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IMPROVING ONE'S SITUATION: SOME PRAGMATIC REFLECTIONS ON THE ART OF JUDGING

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As legal theorists, we live in an age of self-conscious repetition: everything is "neo" and nothing is new. There are neo-realists, neo-formalists, neo-conservatives, and neo-pragmatists to name just a few. And what is not "neo" is "post" as in post-structuralist, post-colonial, and even post-critical. Indeed, the newest theories sound pointedly antitheoretical as deconstructionists, feminists, and critical legal scholars argue in various ways that conventional theory making is but one more mechanism for oppressing the powerless. In all this theory consciousness, it is difficult to have simple thoughts and it is especially difficult to think simply about judging because judging has been the object of so much theoretical attention. This is too bad. Judging, I think, is a little like riding a bicycle—if you are teetering out of control, it is unlikely that a complicated theory will help to restore the balance. Simple thoughts are more useful; they are easier to internalize and therefore more accessible when needed.

In what follows, I wish to make two simple points. The first is that the act of judging is an inherently situated activity. Justice Cardozo made this point most clearly:

> There is in each of us a stream of tendency . . . which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; . . . In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.[1]

Thus, my first point is that every legal judgment is made from a particular perspective. And my second point follows from the first: if judging is a situated activity, then judges should attend to their situation in a conscientious way. While "we can never see with any eyes except our own," we can broaden our situation in such a way that our "stream(s) of tendency" are more receptive to the different perspectives that exist in the world we are seeking to judge.

Before beginning, I would like to emphasize a couple of general considerations. The first is the ethical maxim that "ought" implies "can." No

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1. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12-13 (1921).

matter how strong the reasons may be for thinking that judges *should* be fully constrained by formal law, these reasons are insufficient so long as the judge *cannot* escape the effects of his or her own particular situation. The second is that the question of situated decisionmaking is not just an abstract matter. It has important consequences for thinking about how judges ought to approach their task.[2] If judges can properly consider themselves impersonal decisionmakers (*i.e.*, if their decisions are fully determined by substantive doctrines and by normative theories that are objectively and universally true) then the ideal judge will invest his or her efforts in learning as much about substantive law and normative theory as (s)he can. If, on the other hand, the judge's personal history, character and outlook have a substantial effect on legal decisionmaking, then the ideal judge should pay attention to this fact. In considering these two alternatives, it is important to bear in mind that a position in the middle ground—for example, the position that normative decisions are a product of *both* personal situation *and* formal legal reasons—requires us to become more self-conscious about situation. Being "a little bit situated" is like being "a little bit pregnant"—it is foolish to ignore the fact simply because it is only a little bit true.

In the next two sections, I will explore some of the reasons why it makes sense to recognize the situated character of legal decisionmaking. Some of these reasons arise in the context of legal theory. In traditional terms, the issue of situated decisionmaking can be understood in terms of the debate between formalists and realists about the extent of judicial discretion. The first section briefly considers this debate. Other reasons stem from more philosophical considerations. As modern philosophy has analyzed logic and science, it has generated insights that are useful in thinking about judicial decisionmaking. The second section briefly summarizes two different philosophical approaches. The first draws from work by Wittgenstein and others; it attacks the central concept of an impersonal decisionmaker whose discretion is fully constrained by the formal rules of inference. The second arises from a pragmatic understanding of normative judgments. From a pragmatic perspective, all forms of decisionmaking are inherently situated: a sound, or rational, decision is sound, or rational, only in the context of a given situation and, then, only with respect to the accomplishment of certain specified purposes. Thus, the pragmatist sees legal decisionmaking as a rational but situated activity.

I. Legal Considerations: The Debate over Judicial Discretion

As enunciated by Langdell, classical formalism rested upon three basic assertions: first, that legal reasoning begins with distinctly legal premises; second, that legal method is deductive; and third, that every case has one

2. *See* discussion *infra* part III.

and only one correct legal outcome.[3] It is from formalists such as Langdell that we get the notion that judges should strive to be impersonal decisionmakers. An impersonal decisionmaker is one who decides the case without reference to his or her personal views or character. In short, (s)he decides the case in accordance with law where "law" is understood as a publicly discernible body of rules and theory that is sufficient for pairing any factual situation with the correct legal outcome.

