The (Always) Imminent Death of the Law

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I. INTRODUCTION

Harold Berman is one of the most important legal scholars of recent decades, I think, and I want to begin with an observation from Berman's intriguing book *Law and Revolution*.[1] Berman contends that the Western legal tradition, the tradition that you and I inhabit, originated in the eleventh century with the so-called Papal Revolution.[2] Berman also argues that this tradition has proven to be remarkably resilient: it has survived and adapted itself to a series of wrenching revolutions including

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1. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

2. *See id.* at 2.

the Protestant Reformation, the French Revolution, and the Communist Revolution.[3] But Berman suggests, or at least he suggested some twenty years ago when *Law and Revolution* was first published, that the tradition may at long last have reached its terminus.[4]

"That the Western legal tradition, like Western civilization as a whole, is undergoing in the twentieth century a crisis greater than it has ever known before is not something that can be proved scientifically," Berman wrote.[5] "It is something that is known, ultimately, by intuition. I can only testify, so to speak, that I sense that we are in the midst of an unprecedented crisis of legal values and of legal thought, in which our entire legal tradition is being challenged . . . ."[6] Berman went on to assert that "the historical soil of the Western legal tradition is being washed away in the twentieth century, and the tradition itself is threatened with collapse."[7]

A quarter-century later, Berman's report of law's impending demise may seem greatly exaggerated. Law does not seem to have collapsed; indeed, there seems to be a good deal of life left in the old corpus juris. Though Berman himself was surely no "Crit," perhaps he was temporarily infected by the fever of the times in which Critical Legal Studies diagnosed—or, according to some, *constituted*—a kind of deep-seated malaise in law and legal thought.[8]

Whatever the influences may have been, though, Berman's warning was only one of many in a long line of such forecasts soberly—or, often, sanguinely—predicting that law as we know it cannot long endure.

II. APOCALYPSE NOW, OR NEVER?

In his seminal essay on "The Path of the Law," Holmes prognosticated that traditional law-talk with its quaintly moralistic vocabulary, its invoking and interpreting of formal-sounding doctrines, and its citing and parsing and distinguishing of precedents would surely soon give way to a bold new discourse self-consciously based on policy and economics.[9] "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."[10] This imminent transformation

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3. *See id.* at 2, 18-19, 50.
4. *See id.* at 33-34.
5. *Id*. at 33.
6. *Id*.
7. *Id*. at 39.
8. For an overview of the movement, see GARY MINDA, POSTMODERN LEGAL MOVEMENTS 106-27 (1995).
9. *See* O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).
10. *Id.* at 469.

was "the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth."[11]

A generation or two later, Roscoe Pound and then the so-called Legal Realists wrote in a similar spirit: formalistic or "mechanical" legal reasoning was empty, and was destined to be replaced by a more policy-oriented law expressly built around the learning of the social sciences. In this vein, Felix Cohen described the "Restatement" project as "the last long-drawn-out gasp of a dying tradition."[12]

Jumping forward in time to the 1980s, we might look not to the Crits, who were perhaps predisposed to be gloomy, but to one of their favorite and more mainstream whipping boys. In a colorful little book called *Reconstructing American Law*, Bruce Ackerman argued that conventional legal discourse is archaic and unsustainable, and he advocated a new "constructivist" law-talk that would openly draw upon social science and computer technology.[13] And, of course, Judge Posner increasingly describes "law" as it works today and, if Berman is right, as it has worked for approximately the last millennium, not as a venerable tradition to be celebrated for its deep indwelling rationality, but rather as an archaic discourse that must be "overcome."[14]

A couple of clarifications are in order here. First, I do not believe that any of these thinkers doubted that some form of rule-making and rule-following are and will continue to be part of any collective human enterprise. They were talking, I think, about the distinctive Western legal tradition—one that displays features that Berman carefully enumerated,[15] including the belief that the law has a "capacity for growth over generations and centuries," and that this growth occurs in accordance with "an internal logic" that "reflects an inner necessity."[16] This conception of law underlies the patterns of distinctively lawyerly argument that Holmes thought quaint and that outsiders may find, as Cass Sunstein says, "weird or exotic."[17] It is *that* kind of law that the prophets thought to be doomed.

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11. *Id*. at 468.
12. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 833 (1935).
13. BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 46-104 (1984).
14. *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW (1995).
15. BERMAN, *supra* note 1, at 7-10.
16. *Id*. at 9.
17. CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 13-14 (1996).

Second, temperaments differ here. Some people find the apocalyptic sensibility to be something entirely foreign and almost incomprehensible. I myself am a pretty tame and unimaginative fellow, and so usually I find myself in that quiescent mood. But I am also acquainted with the apocalyptic mentality, I believe, through both first person and third person experience. In my undergraduate days, my favorite book was Sorokin's *The Crisis of Our Age*.[18] And I fondly recall in this respect a friend and former colleague, of a "post-modern" bent and passionate disposition, who would regularly burst into my office, Kramer-like, but with an air of desperation. "It just can't go on like this!" he would moan; I understood "it" to refer to the legal enterprise as we currently teach and practice it.

