Jan Deutsch: An Appreciation

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Musing as I do on occasion about the legal academics who have most influenced my way of thinking about law, Jan Deutsch is one of the top three. I can't say that I was a "student" of Deutsch; I took one class and one seminar from him. The class was Corporations, and all I remember from it are two episodes. In the first he engaged in a sustained line of questioning of my classmate Richard Diamond, at the end of which he asked, "So, now, Mr. Diamond, do you see your behind in front of you?" – a pointed way of saying that he had managed to get Richard to answer one question, then another, then another, to the point where his final answer contradicted the one he originally gave.[2] I can't fully reconstruct the second incident, but its thrust was that in making a corporate deal we would react differently were we told to meet a lawyer with responsibility for the deal on a street corner where he'd be wearing a trench coat or told instead to go to the offices of Jones, Day (a law firm at which Deutsch had worked) and meet the lawyer there. I now understand the point of the observation to be that law is backed up by a set of social expectations that are never fully captured in the formal law – something of a "law and society" observation – but I can't say that I understood it that way then.

The seminar was a different matter, and it is one of three encounters with Deutsch's thought that decisively shaped the way I think about law. The seminar was "Law and Psychiatry," and it was usually co-taught by Professors Joseph Goldstein and Jay Katz. It was a "hot ticket" when I was at Yale, because Professor Goldstein had an "in" with Judge David Bazelon of the Court of Appeals for the District of Columbia Circuit, and Judge Bazelon was what we've now come to call a feeder judge to the Supreme Court's liberal justices. As a result, ambitious Law Journal editors competed for seats in the seminar. I took the seminar because, perhaps oddly, I was actually interested in the subject. My family was quite psychoanalytically oriented: An uncle was an influential figure in the Los Angeles psychoanalytic community, and my older sister and her husband were both analysts. And, as it happened, Professor Goldstein was on leave that semester, and Deutsch taught the seminar with Professor Katz.

At some point in the seminar the light went on in my head. As I came to interpret the conversations in the seminar, Professor Katz was defending the proposition that the kinds of clinical judgments trained professionals

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[2] I've never been able to do that with a student, and not, I think, because my students wouldn't be as astute as Richard in being able to provide answers to each question as it arose.

reached embody a distinctive – and perhaps ineffable – form of knowledge, and that those clinical judgments were quite different from the kinds of rule-guided judgments lawyers were trained to make. As the semester developed, I saw that Deutsch was repeatedly making the point that rule-guided judgments were not in principle different from clinical ones (or, to put the latter in terms more congenial to lawyers, from all-things-considered judgments). I'm not sure that I would have put it this way at the time, but Deutsch's argument, as I came to assimilate it, was that the equivalences ran both ways: A clinical judgment was just the result of an accumulation of rule-guided judgments that could be teased out through careful analysis, and the judgments reached in a system of complex rules could never be fully justified by any identifiable subset of rules. In some sense, I think, that was where I began to think about the so-called indeterminacy thesis associated with critical legal studies (and before that, with legal realism).

My second encounter with Deutsch came in reading his article, "Precedent and Adjudication,"[3] which simply blew me away. I continue to recommend it to students as probably the best article in constitutional law – ever. As I describe it, the article consists of Deutsch's almost literal dissection of a single Supreme Court opinion. Its underlying structure, though not its surface, is this: Take the opinion, rearrange its paragraphs, and you discover that the rearranged opinion means something quite different from the original – even though the words in the "two" opinions are exactly the same. The lesson to be drawn from the article is a simple but I think quite deep one: What a decision said to be a precedent means is determined not by the opinion itself but by what later judges make of it. Or, a precedent is what later judges say it is. In that sense, later judges can't "distort" or "mangle" precedents – and, importantly, they can't be constrained by precedents either.[4]

My final encounter came quite a bit later. At some point, probably while we were in law school, Duncan Kennedy (the second in the array of legal academics who shaped my thinking) communicated his enthusiasm about Deutsch's article, "Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science."[5] I read the article, but couldn't see why Duncan was so enthusiastic about it. Re-reading the article a few decades later, I did. Again, as I describe it, the article is a complete deconstruction of Legal Process thinking, taking it seriously on its own terms and exposing its internal contradictions. As I came to see things (which is not to say, as things really were), Legal Process scholars presented

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[3] 83 YALE L. J. 1553 (1974).

[4] Another connection to the indeterminacy thesis, I suppose.

[5] 20 STAN. L. REV. 169 (1968).

themselves as the sophisticated heirs to Legal Realism, but without the reduction of law to politics that they associated with the most hard-core Realists. True, they agreed, we were irreducibly divided over questions of the substantive policies our polity should pursue but, they contended, we could agree on a "principle of institutional settlement" according to which we would assign authority to make substantive policy choices to an array of institutions with distinctive characteristics. And, importantly, the principle of institutional settlement was a-political, and so it sustained the distinction between law and politics.[6]

Deutsch's article accepts the Legal Process premises at every point up to the principle of institutional settlement. But, it shows, exactly the same reasons Legal Process scholars gave for accepting the proposition that we could not come to an a-political agreement on substantive policy were available – and were equally cogent – with respect to the principle of institutional settlement. The distinction between law and politics that Legal Process scholarship tried to reconstruct collapsed once again.

All three encounters led me to what I suppose some might think are banal insights. My experience in the legal academy suggests otherwise. The idea that there is a real difference between all-things-considered judgments and rule-guided ones is an important theme in much contemporary scholarship, for example, and of course the effort to sustain a distinction between law and politics continues with no less zeal than ever before.

But, for me, Jan Deutsch was there already.

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[6] Whether the best Legal Process scholars thought that the principle of institutional settlement was indeed a-political is unclear to me. I have in mind the stunning passage in Hart & Sacks where the authors ask, about a specific choice among institutional decision-makers, whether the Chamber of Commerce and the Soviet Politburo would reach the same conclusion. I'm inclined to treat that as a genuine question on the authors' part, which could be given either answer. And, if the answer is "No," the implication is that the principle of institutional settlement is not a-political.