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Lawmaking as an Expression of Self

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LAWMAKING AS AN EXPRESSION OF SELF

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We now take it as common ground that different economic and social circumstances generate different legal cultures. If a natural resource like water or oil is vital to the local economy, one would expect the emergence of legal rules and institutions to protect that resource against depletion. If people are interested in surviving, they will take measures to ensure their survival. On the social plane, if an institution such as friendship or the family is regarded as central, this commitment is likely to generate rules protecting the institution. Of course, the correlation between social forces and legal rules might not be precise. It might be the case, for example, that as family values decline, the rules of divorce remain strict as an expression of yearnings for times past. And if family values reassert themselves against a background of loose divorce rules, the law might not revert to its former strictness. If a social movement is deeply rooted, the law might indeed appear irrelevant as an instrument for guarding and furthering that movement.

As a general proposition, we can hardly quarrel with Holmes' aphorism that the life of the law has not been logic, but experience.[1] The felt necessities of the time induce courts and legislatures to change the governing rules. So much is clear. The matter becomes murky, however, if we dig behind this platitude and we attempt to be more precise about the relationship between the base of economic and social circumstances and the superstructure of legal rules. The argument is that the base in some way generates or brings about the superstructure. Unfortunately, this causal proposition verges on truth by definition or tautology. It resembles the circular claim that a soporific condition causes one to be sleepy. To escape the charge of tautology, we have to be able to isolate the cause from its effects. We have to be able to perceive the soporific condition independently of the person's being sleepy. Since it is hard to imagine being sleepy without being in a soporific con-

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1. O. HOLMES, THE COMMON LAW 1 (1881).

dition or being in a soporific condition without being sleepy, we can readily label this connection as circular and therefore tautological. Because they are true by definition, tautologies do not tell us anything about the real world. They are merely the expression of verbal interdependencies.

Those who claim that economic and social circumstances generate the superstructure of the law obviously believe that these social and economic circumstances can be identified independently of the legal institutions they generate. It is not so easy, however, to know whether a particular resource is important or whether a particular requirement is a "felt necessity of the time"[2] without looking at legal institutions. In many situations, the perception of the base collapses into our perception of the superstructure. There is often no way of perceiving social values without looking at legal institutions.

Take the question whether human life is important in the United States today. We claim that human life is important, certainly much more important than property, but if we take a close look at our legal institutions we might wonder whether this is true. We need only note the dominant attitude in the United States toward capital punishment, toward abortion, toward the use of the automobile as our primary means of transportation. The primary evidence for assessing the value of human life in the United States today is indeed the law itself. Of course the legal institutions themselves are complex and there are contrary strains within the legal decisions themselves that reflect a greater concern for human life. Witness the increase in liability against bar keepers and social hosts who serve drinks to obviously drunk patrons and guests.[3] These rules are designed to protect the innocent against drunk drivers.

Let me be clear about my claim. I am not arguing either that there is a high or low regard for human life in the United States, but rather that it is difficult to perceive what our attitude is without looking at the legal decisions that we make. If the consequence, namely the law itself, is the best evidence available for the felt necessities of our time, then it becomes tautological to claim that the social and economic needs generate legal institutions. When the cause collapses into the consequence, we have a logical pro-

2. *Id.*

3. *See* Kelly v. Guinnell, 96 N.J. 538, 476 A.2d 1219 (1984).

position comparable to the claim that a soporific condition brings about sleepiness.

There are obviously some cases in which social and economic upheaval induce significant legal changes. It is not particularly difficult to trace the impact of the Depression on Supreme Court decisions upholding interventions in the economy. Without attempting to assess the precise ways in which social and economic circumstances can induce a legal change, I should like to shift the focus of our thinking about law away from causal explanations toward an understanding of legal phenomena as the expression of meaning. The question that may prove to be more illuminating is not how did we get to where we are, but rather: What do the details of our legal system say about who we are? This is an important shift in orientation — from tracing events back to their causes to reading legal decisions as carrying implicit messages. To follow through on the example of sleepiness, let us suppose that a lecturer confronts widespread yawning in his audience. He can ask himself a number of different questions. He can ask the causal question: What are the physiological circumstances that induce yawning? He can answer that causal question tautologically by saying that a soporific condition induces signs of sleepiness or he can answer the question by pointing to independent causal factors, such as the lateness of the hour or the lecture hall's being overheated. Another approach, the one that I favor in this lecture, stresses the yawning as an expression of meaning. What is the yawning person trying to tell the lecturer? The meaning of the yawn is sometimes painfully obvious.

