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## PAVČNIK'S THEORY OF LEGAL DECISIONMAKING: AN INTRODUCTION

Louis E. Wolcher\*

Marijan Pavčnik, whose essay on legal decisionmaking appears in this volume,<sup>1</sup> teaches at the law school of the University of Ljubljana, in the Republic of Slovenia. Slovenia's status as an independent nation dates back only to 1991, when it successfully broke away from the Federal People's Republic of Yugoslavia following a brief armed struggle.<sup>2</sup> Professor Pavčnik is one of the most prolific and interesting of those academics from the formerly communist states of Central and

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1. Marijan Pavčnik, *Legal Decisionmaking as a Responsible Intellectual Activity: A Continental Point of View*, 72 Wash. L. Rev. 481 (1997).

2. The Republic of Slovenia is a geographically small nation of two million people. Located in the heart of Europe, it is bordered on the west by Italy, on the north by Austria, on the east by Hungary, and on the south by Croatia. Under Habsburg domination from the thirteenth century through the end of the First World War, Slovene lands became part of the Kingdom of Serbs, Croats and Slovenes (the "first Yugoslavia") in 1918, a state of affairs that lasted until the invasion and occupation of Slovenia by the Italians and the Germans during the Second World War. Sergij Vilfan et al., *The National Assembly of the Republic of Slovenia* 13-26 (Miro Cerar ed. & Toby Robertson et al. trans., 1995). Shortly after the war, Slovenia was integrated into the Socialist Federal People's Republic of Yugoslavia (the "second Yugoslavia"). *Id.* at 27. With the collapse of the Eastern Bloc in the late 1980s, and amidst a deepening economic crisis and the intensification of ethnic antagonism within Yugoslavia, in 1990 the Slovene Assembly authorized a popular referendum on independence. More than nine out of ten eligible voters turned out for this referendum, which was held on December 23, 1990, and 88.2% voted in favor of independence. On the basis of this vote, Slovenia declared itself a sovereign state on June 25, 1991, and there followed a ten-day war in which the Yugoslav army failed to prevent it from securing its independence. The Serbian interpretation of these events is that Slovenia seceded from the second Yugoslavia; another interpretation is that the second Yugoslavia was decomposed. In any case, after widespread international recognition of Slovenia's independence in 1991 and 1992, the country was admitted to the United Nations as a sovereign state on May 22, 1992. *Id.* at 30.

On December 23, 1991, the Assembly of the Republic of Slovenia adopted a new constitution for the fledgling nation. *Id.* The text emerged out of a formal process conducted under the auspices of an official "Constitutional Commission." It originated with an outline prepared by a group of intellectuals who had been politically opposed to the old regime, and the subsequent drafting process included widespread public comment and debate as well as the involvement of an "expert group" comprised of prominent legal experts and law professors. Miro Cerar, *The Shaping of Constitutional Institutions in the Republic of Slovenia* 10-11 (Nov. 1996) (unpublished manuscript, on file with *Washington Law Review*). The new constitution declares Slovenia to be a "democratic republic," a "state governed by the rule of law," and a "social state." Slovn. Const. pt. I, arts. 1, 2, translated in *Constitution of the Republic of Slovenia* 15 (Miro Cerar & Janez Kranjc eds., Sherrill O'Connor-Šraj & Garry Moore trans., 1993). It also affirms Slovenia's obligation to protect "human rights and fundamental freedoms" within its territory. Slovn. Const. pt. I, art. 5.

Eastern Europe who are currently writing on topics germane to legal philosophy. I had the privilege of co-teaching two classes with him at the University of Ljubljana in the fall of 1996—one on legal theory and the other on the philosophy of law—and in the course of our collaboration I acquired a great deal of respect for both the man and his work. The editors of the Washington Law Review, having had the excellent judgment to want to publish his essay, have asked me to furnish this introduction for the benefit of those who may find themselves feeling uncertain about the import of Professor Pavčnik's ideas, or the context in which they were developed.

