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Taking Law and Society Seriously

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TAKING LAW AND SOCIETY SERIOUSLY

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This symposium is called "Taking Legal Argument Seriously." The question that comes immediately to mind is this: *Should* we take legal argument seriously? There are a number of reasons why we might want to do so. One is that, as Richard Markovits argues, good legal argument leads to correct legal answers.[1] Who could be against correct answers? But this position assumes that there are, in fact, legal answers that can be described as "correct." I will leave this line of reasoning alone. I have to confess that I am one of the skeptics. For borderline and difficult questions, I doubt that there is such a thing as a "correct" legal answer, even from the "internal" standpoint.

Moreover, suppose we concede that there are "correct" answers: Why should most of us be interested? "Internally" correct means correct in strictly "legal" terms.[2] But why should that be significant? Law from the internal perspective is comparable to a system of theology. If you do not believe in the basic premises of the religion, you are unlikely to care whether there is such a thing as a "correct" answer to a theological question *within* that religion. A theologian might argue that "correct" had a concrete, valid meaning within the system of the religion, but an outsider would not particularly care what that "correct" answer was. For those of us who think that law is a political, economic, and cultural subsystem, which varies with, and is determined by, the surrounding society, the "internalist" point of view is perhaps sociologically interesting—but nothing more. It certainly has no independent moral power.

On the other hand, we might find legal argument important and worthy of attention for other reasons. We might take it seriously because we think legal argument has a significant impact on society or on some party of society. Most lawyers certainly feel that good legal argument influences the way judges decide cases. This is no minor

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1. *See* Richard S. Markovits, *Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions*, 74 CHI.-KENT L. REV. 415 (1999).

2. *See id.* at 417-20.

matter. Legal argument might perhaps affect the behavior of other actors as well. The actual impact on anybody of any particular legal argument is, in my view, an empirical question, and we do not really know the answer. Obviously, legal argument must have *some* impact on judges, but how much is a mystery. It could, in fact, be extremely small. Moreover, whatever the impact is, it is likely to be socially quite variable. Argument might make a difference in some contexts and not in others. In highly charged contexts, the impact is likely to be negligible. I doubt, for example, that anybody in Congress took the *legal* arguments very seriously in the controversy over President Clinton's impeachment. People *said* they did, but somehow I was not convinced. As far as behavior is concerned, I saw no evidence that any legal argument—no matter how clever—changed anybody's mind, once the matter had gotten to a particular stage of heat. Of course, this was an intensely political process. The *type* of situation obviously matters. A judge might pay a lot of attention to strictly legal argument in an intricate tax law case, and very little in a case on abortion rights. Or it might go the other way around.

Legal argument reaches judges in various ways. It can reach them explicitly in briefs and oral arguments. It can reach them implicitly through training and socialization, or through legal literature, or even through the popular press. The impact of legal argument on judges is not readily measurable. We know what judges say in their opinions, but judicial opinions are stylized and tradition-bound. They do not necessarily reflect what the judges were actually thinking. In fact, we have no way of reading the minds of judges any more than we can read the minds of carpenters or police officers. I doubt whether judges are always able to read their own minds. Few of us really can.

We do know that some legal arguments are likely to end up in judicial opinions—others are likely to end up in the trash can or to appear in opinions only to be laughed at or discarded. Hence, a good legal argument *might* be defined objectively as an argument that judges treat with respect. Such an argument may not *actually* change the minds of judges, but at least they have to handle it with care.

What kinds of arguments get treated with respect? This is, again, an empirical question, and I do not know offhand of many studies that try to give an answer.[3] In principle, however, answers are

3. For one of the few examples of studies that attempt to provide an answer, see generally Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of*

definitely possible. What seems abundantly clear is that the answers will vary from society to society and from time period to time period. Imagine what Rufus Peckham, who wrote the majority opinion in *Lochner v. New York*,[4] would have thought of the argument that people have some sort of constitutional right to buy contraceptives or that women have a right to get an abortion.[5] For that matter, what would Oliver Wendell Holmes, Jr., or his ghost, think of these arguments?

