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Persuasion

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PERSUASION†

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> [Horses] have always understood a great deal more than they let on. It is difficult to be sat on all day, every day, by some other creature, without forming an opinion about them.
>
> On the other hand, it is perfectly possible to sit all day, every day, on top of another creature and not have the slightest thought about them whatsoever.
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> —*Douglas Adams*[1]

> [D]ialogue demands shared experience.
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> —*Drucilla Cornell*[2]

Lawyers spend a lot of time attempting to persuade other people.[3] They persuade judges to promulgate rules of law that favor their clients. They persuade their law partners to adopt their interpretation of existing law or to adopt their strategy for litigation. They persuade clients to accept the dictates of the law. They persuade adversaries in settlement negotiations and their clients' business associates in contract negotiations. They persuade legislatures to fund legal services for the poor, to adopt or to reject law reforms.

Law professors spend most of their time teaching — or at least practicing — the art of persuasion. We do this by exposing students to a wide array of argumentative moves and countermoves in the context of real world disputes. Law students react to this training with deep ambivalence. On one hand, "thinking like a lawyer" has a broadening

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* Associate Professor, Boston University School of Law. B.A. 1976, Williams College; M.A. (Political Science) 1978, J.D. 1981, Harvard. — Ed. I presented this Article as a paper at the Faculty Workshop Series at Boston University School of Law in October 1988, and received a great many useful comments from my colleagues. As I have done in previous articles in the Boston University, California, and Stanford Law Reviews, and in keeping with this symposium's spirit of recognizing excluded voices, I have improved the standard citation form by including the full names of authors. I do so, first, to celebrate and give full credit to the creative individuals responsible for new ideas, and second, to make clear that these sources have a human origin — people wrote and thought these things — and have only as much authority as we choose to give them. My goal is to humanize the sources, portraying scholarship as a continuing conversation, rather than as an elaboration of true principles based on a fixed and unchanging foundation.

1. DOUGLAS ADAMS, DIRK GENTLY'S HOLISTIC DETECTIVE AGENCY 6 (1987).

2. Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 366 (1985).

3. On law as the art of persuasion, see James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 685 (1985) ("A modern law school is, among other things, a school in those arts of persuasion about justice that are peculiar to, and peculiarly effective in, our legal culture.").

effect: addressing real cases from the standpoint of both sides teaches students that questions they thought were easy are actually hard. No claim or interest or right appears to be absolute. Understanding the reasons why this is so, and why we might want to protect competing interests, helps students develop expertise in argumentative tactics. Moreover, by teaching students to recognize the complex and contradictory nature of our values, legal education at its best clarifies the value choices we must make in governing social relations. This process may be empowering. As one of my colleagues has said, it not only allows you to state a case for what you believe in, but it also allows you to become a terror at the dinner table.

On the other hand, legal reasoning often appears narrow: the professor may reject out of hand an argument that appears perfectly sensible, even compelling, to a layperson. Law professors have special professional knowledge of what kinds of arguments will have a chance of working in legal settings. At the same time, they may have serious disagreements about this, as well as about which arguments are worth attempting even if they are unlikely to succeed. This cultural knowledge of the profession and the legal system cannot be reduced to a formula. Since everyone believes that some existing laws are wrong or unwise, everyone has the experience of wanting to argue for some result, but being told that the argument is out of bounds, or that it has no chance of success. Students are constantly surprised and frustrated by this process. They are also often confused about what it means to say that an argument will not work. Does it mean that their position is morally wrong or unjust, or does it simply mean that decisionmakers — the people in power — have a professional or personal ideology that rejects the position, and that the argument is unlikely to persuade them to change their minds?

Legal training creates a sense of conflict between the realization that one can argue for and against anything, and the realization that there are significant — even overwhelming — professional and social constraints on what counts as acceptable argument in particular contexts.[4] Judges decide cases somehow, even though they know how to argue both for and against the results they reach — results which are often quite predictable. There may be a professional consensus that a particular law reform proposal is unlikely to persuade those who have the power to make the decision. But the fact that there is a consensus among a significant number of lawyers that an argument is out of bounds does not necessarily mean that it *should* be out of bounds.

