IT'S CONFLICT ALL THE WAY DOWN

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Ever since a colleague at the National Labor Relations Board caught me pulling a Harvard Law School Yearbook out of my backpack ("Wake up feeling a little insecure this morning?" she asked wryly. "Does toting that around help?") I have been careful to keep law school artifacts from prying eyes. In fact, my reasons for carrying the yearbook were less revealing, or at least revealing in a different way, than my colleague had assumed. In those days, just like these days, I biked to the office, and in those days, just like these days, I carried work back and forth in a backpack. But in those days, unlike these days, the materials I carried frequently included official documents, so I needed a way to protect them from sweat and mutilation during the long journey through Rock Creek Park—a task perfectly suited for the only oversized, hardcover coffee-table-style book I owned in those far more Spartan times.

Chastened by that exchange and similar ones over the years, I have taken to keeping the yearbook and various incoming scuds—Harvard Magazine, the Harvard Law Record, fundraising letters, etc.—far away from the office, and I don’t leave them lying around in the more public areas of my home either. They do make for amusing reading—whether or not I am feeling insecure—so I’ve settled for keeping such materials on my bed stand, the place reserved for even more embarrassing things in an earlier stage of life.

And so it was that one afternoon several years ago my wife entered our bedroom and found my then ten-year-old step-daughter thumbing through a magazine on the bed stand. Pam was about to ask Blair what she was doing when Blair suddenly dropped the magazine and cried, “What’s that??!!” Assuming that her daughter had just encountered a dead palmetto bug pressed between the pages—a not uncommon experience here in South Florida—Pam carefully retrieved what turned out to be the

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Fall 1996 issue of the law school alumni magazine, the *Harvard Law Bulletin*. The source of Blair's fright was not a bug at all, but was instead Duncan Kennedy, whose picture appeared in a collection featuring a number of professors who had just been honored with named chairs. The picture—and its stark contrast to those of the other honorees—is pointedly described in Peter Goodrich's Essay, and no doubt it was the dark glasses, heavy boots, and black leather jacket that prompted Blair's startled response. "Oh, that's just Michael's favorite teacher from law school," Pam reassured her. Blair's reply (and for full effect you have to picture the exaggerated roll of the eyes and the look of utter disdain that accompanied it): "Well, *that* figures."

Doesn't it, though? In point of fact, some twenty years earlier I had encountered a similarly striking contrast when Duncan taught Contracts to my first-year section. While our other professors set a decidedly sober and professional tone by wearing jackets and ties (and, in one case, a snazzy-looking three-piece suit), Duncan sported a black turtleneck, a tattered-at-the-elbows ice-pink sweater, and shoulder-length hair, and he lounged comfortably atop the desk as we entered his classroom for the first time. I can still recall the monumental sense of relief at his announcement that we were free to "pass" when called on, and the amazement I felt when he stated that his only rule was that you weren't allowed to raise your hand while another student was talking—a salutary effort to counter a socially insidious practice that our other, more appropriately attired professors were already encouraging, albeit with varying degrees of malice.

In any event, the point of the opening story is that (as usual) Pam and Blair had it right on the money: Duncan was my "favorite teacher," and "*that* figures." But for me it figures less because of the considerable comfort I felt in his classroom than because of the comfort I felt during a half decade of law practice, for which (the conventional wisdom about the utility of legal theory in general and critical legal studies ("cls") in particular to the contrary notwithstanding) I found myself exceptionally well-prepared, thanks almost exclusively to Duncan. In a nutshell, his Contracts course taught us that there were recurring patterns in legal argument—patterns of rules, reasons, purposes, and policies and (more to the point) of counterrules, -reasons, -purposes, and -policies—that bore a complex but fascinating relationship with structures of ideological conflict within American Liberalism. Indeed, at the time he was in the midst of writing one of the

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original critical legal studies, *Form and Substance in Private Law Adjudication*, and so it is no surprise that structures of conflict—most famously, individualism vs. altruism—were as much a part of the classroom show as the rhetorical thrust and parry.

Which brings the story back to the National Labor Relations Board, where I did appellate work between law school and teaching. The Board is the administrative agency that prosecutes unfair labor practices—chasing down employers who fire employees for union organizing and unions who persecute dissidents—and my job was to draft briefs and present oral arguments on the Board's behalf in federal courts of appeals around the country. (As Pierre Schlag might put it, it was moot court for life; but it was moot court with wings and a per diem.)

This was obviously the perfect testing ground for the deployment of Duncan's argumentative strategies and techniques. To be sure, I thought about my other law school professors from time to time, though mostly when a crabby appellate court judge acted like one of them during oral argument. (*Relax, I would think to myself. He's not your father, and he's not even Arthur Miller. And besides: You actually understand the case this time.*) But—as a classmate who was clerking for a judge on the Seventh Circuit put it during our second year out of school—the lessons we learned from Duncan about argument construction we used in our real-world jobs every single day.

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The concept of "indeterminacy" was more implicit than explicit in Duncan's teaching in 1975. One certainly came away from his classes with a strong sense of play in the elaborate rhetorical structures he would dash across the blackboard, but I don't remember ever hearing him (or anyone else, for that matter) actually *use* the word while I was in law school, and I certainly don't remember him making global "anything goes" pronouncements of the sort regularly attributed to cls only a short time later. Duncan was taking doctrine seriously—so seriously that it is only a slight exaggeration to say that he spent more time analyzing its nooks and crannies than did the rest of my mostly mainstream law school professors put together.

Truth be told, the notion that "legal rules don't decide cases" was something I always thought I figured out on my own, not in law school but while I was in practice. It is something that most

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2 Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976) [hereinafter Kennedy, *Form and Substance*].

labor lawyers are likely to figure out sooner or later. The experience of handling several dozen appellate cases persuaded me that the traditional legal materials—statutory text and purpose, legislative history, interpretive precedent, etc.—were only part of the story, and sometimes a very small part.

