

THE POTENTIAL FOR A SYSTEMATIC ACCOUNT OF SOCIAL INFLUENCE ON
JUDICIAL DECISIONS

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INTRODUCTION

This article considers the problem posed to any structural analysis of the legal system by the American Critical Legal Studies thesis that the law is fundamentally indeterminate, and offers one possible solution. My aim is to demonstrate that legal indeterminacy need not lead to the “irrationalism” hypothesis about the role of law in society, and a structuralist or instrumentalist¹ account remains viable.

This article considers the potential that a methodological individualist account² of judicial decision-making might functionally explain the judiciary’s role in the political economy. The aim of this article is to examine whether or not it is possible to bridge the explanatory gap between the analysis of individual judicial behavior and the legal system as a structure. Any functional or “instrumentalist” explanation for the behavior of judges must explain how social systems cause individual judges to respond to the system’s needs. Developing such an explanation is made difficult by the American Legal Realist and later Critical Legal Theory critiques of legal rationality, which provide compelling reasons to think that legal rules are indeterminate.³ If one is persuaded by the so called ‘indeterminacy critique,’ which I shall adopt for the purposes of this article,⁴ special problems follow from this position when attempting institutional or functional analysis of the legal system. Leading Critical Legal Studies proponents of the indeterminacy critique such as Duncan Kennedy have concluded that a systematic account of the role of the judiciary in the social system is more than we can hope for.⁵ This article is an effort to challenge that conclusion from within a Critical Legal Studies framework by arguing that the analytic indeterminacy of the law does not necessarily imply indeterminacy in the relationship between legal decisions and social forces.

A major problem that the indeterminacy critique poses for systematic explanations of the legal system’s relationship to society’s structure is the following: If legal rules are indeterminate, then it cannot be said that judges simply apply the rules devised by the political branches of the government, which are themselves said to be responsive to socio-economic power dynamics.

Legislatures might enact rules to advance the interests of certain socio-economic constituencies, but if legal rules do not lead to determinate interpretations and applications of the law, than those rules cannot be said to compel judges to decide cases in favor of those constituencies. To a court of final appeal, virtually any case can be resolved in favor of either party.⁶ This apparent fact would seem to destabilize rather than stabilize a political system, undermining any structuralist claim that the law reinforces or enables the existing social order. What could make other powerful political players confident that judges would resolve cases in

¹ Examples of structuralist or instrumentalist accounts include: Marxist accounts which suggest that the legal system serves the ruling class, feminist accounts which argue that the legal system serves patriarchal interests, or Foucauldian accounts where the legal system is a functional element of governmentality.

² Which is to say, an account that demonstrates how social phenomena results from individual actions and how those actions result from individual motivations. *See generally* MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich, eds., University of California Press, 1968).

³ *See* Leslie Green, *Law and the Causes of Judicial Decisions*, OXFORD LEGAL STUDIES RESEARCH PAPER NO 14/2009, 7 (2009) *available at* <http://ssrn.com/abstract=1374608>.

⁴ This is a highly controversial, even heterodox view. It is, however, shared by a significant community in the legal academy. I will confine the scope of my paper and argument to this audience.

⁵ *See* DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE}* 266 (Harvard University Press 1997).

⁶ *See* Karl N. Llewellyn, *The Case Law System in America*, 88 COLUM. L. REV. 989, 992 (1988).

their favor, or at least do so often enough to be worth the risk of entrusting a legal intelligentsia⁷ with the power of the state? Worse still, although judges “always deny” that their decisions arise out of ideological motives⁸ a considerable amount of social science literature suggests that judges decisions are influenced by their political commitments,⁹ and many judicial opinions make more sense if we impute the decision to the judge’s ideology.¹⁰

Drawing heavily on the work of Duncan Kennedy, I will attempt to address this problem by proposing that judges are responsive to the needs of the socio-economic structure in the following way: The socio-economic structure institutionally shapes background assumptions and intuitions concerning how politically relevant disputes must be resolved. These assumptions and intuitions are experienced both by judges and the general public.

Individual judges are responsive to these generalized intuitions and assumptions whether or not they agree with their political implications because judges are rewarded; both personally and politically, for shaping their political agendas around these socially constructed background intuitions. The result is that judges, while appearing autonomous, are more likely than not to confirm the socio-economically expedient background intuitions, and this acts to legitimize and solidify those intuitions in the popular consciousness. Judges’ apparent independence from ordinary politics and entrenched socio-economic interests allows them to confer on those institutions’ added legitimacy through their decisions, but when judges deviate from the common background intuitions about the way disputes must be resolved, the legitimating effect of the decisions is reduced. In this way, the institutional self-preservation needs of the judiciary as a whole and judges as individuals, work to enhance, and rarely undermine the political needs of the prevailing socio-economic structure.

I. ARE JUDGES RESPONSIVE TO THE NEEDS OF THE SOCIAL SYSTEM, AND IF SO, HOW?

A major assumption that I will rely on for my argument is that, judges are, in fact, responsive to the social system. While this assumption is potentially highly controversial, I believe it to be reasonable for a number of reasons. If judges did not facilitate the prevailing socio-economic system, then it would make little sense for dominant interest groups and institutions to invest so much authority in the judicial system. Judges lack financial or military power and must rely on those who have such power to carry out their orders. It is reasonable to think that if the people who possess the real material power in society found judges orders to be intolerable or incompatible with their fundamental interests, they would probably disobey and ignore or abolish the judiciary. This sometimes happens in less stable countries and those with overt military dictatorships.¹¹ Given how rare overt disobedience from the state and political elites in

⁷ For an explanation of how the legal system seems to empower legal intelligentsia to determine the outcome of ideological conflict among themselves rather than allowing it to play out in popular politics, See Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785, 786–87 (1996).

