their ideals to something more regularly possible, but less desirable.

2. *Whether Constraint Varies with Beliefs*

In this section, I explain how judges' different beliefs might affect the extent to which law constrains them.³⁹ By constrained, I do not mean compelled to reach a particular outcome; rather, I mean only prevented from reaching some outcome that a judge prefers. Judges could never be entirely unconstrained. All judges are limited in what they can do by many forces, only one of which is law. Judges must build consensus on collegial courts, avoid being reversed, escape undue social pressure from the public, and perform a wide variety of other tasks that limit their decisions. Further, law to some extent constrains judges no matter what they believe. The question I discuss is whether *marginal* changes in law's constraint depend on individual judges' beliefs.

To see how law constrains judges regardless of the beliefs they

36. R. WICKLUND & J. BREHM, *supra* note 25, at 132-34.

37. *Id.* at 5.

38. *Id.*

39. Anthony D'Amato has suggested that what legal theories judges believe can affect how constrained the judges are. See D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 VA. L. REV. 561, 564 (1989); see also R. KEETON, JUDGING 13 (1990) ("The professional commitment of the judge — what the judge believes about what he or she is doing — makes a difference. If any judge believes with the cynics that reasons for decisions are different from those publicly stated — as some judges have occasionally proclaimed — the potential contributions of that judge to justice are in some degree limited . . .").

hold, consider a judge who views his own role as that of political activist: "someone with the 'vocation of social transformation.'" ⁴⁰ Duncan Kennedy offers such an account. ⁴¹ He imagines himself a federal district judge confronting a case that initially presents a conflict between the law and how he wants to come out. ⁴² Kennedy decides to try justifying the outcome he prefers. ⁴³ He finds that law constrains what he can do: "Law constrains as a physical medium constrains — you can't do absolutely anything you want with a pile of bricks, and what you can do depends on how many you have, as well as on your other circumstances." ⁴⁴

Kennedy believes law constrains for several reasons, including that judges view themselves as having promised the public to follow the law, which they at least must view as an obligation to offer a good legal argument. ⁴⁵ Sometimes it is simply more difficult to construct any argument that will seem plausible for ruling in the way you want that accords with widely held views about how judges should decide cases. This will depend on the configuration of the field — on how impacted it is. ⁴⁶

Kennedy as a judge resembles Houdini. ⁴⁷ Rules bind like ropes

40. Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 521 (1986); see also Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 412, 424-25 (1981). A revised version of Kennedy's article was published as Kennedy, *Toward a Critical Phenomenology of Judging*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 141 (A. Hutchinson & P. Monahan eds. 1987).

41. See Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, *supra* note 40, at 521.

42. By this Kennedy says he means that he initially believes that the rule was clearly intended to govern cases exactly like this one, and that he thinks others will share this impression. *Id.* at 518-19.

43. Having to work to achieve an outcome is in my view fundamental to the situation of the judge. . . . [Y]ou could say that the judge is both free *and* bound — free to work in any direction but limited by the pseudo-objectivity of the rule-as-applied, which he may or may not be able to overcome. *Id.* at 522.

44. *Id.* at 526.

45. Other constraining factors include: judges seek community approval, or at least want to avoid being accused of having broken that promise; judges do not want to be reversed; judges want to influence others; judges want to maintain credibility so as to be able to continue their work in other cases; and judges like to see how their moral views translate into legal terms. *Id.* at 527-28.

46. By impacted, Kennedy means presenting itself as "highly organized" and presenting an "image of legal necessity" in which cases each "refer[] in [their] holding[s] to the other cases and indicat[e] how the gaps between the cases should be filled." Kennedy, *Toward a Critical Phenomenology of Judging*, *supra* note 40, at 153. See also Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, *supra* note 40, at 538-39. It will also depend on how smart, and how busy the judge is at the time, how strongly she feels that the apparent application of the rule is wrong (and therefore how much risk of humiliation she is willing to risk and how much political capital she is willing to expend) as well as the political climate at the time of the ruling.

47. A number of judges have adopted "Houdini" as an epithet for other judges who manipu-

bind. Sometimes the ropes are so tight that a judge cannot escape them. Sometimes the ropes are such that it depends how skillful the judge is at trying to escape, and how much time and energy the judge cares to devote. Sometimes the judge does not care to escape — in which case she can simply explain that she is bound. The judge is an escape artist politicized.⁴⁸

Law constrains Houdini not because he believes that it is a reason for his decisions. Rather, it constrains him in large part because many other people whose respect he needs believe that judges can and should follow rules, and discover values in prior cases, without being influenced (too much) by their own political views. As a result, Houdini will not always be able to generate arguments that others will regard as good, or even minimally acceptable, for reaching a particular result. All judges are constrained by the need to appear to follow rules, or discover values, as other people understand rule following, and value discovery.

In the remainder of this section, I argue that law constrains Houdini less than it does other judges because of Houdini's attitude toward following rules. I must therefore first define "following a rule."⁴⁹ Fol-

late precedent inappropriately. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 222 (1979) (Rehnquist, J., dissenting) ("[B]y a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, 'uncontradicted' legislative history, and uniform precedent . . ."); *Pasco Terminals, Inc. v. United States*, 567 F.2d 976, 979 (C.C.P.A. 1977) (Miller, J., concurring) (accusing the majority of escaping from reality "with the wizardry of a Houdini"); *First Natl. Bank of Md. v. Burton, Parsons & Co.*, 57 Md. App. 437, 450, 470 A.2d 822, 829 (1984) ("Such a task requires more than a mere factfinder; it requires a Houdini or soothsayer. Courts should confine themselves to the law, not enter the realm of thaumatology."); *Jonaitis v. State*, 437 N.E.2d 140, 145 (Ind. Ct. App. 1982) (Staton, J., dissenting) ("The Majority's reference . . . is nothing more than a decoy to mask the Majority's Houdini-like manipulation of the unambiguous terms of the Juvenile Code."); *State v. Reeves*, 427 So. 2d 403, 427 (La. 1982) (Dixon, C.J., dissenting) ("Like a blind-folded Houdini, the majority opinion writer eludes uncontradicted convention history, wiggles free of plain words in the constitution and discovers a gap in the document no other scholar knew existed . . ."); *Pin Pin H. Su v. Kemper Ins. Cos./American Motorists Ins. Co.*, 431 A.2d 416, 420 (R.I. 1981) (Kelleher, J., dissenting) ("Houdini would certainly appreciate such 'sleight of eye' . . .").

48. My discussion of Houdini caricatures Kennedy's position. Kennedy notes that how he wants to come out may change once he starts reading cases, not just because the cases prove hard to manipulate, but also because the cases convince him. See Kennedy, *Toward a Critical Phenomenology of Judging*, *supra* note 40, at 157-61. I agree with Kennedy that even the most manipulative judge will be subject to such conversion, and indeed that judges' initial impressions of how they want to decide are already influenced by having read cases on the subject. *Id.* at 157. I ignore this important factor in describing Houdini, because if Houdini, who did not allow himself to be convinced by the normative power of the field is constrained, *a fortiori*, so will any real judge be constrained. As well, I do not consider being convinced that one's initial preference was wrong as being constrained by law.

49. I do not commit myself to any notion of the literal meaning of rules apart from acts of interpretation. Rather, I only claim that if at a moment, in a particular context, judges anticipate that most people (or most people whose opinions matter to them) will agree that deciding one way is following a rule and deciding the other way is breaking a rule, then most judges will be more likely than Houdini to decide in accordance with that anticipated consensus.

lowing a rule consists in finding some general description of circumstances contained in an authoritative source, and then, if the circumstances fit the general description, doing what the source says to do.

These acts demand that one actually can decide when specific facts exist, when those facts are examples of a general category, and what the general category is. Each of these steps is problematic. Even when they seem noncontroversial, explaining why they were easy has itself been difficult. Nonetheless, in particular communities, at specific times, some actions are uncontroversial examples of following rules. Many factors make it possible sometimes to agree about general categories, specific facts, and how they connect. People who reach such agreement share contingent but stable cultural, linguistic, biological and social characteristics. We share some beliefs, values, and understandings.

Among these common factors is a shared understanding of rule following. We disagree over important details, such as whether to consider the intent of rule makers, or the meaning of the words they use, when they seem to diverge. Still, we largely agree about broad outlines. We assume that a rule was developed by people much like us, who had some purpose in mind that we can and were meant to understand, that they used words in the ways usual among the people to whom the rule is addressed, and that they made the rule knowing that it would need to be interpreted by people who shared these assumptions.

Additionally, both followers and makers of rules assume that people trying to follow a rule will be engaged in a sincere attempt to determine something about its intended application. We disagree about whether interpretation involves asking what sorts of situations the actual rule makers had in mind, or whether we should consider what situations reasonable makers of such a rule could have had in mind for it to govern, or whether we should consider the reasons they might have had for enacting it. But we agree that rule following involves making a sincere effort to answer some such question. I do not presume that this is possible. Nevertheless, consensus about when a rule applies is facilitated by the fact that people sincerely make this attempt, and expect that others will as well.

Houdini falsifies these assumptions. He does not try to follow rules. He sees decisionmaking as a tactical game, the point of which is to pursue his own goals, whether or not he believes that the rule can be most reasonably understood that way. He does not care whether most

other people would interpret it this way. The only check on his interpretation game is whether he can get away with implementing his goals.⁵⁰

Houdini is willing to manipulate. By manipulation, I mean intentionally ignoring what one believes to be the most convincing argument and instead offering legal arguments that one believes to be less strong, while failing to disclose one's reasons for doing so.⁵¹ Houdini will pretend that he is engaged in an attempt to follow rules, and that he is not ignoring the purpose of the statute or its most natural interpretation. In an effort to win, he will misrepresent his motives for decision and his opinion about what legal arguments seem to him most convincing.

When Houdini does not like a rule that seems to control a case, he tries to write an opinion distinguishing the apparently governing rule, or finding an exception to the rule that will seem at least minimally acceptable to others whose respect he needs. Nothing save for time, intellect, and other job and life pressures will keep Houdini from this work. Houdini's role conception does not forbid manipulation to achieve political goals. If Houdini notices that he is manipulating, he will not lose self-esteem.

Houdini's manipulation should not be confused with other activities, such as careful thinking or candid activism. A very careful judge might believe that her task is to follow the law. She never decides a case until she has considered all possible arguments, including the arguments that Houdini will often use to manipulate. Sometimes she will be convinced by an argument that upon first inspection seemed unappealing. She differs from Houdini, however, both because she feels obligated to follow the law when she thinks it wrong, and because she feels obligated candidly to offer the reasons that convince her.

An activist judge might believe that the goal of judging is to do what is best for the world in every case, and that she must consult her own moral vision in order to do so. Like Houdini, she does not have the goal of trying to follow law. Unlike Houdini, however, she believes that she is obligated always to disclose exactly why she is deciding a case. If she comes upon a rule or principle that she thinks nonideal, she says so. She offers moral reasons in her opinions for

50. Of course, Houdini cares how other judges interpret in the sense that he must consider how others, including reviewing judges, will react to his decisions. But he cares about conforming with other people's view of following law only in this instrumental sense.

51. I do not count as manipulation writing an opinion offering reasons that one finds less than compelling in order to obtain a majority on a collegial court. I agree with David Shapiro that not expressing all one believes in order to obtain a majority does not necessarily compromise candor. See D. Shapiro, *supra* note 2, at 736, 742-43.

ignoring rules, or overturning them, or creating exceptions. Candid activism is not manipulation.⁵²

By saying that Houdini will follow rules less often than other judges, I mean that in cases in which almost all who view their task as trying to apply rules would agree about what a rule requires (despite varying moral views, and views of the wisdom of the rule or its purpose), Houdini will less often reach that result when he thinks he can get away with it. He will still sometimes follow rules because he agrees with them, because he cannot invent a way to manipulate the rule, or because he thinks that the risk of manipulation is not worth the harm of being seen as a Houdini.

Judges with other role conceptions will be more constrained.⁵³ If they see themselves as more politically neutral than Houdini, other judges will want to act in accordance with their own view of following rules or discovering values — which might include not working too hard to resolve splits between how the law is and how they would prefer it to be.⁵⁴

52. Whether Houdini would be significantly less constrained than a candid activist judge seems to me a difficult question. The candid activist need not seek precedent-based arguments, which could make her less constrained. However, unless she is a Supreme Court justice, fear of reversal could make her more constrained. I offer no further speculation. I point out only that activism and manipulation are not the same. Other parts of this article offer some discussion on the desirability of a more activist judiciary. See *infra* section II.B.4.

53. The theory that judges' beliefs about their appropriate role affects their decisions has of course been a subject of much empirical study since at least the middle 1950s. Because the studies cannot easily isolate single factors to determine what affects judicial decision, the results are inconclusive. However, a number of studies have found the possibility of some correlation between judicial role conceptions and judicial behavior. See J. HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 167-88 (1981); Champagne & Nagle, *The Psychology of Judging*, in THE PSYCHOLOGY OF THE COURTROOM 258, 269 (N. Kerr & R. Bray eds. 1982); Danelski, *Causes and Consequences of Conflict and its Resolution in the Supreme Court*, in JUDICIAL CONFLICT AND CONSENSUS 21, 26, 44 (S. Goldman & C. Lamb eds. 1986). Particularly supportive of the position that judges who believe in a constrained role will be more constrained to decide against their preferences are studies by Theodore Becker. See T. BECKER, POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE 88-146 (1964); Becker, *A Survey Study of Hawaiian Judges: The Effects of Judicial Role Variations*, 60 AM. POL. SCI. REV. 677, 680 (1966). For additional discussion of the effect of judges' beliefs, see Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911 (1978); Gibson, *The Role Concept in Judicial Research*, 3 LAW & POLY. Q. 291 (1981). But see Flango & Schubert, *Two Surveys of Simulated Judicial Decision Making: Hawaii and the Philippines*, in COMPARATIVE JUDICIAL BEHAVIOR (G. Schubert & D. Danelski eds. 1969).