The opposite of classical formalism is extreme realism. Extreme realists oppose formalism by denying each of its elements. First, they argue that there is no such thing as distinctly legal premises—so-called "legal" principles really derive from considerations of social policy and social theory. To the extent that law has developed independently of these considerations, it must be seen as arbitrary and indeterminate—as consisting of empty generalizations that are chanted for the sake of appearance but are not decisive with respect to individual cases.[4] Second, they reject the notion of law as a deductive enterprise. And third, they deny that every legal problem has *one* uniquely correct answer and argue instead that law is an inherently personal enterprise. In their view, judges respond not to legal considerations but instead to such subjective items as their own class interest,[5] their personal psychological pathology,[6] or their vision of the social good.[7]

When one sets out these two positions as boldly as I have done, it seems obvious that neither of them is correct. Surely, the truth about legal decisionmaking lies somewhere in between these two extremes. In a moment I will try to develop such a middle position. In the meantime, however, it is important to say a few words about the argument between realism and

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3. According to Langdell, the common law represented a quasi-philosophical system that was not based upon considerations of convenience, equity or social policy. CHRISTOPHER C. LANGDELL, SUMMARY OF CONTRACTS (1880).

4. *See* THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935) (arguing that law generally operates symbolically and ceremonially). In this respect, Arnold certainly stood at the extreme end of the realist movement. It is common, however, to read even the moderate realists as making the same basic point. For example, the famous essay by Joseph C. Hutcheson, Jr. entitled *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929), is frequently interpreted in this way. To the contrary, I believe that this reading is incorrect. The process of giving legal reasons may not affect the outcome of the current case but, over time, the development of these reasons helps to construct our understanding of future cases. For a partial explanation of this process, see John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924).

5. Oliver W. Holmes, *Comment on the Gas Stoker's Strike*, 7 AM. L. REV. 582, 584 (1873) (discussing impact of class interest on judge's perspective). More recently, this argument has been taken up by those in the Critical Legal Studies movement. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 253-66 (1977); Alan Freeman, *Racism, Rights and the Quest For Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 343-53 (1988).

6. *See* JEROME FRANK, LAW AND THE MODERN MIND (1930) (arguing that judging is best understood in terms of judicial psychology).

7. Max Radin, *The Theory of Judicial Decision: Or, How Judges Think*, 11 A.B.A.J. 357, 358 (1925) (discussing how judge's social values influence his decision making).

formalism as it is traditionally constructed. The terms "realism" and "formalism" have dominated discussions about legal decisionmaking for half a century. These terms have been understood to designate two mutually exclusive conceptions that together exhaust the field of what can be usefully said about judging. Thus, theories are generally described as "formalist" or "realist" even though most theories of judicial decisionmaking combine elements of both. One problem with this approach is that it undermines rigorous analysis by elevating differences of degree and emphasis to the level of fundamental disagreement. A more serious problem, however, is that the realist, formalist dichotomy constructs the controversy over judicial decisionmaking in an oversimple and misleading way.

The dispute between realism and formalism is commonly phrased as a disagreement about judicial discretion: Is a judge bound by law[8] or does (s)he have unbounded discretion to decide the case any way (s)he likes.[9] So conceived, the discussion then turns to whether legal theory should be descriptive or normative. If the aim is descriptive, then the realist is right in suggesting that law is such a loosely woven fabric that judges can decide cases in any way they like and still be able to reconcile their choices with prevailing legal norms. If the aim is normative, however, then the formalists are correct in arguing that judges should aspire to something better. Modern formalists concede that law is not perfectly determinate but remind us that the rule of law represents humankind's best effort at fair and impartial adjudication. For this reason, they argue, judges should not only obey the law's unequivocal commands but should also follow its barest hints and suggestions. Thus, for the past forty years, the world of legal theory has been divided into two camps. In one camp are those who develop the theme of law's indeterminacy. These theorists argue that legal decisionmaking is inherently situated. In the other camp are those who argue that judges must aspire to make their decisions in accordance with the rule of law. These theorists argue that judges should strive to be impersonal; that they should be moved, so far as possible, by legal rather than personal considerations.

Viewed in these terms, the rule of law position seems to have a great deal of force. Judges are not personal actors. They receive the delegation of judicial power subject to an important trust. They should not act like opportunists who glance around looking for loopholes. Instead they should be painstaking in their efforts to determine what the law—their particular and sacred charge—requires. It seems to me, however, that the strength of this argument stems from the oversimple division of the world of legal

8. In the modern era, the phrase "bound by law" is no longer limited to the kind of substantive legal doctrine that Langdell had in mind. Legal constraints are generally understood as being supplemented by various other norms such as shared values, economic efficiency, or objective moral truths.