From our vantage point, though, all of these doleful or gladsome predictions of law's demise may seem to be grossly in error. Indeed, in the complacent jurisprudential lull we currently occupy, they may even seem a bit deranged. Far from dying out, law seems in the second half of the last century to have expanded its jurisdiction, as more and more areas of life have been brought under the sway of "due process" or "rule of law" or legalistic regulations of various sorts. Paul Campos argues that we presently suffer not from the withering away of law but rather from an excessive, obsessive legalism that he calls "jurismania."[19] And of course we are currently working to transport our legalistic commitments and institutions throughout the world, most conspicuously to the Middle East.

Nor does the nature of legal reasoning seem to have changed dramatically. To be sure, we in the academy—and a few select judges—are probably more overtly attentive to policy, and particularly to economics, than our predecessors seem to have been. However, by and large, lawyers and judges argue and justify in pretty much the same forms that they have been using for generations.[20]

Thus, historian and law professor Norman Cantor observes that "[a] London barrister of 1540, quick-frozen and revived in New York today, would only need a year's brush-up course at NYU School of Law to begin civil practice as a partner in a midtown or Wall Street corporate-

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> "For lawyers," to quote E.P.Thompson, writing in 1975 of what he calls "the greatest of all legal fictions," "the law itself evolves, from case to case, by its own impartial logic, true only to its own integrity . . . ." There is, of course, a sense in which nobody really believes this any more, but it remains the case that much legal behavior proceeds on the assumption that the law is like that. For example, all legal argument in court makes this assumption."

A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 10 (1995) (quoting E.P. THOMPSON, WHIGS AND HUNTERS 250 (1975)).

18. PITIRIM A. SOROKIN, THE CRISIS OF OUR AGE (1941).
19. *See* PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW (1998).
20. *See* BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY 241-42 (1997).

law firm."[21] Even Richard Posner concedes as much. He glumly observes that

> Most lawyers, judges, and law professors still believe that demonstrably correct rather than merely plausible or reasonable answers to most legal questions, even very difficult and contentious ones, can be found—and it is imperative that they be found—by reasoning from authoritative texts, either legislative enactments (including constitutions) or judicial decisions, and therefore without recourse to the theories, data, insights, or empirical methods of the social sciences . . . .[22]

So the prophets of law's demise seem to have been woefully mistaken, thus far anyway. And yet, isn't there something at least intriguing about the *fact* of these recurring jeremiads? Predictions of the end of course are not unusual: we are all familiar with the street prophet who carries a sign proclaiming "Repent! The end is near!" But usually such doomsayers are regarded as marginal and pathetic characters. In law, by contrast, confident predictions declaring that "law cannot go on this way" have come not just from marginal types, or even radical Crits, but from the central and revered thinkers of the profession. Holmes, Felix Cohen, Bruce Ackerman, Richard Posner, Harold Berman—these are hardly outcasts or reprobates in the legal community. On the contrary, they are among its respected leaders and thinkers.

So, what are we to make of this recurring spectacle in which luminaries of the enterprise repeatedly declare that the enterprise as traditionally understood and practiced is near defunct and unable to continue on its current footing—and these apocalyptic pronouncements over and over again turn out to be mistaken, or at least seriously premature? If there is nothing essentially wrong in a discipline, then it is all the more paradoxical if many of its central figures repeatedly announce that there *is* something essentially wrong or unsustainable.

So once again, what should we make of this situation? Reflecting on that question might just tell us a good deal about what it is like to live, in the law, or even in the Western neighborhood of the world, today.

III. THE PUZZLE OF INDETERMINACY

One way to approach the question is by reviewing what we might call the indeterminacy problem—a problem, or at least a perceived one, that

21. NORMAN F. CANTOR, IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM 192 (1997).
22. POSNER, *supra* note 14, at 20.

loomed over much of the more subversive or anguished jurisprudential thinking of the last century. Let me hasten to say that I do not believe, as some readers seem to have supposed,[23] that indeterminacy is *the* central "Law's Quandary" that I discussed in a recent book with that title.[24] However, we can approach that quandary by thinking back about the debate over indeterminacy.

We might start with another quotation from Holmes's enormously influential "Path of the Law" lecture.[25] "You can give any conclusion a logical form," Holmes told his audience.[26] "You can always imply a condition in a contract. But why do you imply it?"[27] Here is Holmes's answer: "Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."[28] The statement bears close examination because it foreshadows one of the central debates, and directions, of twentieth-century legal thinking.

"You can give *any* conclusion a logical form."[29] Holmes seems to say here that the doctrines and rules of the law will support arguments justifying either of contrary conclusions in particular cases. The lawyer and judge will *say* that they reached their conclusion because the law so required, but in fact the law would with approximately equal plausibility have supported the opposite conclusion if they had been inclined to give it. So the law is indeterminate.

As we know, Legal Realists like Herman Oliphant, Jerome Frank, and Joseph Hutcheson elaborated in their different ways on this indeterminacy claim.[30] And a couple of generations later, the Crits again asserted claims of radical indeterminacy in law, this time often with the help (or the burden) of fancy Continental theorists like Derrida.[31] Sometimes the indeterminacy claim was pushed to almost absurd extremes, as in the argument that the provision in the Constitution requiring that the

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23. *See* Lloyd L. Weinreb, *Law's Quest for Objectivity*, 55 CATH. U. L. REV. 711 (2006).
24. STEVEN D. SMITH, LAW'S QUANDARY (2004).
25. Holmes, *supra* note 9.
26. *Id.* at 466.
27. *Id.*
28. *Id.*
29. *Id.* (emphasis added).
30. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND (Anchor Books 1963) (1930); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928).
31. *See* MINDA, *supra* note 8, at 117-18.