54. See, e.g., Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths about the D.C. Circuit*, 56 U. COLO. L. REV. 619 (1985); Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307 (1987).

Although the public language of judging remains very close to formalism, see Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1862-65 (1988), few judges are formalists. Surveys of judges suggest that the vast majority believe neither that they should implement their moral views whenever the opportunity arises, nor that they should or can always avoid doing so, though these surveys surely miss exceptions who do view their role as exercising power when they can.

One study, for example, inquired of federal appellate judges in the Second, Fifth, and D.C. Circuits how they felt judges should handle the tension between judicial innovation and the obli-

Consider two other judges: Hapless, who believes in formalism; and Hercules, who agrees with Ronald Dworkin.⁵⁵ Assume that each is confronted with a case that seems to be governed by precedent, but whose outcome he dislikes.

Unlike Houdini, Hapless cannot work directly to avoid a rule. In order to get to the answer he wants, Hapless must not only think of an acceptable legal argument for the conclusion, he must do so without noticing that he is trying to do that at all. If he did notice that he was trying to manipulate a rule for political reasons, his own beliefs about appropriate behavior would lead him to feel dissonance or guilt, and (at least sometimes) to stop. Hapless believes both that he must follow what seems to be the best legal argument, and that he should disclose the reason for his decision in the opinion. Therefore, if he is to reach the decision he likes without perceiving himself to violate his own norms, he must engage in the mental contortion of manipulating a rule without noticing that he is manipulating the rule (or even that he is trying to hide this fact from himself). Imagine being a magician who must trick not only the audience but herself as well. This will sometimes prove a hard task. Although people often fail to see the nature of their own acts, when manipulation requires great effort, judges who cannot direct all their energy toward the task may fail. Hapless might therefore, more often than Houdini, give up and "follow the rule" despite disliking the outcome.

Hercules will also face a problem more difficult than Houdini. Hercules can only rule against his impression of the law if he believes that the justification he offers really is the one that is most consistent with all the other (rightly decided) cases, and with the best theory of the law.⁵⁶ Hercules' work might be harder than Houdini's, because it will involve finding an explanation that both seems acceptable to the general legal community and appears to Hercules to be produced by the strict requirements of Dworkin's task for Hercules.

gation to just apply the law. Of the judges who could easily be categorized, about 14% believed that they should innovate whenever they were able. Nearly 26% of the judges condemned judicial activism as inappropriate. And about 57% took views between these extremes. See J. HOWARD, *supra* note 53, at 160-64. A somewhat similar distribution was found in a study of state supreme courts published in 1971. See H. GLICK, *SUPREME COURTS IN STATE POLITICS* 38-54 (1971).

55. Dworkin's views have of course changed over the years. Little in the textual discussion turns on which of his positions Hercules believes. Generally, Dworkin requires Hercules to decide hard cases by invoking those principles that are most consistent with a theory that explains most settled law. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 67-68 (1977); R. DWORKIN, *LAW'S EMPIRE* 238-40 (1986).

56. If the law is immoral enough, Hercules might be able to justify lying. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 55, at 326-27; R. DWORKIN, *LAW'S EMPIRE*, *supra* note 55, at 202-06.

Some commentators have suggested that Hercules will not be constrained by Dworkin's task. They contend that the law is so filled with conflicting rules and principles that a sincere Hercules will always be able to convince himself that the law is most consistent with the principle that allows him to reach his desired result.⁵⁷ I do not fully agree. Although he would sometimes convince himself that the best theory of the law incorporates his own moral principles,⁵⁸ he will sometimes be unable to do so. Despite the conflicting principles present in most areas of law, often one principle seems to dominate an area, at least for a time. When this happens, a sincere Hercules might be unable to convince himself that his favorite contrary principle really best explains the most cases.⁵⁹ If there are instances in which Houdini can construct an argument from precedent or principle, but Hercules cannot generate arguments that he sincerely believes represent the best theory of the law — even though he likes the outcome — then Hercules' belief in Dworkin's theory will have constrained his decision.

Houdini will follow rules less often than Hapless or Hercules if there are any cases in which (1) there is a rule, in the sense that most people would agree that a general category is fulfilled under a particular authority; but (2) it is possible politically and rhetorically to get away with a different outcome. It seems likely that some significant number of these cases exist.

One might think that in cases not governed by specific rules, Houdini would be indistinguishable from other judges. If there is no rule to follow, Hapless and Hercules cannot follow rules more than Houdini. Yet, when rules run out, law can still constrain. In cases of admitted rule indeterminacy, Houdini will look to see if he can offer any value-based arguments that seem generally acceptable to the public as reasons for his desired outcome. If he finds one, he will not be deterred from offering it either because these reasons are not the ones that convince him, or because he thinks that among the publicly acceptable arguments these are not the best.

By contrast, although Hercules and Hapless will also invoke value-based arguments, they will not offer value-based arguments they do

57. See A. Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 231-32 (1986).

58. See *id.* at 230-31.

59. I recognize that Dworkin's task for Hercules is to find principles that explain the most cases in all areas of the law. However, as I assume that this task is impossible even with Hercules's infinite skill, Hercules will be apt to focus on principles embodied in areas of law most related to the particular case. At least this is the tendency of real judges and scholars in practice. See A. Altman, *supra* note 57, at 220. Dworkin's theory permits this. See R. DWORKIN, *LAW'S EMPIRE*, *supra* note 55, at 250-54.

not sincerely hold as good legal reasons. Hercules, for example, may sometimes conclude that the best theory of the law counsels deciding a case against his own view of what a prudent decision would require, even when no specific rule applies and when he could get away with a different decision.

I have offered some theoretical reasons for thinking Houdini less constrained by law than are other judges, both when rules seem to govern a case, and when they do not. Evidence supporting or contradicting my suggestions admittedly is difficult to produce. I cannot compare judges who take Houdini's attitude with those who take Hapless' attitude to show which group more often follows law. We lack access to most if not all judges' beliefs about their own decisions. Further, deciding which decisions counted as following law would itself be an exercise influenced by the decisions of the researcher.⁶⁰

Several facts nonetheless suggest that role beliefs constrain. First, anecdotal evidence supports the conclusion that some judges both do not believe that they need to follow rules, and do vote for positions that seem to many others to be examples of manipulation.⁶¹ Second, although I do not believe everything judges say in opinions, I am inclined to think that some significant number of the opinions stating "although I personally disagree with the outcome, I feel bound . . ." are sincere disclosures of the judge's experience of deciding.⁶²

Still, some might object, even if judges follow the law in part be-

60. Nevertheless, people do try to engage in this sort of study. See, e.g., Stern, *Special Issue: Judging the Judges: The First Two Years of the Reagan Bench*, 1 BENCHMARK no. 4-5 (1984). This study examined the decisions of all Reagan judicial appointees until 1983. By reading all these opinions, and deciding whether each opinion "practiced judicial restraint" the author concluded that the "President has, in general, kept his pledge to appoint men and women to the bench who exercise restraint." *Id.* at 2. This 118-page report did nothing other than look at each judge's opinions and express a view as to whether the examiner considered the opinion to be restrained.

61. See, e.g., Karpay, *En Banc Furor, Liberal Fury*, NEW JERSEY L.J., June 2, 1988, at 10, col. 1 (discussing the apparent willingness of some conservative D.C. Circuit judges to decide cases according to a political agenda); Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29 (1988) (reporting these allegations, and offering evidence that they are accurate but overstated, and equally true of liberals and conservatives).

62. Even a casual computer search of cases containing words such as "Despite my preference" or "Although I personally" will turn up many cases in which judges express the view that if they could decide unconstrained, they would very much like to vote the other way. See, e.g., *Gwin v. City of Tallahassee*, 132 So. 2d 273, 277 (Fla. 1961) (O'Connell, J., concurring) ("Although I am personally opposed to participation by government in private enterprise, . . . I am forced to agree with the majority opinion because I believe it correctly follows the law of this state."). Such comments even appear in dissents, where one would expect not to find judges like Houdini making such claims. See, e.g., *Florida Bar v. Schreiber*, 407 So. 2d 595, 600 (Fla. 1981) (Overton, J., dissenting) ("Although I personally believe the majority's decision serves the best interests of the public and the legal profession, my reading of the cases cited by the majority leads me to the legal conclusion that we can regulate . . . but [not] prohibit [the conduct in question]."; *State v. Frampton*, 95 Wash. 2d 469, 513, 627 P.2d 922, 945 (1981) (Stafford, J., dissenting) ("Although I personally find the thought of death by hanging to be abhorrent, . . . I cannot for

cause they need to maintain views of themselves as constrained, actual constraint requires that judges' beliefs about what the law requires sometimes differ from how they want to decide. Many judges will view the law as requiring what they prefer, both because everyone tends to see the world as they want it to be,⁶³ and because judges are drawn from groups that have reason to like the status quo. Because Hapless will rarely feel the desire to decide differently from the way he thinks the law demands, he will probably be able to rationalize a bit of manipulation in those few cases in which he does want to decide differently. Therefore, the objection concludes, we should expect no difference between real-world Haplesses and those same judges were they to adopt Houdini's attitude toward law.

Hapless is nonetheless more constrained than Houdini for two reasons. First, the political commitments of sitting judges and laws vary. We now have some liberal statutes and precedents, and many conservative judges. Many judges experience a difference between our relatively liberal laws and how they would like to decide.⁶⁴ Of course, nothing here turns on the judges being more conservative than the statutes. I assume that parallel constraints function when the judge is substantially more liberal than the laws.

Second, how a judge wants to decide is influenced by her beliefs about following rules. Because Houdini believes manipulation is acceptable, he often looks carefully at how he would like to resolve a case, and therefore readily uncovers disparities between the law and his own views. Because Houdini does not regard a result being "dictated" by the law as a reason to prefer it, he will want to manipulate whenever he finds such a disparity.

Hapless, by contrast, does not as often consider as a separate question how he might decide the case if the law did not seem clear. He does not see this inquiry as a central part of his job. Therefore, he will less often discover differences. Furthermore, when the law dictates an outcome different from the one he prefers initially, he might change

that subjective reason alone hold it unconstitutional. A law should not be declared unconstitutional just because one does not like it.").

63. D. GOLEMAN, VITAL LIES, SIMPLE TRUTHS 61-66 (1985); Wilson, *Self-Deception Without Repression: Limits on Access to Mental States*, in SELF-DECEPTION AND SELF-UNDERSTANDING 96 (M. Martin ed. 1985).

64. Although correlations between judicial characteristics and voting patterns have sometimes proved difficult, one correlation is beyond question: judges appointed by Republican presidents vote more often for conservative outcomes than do those appointed by Democrats on all issues that have definable liberal and conservative positions. See, e.g., Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Court of Appeals*, 87 COLUM. L. REV. 766, 783 (1987) (reporting that Democratic appointees are about twice as likely as Republican appointees to vote for liberal outcomes in an array of cases including discrimination, § 1983, and government-benefit claims).

his own opinion because he regards a decision being dictated by law as a reason to prefer it. Hapless' preferences are more apt to be shaped by what the law is than are Houdini's.

In addition to being individually less constrained, Houdinis decrease laws' constraint within a system in two ways. First, if a system has many Houdinis, the level of indeterminacy could rise. Rule following is possible partly because we often agree what the relevant category is, and what the facts are. We often agree in part because we try to follow rules and expect others to do the same. We might find that we agree less often if some significant number of judges stopped trying to follow rules, and especially if this fact became known and accepted.

Imagine that all judges had Houdini's belief that a judge should play a game, the goal of which is to implement her view of what is best for the world, and the rules of which are to write opinions according to a vaguely codified set of acceptable legal moves. Imagine also that all judges and legislators know that this is the view held by judges.

Legislation and judging in such a world might become warlike, with legislators trying to use words that cannot easily be manipulated according to the somewhat standardized rules of the game. Judges would try to win battles with each other and with the legislature by using tools of interpretation to secure political victories.⁶⁵ Perhaps the rules of the game would also change as the war escalated. Were this the process of decision, we likely would find much less agreement about what a rule required.⁶⁶

Second, the perception of Houdinis manipulating in a system can drive other judges to adopt Houdini's cynical attitude toward law. Judges follow laws that they dislike in part because they value a system in which all judges will do the same. They suspend their own

65. This would be like trying to write a chain novel in which the goal was to frustrate the story being told by some of the other storytellers. Cf. R. DWORKIN, *LAW'S EMPIRE*, *supra* note 55, at 228-32.