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At the end of his essay, Professor Pavčnik succinctly summarizes his thesis by stating that legal decisionmaking, and the decision that is its endpoint, "are always responsible human acts, ones that create law in the fullest sense of the word."<sup>3</sup> According to him, legal decisionmakers—and especially judges—are responsible in two different senses. At one level, they are responsible *to* the audience of their decisions (to the parties, to other judges, to the public, etcetera), and the criterion of their having discharged this responsibility is the audience's acceptance or rejection of the decision's premises and its resulting conclusion. Responsibility in this sense entails the kind of constraint on decisionmaking that Duncan Kennedy calls "double objectivity":<sup>4</sup> namely, the decisionmaker's knowledge not only that the legal text expresses a rule that she is not free to ignore, but also that *others* will view her decision through the lens of conventional attitudes and beliefs concerning the range of choices that are legitimately available to her. The feeling of responsibility that this knowledge can instill in a decisionmaker may be compared to the feeling of social pressure that comes from our fearing that others will view us in a poor light if we do something that falls outside the range of what is generally thought proper. But over and above this meaning of the word "responsible," Professor Pavčnik also maintains in his essay that decisionmakers are responsible in a deeper, more primordial sense. For it is the decisionmaker, he contends—not the "statute," not the "intent of the legislature," not *anything* or *anyone* else—who always does and must bear responsibility *for* the creative act of interpretation that constitutes her decision. The decisionmaker is the one who terminates the

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3. Pavčnik, *supra* note 1, at 505.

4. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Legal Educ. 518, 521 (1986).

indeterminacy of the legal text—a text that at first is always “open as to its meaning”<sup>5</sup>—by weaving it just the way she does into the tapestry of the case before her, rather than some other way.

Professor Pavčnik juxtaposes his account of decisionmaking with two other theories, which he claims are descriptively less adequate: (1) the naive but persistent and widely held view that legal decisionmaking consists in the mechanical application, to the facts of the case, of a meaning that is pre-given, and that somehow already resides “in” legal rules as texts (“conceptual jurisprudence”);<sup>6</sup> and (2) the more sophisticated conception, first developed by Adolf Merkl and then refined and popularized by Hans Kelsen, that decisionmakers construct the meaning of a rule, specific to their task at hand, out of earlier interpretations that assigned the rule a meaning residing at a somewhat higher level of generality (the “theory of graduality of legal norms”).<sup>7</sup> Situating his own thesis within the tradition of a discourse that is known in the civil law as the “theory of argumentation,” Professor Pavčnik maintains, against both of these theories, that the legal decision as such is “a value synthesis assessing the normative starting point with regard to the factual starting point, and vice versa.”<sup>8</sup> Conceptual jurisprudence errs by representing decisionmakers as uncreative law-applying automatons. And while the theory of law graduality correctly attributes creativity to decisionmakers, it too errs by imagining that their creativity begins and ends within the domain of abstract legal norms. According to Professor Pavčnik, the legal decisionmaker is best understood as someone who creatively and *simultaneously* constructs the law out of the facts of the case, and the facts of the case out of the law.

And how, it might be asked, could anyone ever manage to do both of these things at the same time? Here Professor Pavčnik’s thesis relies on, and presupposes an understanding of, the concept of “dialectical reasoning.” Although it may be natural for lawyers trained in the common law tradition to think of the categories “law” and “facts of the case” as being interdependent and separated by a boundary that is fuzzy at best,<sup>9</sup> we common lawyers are somewhat less likely than our civilian

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5. Pavčnik, *supra* note 1, at 493.

6. *Id.* at 487–488.

7. *Id.* at 488–490.

8. *Id.* at 481.

9. See, e.g., Walter Wheeler Cook, *The Utility of Jurisprudence in the Solution of Legal Problems*, in Lon L. Fuller, *The Problems of Jurisprudence* 653 (1949).

Cook notes that in all systems of common-law pleading,

counterparts to be familiar with the formal concept of dialectical reasoning. Accordingly, I offer a homely illustration of dialectics that is meant to be useful in preparing the ground for the reception of Professor Pavčnik's more sophisticated treatment of that concept in the context of legal decisionmaking.