In this lecture I should like to encourage an attitude toward legal phenomena that stresses both tradition and change as an expression of meaning, particularly as an expression of national legal identity. I will illustrate this thesis with some specific examples of substantive rules in American and in German law. In the latter part of the lecture, I shall turn to the choice of language as a parallel expression of identity within a particular legal system.

Allow me to begin with an example from the case law on the admissibility of involuntary confessions. We are all familiar with the Supreme Court's ruling in *Miranda v. Arizona*,[4] which extended the constitutional privilege against self-incrimination to station-

4. 384 U.S. 436 (1966).

house interrogations in the absence of counsel. The critical case in the evolution of the law is, in my opinion, *Rogers v. Richmond*,[5] decided in 1961, five years before *Miranda*. In this case, Justice Frankfurter transformed the rationale for excluding involuntary confessions. The true reasons for excluding involuntary confessions, Frankfurter wrote, was not "because such confessions are unlikely to be true but because the methods used . . . offend an underlying principle in the enforcement of our criminal law."[6] The question, of course, is what this underlying principle is if it is not conviction of the guilty and avoiding conviction of the innocent. In Frankfurter's statement of the principle, we find an expression of American identity. The important point, Frankfurter wrote, was that "ours is an accusatorial and not an inquisitorial system — a system in which the State must establish guilt by evidence independently and freely secured and may not by its own coercion prove its charge against an accused out of his own mouth."[7]

The important feature of this argument is not whether the learned Frankfurter was correct about the essence of accusatorial or inquisitorial trials. He and his colleagues on the Supreme Court had an image — a screen memory, if you will — of medieval European inquisitorial trials. The nature of these trials was that the trier of fact sought to procure confessions as the means of establishing guilt. In the system of legal proof that prevailed on the Continent prior to the French revolution,[8] it was important to secure confessions in cases where the formal rules of evidence would not permit a conviction. The evil in this procedure, as the Court perceived it, would extend to modern European accusatorial procedure. It makes little difference whether the inquisitorial judge seeks the confession or whether the independent prosecutor, functioning in an accusatorial system, seeks to gain incriminating evidence from the mouth of the accused. It makes little difference whether torture is used or not. The essential evil is the state's making an informal determination that there is sufficient evidence in the case to clinch the prosecution with a confession from the mouth of the accused. With this argument taken as a premise, it

5. 365 U.S. 534 (1961).

6. *Id.* at 541.

7. *Id.*

8. *See* A. ESMEIN, HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 251-71, 288-322, App. B (Simpson trans. 1913).

was but a short step to the Court's ruling in *Miranda* that any interrogation of a suspect in custody in the absence of counsel or a knowing and explicit waiver of counsel is unconstitutional.

For our purposes, the intriguing issue is not so much the merit of the Court's reasoning, but the role of the argument for an affirmation of identity. To reason as did Mr. Justice Frankfurter is to make a claim about what it means to be an American. Of course, there is an obvious paradox in arguments of this sort — for if it were truly the American way not to rely on confessions, there would be no need to resolve cases like *Rogers v. Richmond.* The argument about the American way is not an empirical claim about what the police do in fact. It is a claim about the essence of the American system of justice, not about its historical particulars. If the particulars of history belie the claim about the American system, so much worse for the particulars. They will pass as do all transient facts of history. Frankfurter's argument in *Rogers v. Richmond* can be buttressed with arguments of principle and of policy, of justice and of utility, but at its core it is an argument of a different sort. Claims of principle should appeal to all judges graced with reason and a sense of justice. Arguments of policy should appeal to all people concerned about social welfare. Yet Frankfurter's argument can appeal only to Americans and others who share the same historical experience. When a judge reasons that a particular decision is compelled by "our" system of criminal justice, his claim speaks only to those who identify with us and our system for trying criminals.