66. The doctrines of indeterminacy and underdeterminacy are partially self-fulfilling; the more that we believe them, the more they will be true. Cf. Schauer, *Formalism*, 97 YALE L.J. 509, 519-20 (1988). Schauer offers three views of constraint. In the first model, judges can always avoid an apparently applicable rule by using an available escape route, or can add to the list of escape routes. In model two, judges can also always find an escape, but must use existing doctrines. In model three, judges will sometimes find themselves unable to use an escape route, and will therefore feel compelled to apply a rule even if they do not like the outcome.

Schauer wonders whether the formalism of model three is psychologically possible. *Id.* at 530. One factor that makes it psychologically possible, and that could make it stable, is the widespread belief that it is both possible and morally required for acceptable judging. If judges and others whose respect they need believe that the stock of escape routes is closed, and that those available have clearly defined acceptable uses, then — although they will in fact sometimes invent new ones, and use the existing ones broadly — they will sometimes refrain from doing so to maintain their self-respect and the respect of others. Formal rules will then have succeeded in constraining decision.

moral views to some extent in order to be part of a system in which other judges will suspend their moral views to some extent. The perception that the other judges are breaching that agreement removes one incentive to continue putting aside their own moral views. The perception of manipulation can thus lead to more manipulation.⁶⁷ Although I cannot name names or offer proof, it is my sense that an increasing number of judges — liberal and conservative — are falling prey to the temptations of Houdini's attitude, and that this is both fueled by and fueling what some perceive as an increasingly politicized judiciary.

C. *How Introspection Threatens Partially Self-Fulfilling Beliefs*

So far, I have argued that how much law constrains depends in part on what judges believe about their decisions. Houdini is less constrained than other judges, and the presence of Houdinis can make judges less constrained, either by reducing the determinacy of law generally, or by causing otherwise sincere judges to defect toward Houdini's attitude. To connect this argument with nonintrospection, I next consider whether judges with accurate understandings of their own behavior might be less constrained than those who hold false beliefs. I also suggest that they might be less candid. Introspection might lead Hapless and Hercules to abandon their theories, becoming Houdinis themselves, or to adopt attitudes that, although not so cynical as Houdini's, would reduce law's constraint.

Were Hapless to introspect, he would discover that he cannot always decide cases without some reliance on his own moral and political views, at least at the stage when he describes the issue to be

67. Consider the analogy between judges' roles and a prisoners' dilemma. See generally M. TAYLOR, *THE POSSIBILITY OF COOPERATION* (1987); A. RAPOPORT, *TWO PERSON GAME THEORY* (1966); A. RAPOPORT & A. CHAMMAH, *PRISONER'S DILEMMA: A STUDY IN CONFLICT AND COOPERATION* (1965). Judges could be understood to benefit by changing law to fit more closely with their moral views, and harmed when judges with different values do the same. Each judge might individually be made best off if she ignores the law when she disagrees with it, and if the other judges always follow the law. But if society benefits from the predictability of rule following, or other virtues of constraint, society might benefit if judges almost always follow the law.

Because judges decide cases repeatedly, one can see judging as an iterated prisoners' dilemma. As well, it has the opportunity for degrees of defection, and for defecting while trying to hide the fact that one is defecting. In such circumstances, it is possible for cooperation to emerge as a stable pattern. See, e.g., M. TAYLOR, *supra*, at 65-78. However, if one player perceives the others to be defecting, this perception can lead to further defections.

I do not mean to suggest that the prisoners' dilemma captures the subtle and complex forces affecting judging. Judges have many interests and many reasons for following laws that they do not like. As well, unlike most prisoners' dilemma models, judges cannot know when other judges defect, because disagreeing and cheating look alike. Nonetheless, one force that helps judges to follow rules could be the belief that other judges will do so as well. If so, the perception of Houdinis can lead to more Houdinis.

decided. Hapless' formalism hides moral choices that he makes when he frames issues and selects levels of abstraction for the terms in his syllogisms.

Hercules might likewise be disappointed by introspection. Hercules believes that he should not ignore a huge portion of cases that defy a best theory of law, and that he should not select principles that best fit his own political and moral preferences.⁶⁸ CLS arguments strongly support the conclusion that Hercules' task is not always possible. Legal doctrine is sometimes so internally contradictory that no theory is consistent with a large portion of decided cases.⁶⁹

Even if Dworkin is correct in thinking that Hercules' task is possible for a judge with superhuman intelligence, no real judge could ever construct such a theory.⁷⁰ An introspective judge would discover that she often violated Dworkin's requirement that her "threshold of fit" not be "derivative from and adjustable to [her] convictions of justice."⁷¹

Hercules or Hapless might renew some form of denial in order to maintain some self-esteem. By doing so, each could retain the belief that he was succeeding at the requirements of his role. Alternatively, each might alter his belief about what constituted a legitimate decision so that his beliefs conformed to an action at which he could actually succeed.⁷²

Of course, introspection might not drive Hapless or Hercules either to denial or to abandon their theories. Often, following law is possible. Introspection would reveal to both judges that they sometimes succeed at their tasks. Nonetheless, I contend that if Hapless and Hercules introspect and discover the *extent* to which they follow the law, the *risk* increases that they will defect to Houdini's position and therefore be less constrained and less candid.

To focus the argument, consider a group of district judges facing statutory interpretation issues. They believe in formalism as a means of decision when there are rules to apply, and some version of Dworkinian best fit theory when they find gaps, conflicts, or ambiguities in the rules. In this group, a judge follows a rule when she finds facts, locates a statutory provision that applies to them, and does both things in a way that most everyone who considered the matter with a

68. See A. Altman, *supra* note 57, at 231.

69. See *id.* at 222-24.

70. See R. DWORKIN, *LAW'S EMPIRE*, *supra* note 55, at 264-65.

71. *Id.* at 255.

72. This is the central insight of cognitive dissonance theory. See *supra* notes 33-38 and accompanying text.

view toward finding and following a rule would agree. Similarly, she fills gaps when she acts in a way that most others would agree is the most consistent with principles implicit in the law. Such consensus is often available, even among judges with different political and moral views.

Assume that there is consensus about the existence of a rule or a determinative principle in 70% of the cases before the judges. Assume further that the judges believe there is such a consensus in 90% of the cases before them. Everyone agrees that 10% of the cases are indeterminate either by rules or by principles, and that disagreement about what to do should be expected among judges with different moral or political beliefs in these cases.⁷³ I am assuming for the example that judges overestimate their ability to follow law. This example will suggest why introspection increases the risks of Houdinis assuming such overestimation. I take up the validity of this assumption below.

In 20% of the cases, judges mistakenly think they are following rules or being guided by principles. In these cases, they have erred in thinking that there would be a consensus about the presence of a rule or the dominance of a principle. In fact, other judges with different moral and political views would decide these cases differently. Perhaps they have been blinded to ambiguities in the statute or in the precedents by their own moral positions. This possibility should not be surprising. We all tend to see as universal things about which we feel strongly.⁷⁴

These judges are not introspective. They mistakenly fail to notice in every fifth case that they do not follow rules or find the best fit. They might, however, introspect in two ways: (1) identify the cases in which they wrongly think that they have followed a rule or found the best fit; or (2) realize that these cases exist, so that they have an accurate understanding of the fact and frequency of their mistakes. I suggest that although dispelling inaccurate self-conceptions in either way could have salutary effects, it might decrease both constraint and candor.

Consider an example. Two judges separately hear a criminal case against Bob. Judge *A* supports abortion rights. Judge *B* strongly favors protecting the accused. Bob gave a party attended by his niece, whom he knew to be 14 and pregnant. When she arrived at the party, he motioned toward the bar and said, "Help yourself to a Martini."

73. I offer these numbers simply to illustrate a point. I would be just as happy to make the same point with numbers indicating somewhat more indeterminacy.

74. See, e.g., Ross, Green & House, *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOLOGY 279 (1977).

Bob is charged with two counts of "knowingly serving alcohol to a minor." The statute defines minor as "anyone under the age of eighteen." Count one is for serving his niece; count two is for serving her unborn fetus.⁷⁵

Judge *A* convicts on the first count and acquits on the second, finding both to be easy cases. *A* believes the first case falls squarely under the literal meaning of the statute and its obvious purpose, and that the second is clearly outside both. She supposes that reasonable people do not understand fetuses to be "under the age of eighteen" or to be "served" when someone offers a drink to a pregnant woman.

Judge *B* finds both cases uncertain. She is not sure whether Bob "served" alcohol, since he did not pour the drink or bring her the glass. She is not sure whether someone not yet born is "under the age of eighteen."

It seems to me that there is clear law in case one, that Judge *A* followed it, and that Judge *B* was wrong to see it as uncertain. Case two is less clear, Judge *B* correctly saw it as uncertain, and Judge *A*'s certainty seems misplaced.

A and *B* might have made their mistakes due to the pull of their underlying political beliefs. Perhaps *A* did not see the ambiguity in case two because she feels so strongly that a fetus is not a person, and that fetal abuse and abortion rights are connected issues. Perhaps *B* saw case one as uncertain because she really opposes paternalistic legislation.

If such unconscious factors did influence *A* and *B*, perhaps *A* and *B* could become aware that they were influenced by controversial moral views. By recognizing a consensus against her own intuitions, *B* might follow the consensus, and convict Bob on count one, thereby increasing constraint. In case two, *A* might expose the indeterminacy and offer moral reasons for acquitting on count two. Recognizing the indeterminacy might improve her decision, because she would give more thought to the best thing to do.

Of course, one might think *A* less constrained in the sense that she would no longer feel compelled to follow what she formerly perceived to be a rule. However, *A* is not really less constrained. First, recognizing the absence of a rule would not alter *A*'s decision in this case because *A* liked the outcome she thought the rule dictated. Therefore, she was not constrained at all. Second, even if she had disliked the rule, the thing that she thought constrained her was not a rule, but her

75. This case is not entirely fanciful. A Florida woman was recently convicted for delivery of cocaine after she "delivered" cocaine to her fetus through the umbilical cord. See *Cocaine Mother Gets 15 Years Probation*, L.A. Times, Aug. 26, 1989, § 1, at 2, col. 1.

misperception. I will call this false constraint — deferring to what one mistakenly believes to be a legal rule. I do not count removing false constraint as decreasing the real constraint of law.

I expect that genuine false constraint, in which a judge wrongly believes a case governed by a rule she dislikes, is rare.⁷⁶ A judge would not misperceive the law to forbid her desired outcome. Motivated misperceptions would usually lead judges to misperceive the law as supporting their desired results as it did for *A*.

In sum, introspection might have only good effects. It might (1) increase the constraint of law; (2) encourage awareness of real uncertainty; (3) possibly decrease law's false constraint; and (4) increase the accuracy of judges' stated reasons for decision.

On the other hand, the judges might react less desirably. *B* might not care to convict on count one. If she did not see the consensus because she felt strongly about the issue, she might ignore the rule once it came to her attention. *A* might find that her real motives are not disclosable in contemporary legal dialogue. If she felt strongly about the matter, she might prefer to abandon candor, and offer legally acceptable but insincere reasons for her decision.

If *A* recognizes case two as indeterminate, but writes an opinion pretending that she is following a rule, introspection would not have improved her decision. It would have moved her toward Houdini's attitude by making her used to abandoning candor self-consciously. At least when misled, she was candid. Similarly, if *B* ignores the rule and acquits on count one, introspection would have made her more like Houdini because she too would be used to abandoning candor, and because she would be used to ignoring what she believes to be the law.

The need to reduce dissonance might lead introspective judges to adopt Houdini's attitude. *A* and *B* believe that they must follow rules when they exist, and find the best fit with principles in the law when rules do not, and that they must offer publicly acceptable reasons for decision when neither is possible. Introspection would lead them to see that they sometimes had strong desires to violate laws, and sometimes wanted to decide for nondisclosable reasons. Their commitment to the rule of law would make these desires uncomfortable.

They might resolve this dissonance in two ways. They might overcome their desire. They might alter their vision of acceptable behavior

76. False constraint does not correspond to the 20% error rate I hypothesize. Rather this error rate includes cases in which judges believe there is a rule, incorrectly, but prefer the outcome they wrongly view as dictated anyway. False constraint requires wrongly believing in the existence of a rule one does not want.

so that indulging their desires by manipulating or offering duplicitous opinions seems legitimate. Which solution a judge will pick seems uncertain. It will depend on the strength of the judge's desire and the relative difficulty of adopting Houdini's attitude. My point so far is simply that introspection creates a risk that strong desires for particular outcomes together with some weakness of will might lead introspective judges to become Houdinis.

Given this account, one might wonder why I think Houdini less constrained by law than nonintrospective judges. According to the example, Houdini reaches the same result as the two misled judges.

Unlike this example, Houdini will ignore law more often than misled judges. *B* might ignore some rules when she is strongly motivated to do so. If, however, noticing that she is ignoring rules makes her very uncomfortable, she will likely do so only when she can avoid noticing it, or when the rule itself makes her *very* uncomfortable. Because Houdini may try to ignore rules self-consciously when he dislikes the rule only a little, he will be less constrained by law.

Consider next what might happen if (more realistically) introspection cannot reveal which 20% of cases judges mistakenly take to be governed by rules or principles. A judge might be blind to other positions in these cases because of the strength of her moral and political views. Still, she might acknowledge that she will mistakenly characterize one in five of her decisions as decisions dictated by law.

