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### The Law and Politics of "Might": An Internal Critique of Hutch's Hopeful Hunch

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# THE LAW AND POLITICS OF “MIGHT”: AN INTERNAL CRITIQUE OF HUTCH’S HOPEFUL HUNCH<sup>©</sup>

BY RICHARD F. DEVLIN\*

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## I. INTRODUCTION

Some of my friends tell me that, as a general proposition, as men get older they become more conservative, but as women get older they become more radical. Allan Hutchinson’s new book, *It’s All in the Game*,<sup>1</sup> tells us little about the latter, but it does seem to confirm the former. For almost twenty five years, Allan Hutchinson has been a very high profile “North American crit.” There is little doubt that he has been Canada’s most prolific and outspoken critical legal scholar. He has been a masterful trasher, combining powerful critical analytical skills with a wicked wit and an enviable writing style to produce some critical classics. But now, he springs a book that represents a significant departure, or perhaps even a retreat,<sup>2</sup> in his scholarship.

In *Game*, Hutchinson articulates a “non-foundationalist” account of law and adjudication, one that is both descriptive and

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<sup>1</sup> A.C. Hutchinson, *It’s All in the Game* (Durham, N.C.: Duke University Press, 2000) [hereinafter *Game*].

<sup>2</sup> Hutchinson seems to admit as much, *ibid.* at 344.

prescriptive, an exercise that is “critical and constructive in equal measure.”<sup>3</sup> To achieve this goal, he attempts to distinguish his “ludic”<sup>4</sup> position from two rival alternatives: foundationalism and anti-foundationalism. The former camp is densely populated with some rather quite curious bedfellows: Hart, Madam Justice Wilson, Dworkin, Weinrib, Sunstein, Fraser, MacKinnon, Trebilcock, Marx, and even Unger. The latter camp, or perhaps it is more of a huddle, comprises some of Hutchinson’s erstwhile allies, most notably Kairys and Tushnet. The basic argument is relatively straightforward: the foundationalists are wrong because, despite their best intentions, they rely on an epistemology that ultimately invokes some universalizing Truth claim; the anti-foundationalists are in error when they suggest that adjudication is simply crass ideological politics gussied up in fancy law talk and that “anything goes.”<sup>5</sup> Hutchinson’s non-foundationalist position explicitly attempts to carve out a middle path between the (too soft) foundationalist credo of constraint and the (too hard) anti-foundationalist credo of flexibility by continually claiming the (just right) non-foundationalist slogan “anything might go.”<sup>6</sup> The reconstructive ambitions of the project—“to contribute significantly to the rebirth of law as a ‘generative force of our public life’ and the revival of jurisprudence as an ‘inspiration’ to judicial practitioners”<sup>7</sup>—give the book a decidedly optimistic, if not jaunty, tone.

There is much that I admire in *Game*. Although it draws on some parts of his previously published work, *Game* is a coherent, tightly argued monograph that avoids the current trend of combining a series of loosely strung together previously published articles which is then presented as a book. Hutchinson’s ludic writing style is as lucid as ever and there are some memorable turns of phrase, analogies and metaphors. Indeed, there is much in the core message that dovetails with, and enriches, my own “bungee cord” theory of judging.<sup>8</sup> However, there are a couple of infelicities and several ambivalences, or perhaps even contradictions, that render the project somewhat flawed.

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<sup>3</sup> *Supra* note 1 at ix.

<sup>4</sup> *Ibid.* at xi, 294.

<sup>5</sup> *Ibid.* at 180.

<sup>6</sup> *Ibid.* at 8, 17, 37, 60, 84, 118, 166, 181, 252, 278, 288.

<sup>7</sup> *Ibid.* at 321.

<sup>8</sup> See, for example, R.F. Devlin, A.W. MacKay & N. Kim, “Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or, Towards a Triple P Judiciary” (2000) 38 *Alta. L. Rev.* 734 at 745-52.

Hutchinson's ambivalences relate to both the descriptive and prescriptive aspects of the enterprise. What follows then is a sympathetic and internal critique on three levels: concerns about the way in which Hutchinson plays the language game; doubts about the accuracy and adequacy of the descriptive claims; and reservations about the cogency and optimism of his prescriptive vision.

## II. PLAYING THE LANGUAGE GAME

As I have indicated previously, Hutchinson is an excellent and engaging writer. However, sometimes his use of language undercuts his egalitarian and progressive ambitions. For example, on several occasions Hutchinson's pursuit of analogies may generate some cause for concern. Persons with disabilities might well be perturbed by the following propositions: "In short, [Weinrib's] law would be autistic: it would spend every day in morbid self-absorption and self-contemplation;"<sup>9</sup> "yet it is only in the dark kingdom of the blind that such one-eyed upstarts can feign regal right."<sup>10</sup> Elsewhere he asserts: "[a]djudication is not carpentry. While judges would do well to include the equivalent judicial pride in their work, they must also be designers and innovators who place their professional craft in the service of political values and ideals."<sup>11</sup>

Even more problematic is the game theme that pervades the book. While it would be unfair to argue that Hutchinson's ludic conception of adjudication is either ludicrous,<sup>12</sup> "quietistic"<sup>13</sup> or trivializing of the human interests at stake,<sup>14</sup> and while I agree that "the turn to rhetoric need not be a turn away from politics,"<sup>15</sup> non-foundationalism is unfortunately "short on bite" in the "progressive

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<sup>9</sup> *Game*, *supra* note 1 at 145.