Imagine that you are walking in the park, and that you come upon a small oblong object lying on the ground. At first glance it strikes you as an oddity that is not quite like anything you have ever seen before. You not only do not know what the object is made of, or why it is here, you don't even know what to call it—indeed, if someone were to ask you to tell them about the object, you probably wouldn't know what to say. But now imagine that a group of children comes along. You see one of them pick the thing up, and they begin to throw and bat it around from child to child. Every now and then you hear them laughing and saying things like "Good catch!" and "That's one point for you." It occurs to you that they are playing a game with the object that looks rather like parts of other games you have played or seen played—games like volleyball and "catch." And now it strikes you, in a flash of insight, that the thing the children are playing with really could be called a kind of *ball*. *What you have just done, to paraphrase Professor Pavčnik, is assess the object (the factual starting point) with reference to the concept "ball" (the normative starting point).* On the other hand (you admit to yourself) you have never before seen a ball that looks like this one: it seems oblong like a football, but it is uneven and irregularly shaped; and you see, on closer inspection, that its construction is a droll mixture of painted cardboard and feathers. Still, both the thing and the way it is being used seem to be provoking you, as it were, to classify it as a *kind* of ball. So you mentally index the word "ball" to provide a special conceptual niche for irregularly-shaped, cardboard-and-feather "balls" like this one. Indeed, if you were to see enough children on enough different occasions playing with balls of this sort, you might even decide to give them a special name—say, "cardfeather balls." *What you have just done now, again to paraphrase Professor Pavčnik, is assess the concept "ball" (the normative starting point) with reference to the object (the factual starting point).*

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from every bundle of raw "facts" . . . data have necessarily been selected and then tied together into bundles by means of statements or propositions in the formation of which rules of law have been applied to the selected data . . . . [T]here is no logical or scientific distinction between what pleaders have called statements of "mere conclusion of law" and so-called "statements of fact" . . . .

*Id.* at 680–81.

Now imagine that the two things you have just done did not unfold themselves in a neat temporal sequence, one after the other, but instead wove themselves together in your experience in such a way that you would be hard-pressed to say which came first, or which was more prominent or important in the flux of events that made up your engagement with the cardfeather ball. If you can imagine this, you will begin to get a pretty good idea of what Professor Pavčnik is getting at when he says that legal decisionmaking is a “value movement to-and-fro” between the normative and factual states.<sup>10</sup> What we lawyers know as the “facts of a case”<sup>11</sup> is not the same as what laypeople sometimes call “what really happened.” For Professor Pavčnik, the expression of the facts of a case is like a stalagmite that is built upwards from a set of concrete and unique historical circumstances, involving just *these* parties,<sup>12</sup> but always according to the decisionmaker’s perception that the facts correspond to one or more (emerging) legal subcategories. Likewise, the expression of what we call the “applicable rule”<sup>13</sup> is like a stalactite that is built downwards from a more abstract level of legal norm,<sup>14</sup> and Professor Pavčnik contends that it, in turn, is constructed according to the decisionmaker’s perception that the (emerging) facts of the case correspond to a kind of conduct that is immanent in the more abstract legal category.<sup>15</sup> Professor Pavčnik points out that the decisionmaker constructs the two discourses—of fact and law—*towards* one another; and that what started out as an “area of freedom”<sup>16</sup> for the decisionmaker always in the end gets filled up with her own interpretations of the facts with reference to the law, and of the law with

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10. Pavčnik, *supra* note 1, at 496.

11. Professor Pavčnik calls these the “legally-relevant state of facts.” *Id.* at 483.

12. Professor Pavčnik calls this set of circumstances the “life case.” *Id.*

13. Professor Pavčnik calls this the “normative state” or “normative state of constituent elements of the case.” *Id.*

14. Professor Pavčnik calls this the “statute.” *Id.*

15. For example, imagine the general rule “No smoking in class.” Particular instances of smoking-behavior may cause a decisionmaker applying this rule to articulate subcategories of smoking that are prohibited by the rule, such as “cigar smoking” and “cigarette smoking.” Now, if someone were to light a stick of incense in class, this behavior (as a “life case”) may or may not be perceived by the decisionmaker as potentially governed by the categories and subcategories that have been constructed heretofore out of the words “No smoking in class” (the “statute”). Suppose that the decisionmaker does think the rule potentially applies. If Professor Pavčnik is right, she will now articulate the facts—for example, “The defendant lit up a stick of incense, producing smoke, but did not inhale it in the manner of a cigar or cigarette”—*with reference to* the rule (“No smoking in class”); and she will express the meaning of the rule—for example, “the word ‘smoking’ in the rule includes anything that smokes, whether or not it has been previously inhaled”—*with reference to* the facts.