9. Legal writers often talk about a judge's ability to "decide the case in any way he or she likes" but, as my colleague Professor Richard Craswell points out in his class, there is considerable ambiguity in this formulation of the realist's claim. On some readings, the claim is trivial; on others, it is entirely implausible.

theory into realist (prodiscretion) and formalist (antidiscretion) factions. Of course judges should aspire to be fair and impartial but it is equally true that this does not convert them into impersonal computers. As we shall see in the next section, there are strong reasons for thinking that the impersonal model cannot be realized and that there is an element of situated judgment in every legal decision. If this is true, then judges are as responsible for thinking about their situation as they are for knowing the substantive law.

II. Philosophical Considerations: The Impossibility of Impersonal Decisionmaking

Let us pay more careful attention to the claim that legal decisionmaking can proceed in an impersonal manner. What would it take for it to be true? First, it requires that there be a body of substantive doctrine that will provide sufficient justification for declaring what the law requires with respect to a wide range of individual controversies. Secondly, it requires a decisionmaking procedure by which these general principles of law can be invoked in the decision of cases. Thus, the impersonal judge needs both a set of declarative statements about the extent of legal entitlements and a set of approved protocols that license moving from the abstract proposition to the decision of a specific case. And, finally, in order for the decision to be fully impersonal, these two sets of items must be sufficient to determine a uniquely correct outcome.[10]

1. The Formal Approach

To understand the formal arguments about impersonal decisionmaking, it is necessary to understand the logical distinction between propositions and rules of inference. Propositions describe states of affairs such as: All persons are mortal. Rules of inference, on the other hand, license a movement from one belief, or set of beliefs, to another. Thus, we could have a rule with the following form: If one believes that all persons are mortal and that Tom is a person then one can, or should, also believe that Tom is mortal. This is, in fact, an instance of a familiar logical rule:

Modus ponens: If ((if A then B) and A) then B.

As I have just written it, the principle of *modus ponens* looks like a proposition. But, when it is written this way, it loses its essential ability to license real world beliefs and inferences. Years ago, Lewis Carroll illustrated this point with a pointed story about Achilles and the Tortoise.[11] The story begins with a challenge to Achilles. The Tortoise sets out three propositions from Euclid:

(A) Things that are equal to the same are equal to each other.

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10. These requirements for impersonal decisionmaking, in fact, echo the characteristics of Langdell's formalism. There are some differences. For example, Langdell thought that the premises of judicial decisionmaking had a distinctly legal character while modern formalists are willing to supplement substantive law with various other kinds of normative theories. But the basic outline of nondiscretionary inferences leading to a uniquely correct resolution remains.

11. Lewis Carroll, *What the Tortoise said to Achilles, reprinted in*, Readings on Logic 117 (Irving M. Copi & James A. Gould eds., 2d ed. 1972).

(B) The two sides of this Triangle are things that are equal to the same.

(Z) The two sides of this Triangle are equal to each other.[12]

and claims to believe that A and B are true but that Z is not. He then challenges Achilles to "force (him), logically, to accept Z as true." Achilles replies that, obviously, the problem is that the Tortoise does not accept the hypothetical: "If A and B are true, then Z must be true." When the Tortoise acknowledges this, Achilles writes down the hypothetical as:

(C) If A and B, then Z

and asks the tortoise to accept it as a premise. So then there are three premises—A, B, and C—and when Achilles once again asks the Tortoise to acknowledge the truth of Z, the Tortoise replies that he will do so only if Achilles will add yet another premise to those he has written on his tablet. The premise is:

(D) If A and B and C, then Z.

Achilles adds the premise and the conversation continues:

> "And at last we've got to the end of this ideal race-course! Now that you accept A and B and C and D, of course you accept Z."
> "Do I?" said the Tortoise innocently "Let's make that quite clear. I accept A and B and C and D. Suppose I still refuse to accept Z?"
> "Then logic would take you by the throat and force you to do it!" Achilles triumphantly replied. "Logic would tell you 'You can't help yourself. Now that you've accepted A and B and C and D, you must accept Z!' So you've no choice, you see."
> "Whatever Logic is good enough to tell me is worth writing down," said the Tortoise. "So enter it in your book, please. We will call it—
>
> (E) If A and B and C and D are true, Z must be true.[13]
>
> "Until I've granted that, of course, I needn't grant Z. So it's quite a necessary step, you see?"
> "I see," said Achilles; and there was a touch of sadness in his tone.

Obviously this line of argument will postpone the inference indefinitely. The Tortoise will not make the inference unless the rule is included among the premises and, once it is included among the premises, it loses all power to license the inference.

The story of Achilles and the Tortoise illustrates an important point not just about formal logic but also about the general problem of deciding cases in accordance with a rule. Rules are required to license behavior in any rule-bound setting. This means, among other things, that having a rule creates an ambiguity about truth. Consider, for example, two sentences:

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12. *Id.* at 118-119.
13. *Id.* at 119-20.

