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Freedom and Constraint in Adjudication: A Critical Phenomenology

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This paper attempts to describe the process of legal reasoning as I imagine I might do it if I were a judge assigned a case that initially seemed to present a conflict between "the law" and "how-I-want-to-come-out." Such a description, if at all true to experience, may be helpful in assessing the various claims about and images of law that figure in jurisprudential, political, and social theoretical discussion. It may also be helpful in assessing what law teachers teach future lawyers about the nature of the materials they will use in their profession. But I will have little to say about these implications, aside from a polemical afterword.[1]

I am not sure what difference it makes to the phenomenology of adjudication whether I begin with this situation rather than another. The whole experience of law may be sufficiently the same thing through and through so that wherever you start, you end up with approximately the same picture. Or it may be that there is no experience of legality that's constant without regard to role and initial posture of the case. What I am convinced of is the need to start with some particularization. I don't find myself at all convinced when people start out claiming they can tell us about judging without some grounding in a specific imagined situation.

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The judge is a federal district court judge in Boston. I am from Boston. I'm more a ruling class elite type than a local politician or notable type, which is why I choose the federal forum. But what's most important is that the judge

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1. Note on sources: I think of this exercise as an extension of the legal realist project, as exemplified in Felix Cohen, The Ethical Basis of Legal Criticism, 41 Yale L. J. 201 (1931), Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals (1960), and Edward H. Levi, An Introduction to Legal Reasoning (1949). The description of legal materials as presenting a field open to manipulation owes much to Wolfgang Kohler, Gestalt Psychology- An Introduction to New Concepts in Modern Psychology (New York, 1947), Kurt Lewin. The Conceptual Representation and the Measurement of Psychological Forces, 1 Contributions to Psychological Theory, 4 (1938), and Jean Piaget. Play, Dreams, and Irritation in Childhood, trans. C. Gattegno and F. Hodgson (New York, 1962). My emphasis on work derives from Karl Marx, Economic and Philosophical Manuscripts of 1844-1845, in Early Works, trans. Benton (New York, 1975). The overall conception and philosophical premises derive loosely from Jean Paul Sartre, Being and Nothingness. trans. Hazel Barnes (New York, 1956) and Jean-Paul Sartre, Critique of Dialectical Reason, trans. Alan Sheridan-Smith (London, 1976).

 Cite as 36 J. Legal Educ. 518 (1986).

is responsible for deciding this case, rather than a party or an observer or an advocate. I am going to be looking at law as a person who will have to apply it, interpret it, change it, defy it, or whatever. I will do this in the context of the legal and lay community that follows what federal district court judges do, and with the possibility of appeal always present to my mind.

The more complex conditions of this inquiry have to do with the polarity between my initial impression of "the law" and my initial sense of how-I-want-to-come-out. How-I-want-to-come-out might be based on my having been bribed and wanting to keep my bargain, or on a sense of what decision would be popular with my community (legal or local), or on what I thought the appeals court would likely do in the case of an appeal. It might be based on a sense that the equities of this particular case are peculiar because they favor an outcome different from what the law requires, even though the law is basically a very good one, and even though it was on balance a good decision to frame it so inflexibly that it couldn't adjust to take account of these particular equities.

Or it might be that I disagree with the way the law here resolves the problem of exceptional situations, believing that it could have been crafted to be flexible to take care of this case. Or it could be that I see the law here as "unfair" in the sense that, taking the rest of the system at face value, it would be better to change this rule. This rule might be an anomaly. (Later I will take up the question of the rules about the judge changing the rules.)

Instead of any of these objections, imagine that I think the rule that seems to apply is bad because it strikes the wrong balance between two identifiable conflicting groups, and does so as part of a generally unjust overall arrangement that includes many similar rules, all of which ought in the name of justice to change. I mean to suggest a "political" objection to the law, and a how-I-want-to-come-out that is part of a general plan of opposition.

Again, the experience of legality may well be different according to the character of the "I want" that opposes "the law." All I insist on is this: it is useless to discuss the conflict of "personal preference vs. law" without specifying what kind of preference we are dealing with.

Here's what I mean by my initial impression that the law requires a particular outcome. Suppose there is a strike of union bus drivers going on in Boston. The company hires nonunion drivers and sets out to resume service. On the first day union members lie down in the street outside the bus station to prevent the buses from passing. They do not disturb the general flow of traffic, and they are nonviolent. The local police arrest them and cart them off, but this takes hours. They are charged with disturbing the peace and obstructing a public way (misdemeanors) and released on light bail. The next day other union members obstruct, with similar results. The buses run, but only late and amid a chaotic jumble. The company goes into federal court for an injunction against the union tactic.

When I first think about this case, not being a labor law expert, but having some general knowledge, I think, "There is no way they will be able to get away with this. The rule of law is going to be that workers cannot prevent

the employer from making use of the buses during the strike. The company will get its injunction."

I disagree with this imagined rule. I don't think management should be allowed to operate the means of production [m.o.p.] with substitute labor during a strike. I think there should be a rule that until the dispute has been resolved, neither side can operate the m.o.p. without the permission of the other (barring various kinds of extraordinary circumstances). This view is part of a general preference for transforming the current modes of American economic life in a direction of greater worker self-activity, worker control and management of enterprise, in a decentralized setting that blurs the lines between "owner" and "worker," and "public" and "private" enterprise.

My feeling that the law is against me in this case is a quick intuition about the way things have to be. I haven't actually read any cases or articles that describe what the employer can and can't do with the m.o.p. during a strike. I vaguely remember *In Dubious Battle,* a Steinbeck classic I read when I was 16. But I would bet money that some such rule exists.

If there is a rule that the employer can do what he wants with the m.o.p., I think it will probably turn out to be true that there is relief in federal court (under the rubric of unfair labor practices?). If relief is available, I have a strong feeling that the workers threaten irreparable injury to the employer, so that he can show the various things usually required to justify an injunction. But I also vaguely remember that federal courts aren't supposed to issue injunctions in labor disputes.

There is lots of uncertainty here. I am not sure that a federal district court has jurisdiction under the labor law statutes to intervene on the employer's behalf when the local authorities are already enforcing the local general law about obstructing public ways. I am not sure that if there is a basis for federal intervention an injunction is appropriate. I will have to look into all these things before I'm at all sure how this case will or should come out.

On the other hand, I am quite sure the employer can use the m.o.p. as he pleases. And I am quite, quite sure that if there is such a rule, then the workers have violated it here. I am sure that what I mean by the rule is that the employer has both a privilege to act and a right to protection against interference, and that what the workers' did here was interference.

Since the supposed rule of law that I don't like won't get applied so as to lead to an injunction unless all the uncertainties are resolved, against the workers, I do not yet confront a direct conflict between the law and how-I-want-to-come-out. But I already have the feeling of "the law" as a constraint on me. It's time to ask what that means.

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The initial apparent objectivity of the objectionable rule. I use the word objectivity here to indicate that from my point of view the *application of the rule to this case* feels like a nondiscretionary, necessary, compulsory procedure. I can no more deny that, if there is such a rule, the workers have violated it, than I can deny that I am at this minute in Cambridge, Massachusetts, sitting on a chair, using a machine called a typewriter. The rule just applies itself. What *I meant* by interfering with the owner's use of the m.o.p. was workers lying down in the street when the employer tries to drive

the buses out to resume service during the strike. I'm sure from the description that the workers actually intended to do exactly what the rule says they have no right to do.

Note that this sense of objectivity is internal—it's what happens in my head. But the minute I begin to think about the potential conflict between the law and how-I-want-to-come-out a quite different question will arise. How will other people see this case, supposing that the preliminary hurdles are overcome?

Sometimes it will seem to me that everyone (within the relevant universe) will react to this case as one to which the rule applies. I imagine them going through the same process I did, and it is instantly obvious that they too will see the workers as having violated the rule. If this happens, the rule application acquires a double objectivity. The reaction of other people is an anticipated fact like my anticipation that the sun will rise tomorrow or that this glass will break if I drop it on the floor.

It is important not to mush these forms of objectivity together. It is possible for me to see the case as "not clearly governed by the rule" when I do my interior rule application, but to anticipate that the relevant others will see it as "open and shut." And it is possible for me to see it as clear but to anticipate that others will see it as complex and confusing.

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The next thing that happens is that I set to work on the problem of this case. I already have, as part of my life as I've lived it up to this moment, a set of intentions, a life-project as a judge, that will orient me among the many possible attitudes I could take to this work.

It so happens that I see myself as a political activist, someone with the "vocation of social transformation," as Roberto Unger put it. I see the set of rules in force as chosen by the people who had the power to make the choices in accord with their views on morality and justice and their own self-interest. And I see the rules as remaining in force because victimized groups have not had the political vision and energy and raw power to change them. I see myself as a focus of political energy for change in an egalitarian, communitarian, decentralized, democratic socialist direction (which doesn't mean these slogans are any help in figuring out what the hell to do in any particular situation).

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Given my general orientation, the work I am going to do in this case will have two objectives, which may or may not conflict. I want these specific workers to get away with obstructing the buses, and I want to move the law as much as possible in the direction of allowing workers a measure of legally legitimated control over the disposition of the m.o.p. during a strike.

If my only objective were to avoid an injunction against lying down in front of the buses during this strike, I would be tempted toward a strategy that would allow me to avoid altogether the apparent legal rule forbidding worker interference. I could just delay, in the hope that the workers will win the strike before I'm forced to rule. I could focus on developing a new version of the facts, and hope to deny the injunction on that basis, or I could look for

a "technicality" having no apparent substantive relevance (e.g., the statute of frauds, a mistake in the caption of a pleading).

On a more substantive level, I could put my energy into researching the issues of federal jurisdiction and the appropriateness of an injunction. Here, if the effort paid off, I might be able to move the law in a way favorable to workers in general, even though the move wouldn't formally address worker control over the m.o.p. during a strike.

But the strategy I want to discuss here is that of frontal assault on the application of the rule that the workers can't obstruct the company's use of the m.o.p. If this strategy succeeds, the result will be both to get the workers off in this case *and* to accomplish my law reform objective. There will be a small reduction in employers' power to invoke the state apparatus, a change that will be practically useful in future legal disputes over strikes. And the mantle of legal legitimacy will shift a little, from all out endorsement of management prerogatives to a posture that legitimates, to some degree, workers' claims to rights over the m.o.p.

What I see as interesting about the situation as I have portrayed it up to this point is that we are not dealing with a "case governed by a rule," but rather with a perception that a rule probably governs, and that applying the rule will very likely produce a particular (pro-employer) result. The judge is neither free nor bound. I don't see it that way from inside the situation. From inside the situation, the question is, Where am I going to deploy the resources I have available for this case? The issue is how should I direct my *work* to bring about an outcome that accords with my sense of justice. My situation as a judge (initial perceived conflict between "the law" and how-I-want-to-come-out) is thus quite like that of a lawyer who is brought a case by a client and on first run-through is afraid the client will lose. The question is, Will this first impression hold up as I set to work to develop the best possible case on the other side?

Having to work to achieve an outcome is in my view fundamental to the situation of the judge. It is neither a matter of being bound nor a matter of being free. Or, you could say that the judge is both free *and* bound—free to deploy 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.

Isn’t what I am doing illegitimate, from the standpoint of legality, right from the start? One could argue that since I think the law favors the company I have no business trying to develop the best possible case for the union. But this misunderstands the rules of the game of legality. All members of the community know that one's initial impression that a particular rule governs and that when applied to the facts it yields X result is *often* wrong. That's what makes law such a trip. What at first looked open and shut is ajar, and what looked vague and altogether indeterminate abruptly reveals itself to be quite firmly settled under the circumstances.

So it is an important part of the role of judges and lawyers to test whatever conclusions they have reached about "the correct legal outcome" by trying to

develop the best possible argument on the other side. In my role as an activist judge I am simply doing what I'm supposed to when I test my first impression against the best pro-union argument I can develop.

If I manage to develop a legal argument against the injunction, the ideal of impartiality requires me to test that argument in turn against a newly worked-out best counterargument in favor of the company. Eventually, my time will run out, and I'll just have to decide.

What would betray legality would be to adopt the wrong attitude at the *end* of the reasoning process, when I've reached a conclusion about "what the law requires" and found it still conflicts with how-I-want-to-come-out.

For the moment, I'm free to play around.

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The euphoric moment in which I conceive legal reasoning as "playing around with the rule" doesn't last long. What follows is panic as I rack my brain for *any* way around the overwhelming sense that if the rule is "workers can't interfere with the owner's use of the m.o.p. during a strike," then I cannot do anything for the union. I am ashamed of this panic. It's not just that I'm not coming up with anything; I also feel that I *should* be coming up with something. It's a disgrace—it shows I lack legal reasoning ability. I feel like a fool for trumpeting the indeterminacy of doctrine and claiming to be a manipulative whiz.

As my panic deepens, I begin to consider alternatives. If I can't mount an attack on the rule-as-applied, maybe I will have to research the earlier contract between the union and the bus company. I have a strong feeling that contracts are manipulable if one applies concepts like good faith, implication of terms, and the public interest, all relevant here. Maybe I'll have to try to "read something in." But this approach is clearly less good than going right for the rule itself.