⁸ See KENNEDY, *supra* note 5, at 62.

⁹ See Kennedy, *supra* note 7, at 788 (citing BARBARA M. YARNOLD, *POLITICS AND THE COURTS: TOWARD A GENERAL THEORY OF PUBLIC LAW* (Praeger Publishers 1992).

¹⁰ This is the opinion of some prominent commentators on the courts. See KENNEDY, *supra* note 5, at 55.

¹¹ One of the most dramatic examples of this was when former Pakistani President Pervez Musharraf removed the Chief Justice of the Supreme Court from office, and then when the remainder of the Court attempted to reinstate him, had the Pakistani army storm the Court and arrest the justices. See David Rohde, *Pakistani Sets Emergency Rule, Defying the U.S.*, N.Y. TIMES, Nov. 4 2007 available at <http://www.nytimes.com/2007/11/04/world/asia/04pakistan.html>; Profile: Ifikhar Muhammad Chaudhry, PAKISTAN HERALD, available at <http://www.pakistanherald.com/profile/Iftikhar-Muhammad-Chaudhry-118>. More recently, the Maldives’ military

stable societies is, I think it is reasonable to assume that the judicial orders on the balance enhance rather than undermine the socio-economic and political power structure, despite the apparent potential for instability, given legal indeterminacy. Widespread respect for the judiciary and lack of overt political conflict with it implies that the judiciary accommodates the needs of the powerful elites, whomever they happen to be.

There are, however, a number of potential problems with this assumption. First, courts' power may be dependent on earlier historical conditions. Courts may have served the needs of the social system at some point in history, but once brought into existence, they develop their own institutional needs and consolidate power around themselves. As a result, they may not serve the needs of the current social power structure.¹²

A second objection may be that regardless of how the system of government we have come about, judges may be so thoroughly integrated into the political system that the organizations wielding physical power do not have the institutional wherewithal to function against court orders. In this alternative explanation, institutions that organize material power—such as banks, police, and armies—have internal systems for recognizing legitimate orders that depend on the courts. If this were the case, we might expect that police sergeants would disobey police chiefs who ignore court orders.

Third, judges may simply be too popular to be opposed by other branches of the government. This popularity insulates the judiciary from attack and compels others to obey it or risk intolerable public consequences.¹³

Despite these objections, I believe my assumption remains reasonable. Even if the first objection was true—that courts' power may be historically path-dependent—it would still be reasonable to infer that courts would accommodate themselves to the needs of other sources of social power. Courts would otherwise risk being delegitimized when they 'lose' political disputes. The exception to this inference would be if courts had interests that were mutually exclusive to other social institutions the way that, for instance, a labor union might be unable to reconcile itself to an employer's needs without accepting a material loss itself. However, there seems to be no obvious reason to think that courts would have irreconcilable conflicts of interest with other sources of political power. In other words, even if courts had autonomous power, it would still be rational for them to be responsive to the needs of other powerful institutions and organizations and avoid obstructing them.

The second objection seems to assume that judges could or do directly command the personnel of other branches of government, rather than affecting their will through the hierarchies of those branches. This seems to be an implausible view of how governments function. Indeed, people will do things they have reason to suspect are illegal all the time under the instructions of superiors within their organization.

The third objection, however, is a serious one, and one to which I hope to provide an answer. The popularity of judges does not arise from thin air by virtue of putting on their robes. Instead, judges' popularity depends on how responsive they are to social needs. Judges' prestige can be enhanced or diminished by how consistently they respond to other social powers. Classic

arrested the chief judge of the Maldives' criminal court after the judge released an opposition figure from warrantless detention for allegedly defaming the government. Associated Press, *Maldives military arrests senior judge*, ASSOCIATED PRESS, Jan. 17, 2012, available at <http://asiancorrespondent.com/73946/maldives-military-arrests-senior-judge/>.

¹² An objection suggested in a letter from Louis Michael Seidman, Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center, (Dec 4, 2009) (on file with author).

¹³ Also suggested by Michael Seidman. *See id.*

examples of this are *Marbury v. Madison*¹⁴ and *West Coast Hotel v. Parrish*.¹⁵ Had those cases come out differently, the authority of the judiciary would have diminished, as the other branches of government would likely have acted against it. Because appellate judges are sometimes interested in enhancing their prestige and popularity, they have an incentive to respond to social needs. In this way, I will argue, the individual motives of judges have a systematically consolidating effect on the social system.

II. DUNCAN KENNEDY ON THE EFFECT OF JUDGES' PREFERENCES ON LEGAL OUTCOMES

In his 1984 article, *Freedom and Constraint in Adjudication: A Critical Phenomenology*,¹⁶ Duncan Kennedy considers the phenomenological experience of a judge asked to decide a case that, on his or her first impression, appears to present a conflict between “the law” and “how-[they]-want-to-come-out.”¹⁷ Of course, Kennedy does not mean to suggest that “the law” on an analytic, rational level compels a judge to rule in one way or the other, despite their assertions that it does. Kennedy, a proponent of the general legal indeterminacy thesis, believes that the law, in itself, cannot constrain the outcome of adjudication.¹⁸ Instead, he describes a sort of background intuition about “the law” that leads him to feel that a particular legal rule “exists” to govern a certain case.