This style of reasoning is found in Continental jurisdictions as well as in the United States Supreme Court. Of course, the areas of law that express the affirmation of identity might well differ. A good example from the German case law is a 1951 decision of the Supreme Court in Criminal Cases.[9] A German national, who had been reared in the Balkans and could neither read nor write German, was charged with incest for having had an illicit sexual relationship with his 17-year-old step-daughter. The sexual union was in fact prohibited under German law,[10] but the defendant claimed that because he came from a different cultural background, he did not know that sleeping with his step-daughter was legally

9. Decision of the Supreme Court in Criminal Cases, December 6, 1956, 10 BGHSt. 35.
10. StGB § 173.

incestuous. Under German law, he could in fact make out a complete excuse of mistake of law if he could establish that his mistake about the violation was free from fault.[11] In view of the apparently different conceptions of incest, the defendant could plausibly argue that his ignorance of wrongdoing was unavoidable and therefore morally innocent.

The trial court convicted the defendant of incest on the theory that the same act of intercourse also constituted the criminal violations of adultery and of sexual exploitation of a dependant minor. He should have been aware, therefore, that he was engaged in wrongful sexual behavior. If this awareness of wrongdoing could be transferred from one crime to another, then it could plausibly be said that the defendant also knew that his incest was wrong. He was aware, generally, that the sexual act was both morally wrong and a violation of law. He was mistaken, simply, about whether the act constituted incest as well as other forms of sexual wrongdoing.

Transferring culpability from one crime to another is common in the Anglo-American tradition. The theory of transferred malice generates the felony murder rule, which takes the intent to commit an independent felony to be sufficient to convict of murder for killings occurring in the course of the felony.[12] The German Supreme Court was fully aware that the trial court in this case relied on a theory that closely resembled Anglo-American doctrine. The German court rejected the American approach on the grounds that it was philosophically primitive. As the court reasoned: "German doctrine has overcome earlier theories which still prevail in Anglo-American jurisdictions, according to which it is sufficient if the actor's intention is to commit any offense, regardless whether he intends to violate the specific legal interests that are actually violated."[13] Later in the opinion, the court bolstered its sense of being different from the Americans. Responding to a writer who urged that culpability could be transferred from one offense to another, the court quoted the distinguished philosopher Gustav Radbruch as saying, "It is but a short step from this view to the Anglo-American conception of intention and the principle of strict liability. . . ."[14] Recoiling against this possibility, the court revers-

11. StGB § 17.
12. *See generally* G. FLETCHER, RETHINKING CRIMINAL LAW 282-84 (1978).
13. 10 BGHSt. at 39.
14. *Id.* at 40.

ed the conviction for incest and developed the argument that the required awareness of wrongdoing must relate to the specific crime charged.

There is no doubt that German jurists take the theory of criminal accountability more seriously than do their Anglo-American counterparts. A revulsion against strict liability, against felony-murder, against utilitarianism, against Anglo-American insensitivity to the problems of just punishment — all of these are part of what it means to be a German criminal lawyer.[15] German theorists invest extraordinary passion and a commitment to the refinement of substantive legal theory. Identifying with this edifice of principles and its immanent structure of values is a form of self-affirmation, precisely as identifying with the American system of criminal prosecution is an act of self-affirmation for American criminal lawyers.

Comparing this German case on mistake of law with *Rogers v. Richmond*, we should note a common feature of the process of self-affirmation in the legal decision-making. Both arguments build on a strong sense of the difference between self and others. In one case, the "other" is the European tradition with its inquisitorial mode of trial; in the German case, the feared "other" is the pragmatic American with his insensitivity to substantive criminal justice. I am not able to say whether the development of self in social interaction requires a comparable sense of superiority related to others, yet in the law, this attitude toward foreign systems appears to be an important feature of the process of discovering and defending the national spirit of a legal system.

This sense of superiority in the expression of legal identity is found not only in cross-cultural comparison, but in temporal comparisons drawn with a view to gaining distance from evils in one's own history. One of the stock arguments of Anglo-American criminal jurisprudence is that particular institutions are tainted by association with the special procedures of the sixteenth century Star Chamber. The latest example is the Supreme Court's opinion in *Faretta v. California*,[16] which holds that, even in serious criminal cases, a defendant has the constitutional right to reject

15. For further elaboration of these premises of German legal thought, see Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985).

16. 422 U.S. 806 (1975).

counsel and proceed *in propria persona*. This is a holding that most German lawyers would regard as ill-informed, if not mad. Indeed, the Supreme Court musters few arguments for its view that our conception of human dignity requires that a criminal defendant be able to stand and fall on his own. Yet we do have the experience of the Star Chamber, which – at least according to the Supreme Court – used the institution of obligatory representation to enhance its persecution of criminal defendants.[17] Reacting in part to this screen memory, the Court could conclude that having or not having a lawyer is a tactical decision that every criminal defendant should be free to make.