<sup>10</sup> *Ibid.* at 112.

<sup>11</sup> *Ibid.* at 293. Over the last couple of winters, I have apprenticed to a "carpenter" to build two sea kayaks out of marine plywood. Although we worked from design plans and were motivated, in part, by pride a large amount of energy was invested by the "carpenter" and the apprentice to innovate and experiment to create craft well suited to the particular context of the Nova Scotia coastline.

<sup>12</sup> *Ibid.* at 16.

<sup>13</sup> *Ibid.* at ix.

<sup>14</sup> *Ibid.* at 41, 42, 88.

<sup>15</sup> *Ibid.* at 16.

commitment to overcoming oppression and alleviating suffering.”<sup>16</sup> This is because there is a significant ambiguity in the work. Despite one early warning that he is not really claiming that law is a game,<sup>17</sup> Hutchinson frequently falls prey to his own game metaphor.<sup>18</sup> In particular, in the preface he notes that “over the years, I appreciate more and more that it *really* is the case that it is the playing as much as the winning that counts ... .”<sup>19</sup> He then follows this with a quotation from the great [Irish] soccer player Danny Blanchflower:

the great fallacy is that the game is first and last about winning. It’s nothing of the kind. The game is about glory. It is about doing things in style, with a flourish, about going out and beating the other lot, not waiting for them to die of boredom.<sup>20</sup>

While this may be true of soccer,<sup>21</sup> it is disturbing to translate this wisdom to law. Winning matters in law. Take, for example, the death penalty system in the United States. A recent report from Columbia University questions “the reliability—indeed, the bare rationality—of

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<sup>16</sup> *Ibid.* at ix.

<sup>17</sup> *Ibid.* at 12.

<sup>18</sup> See, for example, *ibid.* at 20-21: “[m]y own approach to games and, therefore adjudication, is, by and large, philosophical. It is an attempt to make sense of one particular game—the stylized activities of judges of common law countries in deciding cases ... [f]or me, adjudication is a special game of its own kind ... [w]hat it is to play the legal game of adjudication changes and develops as the game is played ... ;” *ibid.* at 33: “ ... adjudication is not so much one particular type of game as it is a shifting multiplicity of competing games;” *ibid.* at 36: “[b]eing a game of infinite possibilities, adjudication ... ;” *ibid.* at 52: “ ... adjudication as a special kind of nonfoundational game ... ;” *ibid.* at 152: “ ... I want to explore further what it means to take seriously the idea and practice of law and adjudication as a playful and rhetorical activity;” *ibid.* at 166: “the adjudicative performance is an entirely fluid and contingent game ... ;” *ibid.* at 172: “adjudication is very much a special language game ... ;” *ibid.* at 295: “judges [are] rhetorical participants in law’s infinite language game ... .”

<sup>19</sup> *Ibid.* [emphasis added].

<sup>20</sup> *Ibid.* at xi.

<sup>21</sup> I am not even sure of this. Such a perspective usually only manifests itself after a player has finished their playing career. For example, as I write this review during Euro 2000, the European Soccer Championship is underway. Romania had persuaded Gheorghe Hagi, perhaps their greatest player ever, to come out of retirement to captain the team. They had an excellent first round, especially in beating England 3-2, with Hagi distinguishing himself as one of the best players in the competition. Later, in the quarterfinal game, with twenty minutes to go Italy were leading 2-0. Hagi, on a break, took a dive in the eighteen yard box, hoping to secure a penalty kick thereby giving Romania an opportunity to get back in the game. But the referee identified that this was a cheat and sent Hagi off the pitch leaving Romania with one player less and finally losing the game. The point is that for Hagi, everything was about winning. He was willing to finish a brilliant career, and an outstanding competition, by cheating. He was humiliated by being sent off.

the death penalty system as a whole.”<sup>22</sup> The authors found “that serious error” had reached “epidemic proportions ... [m]ore than two out of three capital judgments reviewed by the courts were found to be seriously flawed.”<sup>23</sup> In light of such contextualizing failure rates, can Hutchinson be serious when he quotes David Thomson: “And winning doesn’t matter, because victory is *always* an illusion,”<sup>24</sup> or when he posits “the objective is not to win but to keep the game going”?<sup>25</sup>

### III. DUBIOUS DESCRIPTIONS

Beyond the foregoing metaphorical infelicities, there are also some problems with the descriptive dimensions of the project. The first is Hutchinson’s attempt to construct an “anti-foundationalist” camp and to legitimize his own position as so much more sensible than the “anarchic indeterminacy” of “paranoid” and nihilistic anti-foundationalists who view law as “a mere hotch-potch of whimsy, caprice, or perversity,” or a “free-floating irrational grunt.”<sup>26</sup> His basic claim is that anti-foundationalists adopt “a position in which law is reduced to raw power and adjudication is viewed as nothing more than a faux exercise in ideological rationalization”<sup>27</sup> to argue that “anything goes.” In contrast, he argues “a more nuanced and sophisticated”<sup>28</sup> “anything might go” with the emphasis on the *might*.<sup>29</sup> I have at least three concerns about this strategy of legitimation.