Exploring this intuition, Kennedy constructs a scenario where he supposes that a union of bus drivers is on strike, and when the bus company hires scab drivers to replace them, the union drivers lay down in front of the buses to prevent the company from operating them.¹⁹ The bus company sues for an injunction against the union drivers to prevent them from continuing their action, and Kennedy imagines himself a judge asked to decide this case. In this scenario, Kennedy experiences a conflict between what he assumes to be the law applicable to the case, and how he would like the case to come out. Sympathetic to unions, Kennedy would prefer to give the bus drivers greater leverage in their dispute and deny any request for an injunction against them.²⁰ Despite lacking any expertise in labor law, Kennedy had a “quick intuition” about “the way things have to be”: that the bus drivers could not possibly get away with what they were doing, and that the bus company had a right to use their “means of production” during a strike. This intuition was not based on cases or articles as much as general cultural knowledge.²¹ I will return Kennedy’s description of a vague intuition of a ‘rule existing’ later in my argument.

Facing this intuition as a hypothetical judge, the rule that Kennedy intuits initially appears both objectively true and objectionable, given his political sympathies.²² From this arises a concern of how other relevant people will react to the case given similar initial intuitions about the rule; sometimes it is easy to anticipate that other people, by virtue of living in the same

¹⁴ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁵ *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

¹⁶ Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. L. EDU. 518 (1986).

¹⁷ *See id.* at 518.

¹⁸ *See e.g.* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique* 33 STAN. L. REV. 387, 442 (1981); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 999–1000 (1985).

¹⁹ Kennedy, *supra* note 16, at 519.

²⁰ *Id.*

²¹ *Id.* at 519–20.

²² *Id.* at 520.

society, will similarly understand that, using Kennedy's example, the union bus drivers broke some sort of a rule.²³

At this point, Kennedy imagines that as a judge with a political agenda, he will view this case in terms of two objectives. First, he wants to ensure that these particular bus drivers are able to continue obstructing the buses, and second, he wants to shift the law to the extent he can toward permitting unions a greater degree of power over the use of the "means of production" during a strike.²⁴ In order to achieve those two objectives, he is both "bound and free": "free to deploy work in any direction but limited by the pseudo-objectivity of the rule-as-applied."²⁵ A judge is limited in the materials he has to work with; he must remain within the conventions of legal discourse, but with those materials, a judge is free to build a legal case according to his preferred outcome.²⁶ He knows that there are *always* exceptions to a rule²⁷, and there are other rules (such as, in this scenario, perhaps first amendment rights Kennedy posits) that limit the scope of any given rule's applicability.²⁸

A skilled lawyer (or a judge attempting to pursue a particular position) can make a plausible legal argument for nearly any outcome, but some arguments seem more credible and persuasive than others.²⁹ As a judge, Kennedy may be able to order his preferred outcome without making a successful argument; he has a number of reasons to want to convince his audience that it would "violate the law" to issue an injunction against the workers. Kennedy offers six reasons that would motivate him, but only two are relevant for my argument: (1) If he does not provide a strong legal justification for his action, he will not only be reversed, but his friends and enemies will believe he violated a 'role constraint' that they support, and he will feel their disapproval; or (2) The case is part of his political project, and what he does in this case will affect his ability to take action in other cases by either promoting or undermining his legal and political credibility.³⁰

Given these two motives, Kennedy experiences the cost of deciding in favor of the bus drivers and against "the law," as he intuitively and initially perceives it, in two ways. First, it takes a lot more intellectual energy and work to produce a novel legal argument in favor of the striking bus drivers than it would to provide the conventional, already fully-formed legal argument in favor of the bus company.³¹ There are many rules he would like to change and the necessity of producing a plausible legal argument for each change would act as a constraint on what an activist judge could do given limited time and resources. Second, there is a "legitimacy cost" of deciding the case in favor of the bus drivers and against what he takes to be the assumption shared by others that they have violated the law.

If Kennedy decides for the company, no one will question his credibility as a judge for following the conventional wisdom.³² His legitimacy is only at risk when he does something out of the ordinary.³³ When Kennedy decides against his known political preferences, he may gain

²³ *See id.*

²⁴ *See id.* at 521.

²⁵ *Id.* at 522.

²⁶ *See id.*

²⁷ *Id.* at 523.

²⁸ *See id.* at 524.

²⁹ *See generally* James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV 1003 (1985).

³⁰ *Id.* at 527-28.

³¹ *Id.* at 528.

³² *See id.*

³³ *See id.*

legitimacy for being bound by the law, rather than by the sway of politics.³⁴ On the other hand, if he decides against conventional wisdom about the law in accordance with his political preferences, his legitimacy is put into jeopardy, and the more dramatic departure from the expected legal outcome, the more his legitimacy (or “institutional *mana* or *charisma*”) is placed at risk.³⁵ If Kennedy’s ability to persuade people that his preferred outcome is legitimate is insufficient to bring that decision in line with the expected norm, he risks being written off as illegitimately politically motivated when deciding cases in the future. This will make his decisions more likely to be overturned, less likely to be cited as precedent, and he will be less likely to gain appointment to a higher court.