This discovery too could lead the judge to adopt Houdini's attitude. Most people, confronted with failure, go on trying to succeed, because they believe in the goal. At some level of inevitable failure, however, people stop trying. Instead, they redefine success to protect their self-esteem. Often they find virtue in the acts that they used to define as failure.

Whether introspective judges would abandon following law as a primary goal is unclear. Perhaps judges succeed enough that their failures present no obstacle to continued efforts. Perhaps not. This is a risk of introspection. If judges cannot identify when they ignore law, then the risk might be unwise. Although introspection creates a risk of more Houdinis, it offers little increase in the likelihood of rule following, since judges will be unable to identify which cases are examples of failure.

The force driving these two arguments is a concern over judges defecting from sincere effort to cynical manipulation. Evaluating this risk is admittedly intuitive. Perhaps Houdinis are more the product of Machiavellian temperaments developed before taking the bench than of disillusionment or of conflict between desire and obligation. Cyni-

cism toward law might be harder to produce than I have suggested. Perhaps it would be less likely if all judges could be induced to introspect all at the same time, in an atmosphere where they could share their discoveries. But if we urge introspection, we do so taking a risk on these questions.

Even if it caused no defections, introspection could increase law's indeterminacy. If judges who believe wrongly in 90% determinacy came correctly to understand that only 70% of cases are governed by law, this discovery could itself further reduce law's determinacy.

Law's determinacy need not be stable. If judges came to believe that law is less determinate than they formerly thought, they might become increasingly willing to consider and to look for indeterminacies in the law. Although this willingness could decrease some false constraint, it might reduce law's real constraint as well. The existence of legal rules depends on consensus about meaning. Such consensus could deteriorate as willingness to look for gaps, conflicts, and ambiguities increased. As the consensus decreased, the real constraint of law would decrease as well.

To summarize, I have offered three ways that introspection could reduce law's constraint. First, if introspection makes plain to judges in which cases they want to rule either for nondisclosable reasons or against a legal rule, it could lead them to adopt Houdini's attitude, rather than suppress strong desires. If denial formerly permitted them to believe that they followed law and yet sometimes to indulge their strongest desires not to follow law, introspection might force them to choose. Second, recognition of how often they fail could lead to defection just to reduce the dissonance of knowing that one fails. Both these defection options would reduce constraint and candor. Third, without defecting, judges who recognize law's open texture could behave in ways that make law less constraining.

My arguments have presumed that judges do not already have entirely accurate understandings of their decisions. If judges know exactly when and how often they follow rules and principles, and when they are unable to do so because their decisions depend on controversial political views, then ignorance of these details cannot play a role in constraint. I have only shown that *if* judges are overly optimistic about the frequency with which they follow law, revealing their overstatement could diminish constrained and candid judging.

I do not presume to know either what judges believe about their decisions or how often judges follow law. Yet, I see several reasons to suppose that judges might overestimate the level of determinacy achieved by looking to law. First, we have all been educated in the

virtues of the rule of law. It seems likely that many judges have internalized these virtues as norms. Second, psychological studies indicate that many people overestimate their own ability to succeed at tasks that they attempt,⁷⁷ and that few decisionmakers have the ability to assess what factors influence their decisions.⁷⁸ Third, judicial opinions are written as if very many cases were dictated by clear rules or principles, even in appellate courts where we have reason to think that cases are not so clear as the opinions suggest.⁷⁹ If judges consider these opinions to be candid revelations of their reasons for decision, judges must experience their jobs as more constrained than is true. Fourth, taking moral responsibility for deciding indeterminate cases is unpleasant, giving judges a reason not to notice how often they make rather than follow law. Fifth, a wide array of scholars and judges has supposed for a long time that judges lack clear insight into their decisionmaking process.⁸⁰ Though none of these reasons is dispositive, they suggest that some judges hold somewhat inaccurate views of their decisions.

By considering the possibility that judges are misled, I do not mean to adopt the arrogant position that academics have some privileged view, or that we are smarter than judges. Surely we do not and are not. I suggest only that when a person adopts a role, which will have some socially constructed definitions of success, she will have a different view of her own actions than will someone who need not function in that role.

The arguments offered so far show why I think the belief in law is partially self-fulfilling. Judges who believe law constrains are indeed more constrained as a result of their beliefs. But they are not quite as constrained as they think. Judges' beliefs about their decisions are perhaps inaccurate, though they are closer to being true because judges hold them.

In arguing that judges overestimate their ability to follow the law,

77. See, e.g., Feather, *Trying and Giving Up*, in SELF-DEFEATING BEHAVIORS, *supra* note 21, at 67.

78. See, e.g., C. BARTOL, PSYCHOLOGY AND AMERICAN LAW 246-51 (1983); R. HOGARTH, JUDGEMENT AND CHOICE: THE PSYCHOLOGY OF DECISION 56-57 (2d ed. 1987); Konečni & Ebbesen, *The Mythology of Legal Decision Making*, 7 INTL. J.L. & PSYCHIATRY 5, 6-7 (1984) (reviewing empirical research on judicial decisions and concluding that "legal decisions are actually very simple, in the sense that very few factors are typically taken into account, and that the few factors which are taken into account are generally not those which the decisionmakers claim they are responsive to"); Nisbett & Wilson, *supra* note 4, at 233 ("People often cannot report accurately on the effects of particular stimuli on higher order inference-based responses. . . . The accuracy of subjective reports is so poor as to suggest that any introspective access that may exist is not sufficient . . .").

79. See, e.g., R. COVER, *supra* note 29, at 232-36.

80. See, e.g., works cited *supra* note 2; Posner, *supra* note 1.

I have supposed that sometimes law clearly dictates a result, and have relied on broad consensus to pick out these cases. Some have suggested that if individual judges can err about the law as a result of denial or rationalization, actual legal meaning cannot be defined in terms of consensus. After all, if individual judges are subject to psychological mechanisms that cause them sometimes to misperceive law, groups of judges must sometimes suffer the same fate. Therefore consensus cannot form the basis for meaning.

I disagree. I have defined legal rules as what almost all people who view their task as trying to follow law would agree are rules, despite their varying moral and political opinions on the issue. If (and these are two big ifs) judges are sincere, and if they hold a wide spectrum of views, it seems extremely unlikely that they would all arrive at the same position through error, especially the sort of motivated error that I have been discussing. Judges deny when they have reason to do so, in the form of a desire to rule for nondisclosable reasons, or against what they think the law is. But if judges hold a wide enough set of moral and political views, those who disagree with each other on moral issues would not tend to err about the law in the same direction. Moral disagreement serves as a check against group illusion. In other words, consensus is a relatively safe basis for legal meaning in a sufficiently heterogeneous community.

So far I have offered half of my justification for nonintrospective judging: nonintrospection increases the chance that law constrains most. In Part II, I give reasons for thinking that such constraint is desirable. But the justification is nontransparent.

The justification is not so glaringly nontransparent as the third reason for telling Anne's parents to follow me to the tree. In that case, telling them the reason was *certain* to deprive them of an ability and *absolutely* debilitating for the task. Therefore, they could know *nothing* about the justification. The nontransparency of my justification for nonintrospection is more attenuated. First, it is not certain that discovering how they decide cases would decrease rule following or transform judges into Houdinis. Rather, I have suggested that introspection increases the risks of these events. Second, even if the truth did decrease rule following, it would not destroy the possibility of law. Instead, it might make law marginally less constraining. Third, whether judges are in fact aware of the things that I claim they avoid noticing is not at all clear. Nevertheless, I have offered some account of how and why judges might maintain inaccurate beliefs about their behavior.

Admittedly, the plausibility of this theory varies depending on

whether one is discussing trial courts, intermediate courts of appeals, or supreme courts; whether the decisions involve detailed statutes, common law precedents, or broad constitutional provisions; and whether the judge is more or less experienced, sophisticated or careful. Perhaps for Supreme Court Justices deciding constitutional cases, the theory has little descriptive power. I think it fairly useful in thinking about lower courts, and especially about statutory decisions.

II. VIRTUES AND VICES OF ACCURATE BELIEFS

In this Part, I discuss virtues and vices of introspective judging. I consider two prominent positions. The first suggests that introspective judges would reach better decisions. The second suggests that introspective judges would advance a left political agenda. I contend that introspective judges would probably do neither.

A. *The Traditional Version*

1. *Better Decisions*

Usually decisions improve if decisionmakers have more, and more accurate, information.⁸¹ Decisions might improve if judges accurately understood their own decisionmaking process. If judges wrongly believe that a given case is indeterminate, discovering that a rule really applies might lead them to defer to the rule, or more candidly to admit and to justify overruling it or creating a new exception. Judges will be more constrained when introspective, because when they come to recognize that they are manipulating the law for formerly unconscious reasons, they will not continue to do so.

If judges wrongly believe that a case is determined by law, discovering how prior cases or statutes are really ambiguous might induce them to consider moral reasons for their decisions more carefully. If judges wrongly believe that they are not being influenced by one of their own controversial moral views, discovering the truth might permit them to offer those views in their opinions.⁸² If the view is not

81. There are exceptions. One literature suggests that when people believe they are reaching decisions based on a wide variety of information, often they actually decide based on a very few variables. See, e.g., Konečni & Ebbesen, *supra* note 78. As well, sometimes too much information can be debilitating. Usually too much information is understood to be too difficult to absorb. See, e.g., R. WURMAN, *INFORMATION ANXIETY* (1989); Grether, Schwartz & Wilde, *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277 (1986). In some areas, even well understood information can lead to worse decisions. See Reed, *Information in Political Markets: A Little Knowledge Can Be a Dangerous Thing*, 5 J.L. ECON. & ORG. 355 (1989).

82. See, e.g., Watson, *supra* note 1, at 959 (suggesting that judges would reach better decisions if they attended group psychotherapy).

appropriate for public discourse, recognizing this fact could help the judge to reconsider the decision. Further, if judges more accurately revealed the forces that move them to decide, lawyers and commentators would be able more directly to address judges' real concerns.⁸³ Introspection could promote constraint, dialogue, and wise decisions.

I have suggested several reasons not to expect these desirable effects. Whether introspection could improve decisions depends both on what sorts of errors judges can recognize, and on how judges would react to such insight. First, judges might not be able to identify cases in which they are influenced not to follow the law. If so, insight might mean coming to know *that* they fail to follow it sometimes, which would not necessarily offer benefits. Second, depending on why judges fail to notice that they are not following law in the first place, introspection might have just the opposite effect from the one supposed by the traditional argument. If judges fail to notice because they are strongly motivated to reach particular decisions, then introspection raises the risk that this motivation will dominate their commitment to candor and rule of law, leading them to adopt Houdini's attitude. If it did create more Houdinis, law would constrain less, candor would decrease, and decisions would not improve. Additionally, accurately recognizing the level of constraint could decrease determinacy, even for judges who do not defect.

Consequently, whether introspection would have good or bad effects seems very difficult to predict. I claim only that the virtues attributed to it by the traditional argument are not obviously more certain to occur than their opposites, and that introspection carries with it some risk of harm. Introspection could lead to constraint and candor or to duplicity and less constraint.

2. *Less Constraining Law*

In evaluating introspection, one must consider not only whether introspection will decrease constraint and candor, but also whether we should want law to constrain less. Constraint serves important values, but it also prevents good decisions. In this section, I argue that even if law constrains too much, we should prefer a system without Houdinis. In section II.B, I consider whether we should want or could easily create a system of candid and less constrained decision through introspection.

83. See Minow & Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 54-55 (1988) (arguing for introspection as facilitating dialogue). Minow and Spelman also argue that if judges do not disclose the real animating motives for decision, they fail morally by not meeting "the critical responsibility to give account to the human beings affected." *Id.* at 55.

In general, the virtues and vices of having judges follow what they believe to be the law are well known. If judges follow law, rather than doing in each case what seems to them best, many difficulties are minimized. Decisions are more predictable, offering notice to potential litigants, permitting planning, deterring litigation, and promoting stability. If the applicable law was established by a legislature or by many judges over time, following law limits the power of individual judges, promoting the values of decisionmaking by consensus. Finally, if judges hold views aberrant from or unacceptable to the community, constraining judges limits the implementation of unacceptable values.

Constraint also has well known drawbacks. Rules are often over- and under-inclusive given their main justifications. Discarding rules often offers more just decisions.⁸⁴ As well, constrained decisions are inherently conservative, in the sense of preventing change. Law sometimes progresses when judges change it.

In deciding whether judges should follow law that they think bad, we engage in a tradeoff among these values. Often the decision is thought to rest on a risk-of-error analysis. We ask whether in given circumstances the benefits of stability, predictability, and notice are more important than the possibility of well-tailored decisions and improved laws, and whether we worry that judges will make bad rather than good changes. I offer no solution to this difficult question. Whatever resolution is appropriate, Hapless and Hercules are preferable to Houdini.