For one thing, there was always the make-up of your panel of judges. Well-crafted arguments could rally labor’s friends, frequently persuade the moderates, and even occasionally win grudging assent from hard-core opponents. But no matter how strong your case and how seemingly persuasive your arguments, if you drew the wrong panel—and even then every circuit had its share of judges openly hostile to labor’s cause—you (and, more to the point, the employees whose interests you were representing) were unlikely to eke out a victory.

There were times, moreover, when your persuasive talents didn’t seem to be of much help even among friends. After a couple of years of practice, I began to suspect the existence of a “hidden topography” in labor law—a set of understandings unarticulated but seemingly widely shared among judges and lawyers of all stripes.

Sometimes the understandings created a “free space” in which the usual argumentative work of appellate advocacy was simply unnecessary, enabling the brief- or opinion-writer to make what seemed to me to be breathtakingly tendentious points without offering the slightest support from either the record or the legal materials. Quickly to mind comes the short and authority-free passage at the crucial analytical point in International Brotherhood of Teamsters v. Daniel, the unanimous Supreme Court opinion concluding, remarkably enough, that employee pension plans aren’t “investments” (and accordingly aren’t covered by the antifraud provisions of federal securities law), and drafted by no less a giant of the craft than the late Justice Lewis Powell:

Only in the most abstract sense may it be said that an employee “exchanges” some portion of his labor in return for [participation in a pension plan]. . . . He surrenders his labor as a whole, and in return receives a compensation package that is substantially devoid of aspects resembling a security. His decision to accept and retain covered employment may have only an attenuated relationship, if any, to perceived investment possibilities of a future pension. Looking at the economic realities, it seems clear that an employee is selling his labor primarily to obtain a livelihood, not making an investment.  

5 Id. at 560 (citation omitted).
Other times the tacit understandings had the opposite effect—telling you what you couldn’t argue, rather than what you didn’t have to prove, and forcing you to defend employees in condescending rather than straightforward and unapologetic terms. In challenging the dismissal of strikers for their efforts to prevent replacement workers from crossing a picket line, for example, you were supposed to argue that emotions run high in the strike setting and that working folks just can’t help but succumb to an occasional “moment of animal exuberance.” But you couldn’t argue that they ought not to suffer discharge for trying to protect their jobs in much the same way that most of us would try to protect our homes and families against a similarly threatening invasion. After all, the jobs weren’t “their” jobs—just as all their work wasn’t an “investment.”

Thus it was that you frequently found yourself forced to fight on enemy terrain, and although you could still pull off some surprising victories now and then—hidden topography didn’t “determine” individual outcomes any more than legal rules did—it was an uphill battle all the way. And the hill, of course, was capitalism.

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By 1983, President Reagan had appointed a majority of the five-member Labor Board, and so it was time for me to get outta Dodge before I had to begin defending their handiwork in court. Imagine my delight when I discovered that Duncan and his fellow travelers had in the meantime become a full-fledged academic “conference”—with annual meetings and a summer camp and an emerging Canon and even an underground paper. (My first publication as a law professor, I am proud to say, was in The Lizard.) And imagine my further delight when I discovered that the lessons I had learned in legal practice turned out to have an important place in cls lingo: “indeterminacy” (cases can come out either way); “law is politics” (adjudication is a profoundly ideological activity); and “tilt” (that hidden hill is capitalism, and it’s bigger than the both of us).

So imagine my dismay when I found out that you really weren’t supposed to believe in all three of those ideas at the same time. Although the view that “law is politics” was widely accepted among “the crits”—in retrospect no doubt largely as a result of the fact that it meant different things to different people—the

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movement with which I was enthusiastically plighting my troth was divided over the supposed tension between "indeterminacy" (cases can come out either way) and "tilt" (oh no they can't)—a tension, I confess, that had escaped me when I thought I was experiencing both of those phenomena, intensely, in practice. But depending on your point of view, one of those notions represented the true left and the other was either vulgar Marxist residue or just plain irresponsible.

To their credit, in a way, my most senior colleagues at the University of Miami saw no conflict at all between "indeterminacy" and "tilt"; less to their credit, they were perfectly happy to try to get me fired for espousing either of them—and most of all for advocating the view that "law is politics." Duncan thus finds himself in odd company, for in the book that brings us together for this symposium, he focuses his critical fire on each of these ideas, and neither they nor critical jurisprudence will ever be the same.

Indeterminacy. Leave it to Duncan to discover a "loopified" field in the clash between the partisans of radical indeterminacy and the rule-of-law squad—to carve out not so much a middle position as a position that manages to outflank the extremes: Sometimes the judge is bound by the legal materials; sometimes she's not; but when she thinks she's bound, she never knows whether she's correct in that view or merely inadequate to the task of ferreting out a persuasive argument for a different result.

Law is politics. Here Duncan picks up where he left off with his 1985 critical phenomenology of judging, and the basic pitch is this: If you want to understand the politics of American law, the best place to start is inside the judge's head as she struggles with the legal materials to achieve results in individual cases. But the struggle Duncan depicts bears precious little resemblance to the conventional image of the judge torn between her political agenda and the obligations of faithful law application.