Then I start thinking about the federal injunction aspect of the case, as opposed to the labor tort aspect. I'm sure that the combination of the 1930s anti-injunction statute with federal court injunctive enforcement of at least some terms in collective bargaining agreements (after *Lincoln Mills*? I can't quite remember) must have made a total hash of the question of when federal courts will grant injunctions. If only I could worry just about *that,* I bet I could easily come up with a good pro-worker argument. But that move is also less good than going for the rule.

Then there are the really third-rate solutions based on the hope that the facts will turn out to be at least arguably different than they seemed to be when I first heard about the case, and that the company's lawyers will make a stupid technical mistake.

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All the while I'm desperately racking my brains. I think I have good, maxims for legal reasoning, but what are they? The rule represents a compromise between two conflicting policies, so there must be a gray area where the terms of the compromise are not clear. But this case seems clear. There are *always* exceptions to the rule. But I can't think of any here.

When an idea starts to come, it just comes, little by little getting clearer, as

I work to tease it out, flesh it out, add analogies. Here it is:

Of course (oh, how I love to feel that reassuring "of course" tripping off my tongue at the beginning of an argument), it is not *literally* true that the workers are forbidden from "interfering with the owners' use of the m.o.p. during a strike." They can picket and use all kinds of publicity measures to dissuade people from riding the company's buses.

Here I begin to lose my grip again. Lying down in the roadway is a far cry from picketing, which doesn't interfere at all *physically* with the company's use of the buses and is after all justified as an exercise of First Amendment rights. This exception won't do me any good.

After more false leads and panic (I try manipulating the concept of "owner" to get the workers a piece of the action, but that tactic just seems to push me into the inferior implied contract route) I come back to my exception. The workers did lie down in the street to block the buses, but they did not intend to and did not in fact use force to prevent them from rolling. After all, they submitted peacefully to arrest. And the press was everywhere. Obviously the worker on the ground *could not have* physically prevented the bus from rolling, because it could have rolled right over him.

Still, on those two days of lie-ins the company failed to resume service in the fashion it had planned. The workers did physically obstruct the owner's use of the m.o.p. and were delighted to do so. The disruption wasn't just a side effect.

On the other hand, maybe I can argue that the demonstration was a symbolic protest, an attempt to (a) exert moral suasion on the company by impressing it with the extreme feeling of the workers and their willingness to take risks, their sense that the company is theirs as much as management's, and (b) a gesture toward the public through the media.

I will emphasize the non-violent civil disobedience aspects: a physical tactic that *could not in fact* have prevented the use of the m.o.p. by the company, and submission to arrest.

I could hold that because of these factors there should be no federal labor law injunctive remedy beyond what is accorded under state law (narrow version). Or that this demonstration is the *exercise* of First Amendment rights, so that injunction of a nonviolent civil disobedient protest would be an unconstitutional restriction of expression, even though it is of course perfectly permissible for the state to arrest the demonstrators and subject them to its normal criminal process (broad version).

By this time, I'm getting high. I have no idea whether this line of argument will work. I have even lost track of exactly how this argument can be brought to bear in the employer's federal court action for an injunction. (This is probably because I've gotten into an argument on the merits before clarifying in my own mind what the basis of federal jurisdiction may be, and before getting into the anti-injunction Wagner Act issue.) But I am nonetheless delighted. My heart lifts because it seems that the work of legal reasoning within my pro-worker project is paying off.

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What I've tried to do here is to turn this into a First Amendment prior restraint (or at least a "free speech policy") case. I relied on the idea that there

had to be some limit to the employer's freedom from interference, came up with picketing by trying to imagine what the workers certainly *could* do to him, and then looked for an extension of the picketing idea to embrace the particular farts of this case.

Another way to put it is that I stopped imagining the rule of "no interference" as the only thing out there—as dominating an empty field and therefore grabbing up and incorporating any new fact-situation that had anything at all "sort of like interference" in it. I tried to find the other rules that set the limits of this one, so I could tuck my case under their wing. Once I identified those other affirmative rules (protecting picketing and other First-Amendment-based attacks on the employer's use of the m.o.p.), I re-stated the facts of the lie-in to emphasize those aspects that fit (nonviolence, submission to arrest, one prone body can't stop a Scenicruiser bus unless the Scenicruiser wants to be stopped).

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The minute I get rolling, new wrinkles occur to me. Maybe we should see the lie-in as an appeal by union workers to the nonunion replacement bus drivers. It is they, not the union members, who actually stop the buses on the street and fail thereby to carry out the company's plan to resume service. It would be all right to try to persuade the nonunion replacements with flyers, to picket them, to threaten them with anger and non-association, to guilt trip them and swear at them. The lie-in is just a small extension of those tactics. It is a physical statement to them. Will this fly? I have no idea. It is part of the brainstorming process, rather than a deduction of the rule that covers the case. It is part of the work of producing lots of alternative ways at the problem, hoping that one of them will break through. I am already wondering whether it's even worth the time to pursue this approach further.

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As I euphorically contemplate my "breakthrough" from panicked blankness into a swirling plethora of possible legal arguments, I come up against a disturbing thought. By redefining this as a First Amendment case, I have not *abolished* the old rule that once seemed to settle everything. I've just limited its scope. It is still true that (except in these cases I've been discussing) the workers can't interfere with the owner's use of the m.o.p. (during a strike. For example, I think, looking now for a core case that will resist my First Amendment foray into the soft periphery of the rule, if the workers went into the company's garage and physically appropriated the buses, that would be clear interference of the type the rule was meant to prevent.

Three reactions to this thought: (a) I'm disappointed that, fantasy aside, my holding could do no more than chip away a little, though a little is not nothing, at the owner's power. (b) Then I worry that the hypothetical I've just constructed is the hypothetical I was afraid the lie-in might be—the hypothetical in which there is just nothing you can do, because if the rule is in force, it applies to the case in an objective, ineluctable way. (c) But then I think, maybe I could unsettle this one too. Let's hypothesize some more facts. And I have a crazy flash to the tort law doctrine of "recapture of

chattels" which says that the owner of a chattel can't use force to recapture it from a person who seized it under a claim of right without using force. Suddenly I'm wondering whether that means the employer would have to sue in conversion and go through the whole trial before there would be an order for return of the chattel, supposing the union got hold of it in just the right way. And so on.

The question is not whether my initial off-the-wall legal intuitions turn out to be right. They *may* eventually generate at least superficially plausible legal arguments. But maybe it will turn out that the law is so well settled in another direction that I will have to abandon them and try something else the minute I get out *Gorman on Labor Law* and *Prosser on Torts.* Legal reasoning is a kind of work with a purpose, and here the purpose is to make the case come out the way my sense of justice tells me it ought to, in spite of what seems at first like the *resistance* or *opposition* of "the law."

Resistance or opposition is the characteristic of the law when I anticipate it as a constraint on how-I-want-to-come-out. But if my initial sense had been that the law was "on my side," it would be a resistance or opposition from the point of view of the company. I would experience it as a protective barrier I was building around my position, perhaps, or as armor I need to fit to my particular body so that the other side won't be able to strip it away or penetrate it. If I had no sense of "which way the law goes on this," so that each side had an equal opportunity to make a persuasive legal argument, I might experience the law as a body of raw material out of which to "build my case," or perhaps as a mass of wet clay that two opposing potters are each trying to shape before it hardens.

The image changes according to how the law initially presents itself in relation to how-I-want-to-come-out. But in each case I am suggesting that one of the ways in which we experience law (not the only way, as we'll see) is as a medium in which one pursues a project, rather than as something that tells us what we have to do. When we approach it this way, 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. In this sense, that you are building something out of a given set of bricks constrains you, controls you, deprives you of freedom.

On the other hand, the constraint a medium imposes is relative to your chosen project--to your choice of what you want to make. The medium doesn't tell you what to do with it—that you *must* make the bricks into a doghouse rather than into a garden wall. In the same sense, I am free to work in the legal medium to justify the workers' actions against the company. How my argument will look in the end will depend in a fundamental way on the legal materials—rules, cases, policies, social stereotypes, historical images—but this dependence is a far cry from the inevitable determination of the outcome in advance *by the legal materials themselves.*

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The metaphor of a physical medium does not help us solve the problem of just how constraining the law is. All it does is suggest that we should understand both freedom and constraint as aspects of the experience of work—chosen project constrained by material properties of the medium—rather than thinking in the back of our mind of a transcendentally free subject who "could do anything," contrasted with a robot programmed by the law.

One might accept the notion that legal argument is manipulation of the legal materials understood as a medium and still believe that the medium constrains very tightly. An absolutely basic question is whether there are some outcomes that you just can't reach so long as you obey the internal rules of the game of legal reasoning. These would be "things you just can't make with bricks," or silk purses you can't make with this particular sow's ear.

For the moment, make any assumption you want as to how tightly the medium constrains the message. Perhaps there is only one correct legal result in most cases, or perhaps there are some results that you simply can't reach through correct legal reasoning, or perhaps there will be a legally plausible course of reasoning to justify any result that you might want to reach.

What I want to ask is how, rather than how tightly law constrains, when we understand it as a medium through which my liberal activist judge-self pursues social justice. When we are clearer about this it will be time to ask, first, whether it is ever (or sometimes, or always) possible in the last analysis to have a conflict between the law and how-I-want-to-come-out, and, if so, what the ethics of the conflict may be.

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My model of constraint is that people (me as a judge) want to back up their statement of a preference for an outcome (the workers should not be enjoined) with an argument to the effect that to enjoin the workers would "violate the law." We can't understand how this desire to legalize my position constrains me without saying something about why I want to do it.

First, I see myself as having promised some diffuse public that I will "decide according to law," and it is clear to me that a minimum meaning of this pledge is that I won't do things for which I don't have a good legal argument. (This statement says nothing about just how tightly this promise constrains me as to the merits).

Second, various people in my community will sanction me severely if I do not offer a good legal argument for my action. It is not just that I may be reversed and will have broken my promise. It is also that both friends and enemies will see me as having violated a role constraint that they approve of (for the most part), and they will make me feel their disapproval.

Third, I want my position to stick. Although I am free to decide the case any way I want in the sense that no one will physically prevent me from entering a decree for either side, I am bound by the appellate court's reaction. By developing a strong legal argument I make it dramatically less likely that my outcome will be reversed.

Fourth, by engaging in legal argument I can shape the outcomes of future

cases and influence popular consciousness about what kinds of action are legitimate—as here, for example, I can marginally influence what people think about worker interference with the m.o.p. during a strike.

Fifth, every case is part of my life-project of being a liberal activist judge. What I do in this case will affect my ability to do things in other cases, enhancing or diminishing my legal and political credibility as well as my technical reputation with the various constituencies that will notice.

Sixth, since I see legal argument as a branch of ethical argument, I would like to know for my own purposes how my position looks translated into this particular ethical medium.

I might be able to achieve some of these objectives at least some of the time without engaging in direct challenges to my initial intuition that the law is adverse. I don't want to be absolute about it, since I can conceive situations in which I think I would go quite unhesitatingly for a "non-legal" approach. But there will be many, many situations in which it appears that, if I wish to achieve my goals, the only way or the obviously best way is to try legal argument.

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Note that I would have to do *something* even if I wanted to grant the injunction. When I say that my first impression of the law is that it favors the employer's case, I mean that I don't anticipate any difficulty in working up a good argument for the injunction. I see that project as easy, as not much work.

By contrast, deciding *not* to enjoin involves not just the work of pushing pencil across paper to get down thoughts already well worked out before I even begin, but the work of creating something out of nothing. This is a cost of deciding for the workers, and it has at least two aspects. First, the work of creating a good legal argument is hard, scary, and time-consuming. I have limited resources in my life as a judge, and the workers are asking me to allocate them here, when I could put them into some other hard case or just spend all my time on easy cases. My limited store of time and energy for the hard work of creating legal arguments that go against my first impression of what the law is constrains me from doing all kinds of things I could do as judge if I weren't constrained.

I don't want this point to sound minor, because it isn't. There are lots and lots and lots of rules I would like to change or at least reform. If I could do it by fiat, perhaps I would do a lot of it, do it quite fast, and in a way that might be called holistic. But if I have to generate a legal argument for every change, there is no way I can do a lot, do it fast, or do it holistically.

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The second way in which I experience the law as a constraint in my hypothetical is that it is one of the determinants of what we might call the "legitimacy cost" of deciding for the workers. Just as there are competitors for my time and creativity as a legal arguer, there are also competitors claiming shares of the *mana* or *charisma* or whatever that attends my position as a judge. I have leeways or, to put it another way, the mere fact that I decide something makes people think it was legally right to decide it that

way. But there are limits to this legitimating power, and every case raises them.

In our case, assume that *everyone* has the same initial impression that the law favors the employer. If I decide for the employer, people who know that this decision goes against my personal views may grant my decision some increased legitimacy. They may see me as more able to indicate what the correct legal result is in the next case, because they believe I perceived and followed the law in this one, even when I didn't like it.

This factor aside, no one will be able to say much about "what kind of judge he is" from my decision to go along with the collective initial impression. Going along would be costless in terms of legitimacy. My legitimating power is depleted or augmented only when I try to do something out of the ordinary.

I imagine this effect to be a function of two aspects of the situation. The first is the degree of "stretch" from our initial impression of the law to the result I decree. The second is the impact on this distance—we might call it the obviousness gap—of my opinion defending my out-of-the-ordinary result.