III. WHAT IS THE NATURE OF KENNEDY’S INTUITIONS ABOUT THE LAW?

A vital question to consider is whether the intuitions about “what the law is” that Kennedy describes are intuitions internal to legal discourse, or whether these are intuitions about society and what types of outcomes society will tolerate. If the former is the case, then the law is not actually indeterminate, it is merely difficult to articulate. If the latter is the case, however, then the text of the law does not impose constraints by itself; rather, those constraints arise from how one perceives social expectations of how courts will rule, and how those perceptions influence one’s interpretation of legal texts and precedents.

I argue that this second explanation is correct. Kennedy’s intuitions about legal requirements do not actually concern the law as an abstract, distinct thing as he seems to suggest, but rather, his intuitions amount to a sense of how society expects judges to behave in any given case. The analytic structure of the law does not provide any “internal” constraints on its own,³⁶ but the sum of what one assumes others feel about the law creates a *perception of constraint external to the law itself*. Conventional legal arguments can be made either in favor or against virtually any position.³⁷ A judge presented with a legal question by two litigants is not internally bound by the law to decide in favor of either of them, because either of their positions could be arrived at by way of conventional legal reasoning and there are no objective measures of an argument’s effectiveness even if there exists widespread consensus.

Therefore, a judge’s experience of “what the law is” must come from somewhere other than the law itself since the law cannot produce any one internally confirmable position. Judges are not logically compelled to reject any legal argument, providing the argument follows established legal conventions, and are unconstrained in that regard. Judges’ beliefs that they are constrained, instead, comes from what sorts of judicial outcomes feel socially tolerable: some *results* are socially unacceptable regardless of the strength and weakness of the reasoning. In fact, the public does not hold judges accountable for their legal reasoning because laypeople rarely read legal opinions. Instead, judges are held socially accountable only for the *outcomes* of the cases that they decide. This is because when judicial decisions are politically relevant, they do generate considerable public interest and affect the way people perceive the courts in general and the individual judge in particular.

The perception of constraint is a real one, but one external to the law. It is a perception of constraint that arises from social experience, rather than legal analysis or even a vaguer lawyer’s

³⁴ See *id.* at 528–29.

³⁵ See *id.* at 529.

³⁶ As predicted by the CLS indeterminacy thesis.

³⁷ See generally Boyle, *supra* note 29, at 1003.

sensibility. The limits of socially tolerable outcomes provide a sense of constraint not unique to judges and lawyers, but accessible to laypeople, as well, based on the common social expectation of how courts and other governmental actors will and will not behave. Since the public legitimacy of judicial decisions, therefore, ultimately depends on the final outcome of a case, and not the legal reasoning behind it, a judge's intuitions about how a case must come out is based on general socio-political knowledge, not on legal knowledge.

Judges must still justify themselves to other judges and lawyers, so their legal reasoning must also be consistent with this general socio-political understanding. However, deciding what legal reasoning and what precedent governs a given case is indeterminate because there is enough counter-reasoning and counter-precedent to permit the opposite conclusion in the abstract. What might be more determinate is that for given set of socially relevant facts in a case, courts always tend to favor a particular outcome. This is certainly "legal knowledge" in the Holmesian sense of predicting what judges will decide, but it is also publically available social knowledge in that it depends not on legal reasoning or legal rules, but knowledge about social facts. Even an observer with no legal knowledge would have these intuitions about what to expect from courts based on past judicial actions and inactions. Judicial decisions, whatever determines them, contribute to constructing the social norm. This fact makes arguments from precedent seem plausible and explains how judges rule with apparent consistency without being able to analytically determine which precedents are controlling.

IV. THE SOCIAL AND LEGAL RAMIFICATIONS OF KENNEDY'S ACCOUNT OF JUDICIAL ACTIVISM

What are the social and legal ramifications of these dynamics? The tension that Kennedy describes between his intuitions about "what the law is" and what political outcome he prefers highlights the difference between what a judge purports to do and what a congressperson does: Presumably, a congressperson would never openly decide to vote in favor of something with which he or she disagrees.³⁸ When judges claim to be deciding a case against their personal preferences because "the law compels them," they accomplish several things. First, they help to establish that there "really is" a law out there beyond their personal political preferences. They are not making law, but simply enforcing or interpreting it, because if they could make law, they would make it differently.³⁹ Second, judges acting against their publically-stated preferences also

³⁸ This is not to say that politicians never claim to vote against their *personal* preferences in order to abide by their *political* duties to represent their constituents. More commonly, however, they take the fact of their election as a mandate to pursue their political commitments. Elected officials rarely describe adopting positions because they are popular, or for the sake of reelection, even if this is what they do. In fact, "flip flopping" in order to better align a politician's views with those of their constituents is seen as suspect. Following one's principles, rather than popular demands, is more respected in our political culture. See Richard Brookhiser, *The Grand Tradition of Flip-Flopping*, 170 TIME 20 (2007).

³⁹ Politicians also often claim to act in accordance with principle rather than personal preference. However, one can distinguish between what are personal preferences and what is their preferred course of action, given the political and social reality they find themselves in. Thus, John Kerry can claim to "oppose abortion, personally" while insisting that he would not impose his views on "a Protestant, on a Jew or an atheist, who doesn't share it." Raja Mishra, *Kerry abortion comment stokes fire on both sides, view on stem cell widens argument*, BOS. GLOBE, July 18, 2004. How to make law within the constraints of the political reality, while actively shaping that reality, is distinct from claiming to act as a politically neutral "umpire" who "[doesn't] make the rules" but "apply them" as Chief Justice John Roberts and other judges do. See, Bradley W. Joondeph, *Law, Politics, and the Appointments Process*, 46 SANTA CLARA L. REV. 737, 737 (2006).

establish that they are bound to serve a fixed law that confers legitimacy on state action and exists beyond their personal preferences.