Nonintrospective judges could better promote rule-of-law virtues. They will reach decisions that evidence consensus about particular rules and values more often than Houdini. Hapless and Hercules are constrained by a social and interactive process. They often convince themselves that they are following law when they believe, and anticipate that others would agree, that a rule is applicable or that a value is present. Because they repeatedly receive praise, criticism, and other feedback to these decisions, they can often make good predictions about how other people will react to their claim of rule following or value discovery. Because they need to maintain their self-esteem, which is dependent on internalized norms that are in part socially created, they must accurately predict what others will consider acceptable acts. They will be most constrained when they anticipate violating some consensus about what counts as following the rules or discovering values, because in these cases they will be more likely to fear retri-

84. F. SCHAUER, *PLAYING BY THE RULES* (forthcoming).

bution both from their own egos and from external criticism.⁸⁵ Although Houdini is also constrained not to ignore consensus about the law, he will less often need to follow consensus positions if he can get away with some manipulation.

A world populated by Hapless and Hercules would also offer more stability, predictability, and notice than a world with more Houdinis. Because Hercules and Hapless will be more reluctant to deviate from what they believe to be a rule or a clear principle, and because they will have this belief when they think most other people will share it, their actions will be more predictable, and therefore offer more notice, than Houdini's. Although any given Houdini might be very predictable if we know something about his political or moral views, trying to predict outcomes in a world populated by Houdinis with different views would be difficult. Further, judges' beliefs that they should follow law even if they disagree with its wisdom might at the margin lead judges to avoid overruling, ignoring, or creating exceptions to rules, which would in turn promote some stability.⁸⁶ Of course, these arguments are most plausible if one believes that introspection might drive sincere judges to defect and become Houdinis. Still, introspection would undermine some of these values if it simply reduced the determinacy of law.

Some might suggest that we have no reason to dislike Houdini. So long as judges offer a publicly acceptable reason for their decision using the language of rules, precedents, and other legal discourse, they will be sufficiently constrained for rule-of-law purposes. We should not require judges to be convinced by the arguments they offer. Law develops in part because judges change it when it seems to them bad. Some of the most important decisions can be understood as manipula-

85. See, e.g., Gilbert & Cooper, *Social Psychological Strategies of Self-Deception*, in SELF-DECEPTION AND SELF-UNDERSTANDING, *supra* note 63, at 75, 82-84 ("In a complex social network, people govern each other's outcomes, acting as gatekeepers who control rewards and mete out punishments. Such mutual interdependence requires people to arrive at a shared conception of social reality, including that aspect of social reality known as the self."); D. GOLEMAN, *supra* note 63, at 159-93.

86. The possibility that judicial nonintrospection is justified by traditional rule-of-law virtues was suggested to me by Margaret Radin's recent article, *Reconsidering the Rule of Law*, 62 B.U. L. REV. 781 (1989). Radin's project was to salvage some of the rule-of-law virtues while rejecting a formalist conception of rules in favor of a Wittgensteinian belief that rules exist when and to the extent that there is social agreement that a rule has been followed. I agree with her that even if rules function very differently from the way legal philosophers have often assumed, we can still invoke some of the virtues traditionally associated with rules to justify the way that rules do function. But I do not think that we should offer such justifications to judges. Radin styles her proposal as pragmatic. Probably a pragmatist should not want to import Wittgenstein's insights into law. Even if there is nothing more to rule-following than there being a consensus about whether a rule has been followed, believing that rule following is more than this is part of what fosters the consensus.

tions, in the sense that they altered the law while purporting to follow it.

Although I agree that judges should sometimes change the law, and conceivably that they ought on rare occasion to do so without disclosing this fact or their reasons for doing so, we should not want Houdinis for two reasons. First, if we must choose between misled, candid judges and informed, duplicitous judges, we should prefer misled judges on moral grounds. Of course, one need not view Houdini as immoral. Writing opinions is an argumentative practice. Not all argumentative practices require sincere belief. Competitive debate and advocacy in court, for example, do not morally require that their participants believe the arguments they offer. The points of debating and of advocacy would not be well served by such requirements. In deciding whether manipulation counts as a moral wrong for judges, we need to consider whether the point of judging is served by a sincerity requirement. One can imagine a system in which judging resembled debating or advocacy. The adversary system of adjudication, however, seems designed to have deliberative, not argumentative, judging. Much of this paper is devoted to showing why we should prefer a system in which judging requires more sincere commitment to arguments than debating, advocacy, or being a Houdini. If I succeed in making such a prudential showing, then manipulation should be considered immoral on the ground that it is a form of insincere argument that in context makes the practice of legal justification less effective. As such, insincere justifications are harmful lies.

Second, though judges should sometimes ignore law, we might not want them to do so in the cases that Houdini would choose. Houdini will ignore law whenever he desires, limited only by political constraints, reversal, and the limits of his ability to manipulate existing precedents and statutes. Hercules and Hapless will ignore law only when all these factors are present, *and* they disagree with the law so much that (a) they do not notice that they are ignoring law; or (b) they are more troubled by the badness of the law than by breaking their commitment to follow law. Judges who believe they should follow law might ignore law only when they view it as very bad.

Fred Schauer has recently described our legal system as one of presumptive positivism,⁸⁷ by which he means that a judge follows rules unless the outcome strikes the judge as very bad, in which case the judge engages in a more detailed analysis of the best thing to do.⁸⁸ He

87. F. SCHAUER, *supra* note 84.

88. *Id.*

contrasts presumptive positivism with rule-sensitive particularism, by which he means always doing what seems best in the case, taking account of the values of stability, predictability, and notice that are served by following rules even if they are otherwise imperfect.⁸⁹

A judge who sees herself as a rule-sensitive particularist will probably follow rules less often than a judge attempting to follow presumptive positivism. The presumptive positivist judge will not ask herself about each case whether it is best to follow a rule, but only will ask this when she is struck that something is seriously wrong. She will therefore follow rules in some cases where, had she considered the matter carefully, she would have found the rule less than ideal.

A judge who tries to engage in rule-sensitive particularism might systematically undervalue the importance of rules or social values that she does not think significant. We all have some tendency to overestimate short term concerns and to think that our own views are widely shared.⁹⁰ Even rule-sensitive particularists who are aware of these tendencies might not have the strength of will necessary to notice that they are overvaluing immediate results and their own values. We might therefore get better decisions by creating a system in which judges believe they should almost always defer to law, even if we in fact want them to ignore law somewhat more often than we say.⁹¹ A system in which judges ignore and change the law the right amount might require the sort of acoustic separation we use for juries. We tell them always to follow the law, believing that they will nullify the law only when it leads to truly bad results.⁹²

89. *Id.*

90. See, e.g., C. FITZMAURICE & K. PEASE, *THE PSYCHOLOGY OF JUDICIAL SENTENCING* 19-21 (1986); Ross, Green & House, *supra* note 74.

91. This might lead more closely to an accurate rule-sensitive particularism than if judges tried to be rule-sensitive particularists. In fact, we might desire even more acoustic separation. We might get the right amount of rule following if judges believe that they should follow all rules that do not lead to clearly evil results. Presumptive positivism might itself be nontransparent. Cf. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 174 (1982) ("Whom would you trust more to decide . . . torture cases generally, as we want them decided, . . . a judge who in hard and easy cases is always declaring that we must balance the costs and benefits of torture, or the judge who announces that our system has an absolute prohibition against torture?").

92. See M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* 62-65 (1973). I neither defend nor condemn jury nullification. I merely draw the analogy between my position on judging and the Kadishes' position on juries: by not informing jurors of their right to nullify, we can limit nullification to cases in which jurors have a "damn good reason" to ignore law. See *United States v. Dougherty*, 473 F.2d 1113, 1136-37 (D.C. Cir. 1972); *United States v. Simpson*, 460 F.2d 515, 518-20 (9th Cir. 1972). But see *Dougherty*, 473 F.2d at 1143 (Bazelon, C.J., dissenting) (arguing that the jury should be informed of its right of nullification); K. GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 366-67 (1987) (approving jury instructions of the right to nullify); Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, *LAW & CONTEMP. PROBS.*, Autumn 1980, at 51, 111 (concluding that the jury must be instructed about its power to nullify).

If so, Houdini is insufficiently constrained. Houdini has no reason to ignore only very bad laws. He will ignore the laws that he thinks bad whenever he can.

B. *The CLS Version*

1. *Critique as Political Tool*

Some CLS scholars offer a very different image of the virtues of introspection.⁹³ The CLS version differs in two main ways from its traditional counterpart. First, in comparison to liberal thinkers, CLS writers think introspective judges will find that law determines far fewer cases. In the extreme, they accept radical indeterminacy.

Second, CLS writers see critique, or trashing, as a means of social change. Elites can pretend the system is just only if they believe inaccuracies about the rule of law.⁹⁴ Guyora Binder explains: "Legal ideology . . . legitimates inequality for its beneficiaries. It helps its beneficiaries believe their society meets the needs of the powerless. . . . This provides — for those powerful people who need it — a justification for vigorously repressing confrontational behavior on the part of people without power."⁹⁵

For example, some critics consider neutral decision theories, such as rights theories, harmful to social movements. The world would improve, they say, even for those who appear to depend most on rights, if we reached social decisions using some other language, such as discussing needs or political ideals.⁹⁶ Using the language of rights harms social movements because initial rights victories frequently lead to

93. I say "some" both because some CLS writers do not advocate critique, and because some do not envision critique working to create an enlightened judiciary. Instead, they hope for a future with a less important judiciary. See, e.g., R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 31-32 (1986) (offering a proposed government reorganization into more numerous branches).

94. Some have suggested that trashing can be justified on the grounds that it is fun, liberating and true. See, e.g., Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230 (1981). An even less appealing version of this justification admits that trashing may do nothing to alter the behavior of oppressing elites. Trashing will simply make their existence as oppressors less comfortable. Mark Kelman has written, for example:

[I] have a satisfying feeling of fighting a reasonably nonviolent war here. If nothing else, it seems only fair that in a world of meritocratic myth in which true victims must often bear not only their poverty and inability to control an alien environment but frequently their own self doubts as well, *spreading at least the self-doubt to the otherwise privileged is the most minimal act of revenge.*

Kelman, *Trashing*, 36 STAN. L. REV. 293, 327 n.85 (1984) (emphasis added).

95. Binder, *supra* note 1, at 29; see also *id.* at 35-36; Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1358 (1988) ("[I]deology convinces one group that the coercive domination of another is legitimate.").

96. See, e.g., Tuslinet, *An Essay on Rights*, 62 TEXAS L. REV. 1363, 1384-94 (1984).

long-term losses.⁹⁷ Initially rights critics argued that talking about rights offered no benefits — only harms.⁹⁸ After a significant dialogue on the subject,⁹⁹ however, most critics seemed to agree that the relevant question is whether the real benefits of rights talk are worth the real harms.¹⁰⁰

Kim Crenshaw describes this dilemma in advocating civil rights for racial minorities. The civil rights movement succeeded so far as it did by creating an ideological crisis that challenged the logic of the institutional system.¹⁰¹ By pointing to the disparity between the American myth of equal opportunity and the obvious fact of racial oppression, blacks forced Americans to commit to equality in order to maintain their well-loved myth. But that commitment was entirely ambiguous between color blindness and substantive equality. The dilemma arises because the language of “right to equality” was essential

97. Rights critics allege that rights harm us in many ways. See generally *Symposium: A Critique of Rights*, 62 TEXAS L. REV. 1363 (1984). I select this particular harm because it seems to be the most serious and least controversial.

98. See, e.g., Tushnet, *supra* note 96, at 1384. Even at early stages in this debate, however, critics recognized that this is an empirical and contingent claim. See, e.g., *id.* at 1381.

99. See Crenshaw, *supra* note 95; Milner, *The Denigration of Rights and the Persistence of Rights Talk: A Cultural Portrait*, 14 LAW & SOC. INQUIRY 631 (1989); *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987); Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387 (1984); *Responses to the Minority Critiques of the Critical Legal Studies Movement*, 23 HARV. C.R.-C.L. L. REV. 295 (1988); Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); *Symposium: A Critique of Rights*, *supra* note 97; Tushnet, *Rights: An Essay In Informal Political Theory*, 17 Pol. & Socy. 403 (1989); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

100. Robin West exhibits this ambivalence about rights. West explains that rights talk cannot capture the harms and values of women because all theories of rights assume the “separation thesis” — that we are individuated primarily and only later connected. West, *supra* note 99, at 61. Because the separation thesis is false for women, rights only succeed in protecting against male fears of annihilation and frustration. She relies partly on Carol Gilligan for the proposition that women experience the world as connected. *Id.* at 14. Many of the substantive rules that women most need worry about now — rules about child custody, rape, sexual harassment, and abortion — require some understanding of the harm of separation and invasion. Although these can be restated in terms of harms to autonomy, the restatement is both untrue to the way women experience these harms, and in any case will probably not lead to the right result. Fran Olsen also makes this point: “Abstract rights and neutral rules are devices used by feminists to deny what we really want while getting what we want indirectly.” Olsen, *supra* note 99, at 429 n.99. Yet, for strategic reasons, “reforms have often been won by characterizing women’s injuries as analogous to, if not identical with, injuries men suffer (sexual harassment as a form of ‘discrimination’; rape as a crime of ‘violence’).” West, *supra* note 99, at 61.

101. Articulating . . . demands through legal rights ideology, civil rights protestors exposed a series of contradictions . . . Rather than using the contradictions to suggest that American citizenship was itself illegitimate or false, civil rights protestors proceeded as if American citizenship were real, and demanded to exercise the “rights” that citizenship entailed. By seeking to restructure reality to reflect American mythology, Blacks . . . ultimately benefitted . . .

