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# All Judges Are Political—Except When They Are Not: A Response

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BYBEE, KEITH J. 2010. *All Judges Are Political—Except When They Are Not: Acceptable Hypocrisies and the Rule of Law*. Palo Alto, CA: Stanford University Press. Pp. 192. $55.00 cloth; $19.95 paper; $19.95 e-book.

*The author explains the origins of* All Judges Are Political—Except When They Are Not: Acceptable Hypocrisies and the Rule of Law *(2010) as a response to a fundamental question posed by legal realism: How can the judicial process be permeated with politics and yet remain an accepted part of a legitimate legal system? The author demonstrates the ongoing importance of this question by examining debates over the place of constitutional law in the law school curriculum and by assessing public perceptions of the Supreme Court's ruling on health care reform. The author then addresses the critical appraisals presented by the symposium contributors. The critiques are taken as road maps for extending the author's arguments in new directions.*

All authors wish for critics who will closely read their work. The contributors to this symposium have more than matched my hopes for careful engagement. It is an honor and a pleasure to respond to their thoughtful critiques.

It may be helpful to begin with some discussion of my book's origins. *All Judges Are Political—Except When They Are Not: Acceptable Hypocrisies and the Rule of Law* (2010) takes up an enduring challenge posed by legal realism. Originally developed during the early decades of the twentieth century, legal realism encompassed a complex range of related ideas and theories (Purcell 1973; Kalman 1986; Horwitz 1992; Duxbury 1995; Schelegel 1995; Feldman 2000; Bybee 2011). One theme that threaded through the realists' work was a specific critique of judicial reasoning: most realists were skeptical that court rulings were derived solely from legal principles and they insisted instead that the true origins of judicial decisions were to be found in a tangled set of social pressures and political preferences. By virtue of this shared critique, the legal realists were confronted with the task of understanding how the mix of legal and nonlegal factors in the judicial system might fit together. In other words, the realists faced the problem of determining how judges could appear to be motivated by something other than the law and, at the same time, remain legitimate legal actors.

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The legal realists never successfully resolved the problem raised by their arguments (Kalman 1986; Horwitz 1992). Thus many scholars have come to understand legal realism as a set of standing questions, challenging us to explain how a judicial process infused with politics can be consistent with conventional justifications for court authority (Fisher 1991). If we think of the rule of law as a matter of requiring people to "look outside [their] own will for criteria of judgment" (Carter and Burke 2007, 147), what are we to make of the fact that participants in the judicial process appear to be acting on the basis of personal beliefs?

As I note in my book, legal realism's challenge regularly rears its head. We see it in judicial candidates running in partisan elections or negotiating highly political appointment processes and then asking to be treated as impartial arbiters once they are on the bench. We see it in contentious constitutional cases where courts always frame issues in terms of neutral principle yet often appear to be politically riven bodies squabbling over governance of the legal system. We see it in the media, public discourse, and popular culture where judges are frequently presented as expert oracles of law and as activist policy makers. We see it in public opinion where substantial majorities believe both that politics is at work in judicial decision making and that judges can be trusted to be fair and impartial. And we see it in large, parallel streams of scholarship that portray the courts as institutions of principle and as arenas of partisan preference.

How does this house divided continue to stand? There is some degree of motivated reasoning at work here, with individuals unconsciously deeming their own preferred outcomes to be dictated by impartial legal principle and considering opposing positions to be matters of mere politics (Braman 2009; Kahan 2011). However, cognitive bias does not account for the full extent of the perceived contradictions. As Patricia Ewick observes in her symposium essay, the paradoxical perceptions of the judicial process are not simply used to praise ideological allies and lambaste ideological enemies. Judges at every level are seen as being both impartial and partisan at the same time, and law as a whole is broadly understood to be "both sacred and profane, God and gimmick, interested and disinterested" all at once (Ewick and Silbey 1998, 223). It is, as Susan Burgess notes in her symposium contribution, a kind of open secret: a set of tensions between principle and preference that virtually everyone knows to be inherent in the system, even as the courts formally go about their business as if they were not shot through with conflicting understandings (see also Burgess 2008).