Up to now I have talked about judges. Whether legal argument has an effect on anybody outside the circle of judges is even more dubious. Legal argument may have an effect on opinion in the academy. Law professors are always talking about good opinions and weak opinions and so on. Is this important in society at large? Probably not. For its part, the wider public is mostly unaware of legal arguments. The public knows about the *results* of a handful of important cases, but not about how those results came about. How many of the people who are passionate on either side of the abortion issue have the slightest notion of the *legal* arguments for or against? Not one in a thousand, I would guess.

There is, of course, a kind of trickle-down theory of legal argument. The public may not know anything about these arguments, but the legal academy does, or the elites do, or other judges do. Their views ultimately filter into middle-brow journals, *Time Magazine*, television talk shows, and so on. Somehow, then, in the course of time, academic judgments about whether this or that argument makes sense come to have an impact on the thoughts and behavior of the general public or some significant part of it. This is certainly possible; but, again, it is an empirical question. Does this trickle-down process actually take place? In fact, there is little or no evidence to support it. My own hunch is that there is nothing to the argument at all.

Take, for example, *Brown v. Board of Education*.[6] Nobody dares attack the decision anymore—but there have been plenty of scholars who carp at the *opinion*. In the early years, these came mostly from right-wing white Southerners, who hated the decision, or from conservative jurists who found the case too daring, too frightening. But even some liberals, who liked the result, deplored what they saw

Judicial Reasoning, 73 N.Y.U. L. REV. 1377 (1998).

4. 198 U.S. 45 (1905).

5. *See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

6. 347 U.S. 483 (1954).

as Warren's ineptitude.[7] One went so far as to draft a different and presumably better opinion.[8] More recently, some of the complaining comes from the left. According to one critic, Warren adopted bad theories, which ultimately helped derail the whole civil rights movement; the case, he thought, served to "deaden political debate and to legitimate the status quo."[9]

I have little sympathy for these propositions. For one thing, they have no real evidence to back them up.[10] And they are profoundly implausible. Common sense tells us they simply cannot be right. Do we really think that a more powerfully argued or crafted opinion in *Brown* would have changed the minds of white supremacists in Mississippi or Alabama? The question answers itself.

I hate to be raining on the parade, but my view, in brief, is that formal legal argument as such probably does not make much of a difference in the world. I am not saying that *decisions* make no difference; in many cases they do. I am making a distinction between the result of a case—what it decides and how it decides it—and the reasoning that supports the result. To be sure, there are no pure "results." Some argument, theory, or conception is implicit even in the barest per curiam decision. People certainly understood that *Brown* was not just telling Topeka to let black students into all-white schools; the Court was obviously saying something more, something bigger, about race relations and the law. But the precise "legal" arguments that led to the result of the case probably made very little difference to the way the public understood those results. Consequently, the arguments were not much of an element in determining the impact of the case in real life. At least that is what I believe. There is not much proof on either side of this question.

In any society, of course, there are such things as strong arguments and weak arguments. The question is: Where do these judgments about strong and weak come from? Clearly, there are reasons why certain arguments *seem* powerful at particular times in

7. *See* Lawrence M. Friedman, Brown *in Context*, *in* RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION 49 (Austin Sarat ed., 1997).

8. *See generally* Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24-30 (1959).

9. Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 715 (1992); *see also* J. HARVIE WILKINSON, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 46 (1979).

10. Quite a different issue, of course, is the issue of the actual impact of *Brown* on segregation itself. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

history (and in particular places). These reasons are significant. The late nineteenth-century judges appeared to take seriously arguments about liberty of contract, employers' rights, limitations on the power of the federal government, and so on, in cases like *Lochner v. New York*[11]; most of these arguments today are, on the whole, totally out of fashion. On the other hand, nineteenth-century judges brushed off almost cavalierly arguments about the illegality of what we would today call sex discrimination.[12] Legal argument, then, precisely because it is so socially variable, can be an interesting and valuable indicator of trends and values in a society. Research on this subject, too, is in drastically short supply.

Professor Markovits's thesis, as I understand it, also assumes that there is a more or less clear line between a "legal" argument and (say) a "policy" argument. I think in practice such a line hardly exists. Certainly not today. Legal systems in our modern world are enormously complicated. There are tons of statutes, rules and regulations, court decisions, and the like, at federal, state, and local levels. It is impossible to think of a *policy* argument that could not be grounded, explicitly or implicitly, in some purely "legal" premises. This is especially true of close cases, border-line cases, cases fraught with social consequences, and so on.