For one thing, in Duncan's account "politics" isn't just something that the judge brings to legal decision making from the outside; instead, a large dose of politics is already there when she arrives. Thus, the legal materials with which the judge is bound to work are saturated with "policy" arguments of the sort that no self-respecting and even remotely sophisticated post-Realist

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7 See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE (1997) [hereinafter CRITIQUE].
lawyer would leave home without. And “policy” arguments—which in effect bridge the gap between straightforward appeals to established authority (rules, precedents, etc.) and naked, extralegal appeals to politics—are the “Trojan horse” of ideology in American law, enabling the judge who invokes them to “deplo[y] the full range of ‘social values’ that are conventionally understood to be relevant to choices among norms” and thus ostensibly forbidden grounds for adjudication.9

Duncan’s account of the judge who is working with these very political materials is likewise at odds with the conventional view; indeed, tracking his take on indeterminacy, Duncan’s analysis here once again outflanks the extremes in the traditional debate. On the one hand, that bogeyman of mainstream jurisprudence—the activist ideologue tempted to enact her politics into law—will more than occasionally find herself bound by the legal materials to reach a result with which she disagrees, perhaps strongly. The much maligned “rogue judge”—in Duncan’s account, a liberal or conservative “constrained activist”—doesn’t roam at large after all.

On the other hand, the very judges conventionally assumed to be the least political turn out to be far more ideologically attuned than anyone before has suggested. Duncan identifies these folks as “difference-splitters” (who endeavor to locate a compromise between the respective claims of their liberal and conservative activist colleagues)10 and “bi-polar” judges (who side sometimes with one group and sometimes with the other, in order to maintain a posture of independence),11 and in his account it is clear that both types are negotiating the terrain of ideology, albeit following maps drawn by others.

What’s more, where the rogue-judge thesis is typically understood to predict that ideological judges will push the law to the political extremes (Lochner12 to the right and Roe v. Wade13 to the left), Duncan’s take is that a principal effect of ideological adjudication in the American context is a moderating one: Legislation and common-law doctrine—however liberal or conservative in inception—tend to “regress to the mean” under the accumulated effect of judicial interpretation. All concerned are in deep “denial” about the politics of law, and elite partisans from both camps perpetuate the myth of apolitical judging in order

9 CRITIQUE, supra note 7, at 110.
10 See id. at 184-85.
11 See id. at 185-86.
to keep their "moderating" powder dry in the event that the other side is ever able to capture the legislative branch and enact its worst vices into law.

**Tilt.** If Duncan finds the legal materials to be too constraining to be indeterminate, he finds "tilt" to be too indeterminate to be constraining. But this isn't your grandfather's relative autonomy; for Duncan, the search for "what's really going on" beneath the rhetorical thrust and parry—it's not law, it's politics; it's not politics, it's breakfast; it's not breakfast, it's Liberalism; it's not Liberalism, it's culture—is as fruitless in its own way as the efforts of mainstream legal theorists to put Humpty-Dumpty back together again (and again and again) after the Realist critique of formalism. Watch his dust:

Within the opposing sides in the legal argument there are opposing sides in an ideological argument, and within them antagonistic character types and within them opposed cultural styles and within them... opposed modes of legal discourse. There is a circle or an infinite regress, in which there is never a determining outside discourse or fact but a series of never final unveilings.\(^4\)

It is, in other words, conflict all the way down.

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Duncan thus reduces the tension between the seemingly incompatible claims of "indeterminacy" and "tilt" by offering a more modest version of each than the positions historically attributed to cls. And while his account portrays politics as an utterly pervasive force in law—residing not only in the motives of judicial activists but also prominently in the calculations of supposed moderates and indeed even in the rhetorical structures of the law itself—the politics at stake are far more modest than a generation of cls has assumed. For on this account, the ideological dimension of adjudication comes down to the familiar American conflict between political liberals and conservatives—not the politics of what Duncan refers to as big-L Liberalism, the larger (big-I) Ideology within which the endless debates between liberals and conservatives serve mostly to distract us from the many issues that are not debated at all.

All that modesty gets Duncan into trouble in this crowd. Jane Baron wonders whether Duncan is moderating his claims in order to sell them but worries that in so doing he is selling them short.\(^5\)

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\(^4\) *Critique*, *supra* note 7, at 289.

Similarly, Tamara Piety suggests that Duncan would rather be right about modest claims than run the risk of being wrong about important ones and notes the irony of that stance, given Duncan's relentless rejection of "rightness in all its forms." Joanne Conaghan takes issue with Duncan's modest account of ideology because "[i]t tells us nothing about the role judges play in reproducing what is generally perceived to be nonideological" and thus "neglect[s] the role of adjudication in reproducing and reinforcing what is politically taken for granted." Striking a similar note, Steve Winter critiques a failure to recognize that "law is always ideological in the sense that it enforces (and reinforces) the dominant normative views of the culture" and that "the ideological dimension of law is most pronounced precisely when judges are... unaware of the normative entailments of the conceptual materials with which they work."

As I read the book, Duncan's embrace of self-professedly "chastened" views is not the product of some midlife moderation crisis but rather the result of his long-standing fascination with the moment of choice in judicial reasoning. (Critical Legal Sartre indeed.) Some of our most cherished cultural myths to the contrary notwithstanding—"we are a government of laws, not men"; judges should follow the law, not make it—judges make choices all of the time. They choose between rules (e.g., contributory vs. comparative negligence); they choose between interpretations (e.g., broad vs. narrow readings of a statute or a precedent); and—when the law's commands seem to conflict with their notion of a just outcome—they choose between giving in and pressing on in search of a plausible argument to the contrary. What is extraordinary about A Critique of Adjudication—and what is extraordinary about Duncan's earlier work on the phenomenology of adjudication—is how well it captures the strategic dimension of this moment of choice.

I was an appellate lawyer, not a judge (nor even a clerk to one), so I cannot confirm the accuracy of Duncan's account from a judge's perspective; indeed, a pair of local judges who attended a

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20 The sources of that famous adage can be found in Frank I. Michelman, Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 4 n.2 (1986).
21 See Kennedy, Freedom and Constraint, supra note 8.
faculty seminar that Duncan gave here in Miami several years back expressed nothing but skepticism about the portrait he drew of their work, and my colleague Pat Gudridge reported a similar reaction when he gave a lecture on Duncan’s book to a conference of state court judges from across the country. Yet as Duncan’s analysis suggests, it is possible that the principal difference between my perspective and theirs is born of the fact that—unlike judges—appellate lawyers have no need to be in denial about the strategic dimension of their legal work. And the experience of doing that work, at least at this time and in this legal culture, is an experience of relative (i.e., moderate) indeterminacy, huge and frequent doses of liberal vs. conservative (i.e., moderate) politics, and only an occasional glimpse of tilt.