First, as I read the work of those who he categorizes as anti-foundationalists, when they claim “anything goes” they are not usually saying that judges are absolutely arbitrary or engaging in “capricious

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<sup>22</sup> J. Liebman, J. Fagan & V. West, “A Broken System: Error Rates in Capital Cases, 1973-1995” at 1 (2000), online: The Justice Project <<http://justice.policy.net/jpreport/section1.html>> (date accessed: 28 May 2001) [hereinafter “A Broken System”].

<sup>23</sup> *Ibid.*

<sup>24</sup> *Game*, *supra* note 1 at xii [emphasis added]. Also, *ibid.* at 2, Hutchinson is vaguely aware of this potential criticism in the introduction when he claims that “I do not intend to trivialize adjudication by failing to appreciate that it is an exercise in power that has considerable effects on and is affected by the terms and conditions of people’s lives.” However, when we are contemplating the death penalty, for example, surely “considerable effects” is an understatement!

<sup>25</sup> *Ibid.* at 319.

<sup>26</sup> *Ibid.* at 166, 209, 180, 149, 174.

<sup>27</sup> *Ibid.* at 180-81, 214.

<sup>28</sup> *Ibid.* at 180.

<sup>29</sup> *Ibid.* at 8.

irrationality,”<sup>30</sup> or that there is no “formative structure or informing context,”<sup>31</sup> as Hutchinson suggests. Rather, they are positing that there is a great deal of scope for interpretive discretion. The “anything goes” claim is usually just a hyperbolic flourish, an intentional overstatement, to make the point. For example, Hutchinson’s critique of Kairys’ position underemphasizes the context in which it was written. It was relatively early critical intervention designed to be a polemic.<sup>32</sup> Much the same can be said of the two occasions when Hutchinson invokes the extremism of Tushnet, again to legitimize his own more moderate position.<sup>33</sup> This is not that different from Hutchinson’s own argument that adjudication is an “engaged game of rhetorical justification.”<sup>34</sup> It seems to me that Hutchinson has placed a too heavy epistemological saddle on what were simply rhetorical moves. Now, while it might be appropriate to criticize the early critics for the poverty of their rhetoric, that is very different from claiming that they embrace a nonsensical epistemology. (But even a critique of their rhetoric may not be possible without a clear articulation of the criteria for judgment of that rhetoric, a point I will return to later.) An engagement with Duncan Kennedy’s more recent “bad faith” conception of adjudication would have been more helpful.<sup>35</sup>

Second, Hutchinson invokes the requirement of “good faith” to serve as a “hallmark feature” of non-foundationalism, to signify “*the difference*” between “ill-considered” anti-foundationalism and the “more cogent” non-foundationalism.<sup>36</sup> However, when he attempts to calibrate good faith, we are provided with a string of quite fuzzy ideals: “integrity,” “playing fair,” “political reasonableness,” and “do[ing] the

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<sup>30</sup> *Ibid.* at 186.

<sup>31</sup> *Ibid.* at 174.

<sup>32</sup> In fact, as Kairys acknowledges, the article is an edited version of a speech given as part of a book promotion tour. D. Kairys, “Law and Politics” (1984) 52 *Geo. Wash. L. Rev.* 243.

<sup>33</sup> *Game, supra* note 1 at 200, 310. A careful reading of one of these references indicates that perhaps Tushnet was describing the realist approach to adjudication. Indeed Tushnet continues: “[the realists] knew that certain lines of argument were in fact accepted at some times and places, while others not less inherently acceptable were not in fact accepted.” M.V. Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (Cambridge, Mass.: Harvard University Press, 1988) at 192. As we shall see, such a claim seems much closer to Hutchinson’s non-foundationalist position than the demonized anti-foundationalism.

<sup>34</sup> *Game, supra* note 1 at ix.

<sup>35</sup> D. Kennedy, *A Critique of Adjudication: Fin de Siecle* (Cambridge, Mass.: Harvard University Press, 1997) at 56, 67.

<sup>36</sup> *Game, supra* note 1 at 201, 190 [emphasis added], 190.

right thing.”<sup>37</sup> All he seems to exclude is that which is “patently unreasonable.”<sup>38</sup> If I am right in my suggestion that the so-called anti-foundationalists were engaged in hyperbole for strategic reasons, then they are unlikely to want to argue that judges can do patently unreasonable things.<sup>39</sup>

Third, it is not clear to me that the slogan “anything might go” really captures Hutchinson’s message. When one reads the book in its entirety, the impression one gets is that Hutchinson’s main point is that judges have much more discretion and freedom than they have hitherto acknowledged, but there are still some significant constraints. However, when he emphasizes the *might* in the slogan, he underemphasizes the *anything*. But much of his actual argument is to emphasize against the anti-foundationalists that there are constraints, both internal and external, on the judicial interpretative role.<sup>40</sup> Consequently, the slogan should read more accurately as “some things might go.” To take one example, in a liberal democracy it would not appear to be legitimate for the judiciary to declare war on another country.