President be thirty-five just *might* mean that the President could be a teenager so long as he or she did not have acne.[32]

Defenders of law naturally saw the indeterminacy claim as subversive, because if law were anywhere near as indeterminate as critics suggested, then the elaborate (and lucrative) argumentation of lawyers and the solemn pronouncements of judges might plausibly be regarded as a sort of gigantic fraud on the public. But *is* law so indeterminate? At least on first inspection, defenders seemingly had a strong empirical case that it is not.

To be sure, academic lawyers can always spin out legal arguments for contrary conclusions. And ordinary lawyers can do this as well or even better than we academic lawyers can. So in every litigated case that lingers on the docket for more than a moment, you can find motions supported and opposed by legal-looking arguments set forth in legal briefs mustering rules and authorities for diametrically opposed conclusions. From a distance, it certainly *looks* as if legal reasoning can be used to support contrary conclusions in most cases. The critics seem to have a point.

But that criticism is superficial, law's defenders respond. It is true that in most cases, arguments for contrary conclusions *can* be offered. And those arguments usually cannot be shown to be demonstrably and formally incorrect in the way that, say, a student's computation in a math class can be shown to be faulty. Even so, experienced lawyers and judges know that some of these arguments will be persuasive; other arguments, by contrast, will quickly be recognized as, well, just not the sort of argument that a normally constituted judge will actually find acceptable. So while legal reasoning might look indeterminate in the abstract, the abstract is not what counts. Legal reasoning, rather, is an embodied "craft" in which lawyers and judges are initiated and apprenticed and trained;[33] it is a matter of "knowing how," not merely "knowing that."[34] Its practitioners are "law-conditioned," as Karl Llewellyn put it; they see through "law-spectacles."[35] Once you understand that, you can appreciate

32. *See* Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148, 150 n.11 (1990) (quoting Kenney Hegland, *Goodbye to 2525*, 85 NW. U. L. REV. 128, 129 (1990)).

33. *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER 109-62, 295 (1993); Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245 (2001).

34. *See* Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 YALE L.J. 253 (1996).

35. KARL N. LLEWELLYN, THE COMMON LAW TRADITION 19 (1960).

that there is in reality much more determinacy in law than meets the uninitiated (or the perversely inclined) eye.

The fact that most cases are not appealed—because the lawyers understand that appeal would be pointless—and that most cases that *are* appealed are decided by unanimous benches is said to show that law is tolerably determinate despite the possibility of making opposing legal arguments.[36] As Karl Llewellyn put it in his more mature stage, even appellate cases are "reckonable . . . far beyond what any sane man has any business expecting from a machinery devoted to settling disputes self-selected for their toughness."[37]

Suppose this counterargument is convincing: has the indeterminacy worry been vanquished? Yes and no. Perhaps law *is* sufficiently predictable for practical human purposes. But the basic problem is that even if legal *decisions* are tolerably determinate and predictable, that determinacy might derive from something other than the legal reasoning offered in support of the decisions. Take an example: it might be that (a) critically-minded theorists can show that in many or most abortion cases, constitutional "privacy" doctrines can be arranged to support contrary outcomes, but also that (b) political scientists can show that the votes of individual justices can be reliably predicted based on the justices' political affiliation, religion, and so forth. Because experienced lawyers are at least intuitively sensitive to these non-doctrinal factors, they are relatively good at predicting how such cases will be decided. In that case, it would seem to follow both (a) that the *legal doctrine and reasoning* are seriously indeterminate even though (b) the actual *decisions* in abortion cases (the results) are largely predictable.

Let me offer a homespun analogy, somewhat overstated to make the point. You have just recently moved to the Big City, and you find that in attempting to navigate its tangled streets, you are constantly getting lost. But Uncle Albert, who has lived in the City all his life, explains that you can always know which way to go if you just follow a few simple rules—what he calls "the rules of directional driving." "I always follow these rules," he explains, "and I *never* get lost." This sounds hopeful, so you ask what the rules are, and Uncle Albert explains that there are just three rules:

> *Rule* A*: When you come to an intersection, turn left.*
> *Rule* B*: When you come to an intersection, go straight.*
> *Rule* C*: When you come to an intersection, turn right.*

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36. *See, e.g.*, KENT GREENAWALT, LAW AND OBJECTIVITY 38-39 (1992).
37. LLEWELLYN, *supra* note 35, at 4.

This recitation of the rules leaves you a bit befuddled, but Uncle Albert offers to help by giving you a navigation lesson. "Watch how I do it," he says, getting into the car. So you climb in, and he chauffeurs you around the city. At a particular intersection, he turns left, and you ask, "Why did you do that?" "Rule *A*, of course," he explains. At other junctures he goes straight or turns right, citing Rules *B* and *C*. "Like I said, just follow the rules. You'll never go wrong."