(1) All supermen are faster than a speeding bullet.

(2) All supermen may help the police fight crime.

The first sentence is descriptive. If it is true, then all supermen *are* faster than a speeding bullet. The second is a rule. It can be false in a descriptive sense—not all Supermen help the police—but it may still be 'true' in the sense that it genuinely does license a particular kind of conduct. Thus, understanding a rule is to know what it licenses in a diverse range of situations and this kind of understanding is peculiarly problematic. As Wittgenstein and others have pointed out, there are puzzling difficulties associated with the seemingly simple phenomena of grasping a rule, following a rule, and knowing what a rule means. Wittgenstein said it most succinctly "this was our paradox: no course of action could be determined by a rule, because every course of action can be made to accord with the rule."[14]

This seems paradoxical indeed. To make sense of it, we need to think carefully about the nature of rules. They are not, as we have seen, simply propositions that can be written down in Achilles' book. Instead, a rule represents a routinized way of responding to like cases. Rules are amorphous. They may be announced or articulated. They can be evidenced by a course of conduct that is understood as being rule governed. Or they can simply consist of unstated and vague expectations about the nature of future conduct. Suppose, for example, that I sell you a bagel every morning for a week and, in accordance with my rule, charge you one dollar. Suppose further that, on the eighth day, I demand two dollars. Have I changed my price or was I operating under the rule that I would charge one dollar for the first seven bagels and two dollars for the eighth? In either case, there is nothing wrong or inconsistent about my behavior. And the latter interpretation can be correct even if I had never previously articulated how my rule would apply to the sale of bagels on the eighth day.[15] I am free at any moment to recognize a particular set of circumstances as triggering a particular response under my rule or not. The rule can only tell me what happens *if* it applies, it cannot go further and tell me whether it applies to the case at hand. Like the Tortoise, I am confronted with an *ad hoc* decision about the application of the rule and, as logical and inevitable as these decisions sometimes feel, they are all inherently situated in what Cardozo calls the decisionmaker's "inherited instincts, traditional beliefs, and acquired convictions."[16]

The point can be put more precisely in the context of formal deductive reasoning. Listen, for example, to Michael Dummett writing about mathematics:

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14. *Investigations* section 201. The translation is by Kripke. *See* SAUK, KRIPKE, WITTGENSTEIN: ON RULES AND PRIVATE LANGUAGE (1982) (viewing problem of private languages as similar to problem of induction).

15. There are many different ways of interpreting or explaining the Wittgensteinian point. The example I give was inspired by Kripke's interpretation. *See supra* note 14.

16. Cardozo, *supra* note 1, at 12-13.

> A proof proceeds according to certain logical principles or rules of inference. We are inclined to suppose that once we have accepted the axioms from which the proof starts, we have, as it were, no further active part to play; when the proof is shown us, we are mere passive spectators. But in order to follow the proof, we have to recognize various transitions as applications of the general rules of inference. Now even if these rules had been explicitly formulated at the start, and we had given our assent to them, our doing so would not in itself constitute recognition of each transition as a correct application of the rules. . . . Hence at each step we are free to choose to accept or reject the proof; there is nothing in our formulation of the axioms and of the rules of inference, and nothing in our minds when we accepted these before the proof was given, which of itself shows whether we shall accept the proof or not; and hence there is nothing which forces us to accept the proof. If we accept the proof, we confer necessity of the theorem proved; we "put it in the archives" and will count nothing as telling against it. In doing this we are making a new decision, and not merely making explicit a decision we had already made implicitly.[17]

As Dummett argues in the above passage, a person who draws a deductive inference cannot be a passive spectator. Applying a rule of inference to the premises of an argument requires an active decision about whether to "recognize various transitions as applications of the rule." This is because "[t]here is nothing in our formulation of the axioms and of the rules of inference, and nothing in our minds . . . which of itself shows whether we shall accept the proof or not."[18] And this feature of deductive reasoning is similar to a phenomenon that has been frequently observed by legal theorists. The rules utilized by legal reasoning contain many vague terms and unstated exceptions and, for this reason, application of a rule is not merely a matter of determining whether certain formal conditions apply. Application also requires that we have an intuitive grasp of the rule—an ability to determine which of many logically possible exceptions are in the "spirit" of the rule and also relevant to the case at hand. Thus, legal and deductive reasoning have this in common—they both require an active participant who can decide on each occasion whether the occasion is an appropriate one for applying a rule.