4. *See* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

Lawyers may be experts in knowing which arguments are likely to work in particular contexts, but we are not necessarily experts in knowing which arguments *ought* to work. Yet many people confuse what works with what ought to work. Pangloss made this error, but we need not.[5]

It is the area of play between what can work and what ought to work that interests me.[6] Those who are happy with the status quo may see those categories as congruent; what ought to work has worked. These are the people who wax eloquent about the genius of the common law which somehow, despite itself, achieves results that promote efficiency or justice or common sense. Others may see terrible injustice in the world, but feel that tragically little can be done to alleviate it; what ought to work may not be able to work. Others of us would like to believe that fundamental social and legal change is possible; what ought to work can work. Change is possible,[7] and those who have the power to implement significant changes in the law may sometimes be persuaded to do so. But how? Arguments and counterarguments are nothing more than techniques. By themselves, they do not guarantee, or even promise, success. Persuasion is somewhat mysterious. It is especially puzzling when we attempt to persuade others about what values they should have. How is persuasion possible when one's fundamental values are at stake? Can we ever persuade each other about values? If we can, what moves us?[8]

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5. *See* VOLTAIRE, CANDIDE (John Butt trans. 1947). Dr. Pangloss' philosophy is summed up in the immortal phrase: "[I]n this best of all possible worlds, . . . all is for the best." *Id.* at 20.

6. James Boyd White argues that law is both a system of social constraint and a system of social change. When lawyers participate in the legal system, they speak in the existing legal rhetoric — so that they can be both understood and persuasive to those in power. But they also necessarily change that rhetoric by their very participation in the legal system. The law provides a social context, but that context is dynamic. Lawyers continually create and remake that context by what they do within it.

> [Law] is always communal, both in the sense that it always takes place in a social context and in the sense that it is always constitutive of the community by which it works. Both the lawyer and the lawyer's audience live in a world in which their language and community are not fixed and certain but fluid, constantly remade, as their possibilities and limits are tested. The law is an art of persuasion that creates the objects of its persuasion, for it constitutes both the community and the culture it commends.

White, *supra* note 3, at 691.

7. At the same time, there appear to be significant limits on our ability to remake the world to eradicate injustice. Nor is there a consensus about what a just society would look like.

8. There is a large literature about persuasion. It encompasses the fields of rhetoric, law (especially trial practice), psychology, sociology, and political science. *See, e.g.*, HERBERT ABELSON & MARVIN KARLINS, PERSUASION: HOW OPINIONS AND ATTITUDES ARE CHANGED (2d ed. 1970) (psychology); ARISTOTLE, THE RHETORIC OF ARISTOTLE (Lane Cooper trans. 1932) (rhetoric); ROBERT BELLAH, RICHARD MADSEN, WILLIAM SULLIVAN, ANN SWIDLER & STEVEN TIPTON, HABITS OF THE HEART (1985) (sociology of ideology); PAUL ERICKSON, REAGAN SPEAKS (1985) (political rhetoric); ROY GARN, THE MAGIC POWER OF EMOTIONAL APPEAL (1960) (psychology); GARTH JOWETT & VICTORIA O'DONNELL, PROPAGANDA AND PERSUASION (1986) (social psychology); SONYA HAMLIN, WHAT MAKES JURIES LISTEN (1985)

I faced this question in teaching my property students about plant closings. For the first two years that I taught the course, the discussion revolved around what was to me a dismal story.[9] A factory has operated in a city for more than fifty years. The city has grown up around the factory and has come to rely upon it, as have its employees. The company has benefited enormously from its long-term relationship with the workers and the community. Yet the company appears unconcerned for their welfare. Instead, its officers focus on the bottom line; their only goal is to maximize profits and returns to shareholders. Ruled by a distant and seemingly unapproachable board of directors, the company closes the factory, putting thousands of people out of work, many of them permanently. The city faces a crisis. Many people experience downward mobility. Even most of those who find work face reduced living standards. All of the workers face grave difficulties in putting their lives back together.

It is a story of betrayal. The workers trusted the company and depended on it. The company lived off that trust, took advantage of it, and finally, abused it.

Yet most of the students did not see it that way. On the contrary, although they believed that plant closings were regrettable, many of them understood the closings to represent a rather happy story — the efficient restructuring of production through the invisible hand of the free market.[10] Everyone would be better off, most of them thought, if businesses could make economic decisions without regard to their so-

