

NON-LEGAL THEORY IN JUDICIAL DECISIONMAKING

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My reflections about the use of non-legal theory in judicial decisionmaking flow from a basic understanding that law is a *semi-autonomous*, but only a *semi-autonomous*, practice.¹ In this essay I describe that practice as I understand it, then discuss how reliance on non-legal theory both constitutes the semi-autonomous practice that we know and threatens that practice's semi-autonomy. Finally, I offer some musings about the future.

I.

I take American law to be a complex set of rules, principles, and conventions² that aims to establish current rights and obligations by reference to past political decisions such as those reflected in the Constitution, statutes, and judicial precedents.³ Sometimes the controlling force of a past decision, as reflected in a legal rule or principle, is clear.⁴ On other occasions, however, establishing the connection between recognized authorities and current rights and obligations requires interpretation and argument. I agree with Ronald Dworkin that, especially in contestable cases, lawyers and judges generally seek to establish "the best" understanding of past political decisions, thereby to identify legal

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1. I should note two preliminary questions that I shall not probe in any detail. First, anyone could spend a long time querying the distinction between legal and non-legal theory that the title of the panel presupposes. For example, Ronald Dworkin's encompassing account of Law's Empire could be read to suggest that what might appear to the naive as "non-legal theories" are in fact subspecies of legal theory, all seeking their opportunity to make our law the best it can be. RONALD M. DWORKIN, *LAW'S EMPIRE* 238-39 (1986). Second, even if the distinction between legal and non-legal theories is allowed in principle, it may be difficult to define what non-legal theory is, or to reach agreement on what are and are not non-legal theories. In what follows, I shall simply assume that the academic disciplines of philosophy, political science, economics, and (perhaps more controversially) history furnish paradigmatic examples of "non-legal" theories.

2. See Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 *NOTRE DAME L. REV.* 553 (1992); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *HARV. L. REV.* 1189 (1987).

3. In this characterization, as in much else, I am deeply influenced by DWORKIN, *supra* note 1, but employ some elements of Dworkin's theory in service of an argument that differs from his position in several important respects.

4. See, e.g., Frederick Schauer, *Easy Cases*, 58 *S. CAL. L. REV.* 399 (1985).

principles that deserve to be extended into the future.⁵ In such cases, legal argument attempts to connect past decisions with current outcomes through the construction of what I shall call "narratives of deserved continuity."

Within these narratives of deserved continuity, descriptive and normative claims blend seamlessly. Legal reasoning and justification focus on past political decisions embodied in legal texts, but the texts instantiating those decisions must themselves be characterized—for example, as reflecting particular ideals of fairness or conceptions of efficiency. In cases of reasonable doubt, the interpretation that shows past decisions in the best normative light is typically preferred.⁶ Further, judges characteristically assume that past decisions should be applied in ways that are themselves fair and reasonable.⁷ Among other reasons for proceeding in this way, it is typically assumed that fairness and reasonableness are what past decisionmakers would have wanted.⁸ If this account is even roughly accurate, American legal practice could not be divorced from the inquiries of such diverse non-legal disciplines as history, economics, philosophy, and political science. Arguments about history, efficiency, fairness, and practical workability are part of the very fabric of the law.

Nonetheless, American law cannot be *reduced* to any other discipline, nor can legal analysis be reduced to any other methodology.⁹ This is so partly because the values, interests, and concerns illuminated by other disciplines may compete. Value-pluralism is a feature of both American society and American law.¹⁰ But there is an additional factor of even more fundamental importance. Legal reasoning is distinctively reasoning *about* past political deci-

5. See DWORKIN, *supra* note 1, at 238-39.

6. See *id.*

7. Cf. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 164 (1990) (stating that "statutes that embody mere interest group deals should be narrowly construed").

8. It deserves to be noted that the accuracy and even the coherence of this assumption are challenged by the diverse body of work commonly classified as "public choice theory." See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). The issues raised by this movement are large, and I cannot go into them here. Suffice it to say that the standard form of legal interpretation proceeds by imputing purposes to legal texts and that convention generally prefers the imputation of public-spirited purposes to characterizations of legislation as aimed at the gratification of politically powerful groups' naked preferences.