What does it mean, then, to talk about "legal" premises and "internally-correct" arguments? I am not entirely sure; but there seems to be a distinction here which more or less tracks Max Weber's famous distinction between formal and substantive rationality.[13] Formal rationality, for Weber, was reasoning where "the legally relevant characteristics" of facts were "disclosed through the logical analysis of meaning"; formally rational systems used "fixed legal concepts" and "highly abstract rules."[14] Substantive rationality "accords predominance" to "ethical imperatives, utilitarian and other expediential rules."[15] Formal rationality was, in short, "legalistic." Substantive rationality was more open-textured—it was more open to considerations of "policy."

I think the distinction was always somewhat shaky. Even shakier is the assumption that formal rationality ever represented anything

11. 198 U.S. 45 (1905).

12. One of the classic examples is *Bradwell v. Illinois*, 83 U.S. 130 (1873).

13. *See* MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 61-64 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954)

14. *Id.* at 63.

15. *Id.*

more than a style of writing about law. I suspect that there was much less formal rationality, in fact, in the nineteenth century, in Germany and elsewhere, than Weber thought. He may have confused style with substance—in the codes and in opinion writing. But this again is a difficult matter to resolve. Weber himself talked about "anti-formalistic" tendencies in the law of his day.[16] These tendencies have become much stronger over the years. They may well be the inevitable result of more democracy and the development of the welfare-regulatory state.

I. LEGAL ARGUMENT IN CONTEXT

It seems perfectly obvious that social context determines what legal arguments will be used and which ones will strike judges and others as persuasive. Can we say anything more specific than this about the relationship between legal argument and social context?

To begin with, we have to ask why there is such a thing as legal reasoning or legal argument at all. There are alternatives: legal decisions which are not supported by overt reasoning. Judges could, for example, simply toss a coin. Or they could hand down decisions without written opinions. Jury verdicts are decisions that are completely bare of reasoning or argument of any kind.[17] Nor do legislatures, ordinarily, decorate the laws they pass with a chain of reasoning. Once in a while there is a preamble giving excuses or even reasons. But on the whole, statutes simply lay down the law. Indeed, they *are* the law.

How do we explain why some decision-makers must give reasons and why others need not? One key fact is the source of the legitimacy of the decision-maker. I use the term "legitimate" here in an empirical sense, rather than a normative sense. Authority is legitimate if the public, or some relevant part of it, *thinks* the authority is legitimate.[18]

There are all sorts of legitimate authorities in various societies. Legitimacy is either *ultimate* or *derivative*.[19] Ultimate authority does

16. *See id.* at 303.

17. The jury is, therefore, in Weberian terms, irrational, since its deliberations and results are unpredictable in a way that a well-reasoned legal decision (of the formally rational sort) is (theoretically) not.

18. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

19. On the distinctions that follow, see LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 236-37 (1975).

not have to give reasons: within its society, it is self-legitimating.[20] In a sacred law system, which claims that it rests on divine revelation, nobody has to give a reason for a rule or a command that God lays down. The Ten Commandments came into the world as naked fiat. There is probably some form of ultimate authority in every system. In a parliamentary democracy, Parliament passes laws which are as devoid of supporting argument as a jury verdict or the Ten Commandments. This is because Parliament is supposed to represent what the people want; and what the people want is an ultimate authority. A jury verdict itself needs no overt reasons, in part at least because it too represents some sort of popular will.

Derivative authority is not legitimate in itself—not in the way of ultimate authority. Derivative authority has to do something to link its actions to some higher authority, and in the end the chain of justification has to connect with some ultimate authority.[21] Intermediate links can be quite simple and obvious. A police officer wears a uniform as a sign of his authority. The officer gets a search warrant before entering a house. The uniform and badge show that the officer has been empowered to direct traffic, arrest people, or break up a fight. The officer's authority comes from the city, the city's comes from the state, and there is some "law" that lies behind it all. The warrant links the officer to the judge, who in turn is linked to legitimate law.

Legal reasoning is another linkage device. It connects the legal acts of a judge to some higher or ultimate authority. Judges, after all, have only derivative authority in our system and in most systems. Judges and justices do not (in legal theory) have the power to make law on their own—or at least not as blatantly as the legislature. Whatever they decide they must connect to something higher up: to the Constitution, or to an act of the legislature, or to principles of the common law, or (at times) to "natural justice." A judge's say-so is simply not enough.