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(trial practice); PROPAGANDA, PERSUASION AND POLEMIC (Jeremy Hawthorn ed. 1987) (political psychology); DANIEL MCDONALD, THE LANGUAGE OF ARGUMENT (4th ed. 1983) (rhetoric); WAYNE MINNICK, THE ART OF PERSUASION (1957) (rhetoric); COERCION (Nomos XIV, J. Roland Pennock & John Chapman eds. 1972) (social psychology and law); CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, THE NEW RHETORIC (John Wilkinson & Purcell Weaver trans. 1969) (rhetoric); RICHARD PETTY & JOHN CACIOPPO, COMMUNICATION AND PERSUASION (1986) (social psychology); ROBERT REICH, TALES OF A NEW AMERICA (1987) (political rhetoric); PIERRE SCHLAG & DAVID SKOVER, TACTICS OF LEGAL REASONING (1986) (legal argument); LAWRENCE SMITH & LORETTA MALANDRO, COURTROOM COMMUNICATION STRATEGIES (1985) (trial practice); K. PHILLIP TAYLOR, RAYMOND BUCHANAN & DAVID STRAWN, COMMUNICATION STRATEGIES FOR TRIAL ATTORNEYS (1984) (trial practice); RICHARD WEAVER, THE ETHICS OF RHETORIC (1953) (rhetoric); SOCIAL INFLUENCE (Mark Zanna, James Olson & C. Peter Herman eds. 1987) (social psychology); Jerry Frug, *Argument as Character,* 40 STAN. L. REV. 869 (1988) (legal argument).

9. The case is Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980). On law as the creation of stories, see White, *supra* note 3, at 691-92 ("[Law] is a way of telling a story about what has happened in the world and claiming a meaning for it by writing an ending to it.").

10. *See* Gerald López, *A Declaration of War by Other Means* (Book Review), 98 HARV. L. REV. 1667, 1669-70 (1985) ("[O]ne must understand society as a network of competing power strategies. Individuals and groups exercise power through strategies that take the form of stories and arguments expressing their needs and aspirations. We are all caught up in the interaction of these competing power strategies.") (footnote omitted); *see also* Gerald López, *Lay Lawyering,* 32 UCLA L. REV. 1 (1984) (explaining the central role of stock stories in persuasion).

cial consequences. Those consequences matter, of course, but people adjust to change, as they always have. To the extent they find it difficult to adjust, the government provides an adequate safety net for those at the bottom of the economic ladder. Doesn't the government provide unemployment benefits (paid by the company) and food stamps and welfare for those who face desperate circumstances? How much more can the government do?

When students explain why courts should not regulate plant closings, three arguments stand out. (1) *The managerial prerogatives argument:* Doesn't the company have the right to decide what to do with its property, to make basic investment decisions? (2) *The freedom of contract argument:* If the workers wanted higher severance payments or job training or a right of first refusal to purchase the factory, why didn't they bargain for these benefits? If we require a minimum level of entitlements, won't this interfere with the ability of the parties to bargain freely for arrangements that are mutually beneficial? (3) *The deference to the legislature argument:* Shouldn't the legislature, rather than the courts, be the body that creates new property rights?[11]

Conservative students are relatively confident and open about their beliefs in limited government and free enterprise. They firmly believe that government regulation — although intended to help dislocated workers — will actually make them worse off by hastening economic collapse of marginal companies and by stifling new investment. They confidently proclaim that government regulation of employment contracts interferes with both the company's property rights to manage its business and the freedom of both the company and the workers to determine the terms of their association. Liberal students are much more tentative about their views. They worry about how we, as a society, treat vulnerable people in times of crisis; yet they are embarrassed, almost apologetic, about their advocacy of government regulation. Doesn't that make them bleeding heart liberals? Just as liberalism came to be a dirty word in the last presidential election year, these students lost a language for talking about their values. They lack a way to tell a story of plant closings that presents, in a compelling and attractive way, the claims of displaced workers. They seem unable

11. They also argue that government regulation of the free market is inefficient. It promotes waste by preventing the capital mobility needed to transfer resources to their most productive use. The fact that there are reasonable efficiency arguments both for and against regulating plant closings means that it is probably individual ideology that determines how people evaluate the available facts. *See* Jack Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. (forthcoming 1989). It is those value questions that concern me here. For an explanation of the "free market" efficiency argument, and what is wrong with it, see Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

even to tell such a story to themselves, to justify their intuitions about the need for protection.[12]

The readings and class discussions did little to clarify these matters. The judges who faced this case described in poignant rhetoric the painful dilemma the case presented. Some students felt that it was inappropriate to voice such sentiments in a court of law. Others felt that, even if it were appropriate to mention these concerns, it was wrong to give in to them. To rule on the basis of such concerns was what it meant to be a bleeding heart liberal — to give in to emotions at the expense of the facts. But maybe the case for plant-closing regulation was not only an "emotional" one; perhaps there were good, hard-nosed reasons to intervene, such as the need to remedy a market failure. To supplement the case, I gave the students an article I wrote, describing a complex of moral, doctrinal, and economic arguments for protecting the interests of the workers and the community in the context of plant closings.[13] Although the students could replicate these arguments, they appeared unmoved. Even the liberal students were uncomfortable. They felt the burden of proof was on their side, and they did not think, in the end, that they could overcome it.