But all perspectives are partial, and in order to focus like a laser beam on the phenomenology of choice, Duncan pays scant attention to what he refers to as “unselfconscious rule-following”\(^{22}\)—i.e., decision making that doesn’t seem to the judge to involve any choice at all. I think this led him to understate the ideological dimension of American adjudication in at least two important respects. Thus, I agree with Conaghan and Winter that ideology plays every bit as lively and important a role in the construction of what judges simply take for granted—what I described earlier as the law’s “hidden topography”—as it does in the conscious-but-denied judicial strategizing that Duncan so astutely explores. At the same time, my sense is that a lot of what passes for “unselfconscious rule-following” isn’t nearly as unselfconscious or as constrained as Duncan’s account suggests.

The decision to relegate to the sidelines a large body of work mapping political terrain that most judges and other participants in the legal system don’t experience as political at all—in other words, to bracket “tilt”—is a bit surprising in a book that explores the role of ideology in law, and, major fan though I am, Duncan will have to say more than he has thus far to persuade me otherwise. It won’t do to suggest that the taken-for-granted is “worth study” as a product of “authoritative discourse in general” but not in connection with “the specific institutional practice of adjudication.”\(^{23}\) The premise is clearly right: The Supreme Court Justice who concludes that “an employee is selling his labor primarily to obtain a livelihood, not making an investment”\(^{24}\)—like the judge who observes that “in every employment ladder from the lowliest to the highest, there will come a stage at which a

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\(^{22}\) CRITIQUE, supra note 7, at 160.

\(^{23}\) Id. at 405 n. 21.

woman who has family responsibilities must make a choice,” and the jury foreman who, upon hearing an eloquent closing by an African-American lawyer, exclaims “[t]hat Nigger was good!” and proceeds in the face of both law and evidence to the contrary to vote for the conviction of the African-American defendant—is revealing assumptions about class (or gender or race) that are no doubt as widely shared outside of the legal community as within it. But it doesn’t follow from the fact that he may be doing so unwittingly that either the performance or its effects should be of less interest to scholars exploring the ideological dimension of law qua law. Indeed, Duncan’s own account repeatedly stresses the fact that judges are working with politically saturated materials and disposing of important stakes in politically contested terrain, conditions that are certainly met whether a judge is operating self-consciously, unselfconsciously, or somewhere in between.

To be sure, Duncan does not altogether dismiss the role of class-, gender-, and race-based assumptions in “influencing” judicial decisions. His aim seems rather to be to put such considerations in their place and to reject the suggestion that they in any meaningful way “determine” legal outcomes. It is the left legacy of dividing the social world into base and superstructure—where law is understood as simply a means of facilitating and legitimating the “logic” of capitalism (or of patriarchy or of racial supremacy)—that is Duncan’s principal target:

Although “outside” factors influence adjudication, they do not impose on it an outside “logic.” The first reason for this is . . . that they do not determine the rules judges make, in any ordinary sense of the word “determine.” The second reason is . . . that neither the economic base nor patriarchy nor racial supremacy has any more internal coherence, any more “logic,” than the process of legal reasoning from the extant materials.

Fair enough, but the analogy—“outside” factors don’t “determine” legal decisions any more than “legal materials” do—is somewhat surprising. The point of Duncan’s careful and extremely nuanced account of “the process of legal reasoning from the extant materials” is that those materials exert a great deal more constraint on judicial decisions than proponents of “radical indeterminacy” have argued; the inference in the quoted passage is that they afford little constraint at all. What is missing is the

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26 Winter, supra note 18, at 760.
27 See CRITIQUE, supra note 7, at 405 n.21.
28 Id. at 289.
suggestion of a middle term—something between "anything goes" and "determinism," an account of the relationship between adjudication and "the dominant normative views of the culture" that is as careful and nuanced as Duncan's account of legal reasoning itself.

But here's what we get instead:

[G]iving up on the idea of a base whose structure determines legal rules does not mean giving up on establishing a connection between legal rules and their social, economic and political context. When we find that the discourse of legal justification is internally contradictory in ways that sometimes render it plastic, open to ideologically oriented legal work, we try to increase our understanding by "going deeper[.]")... by appealing to ideology, in the vulgar sense of liberalism and conservatism. 30 “Liberalism and conservatism”? As my then three-year-old nephew so memorably exclaimed—he was reacting to the scene in Disney's Beauty and the Beast when Belle suddenly finds herself surrounded by the same wolf pack that had menaced her father earlier in the movie—"Oh, no! Not those guys again!" A principal point of a generation of critical work is that the debates between (small-l) liberalism and conservatism occur within a larger conceptual paradigm—big-L Liberalism, if you will—in which the assumptions of capitalism, patriarchy, and racial supremacy go largely unnoticed and in any event unquestioned. And while Duncan has offered a fresh and vibrant account of the role "those guys" play in adjudication, that account is only part of the story of the politics of American law.

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It is a different aspect of Duncan's argument about rule-following—his effort to distinguish cases involving either a choice between rules or a choice between interpretations of a rule (on the one hand) from cases involving a "mere" application of a preselected, preinterpreted rule to the facts (on the other)—that I'd like to explore for the remainder of this Essay. In "unselfconscious rule-following," he argues:

[T]he judge has facts before her and a single rule in mind. She is focused on the question of what happened, and there are two well-defined contradictory answers. If one version is what "really" happened, then it seems obvious that defendant has

29 Winter, supra note 18, at 772.
30 CRITIQUE, supra note 7, at 289.
violated the relevant rule; if the other, then the defendant has not violated the rule.  