Crenshaw, *supra* note 95, at 1368 (citing F. PIVEN & R. CLOWARD, *POOR PEOPLE’S MOVEMENTS* (1977)).

to taking the first important step. Yet that very language has come back to haunt the civil rights movement.¹⁰² The progress largely stopped as soon as the inconsistency became rationalizable by notions of formal equality: "Although it is the need to maintain legitimacy that presents powerless groups with the opportunity to wrest concessions from the dominant order, it is the very accomplishment of legitimacy that forecloses greater possibility. In sum, the potential for change is both created and limited by legitimation."¹⁰³

Rights victories are sometimes pyrrhic.¹⁰⁴ Rights critics would solve this dilemma by cansing judges to abandon the rhetoric of rules and rights. They believe that by establishing an openly political and discretionary decisionmaking practice we can move toward a better society. These scholars propose that judges and other elites might abandon the defenses supported by rights discourse, and then abandon the discourse itself, if they could be induced to introspect by critique.

Actually, the exact goal of introspection varies depending on how much indeterminacy the writer thinks exists in law. At the extreme, writers who endorse radical indeterminacy hope introspection will lead judges to recognize that all decisions are dictated by moral concerns and therefore require moral justification. Those who believe in somewhat less indeterminacy want judges to recognize moral and political aspects in those cases that law does not control. In the following discussion, I focus on the extreme claim that all decisions are and should be recognized as discretionary and therefore subject to moral argument. I believe that the analysis applies to the less dramatic claims as well.

The CLS solution does not seem to me prudent, even from the perspective of its CLS adherents. I suggest three reasons for hesitating over the virtues of induced introspection: critique will likely fail in its ambitions; if it fails, it increases the risk of Houdinis, which would decrease both candor and constraint; and even for CLS advocates who might reject the rule-of-law virtues of constraint, critique is a tactical mistake given their political goals.

102. *Id.* at 1366 ("The fundamental problem is that, although Critics criticize law because it functions to legitimate existing institutional arrangements, it is precisely this legitimating function that has made law receptive to certain demands in this area.").

103. *Id.* at 1368; see also Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 279-80 (1983) (explaining that "[e]galitarian rhetoric has appeal because it is the American political culture's natural language The rhetoric forces judges and other governmental decision makers to focus on issues that are real").

104. The argument that rights victories are pyrrhic assumes that further rights would in fact benefit the people who seek them, rather than backfiring as some conservative scholars allege. See, e.g., T. SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY* 133-34 (1984).

2. Critique's Optimism: The Emperor's Clothes

Critique — or trashing — might not succeed in inducing introspection. Critique is supposed to induce introspection by revealing contradictions to the legal elites who believe them. The CLS belief seems to be that if the incoherence of liberalism is demonstrated clearly, and in sufficient detail,¹⁰⁵ eventually legal elites will see and admit the error of their ways. If someone tells the emperor that he wears no clothes, the emperor and everyone else will finally see and admit the truth.¹⁰⁶

This emperor's-clothes assumption underestimates profoundly people's need and ability to generate new defenses, especially when they have some strong interest in doing so.¹⁰⁷ Belief in neutral decisionmaking helps judges cope with unattractive facts about law. Judges harm people.¹⁰⁸ They make unpopular and difficult decisions. Sometimes no wise decision is possible. Almost everyone wants to avoid looking at painful facts such as contradictions in their moral commitments, deep moral disagreement among members of their own community, and the tremendous unfairness of the world.¹⁰⁹

Neutrality theories, such as the determinacy of rules and rights, permit judges to deny their own responsibility for these facts.¹¹⁰ Judges can believe in the comforting stories of democracy as majority rule, and judicial discretion as limited by rights and rules dictated by a fair system of constitutionally constrained democracy. If critics prove to legal elites that the defenses they use to cope with these unpleasant facts *are* just defenses, elites will not just admit the facts these defenses permitted them to avoid.¹¹¹ Legal elites will not suddenly give up all

105. See Freeman, *supra* note 94, at 1235-37.

106. Some CLS writing refers to the task of critics in terms of the emperor's clothes story. See, e.g., D'Amato, *Can Any Legal Theory Constrain Any Legal Decision?*, 43 U. MIAMI L. REV. 513, 536-38 (1989); cf. Miller, *A Note on the Criticism of Supreme Court Decisions*, 10 J. PUB. L. 139, 148 (1961).

107. See, e.g., A. FREUD, *supra* note 24, at 49 (indicating that when one defense mechanism fails, people move on to another).

108. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Schaughnessy, *Gilligan's Travels*, 7 LAW & INEQUALITY 1, 23-24 (1988).

109. A substantial, if somewhat controversial, literature suggests that people use a series of defenses to maintain a belief that the world is basically just, and that most people get what they deserve. In order to maintain this belief in the face of overwhelming evidence to the contrary, people (1) deny or withdraw from the suffering, or (2) reinterpret the event so that they can understand it as deserved. For a summary of empirical studies on both sides of this issue, see M. LERNER, *supra* note 30.

110. See R. COVER, *supra* note 29, at 229-38 (arguing that in order to reduce dissonance, antislavery judges ruling against fugitive slaves overstated the need for rule of law, the extent to which they were bound by prior cases, and the extent to which their decisions were dictated by others).

111. Others have noted that critique as practiced by CLS writers has little chance to succeed, because they must choose between demonstrating stark contradictions in oversimplified positions

of the complicated forms of rationalization and denial that permitted them to live with the pain of their profession from the start.¹¹²

If neutrality theories really are defenses, judges will seek less painful alternatives such as (a) dismissing the critique; (b) if the critique cannot be ignored, finding some new defense; or (c) modifying their behavior so that the critique is not quite so cogent, and then return to the defense.¹¹³ Only if *none* of these techniques works will critique induce people to abandon denial and rationalization and admit what they wanted desperately not to see.¹¹⁴

Others have noted that the recent history of jurisprudence has been an alternating series of critiques and new neutrality myths.¹¹⁵ For CLS writers who think liberalism incoherent, this cycle offers historical evidence that people confronted with the incoherence of liberalism will spend a huge amount of time and energy shoring up their views with complex theories rather than give up the views. Defeating all tactics for avoiding critique is very difficult.

Our discourse is not just accidentally filled with devices that permit us to avoid looking at what modern academics view as a complicated and contradictory world. Most often, trying to get people to abandon their devices for denial by showing them the very things that they are trying to deny will fail. Although some academics enjoy sorting through this muck (trashing is fun), we should not forget that the muck exists because most people do not.¹¹⁶

and finding weaker tensions in more accurate portrayals of people's views. See Brosnan, *supra* note 8, at 332-60.

112. Boyle argues that to suppose that CLS has such a plan is to mistake CLS for grandiose 19th century social thought:

It is ridiculous to believe that one could disrupt the massively entrenched set of power relations and collective fantasies that "constitutes" repression in our society simply by attacking one of the more formalized and abstract fantasies and claiming that the rest are "dependent" on it. The lines of logical entailment are not the threads that hold together the patchwork of social reality. To believe otherwise is to make a tactical as well as a theoretical error.

Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 770 (1985). Boyle nonetheless thinks that more localized critique can be effective.

113. This third option seems to be Piven and Cloward's interpretation of the success and then failure of the civil rights movement. See F. PIVEN & R. CLOWARD, *supra* note 101.

114. See generally Slnsher & Anderson, *Belief Perseverance and Self-Defeating Behavior*, in SELF-DEFEATING BEHAVIORS, *supra* note 21, at 11.

115. See, e.g., Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561 (1988).

116. Responses to Unger's praise for plasticity have in some ways been similar. Unger seems to think that context transcendence is itself a human good. Many critics have pointed out that if this is a human good, it is certainly one that we are constituted to avoid — or at least most of us, save for a few scholars, and then only sometimes. See, e.g., Van Zant, *Commonsense Reasoning, Social Change, and the Law*, 81 NW. U. L. REV. 894, 912 (1987) ("Unger's microsociological model is descriptively inadequate in that for the most part it ignores the role of everyday routines in social life.").

3. *Failed Critique as Houdini's Parent*

I argued in Part I that introspection increases the risk of creating Houdinis. Although CLS writers do not necessarily value rule of law virtues, they do not aim to create a duplicitous legal system. If critique leads to more Houdinis, it will not have succeeded.

Consider three stages of judicial practice. In the first stage most judges are like Hapless or Hercules. They are somewhat mistaken, but they are candid and relatively constrained. In stage two, Houdinis come to predominate. They are less constrained, and they no longer believe the rhetoric they must use in their opinions. Stage two judges are introspective, less constrained, and duplicitous. In stage three, judges know that all the other judges, and others who might comment on their work, share their contempt for law. So they abandon discussion in the language of rights, rules, and precedent. They reason openly about the moral and political goals that their decisions promote. Judges no longer need to be duplicitous. Neither must they follow rules. Stage three judges are introspective, unconstrained by law, and once again candid.¹¹⁷

Critique is more than description.¹¹⁸ It is a political act directed at transforming the legal system to stage three, in which judges can be both candid and introspective.¹¹⁹ Yet, critics might (despite their goals) create and entrench stage two, in which all judges are Houdinis. If critical argument convinces many judges that they legitimately decide based on their own political views (stage two), but does not convince and enable judges to alter legal discourse so that public acknowledgement of the political nature of judging replaces attempts to reason from precedent and other neutral sources (stage three), then the project of critique will have failed doubly: judging will become introspective, but deceitful, rather than relatively nonintrospective and candid. Law will constrain less. The step will have been a step back

117. Recall that I am discussing versions of CLS critique that are committed to radical indeterminacy. Those who adopt a less extreme view would hope for a stage three in which judges discuss rules and rights less often than they do at present, and offer moral reasons for their decisions more often.

118. On this interpretation, the critique of rights was misunderstood by some of those who responded to it. They thought that the critics meant to commend abandoning rights in favor of something else such as needs talk or delegated discretion. The critics did not mean to commend anything. They were simply trashing. If so, the correct way to evaluate their project has nothing to do with whether they are speaking the truth. Rather the point is to ask whether speaking these words was likely to have some good effect. See Tuslnet, *supra* note 96, at 1402 ("What is the meaning of writing this article?").

119. See Johnson, *Do You Sincerely Want To Be Radical?*, 36 STAN. L. REV. 247, 267 (1984).

both for those who value constraint and for those who value honest dialogue.

In the end, critique might have no effect, might lead to stage two, or might lead to stage three. I suggested above that it might have no effect. In order to induce Hapless to become Houdini, critique must force Hapless to take responsibility for difficult moral decisions, and to recognize himself as a moral agent.

Despite this difficulty, critique might lead judges privately to abandon believing in law. If critique can cause judges to experience sufficient dissonance, judges might alter their ideals of rule following and candor. Although some version of neutrality has long been a part of the story that judges and lawyers tell themselves to justify their work, it is not the only story available. Houdini's attitude has attractions of its own. Houdini might believe that manipulation is inevitable, and that, so long as it is used to morally good ends, it is justified. Perhaps this narrative even permits judges to feel more zealous about their jobs. Judges might also believe that other judges are manipulating, so they are just acting as a counter, to restore something like the real values held by society. Convincing judges like Hapless and Hercules to view themselves as moral agents when they formerly viewed themselves as functionaries is difficult, especially when they must view themselves as moral agents doing violence.¹²⁰ The possibility of alternate comfortable self-conceptions as a moral agent legitimately acting makes this task simpler. Critique could drive judges to stage two.

I expect that critique cannot easily get judges to alter their discourse of opinion writing to reflect this attitude (stage three). First, the social consequences of being the first to announce that one does not believe in the accepted rules could be significant. Second, even if many elites believe the same thing, so that judges do not fear retribution from their peers, it seems unlikely that the intellectual trends that are now permitting judges to see, and perhaps admit, that they sometimes act politically, will soon become widely accepted by the public. There is concern for censure by a broader population.

Of course, the conclusion that critique might not drive judges to use openly political discourse is speculative. My concerns about critique are alternative. If it has no effect, it will do no good. If it fails and induces stage two, it will reduce both candor and constraint. If it succeeds and induces stage three, I will argue in the next section, it will hinder the political objectives of CLS.

120. See Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815 (1986).

4. *Successful Critique as Tactical Error*

The CLS strategy assumes that if judges discussed only values in justifying most or all decisions, the difficulties social movements face would decrease, and we would be more likely to create the sort of society favored by CLS writers. This strategy seems to me a tactical mistake for three reasons: (a) the people empowered by decreased constraint largely oppose CLS's political views; (b) abandoning law's constraint risks harming oppressed people; and (c) stage three judges will not likely abandon the commitments that limit social change.

a. Political opposition. If critique does foster stage three, the victory would not lead to results that appeal to its CLS practitioners. Conservatives control the federal courts, many of the state courts, and some legislatures.¹²¹ The nonconservative judges are moderates and moderate liberals. Virtually none shares the political and moral commitments of CLS scholars. Critical legal scholars' self-professed goal for trashing is to make judges see how much power they have, so that they can no longer deny it. CLS scholars should be concerned that if it works, judges might do exactly that.¹²²

Consider as an example Richard Posner.¹²³ Judge Posner believes in deciding cases based on practical reason, which includes "anecdote, *introspection*, imagination, common sense, intuition . . . , empathy, imputation . . . , custom, memory, 'induction,' . . . [and] 'experience.'" ¹²⁴ Many decisions, says Posner, "depend on the policy judgments, *political preferences*, and *ethical values* of the judges . . . rather than on legal reasoning regarded as something different from policy, or politics, or values, or public opinion."¹²⁵ Precedents for Posner are nothing more than something to be consulted. They do not compel: "The prior case . . . is just a source of data, anecdotal in character, or of reasons, considerations, values, policies."¹²⁶

121. See West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990) (describing the new conservative politics of the federal judiciary).