Legal reasoning is a method (though not the only method) of making this link. The judges present arguments to show how their result is justified and to connect it with some higher act of authority. Their arguments are, for the most part, grounded in what is conventionally defined as "law." In our own period, judges are somewhat more likely to throw in references to other kinds of

20. *See id.* at 236.
21. *See id.* at 236-37.

authority including ethical, economic, or social norms.[22] This may be nothing more than a stylistic shift or it may be a real movement in the direction of more substantive rationality. It is hard to tell.

Different societies have different forms of linkage—different ways of legal reasoning, different canons for judging argument. A lot depends on the system of primary legitimacy. Some systems do, and some do not, separate "legal" from nonlegal reasons. I call a legal system *closed* when an ideology of legalism dominates its legal culture—an ideology that insists that only "legal" premises can be used to construct an argument. An *open* system, on the other hand, does not distinguish between "legal" propositions and arguments and other kinds of premises and principles. Again, some legal systems admit *innovation*—they expect the legal system to change, which means that they consider it entirely possible for new legal premises to be born. Other systems, on the other hand, are in theory timeless and unchanging. If we join these two distinctions, we get four types of legal systems and to these four types there correspond four types of legal reasoning. I will briefly describe the four types. Needless to say, in the real world almost no legal system and no system of legal reasoning fits precisely and without exception into any of the four boxes.

First, one can imagine a legal system which is closed and which also denies the possibility of innovation. What kind of system would this be? One could conceive of a sacred law system with a single sacred book, which (in theory) has everything in it. All legal decisions have to be painfully extracted from this single text. As the centuries roll by, the task becomes more and more difficult. Legal reasoning, therefore, becomes mystical and arcane, at times focussing on tiny verbal distinctions or indulging in flights of "Talmudic" fancy. Legal fictions abound, and reasoning by analogy becomes highly developed.

Classical Jewish and Islamic law had elements of this kind of system. So too, in a way, did the common law system at some points in its history. True, there was no sacred text; but there was an ideology which, on the whole, was hostile to rank innovation. In theory, too, the canon of premises was more closed than open—the doctrine of *stare decisis* was a doctrine of fixity. Extreme formalism—the "mechanical" jurisprudence of the late nineteenth century, a kind of crabbed, dry logic-chopping, was one possible result. Late

22. *See* Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 817 (1981).

nineteenth-century common law jurisprudence, to be sure, also had elements of other types of systems, including the one next to be mentioned.

The second type, where the canon is closed but innovation is accepted, may seem logically impossible. But there are indeed systems which are not entirely dissimilar. These are the systems which believe in "legal science." In the short run, there is a fixed canon of premises, but jurists can "discover" new propositions, improve old ones, and develop more and more refined legal concepts, as legal science progresses. The continental systems have something of this flavor. The codes are not sacred; the legislatures can (and do) amend them. But in the short run, the judges cannot add or subtract from the text; yet they, and the jurists who write commentaries, can learn new truths about legal principles and about the principles embodied in the codes as their "science" becomes more advanced. Late nineteenth-century common law jurisprudence, in the age of Langdell, shared some of these traits.

Customary law systems are more or less examples of the third type of system. In many customary systems, people think the law is old, traditional, immutable, changeless. There is no obvious way to "legislate." On the other hand, in preliterate systems, there are no codes, lawyers, or written texts; hence, there are no strictly "legal" propositions. Judges and elders draw on custom, experience, common sense, and morality—any norms that are reasonable and accepted. These systems were not, in fact, changeless. But changes took place at a fairly slow pace and the process was relatively unconscious.

The fourth type of system is one where the canon of premises is wide open and innovation is accepted, even welcomed. We can call these *instrumental* systems. In this category, we can put some of the revolutionary systems of law—the law of the Soviet Union, for example, in the early days of the Revolution or the law of China under Mao. Sweeping orthodox legalism aside, these systems allowed decisions to be made on the basis of revolutionary principles. This is also where we would place those systems which are, in Max Weber's terms, substantively rational. These would be systems which welcome arguments based on "policy" or "economic efficiency." Certainly, most legislatures, most of the time, operate as instrumental systems.