"Where application means fact finding in this straightforward way," he explains at another point, "application will have ideological significance only where the intelligentsias anticipate that fact finding is a matter of choice, in the sense of being open to ideological 'bias.'"  

The burden of my argument is that rule application is far more problematic—and that so-called fact finding is "a matter of choice" far more often—than Duncan suggests in these passages and at a number of other points in the book. Indeed, I think it's possible to map the terrain of recurring factual arguments and counterarguments, and the relationship of those arguments to ideological conflict, in the same way that Duncan and others have outlined the "crystalline structure" of so much of the rest of legal reasoning.  

I begin with a caveat about the sketch that follows: I am doing some "bracketing" of my own, for I don't deal here with the credibility dimension of fact finding, where judges and other legal decision makers decide whether to believe the cop or the accused (or the man vs. the woman; the landlord vs. the tenant; the employer vs. the employee) when the parties and their witnesses

31 Id. at 160.
32 Id. at 61.
33 See id. at 32 (suggesting that "problematic cases of rule application" though "common" are the exception rather than the rule in American adjudication); id. at 60 ("[W]e can usually apply [rules] ourselves in ways that we anticipate will correspond exactly to the way others will apply them . . ."); id. at 276-77 (arguing that "we can and sometimes do formulate rules to minimize the need for value judgments in applying them to facts" and that "language can often be made concrete enough so that disagreements will be rare").
34 The seminal piece in this genre is, of course, Duncan's Form and Substance, supra note 2, and his subsequent work—particularly Duncan Kennedy, A Semiotics of Legal Argument, 42 SYRACUSE L. REV. 75 (1991) [hereinafter Kennedy, Semiotics], and chapters 3, 5, and 6 of Critique—has elaborated and refined it considerably; the "crystalline structure" reference is to Jack Balkin's The Crystalline Structure of Legal Thought, 39 RUTGERS L. REV. 1 (1986). Jeremy Paul and I attempt to compile a partial bibliography of this "semiotic" scholarship—a term I use with some trepidation after reading Goodrich, supra note 1, at 976—in our recent book, Getting to Maybe. See RICHARD MICHAEL FISCHL & JEREMY PAUL, GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS 323-25 (1999) [hereinafter FISCHL & PAUL, GETTING TO MAYBE] (listing works by Duncan and Jack Balkin, as well as by Jamie Boyle, Jennifer Jaff, and Mark Kelman, among others). Although it doubles as a how-to guide for students facing the challenges of law exams, the book is also an extended meditation on legal reasoning and argument construction, and it represents what we hope will be viewed as a contribution to this body of scholarship. The "exam" focus was designed to get students to actually read it and to provide a context for concrete demonstrations of the recurring patterns in legal argument. The analysis that follows is a first effort to theorize the rhetorical structures we identify in chapter 6 of the book ("Forks in the Facts"); it is also the groundwork for a larger work-in-progress, tentatively entitled The Politics of Facts.
offer conflicting accounts of an event. There is, to be sure, a complex politics to this sort of fact finding—as a colleague with a lot of jury trial experience once put it, a witness can frequently accomplish more by giving his name, address, and occupation than a lawyer can with her entire brief—but I am focused not on the problem of deciding whom to believe about “who did what to whom” but rather on the problem of figuring out what to do with such “facts” once we think we’ve “found” them.

Rule application decisions of the latter sort reveal a rich pattern of recurring conflict, and it is my sense that two distinct rhetorical operations contribute to that pattern. Thus, rule application will frequently present lawyers with the opportunity to argue one last time about the interpretation of the rule in question, and the arguments and counterarguments they offer will often be “nested” versions of the arguments and counterarguments deployed in the selection or adoption of the rule itself. Rule application will also frequently present lawyers with the opportunity to argue about the characterization of the facts at issue, and the arguments and counterarguments they offer will often focus on the appropriate degree of fact sensitivity and thus closely track the familiar debate over the relative merits of rules vs. standards. We can visualize these operations by imagining opposing lawyers attempting, on the one hand, to expand or shrink the rule to include or exclude their case (rule interpretation) and, on the other, to frame or counterframe the facts to take them inside or outside the rule (fact characterization); in many cases, of course, the lawyers will be undertaking both operations simultaneously. My argument here is that as they make these moves, two phenomena that have figured prominently in the legal semiotics literature—the nesting of argument-pairs in a never-ending contest of positions and the recurring debate about rules vs. standards—continue to exert their respective forces as we move from the more familiar terrain of rule selection into the relatively uncharted territory of rule application in a particular case. In other words—and no doubt you saw this coming—it’s conflict all the way down.

**Rule Application I: Rule Interpretation and Nested Conflict.** Let’s begin with a concrete example drawn from Duncan’s book, a

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tort case in which “A kills B in mistaken self-defense, when B was really trying to assist him.”^36 The “nesting” phenomenon can be seen when the debate shifts from the question of whether a defense of “mistake” should be permitted at all to the question—once a mistake defense is permitted in principle—of whether the mistake must be “objectively reasonable” or merely “in good faith”:

The plaintiff will say that the defense of mistake should not be allowed: “as between two innocents, he who caused the damage should pay”; we must protect the right of bodily security; we need to deter carelessness; a rule of no defense will be easy to administer. As to whether the defendant’s conduct has to be reasonable or merely in good faith, the plaintiff will make the same arguments: an objective standard because “as between two innocents,” we must protect the right of bodily security, we need to deter carelessness, an objective standard will be easy to administer. . . . [And in response, the defendant will offer] the exact same policy argument-bites that it endorsed when the question was whether there should be a defense of mistake [in the first place]: no liability without fault, the right of self-defense, encourage self-help, solutions should be sensitive to particular facts.^37

We can see this same “nesting” phenomenon—where the arguments deployed at one level of legal decision making reemerge at the next level down—when we move from rule (or subrule) selection to rule application, and this may be illustrated by taking Duncan’s mistaken self-defense hypothetical one step further.

