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# On the Connection Between Law and Justice

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**On the Connection Between Law and Justice,**  
by Anthony D'Amato,\*  
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**Abstract:** What does it mean to assert that judges should decide cases according to justice and not according to the law? Is there something incoherent in the question itself? That question will serve as our springboard in examining what is—or should be—the connection between justice and law.

Legal and political theorists since the time of Plato have wrestled with the problem of whether justice is part of law or is simply a moral judgment about law. Nearly every writer on the subject has either concluded that justice is only a judgment about law or has offered no reason to support a conclusion that justice is somehow part of law. This Essay attempts to reason toward such a conclusion, arguing that justice is an inherent component of the law and not separate or distinct from it. Given the history of the topic, I start with a disclaimer. The issues involved in these questions are as vast as they are fundamental. I do not pretend to have a definitive solution. I do attempt a suggestive solution based on an extended hypothetical case.

Tags: Law, Justice, Legal Theory, Jurisprudence, First Impression

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[pg528] INTRODUCTION

Legal and political theorists since the time of Plato have wrestled with the problem of whether justice is part of law or is simply a moral judgment about law. An example of the latter is when we speak of an "unjust law." Nearly every writer on the subject has either concluded that justice is only a judgment about law or has offered no reason to support a conclusion that justice is somehow part of law. This Essay attempts to reason toward such a conclusion, arguing that justice is an inherent component of the law and not separate or distinct from it. Given the history of the topic, I start with a disclaimer. The issues involved in these questions are as vast as they are fundamental. I do not pretend to have a definitive solution. I do, however, attempt a suggestive solution based on an extended hypothetical case. If you, the reader, are not persuaded by it, I hope at least that it will have heuristic value for you.

Justice to me is a personal thing as well as a concept worthy of study. I believe that you cannot "do justice" to my arguments unless you "know where I am coming from." So I intend to be personal as well as theoretical in this Essay, mingling the approaches shamelessly as I go along. I hope that the casualness of my writing style will not signal to you that the ensuing analysis is easy or off-hand. In fact, the choice of style is quite deliberate. For I believe that the most elusive and hardest ideas are best tackled by the simplest and most direct kind of prose. This is in large part a reaction to my frustration over the years in reading "heavy" prose which often, because of its convoluted style (such as the use of third-person, passive tense, and overly long sentences), turns out to be ambiguous. When the subject of an article is difficult, the last thing we need is an ambiguous analysis of it. The simpler the prose, the more naked are the ideas expressed in support of the author's conclusion. I hope to convey precisely what I mean, and if there is illogic or incoherence in what I say, it will be exposed to your scrutiny, not buried in a heavy style.

Let me start by mentioning my current project on justice. For the past decade or so I've been on something of a crusade to persuade law schools to teach justice. Justice, I argue, is what law is for; justice is what lawyers should do; justice is what judges [pg529] should render.FN1 "Law" is nothing but a set of tools—admittedly complex and intellectually engaging. But we should not get so caught up in the intellectual interest of law that we forget that law in itself cannot solve human problems. Like any other tool, law may facilitate the solution of a given problem. But we cannot expect law to tell us how the problem ought to be resolved. Although I would never challenge the proposition that the training of lawyers requires familiarization with the tools of the trade,FN2 I contend that simply teaching students how to find and use the tools of the trade—including verbal and rhetorical skills—is hardly ennobling, is hardly why we can call law a "profession," is hardly the reason students should study law or why the best students come to law school in the first place. Nor can we cop a plea by saying that our duty is only to serve our clients, because some desires of some clients (such as planning a crime) are and should be excluded from a lawyer's professional responsibility. If serving a client is a lawyer's highest aspiration, then that lawyer is just a hired gun. To the contrary, the reason law is properly called a profession is because our job is to help achieve justice—justice for our clients, to be sure, but justice nevertheless. By achieving justice for our clients, we simultaneously add a measure of justice to society.FN3

Yet when audiences ask me for a purely instrumental reason why law schools should teach justice—something that will play well at the next meeting of the curriculum committee—

I respond that justice *arguments* are the ones that are likely to win negotiations and litigations. Since our job is to train our students to be effective in negotiations and litigations, we must have courses on justice and the role it plays in legal advocacy.