Judges known for ruling against their personal preferences when the law supposedly compels it also have greater ability to later rule in favor of their personal preferences, because an observer can reasonably believe that their later ruling was also compelled by the law. An observer inclined to believe the law compels a result that happens to conform to the judge's preference is more likely to follow the ruling, given most people's propensity to follow the law.⁴⁰ This, in turn, increases a judge's "legitimacy" and potentially enhances his or her leeway in future legal activist endeavors. Given that judges, as Duncan Kennedy described, may view their work as an effort to achieve long-term political and policy objectives,⁴¹ there is a built-in motive for judges to issue rulings against their own political positions, at least some of the time, in order to enhance their long-term effectiveness. An activist judge's two aims—achieving a preferred outcome in a given case, and achieving a preferred trend over time—may, thus, come into conflict. If the "stretch" between the desired outcome in a case and the socially-expected legal norm is too great, a judge's ability to pursue his or her political agenda will be undermined should he impose his desired outcome. Some political preferences will likely be sacrificed to preserve the integrity of a judge's overall political project. These sacrifices are more likely to occur where there is a greater "stretch" from the expected legal norm.

V. TEXAS V. JOHNSON AS AN EXAMPLE OF JUDGES' INCENTIVES TO FOLLOW SOCIAL EXPECTATIONS

Justice Anthony Kennedy's concurrence in *Texas v. Johnson*⁴² provides a useful example. Without disagreeing with the majority's legal reasoning,⁴³ Justice Kennedy went to great lengths to express how "painful" it was for him to make a decision that he "did not like" but felt was required of him because "the law and the Constitution, as we see them, compel the result."⁴⁴ In writing his concurrence, Justice Kennedy signaled that this decision, like presumably all of his decisions, was compelled and not chosen, and this is evidenced precisely by the fact that he would not have chosen it were he not so bound by law to do so. Justice Kennedy thus establishes his own credibility and a credible claim that he feels "compelled" to vote as he does, when he votes for decisions that he prefers politically in the future, regardless of those decision's legal merits. Given that Justice Kennedy had nothing to add in the way of legal reasoning, the only explanation for the fact that he wrote the concurrence rather than simply signing onto the Court's opinion was that he saw it as an opportunity to enhance his own judicial credibility by drawing attention to his choice to enforce the legal norm earlier identified by the Texas Court of Criminal Appeals.⁴⁵ As a case that only concerned the protection of a symbol, Justice Kennedy took an

⁴⁰ Judge's rulings, thus, have a "conversion effect" on observers: The fact that a court chose an outcome makes that outcome more desirable. See KENNEDY, *supra* note 5, at 62.

⁴¹ Including their own subjective notions of fairness.

⁴² *Texas v. Johnson*, 491 U.S. 397 (1989) (Kennedy, J., concurring).

⁴³ See *id.* at 420, 421 (Kennedy, J., concurring).

⁴⁴ *Id.* at 420–21 (Kennedy, J., concurring).

⁴⁵ The actual "legal norm," as generally understood at the time, is disputable. There were, after all, anti-flag-burning laws in 48 states. See *id.* at 428, (Rehnquist, J., dissenting). However, as the Texas Court of Criminal Appeals described in its ruling, there were already numerous Supreme Court cases suggesting that a state's interest in protecting the flag as a national symbol did not trump an individual's interest in the exercise of free speech. See *Johnson v. State*, 755 S.W.2d 92, 94 (Tex. Crim. App. 1988).

opportunity to advance his political agenda through enhancing his personal legitimacy as a judge, without having to sacrifice any vital political commitments. It is likely insignificant to Justice Kennedy that a few flags may be burned if allowing it enhances his reputation as a judge. Were the political stakes higher such as in a case deciding social or economic policy, the stakes of the outcome could be too vital to sacrifice for enhanced personal credibility.

This analysis suggests that judges' decisions will generally trend towards the established norm over time, even when their preferred political outcomes do not. Regardless of a judge's political persuasion, he or she will have at least one incentive to make rulings in line with the expected norm—that such rulings enhance their personal credibility as judges and, with it, others' willingness to accept their decisions. However predisposed one is to rule in favor or against a certain litigant in a certain case, that predisposition will be pushed in the direction of what the judge perceives the expected outcome to be. In the aggregate, this has a consolidating and stabilizing effect: judges are more likely, irrespective of politics, to provide for the outcomes the legal community and public expect.

VI. HOW DO JUDGES INTUIT SOCIALLY-EXPECTED NORMS?

This analysis raises the question of how a judge comes to intuit what the expected norm is. Here is Kennedy's description of this phenomenon:

When I first think about this case, not being a labor law expert, but having some general knowledge, I think, 'there is no way [the union bus drivers] will be able to get away with this. The rule of law is going to be that workers cannot prevent the employer from making use of the buses during the strike. The company will get its injunction [ordering the unionists to stop blocking the buses]... *My feeling that the law is against me in this case is a quick intuition about the way things have to be.* I haven't actually read any cases or articles that describe what the employer can and can't do with the [means of production] during a strike. I vaguely remember *In Dubious Battle*, a Steinbeck classic I read when I was 16. But I would bet money that some such rule exists⁴⁶ . . .