9. For an unusually vivid argument to this effect, see Arthur A. Leff, *Law and*, 87 *YALE L.J.* 989 (1978).

10. See, e.g., STEVEN SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990).

sions and their current implications *within* a set of interpretive conventions that is in some ways peculiar to the law.¹¹ Even when it borrows from other disciplines, law is a distinctive practice, with its own reality-making set of concepts, conventions, and expectations.¹²

II.

Within this rough and schematic picture, judges use non-legal theory in at least four ways. The first involves background assumptions. To craft legal rules and apply them sensibly, judges cannot help but make assumptions about what motivates human behavior, how markets work, and how institutions function.¹³ Almost inevitably, judicial assumptions of this kind are influenced by current theories in social science.¹⁴

A second use of non-legal theory is clarificatory or heuristic. Judges can use theories from such disciplines as philosophy, economics, and political science to illuminate what the law would look like if it were exclusively designed to promote some value or reflect some insight captured by a non-legal theory.¹⁵ Similarly, seeing that some such theories fit the legal materials better than others, a judge can use non-legal theory as a device for making sense of the law or imputing as much rational purpose as a particular body of law will bear.¹⁶ Used in a clarificatory or heuristic way, non-legal theories can shed great light on what is at stake in a particular case from a certain point of view and clarify how

11. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991); DWORKIN, *supra* note 1, at 95-96; Fallon, *Constructivist Coherence*, *supra* note 2.

12. See Leff, *supra* note 9.

13. See David L. Faigman, *Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 551-65 (1991).

14. The influence may be easier to see historically than contemporaneously, since we may tend to accept current theories without wholly appreciating their theoretical status. In the light of history, the influence of discredited theories is often unmistakable. Compare *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.") with Faigman, *supra* note 13, at 563 ("Holmes himself believed that all 'rules of law presuppose a certain state of facts.' In fact, it has been argued that Holmes's *Lochner* dissent was shaped by his own particular brand of Social Darwinism.") (footnotes omitted).

15. Much work in law and economics follows this approach by constructing "models" that are then tested against empirical reality. See generally RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 353-74 (1990) (discussing the "positive" branch of the economic approach to law).

16. A superb example of this approach, albeit in the academic literature, is Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165 (1967) (explaining just compensation law as largely reflecting overlapping prescriptions of utilitarian and deontological moral theories).

judges ought to proceed if that point of view were the only one that mattered.

A third judicial use of non-legal theory is motivational. A judge might take some non-legal theory to provide a reason to decide a particular case in a particular way. For example, a judge might adopt a principle of decision in order to promote economic efficiency¹⁷ or to advance Rawlsian principles of justice.¹⁸

Fourth, judges commonly employ non-legal theories in their opinions to justify or legitimate their decisions. As I have noted already, judicial opinions commonly tell a story of deserved continuity—a story that justifies normatively by associating controlling principles with widely shared societal values, such as those characteristically explored by such non-legal disciplines as economics and philosophy.

III.

I am not a legal historian, and it would lie far beyond my competence to chart the history of judicial use of non-legal theory. Clearly, however, there is nothing novel about this phenomenon. To cite but a single example, Chief Justice John Marshall apparently assumed that the Constitution should be construed to accord with true or enlightened political science, and his arguments often reflected this methodological commitment.¹⁹ For instance, his decision in *Marbury v. Madison*²⁰ rests on the assumption that legislators would not stay within constitutional bounds unless restrained by judicial review.²¹ About Marshall's successors, I would offer only the question-begging observation that the extent of reliance on non-legal theory, and the nature of the non-legal theories on which American judges have relied, appear to have varied enormously over time.²² The focus of my in-

17. This is the prescription offered by work in the "normative" branch of the law and economics movement. See, e.g., POSNER, *supra* note 15, at 353-62, 374-84.

18. See, e.g., David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 59-70 (1974).

19. See PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 23-31 (1992).

20. 5 U.S. (1 Cranch) 137 (1803).

21. See *id.* at 176-77. A different political science, or theory of human nature, would have indicated that judicial review is unnecessary. See Faigman, *supra* note 13, at 557. Nor would it have taken any extraordinary imagination to contemplate this possibility, since "at that time no other democracy in the world employed a system of judicial review of legislative acts." *Id.* (footnote omitted).

22. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977) (tracing the emergence of an instrumental conception of law and its replacement

terest is a modern development: recent, prominent expressions of concern about law's allegedly declining autonomy²³ and worries that the increasing influence of other disciplines in legal reasoning risks "the death of the law."²⁴

Among the interesting questions about law's current semi-autonomy is whether legal reasoning can continue to rely so heavily on the methodologies and theories of other disciplines and still retain a distinctive identity. Professor Fiss's essay "The Death of the Law?"²⁵ raises similar questions, which become urgent for him in response to two influential movements in contemporary legal scholarship: Law and Economics and Critical Legal Studies.²⁶ As portrayed by Fiss, adherents of the Law and Economics school, or at least some of them, believe that the law generally does and pervasively should strive to promote economic efficiency.²⁷ Devotees of the movement draw their background assumptions largely from economic theory; they turn to economics for explanatory or heuristic models of existing doctrine; they commend efficiency as a motivation for judicial decisions; and they counsel use of economic theory as a justification for judicial decisions. For Fiss, the Law and Economics movement raises the

by a formalist conception that both reflected and applied a range of social scientific assumptions); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* (1992) (tracing the collapse of "classical legal thought" along with the social scientific conceptions that underlay it and the ongoing legitimacy crisis that has ensued); KAHN, *supra* note 19 (tracing changing paradigms of constitutional interpretation).

23. Cf. Richard A. Posner, *The Decline of the Law As an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 778-79 (1987) (welcoming increased judicial receptivity to "the insights of social science" but maintaining that "many legal scholars who today are breathing the heady fumes of deconstruction, structuralism, moral philosophy, and the theory of second best would be better employed studying the origins of the Enlow-Ettelson doctrine or synthesizing the law of insurance").

24. See Owen Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1987). Similar concerns are expressed in BRUCE ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984).

25. See Fiss, *supra* note 24.

26. Professor Fiss published *The Death of the Law?* in 1986, when the Law and Economics and Critical Legal Studies movements both appeared to be gathering momentum. My own sense is that both movements have lost momentum over the intervening years. Each remains influential, and the Law and Economics school in particular may be gaining converts, but neither currently appears likely to achieve a position of intellectual dominance in the legal academy. If this assessment is correct, the threat that Fiss saw to law as we know it may have diminished. The threat, of course, is not that there might one day be nothing called law, but that what we call law today—something that reflects the values and assumptions characteristically deployed and studied by a variety of disciplines, but that possesses a distinctive, coherent set of concepts and meanings that cannot be reduced to any of them—would be both so transformed and so lamentably inferior as no longer to merit the designation.

27. See Fiss, *supra* note 24, at 2-3.

threatening possibility that law might one day become little more than a branch of applied economics.

Matching the Law and Economics movement on the left, according to Professor Fiss, is the Critical Legal Studies movement, which Fiss understands as propounding the thesis that "law is politics."²⁸ On the critical view as rendered by Fiss,²⁹ law imposes no substantial constraint on judicial decisionmaking; judges are free to decide as they will; legal argument is as open-ended as political argument. As with the Law and Economics movement, the threat is that critical ideas initially propagated in the academy will furnish the background assumptions for a new generation of lawyers and judges; that heuristic models of patterned contradiction will become increasingly common at the bar and on the bench; and that political ideology will increasingly seem an acceptable motivation, and become a common justification, for judicial decisions.³⁰

Viewed together, Fiss's thesis and proclamations of law's declining autonomy raise two questions that I now wish to address. The first has to do with the nature of law's semi-autonomy and the way in which it might be threatened by reliance on non-legal theory. I have asserted already that legal argument is distinctively argument about texts reflecting past political decisions. This aspect of law's autonomy seems relatively secure. But when judges make claims of a kind that appeal to history or that sound in the vocabulary of economics, philosophy, or political science, are they doing applied social science, or does law somehow co-opt the other disciplines and alter the standards by which particular claims should be assessed? The second question is whether the way that judges use non-legal theory—especially in purporting to justify their decisions—does not invite the charges of manipulation and incoherence pressed by critical legal scholars.³¹

28. *See id.* at 9-10.

29. Characterizing the Critical Legal Studies movement is a tricky enterprise, and I do not wish to be understood as endorsing Fiss's portrait. For recent, sympathetic surveys, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); Mark Tushnet, *Critical Legal Studies: A History*, 100 *YALE L.J.* 1515 (1991).