If the Star Chamber can have this impact after three centuries, one can imagine the contemporary uneasiness in West Germany with the living memory of National Socialist criminal justice. It is no accident that the West German Basic Law accentuates values such as the right to life,[18] human dignity,[19] the free expression of personality,[20] the equality of the sexes as well as of all races, ethnic groups, and religions.[21] The organicist positivism of the National Socialist era led to a revival of natural law in the post-war period. Overcoming the immediate past has been one of the preoccupations of German legal theory. In the field of protecting human life, in particular, the ghosts of all those murdered by the Nazis will haunt the administration of criminal justice for a long time to come.

The need to distance oneself from the evils of National Socialism proved to be one of the major determinants of a recent decision by the Federal Constitutional Court[22] to invalidate a 1974 abortion law that permitted all abortions during the first twelve weeks of pregnancy. What is required under *Roe v. Wade*[23] turns out to be constitutionally prohibited in West Germany. The court is fully aware that its decision departs from the trend in the United States as well as other countries in Western Europe. Yet by the court's own admission, it is "the historical experience and the moral, humanistic confrontation with National Socialism" that makes a difference in Germany.[24] Germans are not free to decide the abor-

17. *Id.* at 821-22.
18. GG art. 2(2).
19. GG art. 1.
20. GG art. 2(1).
21. GG art. 3.
22. Decision of the Federal Supreme Court, February 25, 1975, 39 BVerf E. 1.
23. 410 U.S. 113 (1973).
24. *See supra* note 22, at 67.

tion question as are other countries. The imperative to express a self different from that of National Socialists impels a decision at odds with the emergent Western toleration for abortion on demand in the early stages of pregnancy.

The problem with all arguments based on a reaction either to a foreign system or to a foreign past is that so much depends on how one perceives the alien experience. The fact is that the National Socialists developed a policy against, not in favor of, abortion; their concern was not so much the instrinsic value of the fetus, but the strengthening of the German *Volk*. This point is brought out effectively by the two judges dissenting from the ruling of the Constitutional Court.[25] In view of these alternative readings of the Third Reich, one wonders about this process of self-affirmation in developing basic constitutional norms. There is an irrational element in lawmaking by distancing oneself from the past, and this irrationality is compounded by the inevitable disputes about the evil reacted against. With all these difficulties, however, there is no denying the critical role of self-affirmation in the evaluation of legal systems.

In the second part of this lecture, I should like to turn to the language of law as another vehicle for expressing the cultural identity of legal systems. Lawyers become attached, more than they realize, to particular phrases and doctrinal expressions as the means by which they affirm their cultural identity. The most striking example that comes to mind is the pervasive reliance on the term "reasonable" in the common law system. We routinely refer to "reasonable time," "reasonable delay," "reasonable reliance," and "reasonable care." In criminal law, we talk incessantly of "reasonable provocation," "reasonable mistake," "reasonable force," and "reasonable risk." In the variety of usage and diversity of doctrinal context, there is probably no term used more ubiquitously in the language of common law.

The pervasiveness of reasonableness in our discourse would hardly warrant notice if all legal systems relied, similarly, upon the concept of reason to express a central commitment of their culture. The fact is, however, that the language of the common law differs in this respect from every legal language with which I am familiar. French, German, and Soviet lawyers, for example, manage to make out legal arguments without relying upon

25. *Id.* at 68.

derivatives of the concept of reason. Their languages have a term for reason — *raison, Vernunft, razumnost'* — and these terms readily yield corresponding adjectives. Yet these parallels to our term "reasonable" do not figure prominently in legal speech on the continent. The French civil code uses the term *raisonnable* precisely once;[26] the German and Soviet civil codes do not use the term at all. You can read the criminal codes of these various countries in vain in search of a term based upon the concept of reason. It is hard to imagine how these diverse legal cultures could conceptualize negligence without talking about reasonable care, but they manage to do so just fine.[27] It is hard to imagine how they could talk about proof of guilt without invoking a phrase comparable to proof "beyond a reasonable doubt." Yet French, German and Soviet lawyers manage quite satisfactorily to express the requirements of conviction without invoking terms akin to "reasonable doubt."