16. Pavčnik, *supra* note 1, at 482.

reference to the facts. Among other things, he is making the important point that we radically distort the nature of the decisionmaking process if we say that inert, prefactual law is applied "to" inert, prelegal facts, or if we give causal primacy *either* to the facts as such *or* to the legal rule as such. If all we care about is knowing the abstract truth concerning which of these two "elements" of legal decisionmaking is more important, perhaps it would be better for us to follow Hegel's epigram that "the truth is in the whole,"<sup>17</sup> and say that *neither* one is more important than the other.

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It is very clear, however, that Professor Pavčnik did not write his essay merely to elucidate an abstract truth, or to defeat abstract untruths. It is tempting to believe that because legal decisionmaking is an activity that occurs in all legal systems, therefore the *problem* of legal decisionmaking must be essentially the same everywhere. But believing this would be a serious mistake. It would be wiser to ask: What is the *point* of Professor Pavčnik's project? What *work* was it meant to do? Here it would be well to remember the truism that Professor Pavčnik's essay, like anyone else's, develops its theme from within a particular historical and cultural context. In this case, the context is that of a law professor in a newly independent nation that is, to borrow a phrase from one of Professor Pavčnik's colleagues at the University of Ljubljana, "only just getting used to democratic order."<sup>18</sup> In a word, what many American legal academics are inclined to see as a conceptual *problem*—decisionmaking by judges who already have a sense of their own institutional independence—Slovene legal scholars like Professor Pavčnik are inclined to see as the beginning of a *solution*.

Coming to see legal decisionmaking as a problem or as a solution frequently is a function of having had the experience of feeling puzzled by it. And many people who think deeply about the law do eventually get puzzled by what appears to be a conceptual gap between legal rules and their application in concrete cases. Someone who is in the grip of this puzzlement is inclined to ask questions of the following sort: How could a mere graphic sign on a piece of paper—the inert expression of a legal rule—have all of the consequences for people's lives and fortunes

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17. Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 L. & Soc'y Rev. 571, 587 (1977).

18. Miro Cerar, *Mechanisms of Direct Democracy in the New Slovene Legal and Political Order: The Legislative Referendum 7* (June 24–26, 1996) (unpublished manuscript, on file with *Washington Law Review*).

that the law seems to have? Within the context of mainstream *American* legal theory, the impression that there is a gap between the expression of a legal rule and the act of applying it just this way, as opposed to some other way, leads many people to worry that the Rule of Law is insecure. The problem is not that there are “gaps in law” in the narrow sense of a system of rules which, however clearly it seems to answer most questions that are brought to it, still appears not to give an answer to the question whether this or that particular act is prohibited or permitted.<sup>19</sup> The gap to which I refer here is seen to yawn in the midst of *every* act of legal decisionmaking—in easy cases and hard—and may be described as the puzzling absence of anything self-evidently *there* (other than the decisionmaker) that would span the distance between legal texts thought of as rules to be applied and what happens when those rules actually get translated into deeds. Puzzlement about *this* gap can never be removed by positing another, more particular, rule. It’s not just that a more particular rule might not be in existence yet, but that even if such a rule does exist—for example, the rule that “Rule *X* requires that cases of type *A* be decided for the plaintiff”—then between *its* graphic expression<sup>20</sup> and its application to the case at hand will lie yet another gap: namely, the gap from the phrase “cases of type *A*” to *this* case. In short, as Professor Pavčnik’s emphasis on the centrality of the “flesh-and-blood decisionmaker” suggests,<sup>21</sup> one can never close a conceptual gap of this sort by laying down planks that always cover only half the remaining distance to the other side.<sup>22</sup>