In sum, Hutchinson’s attempt to legitimize his own position through the bogeymanization of anti-foundationalists is unpersuasive. However, this is not fatal to his core project which is the rejection of foundationalism.

A second descriptive problem relates to the ambitions of the project and another possible ambiguity in his work. Although

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<sup>37</sup> *Ibid.* at 190, 190, 191, 195.

<sup>38</sup> *Ibid.* at 193. Hutchinson forwards the doctrine of pecuniary interest as an example of something that might qualify as patently unreasonable. He argues that “[w]hile pecuniary interest in the outcome of a case has always been sufficient to disqualify a judge’s participation or to invalidate any decision made, there remains debate over the precise meaning and extent of ‘pecuniary interest’: there is a difference between a judge who is pro-business in orientation and one who holds shares in a litigant’s company.” [at 197 footnote omitted] While the latter claim is accurate, the former is not. Recently, the English Court of Appeal has overturned what was thought to be a shibboleth of the common law of bias—pecuniary interest, however small, automatically disqualifies—to argue that it depends on the size of the interest: *Locabail v. Bayfield Properties*, [2000] 1 All E.R. 65 at 71. This is not just an issue of whether something qualifies as a pecuniary interest; it is an acceptance of something that hitherto was considered to be patently unreasonable!

<sup>39</sup> Moreover, as a regulative ideal, “good faith as anything that is not unreasonable” is a fickle standard for it is only rarely that judges cannot find some discourse to justify their result; otherwise, the parties would not likely have come to court in the first place.

<sup>40</sup> *Game*, *supra* note 1 at 295. Also, see *ibid.* at 214-15: “Being always situated within a legal context of freedom and constraint, judges (and jurists) are never fully restrained nor ever entirely free;” and *ibid.* at 67 [emphasis added]: “... none of this means that people are free to construct any social world at all; the constraints of human vulnerability and the scarcity of different resources forecloses certain options.”



Hutchinson warns on occasion that his aim is not to provide “a theory of” adjudication but rather “an account of law and adjudication,”<sup>41</sup> the project seems to assume that adjudication is a relatively monolithic phenomenon. In his introduction, he states that the focus of the work is on appellate adjudication<sup>42</sup> and indeed his discussion of cases throughout the book concentrates on decisions from a variety of appellate courts. But often in the text there are propositions about adjudication in a more generic sense.<sup>43</sup> This is most obvious in his “assault upon easy cases,”<sup>44</sup> as these do not normally generate appellate review. Over the last ten years, I have participated in a number of judicial education projects involving judges from every level of the hierarchy: provincial, federal, court of appeal and the Supreme Court, both in Canada and elsewhere. One of the most interesting aspects of this experience has been my increasing awareness of the differences between these distinct adjudicative functions. It is not just that lower court judges have to deal with facts more than higher level judges. It is almost as if different judicial clusters occupy different locations—conceptually, spatially and temporally—in the constellation of adjudication. For example, take the practice of giving reasons for decision, a process which Hutchinson clearly believes is important given his efforts to distinguish reasoning from rationalization in support of his rhetorical thesis.<sup>45</sup> In discussing the giving of reasons, Hutchinson barely mentions the importance of audience,<sup>46</sup> but audience looms large in the judicial mind and different levels of judges tend to contemplate different audiences as they perform their judicial function and give reasons for their decisions. There are a variety of possible audiences. The parties are obvious ones, but these are not undifferentiated, for judges do distinguish between different litigants depending on their identity, not just in terms of bodies corporate versus human individuals versus governments, but also in terms of age, gender and class. I have heard at least one (English) judge advise other judges that the primary audience

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<sup>41</sup> *Ibid.* at 19.

<sup>42</sup> *Ibid.* at ix.

<sup>43</sup> See, for example, *ibid.* at 6: “As interpreters, judges and referees are free to do what they think best, not in spite of enabling rules, but because of them;” and *ibid.* at 20: “[I] attempt to make sense of one particular game—the stylized activities of judges in common law countries in deciding cases— . . . .”

<sup>44</sup> *Ibid.* at 77-81.

<sup>45</sup> *Ibid.* at 184-85.