These comparisons are not designed to suggest that our way of speaking is better or worse than Continental European patterns of discourse. My aim is simply to make us mindful that this is indeed the way we speak, and to suggest, further, that this way of analyzing legal problems expresses our image of ourselves as lawyers in the language of the common law. It is almost as though we could not function if we did not rely so pervasively on the unifying cement of reasonableness. Just imagine for the moment that the terms "reasonable" and "reasonableness" were banned from our language. How could we go about talking about negligence, about mistakes, about searches and seizures, and about proof of guilt without this essential word? If the word were banned, we would, no doubt, eventually find substitutes. But as we learned to speak differently about legal problems, we would invariably feel the loss. We would lose a significant component of our identity as common lawyers.

An anecdote might illustrate the importance of reasonableness to thinking like a common lawyer. Biblical Hebrew, and until recently, modern Hebrew, which is still close in its vocabulary and structure to Biblical Hebrew, lacked a term that could be readily translated as "reason" or "reasonable." That this is so tells us a great deal about the difference between Hebraic and Hellenistic

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26. Code Civil § 1137.

27. For further development of these points, see Fletcher, *supra* note 15, at 949-50.

cultures. The centrality of human reason comes to us from the Greeks and their philosophic aspirations. Hebraic culture relies on practice — and less significantly on reason — as the source of wisdom and understanding.[28] If we had to pick one word as the translation of reason into Hebrew, it would presumably be the esoteric term *tvunah*, which derives from the root that means understanding. This is a term used to translate, for example, Kant's *Critique of Pure Reason*.[29] But the term is too high-brow to have much of an impact on common speech.

The absence of a term for reason raised some difficulties for the Imperial British who, in 1936, imposed a version of Stephen's Model Criminal Code on their colonial subjects in Palestine. The official draft of this 1936 criminal ordinance was in English, but it was obviously necessary to translate the ordinance into Hebrew, the language of the courts. As one would expect, the term reasonable appears throughout the code. Translating the term must have been a headache for the translators, for as I have suggested, there was at that time no precise, readily understood equivalent in modern Hebrew. The lawyers were unhappy. It would just not do to have a legal system modeled after the English common law that did not rely prominently on the term "reasonable." As I am told by Shalev Ginossar, a former judge and professor emeritus in Jerusalem, a group of lawyers of the infant state convened one day in the justice department where they decided that something had to be done to fill in the gap in their legal language. Israelis in all walks of life were then making up terms to adapt Biblical Hebrew to modern conditions. Why not make up a new term that would become the Israeli legal equivalent of reasonableness? The lawyers cast about their language and came up with the word *savir* as the appropriate term to use every time an English lawyer says reasonable. Thus a whole new set of phrases was fathered. It became acceptable in Hebrew to speak about a mistake or a doubt or grounds or a time that was *savir* or reasonable. The root for the term *savir* does not mean reason, but rather "to think," "to surmise," or "to have an opinion." Were it not for the artificial designation of this term as the Hebrew equivalent of reasonable, no one would come upon the use of *savir* as an adjective describ-

28. *See generally* Arnold, *Culture and Anarchy*, THE PORTABLE MATHEW ARNOLD 469, 557-573 (Viking ed. 1956).

29. I. KANT, CRITIQUE OF PURE REASON.

ing mistakes or grounds or the amount of care required not to be negligent.

A curious thing has happened since the lawyers coined this expression and the new set of phrases came to be embedded in all subsequent legislation. The word *savir* has moved from the artificial language of legislation into the language spoken on the streets. The appropriate way to ask whether a price is reasonable was once to inquire whether the price is one that "presents itself to the mind." Now the common phrase in spoken Hebrew is whether the price is *savir*.

Why was it so important for Israeli lawyers to coin a single term that could be used every time the word reasonable is used in English? One might say because it is more convenient to have a single term instead of a number of different expressions. But this answer presupposes that the speakers perceive the underlying unity among these diverse expressions. In French, German, and Soviet law, one similarly finds a variety of expressions used to translate the term reasonable.[30] Lawyers in these systems do not sense that the multiplicity of terms represents a fracturing of a single concept; for them, the concepts are multiple rather than variations on the same theme. Israeli lawyers responded differently because they worked within a legal system that relied extensively on English materials, they all spoke English fluently or nearly fluently, and they wanted to think of themselves as carrying forward the English common law. Coining a term and relying on that term became a central expression of Israel's place in the family of common law legal systems.