"But just now, at that corner we just passed, Rule *A* seemed just as applicable," you protest. "Rule *B* did too. So how did you know which rule to follow?" It is true that driving, for Uncle Albert, seems to be a determinate, predictable activity—one with a lot of what Llewellyn called "guidesomeness" and "reckonability."[38] Uncle Albert does in fact seem to know where to go. And it is true that he can cite a supporting rule for every decision he makes. But it does not seem that the rules are doing the guiding.

When you offer these reservations, Albert might try to defend his rule-following account with a bit of sophistication. "Well, of course, it's not enough just to memorize the rules," he might say, imitating law professors in first-year classes. "You need to know how to use them. You need to get the 'feel' of them." Perhaps he adds, "It's a matter not so much of 'knowing *that*' but of 'knowing *how*.' It's a craft, not just a purely mechanical process. As you get used to driving around the City under the rules, you'll figure out how to use them."

In a sense Albert is right, and your own driving probably *will* become more determinate—more "guidesome" or "reckonable"—as your familiarity with the City grows. Eventually you will understand that although in the abstract you *could* invoke Rule *A* at the corner of Fourth and Main when you are on your way home from work, that would be wrong. In that context, the me-going-home-from-work context, the Fourth and Main intersection just is not a Rule *A* type of place; it is pretty obviously a Rule *C* corner. So the rules work after all. Except that . . . it seems clear that it is your familiarity with the city—your "Situation Sense" or "horse sense," to borrow again from Llewellyn—that is actually doing the work and providing the determinacy,[39] not the rules.

Of course, this is a simplified and exaggerated example. But in many respects, the practice of law, in which lawyers provide respectable-

38. *Id.* at 3-6, 41.
39. *Id.* at 121.

looking legal arguments for opposite conclusions but savvy lawyers know which arguments are acceptable and which are not, may seem to present a spectacle very much like Uncle Albert's "rules of directional driving."

IV. TWO-FACED LAW

This, in any case, is what Holmes seemed to suggest and what many of his descendants have believed. Thus, we finally come back to the second part of the quotation from Holmes provided earlier. If it is true that "you always can imply a condition in a contract," then the next question is, as Holmes said, "why do you imply it?"[40] If the formal rules and doctrines allow you to draw either conclusion and thus in themselves and in the abstract appear to be indeterminate, but if something else nonetheless provides substantial determinacy, then what *is* that something else?

Holmes gave the answer that so many over the last century have embraced: "Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds . . . ."[41] Holmes's suggestion ushered in a century of "law-and" in which legal discourse is thought to be supported by some other discipline or form of decisionmaking, and this other discourse (whatever follows the "and") in reality does most of the real work of making decisions. Probably the most conspicuous candidate for the something else, as Holmes himself anticipated, has been economics: underlying the formalistic facade of legal reasoning lies a series of complex economic calculations aiming at the efficient use of resources. But there are other candidates: moral philosophy, as Ronald Dworkin urges,[42] or the eclectic mix of elements that various theorists try to bring together and dignify under the heading of "pragmatism."[43]

Some such "law-and" understanding has come to be presupposed in much or even most of modern legal thought, at least in its self-conscious moods. So law has two levels, or two faces. At one level there is economics, or policy analysis, or moral philosophy, or whatever it is that actually drives legal decisions and gives them determinacy and rationality. At another, more visible level, there are the official legal reasons and justifications in which lawyers and judges dress up their views for public presentation. So as Grant Gilmore observed some years ago (with a bit of hyperbole): "For two or three generations past it has been the merest

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40. Holmes, *supra* note 9, at 466.
41. *Id*.
42. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986).
43. DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY 3-4 (2002).

truism, in much American legal writing, that the doctrine which may be found enshrined in case report and treatise is neither important nor relevant."[44] More recently, but in the same spirit, Jed Rubenfeld has advocated "jettison[ing] the whole enterprise of taking constitutional doctrine seriously" because the doctrine is a manipulable cover for political purposes, so that "the only kind of question really worth asking is whether the agenda pursued by a particular Court" is attractive.[45]

As I have said, this understanding of law as two-faced has become so familiar that it seems pretty innocuous. Even as I describe it, I can see some of you suppressing yawns. And yet, if we force ourselves to assume a more detached perspective, I think this account of law comes to seem quite fantastic.

Just on a descriptive or explanatory level, two-faced accounts make garden-variety "conspiracy theories" look like the epitome of moderate good sense. These accounts ask us to believe, basically, that hundreds of thousands of lawyers and judges, coming from a large variety of backgrounds and trained at a large variety of institutions, have learned to make legal decisions on the basis of one kind of calculus while expressing their views in a significantly different kind of reasoning. The lawyers and judges behave like lawyers and judges in public, while at some private level they are really thinking like economists or moral philosophers. Seriously, how believable is this picture?

The plausibility of the two-level view is further challenged by the fact that most lawyers and judges have not been trained, at least beyond a highly superficial level, to do the kind of economic or philosophical reasoning that supposedly informs their decisions. So if presented with an examination going beyond the barest rudiments of economics or moral philosophy, most of them—of us—would flunk miserably. If you, like me, lack graduate training in economics, I challenge you to try to read some of the more sophisticated law and economics literature. I predict that you will find it almost wholly incomprehensible. So then, how can we be making our decisions on the basis of reasoning we do not even know how to perform?