2. *The Pragmatic Approach*

The formal arguments outlined above suggest that an impersonal model of normative decisionmaking is not a feasible option. This is because a

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17. Michael Dummett, *Wittgenstein's Philosophy of Mathematics, reprinted in* BERNACERAF & HILLARY PUTNAM, READINGS IN THE PHILOSOPHY OF MATHEMATICS; SELECTED READINGS 491, 495 (1964).

18. *Id.*

decision that involves the application of a rule is not—and logically cannot be—constrained by the rule in question. This being the case, some theorists embrace a form of rule skepticism by concluding that legal rules have little (or no) effect on legal decisionmaking. But their conclusion seems somewhat extreme: the observation that decisionmaking involves an irreducible human agency does not necessarily entail the conclusion that rules are irrelevant to the decisionmaking process. As an alternative, we might well want to consider a more moderate approach—an approach that explores the possibility that decisions are properly affected *both* by rules *and* by more contextual considerations. One such approach stems from a pragmatic philosophy and is based upon an analysis of actual decisionmaking practices. Its aim is to develop a conception of situated rationality that does not rely upon the notion of impersonal decisionmaking.

From a pragmatic perspective, one of the difficulties with traditional legal theory is that it makes an absolute distinction between fact and value. Thus, for example, it pits the realist "is" against the formalist "ought." The pragmatist rejects this division and urges instead that every abstract conception should be understood in relation to its consequences for human activity.[19] This means that every theory should be seen as a theory about a particular practice and, more specifically, as a theory that generates implications for the reform of that practice. For example, a pragmatic theory of bridge building should begin by looking at actual practices of bridge construction. The examination of these practices is both descriptive and normative; it is not aimed simply at enumerating the methods of construction but at determining which methods produce the "best" bridges. And the question—What is the best bridge?—cannot be answered in the abstract; we cannot give the same answer on the first day as we might give after a thousand years of bridge building. Theory and practice evolve together within a context of human purpose and activity; the practice informs the theory while the theory, in turn, informs the practice. Thus, the hallmark of a pragmatic method is its continual reevaluation of practices in the light of the norms that govern them and of the norms in the light of the practices they generate.[20]

A pragmatic theory of judicial decisionmaking conforms to this model by beginning its analysis with an examination of actual decisionmaking practices. And, when this is done, it becomes clear that the formalist model does not adequately describe the complexity and diversity of these practices.[21] In this discussion, I will focus on two aspects of decisionmaking that I

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19. CHARLES S. PEIRCE, V THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 5.402 (Charles Hartshorne & Paul Weiss eds., 1934) (discussing pragmatic maxim).

20. *See* Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2361-62 (1990) (describing nature of pragmatic inquiries).

21. Indeed, an adequate description of these practices would fill many volumes. In Wells, *supra* note 20 I have tried in another context to examine some aspects of these practices more fully. *See* Wells, *supra* note 20 (giving more comprehensive treatment to pragmatic inquiries).

believe are fundamental to the judge's task: the first is a type of structured reasoning; the second is a more contextual mode of analysis. I will begin by briefly describing these two forms of deliberation.[22] I will then argue that a judge does a good job of making a decision only when (s)he engages in both forms of deliberation in a conscientious way.

Structured reasoning requires that the decisionmaker locate the controversy within a web (or several different webs) of relevant normative analysis. Suppose that a judge must decide a question under the due process clause. In such a case, it is important to determine how the issue is constructed by contemporary constitutional doctrine and, if there are competing doctrines, how it is constructed by each. It is also relevant to consider contemporary norms of fairness, theories about the constitutional roles of court and legislature, theories about the interactions of state and federal courts, and so forth. A good judge is a theory sophisticate because it is only by locating an issue within these various theories that a judge can understand the full extent of the controversy. Locating an issue in this way is to examine the issue *from the outside in*—we start with various theories that can be articulated independently of the problem and then we understand the problem within a structure that is defined by these theories.

It is also essential for a judge to understand the problem *from the inside out*. Understanding the case requires more than just an ability to summarize the pertinent facts; it entails also an ability to empathize and connect with the various parties. Who are these people? What is this case about from their point of view? And how, as a practical matter, will they be affected by a judgment in this case? In answering these questions, the judge often engages in a variety of activities that would not be relevant in the context of a structured inquiry. (S)he may, for example, engage in a certain amount of relatively undirected fact gathering. (S)he might attempt to reconstruct the event from the differing perspectives of the parties and then to reconcile these differing perspectives into a single coherent account. In the course of these efforts, the judge will develop an intuitive response to the case as a whole and this response will form the basis of further exploration and self-criticism. Thus, contextual analysis requires a complex process of understanding the case in an intuitive and commonsensical way.