The greater the initial perception of stretch, the more of my stock of legitimacy is at stake. Of course, the very notion of legitimating power is that I can reduce the perceived distance between what the law requires and what I decree just by decreeing it. That is the nature of my institutional *mana* or *charisma.* But nothing guarantees that my legitimating power will cause people to see this result as the one that was right all along. That outcome depends on how great the stretch was, and in my own case it is likely that the stretch will be much greater than I can overcome just because the president of the United States has put some black robes on me.

If my automatic legitimating power falls short of fully normalizing the outcome, I will lose legitimating power for the next case—my stock will be depleted—unless I devise an opinion (cast as a legal argument) that makes up the deficit, or even increases the stock. In order to make up the deficit I have to write an opinion that will convince the good faith observer struggling to understand what the law is that in fact my result was not out of the ordinary at all. Rather it was a correct perception, albeit a minority perception, of what the law really required all along.

In other words, I can build up my legitimating power through instances of persuading people through legal argument If they have had the experience of my "being right" before, experiences of my changing their view of the law, then they will be susceptible in the future to believe what I tell them the law is, quite independently of the argument I can muster.

The greater the initial distance between my proposed result and what one would expect, the greater the positive value of persuading the observer through legal argument. You will attribute power to me just in the measure that you find yourself saying, "I never thought he could persuade me of *that!"* Even if I don't persuade you, I gain power if you say, "He didn't convince me, but I never thought he could get me to take the proposition seriously, and here I am arguing hard against it!" On the other hand, if the distance was small to begin with, persuading you that I was right in my

initial impression will do no more than very marginally increase my store of legitimating power.

I also increase my power to the extent that my persuasive efforts spill over from this particular case and cause you to reassess other outcomes you had thought pre-eminently legally correct. This is my ability to make my case a "leading case" that will be cited over and over in increasingly distant reaches of law-space as the years go by. My name on that opinion is a help the next time I have an unconventional view on the merits, because it has increased my legitimating power even if in the next case I don't have much in the way of an argument.

In this very mechanical model of law as a constraint on the judge, I find myself in a *situation,* defined by my initial impressions of what the law is and of how-I-want-to-come-out. In this situation, I have to decide how I want to allocate my energy among "causes," and estimate the consequences for my project as an activist judge of deciding one way or another.

The constraint imposed by the law is that it defines the distance that I will have to work through in legal argument if I decide to come out the way I initially thought I wanted to. "The law" constrains in that it is an element of the situation as I initially experience it. It is the "field" of my action.

* * *

In describing the work of legal reasoning, I have thus far kept to the drastically simplified situation in which there is a rule, a case that the rule appears to cover, and a counter-rule that is initially beyond the periphery of awareness. We need to complicate things.

In my previous examples I treated the rules as autonomous entities that were there in my consciousness independent of cases. I think this treatment corresponds to the way I experience legal rules in real life. It is not true that they are inductive derivations from cases or that they are predictions of what the courts will do. They are much less than either of these: they are verbal formulae I think I know to be "valid" (even though I am often not sure what that means and always aware that my knowledge may turn out to be superficial) that are present like so many random objects floating around in my mind.

One can get access to dozens or hundreds of them—such as "the workers can't interfere with the m.o.p. during a strike"—without having to justify them independently through any inductive or pragmatic process. They are just things we learned in law school or from the newspapers or from reading treatises or from reading cases. They are primary not derivative entities in legal consciousness.

We cite cases as authority for rules. But we also use cases to fill in the actual meaning of the rule when it is open to doubt. In other words, though the rules exist independently of the cases, it is also true that some cases are an essential part of our understanding of what the law of the field "is." This means that decided cases are part of the medium I have to shape if I want to make a persuasive legal argument that the workers shouldn't be enjoined from lying down in front of the buses.

The cases that are most obviously part of the meaning of a rule, rather than mere applications of it, are those we currently see as marking its boundary with a counter-rule. Suppose we have an earlier labor case in which the question was whether there was a First Amendment right to mass picketing, and the courts ruled that there was not, and that the activity should be enjoined as an unfair labor practice or as a tortious interference with the employer's right to use the m.o.p. during a strike. That case is "on the boundary" if it is the "furthest" the employer's right has been extended and the furthest the workers' right of expression has been cut back. If a mass picketing case were followed by a case holding that individual picketing is also tortious, then that case would be the one on the boundary, *if* I perceived individual picketing as at the same time less of an interference with the employer's property rights, and more plausibly a protected speech activity.

The process by which we arrange the cases into a pattern along the boundary, and also within the undisputed territory of one rule or the other, should be understood as a gestalt process. When someone describes the cases, I non-reflectively grasp them as arranging themselves into a particular constellation. For example, I might just instantly understand that mass picketing is more of an interference than individual picketing, and that a lie-in blocking the street is more of an interference than either.

But it does not always happen that the cases arrange themselves for me into neat constellations. For example, I might perceive mass picketing as more of an interference than individual picketing, but also think it more rather than less deserving of First Amendment protection. After all, mass picketing involves associational as well as speech rights. I might then find it hard to arrange these two types of cases along the boundary between expressive and property rights: maybe they occupy adjoining sectors of the boundary?

The point of this discussion is that our new case, *as it initially presents itself to consciousness,* is situated in a field that contains not only a rule that appears to cover it (no interference with the m.o.p. during a strike) but also many instantiating cases. These appear to establish the rule's meaning. For example, if a case has established that you can't mass picket, then you "obviously" can't obstruct the buses by lying down in the street.

In my initial example of legal reasoning, all I had to do in order to tuck this case under the wing of the counter-principle of free speech was restate both the free speech rule and the facts, until the first covered the second. But if there are decided cases along the boundary I am trying to "move" through restatement, I have to deal with them, unless my restatement of the rule leaves them "undisturbed." I have to "move" them by restating their facts and their holdings until they fit my new formulation of the general rule.

"Movement" is possible because these arrangements that seem so objective as they initially present themselves to consciousness are not in fact anywhere near as solid as chairs or tables. It is a common experience that the constellation shifts or dissolves as one contemplates it. It is also much more common with gestalts of this kind than with the dining room furniture arrangement that you can persuade me, by mustering images and moral arguments, that my initial perception was all wrong. Contrary to my first impression, you

argue, mass picketing is "really" more protectable than individual picketing. I hope to persuade you that, contrary to both our initial impressions, the lie-in to block the buses was more worthy of protection than either mass or individual picketing.

It may be useful, or at least amusing, to extend the metaphor of the field in order to distinguish between manipulating the facts of a precedent and manipulating the holding. I imagine the facts of the case (I learned them from the opinion or from somewhere else, such as a classroom or a news-paper) as defining *the position of the case in the field of law.* We may grasp that position as close to a boundary line, or on it, or as so far within the boundary that these facts seem "easy" and the general rule just "applies itself" to them. Legal argument with the facts of the case means restating them so that the case appears in a different part of the field than it did initially.

Remember that my objective is to make my lie-in look like a case plausibly covered by the rule permitting speech-type interferences with the m.o.p., rather than like a case clearly governed by the rule of no interferences with the m.o.p. Suppose that a mass picketing case has already gone against the workers. My first impression is that the lie-in is "even worse" from an interference point of view, and simultaneously "weaker" as a speech case. I will try to restate the facts of the mass picketing case to make it reappear in the field as more of an interference than the lie-in, and as less plausibly a case of protected speech.

I will do this by emphasizing that, in the mass picketing case, the court found that the workers were trying to physically prevent substitute workers from entering the plant, and that the situation was always on the verge of violence. I will de-emphasize the opinion's references to the signs and shouted slogans of the mass picket. By contrast, I will argue that the workers in the lie-in submitted peacefully to arrest, and could never have physically prevented passage of the buses by lying in front of them.

My hope is that you will eventually perceive the two cases as located in just the opposite position from that you saw them in initially, so that I can draw the boundary between rather than around them. Mass picketing will then fall on the side of interference, the lie-in on the side of speech.

* * *

Changing the position of a precedent in the field is, as I've been describing it, analogous to changing the position of the case before us—the lie-in. But the analogy is misleading to the extent that the precedent, unlike the lie-in, comes already equipped with a holding. This complicates matters considerably.

If the facts of the precedent are on the boundary, then its holding is *part of* the boundary. The holding is a rule, or at least a little sub-rule, defining, in the abstract manner of any rule, a range of cases beyond this particular instance of mass picketing. These cases "in the vicinity" or "close to on point," along with any future fact-situation that might be "on all fours" with it, are "settled" by the precedent. In other words, the holding of a case

structures the field around the point represented by the fact situation of that case.

I must be able to restate the holding as well as the facts of the mass picketing case if I want to reposition my lie-in case with respect to the boundary. The work of restating the holding is closer to the work of restating the general rule than it is to that of repositioning a fact-situation. For example, after I've restated the facts of the mass picketing case to emphasize forcible interferences with passage of substitute workers into the plant, I may want to restate the holding too. I will play down the original opinion's claim that because this was "action" it can receive First Amendment protection only if it was "unequivocally symbolic." I will claim that what the court prohibited was coercion of substitute workers, rather than an attempt at persuasion. This statement of the holding will make it easier to restate the general rule to include nonviolent civil disobedient lie-ins under the rubric of protected expression.

* * *

We might think of the holding of the case as a line extending through the point represented by the facts. The line defines a set of cases that the holding has resolved one way or the other. When I redefine the holding, I inflect the line in some way, changing its direction so that it "covers" a different set of hypothetical situations. Thus, when the mass picketing case becomes a case about "coercion vs. persuasion," it helps define the boundary between forbidden and permitted union activity differently than it did when it was about how "action" is unprotected unless "unequivocally symbolic."

The inflection of the line is desirable because, once I have done it, I won't have to spend a lot of time explaining how the lie-in is "unequivocally symbolic." I can admit that it is "action." My (much easier) argument will be that it is clearly persuasive rather than coercive action. Further, my new holding for the mass picketing case makes a nice little piece of the new boundary I am drawing between First Amendment cases and interference-with-property-rights cases. Mass picketing is not closely analogous to nonviolent civil disobedience, now that we've identified it as problematic because "coercive." So there is no inconsistency in forbidding it while tolerating lie-ins.

* * *

Extending the field analogy yet a step further, we can use it to incorporate the "broadening" and "narrowing" of holdings into our analysis. Narrowing the holding, by restating it as a rule that depends for its application on many potentially idiosyncratic details of the particular case, is a shortening of the line that extends through the fact-situation in the field. It means that there will be fewer hypothetical fact-situations "covered" by the holding, and the case will therefore have less structuring effect on the field around it. Broadening is the opposite maneuver.

* * *

Policies as forces in the field. Policy arguments are reasons for adopting a particular holding or mini-rule. They are aimed more specifically than philosophical or social theoretical justifications of whole systems and more

abstractly than appeals to the raw equities immanent in "the facts." Policy argument is "second order" in relation to rule application or argument from precedent. It presupposes conscious choice about how the structure of the field should look, as opposed to simple subsumption of the facts to a norm that I grasp non-reflectively as part of a gestalt.

The arguer can pick and choose from a truly enormous repertoire of typical policy arguments and modify what he finds to fit the case at hand. The arguments come in matched contrary pairs, like certainty vs. flexibility, security vs. freedom of action, property as incentive to labor vs. property as incipient monopoly, no liability without fault vs. as between two innocents he who caused the damage should pay, the supremacy clause vs. local initiative, and so on.

A policy is not invalidated just because I ignore it in a case where it arguably applies. Our rough notion is that the two sides of the matched pair "differ in strength" from case to case. We might see the property-as-incentive-to-labor argument as very strong if the issue is whether there should be any private rights at all in mechanisms of interstate commerce, but as quite weak if the question is whether there should be a right to prevent peaceful individual picketing of an interstate bus company involved in a labor dispute.

The moment when I switch from one of the matched pairs to the other in response to a change in the fact-situation can be quite dramatic. In this case, I might firmly believe that the interests in security and peaceful access to public spaces strongly support state law criminal sanctions against the lie-in. I might then turn around and argue against a federal injunction of the lie-in, on the ground that people should have a right to nonviolent civil disobedient protest, even if it inconveniences the public and the employer, and that repressive measures will make violence more rather than less likely.

In a typical legal argument, policies are elaborated and strongly asserted without regard to their matched pairs. When I argue for state law criminal penalties, I don't have to explain, either as judge or as advocate, the rational basis of my endorsement of "nip it in the bud" here, and my contrary endorsement of "repression breeds violence" when we get to the injunction. In a sense, then, the practice of legal arguers (lawyers, judges, treatise writers) is endlessly contradictory. I assert my policy as "valid" and as "requiring" an outcome, and then blithely reject it, and, in the next case, endorse its exactly matching opposite, without giving any meta-level explanation of what keys me into one side or the other.

From the inside, however, I know from the beginning that this is just "the way we do" legal argument. I don't take the surface claim that the policy is "valid" and "requires" the outcome seriously at all. I work with a model of the opposing policies as forces or vectors, each of which has some "pull" on any given fact-situation. They *seem* logically contradictory (how can I believe, at the same time. that "there should be no liability without fault," and that "as between two innocents he who caused the damage should pay") or so indeterminate that they can serve only as after-the-fact rationalizations of decisions reached on other grounds (who knows whether the injunction will "nip violence in the bud" or "just drive it underground and make it

worse"?). But there is a sense in which both policies are valid at the same time, in every case. The question is which one turns out to be "stronger," or to weigh more in a "balancing test" applied to these particular facts, rather than which is correct in the abstract.