This situation worried me, but not because most of the students disagreed with my particular law reform proposal. It worried me as a teacher that my students failed to understand that many courts would understand plant closings as hard cases. Although they could easily recite doctrinal and policy arguments on behalf of the workers, they seemed unaware that some judges would react sympathetically to those claims. It was partly a matter of professional competence: they could not competently represent a company in a plant closing case if they could not see, and feel, the power of the arguments on the other side. To do a good job representing either side, they had to under-

12. On the ironic relationship between freedom of contract norms and oppression, see Avi Soifer's brilliant and eloquent article on the "free" choice of an emancipated slave to return to her home in the South — and face re-enslavement — to be with her family. Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916 (1987). *See also* Aviam Soifer, Liberty of Contrast: Notes Toward a Contrarian Approach to American Legal History (unpublished manuscript on file with the author) (using a narrative approach to discuss several key cases that illustrate the complex tensions within American legal history). For a stunningly rich and insightful exploration of the social context in which contracts are made, see Jane Maslow Cohen, *Posnerism, Pluralism, Pessimism*, 67 B.U. L. REV. 105 (1987). Three excellent discussions of the ways in which exploration of social context may influence our interpretation of contracts are Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985) (describing how images of gender influence attitudes and interpretation of contractual relations); Robert Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987) (describing competing versions of the social context in which contracts are made).

13. *See* Singer, *supra* note 11.

stand this to be (in Ronald Dworkin's phrase) a hard case. It was a matter of professional competence in a second way as well. By giving the students materials that elaborated both sides of the argument, I hoped that they would appreciate the difficult questions of property and contract law that these cases present. I hoped they would get some insight into why plant closings have been such a focus of recent political debate. I wanted the students to understand that a decisionmaker might find the workers' arguments forceful because the marketplace works through a mixture of self-reliance and trust. Almost no one takes the position that people have absolutely no rights other than those explicitly stated in their written agreements. All agreements take place in the context of legitimate social expectations about how the parties will deal with each other, which are not, and need not be, written down.

But the difficulty of persuading the students that this was genuinely a hard case also led me to wonder: If it were possible at all to change someone else's mind, what would it take to persuade someone who had strong intuitions against "government regulation" that it was morally justified here? The detailed arguments I had constructed had created some amount of doubt about the fairness and wisdom of deferring to the "free market" here, but they had done no more than that. By themselves, their persuasive force was limited. Something crucial was missing.

The next couple of times I taught the course, I tried something different. I had much better success in getting across to students the competing norms at work here. I also got a clue as to what was missing in my attempt to persuade the students that they should see this as a hard case. It was, as Mari Matsuda has said, "[a] refusal to acknowledge context — to acknowledge the actual lives of human beings affected by a particular abstract principle."[14] The students understood intellectually that unregulated plant closings cause significant problems and create many victims. But they understood those victims through distanced analytic language; they were "externalities," rather than people with whom the students could empathize.[15] To remedy this problem, I gave the students the same set of readings — but when

14. Mari Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice,* 16 N.M. L. REV. 613, 619 (1986). On the relation between formal conceptions of race and actual experience of it, see Neil Gotanda, Towards a Critique of Colorblind: Abstract and Concrete Race in American Law (unpublished manuscript on file with author); *see also* Julius Getman, *Voices,* 66 TEXAS L. REV. 577 (1988) (describing the role of the human voice in persuasion).

15. *See* Martha Minow & Elizabeth Spelman, *Passion for Justice,* 10 CARDOZO L. REV. 37 (1988) (explaining the interconnection between reason and passion).

I came into the classroom, I did not mention the problem of plant closings. Instead, I told the following story:

* * *

This did not happen, but suppose it did happen. For some time now, the faculty of the law school has been worried about the declining competence of attorneys. Chief Justice Warren Burger has voiced concerns about the preparation and competence of the Supreme Court bar. Recent scandals have arisen involving lawyer neglect of client matters, violation of ethical norms, and even violations of law. We have therefore commissioned a study to investigate how legal education can contribute to protecting the public from unprepared or unethical lawyers. Our study indicates that the bottom third of our graduating class will never be truly competent at the complexities of the practice of law. This situation demands a remedy. Your examinations for the first year of law school are next week. As a consumer protection measure, we intend to give failing grades to the bottom thirty-three percent of the class. The bottom third will flunk out of school. The old way of doing things was right. Look to the left of you; look to the right of you. One of you will not be here in the fall. You are free to apply to transfer to other law schools, but we will not recommend you to them. In fact, if they ask us, we will candidly inform them that we are pessimistic about your ability to make it in the profession. We recognize that this new policy is a substantial change from our previous grading curve, under which only two to three percent of each class would be asked not to return. We know that many of you will be surprised and disappointed at our change in policy. Nonetheless, it is a necessary measure to promote the efficient delivery of legal services.