In short, styles of reasoning and argument do not fall from the sky; they are closely tied to ruling constructs in a society or within a legal culture—particularly concepts of legitimacy. What is true of whole legal systems is also true of subsystems: forms of legitimacy and

types of argument are different in legislatures compared to courts. A religious court in a sacred law system might reason in a highly casuistical manner; a charismatic leader, in the same system, might simply rule by decree. An American judge is not supposed to make law; of course, we all know that they do make law, but they make only certain kinds of law, and they disguise what they are doing with certain well-known figleaves. A legislature, on the other hand, is perfectly free to make law, in great detail and specificity. Making law is what legislatures do.

All these remarks relate to the *form* or type of legal argument. As I said, real-life systems are very complicated, especially today, and resist being squeezed into one particular box. American law perhaps has elements of all four of the types mentioned. These forms and styles are, obviously, not politically or socially neutral. Some twentieth-century observers think that American judges have become less formalistic than they were in the late nineteenth century; and that in that period they were more formalistic than they were in the early nineteenth century.[23] Why the changes? One suggestion—and it is only a suggestion—is that formalism in the age of *Lochner* and substantive due process was a convenient disguise, a camouflage. The judges were fighting an ideological, political, and economic battle. They were resisting socialism and paternalism, as they saw it. They were hostile to organized labor. The judges covered their conservative opinions with a figleaf of legalism.

This suggestion, I think, has more than a grain of truth but reality was undoubtedly far more ragged and complex. The point here is simply that styles and forms of argument are socially determined. In each instance, we have to ask, why this style, why this form, what did it mean, and to whom? What did it accomplish, and for whom? The content or *substance* of legal argument is also socially determined—and politically meaningful. That much is perfectly obvious. As I suggested, you can imagine how a nineteenth-century judge would react to the wilder sorts of argument about due process or equal protection or freedom of speech that are absolutely standard today. Freedom of speech, according to the Supreme Court, puts its mantle of protection around somebody who burns the American flag as a protest.[24] State supreme courts have struck down sodomy statutes as

23. Notably, see Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

24. *See* Texas v. Johnson, 491 U.S. 397 (1989). *See generally* ROBERT J. GOLDSTEIN, BURNING THE FLAG: THE GREAT 1989-1990 AMERICAN FLAG DESECRATION CONTROVERSY

violations of fundamental rights.[25] The Supreme Court came within a hair of doing so itself.[26]

On the other side, highly technical arguments, or arguments based on legal fiction, are probably somewhat suspect today and are unlikely to make much of an impression on judges—even if a lawyer were so foolish as to pursue this kind of argument. Courts get a drubbing from the public (and from politicians) for letting dangerous criminals loose on "technicalities." Of course, statements like this are usually based on bias or ignorance, but they tap into a distaste for "technicality," which is widely shared among members of the public.

II. LEGAL SCHOLARSHIP AND LEGAL EDUCATION

The *Introduction* to this symposium posed a number of questions which the participants were invited to address.[27] I have dodged or avoided most of them. But I do want to add a few comments about legal education and its history. Professor Markovits thinks that law professors have been paying less and less attention to legal argument.[28] He believes there has been a shift from teaching students "thinking like a lawyer" to teaching "manipulating like a lawyer."[29] He also thinks scholars have, increasingly, tried to "smuggle various kinds of personal values . . . into their legal analyses."[30] He is afraid these trends in scholarship and teaching have had a bad effect on lawyering and judging.

I read the history somewhat differently. To begin with, I see little or no difference between "thinking like a lawyer" and "manipulating like a lawyer." C.C. Langdell, who brought the case method to Harvard, thought there was such a thing as a correct legal answer.[31] Langdell claimed that law was a science which rested on a few broad, basic principles. These were apparently timeless and value-neutral.

(1996).

25. The most recent example is from Georgia, in *Powell v. State*, No. S98AO755, 1998 WL 878550 (Ga. Nov. 23, 1998). The court said, among other things: "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." *Id.* at *4.

26. See *Bowers v. Hardwick*, 478 U.S. 186, 187-89 (1986), a five to four decision. Ironically, this case upheld the very Georgia statute that the Georgia court struck down twelve years later. *See Powell*, 1998 WL 878550, at *6.

27. *See* Richard S. Markovits, *Taking Legal Argument Seriously: An Intoduction*, 74 CHI.-KENT L. REV. 317 (1999).

28. *See* Markovits, *supra* note 1, at 461-63.