We can represent the process of arranging cases in a field, and the process of fixing a boundary between permitted and forbidden acts, in terms of this imagery of vectors and balancing. For example, the imaginary mass picketing and individual picketing cases discussed earlier had fact situations and holdings, but they also "involved" or "implicated" various policies. The mass picketing case implicated the general social policy in favor of political association and the general social policy against the use of force to resolve disputes. (Each case implicates as many policies as I can plausibly think up. Those mentioned here are illustrative, not exhaustive.)

Suppose we see the lie-in, in relation to mass picketing, as a "better" First Amendment case, and as a less serious interference with the employer's use of the m.o.p. during a strike. The "second order" interpretation of this intuitive ordering is that pro-speech policies apply more strongly, and pro-property policies less strongly, than in the mass picketing case. As we move from fact-situation to fact-situation across the field, the speech policy gets weaker, and the property policy stronger, until at the boundary they are in equilibrium. At this point a very small change in the relative forces of the policies produces a dramatic change in result. We "draw the line" and treat cases beyond the line repressively.

What this means is that we have to add to our model of the field of law the notion that, at every point in the field, contradictory policies exert different levels of force. Boundary lines in the field represent points of equilibrium of opposing forces. At points not on boundaries, one or another set of policies predominates. The policies are to be understood as gradients; they are strongest in the "core," where a given general rule seems utterly obvious in its application and also utterly "appropriate as a matter of social policy." The argument set supporting the general rule diminishes in force as we move from the core outward toward the periphery, and ultimately to a boundary with another general rule.

The boundary appears to me as "there" in three quite different ways. First, it is a line, a rule that was implicit in the statement of the general rule. For example, I may see the idea that there shall be no laws against "free speech" as implicitly including nonverbal expression. Second, the boundary is a line running through all the limiting cases. Suppose that individual but not mass picketing is all right; that threats of non-association with substitute workers but not threats to call demand notes are all right. The boundary "connects the dots." Third, as we have just seen, the boundary is like the line in a magnetic field formed by iron filings exactly balanced between two distant magnets. State law criminal penalties against a lie-in are desirable and don't violate the first amendment, but the addition of a federal injunction is undesirable and would be unconstitutional, say, because the injunction is just a little bit "too much."

We have already discussed legal argument as the restatement of general rules and the re-selection of facts so that a case that initially appeared "covered" by rule A turns out to be covered by rule B. And we have discussed the manipulation of the facts and holdings of precedents to redefine the boundary. My goal in policy argument is analogous. First, I develop a potential holding for my lie-in case, such as that there shall be no federal injunction of nonviolent civil disobedient protests in labor disputes. Then I develop some policy arguments as to why this rule is preferable to an alternative (usually a straw man) or to the rule proposed by the employer. For example, I argue that if the workers feel strongly enough to undergo arrest and criminal charges, they almost certainly feel strongly enough to do something violent if they are not permitted their symbolic protest. It follows that, far from "nipping violence in the bud," an injunction will likely lead to unorganized individual acts of violence, such as shooting out bus tires on the open highway.

But this argument is unlikely to be enough. Once I have taken the step into the "second order," forsaking the strategy of mere rule application, I evoke in the mind of my audience the whole force field of this area of law. I will now have to take steps to preserve the coherence of the overall policy "picture." This means restating policy arguments in other decided cases. For example, suppose that in the mass picketing case the court justified a prohibitory rule on the ground that unless you nip violence in the bud it develops until it is unstoppable.

My problem is that in the lie-in case I am arguing that worker anger makes it important to tolerate civil disobedience, and this position seems inconsistent with a "nipping in the bud" strategy against mass picketing. In order to restore order to the field, I will "distinguish" the mass picketing case as follows. Mass picketing is essentially uncontrollable and naturally tends to escalate toward violence. In the civil disobedience case, by contrast, the police exercise detailed and intense control. Though the initial emotion may be greater in the lie-in, the setting allows the release of emotion without escalation. Since the situation is already under control but still serving to release emotion, an injunction is likely to be counterproductive overkill.

[Let me remind the patient reader that I have no idea whether the preceding policy arguments and distinctions are "any good," that is, whether they would be persuasive to a person a little knowledgeable in the field. One begins the work of legal argument enveloped in ignorance of what the law "is" and with little sense of what may be the conventional wisdom about how the law works in practice. I will find out about these matters by doing research and by asking people. In consequence, I'll flatly abandon some arguments while I develop others. What I am trying to do here is describe what the work process in its initial stages feels like from the inside.]

* * *

The boundary can be cast either as a rule (a determinate outcome on easily determined facts) or as a standard (ad hoc judgment required) applying a value, like good faith or reasonableness, or an abstraction, like foreseeability

or promotion of competition. When the boundary is cast as a standard argument that a particular fact-situation meets it will often look a lot like policy argument—may indeed merge by degrees into it. There are "formal" arguments for rules and for standards. against rules and against standards. These are policy arguments about the appropriateness of using a rule or a standard in the particular case.

* * *

Social and historical stereotypes. These are part of the stock in trade of legal argument. By a social stereotype, I mean, for example, the raw image of "worker blocks bus"—an unshaven large burly white man without a tie or jacket aggressively obstructing innocent third-party passengers (us!) who have to sit passively until someone comes to their aid. I might reverse the stereotype by expanding the time frame of the story, a la Kelman, and adding lots of facts, until we get "bus monopoly's intransigence finally breaks patience of Job-like toilers." Historical stereotypes are ideas like "the nineteenth century was a time of agrarian individualism so it was natural for people then to accept the doctrine of *caveat emptor*."

Overruling. If policy argument is second order in relation to mere rule application, overruling is third order. Without question there are *some* circumstances in which, as a federal district court judge, I can redraw the boundary between permitted and forbidden conduct without restating the facts of cases, so that cases find themselves looking at a boundary where once they were looking at home, and looking at home across an open space where once there was a boundary.

There are maxims about overruling. The district court, a trial court, should be less quick to do it than an appeals court. It is more permissible to overrule a doctrine riddled with exceptions, and consequently more honored in the breach than in the observance, than to overrule a vital modern doctrine that dominates its field like a young Mars. And so forth. There are cases in which a course of law reform has become the norm, so that *not to* overrule a case would appear an abuse of discretion. (Suppose that the Supreme Court had upheld separate-but-equal public playgrounds facilities after desegregating schools, public accommodations, government offices.)

When I first began thinking about this subject, the possibility of overruling seemed a dramatically important aspect of the judicial activist's situation. Indeed, it seemed to mean that there is no such thing as a conflict between "the law" and how-I-want-to-come-out, since I can change the law by over-ruling to make it correspond to my heart’s desire. On further reflection, this has come to seem a shallow view.

First, though overruling is a third order practice, it is nonetheless subject to the calculus of legitimacy I have been describing. I can't overrule with impunity any more than I can disturb the field with impunity in any other way. The set of maxims by which the overruling decision will be judged are pretty vague, but if the decision isn't convincing, I will find myself less able to persuade the next time around and feeling guilty about violating role constraints.

Second, my power to overrule, seen as a kind of ultimate power to reorder the field, is counterbalanced by the notion of legislative supremacy. I can’t

"overrule" a statute. *But* the statute may be trumped by the state and federal constitutions, of which I am interpreter here. *But* though I can use the constitutions to overrule the statute, I have no power to overrule the constitutions themselves. *But* even this is not the end of the story, since the constitutions don't seem, a priori, to be any more conceivably self-applying than any other set of legal norms. Many great cases branch down from the sacred texts, and these I *can* overrule.

The upshot of these twists and turns is that I decide about overruling enmeshed in the field of law, subject to its typical constraint that I argue persuasively across some perceived obviousness gap, or forfeit my charismatic power and get reversed on appeal into the bargain. It is an added power; it enhances my freedom to make the law correspond to how-I-want-to-come-out beyond what it would be if I had always to work in the first order of rule application or the second order of policy argument. But it liberates me as a technological innovation might liberate a worker in a medium—as, say, the invention of new casting techniques changes the possibilities of sculpture. New techniques bring new constraints along with new possibilities. They change as well as reducing the experience of constraint. It becomes harder than it was before to say with authority what can and cannot be done in the medium. But the overruling option does not make the judge all-powerful.

* * *

Typical field configurations. As I initially apprehend it, a legal field is more than just a collection of general rules, boundaries, precedents, and vectors. I will almost certainly experience it as patterned, as a field with a particular configuration. Of course each field is different from every other one. But in the gestalt process by which we grasp it, we employ—albeit non-reflectively—what we might call "configuration-types." We get a cognitive grip on the particularity of a given field by relating it to one or more of these types, distorting it in the process.

We can loosely array configuration-types according to how impacted they are. By this I mean that some fields seem to offer more opportunities for one kind or another of legal argument than others. Here are my candidates, beginning with the type that seems to offer least opportunity for overcoming whatever the initial distance may have been between the law and how-I-want-to-come-out.

The impacted field. In the impacted field boundaries are long straight lines, meaning that there are general rules determining the limits of general rules. For example, we might have a rule that "protected speech," must be either speech or the dissemination of written texts. The "further we go" without making exceptions (e.g., we uphold censorship of a dance performance with obvious political content, or of a mime show) the longer the straight boundary line. In the impacted field, there are a substantial number of cases distributed in a regular pattern along the boundary, dispelling any doubt that the rule means what it says. The dance and mime cases have actually been decided.

Moreover, the courts deciding them did so with holdings that carefully incorporated the cases under the most general statement of the general rule,

in the process reaffirming all the earlier cases along the line, while predicting that at points in between the decided cases the courts would adhere to the existing pattern. Behind the lines, there is a nice scatter pattern of easy cases, and they get easier and easier as you approach the core, all in accord with the gradient hypothesis about social policies. This pattern makes it hard to imagine "parachuting in," so to speak, with a surprise case permitting peacetime national security censorship of a newspaper editorial criticizing the government.

When I apprehend the field as impacted, I apprehend it as hard to manipulate. Those long straight boundaries, reinforced at regular intervals with precedents whose holdings exactly track the line, will defy the arts I have been describing. My initial sense will be that, unless I can do my work on the facts of the lie-in itself, I am going to be in trouble. But remember that we are not speaking of actual, objective properties of the field, but rather of my initial apprehension of it.

When I set to work, for example, at reading a lot of those cases I vaguely remember, everything may change. I haven't yet tried to restate the rules and cases and policies in a serious way. My initial impression, that the field is impacted, is as much a *product* of my initial fear that I won't be able to come up with a viable legal argument for the lie-in as it is a *cause* of that fear. If you wait a minute, the field may suddenly look a lot different, as happened above when I finally began to see a way to tuck the lie-in under the wing of the First Amendment.

The case of first impression. Sometimes the field presents itself as structured everywhere except in the vicinity of the case at hand. The boundary line is vague throughout the area of the lie-in; no precedents appear nearby; and, significantly, the policy vectors seem to be of about equal force, not just along a thin line of equilibrium, but throughout the border region. If the vectors are about equal and also relatively very strong, it is not just a case of first impression, but a "great" case. If the vectors are weak, then it is the routine case of penny-ante judicial creativity.

If the field has this structure, but the lie-in seems to fall outside the area of indeterminacy, a basic argumentative tactic is to restate the facts to put it there. This changes the situation from an adverse one, in which rule application seems to settle things against me, to a neutral one, in which everyone will concede that there are good legal arguments on both sides, and the whole proceeding has the air of a solemn sports event.

The impacted field and the case of first impression represent constraint and freedom as they are conceived within the legal tradition itself. The case of first impression does not threaten that tradition because the freedom involved is, first, exceptional, and, second, freedom constrained by its narrow context. The case is a kind of clearing of freedom in the endless forest of constraint. Because we exercise freedom where there is no constraint, it doesn't threaten constraint. Moreover, the judge's action fills in a part of the clearing, so that the freedom of cases of first impression can be understood as self-annihilating. The more times judges exercise this freedom the less of it there will be, as the boundaries get staked out case by case.

The following configuration-types differ from both the impacted field and the case of first impression because of their ambiguity. Rather than presenting themselves either as hopeless (constraint) or as open (freedom), they present themselves as opportunities whose ultimate meaning we will fix through the work of argument.

* * *

The unrationalized field. Imagine that there are lots and lots of cases in the general vicinity of the boundary, some coming out for the workers and some for the employer. But they are decided "on their facts," with minimal argumentation and narrow or conclusory or obviously logically defective holdings. Just because there are so many cases clustered around the boundary, there are many, many occasions for rearrangement by restatement of facts. This will be especially true where there are lots of details available for each precedent (so the restater has free play in selection) or almost no details at all (so the restater can dismiss the case as ambiguous). A field of this kind invites an opinion proposing a new rule and showing how all the old cases, properly understood, are consistent with it. Because the earlier cases are unrationalized but numerous, the exercise may be particularly convincing as "order out of chaos," and a great relief to the audience. Or it may fail miserably, leaving things more disorderly than they were before.

* * *

The contradictory field. This is the situation in which there are lots of cases on both sides, but the company has won some that seriously impair free speech, and the workers have won some that seriously impair employer control of the m.o.p. during a strike. The courts have prohibited all picketing, say, but have permitted unlimited secondary boycott activity.