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19. For an interesting discussion of “gaps in law” in this sense, see Marijan Pavčnik, *Why Discuss Gaps in the Law?*, 9 *Ratio Juris* 72 (1996). There Professor Pavčnik brings up Hans Kelsen’s thesis that it is a logical impossibility for the legal order to contain a gap, because in the moment of legal decisionmaking in concrete cases the legal order can always be applied, if only by means of a “negative rule” to the effect that the defendant is not bound by the obligation that the plaintiff alleges. *Id.* Professor Pavčnik confronts and takes issue with Kelsen’s thesis by appealing to what might be called an *ethical* difference between the law and the world: “The world does not only consist of legally regulated areas and gaps in law that have to be filled. In the world there are also legally empty (free) spaces eluding law and lawyers. In discussing gaps in law, we also discuss man and his freedom.” *Id.* at 84.

20. And the graphic expression of any still more particular rule that you can imagine.

21. Pavčnik, *supra* note 1, at 483.

22. What goes for rules also goes for any theory of decisionmaking that tries to intrude into legal deciding itself. Without meaning to sound disrespectful to particular theorizers, or to theorizers in general, the objection noted in text also pretty much disposes of the gap-closing aspirations of all theories of legal decisionmaking that are offered to lawyers and judges as *programs* to be followed in arriving at the correct applications of legal rules. For any theory of this kind, like a legal rule, must express itself in signs, and between these signs and the application of the theory by the decisionmaker there yawns the same old conceptual gap. See generally Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*



Now what really bothers many Americans who are puzzled by the gap I have described—but who at the same time believe, with John Adams, that the ideal of liberal democracy entails “a government of laws and not of men”<sup>23</sup>—is just this: if the flesh-and-blood decider is “taken to be the sole logical “term,” as it were, mediating between the legal-rule-as-sign and *this* particular result, then there seems to be nothing to distinguish what the law requires from what Duncan Kennedy calls the decider’s HIWTCO: “How I want to come out.”<sup>24</sup> The theory of judging displayed in Ronald Dworkin’s *Law’s Empire* comes to mind as an excellent example of the kind of thing that legal philosophers who see this gap as a problem are prone to think up.<sup>25</sup> “It matters how judges decide cases,” Dworkin writes, because “[p]eople often stand to gain or lose more by one judge’s nod than they could by any general act of Congress or Parliament.”<sup>26</sup> Dworkin’s *bête noire* is a judge who is insufficiently constrained by the law—a judge who, one has to suppose, has already acquired a sufficient sense of her institutional independence from the overtly “political” branches of government to feel frisky enough to enact her own preferences (or someone else’s) to fill up the gap between rule and application. Whatever else can be said about it, Dworkin’s theory of “law as integrity”<sup>27</sup> came into being in response to what might be called the “problem of the independent judge” in historical and political circumstances like those prevailing in the long-standing and well-

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372–98 (1989) (making similar argument against programmatic aspirations of theory). Indeed, for those who are deeply puzzled by the gap between a rule and its application, a theory of decisionmaking in the programmatic sense always in the end takes on the aspect of just another rule—a metarule, perhaps, but still just another bit of text lying on the table with all the other inert signs that the decisionmaker feels obliged to apply to the case at hand.

23. John Adams, “*Novanglus*” papers, No. 7, 1774, in 4 *Works of John Adams* 106 (Charles Francis Adams ed., 1851).

24. Kennedy, *supra* note 4, at 548.

25. Ronald Dworkin, *Law’s Empire* (1986).

26. *Id.* at 1.

27. *Id.* at 225–75. The concept of “law as integrity” is Dworkin’s answer to conventionalism (the thesis that law is and should be simply a backward-looking report of what judges have done in fact in the cases they have decided) and pragmatic instrumentalism (the thesis that law is and should be simply a forward-looking program of social betterment). His concept “insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative.” *Id.* at 225. His aim is to inculcate the right “interpretive spirit” in decisionmakers—one in which they are inclined to lay “principle over practice.” *Id.* at 413. The point made in text is that Dworkin’s *project*, whatever its merits may be as a program for legal decisionmakers to follow, *cf. supra* note 22, is driven by worries about what insufficiently constrained judges might do, and that this point of view for looking at the problem of legal decisionmaking is historically situated and contingent.

established liberal democracies of the United States and Western Europe.