30. *See also* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *MICH. L. REV.* 34 (1992) (emphasizing the long-run effects of legal education on the legal profession and criticizing the Critical Legal Studies movement).

31. *Cf.* Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1070-72 (1984) (arguing that more honest justificatory narratives are needed if law is to achieve interpretive integrity and not leave itself vulnerable to nihilist critics).

IV.

In considering the current status of law as a semi-autonomous practice, it may be useful to begin with what many judges and lawyers would regard as an embarrassing truism. It is notorious that judges and lawyers frequently use historical sources in ways that historians regard as scandalous,³² engage in bad economic analysis, rely on insupportable political science,³³ and advance shallow if not shoddy philosophical arguments. This fact about legal practice inspires a question: Is it possible that what would be bad history, economics, political theory, or philosophy is sometimes acceptable, or possibly even good, judicial *justification* for a decision under the distinctive standards of the law?

My tentative thesis, which is largely inspired by the work of Philip Bobbitt³⁴ but which I believe ultimately departs from his views in important respects, is that judges can make claims about history, philosophy, economics, and political science that would be regarded as shallow or discreditable by practitioners of those disciplines but that do not offend the minimal standards of acceptability for performance of their own distinctive craft. An explanation for how this could be so includes at least three elements.

First, law is a practical discipline, with a need to reach closure swiftly. Resolution of a case cannot always await all of the empirical investigation or development of close reasoning that a decisionmaker would ideally want.³⁵

Second, as I argued earlier, implicit norms of the judicial craft call upon judges, where reasonably possible, to explain their decisions as reflecting principles or policies rooted in past, legally authoritative decisions that *deserve* to be applied in the present.

32. See, e.g., Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

33. See, e.g., Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (questioning the theory, widely thought to underlie modern equal protection doctrine, that "discrete and insular minorities" are peculiarly disadvantaged in the political process and therefore deserving of special judicial solicitude on that ground).

34. See BOBBITT, *supra* note 11 (arguing that ethical, prudential, and historical arguments in law remain distinctively legal and should not be treated as poor specimens of the kind of ethical, prudential, and historical arguments offered in other contexts). I am also influenced by a sympathetic review of Bobbitt's book. See Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270 (1993) (book review).

35. See, e.g., *Witherspoon v. Illinois*, 391 U.S. 510, 512-23 (1968) (noting the constitutional relevance of the question whether excluding potential jurors who oppose the death penalty tends to produce juries biased in favor of conviction but noting that the available evidence was too fragmentary to support an affirmative conclusion).

For a variety of reasons, including the pressures to decide and the limits of time, arguments that purport to justify a decision as uniquely correct may have to claim more than they can prove.

Third, as I have argued elsewhere,³⁶ the implicit norms of our legal culture frequently countenance, and even applaud, judicial opinions that mask underlying tensions in the law's narratives of deserved continuity. Our constitutional culture recognizes the relevance of at least five kinds of factors to constitutional adjudication: the constitutional text, the framers' intent, constitutional structure, precedent, and value-based arguments such as those of efficiency and fairness.³⁷ Yet it is a very striking feature of our practice that it is the *rare* judicial opinion that recognizes any conflict among these factors. The typical opinion tends to depict or assume a harmonious conjunction, in which all point toward the same result.³⁸

How can uniformity of this kind be achieved? Sometimes the history is shaded, not to lie about the goals or purposes of the Constitution's framers or a statute's authors, but to achieve an interpretation of those goals or purposes that supports an economically efficient or fair outcome at the time of the court's decision.³⁹ Sometimes a shallow economic or philosophical analysis helps to buttress imposition of a rule dictated by precedent, when a deeper analysis would sow doubts. Sometimes a poorly grounded political scientific analysis is invoked to allay concerns that some value of constitutional relevance has been ignored entirely.⁴⁰

36. See Fallon, *Constructivist Coherence*, *supra* note 2, at 1194-1209.

37. See *id.*; see also PHILIP BOBBITT, *CONSTITUTIONAL FATE: A THEORY OF THE CONSTITUTION* (1982) (developing a similar though not identical typology of constitutional arguments).