<sup>46</sup> There is one brief passing mention of the importance of audience at *ibid.* at 292.

is the losing party. The lawyers are also an obvious audience, particularly if there are possibilities for appeal. Other judges are a significant potential audience. For trial judges, there are strong temptations to make one's judgement appeal proof; appeal judges may be similarly inclined, but they might also be seeking to provide direction to lower courts. Often appeal court judges conceive their primary audience to be their colleagues. More generally, there is also the practicing legal community, academics, the media and the general public. Depending upon which of these audiences are in the judicial mind, there are likely to be different types of reasons given. Furthermore, this potential for variability is intensified if we consider other complicating factors, for example, resources and geographical location.<sup>47</sup> Even more importantly, judges themselves are very aware of these differences and these have a significant impact upon their conception of the parameters of the possible. This is important because one of the crucial points that Hutchinson relies upon in his attempt to distinguish his position from the anti-foundationalist position is that his analysis "does not ignore the judges's experience of their task as a 'rational, disciplined, and constrained process.'"<sup>48</sup> Thus, as an act of description, Hutchinson has been insufficiently contextual in his account of adjudication.

#### IV. PROBLEMATIC PRESCRIPTIVISM

Neither of the descriptive flaws which I have identified is fatal to the non-foundationalist enterprise. All they require are some supplementary analyses. However, there are also some problems with the prescriptive dimensions of the project that are significantly more worrisome. Hutchinson makes some quite ambitious claims: non-foundationalism has "political salience"<sup>49</sup> and "provides *the* most fitting and effective complement to the transformative ambitions of a truly

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<sup>47</sup> Having worked with judges in a large number of jurisdictions in Canada, there are significantly distinct judicial subcultures. The differences are not just between relatively well supported superior and appellate courts as opposed to overburdened provincial courts, nor between metropolitan courts and rural courts but even between courts which would appear to encounter relatively similar conditions. To take one example, there is a different "feel" to the judiciary of Saskatchewan than that of Manitoba.

<sup>48</sup> *Ibid.* at 13. He also makes a similar point in his critique of Weinrib's foundationalism at *ibid.* 146.

<sup>49</sup> *Ibid.* at 217.

democratic politics.”<sup>50</sup> Indeed, his express goal is to encourage judges “to turn their adjudicative energies to transformative effect.”<sup>51</sup> Given these large claims, the fundamental question on the prescriptive side is therefore “on what basis can a non-foundationalist analysis assess the legitimacy of an adjudicative performance?” Unfortunately, Hutchinson provides an ambivalent, if not contradictory, response. In his more purely non-foundationalist moments he focuses on rhetorical prowess,<sup>52</sup> at other times he suggests a more substantive benchmark. Hutchinson’s invocation of “good faith” is a useful analytical starting point. He is adamant that the only function of good faith is to “make some telling points”<sup>53</sup> about anti-foundationalism. He continues,

[it is] not to argue that a case was decided rightly or wrongly; that would miss the point of any nonfoundationalist analysis ... [the argument is] that while judges should and most of the time often do tend to act in good faith, this requirement will not in itself crimp [sic] their judicial style or limit the results that they achieve.<sup>54</sup>

And he then goes on to discuss the *Mhlungu* case in which four different judgments all qualify as reasonable and in good faith.<sup>55</sup> He claims at one point that “some of the judicial performances are more convincing than others”<sup>56</sup> and that “reasons can be given as to why one decision is better than another,”<sup>57</sup> but he fails to specify which ones are better and for what reasons. All that we are provided with is the suggestion that

[t]he correctness of any particular move is established though persuasion and argument ... [and l]egitimacy, therefore, is something that does not precede or ground any judgment given but rather follows or flows from the rhetorical force of the judgment made.<sup>58</sup>

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<sup>50</sup> *Ibid.* at 257 [emphasis added].

<sup>51</sup> *Ibid.* at 15.

<sup>52</sup> See, for example, *ibid.* at 150: “Law and adjudication are thoroughly human and, therefore, flawed activities whose practices and performances earn as much legitimacy as they are able to achieve through their rhetorical play;” *ibid.* at 181: “From a nonfoundationalist perspective, there remains the insistence that there are legitimate and illegitimate ways to act, but there is also an acknowledgement that ‘legitimation can only spring from [judges’] own linguistic practice and communicational interaction;” and *ibid.* at 188: “From a nonformalist perspective, there are standards by which the judicial performance can be assessed or criticized; law is a rhetorical performance that can be played in better or worse ways.”

<sup>53</sup> *Ibid.* at 202.

<sup>54</sup> *Ibid.* at 202.

<sup>55</sup> *Ibid.* at 201-15.

<sup>56</sup> *Ibid.* at 210.

<sup>57</sup> *Ibid.* at 211.

<sup>58</sup> *Ibid.*

But what are the standards by which Hutchinson evaluates “good” rhetoric and therefore a better or even correct legal decision? He is not adequately forthright in this regard. Clearly, consistency is out, for it is the “hobgoblin of little minds.”<sup>59</sup> Getting it “right” or making it “true” are also explicitly rejected.<sup>60</sup> His preference is to take us “back to [rhetoric’s] classical roots and implies the art of cogently presenting ideas and arguments that does not insist on [its] own superiority.”<sup>61</sup> If this seems a bit obtuse, elsewhere he suggests that the key is experimentation.<sup>62</sup> He elaborates that this entails “doing it well; great players are those who understand the worth of experiment, improvisation and transformation ... vision, technique, application, industry, conditioning, insight, openness, fairness, humility, and a willingness to experiment.”<sup>63</sup> Elsewhere he celebrates “persuasion,” “contradiction,” “imagination and persuasion,” imagination and style, “timeliness, insight and argumentation,” “the continuing responsibility to dream and experiment in reasonable and reasoned ways,” and an ability “to carry the rhetorical day.”<sup>64</sup> Such ludicism sounds remarkably

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<sup>59</sup> *Ibid.* at 9, 213.