You bring a lawsuit, asking the court to order the law school to allow you to graduate on the basis of the rules that were in effect at the time you accepted our offer to come here. Do you have any rights?

* * *

Students react to this story with alarm. There is some nervous laughter. They overwhelmingly feel that a sudden change of policy like this is fundamentally unfair, and that they should be entitled to relief. The feeling is not always unanimous, although sometimes it is. Even when it is not unanimous, it is clear that those who take a hardline, antiregulatory approach here understand that the burden of proof is on them.

I take the position that the school is perfectly entitled to determine how to run its program. I give a series of arguments justifying autonomy for the school administration. These arguments track the three most common arguments against regulating plant closings. The stu-

dents understand the role I am playing, and argue that such a policy would violate their rights. But they are not playing a role. They want to win the argument. The discussion goes something like this:

I. The Managerial Prerogatives Argument

Do you have any rights?

Of course we do. You can't change the rules midstream like that.

Why not? We run the school; we're in charge here. We can do what we think is required to produce top-quality lawyers; that is our job.

That's true, but you can't act as if we weren't here. You can't just ignore our needs or the fact that you misled us by telling us that one system was in effect and then changing in the middle. If we had known you were going to do this, we would have gone somewhere else.

That may be true, but it is not to the point. We have made an expert judgment about the needs of the profession. It is always disappointing to be told you are not up to snuff. But we have to think about the larger picture. We are making sure that the market for legal services works well.

Maybe you're wrong about that. You should at least listen to our side. When what you do affects us so powerfully, we should have something to say about it. You have no right to change school policy in a way that affects us so deeply without consulting us.

What good would it do to discuss it with you? We are the experts. We make policy here, and we know what we're doing. What could you possibly say that would change our minds? Facts are facts. Someone once said that the truth may make us free, but first it will make us miserable.

Even if you are right, you don't make policy in a vacuum. It is unfair for you to destroy our careers when we could not have known that you were going to apply these new rules to us. What you are doing is the equivalent of an *ex post facto* law.

Whether or not it is unfair to you, we have an obligation to do our jobs to produce good lawyers. We have an obligation not to grant law degrees to people who are not competent to practice law. We have an obligation to be fair to the people our graduates will be serving.

II. The Freedom of Contract Argument

Of course you must exercise your judgment about how to run the law school. But even if you are right that you need to be more selective about whom you graduate, you cannot change policy retroactively. We had an agreement. You can't back out now.

What agreement?

Your literature explains school policies, including the grading curve. It explains that ninety-eight percent of your graduates get jobs in law-related fields after graduation. This unmistakably suggests that if we attend this law school, we will do well in the legal profession. It would be fraudulent for you to renege on those promises. You are estopped from denying those claims.

Who made those claims?

It is all in the catalogue.

Oh, the catalogue. The catalogue is very carefully written. It was drafted by lawyers. It contains no promises of any kind. In fact, it says in big, bold letters: Subject to change at any time without notice. *Didn't you read that part?*

What are you talking about? You send out the catalogue, obviously intending to induce us to attend your school by your claims about your ability to produce and place your graduates. We relied on those claims; we trusted your good faith. You have no right to say now that those claims are meaningless.

They were not meaningless. They just were not legally enforceable promises.

But you led us to think they were promises. You knew we would rely on them.

If you wanted the security of knowing that you would be able to graduate on the basis of the rules in effect at the time you came here, why didn't you bargain for it?

What? Who would we have talked to?

The Dean, of course.

It would never have occurred to us that you would renege on those commitments.

You made a mistake. You should have been more careful. The law rewards people who are self-reliant. The courts cannot remake your contracts for you, giving you the benefit of entitlements that were not part of the bargain. It would be paternalistic for the courts to interfere in freely negotiated contracts in that way. It is better to leave the terms of contracts to the free market, rather than government fiat.

Freely negotiated? It was a take-it-or-leave-it offer. We did not negotiate about anything.

It does not matter. There are lots of law schools, lots of law students. Lots of buyers and sellers means a competitive market. Supply and demand determine the terms of arrangements in the market for legal education. If our policy change decreases the number of students

who apply here, that is our business. We bet that other law schools will follow our lead. The American Bar Association may even commend us for our service to the profession.