Assume that the defendant won the first round (mistake is a defense) and that the plaintiff won the second (the mistake must be objectively reasonable) and that the question now is whether this particular defendant’s particular mistake meets the “objective reasonableness” test. That question will almost surely be viewed by the lawyers as an invitation to resume their debate as they urge broader vs. narrower readings of “objective reasonableness” in order to exculpate the defendant (a reasonable person wouldn’t risk waiting until it was too late to exercise the right of self-defense) or to inculpate him (a reasonable person would be careful to distinguish friend from foe before inflicting bodily injury). At the moment of application, then, the argument—“he who hesitates is lost” vs. “look before you leap”—ends up right back where it started.

^36 CRITIQUE, supra note 7, at 175.
^37 Id. at 175-76.
Or consider the debate in American contract law over whether the offeror should be liable for the offeree's reliance on an unaccepted offer—the debate made famous by the problem of the general contractor who relies on a subcontractor's bid. On the question of liability "in principle," the offeror is likely to argue that courts shouldn't make contracts for the parties, that liability should be promise based, and that a rule of "read my lips, no liability" is easy to administer. The aggrieved offeree is in turn likely to support liability by arguing that courts should protect reasonable commercial expectations, that liability should be reliance based, and that a more flexible approach is needed in order to calibrate results to the particular commercial circumstances. Once again, precisely the same debate will reemerge if liability is established in principle but is made to turn in an individual case on whether reliance should have been "reasonably expected" by the offeror. Parallel to the "nesting" we just saw in the context of mistaken self-defense, the parties will find themselves redeploying their arguments as they urge a broad reading ("the offeror should reasonably expect the offeree to rely on the bid before accepting it because that is the commercial norm") vs. a narrow reading ("the offeror should not reasonably expect the offeree to rely unless he first protects himself with a contract").

Similar examples abound—cases involving a determination of "negligence" in the context of an injury-causing accident; "coercion" in the context of a union organizing campaign; "consent" in the context of an alleged rape—and when we apply these standards to particular facts, and thus argue about how broadly or narrowly to read them, we almost invariably find ourselves revisiting the debates that led to their adoption in the first place (no liability without fault vs. responsibility for the consequences of your actions; employees as "free citizens" who are capable of discounting overheated campaign rhetoric vs. employees as economically dependent and thus vulnerable to even subtle threats; the primacy of bodily security and decisional autonomy vs. the right to rely on an "invitation" assertedly implicit in the social setting).

Duncan refers to relatively open-ended concepts such as these as "mixed questions of law and fact," and he concedes that their


39 See RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1979) (basing liability on the offeror's "reasonable expect[ation]" of reliance).
application may involve "a matter of choice" and thus be "open to ideological 'bias.'" But his effort to treat them as exceptional cases in the world of rule application is unconvincing. Unless there is something unusual about the regimes with which I am most familiar—the National Labor Relations Act, the Uniform Commercial Code, and the Restatements of Contracts and Torts—there are an awful lot of legal rules out there the application of which turns on precisely such questions.

More to the point, the burden of my argument is that the ideological significance of this dimension of rule application is not so much a function of the room to maneuver afforded by open-ended standards as it is a consequence of the fact that as we move from principle to particularity, the "nesting" phenomenon Duncan has so astutely uncovered never seems to stop. Lawyers who have pressed for different interpretations of "no vehicles allowed in the park"—e.g., a plain-meaning approach that interprets "vehicles" as "all vehicles" vs. a purposive one that interprets it as "motorized vehicles"—can be expected to renew their debate when they argue over how to apply the rule to the case of a motorized wheelchair. Likewise, when a municipal ordinance regulating restaurants requires two flush toilets "for every forty seats," the debate over the meaning of "seats"—e.g., a lay dictionary approach vs. a commercial context approach that interprets it as "seats available for meal service"—can be expected to continue when the rule is applied to an establishment with stools at the bar or a bench at the take-out counter. And when the Statute of Frauds requires a "signed writing," the debate over the meaning of "writing"—e.g., an historical approach that requires hardcopy vs. a commercial practices approach that focuses on how businesses actually record their transactions—can be expected to continue when the rule is applied to forms of electronic commerce we cannot yet imagine.

Indeed, it may well be that the principal functional difference between what we think of as a context-dependent standard and what we think of as a bright-line rule lies in the fact that "plain meaning" and "dictionary" arguments won't get you very far in a debate over the application of (say) a "reasonableness" test, whereas they might if we are trying to figure out what a "seat" or a "writing" is. Does this make me a rule skeptic? Perhaps, though it is a skepticism born of watching what lawyers and judges do with rules (and teaching those techniques to my students) rather than of any larger theoretical predisposition. Yet I do agree with Jeremy

40 CRITIQUE, supra note 7, at 61.
Paul that what lawyers and judges do with rules isn’t all that different from what regular folks do with language all the time. 41 When you ask me to shut the window, I may indeed shut the door instead if the reason for your request is that you are feeling a draft, and I decide that the door is the source of your discomfort. Have I acted in accordance with your request? I’m not sure, but I bet you’ll thank me for it later.

In any event, my point here is a more modest one. Seemingly defeated arguments live on to fight another day, even when the “questions of law” are finally settled and the lawyers are left to the mundane task of applying the resulting rule to the facts, for it’s nesting all the way down.