In contrast, to Professor Pavčnik and the other legal scholars at the University of Ljubljana who are laboring hard to construct the conditions for a new democratic order in Slovenia, it must seem to be an incredible luxury to have time to worry about dangers that are felt to be posed by a strong and institutionally independent judiciary that is insufficiently constrained by the law. During my stay in Ljubljana, I never got the impression from my Slovene colleagues that the activities of *rogue judges* were among those that were felt to be the source of the problem that is referred to in Slovenia's Charter on Independence, which states that the country from which Slovenia seceded, the former Yugoslavia, "is not a state which observes the rule of law but rather grossly violates human rights."<sup>28</sup> On the contrary, I was told repeatedly that the real problem with the "rule of law" when the former Yugoslavia was intact was the *absence* of judges and lawyers who were willing to stand up to a repressive regime that was bent on stifling dissent and securing obedience to its political programs. Hear what Professor Pavčnik has written elsewhere of this period in his country's history:

In the Slovenian (Yugoslavian) constitution of 1974, basic [human] rights were merged into a detailed vision of self-governing society and state. The basic rights were designed as an element of an all-embracing (and thus also totalitarian) self-governing system based on the right of the working man and citizen to self-government. The basic rights were not the starting point of the system, but only a part thereof, and it was exactly determined beforehand how far and where this part might be active. It is characteristic of this system that it accepts the thesis of a pluralism of self-governing interests but is not ready to institutionalize this plurality in a legal and political manner.

Pluralism is only accepted up to a certain demarcation line not to go beyond the system, whereas it seems suspicious and may lead to criminal prosecution (cf. Art. 114 and 133 of the Federal Criminal Code of Yugoslavia of 1976) as soon [as] doubts are expressed about the system and changes are demanded.<sup>29</sup>

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28. Slovn. Basic Const. Charter on Independence and Sovereignty, *translated in Constitution of the Republic of Slovenia* 11 (Miro Cerar & Janez Kranjc eds., Sherrill O'Connor-Šraj & Garry Moore trans., 1993).

29. Marijan Pavčnik, *Understanding Basic (Human) Rights (On the Example of the Constitution of the Republic of Slovenia)*, 2 E. Eur. Hum. Rts. Rev. 41, 42 (1996). For a socio-economic critique

For more than four decades after the Second World War, lawyers and judges in Yugoslavia were taught that they and the law were at best marginally important to the social order. Yugoslav legal theory denied the relevance of the bourgeois concepts of human rights and the rule of law, and asserted the orthodox Marxist claim that the law and the state should and would gradually wither away.<sup>30</sup> As one of Professor Pavčnik's colleagues at the University of Ljubljana recently put it:

[Yugoslav] [l]egal theory was thus predominantly occupied with the idea of the establishment of a new self-regulative social order, which resulted finally in the so called self-management system. The paradox was that the state, led by the communist regime, did not lose strength while, on the other hand, the law did. The status and role of lawyers slowly lost any real significance, since the law became or remained essentially subordinate to politics and the regime. The consequences of that period are still apparent today, especially within the legal administration and judiciary, whose role within the legal order and society is still underestimated.<sup>31</sup>

The same author goes on to state that “[p]ublic opinion [in Slovenia] about the judiciary is predominantly negative,” and attributes this in part to “a collective memory of the communist regime,” and in part to the circumstance that many judges from the former regime still hold office—a fact that the right-wing political parties in Slovenia's new parliament have managed to keep constantly before the public eye.<sup>32</sup> When I was in Slovenia, I heard many similar reports from other professors and students; they were usually delivered in a rueful tone of voice, and were almost always accompanied by the expression of hope for the coming of a change in people's attitudes about law and lawyers. In short, within at least a large segment of the legal academic culture there, the perceived problem with legal decisionmaking is the absence of a strong feeling of professional independence and competence on the part of lawyers and judges in Slovenia,<sup>33</sup> and the presence of widespread public mistrust of the legal system.<sup>34</sup>

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of the Yugoslav self-management system, see Roberto Mangabeira Unger, *What Should Legal Analysis Become?* 160–61 (1996).