That does not mean that we understood that you would treat us so shabbily. Why couldn't you at least make the change prospective? If the bottom third of this year's class needs extra help, why not give them a longer time to learn the subject matter? Why not let them repeat a year?

The cost is just too high. This would require us to accept fewer students next year, and to spend much of our time attempting to retrain people who need special attention. It is just not worth it. Besides, law is not the only thing you can do. There are lots of jobs out there. You all have college degrees. Go do something else.

You are being unbelievably callous. Of course we can do something else. But it means we may have to move; we may have to change our life plans entirely. This is bitterly disappointing. We trusted you, and you have no right to abuse that trust.

III. The Deference to the Legislature Argument

Suppose you are right that it is effectively fraudulent for us to change the rules in the middle of the game. Suppose you have a right to rely on the representations made in the catalogue and on our good faith. Suppose you have a right to assume that the program you enter will not change dramatically while you are here. This still does not explain why a court of law should grant you injunctive or even monetary relief. You are asking for something extraordinary. You are asking for the right to attend our law school, to participate in our program, and to be granted a law degree that will enable you to enter the legal profession — and all this against the better judgment of the professors who run the school. Moreover, it is not something we promised you; you did not bargain for it. In the absence of a contract giving you this right, your claim is effectively an argument to create a new property right — an entitlement to receive a law degree. That would be a momentous change in the law. Isn't the democratically elected legislature the appropriate body to create new property rights, rather than the courts?

The legislature is not going to address this problem. And even if they do, any regulation is unlikely to help us. Moreover, courts have the obligation to enforce the rights of the parties, and to protect reasonable reliance. The law is not static, but changes over time, and the courts have the duty to change the law to fit new social conditions and values.

But the consequences of creating a new property right are momen-

tous. The courts are not experts in determining the consequences of interfering in the free market in this way. On the contrary, the law faculty are the experts on legal education and the needs of the legal system. We know what policies will work and which ones won't. Why shouldn't the court defer to our judgment? If we are wrong, the legislature can hold hearings, get evidence, and determine whether there is political support for redistributing property rights.

The courts have the obligation to promote justice. If the legislature determines that law faculties should have carte blanche to run roughshod over the rights of law students, it can promulgate a law saying so. In the absence of such an appalling statute, the courts should prevent the law school from defrauding its students by trampling on our reasonable expectations. I will say it again: We trusted you, and you have no right to abuse that trust.

* * *

I had hoped to persuade the students that their initial intuitions about the norms governing the marketplace were oversimplified. This exercise did seem to enable the students to see that there was something to the arguments they had at first rejected out of hand. Why did the exercise work in this way? I do not think that what made the difference was simply a crass appeal to the students' self-interest, although I certainly did appeal to their self-interest. I think the exercise worked for two, somewhat paradoxical, reasons. On one hand, it encouraged the students to try to empathize with the victimized workers. On the other hand, it taught the students something about themselves and their own beliefs of which they had been unaware. Together, these two moments created a sense of connection between the students and the workers. This sense of connection created a felt relationship between them where before they had felt no connection.[16]

16. A felt relationship may be created in a variety of ways. One way is to adopt a dialogue form. This form is often adopted as a persuasive device to highlight both arguments and counterarguments and competing perspectives. The dialogue form itself enacts the relationship it seeks to create. It poses two persons in a dialogic relationship with each other. For this form of presentation to be effective, both parties must be committed to the dialogue as a joint project, and both must make the effort to understand the perspective of the other. On dialogic relations as a form of normative argument, see BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); Drucilla Cornell, *Beyond Tragedy and Complacency,* 81 NW. U. L. REV. 693 (1987); Cornell, *supra* note 2; Drucilla Cornell, *Two Lectures on the Normative Dimensions of Community in the Law: In Defense of Dialogic Reciprocity,* 54 TENN. L. REV. 335 (1987). A second way to create a felt relationship is by use of parables. *See, e.g.,* Allan Hutchinson, *And Law (or Further Adventures of the Jondo),* 36 BUFFALO L. REV. 285 (1987); Arthur Allen Leff, *Law and,* 87 YALE L.J. 989 (1978); Martha Minow, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: A Parable,* 138 U. PA. L. REV. (forthcoming 1989); Robert Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Color,* 5 LAW & INEQUALITY 103 (1987). For examples of persuasive parables which also use dialogue, see Kathryn Abrams, *The Deluge: A Trial and Judgment in One Act* (Book Review), 65 TEXAS L. REV. 661 (1987); Derrick Bell, *The Supreme Court, 1984 Term — Foreword: The Civil Rights*

Creating the relationship enabled persuasion to occur.[17]