Rule Application II: Form and Substance in Factual Characterization. Let’s look one more time at Duncan’s description of “unselfconscious rule-following”:

[T]he judge has facts before her and a single rule in mind. She is focused on the question of what happened, and there are two well-defined contradictory answers. If one version is what “really” happened, then it seems obvious that defendant has violated the relevant rule; if the other, then the defendant has not violated the rule.42

It is frequently the case that this moment marks the beginning, rather than the end, of conflict over the application of a rule. Lawyers may offer competing accounts of the facts—designed to take the case into or out of the rule—and the debate here is less about what the facts “really” are than about how we should go about reading them. And when lawyers engage in this debate they will often draw on arguments that fall into familiar patterns. Consider the following examples:

One at a time vs. taken-together. One side will take a series of statements, communications, or events and measure them “one at a time” against the applicable legal test (do we have an offer? has the employer interfered with the union election?); read that way, the individual statements etc. won’t satisfy the test. The other side will argue that the statements “taken together” do indeed meet the test.

Words vs. actions. One side will focus on what the parties have said or written (the letter described the promised donation as a “gift”); the other side will focus on their actions or course of conduct (but when she made part payment she was obviously seeking a return commitment and thus proposing a bargain).

42 CRITIQUE, supra note 7, at 160.
Written vs. oral expressions. One side will focus on the “paper trail” (e.g., the personnel manual with the carefully crafted notice that all employees are “at will”); the other side will focus on conversations and oral statements (e.g., repeated assurances by the supervisor that your job is secure).

Literalism vs. reasonable expectations. One side will focus on the “fine print” (e.g., the details of an “add-on” clause or an idiosyncratic definition of a “break-in” covered by an insurance policy); the other side will focus on the reasonable understandings of the parties based on the purpose of the transaction, assurances contained in advertisements, statements by sales agents, lay or common sense understandings, etc.

Competing meanings. One side will use (say) a lay dictionary definition to support its claim (the offer said mason jars, and the response was not an acceptance under the mirror image rule because it stipulated that the mason jars had to be “first quality”); the other side will invoke commercial understandings (those engaged in the mason jar trade would reasonably understand that the two expressions mean the same thing).

Competing time frames. One side will focus on the immediate events (e.g., the seemingly minor provocation prompting a deadly act of self-defense); the other side will expand the focus to include past events that put matters in a different light (when the act characterized as a seemingly minor provocation occurred in the past, it quickly escalated into life-threatening behavior).

Competing levels of generality. One side will portray the facts at a high level of generality in order to fit them into a desired rule (he didn’t read the contract before signing it); the other side will fill in the details to call the application of the rule into question (the other party asked him to sign as he was rushing out the door to his daughter’s wedding and didn’t speak up when it became clear that the signing party was under a mistaken impression about the contents of the document).

Competing points of view. The same statement (“in our current financial state, we can’t afford the union pay scale”) may be portrayed as a simple statement of fact from the point of view of the employer and as an ominous threat from the point of view of the employee; the same act (making sketches from which to paint a family portrait) may be portrayed as the “beginning of performance” by an artist (“sketchwork is an essential part of portraiture”) and as “mere preparations” by her customer (“I am paying for a portrait, not a sketch”); etc.43

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43 Jeremy Paul and I outline these conflicts—and offer more extended illustrations—in FISCHL & PAUL, GETTING TO MAYBE, supra note 34, at 75-85.
Sometimes substantive law "takes sides" in these debates, but when that happens the underlying conflict will nevertheless frequently persist and simply move to a new battlefield. The debate between "one at a time" and "taken together" may, for example, seem to be resolved in favor of the latter if an "all the circumstances" test is adopted, but we shouldn't be surprised if "nesting" occurs and the parties renew their debate when the legal standard is applied to a particular case (totality = the sum of the statements vs. totality = a "whole" that is "greater than the sum of the parts"). Likewise, substantive law may privilege one of the "points of view"—in labor law, for example, the presence or absence of unlawful coercion in employer statements is evaluated from the point of view of what employees would "reasonably understand"—but the vanquished viewpoint may reemerge from the nest when we apply the test and (to continue the example) argue about just what is "reasonable" for the employee to "understand."

Conflict may continue even in cases where the substantive law is designed to eliminate factual dispute altogether. This is a phenomenon that is closely related to "nesting"—I think of it as "argument flight"—where the supposedly eliminated conflict simply migrates to a more favorable climate. If acceptance is invariably effective upon dispatch, we shouldn't be surprised to find a great deal of factual dispute about what constitutes an acceptance. If speech is free, we shouldn't be surprised to find a lot of litigation about what constitutes speech. And if the National Labor Relations Board decides not to regulate campaign misrepresentations by employers and unions—but continues to prohibit threats—we shouldn't be surprised to find an increasing number of election challenges based on threats.

This is not to suggest that legal rules don't matter. There will no doubt be acceptances, speech, misrepresentations, etc. that cannot even plausibly be recharacterized, and while sometimes this will mean that the dispute will simply migrate elsewhere (maybe the earlier communication wasn't an offer? maybe there is a compelling state interest for restricting the speech?), there may at other times be no way out. Taking the possibility of closure seriously—and locating it in the experience of constructing legal arguments—is one of Duncan's most valuable contributions to this debate.

Yet I do think he's overstated the frequency of closure, and I don't think it's because he's a closet formalist. Duncan is rightly anxious to respond to the legal sociologists who have criticized the cls focus on appellate adjudication: "If it makes no difference
(beyond the dispute in question) what law [judges] make or how they explain it, then there are no interesting ideological stakes in the rules, and there is no possibility of legitimation through legal discourse."

But it seems to me that he won this fight by demonstrating that judicial lawmaking is as much a fact of legal life as legislative and administrative lawmaking. That ideological conflict doesn't stop once "law" is "made" is an affliction common to lawmaking in every forum.