Current examples of such dynamics are, as Helena Silverstein suggests in her symposium essay, readily found. Consider the recent debate over the role of constitutional law in the law school curriculum. Michael Stokes Paulsen, who is himself the co-author of a constitutional law casebook, has suggested that constitutional law be removed from the roster of required courses because the subject is so saturated with politics that it "teaches bad habits" (Paulsen 2012). As elaborated by the Supreme Court, constitutional law tells students that "any answer is as good as any other, that there are a variety of interpretive approaches from which to choose, and that you should argue from your preferred approach in order to reach your preferred result" (Paulsen 2012). The law professors responding to Paulsen agree that the Supreme Court's jurisprudence is essentially a political enterprise (Levinson 2012; Lund 2012). Yet they nonetheless insist that constitutional law remains law. Judicial reasoning is results oriented, but it is also the authoritative language of the courts and training in this

language "is among the most important skills that competent practicing lawyers must acquire" (Lund 2012). "We are training *lawyers*, and, whether we like it or not, it is the essential job of the lawyer to manufacture non-frivolous arguments, whether sincerely believed or not, that are designed to serve the interests of a client" (Levinson 2012, emphasis in the original). Constitutional law cannot be purged of either law or politics; it is simultaneously practiced as both. The question, prompted by legal realism, is how this uneasy mix manages to cohere.

For another example, consider the public perceptions of the Supreme Court's health care reform decision (*National Federation of Independent Business v. Sebelius* 2012). Before the Court rendered its decision, there was widespread speculation that the five conservative justices would vote to strike down all or part of the Affordable Care Act, while the four liberal justices would vote to uphold. The anticipated split on the bench mapped perfectly onto the positions staked out by the political parties and thus fueled a good deal of public discussion about the influence of political factors on judicial decision making (see, e.g., Klein 2012). Political perceptions of the Court were clearly reflected in polls, with surveys showing the Court's approval rating reaching a new low (Liptak and Kopicki 2012a) and over half of Americans expecting the justices to base their health care ruling on something other than legal analysis (Barnes and Clement 2012; New York Times/CBS News 2012a). At the same time, however, there was also clear evidence that the public did not view the Court solely (or even primarily) as a political institution. Roughly equal majorities of the health care law's supporters and opponents had a favorable view of the Court (Pew Research Center 2012) and the Court's overall approval rating and level of trust remained higher than other national institutions (Fox News 2012; Liptak and Kopicki 2012a). It is true that when given a choice among a number of factors that might influence the Court's health care decision, large numbers of Americans agreed that "national politics," "whether the justices' themselves hold liberal or conservative views," and "whether a justice was appointed by a Republican or Democratic president" were all likely to play a major role (Kaiser Family Foundation 2012a, 2012b). However, the most important motivating factor consistently selected by the largest percentage of Americans was "the justices' analysis and interpretation of the law" (Kaiser Family Foundation 2012a, 2012b).

The Court's actual decision turned out contrary to general expectations, with Chief Justice John Roberts joining the four liberal justices to uphold virtually all provisions of the Affordable Care Act. The Court's surprise resolution was greeted with largely the same mix of public views present during the run up to the ruling. On one hand, political perceptions of the Court were clear: the Court's approval rating dipped a bit lower after issuing its judgment and over half of Americans thought that the Court's decision was based on the justices' personal or political beliefs (Liptak and Kopicki 2012b). On the other hand, the public continued to see the Court as something other than a political institution: the Court's overall approval rating remained higher than other national institutions (New York Times/CBS News 2012b), and when given a choice among a number of possible motivating factors, Americans continued to believe that the single most important influence on the decision was "the justices' analysis and interpretation of the law" (Kaiser Family Foundation 2012c). Given such views, the question is not whether the judicial process is legal or political, but how a process that is widely understood to be an amalgam of both continues to endure.

As Burgess, Ewick, and Silverstein note in their essays, I seek an answer in the workings of common courtesy. Courtesy differs from law in a variety of important ways, but the two also share key features. Both are systems of rules designed to regulate individual behavior. Moreover, the practice of courtesy, like the rule of law, is frequently beset by the suspicion that people do not mean what they say. Just as a judge citing legal principles in his or her rulings is often thought to be deciding on nonlegal grounds, so, too, are courteous demonstrations of respect often suspected of being purely outward displays, a matter of merely being polite rather than of expressing genuine esteem. Over the course of my book, I argue that courtesy functions because of (not merely in spite of) the possibility that truly gracious souls and unrepentant rogues may both be well-mannered. I then extend my analysis to the judicial process, arguing that the legal order persists because it is open to those honestly seeking impartial adjudication of principle as well as to those who merely wish to drape their personal preferences in the mantle of principled impartiality.