Reasonableness is not the only term in English that plays this distinctive role. There are other usages that locate lawyers in the orbit of those nurtured on English as their legal language. Think for a minute about the term "policy." In discussing the law and law reform, we rely heavily on this term. One of the first clichés that law students learn is the answer: "The court decided this way as a matter of policy." We distinguish, seemingly, between the positive law, which is enacted and fixed, and policy objectives, which are unwritten but nonetheless embedded in our legal culture. Various policies, such as deterrence in the criminal law, risk distribution in the law of torts, and facilitating transactions in con-

30. *See* materials cited in Fletcher, *supra* note 15, at 950 nn. 2-8.

tracts, seem to stand beyond the unseemly fray of politics. Yet the terms policy and politics derive from the same root. By a stroke that we would have to regard either as genius or self-deception, the evolution of our language enabled us to think of policies as clean and politics as dirty. Little do we realize, however, that lawyers in other legal systems have a great deal of difficulty understanding what we mean by policy and translating this term into their language. They are stuck with only one word for both policy and politics, and therefore they do not pick up the distinction between the clean and the dirty that we invest in this distinction. A term has crystallized in contemporary German usage that enables legal theorists to distinguish between politics and policy, but the term has an artificial ring. Theorists combine the term for law with the term for politics, yielding *rechtspolitisch*, thus distinguishing legal politics from ordinary politics.

Note the critical difference between our reliance on the term reasonable and our attachment to the distinction between policy and politics. The term reasonable lends itself to translation in virtually every other Indo-European language. We choose to rely upon the term reasonable, and lawyers in Europe choose the opposite. In contrast, the very existence of the term policy distinguishes our legal language. For European lawyers, the problem is not whether they should invoke a term they already have, but whether they should devise a term that captures what we mean when we talk about policy.

English legal discourse is replete with technical terms, such as "estoppel" and "consideration," that do not lend themselves readily to translation into other legal languages. When the terms are expressed in Latin, as is the case with *certiorari* and *habeus corpus*, we can guess that translation into a foreign language will be difficult; translation into English itself is a stumbling block. In some of these cases, the difficulty of translation is simply an inevitable fact of distinct linguistic experience.

Sometimes, however, the non-translatability of a term points to a distinctive feature of our history or the structure of our legal discourse. There is no way to translate the terms "equity" and the equitable institution of the "trust" into European legal languages for none of these systems recognizes the distinction between law and equity, between legal and equitable ownership. Of course, there are analogues to the trust in various jurisdictions,

but they are based upon concepts of contract, rather than the bifurcation of the property interest.[31]

The nontranslatability of policy is illuminating in a different way. The term does not point to a special feature of historical experience, but rather to a prominent feature in the structure of our discourse. Why, indeed, have we cultivated the distinction between policies that are beyond question and politics, the methods of which are always subject to question? What need does the term policy fill in our own language? I submit that one of the reasons we rely so heavily on the concept of policy is that we lack a term in English to express the notion of law as a set of unwritten, enduring principles binding upon us by virtue of their intrinsic merit. Blackstone thought of the common law in this way, but in the course of the nineteenth century our thinking about law became so heavily dependent upon judicial and legislative enactment that we have lost our sense for law as an enduring body of principles. Europeans retain the distinction between law as principle and law as enactment by distinguishing in their language between two sets of terms for law. In German the distinction is between *Recht* and *Gesetz*, in French between *le droit* and *la loi*, in Spanish between *el derecho* and *la ley*. Normative ideals of the legal system are expresssed by relying upon the first of these ordered pairs. The notion, for example, of the rule of law is always expressed by choosing the term that means law as a body of enduring principles, for example, as in the terms *Rechtstaat* or *la règle de droit*. We lack a term for law that points clearly to the higher dimensions of justice and order that make the rule of law something more significant than the law of rules. As a result, we rely heavily on policy as a surrogate expressing the higher dimensions of value in our thinking about governing by law.

The pervasive influence of reasonableness on our legal culture might also fill the gap left by the absence of a concept of *Recht* or *droit* in our legal thinking. Both terms, policy and reasonableness, are indisputably normative. The legislature can never say definitively what constitutes the guiding policies of our society, nor can it ever specify what shall constitute reasonableness in a particular context. These standards transcend the enacted, written legal materials. They always require a judgment of value that goes beyond what we read in the lawbooks.