Holmes proposed an answer that "law-and" theorists have sometimes repeated. Lawyers and judges may not do the policy or philosophical

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44. GRANT GILMORE, THE AGES OF AMERICAN LAW 13 (1977).
45. Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1177-78 (2002).

analyses consciously, but rather subconsciously: they act on the basis of "inarticulate and unconscious" judgments.[46] In a similar vein, Richard Posner asserts that "legal doctrines rest on inarticulate gropings toward efficiency" and that "[a]lthough few judicial opinions contain explicit references to economic concepts, often the true grounds of legal decisions are concealed rather than illuminated by the characteristic rhetoric of opinions."[47]

Does this theory of "law-and-(a subconscious) whatever" make the two level account more plausible? Suppose someone tells you that you actually think *x*, but at a subconscious level, so that you are not actually aware that you think *x*. Of course, this is an allegation that is not easy to refute directly. I do not think, as some may, that the allegation is nonsensical: Joseph Vining has convinced me that it is possible, and even common, for us to believe things in an important sense without being fully conscious of our beliefs. Still, you may wonder how this person knows what you are thinking better than you yourself do. And you might naturally be skeptical if, as in the Holmesian hypothesis, your conscious reasoning is supposedly pretty much empty and indeterminate, so that it is the subconscious level of thought that gives your decisions whatever rationality and predictability they enjoy. After all, the subconscious has typically not been thought to be the home of heightened rationality: rather the reverse.

I admit that it may be gratifying to suppose that, like idiot savants, you and I can actually perform economic calculations, or similarly abstruse reasonings in moral philosophy, instinctively or intuitively. "Sure, Kip Viscusi and John Finnis are pretty smart guys. They produce some fancy displays of reasoning. But big deal! I can do that stuff in my sleep—or at least without even thinking about it." It might be pleasant to believe this. Pleasant, but is it plausible?

Actually, this is not a purely rhetorical question. There are both evolutionary and religious accounts of how we might be able to make policy or moral judgments intuitively, and I myself am sympathetic to such an account for what we usually though unfortunately call "moral" judgments. So let us suppose that the two-faced account of law *is* correct as a descriptive matter: What would that conclusion mean for law as a normative institution?

I think the answer cannot be a happy one. Because even if law has been rescued by "law-and" from suspicions of indeterminacy, it now stands open to a more serious charge: namely, of rampant dishonesty. Lawyers and judges are complicit, it would seem, in a systematic

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46. Holmes, *supra* note 9, at 466-68.
47. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 21 (3d ed. 1986).

conspiracy to deceive the public about how legal decisions are actually made. Even while giving what appears to be an elaborate and sophisticated apology for law, Ronald Dworkin obliquely suggests as much. Thus, in arguing for a "moral reading" of the Constitution in which constitutional decisions are driven by moral philosophy—not merely by the sorts of considerations actually evident in judges' opinions, such as text or original meaning or precedent—Dworkin suggests that *all* judges necessarily engage in this sort of interpretation: those who do not confess to doing so are guilty of a "costly mendacity."[48] But of course this accusation would extend to nearly all judges, because not many admit to interpreting the law on the basis of moral philosophy. So it would seem that mendacity on a massive scale is at the heart of the legal enterprise.

Suppose Dworkin is right, though. In that case, it is understandable that lawyers and judges might be reluctant to admit their "mendacity," even (or especially) to themselves. So maybe they are deceiving themselves along with the public. The suspicion would fit well with the theory, noted a moment ago, that lawyers and judges perform their policy or philosophical reasoning at a subconscious level, and hence are not aware of what they are doing. Perhaps this conjecture furnishes them with an excuse. But if we are assessing not the personal integrity of judges but rather the moral attractiveness of the *legal enterprise*, that excuse does not help much. If the implicit (and sometimes explicit) charge against the legal profession is that "you are systematically deceiving the public," the defense that "we are systematically deceiving ourselves, too" seems poorly calculated to elicit much admiration.

Indulge me in another overdrawn analogy. Suppose that you live in a deeply astrological culture in which it is generally believed that the configurations of the stars give wise guidance about how to conduct human affairs. You are a precocious person, so you attend the best astrology schools, graduate with honors, earn your astrology license, and make partner in a "blue-chip" astrology firm. Gradually, though, you come to believe that the stars are mindless globes of superheated gas oblivious of human concerns, and that practical decisions would be much better made on the basis of cost-benefit analyses. What do you do?

48. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 37 (1996).

For a while, perhaps you learn to do cost-benefit analyses in secret and to dress up your arguments in astrological jargon when talking to others. When you are in this mode, you find it convenient that astrological "science," while presenting itself as solid and determinate, is in fact quite vacuous: its indeterminacy allows you to package just about any cost-benefit calculation you might make in astrological terms.