<sup>60</sup> *Ibid.* at 19.

<sup>61</sup> *Ibid.* at 51-52.

<sup>62</sup> *Ibid.* at 289.

<sup>63</sup> *Ibid.* at 19, 288. There is also something deeply individualistic about these standards, with very little reference to the ability to be a team player. Hutchinson analogizes these judicial virtues to those of a great soccer player. (Elsewhere he analogizes them to other great athletes, see *ibid.* at 300.) However, while these may manifest an individual talent, there is something missing. For example, during the 1998 World Cup there was great emphasis put on the individual brilliance of Ronaldo of Brazil and Beckham of England. Both players proved to be poor team members (Ronaldo never got in the game and Beckham threw a temper tantrum) with disastrous consequences for their teams. By contrast, it is often stated that one of the reasons why the former chief justice of Nova Scotia was such a great judge was because he quietly but efficiently provided stabilizing leadership. Much the same can be said of Pele, who was not only brilliant as an individual soccer player for Brazil, but also a wonderful team member. On another occasion, Hutchinson analogizes to the improvisational nature of jazz, see *ibid.* at 178. In the movie *The Commitments*, such solo efforts are wonderfully characterized as “wanker music.” All of this is ironic in light of Hutchinson’s criticism of Unger as being excessively individualistic and heroic, see *ibid.* at 265-70.

I have similar concerns about Hutchinson’s celebration’s of Van Morrison, the so called “Celtic Cowboy,” see *ibid.* at x-xi.

<sup>64</sup> *Ibid.* at 170, 132, 34, 293, 200, 296, 200. He also suggests that certain rhetorical practices are beyond the pale. For example, *ibid.* at 148, he agrees with Weinrib that judges must act in good faith and that to use “legal discourse only as a cover for political decisions is illegitimate and can be righteously deplored.” Similar indictments are made of rationalization as opposed to reasoning or rational debate, see, for example, *ibid.* at 185 and 200-201.

This causes me some concern. As I will suggest later, Hutchinson seems to suggest two, not necessarily compatible, sets of evaluative criteria: rhetorical prowess and progressivism. If he actually endorses the second, this may cause problems for his indictments of certain rhetorical

like a post-modernized version of the conventional liberal marketplace of ideas: it is not that Truth will emerge triumphant, but rather that legitimacy will accrue to the most talented rhetorician.<sup>65</sup>

On other occasions, Hutchinson tentatively ventures beyond stylistic criteria. He suggests the rather vague “usefulness and acceptability,” “persuasive or useful,” “practical utility in particular situations” and even “better or worse answers or even correct ones ... ‘correct’ in the contingent and contextual sense that certain people for certain purposes at a certain time and place are persuaded that it is correct.”<sup>66</sup>

However, interspersed throughout the book, there are other more bold moments. He advocates that judges pursue “transformati(on),”<sup>67</sup> “the valuable work of advancing the cause of social justice in a democratic society,”<sup>68</sup> “the human project of improved social justice,”<sup>69</sup> “justice and betterment,”<sup>70</sup> “an enhanced social solidarity and experience of justice,”<sup>71</sup> plain and simple “social justice,”<sup>72</sup> “a polity of truly equal readers and engaged writers,”<sup>73</sup> an “active dialogue of competing voices,”<sup>74</sup> an “open[ing] up [of] the essential dialogue of world making,”<sup>75</sup> “responsible skepticism and participatory democracy,”<sup>76</sup> “a participatory democracy that is egalitarian and pluralist,”<sup>77</sup> a “progressive politics ... [that] address[es] the *real* issues that divide and plague society—economic deprivation, public illiteracy,

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strategies. For example, assume that a judge is convinced that the death penalty system is “a broken system” see “A Broken System,”*supra* note 22, and that the only way to keep an accused off death row, and free from the threat of the gallows, is to engage in “bad faith rationalization,” would Hutchinson rightly deplore such a judicial strategy?

<sup>65</sup> For example, *Game*, *supra* note 1 at 277. The core of his criticism of MacKinnon is that her approach to pornography “tends to stifle debate rather than encourage it.”

<sup>66</sup> *Game*, *ibid.* at 45, 208, 155, 157, 179.

<sup>67</sup> *Ibid.* at 15, 121.

<sup>68</sup> *Ibid.* at 16.

<sup>69</sup> *Ibid.* at 46.

<sup>70</sup> *Ibid.* at 257.

<sup>71</sup> *Ibid.* at 259.

<sup>72</sup> *Ibid.* at 75.

<sup>73</sup> *Ibid.* at 112.

<sup>74</sup> *Ibid.* at 46.

<sup>75</sup> *Ibid.* at 75.