In my previous examples I treated the rules as autonomous entities that were there in my consciousness independent of cases. I think this treatment corresponds to the way I experience legal rules in real life. *It is not true that they are inductive derivations from cases or that they are predictions of what the courts will do. They are much less than either of these: they are verbal formulae I think I know to be "valid" (even though I am often not sure what that means and always aware that my knowledge may turn out to be superficial) that are present like so many random objects floating around in my mind.* One can get access to dozens or hundreds of them—such as “the workers can't interfere with the m.o.p. during a strike”—*without having to justify them independently through any inductive or pragmatic process.* They are just things we learned in law school or from the newspapers or from reading treatises or from reading cases. They are primarily not derivative entities in legal consciousness.⁴⁷

This explanation of Kennedy's experience of legal rules in real life of “so many random objects floating around in [his] mind” is one that stands in stark contrast to what is required for a

⁴⁶ Kennedy, *supra* note 16, at 519–20.

⁴⁷ *Id.* at 530 (emphasis added).

“good legal argument” or what would be termed “legal analysis.” No one writes a brief saying something to the effect of “I think the rule must be XYZ because I vaguely remember an episode of some lawyer television program where there was a rule like that.” It seems equally reasonable, however, that the majority of non-lawyers and non-law-makers are not aware of all of the argumentative strategies lawyers use to make a conventionally persuasive legal argument.

For the non-lawyer, a “legal rule” is *only* that random non-derived entity floating in his or her head—it is a notion gleaned from conversations, read in the news, or simply assumed without any clear attribution. To the non-lawyer, there is no (or at least far less) access to other such legal rules that might limit the scope of the apparent rule. The initial intuition that a legal rule exists and dictates a certain result may be counteracted in at least two ways. First, legal arguments limit a rule’s scope by introducing additional competing rules and considerations. Second, precedent cases may be factually distinguished or analogized to influence the outcome of a present case. However, these rhetorical strategies are not likely available to most non-lawyers.

For example, in Duncan Kennedy’s striking bus driver’s union hypothetical, he found he could limit the initially apparent rule that “workers cannot interfere with the means of production during a strike” by introducing a counter-rule that there is a right to peacefully persuade strike-breaking drivers to quit. He could compare lying down in the street to legally protected picketing, and so on. In considering these possibilities, Duncan Kennedy was engaged in a type of discourse inaccessible to most non-lawyers. When non-lawyers understand that something is a legal rule, the answer to whether the rule governs a given case is rarely “it depends.”⁴⁸ Non-lawyers instead automatically assume if a rule seems to refer to the circumstances of a case then the rule must be followed in those circumstances.

A lot of “common sense” notions about the law are much more persuasive to most non-lawyers than recognizable legal arguments. For example, in a dispute over legal fees arising out of tobacco litigation, lawyers for Brown Rudnick suing the Commonwealth of Massachusetts repeated the mantra “[a] deal is a deal, a promise is a promise, and a contract is a contract” to the jury,⁴⁹ and lawyers for the Commonwealth recognized that ““a deal is a deal’ is a very compelling argument for most people,” after taking polls and organizing focus groups.⁵⁰ When most people learn that payment has not been provided in accordance with a contract, they are not likely to think of the different standards for common law contract defenses or implied contractual terms and binding duties that might affect each party’s rights.

When a judge rules according to commonly experienced intuitions of what “the rule” is, it seems reasonable to think that lay people would think the judge followed “the law” as the public understands it—“the law” in the common understanding is something the average non-lawyer believes really does dictate judicial outcomes. This creates a cognitive consonant feeling and acceptance of the legal outcome in a way that may not be present if the state just imposed its will in an ad hoc fashion. However, when judges make decisions that are clearly outside of the public expectation, regardless of how apparently valid their arguments may be, the public response is more likely to be outrage when it runs contrary to public political preferences. Contrary

⁴⁸ To refer to the meme that the correct answer to legal questions, to the surprise of those entering law school, is not “yes” or “no” but “it depends.” See e.g., Blogdenovo.org, Berman: It Depends, <http://www.blogdenovo.org/archives/000033.html>; Cf. Barbara Glesner Fines, Associate Dean for Faculty, University of Missouri Kansas City School of Law, annual orientation speech to Kansas City School of Law, available at <http://www.law2.umkc.edu/faculty/profiles/glesnerfines/bgf-strs.htm>.

⁴⁹ Alex Beam, *Greed on Trial*, in LEGAL ETHICS: LAW STORIES, 287, 300 (Deborah L. Rhode, David J. Luban, eds., 2006).

⁵⁰ *Id.* at 291.

judgments may unsettle the rule for the legal community—but laypeople who do not read judicial opinions will almost certainly be unpersuaded that the law in fact demands these alternative judgments. How could they be when the legal arguments that bridge the gap between what the law initially appears to be and a judge’s contrary ruling for lawyers, are not readily accessible to lay people.⁵¹

While a lawyer or a judge can give an argument as to why the alternative judgment should be followed, a layperson does not have access to that element of legal discourse, only to the general sense of what the rule is. The dynamic at least among the public outside of the legal community, may therefore be substantially more one sided than Duncan Kennedy suggests. For laypeople, a judgment is legitimating if and only if it is in line with conventional practice and the general free-floating sense of “the law.” When judges deviate from this sense, they do not confer as much legitimacy on the outcome. Of course, there may be many other reasons why members of the public might support a non-conformist legal decision, such as their personal political or policy preferences, but the fact that it was a judge that made the decision will not enhance the decision’s legitimacy when it is inconsistent with the general sense of “what the law is.”⁵²

