

## KANDINSKY OR HART?

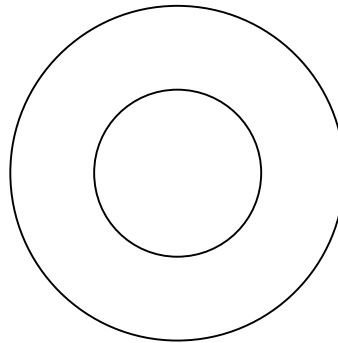
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In 1927, Heisenberg introduced his uncertainty principle. By 1934, Wittgenstein was breaking with his early work. In 1923, Kandinsky was putting the finishing touches on *Composition VIII*:



And in 1958, H.L.A. Hart, the great jurisprudential thinker, was dividing up the world of law into cores and penumbras:



Arresting, isn't it?

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Consider, some other things (and these seem equally arresting) that law teachers may well have to teach their students:

**How to elaborate the framers' intent** (*when we are lacking any intellectually respectable conception of the framers as well as intent*)

**How to discern the plain meaning of the text** (*when meaning has ceased to be anything but plain and the identity of a singular text has become problematic*)

**How to elaborate mens rea** (*when the concept has yet to address in any serious way the problem of the unconscious or the identity of the self*)

**How to deploy the conceptual and institutional grammar of 18<sup>th</sup> century constitutionalism** (*when many of its key distinctions and political grammar no longer track with the organization of post-industrial society*)

**How to do policy analysis within a defined context** (*when the specification of the context is itself at once necessary and yet antithetical to the logic of policy reasoning*)

How does a law teacher deal with teaching such things? The question is salient because the second part (in italics) seems to render the first part (in roman) incoherent.

One thing to recognize at the outset is that, for a few law teachers, no question ever arises. No question arises because, for them, the second part (in italics) is quite simply invisible. But for the vast number of law teachers, some form of the question does arise. There are many ways to pose the question. Here, I will mention only two.

Some law teachers might ask whether it is appropriate to teach the second part (the italics) at all? Perhaps it's not appropriate: to teach the second part is to leave the law—as announced by judges—in a compromised state. It is to undermine the rule of

law and to leave it without any obvious fixes. And this (or so goes the argument) is not right: At the very minimum, the law student, who is going to be a lawyer, needs to be able to believe in the rationality and ethical soundness of the conceptual apparatus he or she will be deploying, enacting, becoming.

Some law teachers might wonder whether it is appropriate to teach the first part (in Roman text) without also teaching the second (in italics)? Perhaps it is not appropriate: to leave the student with the idea that the framers' intent is an adequately formalized concept, or that mens rea is a good account of human psychology, or the like, is to engage in a kind of deception or mystification. And this (or so goes the argument) is not right. At the very minimum, the law student, who is going to be a lawyer, needs to understand the intellectual shortfalls and ethical vulnerabilities of the conceptual apparatus he or she will be deploying, enacting, becoming.

These are very brief sketches of two positions one might take in deciding whether one must, or can, impugn the law by juxtaposing more critical knowledges. The positions could be elaborated from many different angles: in terms of professional ethics, intellectual responsibility, political responsibility, pedagogical soundness, and more.

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I come down on one side, with some confidence, but without being able to dismiss the arguments on the other side as trivial. High modernism—Kandinsky serving as avatar here—is not unproblematically an appropriate aesthetic for law.<sup>1</sup> Still, I'm in favor of trying to bring American law (or rather some of its precincts and modalities) up to speed.<sup>2</sup>

Rather than present a brief-like set of arguments, I would rather lay out the back and forth of the ethical, political, and intellectual struggles involved with the questions posed by the prospect of modernism in law (and its relative absence). And I do so by

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<sup>1</sup> Of course, for American law, any aesthetic (in my sense of the term) is problematic inasmuch as American law denies its own aesthetic character.

<sup>2</sup> Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002).

discussing an artifact inhospitable to high modernism—namely, the judicial opinion.<sup>3</sup>

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The judicial opinion is an artifact addressed to many disparate audiences. It is, among other things, an attempt to yoke many potentially conflicting imperatives. A judicial opinion is at once an attempt to follow precedent, to heed ideals, to address the parties, to bolster judicial authority, to articulate a workable regime that tracks social practices and institutions, to soften defeat, to temper victory, to shut down disputes, (and much more). The judicial opinion is thus an articulation or fusion of sundry intertwined networks of political forces, professional craft, intellectual struggle, moral obligation, cultural norms, language and more. The judicial opinion is written by an author (a judge) who is variously more or less self-aware of any and all of these grammars: He or she writes for several audiences—some of which are culturally and cognitively up to speed and some of which are not.<sup>4</sup> Given this view of the judicial opinion and its various roles, it may simply be too much to demand that judicial opinions come up to speed with Kandinsky.

As I see it, it's not possible to write a high modernist judicial opinion. There is no and can be no Kandinsky equivalent of a judicial opinion—at least not currently. Why not? It simply would not be recognizable as a judicial opinion. The judicial opinion is a dedicated genre—its form belongs to a certain stage of knowledge and politics—a particular understanding of how facts relate to law, how law relates to parties, how parties relate to judges, how judges relate to the state, and how language relates to institutions.

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<sup>3</sup> I do not consider one of the obvious moves here which would be to look for modernism in other precincts of law. For examples see generally the monograph: DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIECLE)* (1997); the article: Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of Withdrawn Selves*, 62 *TEX. L. REV.* 1563 (1984); the essay: Pierre Schlag, *My Dinner at Langdell's*, 52 *BUFF. L. REV.* 851 (2004); and the legal fiction: LAWRENCE JOSEPH, *LAWYERLAND: WHAT LAWYERS REALLY TALK ABOUT WHEN THEY TALK ABOUT LAW* (1997). There are, of course, many more examples.