But eventually you realize that you are not uniquely insightful: many people (maybe even most) have come to perceive the emptiness of astrology and the superior rationality of cost-benefit approaches. Many have been resorting to the same two-faced stratagem that you have been using. *Now* what to do? Well, because you happen to belong to the astrologers' guild, you and your fellows might try to carry on for a time using the two-faced approach. Perhaps that is the only way to maintain your guild's beneficent influence in society. But this would be a deeply compromised and unstable project, and one in which you could hardly feel proud to participate. And as the rest of society comes to understand what you understand, it is hard to imagine that the charade could continue.

For a while, astrology *might* survive, with its mindlessness and pervasive deception persisting as an "open secret" that everyone understands but is not quite ready to own up to publicly. But you would have an impending sense that things cannot continue in this way. Astrology, you might say, "is threatened with collapse." So the "death of astrology" would seem imminent.

V. RECOGNITION DISCOURSE

So, is this our situation in law today? It might be, and if so, we could understand why legal thinkers throughout the last century believed that law could not go on in anything like its traditional form. But on this view, it becomes harder to explain why all the prophecies have gone perpetually unfulfilled. Why are the prophets of law's demise always wrong, as it seems they have been? Why does law persist, and even flourish?

Perhaps the two-faced, "law-and" account of law has misconceived the enterprise, and has given the wrong response to the diagnoses of indeterminacy. But how? And what other responses might be possible?

One tempting response would repudiate "law-and" and deny the necessity of what follows the "and." More affirmatively, it would assert the sufficiency and autonomy of law—of the formal legal reasoning that the "law-and" proponents found insufficient and tried to supplement with economics or moral philosophy or whatever. So it would deny that what Holmes called "the fallacy of logical form" is a fallacy after all. In

this spirit, over the last ten years or so we have seen a resurgence of legal thinkers who proudly embrace what used to be an epithet—"formalism." The basic idea is to assert that legal decisions *are*, or at least *could be* and *should be*, determined by the kinds of legal reasoning presented on the face of lawyers' briefs and judges' opinions: textual arguments, deductions from announced doctrines, and so forth.

The appeal of this "law is enough" formalism is understandable, I think, but I also doubt that the formalist strategy will prove satisfactory for very long. After all, the indeterminacy arguments of the Legal Realists and Crits generated the massive enterprise of "law-and" precisely because the arguments were, and are, powerful on their face. Once again, the very existence of respectable-looking legal briefs on both sides of the central questions in most cases is powerful evidence that the purely formal resources of legal reasoning often fail to generate determinate conclusions.

So, are there other alternatives? Well, here is a thought, or at least a tentative and preliminary proposal. But as a starting suggestion, I wonder whether we may have been pointed in wrong directions by the overtones of the very notion of legal "reasoning." *Reasoning* connotes something deductive—the kind of thinking we associate with logic or maybe proofs in geometry—and even if we acknowledge that in subjects like law "reasoning" will not lead to certainties but more to probabilities,[49] the term still suggests a deductive or quasi-deductive enterprise. There are premises, and there are conclusions derived from premises. But it seems to me that in life, much of our talk, including talk that is designed to be deliberative or persuasive, does not work in this way. Rarely do we actually reason deductively and even when we do, the deductive logic is typically a post hoc affair—an exercise we use to test or rationalize or support conclusions reached in other ways.

So then how *does* deliberation work? It seems to me that our deliberative discourses often consist more of what we might call "assisted recognition." The assumption is that we already in some sense know something, but we do not currently recall it. Or we do not recall it in the vivid sense necessary to see its relevance to our present question. Deliberative discourse consists of efforts to bring this tacit knowledge

49. *See, e.g.*, LLEWELLYN, *supra* note 35, at 17 ("I see no absolute certainty of outcome in any aspect of legal life, and think that no man should ever have imagined that any such thing could be, or could be worth serious consideration. Instead I see degrees of lessening uncertainty . . . .").

more fully to consciousness so that it can be appreciated, and so that its relation to the present question can be recognized.

There are many, many examples of this sort of discourse. Some of them are quite mundane or even trivial. We engage in recognition functions in games—for example, the guessing game, or charades. Or maybe we are trying to remember something, a song, perhaps, so that I remember and sing a line or two and this brings the whole song back to your memory. Or it might be a joke: "How does that one go, the one about the farmer and the pig?" In each case, there is discourse designed to help someone recognize the answer to a particular question. But the discourse does not consist of deducing conclusions from premises. Rather it consists of hints, fragments, partial descriptions, aimed to help someone retrieve and recognize something they already in some sense know.

Nor is recognition discourse limited to recollection, at least in any ordinary sense. Suppose you go to a travel agent and say, "My spouse and I are going to celebrate our twenty-fifth anniversary, and we'd like to take a trip to some place really special, just right for the occasion. But we can't think where. Do you have any suggestions?"

The agent might reply with some suggestions that consist of abbreviated descriptions.

"Hawaii?"
"Well . . . maybe. That would be fun."
"Paris?"
"I don't know. Paris would be romantic, but . . . ."
"How about Rome?"
"Ah, Rome. That would be perfect—just what we were looking for."