The story encouraged students to see the world from someone else's perspective.[18] Understanding plant closings as the efficient restructuring of the economy takes the perspective either of an outsider viewing the system as a whole or of the corporate managers who make investment decisions on behalf of shareholders. An outsider to the drama can easily choose to focus on the performance of the economic system in the aggregate, rather than the impact of investment policy on particular victims of economic change. Managers may take the view that the goal of maximizing returns to shareholders requires unhindered discretion to transfer investments freely from one economic activity or region to another. Either of these perspectives may rest on the assumption that people get what they bargain for, and that economic actors have no duty to act to help others absent an explicit promise to do so. By asking for regulation of the employment contract to protect their interests in the event of a plant closing, workers are asking for special privileges to which they are not entitled. These perspectives also assume that both the bargains that take place in the marketplace and the distribution of property and skills that are exchanged in those bargains are generally fair and legitimate.

What is missing in the free market story is the fact that the relative bargaining power of the parties to consensual transactions is often woefully unequal, and that economic actors — both weak *and powerful* — often legitimately rely on the good faith of others. However, merely explaining this to be the case is not sufficient to persuade a person who takes the perspective of the social engineer or the corporate manager. Such a person may start from an assumption that, in the case of unionized industries, workers are sufficiently powerful to get the contract terms that they have a right to expect. Because this is so, the workers have no right to complain when they did not bargain for special protections. Believing this story allows the decisionmaker to distance herself from the workers' situation.

Chronicles, 99 HARV. L. REV. 4 (1985); Jeremy Paul, *A Bedtime Story*, 74 VA. L. REV. 915 (1988).

17. A somewhat different, but related, process is described in Jerry Frug's article on argument as an appeal to a particular character. Frug, *supra* note 8. Professor Frug explains that persuasive arguments "appeal simultaneously to a notion of the self and a notion of society." *Id.* at 875. This aspect of argument works by asking the listener to imagine herself as the sort of person who would identify with persons of a certain character. To the extent this appeal is successful, the listener is persuaded by a deeply felt sense of commitment to an imagined community of persons.

18. *See* Martha Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

This is why an empathic narrative[19] describing the effects of a plant closing on workers is not necessarily adequate to convey the reality of that situation. My initial inclination had been to tell a story that would enable the students to empathize with the workers in the case by giving a "thick description"[20] of their situation. But this strategy could not work if the students simply did not believe that the workers were in fact vulnerable or that the company's action was an illegitimate breach of trust. The only way to break through this barrier was for me to imagine a situation in which my audience would themselves feel both vulnerable and betrayed. This situation would convey the message that ordinary people, *like themselves,* sometimes feel powerless in the face of large institutions on which they are heavily dependent — that ordinary people, *like themselves,* rely on the good faith of others in the marketplace.

The law school example was a good one because it described a situation that the students could understand and which enabled them to experience both vulnerability and broken trust. The story forced the students to imagine what it would be like to be vulnerable to the whims of an institution which had a significant power to determine the shapes of their lives. Perhaps more important, law schools are institutions that many students would imagine to be outside the rough and tumble of the marketplace. I do not mean that they would not understand that there is fierce competition to get into the better law schools or that law schools compete to place their graduates in legal jobs. I mean that both the professional and educational nature of the institution would conjure up images of dependability and high moral standards. The professions, after all, ostensibly require high standards of ethics from their members, and schools are in the business of promoting knowledge. Neither one focuses entirely on profit maximization or self-interest. This may be why students say that when they graduate they go out into the "real world."

By telling the story, I conveyed the message to the students that the law school was not in fact out of the market, but was an economic actor just like a steel company. Law students do not spend their years in school in a fairy tale; the world they are in is very real. In this way,

19. *See* Lynne Henderson, *Legality and Empathy,* 85 MICH. L. REV. 1574 (1987). Henderson writes:

> The argumentative steps taken to convey human situations to a judge might be described as creating affective understanding by use of a narrative that includes emotion and description ("thick" description, if you will) of a human situation created by, resulting from, or ignored by legal structures .... I shall refer to such arguments as "empathic narratives" ....

Id. at 1592 (footnote omitted).

20. *See* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 3-30 (1973).

I hoped to get the students to ponder the connection between their dependence on the law school and the steelworkers' dependence on the employer. "Oh," they could say, "that is what it might feel like to lose your job after twenty-five years, with an inadequate pension, two kids in college, and an elderly father in a nursing home. That is what it feels like to have your life disrupted, your hopes dashed, your plans shattered. That is what it feels like to have nowhere to go."