It is important to note that the distinction between these two forms of deliberation is not an "either-or" choice—a decisionmaker cannot simply choose to decide the case in one way or the other. Remember Achilles and the Tortoise—the Tortoise will not come to a conclusion until he is willing to make a bottom line judgment about the logical consequences of the premises he has adopted. This mental process of judgment is not optional—the tortoise must make the judgment even if he does not do so in a conscious (or conscientious) way. Similarly, even if a judge focuses exclusively on the structured aspects of the case, the contextual elements will not

22. *See* Catharine Pierce Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1728, 1731-37 (1990) (discussing structured reasoning and contextual analysis at length).

disappear. The only thing that happens when (s)he proceeds this way is that (s)he substitutes stereotypical conceptions and default assumptions for what (s)he might have learned by engaging in a contextual analysis. And the same is true for a judge who ignores structured considerations and relies solely upon an intuitive grasp of the situation. (S)he overlooks the fact that intuitive judgments are significantly affected by whatever theories the decisionmaker happens to hold. Thus, a judge who decides not to think about theory simply allows his or her decision to be affected by a theory that (s)he has not chosen in a conscious and reflective way.

The above discussion suggests that good normative decisionmaking requires attention to both the structured and contextual elements of deliberation. To further support this idea, I will offer an analogy that highlights the importance of both forms of analysis. Imagine that you have an important decision that must be delegated to another. For example, suppose that you must choose someone to decide about medical treatment in case you become incompetent. In making this choice, what qualities would you look for? Certainly, you would want someone who was capable of understanding all of the relevant information and theories about your condition. It would, after all, be extremely unfortunate if (s)he were to make an avoidable mistake about the probabilities of recovery or about whether, in your vegetative state, you were capable of suffering and experiencing pain. On the other hand, you would be looking for more than technical aptitude. You would want a person who was capable of understanding you as a person—what your life stands for and what it might mean to you in the future. In short, the person you choose ought to understand not just the explicit criteria that are important to you but also the nuances of individuality and personality that are inevitably implicated by such an important decision.

There are some obvious similarities between the above example and judicial decisionmaking. Both cases involve delegated decisions where the delegation includes criteria that are relevant to the decision but does not specify the desired outcome under every conceivable circumstance. In both instances, the analogy suggests, we are looking for someone who excels at both structured and contextual analysis. On the other hand, the analogy is not exact. Certainly, some legal theorists would argue that there are fundamental differences between these two types of delegation. In the first case, (s)he might argue, I delegate a uniquely personal decision to a friend or relative and am understandably concerned about the decisionmaker's ability to emphasize with my personal situation. In the second case, society as a whole delegates a collective problem to a public official and is therefore more likely to be concerned with publicly stated justifications for judgment. But this conclusion seems to rest upon an overly simplistic conception of the legal enterprise. Certainly it is true that much of the legitimacy that surrounds judicial decisionmaking is related to the expectation that judges will make their decisions in accordance with legal principles. It is equally true, however, that many important legal decisions raise questions that are significantly related to the community's deepest aspirations. As citizens, we

want these cases decided in a way that resonates with our collective identity and courts that ignore these considerations fall rapidly into public disrespect. Thus, the legal community is much like the patient who must delegate treatment decisions: it needs a judge who has not just theoretical expertise but also a deep understanding of the community's collective self—its present sense of identity and its most significant aspirations for the future.

Thus far, I have argued that every legal decision is the result of two very different modes of deliberation. On the one hand, there is a highly structured analysis that moves *from the outside in* and aims at analyzing the specific controversy in accordance with certain theoretical considerations. On the other hand, there is a more contextual exploration of the controversy that moves *from the inside out* and aims at prompting sound intuitive recommendations for its resolution. Structured reasoning transforms the case into an instance of a more general rule; contextual reasoning recreates the controversy as an individual narrative that requires an outcome satisfactory to our sense of doing justice in this particular case. I have also argued that conscientious performance of both these elements is essential to reaching a good decision. It is now time to consider what constitutes conscientious performance or, more generally, how decisionmakers can perform these functions in a fair and judicious way.