<sup>76</sup> *Ibid.* at 76.

<sup>77</sup> *Ibid.* at 262.

sexual violence, education, racial hatred, and other such issues,”<sup>78</sup> “a radical project of transformative politics,”<sup>79</sup> a “subversive politics that is committed to confronting and confounding the oppressive workings of elite institutions”<sup>80</sup> and “a more flexible and less oppressive social structure.”<sup>81</sup> He even characterizes the ludic judge as a “happy-go-lucky anarchistic sort of creature”<sup>82</sup> who can “engender local hope in the struggle to transform experience, to overcome suffering, and to endow others with opportunities to remake their own world.”<sup>83</sup> In the conclusion, he baldly states that “judges are to be judged by the political merit of their practical performances, not the conceptual coherence of their theoretical performances.”<sup>84</sup> Such exhortations and evaluative benchmarks clearly go beyond the play of rhetoric to suggest a more substantive (and perhaps even foundationalist?) conception of legitimacy.

My concerns about this apparent slipperiness and its prescriptive consequences, can be best illustrated through a discussion of Hutchinson’s analysis of *R.A.V. v. City of St. Paul*<sup>85</sup> (the cross burning case). Hutchinson is critical of Justice Scalia’s decision, but on what basis? As a rhetorical performance, the opinion manifests many of the hallmarks of what Hutchinson would appear to believe to be salutary style. One could argue that Scalia is an exemplar of ludic prowess; his use of precedent certainly appears to be innovative, experimental and improvisational. The fact that he can persuade four of his colleagues to concur<sup>86</sup> and “win the rhetorical day” has to be impressive by Hutchinson’s standards. But, it is telling that having spent much of the book locating legitimacy in rhetorical adeptness, Hutchinson explicitly refuses to examine Scalia’s (and the other Supreme Court judges’) performances on the basis of “rhetorical cogency.”<sup>87</sup> Rather, he uses the case to argue that ludic judges would be more politically candid about

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<sup>78</sup> *Ibid.* at 111 [emphasis added].

<sup>79</sup> *Ibid.* at 253.

<sup>80</sup> *Ibid.* at 258.

<sup>81</sup> *Ibid.* at 328.

<sup>82</sup> *Ibid.* at 298.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* at 322.

<sup>85</sup> 112 S. Ct. 2538 (1992) [hereinafter *RAV*].

<sup>86</sup> *Game*, *supra* note 1 at 306.

<sup>87</sup> *Ibid.* at 301.

their underlying visions and ideals.<sup>88</sup> All he can do is suggest that Scalia is a hypocrite for not coming out of the non-foundationalist closet.<sup>89</sup> And yet, it is clear that Hutchinson disagrees with Scalia in that he does not believe that the free marketplace of ideas advances “social utility.”<sup>90</sup> However, Hutchinson himself has built much of his argument on openness to the plurality of ideas and is explicitly critical of MacKinnon for attempting to “stifle debate rather than encourage it.”<sup>91</sup> As a consequence, it would appear that Hutchinson’s position is really based upon a substantive preference: he finds the “vile activity of white supremacists”<sup>92</sup> more unpalatable than the peddling of pornography. But, even then his ludic judge prevaricates in determining whether censorship is the appropriate remedy<sup>93</sup> because of Hutchinson’s attachment to the circulation of the free flow of ideas.

Thus, *RAV* brings to the fore an underlying thematic tension for Hutchinson. While the dominant register of the text has been to espouse the progressivism of rhetoric, there is also a counter voice registering caution. In passing, he seems to acknowledge that rhetoric is a risky, perhaps wanton, conduit for the pursuit of legitimacy: law has a “repertoire of argumentative moves,”<sup>94</sup> a repertoire that is “almost infinite.”<sup>95</sup> With commendable candour, he confesses that his ludic analysis cannot guarantee a more progressive judiciary,<sup>96</sup> but most importantly in his discussion of *RAV*, he actually concedes that non-foundational ludicism can justify Scalian conservatism.<sup>97</sup> Given these significant concessions what is it that justifies Hutchinson’s categorical claim that “it provides *the* most fitting and effective complement to the transformative ambitions of a truly democratic politics”<sup>98</sup> It would appear that it can just as easily provide a “fitting and effective complement to the [conservative] ambitions of a truly [reactionary]

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<sup>88</sup> *Ibid.* at 309.

<sup>89</sup> *Ibid.* at 305.

<sup>90</sup> *Ibid.* at 309.

<sup>91</sup> *Ibid.* at 277.

<sup>92</sup> *Ibid.* at 310.

<sup>93</sup> *Ibid.* at 311-313.

<sup>94</sup> *Ibid.* at 159. Also, see *ibid.* at 175.

<sup>95</sup> *Ibid.* at 173.

<sup>96</sup> *Ibid.* at 111.

<sup>97</sup> *Ibid.* at 310.