In this conversation, the agent has engaged in a kind of discourse that has helped you deliberate, and has "persuaded" you to adopt a particular decision. But the discourse is hardly deductive in nature. Rather, it has helped you bring to mind, and to recognize as the answer to your question, something you already knew at some level. Of course, it might be that merely reciting the names of places would be insufficient. The travel agent might need to fill out the descriptions somewhat: "Palm trees, beaches, volcanoes." The talk might get quite detailed, supplemented by brochures and pictures. And it might be partly propositional in form: "There's a wonderful little restaurant—and not so expensive—just a short walk from the Colosseum." It might be that you have never actually been to Hawaii or Paris or Rome. Nonetheless, you know something about them and you have an image of what they are, and the travel agent's suggestions help to bring them to consciousness so that an image is present. You can see the image that seems to be an answer to your question.

Suppose someone were to object, after listening to this conversation, that the travel agent's suggestions were utterly indeterminate: "Sure, he said some things and then you chose Rome. But he said things that could just as easily have supported Paris, or Hawaii. You say—you may even think—that you were influenced to choose Rome by what the travel agent said to you. But it is obvious that all of that talk was just cosmetic, for public presentation, and you actually chose Rome based on something else." How cogent would this criticism be?

I suggest that if we pay attention, much or even most of what we say when we are trying to deliberate or to persuade each other is of this "recognition discourse" variety. Rarely do we actually cause people to deduce conclusions from premises in any formal way. Rarely are the considerations we urge on people "determinate." But we do not think that this lack of deductive determinacy is a shortcoming that makes our discourse empty. Nor do we infer from the indeterminacy of our discourse that what we say is a mere facade and that *something else* must really be driving the decisions. Recognition discourse is not "two-faced" but rather what we might call "partial featured"; it consists of hints, suggestions, partial descriptions, that point us to things we already in some sense know. Our discourse is not a *complete* description of those things that we eventually accept as the answers to our questions. But the discourse is nonetheless about those things; it is not merely a facade for something different (the "real reasons") that drive our decisions.

VI. REAL LAW?

If you accept my suggestion that much of our deliberative and persuasive discourse is of this "recognition" variety, then questions promptly follow. Why is it that "recognition" discourse seems so little recognized as a legitimate kind of reasoning? And what if anything does any of this have to do with law?

These are hard questions, and I can only offer a few tentative thoughts in response. First, anyone could readily grant that "recognition"—and the processes by which human beings "recognize"—presents an important and fascinating subject. However, the subject might seem to be within the domain of cognitive psychology, not of philosophy or of jurisprudence. Philosophers, ideally at least, want to know truth, or at least to consider how we can apprehend truth, so they study logic and epistemology. But how could the psychological processes that produce recognition provide any epistemic credentials to the beliefs we come to hold?

To be sure, on older, Platonic assumptions, knowledge has sometimes been viewed as a kind of recollection.[50] But if you think with Locke that the mind is a *tabula rasa*, or if you hold the modern or post-modern view that order and value are constructed or imposed, then it is not so clear how "recognition" could provide any indicia of truth, or rational acceptability.

This reservation seems particularly powerful with respect to law, at least on modern views. Put it this way: the notion that "recognition" could play a central role in the acquisition of truth seems to presuppose that (a) there is something real "out there"—or at least something that exists independent of our opinions about it—that is the subject of some question we have; and (b) we already have some at least dim or submerged knowledge of that something, whatever it is. On these assumptions, the hints and partial descriptions that make up recognition discourse might help point us to that object of our inquiry. We might then retrieve and contemplate the object more deliberately and come to perceive how it provides the answers to the questions we are asking. Thus, if "law" in some sense existed independent of our talk about law, then it is just conceivable that law-talk would properly be viewed as a sort of halting, partial description seeking to bring that object—the law—into clearer view, so that we could see how particular legal questions should be answered. The "weird" or "exotic" law-talk might be not so much like premises supporting a deduction as like the snatches of a song that help us recall the whole song (or at least a stanza or two) which we can then apply to the case at hand.

Conversely, if law is not in any sense "real" independent of us, that is, if it is purely man-made or conventional, then it is harder to see how law-talk could be serving this function. So then it would seem that our alternatives would be more limited. Law-talk—legal reasoning and justification—could be formal and deductive. Or else it might be a cosmetic facade for other forms of reasoning. What other possibilities exist?

And here I believe we get to the heart of the modern quandary of law and legal thought. In pre-modern or what we might call "classical" legal thought, it seems, law *was* understood to be something real and independent of human actors. Hence, judicial decisions were routinely described not as "of themselves, laws," as Joseph Story put it, but rather as "evidence" of law—of something real that transcended them.[51]

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50. The claim that knowledge is recollection is developed in Plato's dialogue *Meno*. *See* PLATO, *Meno*, *in* MENO AND OTHER DIALOGUES 97, 123 (Robin Waterfield trans., 2005).

51. Swift v. Tyson, 41 U.S. 1, 18 (1842) (emphasis added). For a learned and helpful discussion of this view, see Charles J. Reid, Jr., *Judicial Precedent in the Late Eighteenth and Early Nineteenth Century*, AVE MARIA L. REV. (forthcoming).

It is far beyond the scope of this lecture, and even farther beyond my competence, to elaborate in just what sense law was thought to be real. For now I hope it is sufficient to say that law was viewed as part of God's providential scheme for the cosmos. Probably the most complete and important account of this view was given by Thomas Aquinas, but the view was reiterated in abbreviated form by legal thinkers through the centuries, from Fortescue to St. Germain to Coke to Blackstone.