122. Some CLS scholars acknowledge that the strategy is risky. See, e.g., Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 86-87 (1989).

123. I select Judge Posner more for his public rejection of precedent as a system of rules than for his conservative politics. Even from a left or liberal perspective, Judge Posner's opinions are sometimes relatively progressive. See, e.g., International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 902 (7th Cir. 1989) (Posner, J., dissenting) (rejecting the position that fetal protection policies that apply only to women should be subject to the business necessity defense in Title VII suits even though this defense is usually available only in cases of disparate impact), *cert. granted*, 110 S. Ct. 1522 (1990).

124. Posner, *supra* note 1, at 838 (emphasis added). For further refinements on Posner's views, see R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990).

125. *Id.* at 828 (emphasis added).

126. *Id.* at 845.

Posner joins realist and CLS critics in decrying judicial self-delusion and in advocating that judges be more introspective, and candid about not being bound:

We should hesitate to take at face value descriptions of judges as striving always to find the correct answer rather than exercising discretion or enacting their personal values or preferences. . . . Adults delude themselves . . . ; what is more common than lack of self-knowledge? . . .

. . . Neither the conditions of judging nor the methods of selecting judges (including self-selection) would lead one to expect the deep introspection that so much academic literature attributes to judges. . . .

. . . [L]ike other people judges want to diffuse responsibility for their unpopular, controversial, or simply most consequential actions, and they do this by persuading themselves that their decisions are dictated by law, rather than the result of choice.¹²⁷

Posner considers that delusion has some virtue. Nonetheless, he seems to dismiss the possibility that we should maintain these delusions:

Maybe the dogmatic style, pretence of humility, and ostentatious abnegation of will that characterize judicial opinions serve a social purpose. By concealing from the judges themselves the degree to which they exercise discretion, the formalist mode may make them more restrained: virtue begins in hypocrisy (maybe). . . . Only one thing is clear: We should not be so naive as to infer the nature of the judicial process from the rhetoric of judicial opinions.¹²⁸

Judge Posner should be every CLS scholar's hero. He is an introspective judge, ready to admit that judging requires political decisions, that judges are not bound by precedent in any interesting case, and that they should not strive for objectivity.¹²⁹ He thinks that judges who believe in neutrality are merely deluding themselves. He is prepared to talk about values in his decisions.¹³⁰

127. *Id.* at 872-73. In case it is not apparent, I largely agree with Posner about the extent of judicial delusion. I simply disagree with his assumption that this is obviously a vice to be abandoned.

128. *Id.* at 865. This quote is somewhat ambiguous. Posner might be understood as endorsing judicial self-delusion if one interprets his suggestion that "we" should not believe it as referring just to academics.

129. In response to the suggestion that judges might engage in "all things considered" decisionmaking, and yet retain some semblance of neutrality by ignoring their own values and preferences, Posner says that "[a] judge who has a powerful intuition that it would be an outrage to decide a particular case a particular way should not feel compelled to decide it that way merely because a comparison of the reasons pro and con shows the pros with a slight preponderance." *Id.* at 859.

130. Although judges' attitudes are difficult to discern, I have not detected the effects of Posner's jurisprudence on his decisions. As a judge, he seems still to be engaged in the "ostentatious abnegation of will" that he finds in other judge's pretence of following rules. See, e.g., *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 741 (7th Cir. 1986) (Posner, J.) ("The case against the doctrine seems to us conclusive. . . . Despite all this we think it would be improper for this court to reject the doctrine."). Perhaps the gap between Posner's jurisprudence and his opinions supports my suggestion that stage three will be difficult to create.

Critical theorists are not enthralled with their intellectual progeny. Noting the similarities between Posner and CLS, one commentator suggested that practical reasoning advocates such as Posner lack only one thing: "an association with an extensive critique of the prevailing legal and political order — that is, with the Critical Legal Studies movement."¹³¹ This comment exemplifies one fallacy of radical critique: critique wrongly assumes that introspection will lead not only to recognition of power, but to political transformation.¹³² Of course Richard Posner lacks an "association with . . . the Critical Legal Studies movement."¹³³ He would not have become a federal judge with that association. Conservatives who abandon the belief that they are following rules or discovering values will not automatically become committed leftists.¹³⁴ CLS critics should see that removing constraint means removing constraint from conservatives.¹³⁵

b. Oppressive instincts. CLS writers believe stage three will benefit oppressed people. Several authors have expressed strong reservations about this strategy, because constraint sometimes benefits powerless people. As Patricia Williams explains, although it is possible that in an informal world with fewer or no rights white people would not discriminate against blacks any more than they do now, so long as rights constrain behavior at all, one has reason to suspect that without rights, some people would discriminate who currently do not.¹³⁶ Tomi Massaro agrees, saying that "[a] proposal implying that greater discretionary authority should be given to legal decisionmakers betrays

131. Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 MICH. L. REV. 724, 730 (1988).

132. Cf. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2115 (1989).

133. Feinman, *supra* note 131, at 730.

134. The intellectual act of making [judges' normative instincts] more visible and self-conscious will not by itself change the decisions reached. Although the unveiling of these assumptions might spur greater reflection and motivate an occasional change of heart, most judges will validate and ratify their informing visions; they decide as they do because of, not in spite of, their instincts and assumptions.

Hutchinson, *The Three "Rs": Reading/Rorty/Radically*, 103 HARV. L. REV. 555, 581-83 (1989).

135. See Burton, *Judge Posner's Jurisprudence of Skepticism*, 87 MICH. L. REV. 710, 722-23 (1988) (Judge Posner's "skepticism about the existence and identification of law, together with advocacy that a judge act on his own social vision" serves "to do away with the traditional 'fetters that bind judges' in a fell swoop, clearing the decks for a new law based on wealth maximization.") (footnote omitted).

136. See Williams, *Alchemical Notes: Restructuring Ideal From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 423-24 (1987). Not everyone agrees that rights, apart from political coalitions, can do anything at all to restrain oppressive instincts. See, e.g., Tushnet, *supra* note 99, at 446 n.72. I disagree for reasons parallel to those offered for thinking law constrains judges. In fairness, I note that Tushnet allows that rights have some uses, *id.* at 440 n.16, and that their usefulness is historically contingent. *Id.* at 425.

tremendous faith in the wisdom and responsiveness of our decisionmakers. One reason to be skeptical about this faith is that 'empathic capacity' . . . [is] unevenly distributed among human beings."¹³⁷

Of course, constraint can also work against the interest of oppressed people. If the rules followed are discriminatory, and those who apply the rules are less so, a system with more discretion will be better than a system of rigid rule-following.¹³⁸ The question is contextual. In the United States today, however, the rules publicly announced likely will be fairer than the secret desires of people in power. The world is much more filled with secret racists and sexists than with secret egalitarians. Listening to people who experience oppression, one hears about the dangers of discretion.¹³⁹

The issue is not whether law greatly helps oppressed people, but whether the exercise of discretion is likely to be more oppressive than the application of law. Several reasons suggest that rule-following will be less harmful to oppressed people than discretion. Judges, like the rest of us, exist in a world pervaded by unconscious prejudices.¹⁴⁰ Although both our rules and our discretionary decisions will reflect these presuppositions, rules have a much better chance of being purged of oppressive instincts than do exercises of discretion. Publicly enacted rules must be debated in forums generally hostile to expression of hate-filled sentiments. Obviously, this process does not create perfect laws, but it can have an effect. Individuals' intuitions often avoid this process.¹⁴¹

Nor would the benefits of a discretionary system outweigh the harms. Consider what would happen if rather than our current statutory and constitutional regime, courts were empowered to "remedy discrimination when it seemed best all things considered." Although some judges would order more remedies, and others fewer than now, it seems to me that the number of currently precluded claims that would

137. Massaro, *supra* note 132, at 2117 (footnote omitted); see also *id.* at 2115 (arguing that the call to context overestimates the value of empathy because it is homophobia, not distance created by the rule of law, that leads to decisions like *Hardwick*).

138. See Schauer, *supra* note 66, at 543 ("It may be a liability to get in the way of wise decision makers However, it may be an asset to restrict misguided, incompetent, wicked, power-hungry, or simply mistaken decisionmakers whose own sense of the good might diverge from that of the system they serve."); Radin, *Presumptive Positivism and Trivial Cases* (forthcoming in HARV. J.L. & PUB. POLY.) (explaining that rules are useful less for predictability than as devices for minimizing expected risks of error).

139. See, e.g., Williams, *supra* note 136, at 407-08.

140. See generally Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

141. I do not mean this argument to be *a priori*. Currently it seems to me that publicly acceptable discussion is much more progressive than the private opinions of most people, including most judges. Perhaps this has not always been true.

be remedied under a discretionary regime would be dwarfed by the number of currently prohibited acts of discrimination that would be permitted under the discretionary regime. Civil rights laws offer a good example. The experience there has not been primarily one of judges, otherwise anxious to offer remedies, being constrained by the statutory language. Rather, the statutes have been implemented more often by judges grudgingly admitting that they could not avoid a remedy.

Of course, constraining judges has costs. Blind adherence to rules forecloses visionary as well as oppressive decisions. Rules lead to, as well as prevent, mistakes.¹⁴² In deciding whether we desire more or less constrained decisionmaking, we must consider how risk averse we should be toward possible abuses, and how hopeful we are about beneficial departures from law. If oppressed people prefer rules to discretion, they do not ignore the very real drawbacks to constraint. They conclude that compelling decisionmakers to give publicly acceptable reasons that take the form of following the law will more often constrain oppressive rather than progressive instincts.

c. Entrenched commitment. Critique seems to me a tactical error for a third reason: the dilemma faced by social movements would not change in stage three. Judges would discuss values rather than laws. But the formal equality/substantive equality equivocation, as well as ambiguities in the ideal of autonomy, would still persist at the level of values.

Perhaps critics think that values such as formal equality would be displaced once values were explicitly discussed by judges. I think this unlikely. Many ethicists maintain commitment to formal equality. Further, even if no good intellectual reasons justified formal equality, strong psychological reasons would make rejection of formal equality unlikely. Believing in formal equality makes people feel better about the world and enables them to rationalize aspects of life that make them uncomfortable. The equality myth rationalizes the judge's access to relative wealth and luxury even in the face of the poverty that judges encounter. Avoiding the unpleasantness of this unfairness is important to almost anyone in a position of advantage.¹⁴³ People have few obvious mechanisms for coping with these facts other than the equality myth. Unlike when they abandon belief in neutral rule application, judges cannot fall back on their own moral views to justify inequality. Perhaps critique can induce judges to see that they are

142. See Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989); Schauer, *Rules and the Rule of Law* (forthcoming in HARV. J.L. & PUB. POLY.).

143. See M. LERNER, *supra* note 30.

moral agents who harm people; it will not induce them to view themselves as moral agents acting within an unjust system and therefore harming people without justification. Judges could not continue without some way to believe that they act justly. Finally, some people have suggested that belief in formal equality facilitates racism.¹⁴⁴ If so, this belief might not be abandoned until people reject the racist beliefs that make formal equality attractive.

Whether values such as formal equality are accepted by legal elites because they are normatively appealing, because they are rationalizations that help elites deny unfairness, or because those elites are really racists, trashing the rule of law will not likely undermine such commitments. The difficulties of social change would remain in stage three because the discourse of rights (like other neutrality theories) does not prevent social change. It is so manipulable that anything could be formulated as a right. Of course, this very manipulability means that victories are not what they seem. When you ask for equality, perhaps you want a commitment to ending unequal outcomes, and all you get is a commitment to formal equality. Still, you could have asked for a right to substantive equality and have been engaged in rights discourse.

Disempowered people have often been unable to ask for what they want directly not because of rights discourse, but because they knew the answer would be "no." The answer would be "no" because political pressure or the judge's own values, interests, psychological defenses, or prejudices did not permit the desired relief. Depriving judges of neutrality theories will not alter their values, interests, prejudices, or psychological needs. No simple way of asking or demanding will win oppressed people relief. Instead, it must become impossible for those in power to continue to believe that society is legitimate without giving in to the demand. The goal must be to make Americans look at discrimination and oppression without being able to tell themselves that this is acceptable. Dismantling belief in law is not well aimed at this goal.

We should be working in the opposite direction — to find a way to create a community in which law will confine more than it does now.

144. Kim Crenshaw has argued:

The rationalizations once used to legitimate Black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of Blacks though reference to an assumed cultural inferiority.

....

... Racism, combined with equal opportunity mythology, provides a rationalization for racial oppression, making it difficult for whites to see the Black situation as illegitimate or unnecessary.

Crenshaw, *supra* note 95, at 1379-80.