In other words, should a leftist judge decide a case where the “easiest answer” results in the leftist outcome, leftist non-lawyers will agree with the decision anyways for political reasons, and rightist non-lawyers may be moved in the direction of the judge’s decision because the decision is in line with their understanding of what the law is (and the fact that it is “the law” is of normative value to them). If on the other hand the perceived “general sense of what the law is” runs counter to the judge’s politically motivated decision, then the dynamic is different: leftists may still support the decision since they approve of the outcome on policy grounds, but rightists will have no reason to agree with the decision, because it will strike them as a *wrongly decided*, even if some rightist lawyers and jurists will actually be persuaded. So while there is a general trend towards the social expectation within the legal community, the trend is doubly strong among the public.

In this scenario, it would be a mistake to think that because someone is a rightist, their understanding of “what the law is” will correspond to their political commitments. “What the law is” is intuitively informed by a person’s sense of the social reality they find themselves in, of the “way things have to be,” and this perceived social reality is often in conflict with one’s political preferences.

There may be some ways to provide evidence for this explanation. If my hypothesis is correct, then one would expect that the degree to which a “conversion effect” is generated by a

⁵¹ The disconnect between legal discourse and the discourse of the lay community has an additional effect: it also mystifies the law. When judges clothe their decisions in inaccessible discourse, non-intuitive results in trivial matters contribute to the mystic of the law and the respect for judges. See generally Duncan Kennedy, *American Constitutionalism as Civil Religion: Notes of an Atheist*, 19 NOVA L. REV. 909 (1995) for a discussion of the way the law generates this mystification. However, for politically significant cases, people have enough invested in the result that this mystification is typically insufficient to dislodge their political commitments.

⁵² Judges gain power from the perception of the law as a sophisticated discipline that requires specialized training to understand, and this is one of the reasons why people are inclined to defer to them. However this perception is not necessarily established by reaching outcomes that violate common sense; the perception may be more plausibly attributed to political discourse about the law and role of courts. When judges rule against expected legal norms in cases of political importance, legal discourse rarely convinces those who are not already committed to the outcome that the ruling was correct. When they rule against expectation in politically trivial cases however, the public does not pay attention to the ruling, unless of course it is outrageous, in which case it is more likely to bring ridicule to the legal process. It would seem difficult to argue for instance that the outcome of the O.J. Simpson case enhanced the prestige of the legal system with the public.

legal decision would depend on the degree to which it conformed to social expectations. The “conversion effect” is one of the normative effects of “valid legal rules”⁵³ on social conduct.⁵⁴ This effect is twofold. First, when people believe a rule to be “the law,” they are more inclined to adhere to that rule than they would be otherwise.⁵⁵ People often feel they should obey the law for no other reason than that it is the law, in addition to whatever set of material incentives and sanctions the state might invoke.⁵⁶ Second, people tend to believe that if a consequence is legally required, the fact that it is a legal requirement provides a reason to believe the consequence is a good and appropriate one.⁵⁷ If the legitimating effects of legal judgments are stronger where those judgments are in accordance with the generally assumed “legal rule” than when the judgment runs against it, then I predict that the “conversion effect” will be strong for judgments consistent with popular assumptions about the law, and weak when a legal judgment represents a departure from the conventional norms.

For some anecdotal evidence of this difference, consider the example Duncan Kennedy uses to illustrate the effect. In the 1895 Pullman strike, despite “intense polarization and potential violence,”⁵⁸ the railroad was able to get an injunction against nearly all of the union’s activities.⁵⁹ As a result, the union members decided to “simply go home” despite not knowing the precise (and apparently questionable) legal reasoning developed by the court.⁶⁰ In this case, the court’s holdings that the rail workers could not disrupt the trains could perhaps be seen as consistent with ordinary popular assumptions about what the law was at the time. Given this background, the workers complied not only with the court, also but with their general sense of what “the law” was. The court only “enforced” what they already may have assumed to be the case.⁶¹

Compare this behavior with the reaction of racist white southerners to the effects of *Brown v. Board*.⁶² Instead of a conversion effect, there was immediate and sustained resistance by white southerners against the Supreme Court decision. Indeed, several southern governors openly defied the Court order.⁶³ *Brown v. Board*, in overruling the established precedent of *Plessey v. Ferguson*⁶⁴, came as a shock to the expected norms of racist white southerners and a radical divergence from what they understood the “the law” to be on the issue.⁶⁵

⁵³ By “valid legal rules,” Kennedy means “valid” in the restricted sense of “being agreed by just about everyone to be in force, meaning in force in the very limited sense of expect by just about everyone to be applied by the top court in a jurisdiction when lawyers argue it to that court.” KENNEDY, *supra* note 5 at 62 (I will be using the term in as close to the same way as possible).

⁵⁴ *See id.* at 63.

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *Id.* at 64.

⁵⁹ *See* KENNEDY, *supra* note 5 at 64.

⁶⁰ *See id.*

⁶¹ Needless to say, this is a somewhat speculative description, but it will hopefully be at least plausible to a reader. To confirm this conclusion would require empirical and historical research beyond the scope of this article.

⁶² *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

⁶³ *See* Matthew Berns, *Trigger Laws*, 97 GEO. L. J. 1639, 1678 (2009).