Getting students to imagine themselves in a vulnerable and dependent position would not carry a moral message unless they believed that they would have a right to fair treatment in that situation. Persuasion ordinarily works, not by convincing others to change their values, *but by making them aware of values they already have* which they simply had not initially thought were relevant in this situation.[21] As Martha Nussbaum argues: "[M]ost people, when asked to generalize, make claims that are false to the complexity and the content of their actual beliefs. They need to learn what they really think."[22] The students' feeling that it would be outrageously unfair for the law school to surprise them by changing the rules in the middle of their education enabled them to become conscious of values they already held, but which they had assumed were not relevant in the plant closing situation. The story forced them to confront the question: If it is all right for the steel company to close the factory in furtherance of its property interests, why isn't it legitimate for the law school to change its educational policy as it sees fit? If you feel, on the contrary, that it would be unfair for the law school to act in bad faith, why is it fair for the steel company to do so?

This means that Oliver Wendell Holmes' appeal to the felt needs of society[23] or Karl Llewellyn's appeal to "situation-

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21. Professor Crenshaw makes a parallel argument:

> People can only demand change in ways that reflect the logic of the institutions that they are challenging. Demands for change that do not reflect the institutional logic — that is, demands that do not engage and subsequently reinforce the dominant ideology — will probably be ineffective.
>
> The possibility for ideological change is created through the very process of legitimation, which is triggered by crisis. Powerless people can sometimes trigger such a crisis by challenging an institution internally, that is, by using its own logic against it. Such crisis occurs when powerless people force open and politicize a contradiction between the dominant ideology and their reality.

Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* 101 HARV. L. REV. 1331, 1367 (1988) (footnotes omitted).

22. MARTHA NUSSBAUM, THE FRAGILITY OF GOODNESS 10 (1986).

23. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed. 1963).

sense"[24] are not necessarily enough to persuade someone about a particular dispute. The situation sense of most of my students in response to plant closings was that this was an area of life appropriately left to the "free market," meaning the relative bargaining power of the parties. It took the closer-to-home example of the law school to enable them to realize that they often expect economic actors to comply with general norms of trust. The example forced them to realize that self-reliance is not the only norm that drives the market; nor do they think it should be. The market operates on a combination of self-reliance and reliance on relationships with others. Without a great deal of trust among market participants, the market could not operate. It is, after all, a market, and not a state of war. We value self-reliance, but self-reliance is not all that we value. The story brought the students in touch with the complexity of their moral intuitions. It enabled them to understand the case as one of moral conflict, rather than one that could be easily solved.

This realization changed them. It did this partly by bringing them in touch with their own values. But, perhaps more important, it changed them by bringing them in touch with others. It remade their relationship with those others.[25] The students had identified, consciously or unconsciously, with the corporate managers who desired the freedom to manage what they saw as their business. These managers occupy a hierarchal relation to the workers they employ; they exercise significant power over the workers' lives. In effect, by viewing the world from the perspective of the managers, the students placed themselves in an imagined hierarchial relationship with the workers. It is as if the students had adopted the position of the rider on the horse, unaware of their own power relationship with the horse. Persuasion could not possibly occur unless the students got down off the horse so that they could see the world from the perspective of the workers.[26] Seeking to understand the perspective of the other is a *precondition* to persuasion. Without such an effort, we commit what Patricia Williams has called "spirit-murder, or disregard for others whose lives

24. KARL LLEWELLYN, THE COMMON LAW TRADITION 121-57 (1960).

25. *See* Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference,* 22 HARV. C.R.-C.L. L. REV. 111, 179 (1987) ("Knowledge and identity are forged in social relationships."); White, *supra* note 3, at 696 (Law is a "radically ethical [enterprise], by which self and community are perpetually reconstituted.").

26. *See* Richard Delgado, *Critical Legal Studies and the Realities of Race — Does the Fundamental Contradiction Have a Corollary?,* 23 HARV. C.R.-C.L. L. REV. 407 (1988) (Because white persons do not share the recurring experience of racial treatment faced by minorities, they must constantly relearn what racism is.).

qualitatively depend on our regard."[27]

Perhaps, then, persuasion starts by creating a relationship between oneself and others. Such a relationship does not connect people who were unconnected; it makes them aware of the connections they already have. The relationship changes who one is. In so doing, it clarifies what one really thinks. In this way, we may redefine our values. Persuasion begins when the rider notices the horse, and the fact that the horse cannot speak. The rider can never know what the horse knows. To get even a glimpse of what the horse is thinking, the rider must look the horse in the eye. But to do that, the rider must get down off the horse and walk a little way. Persuasion is what happens when the rider turns around.

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27. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 151 (1987).