III. Conclusion: Situated Decisionmaking and its Obligations

This paper is based upon a contrast between the notion of impersonal decisionmaking—the kind that a computer might do—and situated decisionmaking—the kind that requires a real human agency. In the previous sections, I have argued that legal decisionmaking is at least partially situated; that judges are not computers but that they are not entirely free from legal constraint. This is hardly a controversial result. Most observers—that is most observers who are not in the grips of some sort of theory driven extremism—recognize that legal judgments do occupy this kind of middle ground. And, given the common sense appeal of this kind of middle position, it is surprising that its normative consequences are so little understood. To explore these consequences, we must think more carefully about the process of legal judgment and the issue of fairness as it applies to this process. This, then, is the point of a pragmatic analysis. An examination of decisionmaking practices is only the beginning. The ultimate issue to be addressed is whether these practices are adequate representations of our ideals of fairness and justice and, if they are not, what can be done to render them more adequate. Thus, in this concluding section, I will outline what I think follows from the fact that legal decisionmaking is inherently situated.

The first thing that must be recognized is that both the structured and contextual elements of legal decisionmaking are inherently situated. This is easy to see with respect to contextual analysis. Obviously, a process that relies upon intuition and common sense will be significantly affected by the nature of the judge's background, temperament, and prior experience. It is

harder to see how these factors affect structured analysis. In a structured analysis, a decisionmaker chooses a normative theory to structure the problem. For those who believe in impersonal decisionmaking, the application of a general normative theory is thought to be the very essence of impersonal decisionmaking. The pragmatist reminds us, however, that every theory must be understood as an explanation of a particular set of experiences and evaluated with respect to its usefulness in achieving a particular set of goals. For example, particle physics does a good job of explaining certain sophisticated experimental data but it is not very useful in planning a billiard shot. Thus, when a judge selects the theory that (s)he will use to decide the case, the selection is made relative to a situation that includes his or her prior experience and his or her sense of the purpose to be served in a case of this kind. A judge may strive, in Dworkin's terms, to use *the* best available theory[23] but, from a pragmatic perspective, determining which theory is "best" requires that we answer certain other questions: "Whose experience are we trying to explain?" and "For what tasks must the theory be useful?" And, for this reason, the use of any theory—even "the best" theory—is inherently situated.

One way to understand this point more clearly is to consider an analogy.[24] Suppose that a traveller is lost in an unfamiliar territory and it is your job to help him home. If you had maps of the relevant territory, you might use a structured approach. You might, for example, ask him questions about the surrounding terrain until you had enough information to place him on the map. Thus, the use of a structured approach presupposes that we are able to locate the traveller (define the problem) within the map (in terms of a theory) by means of certain identifying features (legally relevant features) that are contained on the map (in the theory) itself. A contextual approach, on the other hand, is what you might use if you could join the traveller and begin to explore. You might, for example, try various roads and ask directions of the people you meet. In short, a contextual approach allows us to solve a problem by exploiting our potential connection with it. We put ourselves in the traveler's shoes, rather than trying to locate him in the larger universe.

The two approaches represent the difference between zeroing in on a spot from afar or starting with the spot and working our way outward. The virtue of the first approach is that it removes us from the traveller's subjective situation into an objective but abstract conception of his terrain. The strength of the second approach is that it brings us closer to the problem by placing us "on the spot." Each approach has an advantage but neither approach can function alone. Structured reasoning utilizes abstraction and reason, but the usefulness of these tools depends upon the accuracy

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23. *See* RONALD M. DWORKIN, LAW'S EMPIRE (1986) (urging that judges should strive to apply best available theories).

24. I have developed this analogy at greater length in *Situated Decisionmaking*. Wells, *supra* note 22, at 1740.

of the information that they analyze. Thus, to make an accurate map, it is necessary to have accurate "on the spot" observations. Similarly, contextual analysis will not get far so long as individual observations remain uninterpreted. The contextual rescuer will not be effective unless (s)he makes some effort to map out, *i.e.*, to record and interpret, what (s)he sees.

The mapmaking analogy helps us to understand the manner in which each of these approaches are relative to an individual's perspective and viewpoint. A contextual analysis relies upon individual observations and are thus "situated" in the sense that each observation is made relative to an individual viewpoint. A structured analysis, by contrast, seems to be less situated in that the maps (or theories) that they use are based upon observations that have been obtained from many different viewpoints. Even so, maps can never be entirely free of perspective. Consider two different maps: One is drawn by a giant who is hunting tigers; the other is drawn by a Lilliputian who is seeking a sunny place for a nap. Will these two maps look the same? Which one is more objective? Are footprints or rays of sunshine the objective features of this terrain.