In a situation like this, connecting the dots so as to draw the boundary requires a zig-zag line that cuts deep first into one territory and then into the other. Each opinion fully restates the policy vectors so that it looks as though the outcome is "required." But the result is that a given policy appears to vary widely in force at points that are near each other in the field.

These rapid fluctuations along a contorted boundary suggest that "something is wrong." The boundary between strict liability and negligence in the law of unintentional tort has much this quality. Cases that openly impose strict liability are only part of the picture (though, as every law student knows, it is hard to decide what is an "ultrahazardous" activity, given the precedents and the ambiguous definition). There are also so-called "historical" instances, as with animals and nuisance. There are situations such as res ipsa loquitur and the manipulation of informed consent in which the courts impose de facto strict liability behind a screen of fault rhetoric. And courts interpret the reasonable person standard to permit liability without fault, right next to cases in which they "individualize" the standard to prevent that outcome.

There are lots of arguments for strict liability and lots of arguments for the fault standard in these cases. The problem is that if one took the arguments in any of the cases seriously, one would have to overrule dozens and dozens of cases based on the opposed policy in the matching pair. Consequently,

almost any case can appear to be of first impression, since virtually all cases seem to fall midway between cases decided for strict liability and cases decided for the fault standard. Instead of a field divided in half by a straight line that represents an equilibrium of forces, we have an extremely complex structure shot through with interstices. There really is no boundary. Every point not occupied by a recent precedent is contestable.

* * *

The collapsed field. A field collapses, in this lingo, when the policy arguments on one side of the boundary get restated so as to abolish the boundary. One of the contending general rules then appears correctly applicable across the field so as to obliterate the counter-rule.

Collapse is usually an event quickly recognized to threaten the whole enterprise, so the collapsing argument is not just "accepted." Rather it is there as a possible, plausibly legal, incontestably legitimate and sometimes highly persuasive argument *in every single case.* On the other side are ad hoc appeals to factual peculiarities, arguments harking back shamelessly to a more innocent time, mistakes, intuitionistic protests against collapse, but no coherent argument for a line that would hold against the collapsing argument.

In *Shelley v. Kraemer,* if enforcement of discriminatory covenants is state action, then the private sphere "disappears," since all private arrangements are dependent for their structure on enforcement of private law ground rules. In *Wickard v. Fillburn,* if wheat grown for your own consumption affects interstate commerce by reducing demand, then it is hard to see what activity can ever be "intrastate." In *Pennsylvania Coal v. Mahon,* Holmes points out that all police power regulations "take property" in the sense of impoverishing some, but proposes to solve the problem only by an incoherent test of "how much taking." In *Hoffman v. Red Owl Stores* and *Drennan v. Star Paving,* the court allows a promissory estoppel recovery where there was no gratuitous promise and indeed no consideration problem of any kind. There was merely a failure to comply with the formalities that indicate intent to make the promise binding. If promissory estoppel applies in such cases, it potentially abolishes formalities in any case where there was reliance.

* * *

The loopified field. The notion of loopification makes people uptight, and since it’s not that important here, I’ll just mention it briefly. We apprehend the field as loopified when supposedly easy cases in the heartlands of the territories of the opposing rules seem closer together (around the back, so to speak) than cases that are opposite one another along the boundary.

For example, the intimate relations of family members are simultaneously those that seem most clearly private (e.g., as described in *Griswold v. Connecticut* or *Roe v. Wade)* and those that, because of their implications for the public weal, are subject to the most intense and intrusive state regulation (as in the standardless determination of child custody in the "best interests of the child"). Or take promissory estoppel, which now applies most typically to a business transaction in which there has been a failure to comply with formalities and in which the measure of damages may actually

be the expectancy. This core promissory estoppel case is hard to distinguish from the core case in which, according to the traditional wisdom of, e.g., *Baird v. Gimbel,* the doctrine simply has no applicability at all.

* * *

I hope, as I begin research on the lie-in case, that the field will present itself in a somewhat disordered configuration—as unrationalized, for example—and I fear that I will confront an impacted field, with my case firmly planted behind "enemy lines." One goal of legal argument is to recast the field so that it will end up looking impacted, but with the lie-in case now securely where it ought to be.

If the field looked well ordered for me initially but at the end of the argument the field looks contradictory, I have lost ground, even if I am still quite plausibly presenting the lie-in case as one that has to be resolved for the workers. On the other hand, if I begin with an unfavorable impacted field and end up with a plausible case of first impression, or a plausible case in a loopified field, I have done quite well.

The reason you want to end up with an impacted field (with your case favorably placed) is that the impacted field's orderly boundaries, its neatly disposed precedents, with their congruent holdings and smooth policy gradients, is the very image of legal necessity. If you persuade your audience that the field is like this, the audience will see the decision-making process as a simple exercise in rule application. The case will "decide itself."

By contrast, a case in a contradictory field, no matter how plausibly presented, can't seem necessarily to come out your way. The chaotic configuration of the contradictory field—no matter where you are in the field there are cases all around that come out all different ways—is a symbolic representation of contingency dressed up to look like necessity. This may be a relief, given how bad things looked to start with, but it's never the ideal end of the argument about this case.

* * *

Remember, though, that this case is not the whole story. In my role as a liberal activist judge, I have long-term goals with respect to the configuration of the various fields I work in. For example, suppose that I can decide the lie-in case for the workers if I emphasize one aspect of the facts but in the process will reinforce a boundary in the field that I see as congealed injustice. My goal of law reform may be to collapse that boundary--say by establishing that there is no a priori distinction between worker rights in the m.o.p. and ownership rights—so that the concept of ownership cannot define a core of employer prerogative that must remain immune from worker meddling during a strike.

I may be willing to sacrifice something in the way of total convincingness in this particular lie-in case in order to disorder the field. Maybe I will emphasize the extent to which the holding of my lie-in case conflicts with holdings in the long string of picketing cases, so as to create a consciousness of discontinuity that will induce workers and their lawyers to expand the lie-in into a deep salient extending toward the core of the employer's property rights.

Just as I have multiple objectives in constructing my argument, I have multiple materials and a variety of different kinds of moves I can make with each element in the field. As I set about the task of argument, these possibilities generate a rough sense of an *economy of the field.* By this I mean that there are systems of trade-offs between desired objectives and between the different kinds of moves I can make with the materials available to me. For example, I just described a possible trade-off between making the most convincing possible argument against an injunction in this particular case and my long-term goal of destabilizing the rule that the workers can't interfere with the owner's use of the m.o.p. during a strike. Trade-offs at the level of goals are executed through decisions about which elements in the field to manipulate and how much. These are *strategies of execution* of a given field manipulation.

A strategy is a set of choices between, say, distinguishing a given case by restating its facts and distinguishing the same case by restating its holding. Or between distinguishing all picketing cases from the lie-in on the basis that the lie-in is civil disobedience, and distinguishing the lie-in from mass picketing on the ground that it's non-coercive, while emphasizing its similarity to individual picketing.

The notion is that there is a rough relationship of substitution between different manipulative moves. I have a choice between dramatically redrawing a boundary and dramatically restating the facts of cases so that they appear on the other side of an unmoved boundary. Moreover, choices between moves in one part of the field—or with respect to one element, say, precedents—influence and indeed constrain the choices that are available in other parts of the field.

I have been developing through the preceding discussion a particular strategy for arguing against an injunction of the lie-in. Some elements of the strategy are: the choice of a First Amendment general defense of the action; the choice not to attack state law civil and criminal penalties short of injunction; the choice to distinguish mass picketing cases as coercive rather than as "not speech," and so on. It seems obvious to me that there must be other possible strategies, though for the moment the only one that comes to mind is that of using the Wagner Anti-injunction Act.

One of the effects of adopting a strategy is a kind of tunnel vision: one is inside the strategy, sensitive to its internal economy, its history of trade-offs, attuned to developing it further but at least temporarily unable to imagine any other way to go.

But a strategy is also a *practical commitment.* Because it hangs together, the strategy imposes multiple constraints on how I respond to any new aspect of the case. It's not just a matter of logical consistency: the strategy has a tone and a style. For example, hard-nosed nip-it-in-the-bud rhetoric about mass picketing will be in tension with repression-just-makes-it-worse rhetoric in the lie-in, even though there is no logical problem. Moreover, a strategy is an investment of time. Once I've put in the work of developing its many interlocking parts, it will cost me plenty if I respond to a new question with an answer that would force revision of everything that's gone before.

In legal argument as in other production processes, practitioners have an intuitive idea of efficiency in the deployment of the available materials. Anyone who has done legal argument knows what it means to do it "neatly" or "elegantly," meaning at a minimum expenditure of ... something. A part of this complex notion is that if you are mainly interested in who wins the particular case, you should persuade us that the lie-in is non-enjoinable with the least possible restatement of the facts and holdings of other cases, the least possible rearrangement of policy vectors, and the least possible movement of the boundary between free speech and interference with property. If, by contrast, you want to "make some law," you should do that, too, so as to accomplish the greatest possible movement of the boundary with the least possible disturbance of the other elements of the field.

A kind of quotient notion emerges. Success at the skill of legal argument can be measured by how little you disturb the field in order to persuasively achieve a given restructuring, whether it's a big restructuring through law making or a small one by making sure the good guys win this case. It's the ratio rather than the absolute amount of movement or of disturbance that counts.

* * *

My uncertainty about whether I will succeed in making a convincing argument. Up to now I have presented the activity of argument as a kind of work, undertaken in a medium, with a purpose. The purpose was to convince the audience that, contrary to our initial impression, a decision denying an injunction in the lie-in is in accord with the law. I undertake this argumentative labor with a number of ulterior motives, such as avoiding reversal on appeal, fulfilling my obligation to the public, and so forth. I hope that by developing a convincing argument against the injunction I will avoid a loss of credibility as a judge (indeed, I hope to increase my credibility through a strong opinion).

There is an ideal scenario in which I am able to represent the legal field so that the law corresponds exactly to how-I-want-to-come-out. What was initially an impacted field with the lie-in unequivocally prohibited (an easy case) becomes, to the surprise of my public, an impacted field in which the lie-in is a case that is clearly permitted (or at least not enjoinable). I close a large obviousness gap by a field manipulation that is notably elegant—a dramatic change in outcome with surprisingly little disturbance of the elements of the field.

When my reasoning turns out this was, I feel euphoria, indeed a moment of dangerous omnipotence, delight at the plasticity of the natural/social field-medium, and narcissistic ecstasy at the favorable reaction of my public (not to speak of sober joy at all the good I will be able to do with my increased credibility). But before you put me down as an egotist, I want to add that some element of this pleasure is quite legitimate. I had an intuition about the justice of the situation—how-I-wanted-to-come-out in this case was in accord with an intuition that the law as I initially apprehended it was

unfair to a particular group. If I have succeeded in making the law fairer to that group, my pleasure will be in part an altruistic emotion that seems to me no cause for shame: I will have helped out. Too bad it doesn't always turn out that way.

I will describe below some of the ways things don't turn out ideally. But first dwell for a bit on my uncertainty, as I begin my argument, about what will happen during its course. I have an initial estimate, a guess about how large the obviousness gap is, about the resources I will have to marshal in order to overcome it, and about the chances that I will fall short to one degree or another. But why can't I tell in advance the more or less precise dimensions of my problem, the means at my disposal, and the quality of my solution? I don't know *why.* But here is *how* I don't know in advance.

* * *

Projection. I may have misjudged the way the field will look to other people. I'm trying to persuade not only myself but also some hypothetical public. But I have to construct their way of seeing it on the basis of my own vision. It often happens that the field looks to me at first glance at least unrationalized and very possibly contradictory, while others see it as at least close to impacted. In other words, I know I have a bias, measured by the vision of others, toward seeing the field as undetermined, as unstructured, as open to all kinds of manipulation. Remember that my initial apprehension of the configuration of the field is a gestalt process, very firmly located in the eye of the beholder, yet dependent on stimuli that are external. Other people seem to me to see the field as always impacted, and adversely at that, until they have put an inordinate amount of pain into loosening it up.

Virtu. The skill of legal argument is to close a big obviousness gap with minimal disturbance of the elements of the field. It is the skill of combining the different moves—restating facts and holdings and rules and policies and stereotypes—in such a way as to achieve multiple goals at minimal cost.

There is no way to be sure you will be able to do this the next time you try. How much you can change the held through argument is a property of *yours,* that is, it is determined by your skill, as well as a property of the field, but the property of yours is unknowable in advance. There is such a thing as a good day and such a thing as a bad day. Internal psychic factors like adrenalin, panic, fatigue, but also internal factors that seem random, or psychoanalytically knowable after the fact, all impinge. Life is a gamble, here as everywhere else.

Hidden properties. My initial apprehension of the field doesn't tell me that much about it. An analogy is my initial apprehension of a body of water through which I am going to navigate a boat. I can see the surface of the water but usually not what lies beneath it. Yet lots and lots of signs on the surface indicate what is beneath. Some people are terrific at "reading" the surface; others not so good. But no matter how good you are at reading, there is lots that just isn't knowable in advance. In legal argument, I have no way of knowing with any precision what is contained in the hundreds of cases I haven't read that might be relevant to my problem, or in the thousands of other legal materials scattered across creation waiting to be put to use here.

* * *

The consequence of these different kinds of uncertainty is that I can never know in advance whether it will be possible to develop a legal argument for how-I-want-to-come-out that will persuade any part of my audience. Sometimes, the problems are obvious from the start. I never break through my initial panicked sense that this is a case the workers can't possibly win. It sometimes happens that my sense that they can't possibly win emerges slowly as I pursue what at first seemed like a promising course of argument.