38. See Fallon, *Constructivist Coherence*, *supra* note 2, at 1193, 1239.

39. The process of accommodation is facilitated by the fact that legislative intent can be stated at varied levels of abstraction. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 238 (1980). The available evidence is also often conflicted. See *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.").

40. See, e.g., *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 556 (1985) (arguing that structural features of the federal system "ensure that laws that unduly burden the States will not be promulgated"). Although the argument offered by the *Garcia* Court was unconvincing, see Martha Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 109-110 (1985), subsequent studies have adduced support for the thesis that states as states do possess considerable influence in Congress. See William Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Carol Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW 301 (1988).

Shading and shallowness of this kind are countenanced, I think, because of a widely shared if seldom articulated belief that judicial opinions, as the law's justificatory narratives, ought to be reassuring. If so, it would be natural that conflicts of values—between fidelity to past democratic decisions and economic efficiency or moral justice, for example—are widely concealed. As Professor Fiss has written, judges learn to read legal materials in ways that do not lead to trouble or contradiction.⁴¹ The way to avoid trouble or tension within the law's justificatory narratives is often for judges to engage in shallow or simplistic historical, economic, or philosophical analyses. This happens most often, I think, when judges quote from, rely on, or simply fail to challenge the shallow analysis of cases that they cite for authority. But sometimes, I think, judges are more nearly purposive in their search for historical, economic, philosophical, or political scientific arguments—including shallow ones, if necessary—that cohere with and thus tend to support arguments and conclusions to which the judges are committed on other grounds.⁴²

This, I should be clear, is an empirical thesis, and I want to make sure to cast it correctly on one crucial point. Professor David Shapiro is among those who have written most eloquently about a fundamental requirement of judicial candor.⁴³ The integrity and ultimately the legitimacy of our system, he argues, depend on judicial truth-telling. With his thesis in mind, I feel troubled by the question whether my claim that judges commonly rely on theoretical propositions that they know or ought to know are shallow or questionable should count as an indictment under Shapiro's standards.

For now I would only insist that there is often no sharp line between arguments—including the justificatory arguments offered by judges—that are treated as legally colorable and the bald-faced misrepresentations that professional standards condemn. Sometimes judges cross the line; critical academic writing numbers among the disciplining mechanisms by which conventions of acceptable argumentation are maintained.⁴⁴ Yet given the pressure for judges to provide reasons for their conclusions

41. Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

42. I have described the process before as one in which judges seek "constructivist coherence" among the various legally relevant factors. See Fallon, *Constructivist Coherence*, *supra* note 2.

43. David L. Shapiro, *Judicial Candor*, 100 HARV. L. REV. 731 (1987).

44. See Faigman, *supra* note 13, at 603-05.

that are at least not inconsistent with the results indicated by a multiplicity of factors, coupled with the pressure to reach decisions quickly, it is almost inevitable that some tolerance of shallow, result-oriented argumentation would exist within our legal practice.

Having struggled somewhat uncertainly to articulate a thesis about the role of shallow non-legal theory in judicial opinions, I want to offer a few immediate qualifications. First, I certainly do not mean to deny that judges sometimes do, and are required by professional standards to, break from the mold of presenting unconflicted justificatory narratives. Every great judge does this sometimes, typically to stimulate consideration within the profession and plant the seeds of doctrinal reform, and occasionally to justify a rather plain innovation in a particular case. I have only meant to suggest that the standards of what is *acceptable* as argument and justification in law, even if not ideal, differ in an interesting and important way from the standards of acceptability prevailing in disciplines on which law increasingly draws.

Second, I do not believe that a judge should ever fail to reckon honestly with the best arguments presented against the result that he or she reaches. Neither, however, do I believe that a judge is always obliged to go beyond the arguments urged by counsel. Moreover, where a judge believes that a conclusion is justified on balance, I do not understand professional norms as always requiring judicial opinions to engage in an evenhanded weighing of every subsidiary argument.

Third, my claims have mostly to do with what counts as an acceptable *justificatory* use of non-legal theory. The sophistication of a judge's background assumptions and capacity to understand the practical and theoretical stakes of a dispute are crucial indicators of judicial excellence. I do not mean to suggest that if shallow analysis is sometimes acceptable in judicial opinions, it should also be deemed good or acceptable in a judge's effort to understand a case.⁴⁵

45. I also want to distinguish the role of the scholar from that of the judge. Advocacy scholarship, written to show judges a clear path to a preferred outcome, has its place in the academy, but that place is only secondary. Exposure of conflict and uncertainty is often a way station to the deeper understanding that should be scholarship's ultimate goal.