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So is there a politics to the recurring patterns of factual argument? I think so, but it's more difficult to discern than the politics of doctrine and policy explored so thoroughly in Duncan's book. For one thing, it is often the case that judges and lawyers offer competing factual characterizations without actually defending them. Each side acts as if it has simply provided an account of "what 'really' happened" and as if the other side is just plain wrong. In the famous Allegheny College case, for example, Cardozo's majority opinion doesn't criticize the Kellogg dissent for failing to look beyond the four corners of Mrs. Johnston's written pledge, nor does Kellogg criticize Cardozo for his willingness to look to subsequent party conduct to resolve the dispute. Like lawyers and judges in many cases, they each offer their carefully crafted narratives in the style of Joe "Just the Facts, Ma'am" Friday and do not engage in a debate about why we ought to view the facts one way or the other. To be sure, this happens with some frequency in debates about "law" as well, but my undocumented (if not uneducated) impression is that it is a more common occurrence in the context of disagreements about facts.

A possible reason for this is that factual argument tends to slip through the cracks of American legal education, undertheorized in most clinical courses and missing in action altogether in the traditional Socratic classroom. (Indeed, "wrong on the facts" was the only factual argument anyone ever taught us when I was in law school.) With some important exceptions, we've scarcely begun to study or teach the structure of factual analysis with the same energy and rigor that we devote to law and policy, and as a result the lawyers and judges we help train may in fact be far less self-

44 Id. at 268.
46 See, e.g., TERENCE ANDERSON & WILLIAM TWINING, ANALYSIS OF EVIDENCE: HOW TO DO THINGS WITH FACTS BASED ON WIGMORE'S SCIENCE OF JUDICIAL PROOF (1991).
conscious about how they do things with facts than they are about how they do things with law.

But as we have seen there are recurring rhetorical patterns in the practice of factual characterization, and there is, I think, a politics here as well. Perhaps the most common pattern of factual dispute is what I have described as “competing points of view,” where a statement or an event is characterized differently by (say) the employer vs. the employee or the landlord vs. the tenant. What we have here is simply one more instance of nesting, where the conflict at stake in the selection and interpretation of the rule at issue (e.g., a prohibition against antiunion threats by employers) reemerges at the moment of rule application, and here the parties are proxies for partisans in the larger conflict.

The rest of the patterns seem to me to share a common thread. They reflect a profound cultural ambivalence about the appropriate role of fact sensitivity and context—how much is enough and how much is too much—in authoritative decision making, and in this respect the debate can be understood as a nested version of our endless debates about rules and standards. Like the arguments for rules, the arguments for “taking things one at a time”—or for narrowing our focus to the four corners of the document; or for genuflecting at the altar of fine print; or for limiting consideration to the events immediately preceding an act of supposed self-defense; or for insisting on dictionary rather than social meanings; or for viewing events abstractly rather than concretely—are arguments that reveal a mistrust of authoritative decision making (and decision makers!); a desire to avoid judgment calls; a need for closure (enough already!); and a belief that it is possible, and indeed desirable, to let rules do the deciding for us. And like the arguments for standards, the arguments for “taking things together”—or for broadening our focus to the larger course of conduct; or for attempting to divine reasonable expectations; or for preferring a movie to a snapshot and detail to abstraction—are arguments that reveal a willingness to trust ourselves, each other, and judges. Like the arguments pitting rules against standards, then, there is a deeper connection to competing “organicist” and “atomist” social visions—complicated, to be sure, by the fact that the arguments in question are with some frequency instrumentalized for deployment by “the other side”—but, as Duncan has argued, a connection nonetheless.

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47 See CRITIQUE, supra note 7, at 151-52.
Have I overstated the case for ambiguity in adjudication? Maybe; but then again, maybe not. I worried a lot about that question when Jeremy Paul and I finished work on a book designed to make law students more comfortable with all the ambiguity they encounter in their legal education generally and on law school exams in particular. What concerned me the most as we awaited the reactions of readers was that in our effort to provide dozens upon dozens of concrete illustrations from multiple areas of the law, we would get one or more of our examples "wrong"—that what we had offered as an instance of ambiguity was really a "well-settled" case that anyone well-versed in the field would immediately recognize as a question with but a single answer, perhaps suggesting that an ideological commitment to ambiguity had overcome our professional commitment to craft.

The nightmare nearly came true when within a short period of time we each received calls from readers anxious to let us know that there was a serious problem with a hypothetical—a variation on that old Contracts chestnut, the "flagpole" or "Brooklyn Bridge" case—that plays a major role in the book. Jeremy heard from a prominent lawyer who had taken first-year Contracts from no less than Karl Llewellyn, and I heard from my own law school Contracts professor, no slouch. And sure enough they were both bearing the bad news that the hypo we were using could only come out one way. Much to our relief and then amusement, though, they each were absolutely certain that it would come out a different way.

My criticisms are obviously quite sympathetic with the larger intellectual and political project that Duncan began a quarter century ago and has reenergized with this remarkable book. Indeed, it is precisely because I find his account of freedom and constraint in adjudication so compelling that I want to take it beyond the debates between liberalism and conservatism, and it is

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48 See FISCHL & PAUL, GETTING TO MAYBE, supra note 34.
49 See id. at 22-24, 133-41. The hypothetical involves an offer by "Patron" to pay "Artiste" $10,000 to paint a family portrait and an attempt by Patron to revoke the offer after Artiste has begun sketchwork, but before she had actually begun the portrait. The point of the hypothetical is to demonstrate ambiguities with respect both to the law (the common-law rule permits revocation prior to complete performance, and the Restatement (Second) of Contracts prohibits revocation once performance has begun) and to the facts (the sketchwork could be characterized either as the beginning of performance or as "mere preparations").
precisely because I find his semiotic work so compelling that I want to take it "all the way down." There is, of course, no small irony in arguing that there is simultaneously more constraint ("tilt") and more "indeterminacy" than Duncan's account of adjudication acknowledges, but I can think of no better starting point for the work still to be done than *A Critique of Adjudication*. It seems to me that we should be grateful for this much and wish the enterprise what success is possible short of the overcoming of its contradictions.