Central to my account of courtesy and law is an understanding of the human condition that runs from Machiavelli and Lord Chesterfield through James Madison and Miss Manners. There are two main elements of this longstanding view. First, the differences between individuals are taken to be significant and irreducible. People cannot be trained or persuaded to adopt the same views and advance the same interests; therefore, techniques for managing diversity and disagreement are always required. Second, the necessary task of coping with heterogeneity and conflict is seen as complex because ordinary people are ruled by an inextricable mix of high principle and low passion. On one hand, moral standards are an essential part of social life and almost everyone wants to be thought of as being good. Yet, on the other hand, public life cannot ultimately be run on the basis of morality because people are often motivated by ambition, pride, and vanity. The end result is that individuals are never completely able to practice the principles that they preach; rather than actually being good, individuals will frequently strive for the appearance of goodness in the hope of creating impressions that allow them to look better than they are.

There are, of course, other conceptions of society and human nature available. However, the understanding sketched above has the advantage of explaining how courtesy and law may rely on the possibility of hypocritical manipulation. If we accept that ordinary people are at once ethically attuned, willful, and vain, then courtesy becomes valuable because it allows individuals to trade on significant yet often unobtainable moral standards, permitting them to call for expressions of concern and mutual respect without necessarily requiring very much in the way of actual virtue. Similarly, if we assume that most Americans value the ideals of impartiality and principle expressed in legal procedures and yet remain too consumed with self-serving passions to live up to these normative ideals, then a legal system that gives everyone a chance to appear impartial and principled, without actually requiring them to be so, is a system that usefully creates a common language for managing conflicts.

The analogy to courtesy also tells us about more than just the utility of a half-politics-half-law judicial process. I argue that courtesy's constructive use of hypocrisy is bound up with and supported by other powerful factors, including habit (we are schooled from childhood in the rudiments of etiquette), pleasure (the rituals and pleasantries of good manners appeal to vanity, allowing each of us to feel more worthy of praise than we

may actually be), and the preservation of hierarchy (courtesy is typically a bulwark of the established order, defining appropriate behavior in terms that serve the interests of the most powerful groups). Similar dynamics attend law: steady habits of obedience, the pleasures of being treated like a rights-bearing subject, and the maintenance of power all play roles alongside the possibilities of pretense in sustaining the prevailing legal order. The resulting system is neither particularly fair nor free of contradiction. But it is durable and reliably attracts people seeking resolution of their disputes.

In their insightful discussions of my book, Burgess, Ewick, and Silverstein express several major concerns. Burgess argues that I do not pay sufficient attention to the role of rudeness and dissent as engines of social and legal progress. In a related vein, Silverstein contends that I do not fully account for the depth of current political challenges to the judicial process and that I do not provide adequate normative guidance for how judicial hypocrisies ought to be confronted. Ewick argues that I underemphasize the ways in which courtesy and law actually constitute (rather than merely suit) the individuals who they govern. In a sense, one could say that Burgess and Silverstein critique my analysis for pressing the claims of courtesy too far and that Ewick critiques my argument for not pressing far enough.

Although these criticisms point in different directions, I think they all manage to hit an important mark. As I noted at the outset of this essay, my book begins with a particular challenge posed by legal realism and my analysis is shaped by the structure and limits of that challenge. More specifically, my argument reflects the realists' interest in explaining the existing legal order and a concern for how that order is maintained. The orientation toward the prevailing system does leave open questions about how that system can and should be changed. And the emphasis on how actors sustain the status quo does focus attention on the importance of instrumental action while leaving constitutive processes largely unexplored.

The identification of a project's limits is also an invitation to extend the work. I read Burgess, Ewick, and Silverstein as indicating how my arguments may be usefully projected beyond the specific preoccupations of realism. Regarding the issue of system change, my analysis suggests that lasting reform cannot be produced simply by passing new laws or by staking new legal claims. The judicial process is upheld by a suite of interests, habits, and pleasures. Therefore, the work of political or legal change cannot be limited to rewriting the formal rules of the game; activists must direct their efforts toward altering the mores, social practices, and hierarchies that keep people invested in the rules. My analysis also suggests that any successful reform will ultimately be accompanied by its own set of conventions and pretenses. Change may well begin with disruptive dissent and blunt challenges to the exclusions of the existing order. Yet when rudeness gives rise to a durable new way of relating to one another it is because impolite opposition has managed to generate new forms of acceptable behavior, not because active dissent has been able to abolish the need for systems of manners. Thus my etiquette-based argument suggests a fresh perspective on how any new rule of law gains traction. Finally, the reframing of my argument within a constitutive logic not only underscores the inescapability of courtesy and law in a deep way, but also points toward the possibility of significant historical and comparative study. If we think of courtesy and law as engendering characteristic experiences that courtesy and law are themselves called on to administer and control, then we set the stage for comparing constructions

of the polite and legally ordered self with other selves constructed and managed on different terms.

In closing, let me say once again that I am grateful for the symposium contributors' incisive commentary. It has been a privilege to revisit and discuss my book in the company of such good critics.

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