⁶⁴ *Plessey v. Ferguson*, 163 U.S. 537 (1896).

⁶⁵ *See* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 55 (2003).

VII. HOW JUDGES' MOTIVATIONS CONSOLIDATE THE EXISTING SOCIAL STRUCTURE

To summarize, judges are individually motivated to prefer legal outcomes in-line with social norms, even when this brings them in conflict with their preferred political outcomes. Social norms are themselves shaped by the interests and power dynamics of various social forces. This localized and momentary setting aside of judges' political preferences is necessary if they are to retain the credibility and legitimacy to pursue their broader political objectives over time. The effect of this dynamic is to consolidate the socially expected, "intuitive" legal norms; judges all share a common incentive to support this norm whether their political preference falls to the left or the right of the norm. The expected social norm exerts a pull in either direction. For the public, the effect is even more dramatically consolidating, because when judges make decisions against the norm, those deviations do not carry the normative weight of decisions made in accordance with societal legal expectations.

These judicial motives lead to results quite different from those that would be produced by a judge constrained by no more than the risk of disobedience. Were the dynamic described above not in effect, judges might consistently pursue their political agendas until external political forces intervened by impeachment or disobedience. Instead, even judges self-aware of their own political motivations have an incentive to moderate their positions towards socially expected outcomes so as to maximize their effectiveness over time. If judges in the real world did not behave this way, we would expect more impeachments and more disobeyed court orders by other branches of government, because some judges are bound to miscalculate the extent of their leeway.

Of course, there are alternative explanations for judicial behavior. Judges may be sufficiently "pre-screened" for political preferences inconsistent with socially expected outcomes. Even if this were the case, it would be an explanation that could coexist with rather than undermine the explanation provided above, because the dynamics described would still offer added reasons for these judges to prefer legal outcomes consistent with popular intuitions about the law, even if these were identical to their preferred political outcomes. To whatever extent judges are "pre-screened" would seem to enhance this effect. The closer a judge's political views are with general social intuitions about the law, the fewer competing motives they would experience.

The explanation summarized above is compatible with what Duncan Kennedy refers to as his "Pink Theory." On this view, the law legitimates the status quo, but it does not legitimate any "deep structure" such as the socio-economic power relations in a society.⁶⁶ Kennedy positions the "Pink Theory" against the "systematizer's critique" that judge made laws can be "explained as responsive to and legitimating of either the needs of a market system or the structural requirements of particular stages of capitalist development."⁶⁷

When coupled with the observation that the intuitions about the law are not legal intuitions confined to a "lawyers sense" of the law, but rather social expectations of how courts intervene in society, my theory leads more strongly to a different conclusion: that judge made law is responsive to and legitimating of a deeper social structure. This is so because judges are neither the only (or, perhaps, even the dominant) source of the "floating objects" that constitute what people generally believe they know to be valid rules, judges are not the only people affected by these "objects," and judges are for the reasons earlier described, motivated to not only produce sound legal analyses but to reduce the degree to which they deviate from generally recognized

⁶⁶ See KENNEDY, *supra* note 5, at 293.

⁶⁷ See *id.* at 265.

socio-legal norms. The “Pink Theory” account in some ways unduly isolates the more formally legal “status quo” within legal discourse from the broader socio-legal norms of what people assume to be valid rules. Duncan Kennedy’s theory recognizes that judicial decisions have moderating and legitimating effects on rules in society⁶⁸ without fully accounting for the ways in which extra-legal observations and expectations about social realities feedback into the general intuitions about legal necessity that judges, in common with non-lawyers, experience.

If the baseline from which judges work from is a non-derivative intuition about how things have to be that they gleaned from their social experience in the world,⁶⁹ then the “status quo” around which judges work is not one internal to the legal community but is instead constructed by the socioeconomic reality commonly experienced in society. More than anything else it might be reasonable to expect social perceptions of power dynamics to have a formative role for these general, non-derivative legal intuitions. This is because people are generally attentive to questions about who has power and/or prestige in society even if they do not attempt to systematize it.

In this way, power dynamics in society could act as an “input” in shaping the baseline conditions for judicial decisions. Judges are, regardless of ideology, individually incentivized to shape their desired outcomes to those that more closely adhere with these general intuitions when deciding on rulings. The “output” of the rulings would in turn further entrench the power dynamics that indirectly contributed to the initial intuitions.

There are however, two possible objections to this position. The first is that judges simply adjudicate directly between the interests of various social forces. The second is that social forces are themselves underdetermining and subject to the same deconstructive analysis as legal argument. For the first objection, I would suggest that while judges often do overtly decide between social interests on policy questions, this does not represent the full extent of judicial experiences of “the law.” I would offer my account as a means of explaining the additional experience of constraint by “the law,” rather than the experience of being constrained by explicit policy considerations.

As to the second objection, I would argue that while arguments may be advanced for differing social interests and needs, the general perception of what judicial decisions are expected and not expected comes from the shared experience of living in society. This experience is conditioned by the material reality of social power dynamics. Those power dynamics and the material conditions that give rise to them may be difficult to ascertain, but they are at least in principle concrete and potentially determinate. My hope is that this account can demonstrate at least the plausible potential for reconciling a methodological individualist account of judicial behavior with a structural functionalist account of judges’ role in the political-economy.

⁶⁸ See Kennedy, *supra* note 7, at 787.

⁶⁹ See Kennedy, *supra* note 16, at 530.