V.

Thus ends the presentation and qualification of my empirical thesis, which was offered partly to explain how American legal practice has so far managed to draw so heavily on non-legal theories while retaining an important semblance of relative autonomy. Supposing that the empirical thesis is true, I now want to ask whether the situation is likely to prove stable. Is it not likely that law's increasingly self-conscious reliance on non-legal theory will move the law, willy-nilly, toward adoption of the standards of the disciplines from which law borrows? If so, will not law's relative autonomy necessarily be compromised? On the other hand, if law does *not* move to adopt the standards of non-legal disciplines for assessing economic, political scientific, and historical arguments, isn't the law's integrity at risk? Isn't cynicism, possibly even nihilism, invited? There are at least four possibilities.

First, law might move increasingly toward acceptance of the methodology, concepts, insights, and values of some *one* non-legal discipline, with economics being the most likely candidate. Despite the large influence of the Law and Economics movement, it seems unlikely to me that law will ever be taken over by economic analysis in the way feared by Professor Fiss.⁴⁶ Value-pluralism is prevalent in our general, as well as our legal, culture, and an exclusively economic framework would require too much reductionism to be tolerable. Although one instance by no means constitutes a trend, I find it interesting that one of the founders of the Law and Economics movement, since reaching the bench, has embraced a value-pluralist approach to law and adjudication that he characterizes as "pragmatism."⁴⁷

Second, law might retain its value pluralism, and continue to draw on a number of non-legal disciplines, but adopt the standards of other disciplines for assessing economic, philosophical, political scientific, and historical claims. Writing about judicial use of social science, Professor Faigman appears to regard this result as necessary for courts to maintain the integrity on which their legitimacy ultimately depends.⁴⁸ It is unlikely, however, that judges will ever be held to the standards of other disciplines in their use of what might plausibly be viewed as non-legal theories. For the profession to begin to hold judges to the analytical and

46. See Fiss, *supra* note 24.

47. See POSNER, *supra* note 15, at 454-69.

48. See Faigman, *supra* note 13, at 601-05, 612-13.

truth-telling standards of other disciplines would almost certainly necessitate much more frank acknowledgement of both uncertainty and conflict within law's justificatory narratives than typically occurs today. The effects on our legal culture are difficult to predict, but I think the strain would be considerable. It is striking to me how little movement in this direction has occurred.

Third, and in some ways to me most alarming, the jerry-built character of prevailing legal standards for judging economic, philosophical, and historical claims could win increasing credence for the view that legal analysis lacks integrity.⁴⁹ If the perception that legal argument lacks integrity were to gain widespread acceptance, legal practice would likely tumble into a more acute form of the legitimacy crisis that has afflicted it for much of this century,⁵⁰ until possibly being rescued by reformative trends in the general culture, a paradigm-creating breakthrough in legal theory, or some combination of the two. Right now, however, I cannot imagine the form that a jurisprudential revolution of this kind might take.

Finally, legal practice might go on substantially as it has. As I have suggested repeatedly, our law could not imaginably keep other disciplines out; a variety of considerations dictates that law can be at most partly autonomous. As I have also argued, however, there are reasons to doubt the likelihood of law's wholesale adoption of the analytical standards of any other discipline. Reliance on somewhat jerry-built standards therefore might continue as the way of compromise. I have meant to emphasize, however, that there is no guarantee that this will be so.

VI.

I conclude with a sense of having traveled far but made little advance. Judges do, and apparently must, rely on non-legal theory. Yet when judges make claims that would appear to invite assessment under the standards of other disciplines, the conventions of our legal practice frequently countenance judicial analyses that appear shallow, even shoddy by the standards of non-legal disciplines. The situation is peculiar and quite possibly

49. See *supra* note 13 and accompanying text.

50. See generally HORWITZ, TRANSFORMATION 1870-1960, *supra* note 22 (describing the legitimacy crisis attending the collapse of "classical legal thought"); EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 159-78 (1973).

unstable—though not even this much seems sure. I am left with nothing so much as a sense of the enormous cultural and historical contingency of American legal practice.