<sup>98</sup> *Ibid.* at 257 [emphasis added].

politics.”<sup>99</sup> Like natural law, non-foundationalism can be press-ganged into the service of all kinds of political masters for it has “no necessary direction [and] no necessary political program.”<sup>100</sup> To be told that “it is not incompatible with a progressive politics”<sup>101</sup> is hardly sufficient to justify the “the” claim. So where is the “prescriptive bite” and “political salience”<sup>102</sup> which Hutchinson has proclaimed? Like the relative autonomy thesis of which he is so critical, is his “anything might go” account of law and adjudication “so ample that it can accommodate almost all theorizing about law’s relation to other social phenomena”?<sup>103</sup> As a result, the law and politics of “might” take on a different, perhaps Hobbesian, meaning. As Hutchinson himself says:

there is no way of knowing whether the attempt to “do the right thing” might turn out to be another way to “do the wrong thing.” Because all strategies are hazardous and all consequences are unpredictable, much will depend on the informing context and precise timing of any particular intervention ... there are no self-evidently correct actions or easy answers but only different choices and questions.”<sup>104</sup>

If this is accurate, and I believe it is, then the difference between Scalia and Hutchinson is that the former’s conservative (political) *might* emanates from the Supreme Court of the United States, whereas the latter’s progressive (epistemological) *might* emanates from the university. To my mind, this is the crucial significance of the law and politics of might.

To be clear, my point is not that I disagree with Hutchinson’s inadvertently Hobbesian message. Nor am I arguing that it is impossible for some progressive things to emerge from the adjudicative process. My concern is that *Game* is pervaded by a false optimism that non-foundational ludicism is *the* progressive way to go. Hutchinson’s non-foundationalist and deconstructive conception of game playing is premised upon a hunch. “As an activity that is always beyond absolute determination and never fully finished, adjudication not only passively

<sup>99</sup> *Ibid.* at 257.

<sup>100</sup> *Ibid.* at 258.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.* at 217.

<sup>103</sup> *Ibid.* at 218. Also, see *ibid.* at 234: “... whether [anything] actually does or does not go will depend on many things, including the political context, the individualized circumstances of each adjudicative incidence, the personalities involved, and the perceived implications of different resolutions;” and *ibid.* at 242, in what way is this different from his criticism of other theories: “the explanations become either so abstract as to lack any practical predictive force or so elaborate as to capture only a particular historical moment in time”? See also *ibid.* at 329.

<sup>104</sup> *Ibid.* at 253.



allows but also actively encourages transformative and disruptive acts, because, without them, the game risks paralysis and irrelevance ...<sup>105</sup> While he admits “that everything is a matter of risk and strategy,”<sup>106</sup> he is deeply committed to the idea that the nature of the game might just encourage judges to do the right thing. But in this he makes a crucial assumption about human motivation. Drawing on Margaret Radin, he suggests:

“Once we admit that the rules are mutable and inextricable from material social practice, we will at least experience a psychological change in the way we perceive our roles as legal actors.” There will still be general agreement on what particular rules mean, and individual judges will still experience the same degree of (in)determinacy, but the vital justification for that result will be subverted and the question of authority will be challenged. Judges will no longer be able to claim that “the rule made me do it” but instead will have to take greater responsibility for judicial decisions and their social consequences.<sup>107</sup>

Again, let me draw upon my experiences with judicial education programmes. Recently, the National Judicial Institute has been developing a programme of social context education, that is, a programme that is designed to provide judges with a greater insight into the dynamics of inequality. One of the reasons why some judges resist such knowledge is because they realize that to factor social context into their decisionmaking processes will make their task that much more difficult and that many of the traditional certainties which they have historically relied upon can no longer be sustained. Unfortunately, Hutchinson provides no account of *why* judges would want to engage in a ludic enterprise which inevitably will not only make their already demanding tasks even more difficult, but will also open them up to challenges to their authority and even greater criticism.

## V. CONCLUSION

Ultimately, it would seem that Hutchinson’s “account” is premised on a hunch and a hope that if judges adopt non-foundationalism they might be more likely to do the right thing. But even from the couple of cases that he has actually discussed there is barely an inkling of this sanguine aspiration. Furthermore, if we locate his conception of adjudication in the broader formative contexts of

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<sup>105</sup> *Ibid.* at 166.

<sup>106</sup> *Ibid.* at 176.

<sup>107</sup> *Ibid.* at 177.

access to legal education, professional hierarchies and the politics of judicial appointments,<sup>108</sup> the *possible* “might” may well be eclipsed by the *more probable* “might not.”<sup>109</sup> Given the increasing significance of the courts as an arena of political struggle, progressives may have no choice but to “get stuck in,” as soccer players are wont to say; but in doing so, they must never forget that there are several key imperatives: do not squabble with your teammates; understand that referees have their own games to play and audiences to satisfy; never underestimate the strength of the forces arrayed against you; keep your defence tight; and never rely on individual talent to win the game. Such injunctions will not guarantee success, but they can guard against scoring an own goal as a result of an unjustified optimism.

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<sup>108</sup> Devlin *et al.*, *supra* note 8.

<sup>109</sup> J. Bakan, “Constitutional Interpretation and Social Change: You Can’t Always Get What You Want (Nor What You Need)” in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 445 at 445.