Sometimes it's less dramatic than running up against the brick wall of the experienced objectivity of the rule. Maybe it turns out that I can make an argument that is "plausible" but won't actually convince many people; or that I can convince my audience that the law is a lot more favorable to the workers than they thought, but not so favorable as to prohibit an injunction of this particular illegal action. I may come up with a field-manipulation that strikes me as clumsy or just plain wrong—one that wouldn't convince me for a minute of anything—but which I think will appeal to this public as highly plausible.

I experience the course of events as contingent. I don't have, and I know I don't have, a technique for predicting with a high degree of certainty what will happen to my first impression of conflict between the law and how-I-want-to-come-out. I can only find out the actual posture of the law by going through the work of argument. While it's happening, the situation seems to open toward a multiplicity of possible outcomes, none of which would violate any strongly held theoretical tenets.

* * *

When I've finished, I may be able to represent what happened as the necessary consequence of the "state of the law" when I began. But I won't really know why it turned out the way it did. In particular, if I fail to develop a plausible legal argument against an injunction of the lie-in, I won't know whether the reason was that I lacked skill in manipulating the field or that the "inherent properties of the field" were such that there was nothing I could have done. Did I screw up, or was I doomed from the start?

I am not in a condition of total ignorance about the failure. Next week another judge or lawyer may produce an argument against enjoining the lie-in that is highly plausible, and dissolves the felt objectivity of the rule, at least as applied to this case. If that happens, I will say to myself, with a lot of confidence, that my failure last week was a failure of skill rather than something preordained by the latent structure of the field. Or I may discover a whole series of earlier unsuccessful attempts to argue the case convincingly and conclude that my failure was not so shameful after all.

Knowledge of this kind is consistent with the sense of radical contingency I am asserting here. When someone else does what I couldn't do I learn that my failure was a failure of skill; and there is suggestive evidence in the failure of others that my failure was a consequence of the properties of the field. But it isn't possible to prove convincingly that there was just no way to make it fly. You can't prove it can't be done.

I have had many times the initial apprehension of the objective coverage

of a case by a rule. I have many times started out thinking, "no way." And I have had many times the experience of apparent objectivity dissolving under the pressure of the work of legal argument. I have no theory that tells me in advance when that will happen and when it won't. I just have to try and see. When it doesn't work, sometimes someone else can do it. And sometimes I come back to the problem later and succeed where before I seemed to fail through no fault of my own. *From the inside,* what happens to my initial experience of the rule as objective is radically contingent.

I can imagine what it would be like to be able to tell in advance whether or not the rule's objective self-application will stand the test of time and effort. I can imagine having a technique, like the technique of a surveyor, say, that would tell me with great confidence that if I extend a bridge's span at a particular angle in a particular direction it will eventually hit the other side of the ravine at a predetermined spot. But that's just not the way it is in legal argument, at least for me. And in all honesty I have to say that people who think differently have, in my experience, turned out not to know what they are talking about.

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[*The quantitative question.* It seems irresistible to ask at this point some such question as, "How often will the field be impacted or otherwise unbudgeable through legal argument?" If this is a question about the experience of a particular judge or group of judges, then it is at least intelligible. We could devise an empirical investigation into that experience, perhaps through interviews about past cases. We could even attempt an historical inquiry, based on more diffuse and suggestive data, into how the experience of judging has changed through time. Some of my own work is in this mode. I would venture the hypothesis that experiences of the manipulability of the field have become steadily more common in American history since 1776.

But I don't think the question is usually asked with this kind of answer in mind. It is a question about the *nature* of the field, about an objective property of the legal materials in use in a society at a particular moment in its history. That there can be no answer to the question posed in this way seems to me implicit in what I have already said.

The field is unknowable except through experience, and there is no "value neutral" perspective from which we can assess the "correctness" of a report of immovability. Whether judges have the experience may vary with how hard and how often they try to manipulate the field when it initially appears impacted. It may vary with the critical techniques available in their legal culture to dissolve the initial appearance of objectivity. It may change according to the quantity and the particular quality of the flow of cases they adjudicate, and according to whether they must habitually consider cases from many autonomous jurisdictions.

It is probably overdetermined by all of these things at once, and by many other aspects of judicial reality as well. One of these aspects is probably the extent to which judges learn in law school to anticipate that socially constructed systems of meaning, and particularly law fields, will be open to multiple interpretations. If we decided to "count" experiences of objectivity, we would have to decide what counts as an instance. But there just isn't any

"natural" set of assumptions, any model of the "juge moyen sensuel" to use as a standard in determining what particular law fields are "really" like. The quantitative question is simply unanswerable.

What then can be said of the body of legal materials "itself," considered in isolation from the particular contexts within which particular judges experience it? Not much. We have no reason to believe that the field is *ever* unbudgeable otherwise than as a consequence of the failure of particular judges to find a way to budge it. But we cannot assert the contrary either: it *may* be true that a given field was experienced as immovable because it *was* immovable, and that's all there was to it.]

* * *

The normative power of the field. Throughout the discussion to this point, I have spoken as a judge who knows how he wants to come out and is vigorously trying to bring the law into accord. Sometimes I apprehend the law as plastic and cooperative, sometimes as resistant or even adamant, but me and my favored outcome are always the same. It is now time to critique the how-I-want-to-come-out pole of our duality. First, however, let's reify it with an acronym: HIWTCO.

HIWTCO is not a datum given externally, something that comes into the picture from outside. HIWTCO is *relative to the field.* This is true in the weak sense that I have decided HIWTCO in response to a question posed in terms of the existing social universe that includes law. I don't want these particular workers, living in our particular society under a particular set of legal rules to be enjoined from lying-in. I can't even formulate HIWTCO without referring to this legal context to give that result a meaning.

* * *

But HIWTCO is relative to the law field in a much more interesting and important way. I've been treating the law field as though it were a physical medium, clay or bricks, when what it is in fact is a set of declarations by other people (possibly including an earlier me) about how ethically serious people ought to respond to situations of conflict. As I manipulate the field, I am reading and rereading these declarations, apparently addressed to me, and trying to absorb their messages about what I ought to do. Indeed, before I ever heard of this case, I was already knowledgeable about hundreds of opinions by judges and lawyers and legislators about how to handle conflicts roughly analogous to this one.

As a preliminary matter this means that we are *not* dealing with a confrontation between "my gut feeling about the case" and the law, unless we understand my "gut" as an organ deeply conditioned by existence in our legalized universe. I simply don't have intuitions about social justice that are independent of my knowledge of what judges and legislators have done in the past about situations like the one before me. Other actors in the legal system have influenced, persuaded, outraged, puzzled, and instructed me, until I can never be sure in what sense an opinion I strongly hold is "really" mine rather than theirs. I don't even think such a question has an answer.

But the more important point is that my initial impression of conflict between the law and HIWTCO may disappear because HIWTCO changes,

as well as because I manage to change the law. Further, the very resistance of the law to change in the direction of HIWTCO may impel HIWTCO to change in the direction of the law. I may find myself persuaded by my study of the materials that my initial apprehension of HIWTCO was wrong. I may find that I now want to come out the way I initially perceived the law coming out. This is what I mean by the normative power of the field.

* * *

I try to move the law in the direction of HIWTCO, and to the extent the law is resistant, I find HIWTCO under pressure to move toward the law. But neither HIWTCO nor the law field are physical objects. If I experience "pressure" as I read through the legal materials, if the very fact of my initial apprehension that the law favors the employer exerts pressure, it is because the field is a message rather than a thing. It is a message of a kind I'm familiar with, a message of a kind I've dealt with before. Indeed, I am one of the authors of the message.

Precedents come to me as stories called fact situations that judges resolved in particular ways. What they did interests me in the way an earlier painter's work might interest a later painter. But interest is too weak a word. Especially when they are put together in patterns, precedents reveal possibilities that it would have taken me a long time to come up with, or that I might never have come up with at all. I look at six outcomes, and I say to myself, "Oh, they devised a strategy of banning all picketing, but allowing just about any kind of secondary boycott. Hmm. I wonder why. Oh, I get it, they had a rough distinction between physically confrontive and non-confrontive tactics. Or maybe they were concerned with workers' freedom not to contract in the boycott cases, and worried about the implications for business combinations if they banned labor combinations."

Just studying these patterns may change my view because the study will set my mind going in directions that it otherwise wouldn't have taken. But there is also the elemental normative power of any outcome reached by people I identify with. Because I think they were up to the same thing I am up to, *whatever* they came up with has in its favor my initial sense that it's probably what I would have come up with too.

I place my lie-in in the field among the various precedents, as more of an interference than, for example, individual picketing. Immediately, the analogical weight of the precedents pulls me toward wanting to come out as "the law" would have me come out. "Given what I know about what they were up to, by inference from the way they came out in those cases, I think they would have come out as follows in this case. If they would have come out that way, then I should come out that way too." This is the first order normative power of the field.

* * *

The second order normative power of the field comes from the fact that all these judges (and others) have left us more than just a record of fact-situations and outcomes. They wrote opinions full of overtly normative explanations of outcomes by reference to rules and policies. There are hundreds of particular statements about *why* we should come out

in a particular way under particular circumstances, sometimes very particularly defined circumstances, but sometimes how we should come out in large classes of fact situations quite abstractly defined (e.g., the workers can't interfere with the owner's use of the m.o.p. during a strike).

Now the practice of recording outcomes for fact-situations, along with messages about why those outcomes are ethically and politically and legally correct, is no great mystery to me, since I do it all the time. I know first-hand what it means to try to indicate for the future how some future dispute should be resolved, and I have a good idea of what it is like to succeed. The person you've tried to influence says to you something like, "I had this problem, and I wondered what you would have to say about it, so I looked up your decision in the X case, where you gave your theory of what disruptive tactics labor should be permitted to use during a strike, and I found it very helpful. In fact, you might say what I did in the Y case was try to apply your theory. Of course, you may think I botched it completely."

I believe that it is possible to record messages about how to deal with future situations which will be intelligible to actors in the future, that it is possible for those actors to set out to "follow" the messages or directions, and that sometimes they do actually do something that is well described as "following the message." I sometimes feel that the people who set down all these messages that together make up the field had in mind something like the case before me and intended to instruct me to resolve it in a particular way. They are telling me not only that this is the rule they would apply, and here's how to apply it, but also that it is the *right* rule, that it is the way I ought to come out.

The second order normative power of the field comes from the fact that I identify with these ought-speakers. I respect them. I honor them. When they speak, I listen. I even tremble if I think I am going against their collective wisdom. They are members of the same community working on the same problems. They are *old;* they are *many.* They are steeped in a tradition of serious ethical inquiry whose power I have felt on countless occasions, a tradition that seems to me a partially valid great accomplishment of the often cruddy civilization of which I am a tiny part.

* * *

It is no good telling me that my reverence for the messages of these ancients is "irrational." It's not a question of rationality. When I read their words, it is as though I myself were talking. (Of course, when I'm reading my own earlier opinions, it *is* me in an earlier incarnation who's talking.) I am not able to treat their ethical pronouncements about how to decide cases like this one as though they were a set of randomly generated possible answers to a math problem. In that case, I test each answer "coldly," so to speak, without any investment at all in its correctness or incorrectness. But as I sit reading the messages of the ancients about cases like this one (or even, I may sometimes feel with horror, about this very case neatly anticipated), I can't remain neutral. I want them to agree with me. And I want to agree with them. I feel I *ought* to agree with them.

In this state of mind, I may find myself adopting the voice of the ancients, knowing what they are talking about when they extol the sacredness of

owner's rights and feeling that what they are saying accurately expresses something that I think too. I set out to manipulate the field so that the law would favor the lie-in, but in order to do that I have to enter into the discourse of law. In the process, I have to undergo its intimate prestige. I discover that I know what they were talking about because I myself am capable of thinking just what they thought. At that point, the normative force of the field is just one side in an interior discussion between my divided selves about who really should win this case anyway.

* * *

Who is the field? The messages that constitute the field are on one level just a set of verbal formulae. On another, they are speech I imaginatively impute to the "ancients." On a third level, the resistance of the field is another name for my ambivalence about whether or not I should enjoin the lie-in. To the question “who is the field,” the answer has ultimately to be that the field is me, resisting myself.

* * *

Conversion. It is possible that I will resolve my ambivalence by adopting the field as I initially apprehended it as a correct ethical statement as well as a correct perception of what the law is. In other words, I will find that I no longer want to come out against an injunction, but rather that my intuition of social justice is now that an injunction ought to issue, just as I initially thought the law required. But this is only one of many possible modes of interaction and ultimate equilibration of the law and HIWTCO. Here are some of the other possibilities.

I move the law and the law moves me. The outcome may be a modification of HIWTCO that brings it into accord with a new view of the field, one substantially different from my initial apprehension. Such a compromise might involve conceding that these workers went too far, though the law will not enjoin all lie-ins. Or it might involve not enjoining these workers but conceding that my initial pro lie-in position went much too far, so the workers better not take the next step they appear to be contemplating.