30. See Miro Cerar, *The Rule of Law (“Rechtsstaat”): The Case of Slovenia* 16–17 (Nov. 21, 1995) (unpublished manuscript, on file with *Washington Law Review*).

31. *Id.* at 17.

32. *Id.* at 23.

33. See *id.* at 12.

[I]t is more or less clear that, in Slovenia, the consensus about the basic institutions of the rule of law is still predominantly based on the abstract level and not in the sphere of interpretation

It is important to keep this background in mind as you read Professor Pavčnik's essay. As I see it, what many mainstream American legal philosophers are inclined to see as a problem with legal decisionmaking—how to *ground* it in something outside of its own performance—Professor Pavčnik's essay portrays as an opportunity. It is an opportunity for the judges and lawyers of his country to fill the gap between rule and application<sup>35</sup> with a real power (and a real responsibility) that would help to counterbalance the awesome power that the non-judicial branches of the state—and private economic interests, including international big business—can bring to bear on people, both individually and collectively. Indeed, I can't help thinking that Professor Pavčnik's essay is not about legal decisionmaking in the American sense at all, but is rather an exploration of the preconditions, both logical and psychological, for the emergence of a legal profession that considers itself a "player" in the construction of a new social, political, and legal order. And the ethical dimension of Professor Pavčnik's essay—his relentless insistence on the personal responsibility that legal decisionmakers bear for their choices—puts me in mind of Max Weber's advocacy of an "ethic of responsibility" for public policymakers: an ethic that is inextricably connected to the "knowledge of tragedy with which all action, but especially political action, is truly interwoven."<sup>36</sup> But these are just my own interpretations. Putting them

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and implementation of these institutions in practice. The coming years will thus show whether these institutions have been adequately translated into Slovenian legal order, and whether they have become an essential part of Slovenian legal culture.

34. Recent public opinion research conducted by the Social Science Faculty of the University of Ljubljana shows that people in Slovenia express a level of trust in the President of the Republic, the police, the army, educational institutions, and banks that is significantly higher than the level of trust they express in the courts. Cerar, *supra* note 2, at 26 (reporting that in 1996 only 24% of representative sample of 1,050 adults said that they completely or mostly trusted courts, whereas figures for other institutions just mentioned were: 40% (president), 34% (police), 33% (army), 69% (educational institutions), and 44% (banks)).

35. Here I am inclined to say, though I doubt that Professor Pavčnik would say it, that the gap between rule and application is not existential, but is the consequence of a certain way of looking at legal decisionmaking. It is the *picture* of a gap—say between *X* and *Y* in this sentence—that underwrites the project of seeing "it" (the gap) as a problem or an opportunity. It is the picture of a gap, therefore, that has its use in this or that political project.

36. Max Weber, *Politics as a Vocation*, in *From Max Weber: Essays in Sociology* 77, 117, 120 (H.H. Gerth & C. Wright Mills eds. & trans., 1958). Compare Weber's remark with Professor Pavčnik's poignant rejection of the idea that decisionmaking consists merely in the establishment of what is a "completely preexisting solution":

If someone does claim to have knowledge of such a solution, this claim is but a precursor to the imposition of a particular, and therefore contingent, system of values masquerading as objectively absolute. Historical experience in Europe and elsewhere has proven that the

all aside, it remains quite clear that in *Legal Decisionmaking as a Responsible Intellectual Activity: A Continental Point of View* we are hearing the intelligent and subtle voice of a legal philosopher who has thought long and hard about his subject. We American legal thinkers would do well to listen closely to voices like his, coming as they do from a part of the world that is undergoing such profound, and frequently painful, transformations.

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generalized tendency to impose such value systems does not have much in common with human rights and human dignity.

Pavčnik, *supra* note 1, at 503.