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31. *See* C. DE WULF, THE TRUST IN CIVIL LAW 27 (1965) (trust "without parallel in the Civil Law").

My thesis is that our gravitating toward particular words and concepts reflects our consciousness of being lawyers in the common law tradition. Unlike Israeli lawyers who chose to develop a concept of reasonableness in their legal language, we use the basic terms of our language without reflecting on the way in which they make us different from lawyers in other traditions. We are hardly aware that our pervasive reliance on reasonableness and on policy says something about the structure of our thinking about law. Perhaps this point shall count as a criticism of the general argument that the choice of language expresses our national legal identity. If the use of language is unwitting, if we are not aware of the way in which our choice of words makes us distinctive, then arguably the use of language does not serve the function of self definition.

You will recall that the American rejection of the inquisitorial system and our firm belief that everyone has a right to defend himself, even in a capital case, self-consciously distinguishes us from the European legal tradition. Similarly, the Germans' rejection of strict liability in the criminal law self-consciously distinguishes them from what they take to be the primitive features of Anglo-American jurisprudence. The contemporary West German stand on abortion self-consciously distinguishes them from what they take to be the National Socialist attitude toward human life. All of these legal positions serve to define the respective legal culture in contrast to others.

The commitment to particular forms of language may serve this function only if the commitment is self-conscious, that is, only if the lawyers are aware that their mode of speaking is distinctive. Of course, it is typically the case that lawyers self-consciously speak differently from the lay public. This choice of a special lexicon fulfills the need for differentiation from untutored lay people. This proposition holds clearly with respect to arcane Latin expressions, yet not quite so clearly with regard to basic terms like "reasonableness" and "policy."

In the field of comparative law, the study of language and language transplants proves to be essential in understanding the self-definition of language systems. When the Japanese sought to enter the Western legal world in the late nineteenth century, the first thing they did was generate a whole new vocabulary in order to talk about law in the way in which Europeans, particularly Germans, cast their arguments. Embarrassed by not having a word for individual "rights" in their language, they created a new word

— precisely as the Israelis created a new word to express the concept of reasonableness. Also noting that they did not have a vocabulary of abstract terms to talk about legal theory, the Japanese translated wholesale a range of concepts that the Germans developed in the nineteenth and early twentieth centuries. After World War II, American influence was felt more strongly, particularly in the drafting of the new Japanese constitution. Eager to reflect American influence in their vocabulary, Japanese lawyers now talk about the constitutional issues of "due prosessu." The conclusions that Japanese lawyers and judges draw from these transplanted terms and concepts are probably not as important as the commitment to this language as an expression of their attachment to Western jurisprudence.

In these examples, drawn from the Israeli and Japanese experience, I have stressed the translation of legal concepts as a way of expressing adherence to a foreign tradition. We should not underestimate, however, the power of language as a barrier between legal cultures. This is most noticeably the case in those jurisdictions, such as Quebec and South Africa, where the conflict between the common law and the civil law is expressed, as well, as a linguistic conflict. In both of these cases, the common law is expressed in English; French and Dutch are reserved for expressing civilian legal ideas. Without this difference in language, I would submit that the common law and civil law traditions would quickly amalgamate. My sense is that in Louisiana, which no longer has the French language as an anchor for the civilian tradition, the fusion of the two legal cultures is inevitable. The differences between case law and codification tends to disappear in every developed legal system. But differences anchored in a different idiom and a different mode of self-expression endure despite virtually every form of social and economic change.

What is the moral status of these arguments expressing cultural identity in law-making? How do they rank with arguments of justice? Of principle and policy? Of efficiency? Are they, in any sense, moral arguments? As detached observers of our own and foreign legal systems, we can readily identify these arguments as frequent occurrences. As participants in legal debate, however, we should have serious reservations about seeking to affirm ourselves — or to affirm what we think our tradition has made us — in solving serious conflicts, such as the asserted right to an abortion, the asserted right to represent oneself in a felony trial, and the issues

of culpability and strict liability in the criminal law. All legal traditions as well as our identity within those traditions vacillate in flux. Solving a problem by self-affirmation renders our moral judgment hostage to a self-serving perception of the past. We should indeed turn the inquiry around. We should constantly test our tradition for its principled soundness. The life of the law may be experience, but our experience rings hollow unless tested, in every decision, against the rule of reason.