A compromise, like restatement of the law to correspond to HIWTCO, or conversion of HIWTCO to correspond to the law, has the peculiarity of *resolving* the initial perceived conflict. But this may not happen. The law may move me, and I may move the law, but the two may end up still in conflict, albeit less in conflict. It’s also possible that the normative pull of the field will leave me confused or ambivalent, where I had earlier been quite clear about HIWTCO. Or the reverse might happen: a vague sense of HIWTCO ends up clarified through the imagined dialogue with the ancients. As always, from inside the practice of legal argument the outcome is radically indeterminate.

* * *

How it sometimes doesn't work. What I have just described might be called the counter-ideal to the scenario in which I manipulate the law-field to correspond to HIWTCO. Here, the law field manipulates HIWTCO, stimulating first ambivalence and then perhaps outright conversion to the other side. But the field is no more necessarily normatively powerful than I am

necessarily manipulatively powerful.

To have normative power, the field must present itself as objectively favoring an outcome. Since normative power resides in the voice of the ancients, which is also just the voice of my ambivalent other half, I must be able to "read" the field in order to feel its power. The field must present itself as at least somewhat impacted, rather than as unrationalized, collapsed, contradictory, or loopified. What I mean by those configurations is just that I can't integrate the cacophony of ancient voices into a single voice with a message. The disordered fields may influence me in the sense that after exposure to them HIWTCO changes in one direction or another. But they are not exercising normative power, by which I mean the power to persuade me to a view you are trying to persuade me to.

But even supposing I have a sense of how the law comes out which I can contrast with HIWTCO, it does not follow that the field will exercise normative power. The message I apprehend as "the law" is at several removes from a conviction of my own about what I want to do. It is a message I have to decode, rather than a thought immediately accessible to me inside my own mind (without making too much of the mediate/immediate distinction). There will always be an element of mystery as to whose message it is, whether I have properly understood it, whether it is "applicable" here at all. Until I "make it my own" and begin to argue the side of the law against HIWTCO, the message hovers between the life I can give it and the status of dead formula.

The message is from the past, from people who put it together in the past (including my past self, if I was involved). Even if I can understand it and enter into it, it is yesterday's newspaper, queer-looking because so much has happened that it doesn't and couldn't take into account. The message that is the field was not developed by a clairvoyant as a message to the future; it is the product of judges deciding cases and writing opinions to deal with their problems, though with an eye toward the shape of the field for future cases. The way we constructed the field dates it and thereby deprives it of the normative bite it would have if it spoke in the voice of someone looking over my shoulder as I study the facts of the lie-in.

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The message was composed by other people, though I may have played a small part myself. I conceded that just about any message I can understand will have some normative power, if it is a normative message. That I can understand it at all means that there was another person out there thinking about this problem, with that degree of community with me that mere personhood alone is enough to establish. From that communal identification, however limited it may be, comes the power to move me just by saying "you ought to do thus and so." But there are others and there are others.

I will interpret the field as a message from particular others of a particular historical moment, and, as I particularize, I may find myself less and less convinced. The architects of the law of labor relations applicable here were turn-of-the-century conservative state court judges and New Deal reformers. I have mixed feelings about both groups and about

the legal structures of which these by-ways of labor law form a part. At least, my own evaluation of the message and its senders seems to have a great effect on how and how strongly I feel it. Moreover, there are other pulls beside the normative one that I know are there but whose individual contributions to the force field around me are indistinguishable, at least as I initially experience them.

* * *

Influences on the relation between HIWTCO and the law other than the normative power of the field. I have been describing how I ultimately want to come out as the product of an interaction between my evolving apprehension of the law field and my intuition of social justice. In my experience, this interaction is partly a series of events that is happening to me. It is also partly a series of events that I am making happen through my interpretive construction of the field, which powerfully affects its normative power. But it turns out that my initial intuition of justice under the circumstances is open to other influences than only the normative power of the field.

I consult my "gut" against the background of my situation as a judge. In that situation there are definite advantages and disadvantages to a rapprochement between HIWTCO and the law as it now appears to me. I have interests in agreeing with the law and interests in maintaining my disagreement. I worry that these are powerfully modifying what the outcome would have been in their absence—what it would have been had I dealt only with an intuition of justice and a law field capable of exercising normative power.

I also worry about their status: are these influences that should be resisted or that should be treated as legitimately normative in the same way the voice of the ancients is legitimately normative?

* * *

The principal influences against merging HIWTCO into whatever I think the law may be—the principal sources of non-normative resistance to the normative power of the field—are the psychological cost of conversion and terror of the disaster of false conversion. On the other side, the principal non-normative influence pushing HIWTCO in the direction of what I see as the law is fear that I won't be able to develop a plausible legal argument for my position, with attendant unpleasant consequences no matter what course of action I undertake.

I am going to discuss these various cost and benefits as influences on HIWTCO—that is, as constitutive of my experienced conviction about the proper outcome. This is odd. It might seem more appropriate to discuss costs and benefits as elements in my decision about what to do, when and if it appears there is an irreconcilable difference between the law and HIWTCO. Indeed, all these costs and benefits of divergence will again become relevant at the point when "I" have to choose a course of conduct. But I want to take them up here as elements constituting HIWTCO because I believe that they impinge first at this unconscious level—eliminating or exacerbating conflict, rather than setting the terms of its resolution.

These costs and benefits also influence my apprehension of the law. It is important, now that we are in the phase of relativizing HIWTCO, not to lose

track of the extent to which I constitute the field, both through my interpretation of its configuration and through the work of legal argument. The gestalt process of interpretation and the work of argument go on under the influence of my fear that, if I disagree with the law, I will be forced into an untenable corner of civil disobedience or craven surrender, or undergo false conversion. My choice to see the field as, say, contradictory rather than as impacted in an unfavorable way will be in part a product of my interest in seeing it that way, given my fear of a sharp conflict with HIWTCO.

* * *

The costs of conversion. I don't want to be converted to the view that I should enjoin the lie-in. My initial opinion that there should be no injunction is in character: as soon as it occurs to me I hold it dear as an emanation of my true self. Like a collection of knick-knacks, my opinions, along with my past, my work, my family, are a store of treasures I don't want to give up.

My social identity, moreover, is bound up with the ritual of agreeing, publicly, with others about issues like this. Other people see me as a person who holds particular kinds of views, and they like me or dislike me partly on that basis (however lamentable such superficiality on their part may be). I'm dependent on their good opinion. If I change my views, some will regard me as a turncoat, as weak-willed or stupid, a fluff-head or an opportunist.

Those who tend to favor management aren't likely to form favorable opinions that will make up for what I lose by conversion, since they won't know whether to trust me. Still worse, perhaps, is my sense that those who hold the view I might convert to—that the injunction should issue—are a bunch I'd hate, as of now, to join. When I think of myself as one of them, I shrink from my imagined turncoat self.

Legal argument, in which I take up and work with the message of the field, and maybe end up espousing it against my current correct and virtuous position, looks like working in a nuclear plant at the risk of radiation sickness. It looks like fooling around with heroin: you think you have it under control, and one morning you wake up already addicted. You've gone from one (good) state to another (bad) state without ever having a moment of choice about it.

I think this fear of being converted without choice, somehow forced from one's own view into another, is deep in almost everyone involved with law. It leads progressive-minded people to ask things like, "Will law school warp my mind?" Or to assert that they think something is legally right but totally morally wrong. Or that law is made-up noise that reinforces things as they are, so it's not worth the trouble to argue within its terms (even though it's manipulable) when the facts cry out for direct moral response.

Even if in contemplation I admit that the conversion might be to a "better view," I still don't want it to happen. Just because it's a better view doesn't mean that moving to it is painless. I don't want to be converted, but I do believe in the possibility of progress in my own views. I believe things now that I used to think were stupid, and I think I'm better off for having been through the process of enlightenment, however painful. So my fear of conversion is qualified by my longing for truth and for change and interesting conflict.

I may still be deeply influenced against the normative power of the law field by the fear of *false conversion.* Maybe what looks like a very compelling legal, moral, utilitarian, political argument against HIWTCO has a flaw a mile wide. Maybe the company's lawyers even know it does, and maybe I'll be suckered into believing it because I lack constructive as well as critical argumentative ability. (I might be great most of the time but have screwed up here, despite my previous record.) If this happens, I will experience a momentary pleasure of conversion (with attendant mild pains), followed by a subsequent devastating awakening to my own mistake, then humiliation if I change my mind back, and shame if I find myself unable to admit my error and forced to persist in pretending my new wrong position is right.

My sense that I'd better hold on tight to HIWTCO, insulate it against the power of the field, is strengthened by my knowledge that it's not only normative power that's in play here. There is something pure and cutely idealistic about listening to the ancients because one thinks what they have to say may be of value in one's search for the ethically correct result. But suppose that I'm drawn into a false conversion not by earnest openness to enlightenment but by my opportunistic interest in avoiding controversy? I resist the normative power of the field in part because I distrust my own construction of the field.

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Reasons for changing HIWTCO to correspond to the law (other than the normative power of the field). It's not that a divergence between HIWTCO (no injunction) and the obvious legal solution ("of course the employer can get an injunction") has to produce trouble for me. Where I am out, of line I may be able to persuade people that I have the better legal case; indeed, the divergence may be the occasion for me to increase my fund of credibility. But if there is a divergence, and I persist in my position rather than letting myself be persuaded that I was wrong and "the law" was right, I have to be ready for the possibility that I will be unable to produce a plausible legal argument for my position. If this happens, I will be in a corner. I may not be able to avoid a painful controversy.

Fear of this controversy will influence how I see both HIWTCO and the field, and influence them in such an intrinsic, automatic way that I won't be able to be "outside" the influence and neutralize it. Sometimes, in spite of the most intense vigilance on my part, fear has eroded my opposition to an outcome until without ever being aware of it I have "gone over to the other side."

* * *

The devil's compact. I want to discriminate between more and less crass, reasons for abandoning HIWTCO. The less crass is fear of finding myself in violation of the devil's compact: that I will either defend my position as plausibly in accord with law, or change it, or withdraw from the case.

I entered the devil's compact when I took my oath of office as a judge. The compact is between me and an imagined public, but it is also a rough way of describing what I think will be the practice of various real people I know, or

who can communicate with me through newspapers, letters, popular magazines, law reviews, or bar journals.

Many people believe there is a sharp distinction between action according to law and lawless action. If it appears to them that I have no plausible legal argument for how I want to come out but, nonetheless persist rather than changing my view or withdrawing from the case, they will say I have violated the elementary meaning of the agreement under which I direct the use of state force.

There are people whose good opinion is important to me whose belief in the devil's compact is such that they will condemn me for violating it even if they think the outcome I favor is the just one. They see it as an aspect of the judge's job that she is supposed to bring about outcomes that are unjust when the law is unjust. If you don't like the job, you shouldn't take it. Once you take it, you either do it or refuse to do it (withdraw from the case).

I was aware when I took office that if I were to publicly reject the compact, I probably would not be allowed to become a judge. When I took the job without raising the issues I am about to raise here, I allowed some people to think that I agreed to the terms of the compact. The fact that many liberals and some conservatives understand it in a way that modifies it so much as to make it almost meaningless is irrelevant to my point. People who believe in the compact were necessary, I imagine, for me to become a judge, and it is with them that I entered the compact.

On the other hand, I think the popular conception of law is internally contradictory, embracing the notions that (a) "the law is the law," a determinate result-producing technique, and (b) the law is intrinsically an affair of justice, so that it is always "for the best," and lacking any theory at all of how conflicts between (a) and (b) are to be resolved. Lay people tend to be surprised when the law turns out to be plain unjust, and surprised also when it turns out to be indeterminate or patently determined by "external" factors such as controversial ethical or political views.

Furthermore, the devil's compact presupposes a view of the relation between the law and HIWTCO that initiates know is false. The manipulability of the field is much greater than the lay public realizes, even if we concede that there is no intelligible way to answer the quantitative question, "How manipulable?" And the point at which the field "sticks," presenting itself as an objective message there's no way to evade, is much more arbitrary than even the legal profession realizes.

This point at which I am supposed to refuse to exercise my power in favor of the workers, is indeed one of perceived objectivity of the field. But I cannot affirm that it is a point at which the law was "just not on their side," because the problem may be that I was not sufficiently skillful, or didn't have enough time, to find their argument. Even if we *are* at a point of objective field adversity (I can't prove such points don't exist), it is not a point that is part of an intelligible pattern.

If the field constrains the judge only in this arbitrary manner, it doesn't make sense to claim that constraint is the workers' quid pro quo for accepting an unjust outcome in any particular case. The devil's compact, if I try to impute it to the litigants rather than to myself as the judge, is vitiated

by a mistake as to fundamental terms, a mistake of which I had prior knowledge.

Suppose that I persist in HIWTCO even though it differs from the law as I perceive it after exhausting my resources of legal argument against it. I will then face a choice such that, whatever I do, I will feel terrible. I therefore have a strong motive to somehow reconceive HIWTCO so that it accords with the law and thereby prevent my painful dilemma from ever reaching the level of consciousness.

What determines the outcome of the interaction between the field and HIWTCO? From inside the practice of legal argument, the only possible answer to this question is that I determine the outcome. As I work to manipulate the law field in the direction of HIWTCO, I have a strong feeling that I am acting in the world, remaking it to fit my intentions. If I manage to restate the law so that it plausibly requires my preferred outcome, I will see this as my accomplishment.