<sup>4</sup> For an interesting discussion of the point, see, Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 *CAL. L. REV.* 1473 (2007).

These relations are all introjected into the genre of the judicial opinion. This is not to say that one cannot tug at the genre to bring about slight changes here or there. On the contrary, one can: The judicial opinion—like all other elemental forms in law (e.g. rule, policy, principle, holding, etc.)—is not completely formalized.

But at the same time, where the judicial opinion is concerned, the form will resist, in various ways, the deployment of knowledges cast in contrary or antagonistic aesthetics. And this resistance, this opposition, is not purely aesthetic. It is also political: one has to recall here that the judicial opinion is an artifact, a communication, of the liberal democratic/administrative state to its subjects and to itself. In contemporary terms, the judicial opinion is an introjection of the liberal democratic/administrative state within a certain juridical form.<sup>5</sup> This point is, once one thinks about it, neither a criticism (it is what it is) nor very surprising. But the point does have some bite precisely because it is often overlooked.

And yet, when one thinks about it, perhaps we can say that in some highly attenuated ways, the judicial opinion is already tinged with modernism. Consider that as a legal professional one can responsibly read an opinion in multiple ways. One can read an opinion for its breakpoints—the key recurrent legal distinctions that form the infrastructure around which the opinion is constructed. One can read the opinion for its dramaturgy—the narratives of reconciliation, coercion, suasion, etc. that it enacts. One can read the opinion for the emotional registers instanced in the doctrinal regimes—the play of empathy and envy (equality), anger (retribution), fear (ordering), etc. One can also read the opinion for the violence it does—the compelled ascription of undesired and unwanted identities, the rhetorical suppression (in some cases erasure) of interested parties, the compulsory character of interpellation. One can read an opinion as a schedule, a regime, a ritual healing, a rehearsal of a cover myth, a resource allocation device, a dispute suppression exercise, a channeling mechanism, and so on. There are a great number of different registers from which the judicial opinion draws and in which the judicial opinion resonates. If one takes stock of all of these (which, for the sake of coherence, few of us do), sooner or

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<sup>5</sup> This is hardly to say that the judicial opinion is unique to the liberal democratic or administrative state.

later one ends up with an abstract expressionist artifact. In motion, no less.

But it's still the case that this "abstract expressionist artifact" is not the opinion itself. The reconnaissance of all these registers (along with their interactions and confluences) cannot be introduced responsibly into the opinion itself. Nor is it likely to be introduced anytime soon.

So how does one reconcile this antinomy? One strategy—and it is at odds with the preconditions for the rule of law—is to recognize that the judicial opinion is a pervasively coded artifact whose meanings resound in many different registers at once, only some of which are allowed to be publicly expressed or acknowledged in the opinion itself.

This may seem odd at first. Yet, in some limited, very modest ways, we have already encountered this sort of thing in law. The idea is implicit in the disjunction between the logic of discovery (the paths through which the judge comes to a conclusion) and the logic of justification (the self-presentation of the judge as she recounts how she arrived at her conclusion).<sup>6</sup> The idea is implicit in the distinction between law books (those books that articulate the law *qua* law) and books about law (those books which provide a running commentary on the law).<sup>7</sup> The idea is implicit in the notion of acoustic separation (the notion that an opinion addresses and is meant to convey divergent meanings to the public and to legal professionals).<sup>8</sup> It is implicit in the non-coincidence, the dissonance, between the constative and performative significance of a single legal rule, a single legal regime.<sup>9</sup>

These are all, in their own way, conceptual tools through which we can come to recognize that judicial opinions have conflicting

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<sup>6</sup> RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 27 (1961) (distinguishing between the way a judge decides a case and the way he justifies his decision).

<sup>7</sup> Richard L. Abel, *Law Books and Books About Law*, 26 *STAN. L. REV.* 175, 175-76 (1973) (book review).

<sup>8</sup> Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625, 630-34 (1984).

<sup>9</sup> Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 *STAN. L. REV.* 929, 947-50 (1988).

meanings, some of which remain discursively repressed.<sup>10</sup> To put it another way, judicial opinions may have many layers of meaning, but only some are allowed to be expressed and integrated back into the form itself.

Now, it may be that the judicial opinion, because it functions as a popular legitimation device (not a criticism here) and because it must track lay culture (not a criticism here) is slated to remain an intellectually and aesthetically arrested artifact.<sup>11</sup> This may not be so bad: It may be that among the last things we would want from our judges is to write opinions in the aesthetics of high modernism. There are certain artifacts—instruction manuals, phone books, application forms, (and so on)—where a modernist aesthetic would be rather unappealing. The judicial opinion seems to fall easily within that list.

But now here's another side to the matter: The judicial opinion is not just the setting down of a regime. It is also the discourse through which the law acquires knowledge of the cultural, the social, the political, and so on. Doctrinal classification schemes, policy considerations, legal reasoning, and legal identities are not simply aspects of setting down legal regimes; they are also *simultaneously* the enframings and channels through which the law learns. This dual function problem presents a potential challenge. If for reasons of setting down legal regimes, the judicial opinion must remain an arrested form (an archaic artifact) then the law can become numb to the roles it plays (or no longer plays) as a cultural, political and economic matter. Put simply: law can fail to learn.

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<sup>10</sup> This language of “repressed” meanings is very old school. It is not for that reason any of the less apt. I am after all talking about the relatively modest goal of trying to bring our thinking up to a level that would correspond to 1923 in the graphic arts.

<sup>11</sup> See, Post, *supra* note 5.