No doubt this view raises lots of questions, both about the nature of law and about how humans can know the law. I would not presume to say whether there are satisfying answers to all of those questions. I am content to put forward a modest and heavily qualified proposition: the classical view at least embraced the presuppositions necessary to accept the theoretical possibility that legal reasoning might be a way of apprehending—of "recognizing"—something that actually existed and that was responsive to the questions people ask of law. Robert Gordon makes the point colorfully: quoting Richard Hooker's statement that law sits in "the bosom of God, her voice the harmony of the world," Gordon observes that pre-Holmesian lawyers "had, as they saw it, a direct line to God's mind through their knowledge of the principles of legal science."[52]

Things are different today. Holmes might be taken as the watershed thinker who moved us from a classical to a modern view, or at least the most vivid expositor of that transition.[53] Although Holmes himself seems to have found the classical view pretty much incomprehensible, he at least perceived its basic contours. If you read books about law, Holmes observed, "it is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned."[54] The assumption seems to be that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute . . . ."[55] Conventional law-talk implicitly treats law as a "brooding omnipresence in the sky."[56] But

52. Robert W. Gordon, *The Path of the Lawyer*, 110 HARV. L. REV. 1013, 1013 (1997) (quoting I RICHARD HOOKER, *Of the Laws of Ecclesiastical Polity*, *in* THE WORKS OF RICHARD HOOKER 197, 285 (John Keble ed., 7th ed. 1888)).

53. For a helpful recent exploration of this transition from a different perspective, see BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END (2006).

54. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

55. *Id*.

56. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

in fact this notion was patently "fallacy and illusion," because nothing of the sort exists.[57]

With few exceptions, twentieth-century legal thinkers followed Holmes in this respect. Sometimes they recognized, at least dimly, what had happened. Karl Llewellyn noted that the classical approach to precedent had reflected the fact that for centuries, "law was felt as something ordained of God, or even as something inherently right in the order of nature," though he peremptorily dismissed this view as "superstition."[58] Felix Cohen conceived that the modern task in law was to "redefine supernatural concepts in natural terms."[59]

As the twentieth century progressed, or declined, few legal thinkers gave evidence of even perceiving the framework of presuppositions within which they—we—operate. The possibility of law in the classical sense hardly even occurs to us anymore. It is hard for us even to conceive of what such a law could be, and so we are naturally suspicious that anyone ever did have a satisfying conception of such a law: hence the seemingly irresistible resort to "law-and."

But a two-faced "law-and" account is an unhappy and unstable resting place, for reasons I have noted earlier. And so it has seemed to those who bothered to think about the situation that this awkward marriage cannot continue. The "law" side of the "law-and" must somehow be transformed, must give way to policy science, or "constructivist" legal discourse, or a more overt use of moral philosophy, or something more discernibly rational.

VII. WHERE AND WHITHER?

Hence the recurring predictions of law's demise. In our times, law is always on the verge of dying, or of being "overcome," or superseded by something bold and new and more palpably rational.

And yet . . . law does not have the decency to just die. Instead, it remains as vigorous as ever. What to make of this inconsiderate persistence?

In the final chapter of *Law's Quandary* I discuss some possible diagnoses, but the most eligible candidates, I think, boil down to two.[60] It might be that conventional law-talk is a holdover—a vestige of a world view that is no longer plausible, and is barely even entertainable. Law is a remarkably tenacious holdover, clinging to life and indeed apparently flourishing long after it was supposed to have died. Because

57. Black & White Taxicab, 276 U.S. at 532-34.
58. KARL LLEWELLYN, THE BRAMBLE BUSH 43 (1951).
59. Cohen, *supra* note 12, at 830.
60. SMITH, *supra* note 24, at 157-70.

earlier predictions of its demise have repeatedly fallen flat, we should probably be careful in our forecasts. But law-talk is a holdover nonetheless, and destined for eventual extinction.

Or it might be that, in some sense and at some level, we tacitly believe or are committed to believing more than we think or admit we believe. The "brooding omnipresence in the sky" that Holmes mocked is a metaphor, of course, but maybe it is a metaphor for something that is not so unthinkable after all. Maybe law-talk is a way of bringing us to some sort of recognition of that omnipresence. And maybe theorizing about law is a kind of exploration that, as Joseph Vining has repeatedly proposed, searches for something (or someone) with an authority that we did not construct,[61] and maybe, to borrow now from T. S. Eliot, "the end of all our exploring/Will be to arrive where we started/And know the place for the first time."[62]

Just to keep us guessing, or to be grand or perhaps perverse, Holmes said this too:

> The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.[63]

If this more mystical Holmes was right, then the sequel to a lecture on "The (Always) Imminent Death of the Law" might be something like "The Eternal Return of Natural Law." But somebody else will have to give that lecture. Actually, I think somebody already has.[64]

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61. *See* JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN (1986); JOSEPH VINING, FROM NEWTON'S SLEEP (1995).

62. T.S. ELIOT, *Little Gidding*, *in* THE COMPLETE POEMS AND PLAYS 138, 145 (1952).

63. Holmes, *supra* note 9, at 478.

64. JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 295 (1960).