As I develop the case against an injunction of the lie-in, I am restating the law about lie-ins. At some point, I may "get the message" of that law and find myself developing it in my own mind as an argument against the position I have been taking, against HIWTCO. Then at some point I may find that "I am changing my mind" and then that "I have changed my mind." In that case, I will feel that it was my own decision to bring HIWTCO into accord with the law.

It is a little hard to figure out what it means to have an "I" inside me who is capable of changing a "my mind" that is both the same as that "I" and different enough so that "I" can determine it rather than just *being* it. But it is my experience that HIWTCO is undetermined right up to the moment when something has happened that moots the question. I can always change my mind about HIWTCO, and I have on occasion found myself changing my mind very late in the game.

But this way of putting it, though true to occasional experience, overstates my freedom by making it sound as though I were omnipotent. Remember that even in the first moment of confronting the problem I want to come out one way or another in the context of my life-project as a judge and of the law as I already know it. These contexts are givens that have shaped me before I begin to reshape them. I decide already positioned somewhere, having no choice about that somewhere, able to move only by work that takes time.

As soon as I set to work on the particular law field, I undergo its influence, an influence that is partly normative and partly the product of my fear of finding HIWTCO ultimately in conflict with the law. On the other side are all my good reasons for sticking to my initial conviction, reasons whose influence I can never fully neutralize.

As I work on the field, following a strategy that has its own internal economy and takes time to execute, the field and HIWTCO change and influence one another and change and influence one another some more. If I am lucky, this process appears to have an unforced inner tendency toward convergence, so that eventually the law and HIWTCO are the same, one way or another. But whether and how this convergence occurs is very much a

function of aspects of the situation over which I have little control.

First, there is my initial apprehension of the law field, which I just "get" as impacted, contradictory, or whatever. Then there is my strategy, which takes me down a path I can't know in advance. Although I choose it, I don't control the consequences of my choice, since the field has hidden properties, and I have particular biases and only what skill I can muster for the occasion. Then there is the time factor, which means that sooner or later, if convergence does not occur, I will have to stop working on the field, unsure whether its current state is an irremediable aspect of its "true nature" or an artifact of my blundering.

I am now repositioned, so to speak. It's true that I can still change my mind about HIWTCO and that I am free to make one of a number of choices about how to play things, if HIWTCO and the law as I have reconstructed it are in conflict. But it is also true that I will make these choices constrained by where I started and by all my decisions about how to develop the field. What I have done is irreversible in the sense that I can't just "go back" to the way I used to see things. And I've run out of time to *work* the field backward (or forward). I'm stuck where I am and have to decide from here.

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What to do in case of conflict between the law and HIWTCO. My answer to this question is unhelpful: it depends on the circumstances.

1. Go along with the law. In spite of my conviction that social justice requires me to deny the injunction, I issue it, along with an opinion denouncing the law and urging reform. I make the very convincing legal argument for an injunction that comes to mind in an impacted field such as this one. A crucial question is how I explain my obedience, that is, my willingness to act as the instrument of injustice.

2. Withdraw from the case. I neither issue the injunction nor deny it. I withdraw, explaining that I think the law is unjust and that my feelings against it make it inappropriate for me to preside and repugnant to me to be involved in administering this regime. A crucial question is how I justify begging off while insisting that someone else do the dirty work, if I intend to stick around for the more attractive assignments.

3. Decide against the injunction on the basis of what the law should be. I deny the injunction, honestly explaining my inability to come up with a plausible legal argument against it. Though I may be reversed on appeal (and quickly at that), I exercise what power I have to further HIWTCO. This may be decisive if the litigants are evenly matched out in the world. I accept what consequences my bureaucratic superiors and my colleagues and peers decide to inflict (highly indeterminate). I appeal to them to accept my outcome as the correct one in this and future cases, thereby changing the law. A crucial question is who authorized me to take the law into my own hands.

4. Decide against the injunction on the basis *of an implausible legal argument.* Maybe it will look good to others, even though I think it stinks; I can never be sure in advance. Maybe it will turn out in my own hindsight to be a better argument than I thought. But what about the dishonesty of bad faith argument?

5. Decide against the injunction on the basis *of fact findings I know to be*

false. As the trial judge, I decide to pretend to believe an account of the facts of the lie-in that I know to be false, and deny the injunction on that basis. This is obviously an extreme measure.

Afterword

The rule of law. I can imagine hypothetical situations in which each of these courses of action in the face of conflict would be appropriate. I don't think any of them can be either endorsed or excluded a priori. But I am aware that it is often argued that the meaning of the rule of law is obedience to the devil's compact, and that the only permissible course of action for a judge confronting a conflict between the law and how he wants to come out is *always* to follow the law.

Given the practice of judging as I have just presented it, and especially given the apparently arbitrary character of eruptions of perceived objectivity in the course of manipulation, I find this argument unconvincing. But that is for another time. From within the perspective of my imagined judge, the story is over when she reaches the moment of decision. Whether she should *always* follow the law in cases of conflict is a question that we answer as best we can through reflection and argument about our political system, about the actual laws in force within that system, and about particular cases.

Social theory. The judge has to decide what to do from a position. That position depends on the givens of the judge's life-project, on the body of legal materials and the facts of the case as grasped at the beginning of the process, and on the work the judge has done on those materials and facts. In deciding, the judge risks but may also gain credibility, depending on the obviousness gap between the common perception of "the law" and HIWTCO.

On this basis, we might hypothesize that the probability that a judge will move the law so as to achieve any given result is smaller in proportion as the work and the credibility risk involved are greater, and that the total quantity and quality of work available from the judicial labor force limit the total amount of legal movement we can expect in any direction.

For this hypothesis to be useful in studying the role of law in a given social formation, we would have to study both the legal materials and the culture of judges in order to determine, by an essentially imaginative rather than positive procedure, how they are likely to construct given fields, and how much work will appear to them to be involved in different kinds of field manipulations. We would also need to know how often divergences between their initial apprehension of the law and how-they-want to-come-out will motivate them to work hard at manipulation and risk credibility. On the basis of such knowledge, we might speak meaningfully of law as a general constraint on the exercise of state power in the society in question.

Note that without this "internal" information about how judges perceive law fields the notion of law as a constraint on state power is essentially meaningless. We have to know "constrained in what position from moving what distance" before we know anything at all. Note also that this hypothesis is merely "inertial." It says nothing about "inherent tendencies"

of the legal materials to develop in particular directions. The total available labor time may be deployed in any way at all, but that it is limited means that movement is constrained.

Whether this description of judging could form the basis of a theory of "inherent tendencies" or directions of development of legal materials is a very difficult question. On the one hand, the judge experiences the normative power of the field as directed toward a particular outcome, and we might develop a social psychology of what this direction will be for a given body of materials. On the other, the field moves only because the judge moves it, and this he does in accord with how-he-wants to come-out, under the constraint of having to work at manipulation and to risk credibility.

A sufficiently complex social psychology might allow us to describe meaningfully the way in which a judiciary with a particular set of political commitments will interact with fields it experiences as having normative power in particular directions. But the notion that the normative power of law fields is directed toward particular patterns of substantive outcomes seems to me tenuous, at least at the moment.

Of course, most social theorists simply assume that "law" is one thing or another and can be treated as a kind of block contributing to a larger edifice. To the extent the experience of law is as I have described it, this approach makes little sense.

Jurisprudence. Imagine you are a professor of jurisprudence, in possession of professional knowledge of the nature of law. Suppose you approach me in my dark cloud of ignorance of whether or not I will be able to overcome the gap between the law and how-I-want-to-come-out. You argue that legal rules, like the rule that the workers can't interfere with the owner's use of the m.o.p. during a strike, *never* determine the outcome of a case. And since the legal rules are the only things that stand in the way of my coming out the way I warn to come out, I have no problem. Legal theory indicates that I am home free, or at least that I ought to be home free. If I'm not, it's because I've failed at legal argument, not because of any properties inherent to the field I'm trying to manipulate.

You can expect me, in my role of humble law artificer, to ask you how you can be so sure. You might respond that since Wittgenstein we know that no rule can determine the scope of its own application. It follows more or less directly (unless you insist on a detour through semiotics, structuralism, and deconstruction) that the mere statement, "the workers can't interfere with the owner's use of the m.o.p. during a strike, " tells us *nothing* about whether or not they can lie in to block substitute workers from driving the buses out of the garage onto the great American highway. There is a whole world of interpretation, inherently subjective and indeed perhaps even inherently arbitrary (from the standpoint of my humble artificer's idea of reason), that we have to go through to get from the rule to "the facts." And "of course" the facts aren't any more "just there" than the rule.

My experience with legal argument doesn't allow me to meet your jurisprudential position on its own ground. What I can say as a legal arguer is that sometimes I come up against the rule as a felt objectivity, and can't

budge it. This doesn't mean that I agree with it or that I think anyone would necessarily condemn me if I disregarded or changed it. All it means is that I say to myself, "Here's the rule that applies to this case;" "we all know that this is the rule;" and "here's how it applies;" and "Everyone is going to apply it that way."

I am perfectly aware that the rule is not a physical object and that deciding how to apply it involves a social, hence in some sense a subjective process. But there is this procedure I've performed many times in my mind, in many different contexts, of applying a rule to a fact-situation. I've many times had discussions with others in which we formulated rules together, seemed to agree about their terms, then engaged in a series of applications, and found that once we'd agreed on the formula we came up with the same answer to the question: how does the rule apply *here?*

I believe that it is possible to communicate with another person so that we both have roughly the same rule in mind. I believe that it is possible to communicate with another so we both have roughly the same fact-situation in mind. And I believe that when we both come up with the same answer to the question, "How does the rule apply to the facts," it is sometimes meaningful to describe what has happened as "we applied the rule to the facts."

In the situation I most fear as a liberal law-reforming judge when I have studied the various rules that I think might apply to the lie-in, I conclude that everyone will agree that the employer has a right to an injunction under the rules as we all understand them to be as of now, and that to change this particular rule would be unconstitutional. This conviction might be based on an "identical" case decided by the Supreme Court yesterday, or it might be based on a rather long and abstract chain of reasoning by analogy. But it might happen. And if it happened I would face some pretty tough choices about what to do in the case.

As I said, this declaration of faith in the possibility of communication and in the at least occasional intelligibility of the procedure of rule application doesn't meet your fancy argument on its own ground. I have no idea why this stuff happens. As I see it, your fancy argument is that I can't show an "objective basis" or a rationale or an explanation of rule application that will prove that any particular application was "correct." Indeed, the notion of correctness, at least as we usually use the word in math or science or logic just isn't applicable.

From my position inside the practice of legal argument, I can't say anything one way or another about this fancy argument. I have no way of knowing, from inside the practice, why it is that sometimes the field gives way but sometimes refuses to budge at all. Maybe when it seems unbudgeable it's just because I didn't find the catch that releases the secret panel. Maybe my sense that we communicated the rule to one another and then each "applied" it and that that's where the result "came from" is a false sense, a hopeful or sentimental or, in this lie-in case, a paranoid interpretation of the random fact that we agreed on the outcome, rather than a reflection of a common experience. From inside the practice of argument, I just don't know.

I will be very irritated indeed if you turn around on me now and reveal that you were just using the fancy argument to make me concede the truth of some form of positivism or objectivism about law, or at least legal rules. It was a good trick, but I claim to have evaded it. I have been saying all along that legal argument is the process of creating the field of law through re-statement rather than rule application. Rule application is something that does happen, but I *never* experience it as something that *has* to happen. It is an outcome as contingent and arbitrary from the point of view of jurisprudence as that in which the field is gloriously manipulable.

I dealt here with a case in which my initial apprehension was that the law was clear against the workers, but I was able to undermine the perceived objectivity of the rule (at least in a preliminary way). That was an example among many possible of how an initial apprehension of ruledness can dissolve. Sometimes I approach the field in an agnostic frame of mind, and just can't figure out what the rule is supposed to be; sometimes I can't decide whether the facts are such that the outcome specified by the rule is triggered or not. Sometimes it seems there are several possible answers to the question and I don't have any feeling about which is correct. Sometimes I'm initially quite sure what the rule is and how to apply it but a conversation with another person who has reached a different set of conclusions leaves me feeling neither that I was "right" nor that she was "right," but rather that the rule was in fact hopelessly ambiguous or internally contradictory all along.

If you tell me that there is always a right answer to a legal problem, I will answer with these cases in which my experience was that the law was indeterminate, or that I gave it its determinate shape as a matter of my free ethical or political choice. It is true that when we are unselfconsciously applying rules together, we have an unselfconscious experience of social objectivity. We know what is going to happen next by mentally applying the rule as others will, and then they apply the rule and it comes out the way we thought it would. But this is not in fact objectivity, and it is *always* vulnerable to different kinds of disruption—intentional and incidental—that suddenly disappoint our expectations of consensus and make people question their own sanity and that of others. This vulnerability of the field, its plasticity, its instability, are just as essential to it as we experience it as its sporadic quality of resistance.

The rule may at any given moment appear objective; but at the next moment it may appear manipulable. It is not, *as I apprehend it from within the practice of legal argument,* essentially one thing or the other.

If this is what it is like to ask the nature of law from within the practice of legal argument, then the answer to the question must come from outside that practice. All over the United States and indeed all over the world there are professors of jurisprudence who think they possess professional knowledge of the nature of law. Where are they getting it from? For my own part, I think their answers to questions like those I have been addressing are just made up out of whole cloth. Show me your ground before you pretend to be moving the earth.