29. *Id.* at 462.

30. Markovits, *supra* note 27, at 322.

31. *See generally* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

Students were supposed to learn these principles, through Socratic osmosis, and use them to derive right answers to legal questions.

Langdell's method—the Harvard method—was unpopular at first, but ultimately it spread to school after school and blew away all the rival methods. Why this occurred, what the attraction was, and what connection "legal science" had, if any, with capitalist expansion or any other trend in the larger society, are difficult and murky questions.[32] By the 1920s or so, the case-method had legal education almost all to itself.[33] Yet many legal scholars had fallen away from Langdell's faith. They no longer believed in his kind of "legal science." But if this was the case, what was the point of Langdell's methods? Exactly what were students learning in the classrooms and why were they learning it?

To answer these questions, legal educators repackaged legal education as skills training. Law school taught you not the principles of the science of law—certainly not the law itself—but how to think like a lawyer. Law, as Alfred Z. Reed put it, was a "thicket, . . . [and the] young practitioner [was to be] equipped with a trained mind, [which, like] a trusty axe, [gave him the ability] to spend the rest of his life chopping his way through the tangle."[34]

Of course, all this chopping and hacking had nothing to do with right answers. The Legal Realists doubted that there were such things as right answers; but the skepticism surely went beyond this school of thought. What was training all about? It was all a matter of clever arguments. It was, in short, training in how to score points effectively—or, if you will, how to manipulate legal concepts and propositions most cleverly. A good lawyer was quick and adroit; a good lawyer was able to think on her feet; a good lawyer was able to argue either side of a contested question.

This was certainly the assumption that governed legal education when I was in law school. It was the point of the merciless Socratic water torture that was prevalent then. Law school has, it seems to me, become more humane since those good old days, but I see little or no change in the underlying ethos. The good lawyer can make an argument on any side of any issue, any client, any cause, and do it

32. *See generally* Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (Gerald L. Geison ed., 1983).

33. See the survey in ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW xiii-xvii, 343-422 (1921).

34. *Id.* at 380.

well. But if a good lawyer can do this, so can a good judge. A good judge can write an opinion saying the law is on the side of *A*, *B*, or anybody.

There are, of course, many other changes in legal education over the last fifty years. Law schools have opened their doors to more clinical training, more policy discussion, more economics, more history, even a tad more sociology. It is arguable whether this stuff is well done or whether there is enough of it (or in some cases, too much). But I cannot see that it or anything else represents a regression. The good old days in fact were terrible—narrow, mean-spirited, deliberately and defiantly ignorant of the world.

Of course even during the heyday of Langdell or of Legal Formalism, we should be skeptical, as I have suggested, about the actual thought-processes of judges. It may be a mistake to take what they said at face value—all those pious claims about the neutrality of the law, about being bound by precedent, and so on. In the end, it hardly matters whether the judges were true believers in formal rationality, or true believers in laissez faire, or whatever. They may have merely responded like Pavlov's dogs; they salivated when the parties dished up before them some fact situation, some argument, some principle that a person of their backgrounds, inclinations, training, and temperament was likely to respond to. And liberal judges of, say, the 1950s were in a way no different.

What role does legal education play in shaping the way judges think and the way they do justice? There is a chicken and egg problem here. Students, like judges, respond to certain lines of reasoning and reject others. But much of this probably depends on what kind of people they were, their backgrounds and personalities, before they ever got to law school. How much is a product of socialization inside law school is a question not easy to answer. And the professors, after all, are themselves only former students placed in front of a class. They are, of course, not a random sample of former students.

Nobody could be against reforming or improving legal education, at least not out loud. But how should we improve it? My personal preferences (unlikely to be realized) would not, alas, go in the direction I think Richard Markovits is suggesting. I would like to see more *real* skills training—training in what lawyers actually do; and I would like to see more study of the context in which legal systems operate. This means going for the history, sociology, and anthropology of law in a fairly big way. I would include the empirical

and theoretical parts of economics as well, though I would like to purge it of *its* tendency to look for right answers. Whether my own program would have much impact on the legal profession or on the judges is pretty dubious, but I would be willing to give it a try. At least it would give students a better and, at the same time, more practical education. I am, as I said, not very interested in taking legal argument seriously. But social justice through better understanding of the world in which the legal system lives and works—this I would take seriously indeed.