All this tells us something important about the nature of judicial decisionmaking. A judge appears to render a verdict that is not the product of his or her own beliefs but is instead the result of applying a legal or normative theory to the facts of an individual case. The mapmaking analogy reminds us that this process is not so impersonal as it appears. First the judge must make a situated judgment about the nature of the case: Is the plaintiff on tenth street by the water tower or on first street by the river? Second, (s)he must make a situated choice of theory: Should (s)he get his or her maps from the Lilliputians or the Giants? In many cases, these sorts of questions are not controversial. They frequently do not test the limits of our individuality and idiosyncracy. But it is nevertheless important to understand that there will be times when a decision that feels like a straightforward application of a traditional legal principle is, in reality, something much more difficult—something that requires us to be mindful of who we are and the purposes that we are trying to accomplish.

As human beings, our individual perspectives are such intimate and constant companions that we forget that they are there. Thus, we need constant reminders that we each have our own distinctive window on the world. We are large or small. We hunt tigers or rays of sunshine. We notice and understand what is familiar and what is useful to our projects. And judges do not shed these facts of human existence merely because they hold judicial office. Most judges understand some things well and other things only poorly. Like all of us, judges possess a limited viewpoint and limited powers of empathy and imagination and they bring these limitations to the decision of every case. This does not mean that we should accuse judges of making irrational or political decisions. Nor does it mean that we must resign ourselves to replacing the rule of law with the force of arms. If we look to our actual decisionmaking practices to see that there is no need to resort to such extremes. Not all legal decisions involve disparities in viewpoint. Commercial litigants, for example, frequently share a common out-

look that governs their joint undertakings. And, even when they do not, their differences are frequently not extreme. In a consumer transaction, for example, one party is operating in a commercial context while the other is involved in a purely personal capacity. Nevertheless, courts and legislatures have been able to define a common framework that can be comfortably occupied by both points of view. On the other hand, there are cases that test the limits of judicial experience and imagination. Consider the question of whether it is constitutional to force a drug addicted mother to make a choice between incarceration or abortion. How many of us can think about this question from her point of view? How many of us could imagine how the case would appear to her potential child? And, if we fail in our attempts to make a common sense connection with this context, how can we speak meaningfully about privacy or respect for human life as it applies to this situation? How can we decide what the Constitution requires once we acknowledge that thinking about context is a legitimate part of the inquiry?

One answer to this problem is to appoint judges who represent a wide range of experience and viewpoint. Indeed, it is often said that the diversity of contemporary life requires an equally diverse judiciary. But, while I favor a diverse judiciary, I do not believe that it is a practical response to the problem of situated decisionmaking. *Perhaps* it is true that women judges have a clearer perspective on problems associated with pregnancy. *Perhaps* it is true but perhaps it is not. What would it take to judge this case from the viewpoint of the parties? A judge who is, or has been, a drug addict? A child judge? Or a judge who survived a fetal addiction? And where does this need for specialized judgment end? Does every litigant deserve a psycho-social twin who can fully understand her perspective? Obviously, the answer to this question must be no—we do not need "psycho-social twins" but we do need judges who are receptive to other perspectives. It may be true that I can, in Cardozo's words, "never see with any eyes except my own" but I can nevertheless do better or worse at making meaningful connections with the experience of others. Given this, it seems to me that an important project for legal theory is to develop a more rigorous analysis about the effect of viewpoints on legal decisionmaking and to develop ways in which the law could become more responsive to disparities in viewpoint. This is a large agenda but I would like to make a start by identifying three topics for further discussion.

The first is a reexamination of the tradition that requires judges to be reclusive. Undoubtedly, it is inappropriate for judges to be leading protest marches. But, short of this, there is no reason to require that judges isolate themselves from the problems of contemporary life. What is needed is a better balance.

The second is that all of us who study and practice law should read more widely about the divergent cultures that are now a part of the American scene. In law, there is a veritable explosion of writers who are exploring legal questions from nontraditional perspectives. And we do not need to confine ourselves to legal theory. Indisputably the United States has become multicultural. It is therefore time for all of us who think about law to work

at learning about life in the context of these different cultures. The truth is that many of us know a great deal more about Jane Austen's England than we do about the daily life of most Americans. And surely the fact that our viewpoint is focused in this way has a substantial impact upon our understanding of legal questions. Law and culture are intimately connected and we cannot be knowledgeable about one while remaining ignorant of the other.

Third, as lawyers, scholars and judges we ought to strive to be fair minded. Fairness requires that we consider all points of view and this, in turn, requires that we open our minds and our hearts to the viewpoints of others. In short, we must be receptive to the lived experience of all persons who stand before the law. And this means opening ourselves to the pain of others. It means facing the discomfort of admitting that we do not have all the answers. And, most importantly, it means forswearing detachment and risking the admission that life has anchored us in a particular web of experience and desire in which we are personal rather than impersonal agents of the legal order.