As Martha Minow has said: "The use of rights discourse affirms community, but it affirms a particular kind of community: a community dedicated to invigorating words with power to restrain, so that even the powerless can appeal to those words."¹⁴⁵

Perhaps, however, I have misunderstood the role of critique. CLS scholars might understand that stage three would not turn conservatives into leftists, nor eradicate racism or sexism, nor convince people to abandon belief in formal equality as a value. Nonetheless they might believe that stage three is a necessary prelude to their social program. Perhaps judges use the belief in their neutrality as a means of avoiding examining the wisdom of their values, or the possibility that they are illicitly influenced by unacceptable ideas. If so, removing rule following as an explanation of their decisions could be a useful prelude to inducing them to consider these things more carefully.

On the other hand, judges who believe that they should generally follow the law might be more receptive to arguments that the law is racist or otherwise unacceptable. The challenge would be less directly aimed at the judge, and therefore would be less threatening. Because judges frequently modify rules, find exceptions, and overrule cases, certain ideals might be challenged without convincing the judges they were in fact altering the law, or that they can always do so.

Even if stage three would make somewhat more likely the possibility that judges consider whether they have been racist or have adopted bad values, trying to induce stage three as a prelude to social change seems imprudent. It risks failing and inducing stage two, which would undermine rule of law virtues without any benefit to those concerned about discrimination. And even in stage three, people would remain very attached to their commitments.

The analysis in Part II has canvassed various potential virtues and vices of introspection. I recognize that the harms and benefits that I identify are themselves somewhat controversial. Not everyone cares about constraint, decision by consensus, movement toward an egalitarian society, or the particular sort of society envisioned by CLS writers. Many people who like some of these benefits will dislike or care little about others. I have sought to justify nonintrospective judging with separate arguments aimed at readers with different commitments. I have offered some reasons to convince someone who values traditional virtues (constraint and consensus) that a system with these virtues is made more stable by nonintrospection. I have offered other

145. Minow, *supra* note 99, at 1881. Although I agree with Minow about constraint, she does not share my views on introspection. See Minow & Spelman, *supra* note 83, at 54-55.

reasons to those who aim at social transformation to accept this same conclusion.

The arguments I advance in this article, and therefore the conclusions I suggest, are hardly conclusive. At many points I have assumed facts and relied on intuitions. For example, I assumed that judges have somewhat inaccurate beliefs about their decisionmaking process, and that accurate understandings present some real risk that judges would turn cynical. Though I have offered reasons for these assumptions, I cannot prove them. Similarly, I have speculated about the benefits and drawbacks to reduced constraint. Yet in the end we cannot know for certain what unchosen alternatives would produce. Finally, my analysis has been wholly consequentialist. Even if I have been right, nonconsequentialist moral concerns remain. For example, we might violate norms against using others only as means if we mislead judges, or if we do not encourage them to understand, merely to achieve social ends. Further, judging might itself be a moral activity requiring self knowledge. Perhaps we diminish the morality of our community by having any institution requiring deception, no matter what its benefits.

Acknowledging all these difficulties, I assert that we act at best with uncertainty when we demand introspection. Although judges might already understand their decisions, and although introspection might not plunge them into cynicism, we act taking these risks. As to the moral concerns, I have no answer, save that consequences matter to me, and that failing to encourage introspection strikes me as acceptable even though intentionally misleading others is not.

I conclude now with some thoughts on how problematic legal scholarship and teaching become in a nontransparently justified legal system if judges hold inaccurate but somewhat self-fulfilling beliefs.

III. POSTSCRIPT: THE ACADEMICS' DILEMMA

The questions I have considered pose problems for the legal scholar and teacher.¹⁴⁶ We face a dilemma. As scholars we seek truth, but as teachers, we must realize that we help socialize the individuals whose behavior we study. Because we teach students about a system they will enter, what we teach them might change the sys-

146. The questions have been discussed at length. See, e.g., Carrington, *Of Law and the River*, 34 J. LEG. EDUC. 222 (1984); "Of Law and the River," and of *Nihilism and Academic Freedom*, 35 J. LEG. EDUC. 1 (1985) (collecting responses to Carrington's article); Levinson, *Professing the Law: Commitment of Faith or Detached Analysis?*, 31 ST. LOUIS U. L.J. 3 (1986) (and collected comments).

tem.¹⁴⁷ What should we do if speaking the truth threatens to make the system that we describe less just?¹⁴⁸

My arguments, if believed, intensify the discomfort of this question. If oversimplified beliefs about the legal system help to make the system function better, what should we tell our students?¹⁴⁹ If we follow our professional norms, and our usual moral intuitions, we will simply tell the truth. But then we risk affecting the world in ways we should regard as harmful. If we consciously dissemble, adopting Houdini's attitude toward teaching and scholarship, we may find our jobs unfulfilling, or even morally impermissible.¹⁵⁰ Silence is no answer.

In the course of this article, I have argued that a particular solution to this professional tension — demanding transparent justification and introspective practice — is imprudent. In this last Part, I want to express some regret at the problems with transparent justification of the legal system. I note the difficulty of our present circumstance, and my sympathy with the sentiments that led people to demand introspection and transparency.

The predicament of the legal scholar and the predicament of the judge are not really dissimilar. Each is in a position to have some influence, though the judge's is more direct and profound. The professional norms for both require that their written products display some frankness about their own thoughts. The judge must disclose the arguments that convince her that a particular legal outcome is correct. The scholar must disclose the facts, arguments, or values that per-

147. Of course, students do not hear, much less believe, everything we say in the classroom. Very few lawyers and judges read what we write in law reviews, especially lately. But some of them hear some of it, and many of them probably misunderstand much of it. As teachers, we must take responsibility for the consequences of what they understand us to say.

148. Because what we say could have an effect, we cannot ignore the dilemma. See R. KEETON, *supra* note 39, at 11 ("What lawyers, law teachers, and judges say to each other and to students about the quality of judging may tend to be self-fulfilling prophecy."). Owen Fiss has not come to terms with this difficulty. He says, "Law professors are not paid to train lawyers, but to study the law and to teach their students what they happen to discover." "*Of Law and the River*," and of *Nihilism and Academic Freedom*, *supra* note 146, at 26 (letter from Owen M. Fiss to Paul D. Carrington).

149. See Nonet, *The Rule of Law: Is that the Rule that Was?*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY*, *supra* note 40, at 125 (discussing the conflict between the desire of the teacher to expose the "truth" about the law and the teacher's moral responsibility to educate students about legal ideals).

150. Although I have not seen anyone say so in print, I have heard people wonder whether some scholars have not already adopted Houdini's view toward their scholarship. I have no insight into this question, and therefore offer no speculation. However, one candidate for a politically motivated scholarly stance is retraction of indeterminacy. Of course, perfectly good intellectual reasons support retracting one's previously stated belief in indeterminacy, such as that it is false. But some people speculate that it has become clear to some critical scholars that — as I have argued in this paper — the indeterminacy thesis is both partially self-fulfilling, and politically harmful to the left.

suade her the world is as she describes it, or should be as she recommends.

For both, the predicament arises from demanding introspective practices: scholars notice that judges — even if they report their decision process frankly (which they do not always do) — fail to recognize all the ways they mislead themselves. So the scholars demand introspection. If the judges believe the scholars, and become more introspective about their jobs, they face a dilemma. They can find some different language to speak so that they preserve the candor of some decisions, or they can retain the language of those decisions, knowing that they act duplicitously. The dilemma is especially hard because language does not always exist that permits judges to decide in a way that they and the community can agree is legitimate.

Scholars face a similar dilemma. At first they notice that judges are not doing what judges say they are doing. Scholars express this in their articles and in their classes. While scholars write and speak, they tell themselves that they are simultaneously and unproblematically both scholars — speaking the truth as they see it — and activists — demystifying the law as a prelude to social change or, in the traditional version, as a prelude to open discussion. Perhaps, like judges, scholars need to believe this story to justify their activities.

CLS scholars must either give up speaking the truth and become self-conscious manipulators, or become ineffective, and perhaps counterproductive, advocates. As things stand, the only frank kind of scholarship that critical scholars can engage in is trashing and the occasional utopian vision. I have tried to argue that trashing, at least indiscriminate trashing, is bad politics. More political benefits are gained by forming alliances, which usually includes speaking the language of those in power. Yet most CLS scholars cannot speak the language of formalism and neutrality in good faith. So the only alternative seems to be attempting to convince those in power to speak a language that CLS scholars can use. Seeking this alternative perhaps motivates the otherwise inexplicable insistence that we should just talk about needs.¹⁵¹ It is not that critical scholars are convinced they could win conservatives over with needs talk. Rather, critical scholars believe they could get back into the game of advocacy if this language were in vogue. Demands for transparency can be seen as scholars' attempt to help themselves out of this situation.

This solution might also help judges out of their dilemma. If only

151. Tnshnet, *supra* note 96, at 1394. But see Crenshaw, *supra* note 95, at 1365 n.134 (pointing out that needs rhetoric is subject to many of the same criticisms as is rights rhetoric).

judges would abandon the language of rules and precedent (or use it less often) and simply talk as if they lived under a system of discretionary decisions, they could once again candidly and even introspectively disclose their reasons for decision.

This vision is appealing. Recall the three stages that both scholars and judges might find themselves in. In stage one, they believe that law can sometimes be a practice of rule following. Judges will often be able to report their experience of decision as an acceptable opinion without much conscious modification. Likewise, scholars are able to say — in terms that judges will find to be acceptable legal arguments — what really seems to bother them about judicial decisions. In stage one, although they are perhaps naive, both scholars and judges have the comfort of being able to disclose their thoughts candidly as an acceptable public discourse.

In stage two, some or all scholars and judges come to believe that rules are extremely manipulable, and that the opinions that purport to follow rules, and report the experience of feeling bound, are rhetoric. Judges who come to hold this view must choose between writing unacceptable but candid decisions, and writing the sort of manipulative unfrank opinion that they think other judges write. As I argued above, I suspect that judges would pick the second.¹⁵²

Scholars who believe that judges are acting duplicitously also face a difficult choice in stage two. They can write traditional articles criticizing courts for making doctrinal mistakes, either in the hope of influencing those judges who still believe in doctrine, or in the hope of making the job of doctrinal manipulation more difficult for political opponents on the bench. This places the scholar in the position of making arguments that she sees as just rhetoric. Alternatively, the scholar can announce that judges are in stage two. This act may drive judges from stage one into stage two. Also, it is not certain this act will have any desired political effect, even though it permits the scholar to say what she really thinks. In particular, I doubt it will drive judges to stage three.

In stage three, judges and scholars finally understand how problematic rule following has become and see that almost no one is any longer able to engage in frank opinion writing (or scholarship). They therefore manage somehow to alter professional discourse so that many or all legal decisions are openly discretionary, and justification involves discussing values. Stage three offers comfort. As in stage

152. See *supra* notes 75-77 and accompanying text.

one, judges and scholars can once again speak their minds candidly in an acceptable public discourse.

Although each of these stages has virtues and vices, perhaps we should prefer an uncomfortable existence between stages one and two to aiming for stage three. If we try to get there, I think we will fail in harmful ways.

Overcoming self-deception is often healthy, occasionally noble, and sometimes morally required. Judges in some circumstances ought to become more introspective.¹⁵³ Introspection can have liberating consequences. Certainly we admire some great literature for its ability to unmask our daily self-deceptions and demials. We also rightly admire introspective and candid people. We rightly value truth and candor. Nevertheless, introspection can be debilitating,¹⁵⁴ and trying to compel introspection can have unwanted side effects. Some useful beliefs are partly self-fulfilling, but cannot withstand introspection.¹⁵⁵ In professing the law, we must consider how sure we are that we want introspective judging, and how we expect critique to be an instrument for effecting this goal.

Our legal system cannot be justified transparently. Judges are neither fully introspective nor self-conscious deceivers. By demanding that judges be wholly introspective, we risk cynicism and deception displacing somewhat inaccurate candor. We must be careful not to make our ideals less attainable by pointing out the ways in which we have not reached them.¹⁵⁶

153. For example, the substantial literature urging judges to take account of other perspectives seems correct. See, e.g., Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Minow & Spelman, *supra* note 83, at 50-53. But see Massaro, *supra* note 132, at 2113 (warning that the call for increased empathy is really a call for a substantive reordering of empathic responses). Judges might reach better decisions if they made an effort to view situations in other ways.

154. See S. TAYLOR, *POSITIVE ILLUSIONS* (1989); D. GOLEMAN, *supra* note 63.

155. But cf. P. RICOEUR, *THE SYMBOLISM OF EVIL* 351 (E. Buchanan trans. 1967) (discussing second naiveté).

156. Many readers have gently pointed out the awkwardness of publishing this article where judges might read it. Haven't I, they ask, just told Anne's parents that the girl under the tree is not their daughter? One reader suggested that my article might itself provide a complex rationalization to judges who want to believe they follow law. I offer them a justification not to think about it.

I justify my publication on less ambitious grounds. Judges are exceptionally busy. Few have the time to read long jurisprudence articles. Further, even if I am sufficiently fortunate that some judges read this article, I do not worry about transforming their thinking. If my thoughts are true, converting judges requires sustained public attacks, such as those made by legal realists and by critical legal scholars. Given the strong psychological reasons, not to mention intellectual reasons, for judges not to agree with my position, to fear that my small contribution to this debate could alter legal culture would be hubris out of the ordinary even for a law professor.