The reason I give for contending that justice arguments are winners is worth summarizing here because it will tie in at several [pg530] places to the theme of this Essay. I start by saying that good lawyers on either side of a negotiation or litigation will probably succeed in checkmating each other with their legal arguments. Our law schools do an admirable job in training students to come up with plausible legal arguments on any side of any controversy. After they graduate, our students will meet other equally well-trained attorneys who will come up with plausible arguments on the other side of any given controversy. Once all the legal arguments are ventilated, justice often tips the scale at the end because the decision-maker<sup>FN4</sup> will likely be swayed by what is, under the circumstances, fair.<sup>FN5</sup> Faced with opposing briefs that are equally, or just about equally,<sup>FN6</sup> persuasive, the decision-maker in the end will likely be guided by his or her sense of justice. This is especially true if the decision-maker is a judge, partly because it is an ancient tradition and belief that the role of the judge is to do justice to the parties.

Such are the arguments in outline as I have been making them in various articles and speeches around the country.<sup>FN7</sup> Professor Arthur Jacobson and I have recently published a coursebook, *Justice and the Legal System* (1992)—a first cut at showing how justice can be taught as a one-semester course in a law school.<sup>FN8</sup> Almost overnight, it seems, the law journals are filled with articles about justice.<sup>FN9</sup>

To be sure, it's hard for a professor or lawyer to be opposed to justice. Like motherhood and apple pie, there's not much [pg531] controversy about the desirability of justice. Indeed, the danger is that justice may become an honorific term that sweeps through law school classrooms, touching everything and influencing nothing.

But it's easy enough to make "justice" quite controversial. All you have to do is assert that judges should decide cases according to justice and not according to law. Even though judges may in fact do this, as soon as you assert that they *should* do it you can rock the foundations of the academic legal establishment.

That question, accordingly, has considerable value in organizing our thoughts about justice. What does it mean to assert that judges should decide cases according to justice and not according to the law? Is there something incoherent in the question itself? That question will serve as our springboard in examining what is—or should be—the connection between justice and law.

### I. A FALSE START: "LET'S DEFINE OUR TERMS"

It is natural to think, at first blush, that if our task is to look at the connection between law and justice, our best beginning would be to define law and justice. We might wish to have an exhaustive, definitive account of what "law" is, building on theorists from Plato, Aristotle, and Cicero down through the positivists Bentham, Austin, Kelsen, Hart, and naturalists like

Fuller. A 500-page book on the subject might do nicely. Then we would want a similar book on justice," building again from Plato, Aristotle, and Seneca down through Sidgwick and Rawls, and various contemporary theorists. Finally, we would need a third book to deal with the theoretical connections between the first two books. But it is quite possible that when—or if—all of this is accomplished, it will appear to be nothing more than a vast tautology. A critic might well say: "if you *define* law that way, and you *define* justice that way, then perhaps your third book on the connections between the two would be persuasive. But it would only be persuasive to those people who accept your definitions of law and justice in the first two books. In fact, all you will have accomplished is to build a bridge between two huge concepts of your own invention. That bridge may work for you, but it doesn't necessarily have to work for anyone else."

All right, then, why not, at the outset of an essay, simply offer a brief definition of law and justice? Don't we need to know what the terms mean before we can decide how they relate to each other? Isn't "defining one's terms" what we learned in high [pg532] school to be the appropriate way to begin any conceptual analysis?

To show, rather than simply contend, that this approach doesn't work, let's look at a couple of plausible definitions:

"LAW" — officially promulgated rules of conduct, backed by state-enforced penalties for their transgression.

"JUSTICE" — rendering to each person what he or she deserves.

Before we could even begin to address the possible "connections" between these two concepts, it is clear that the definitions themselves need explication. Consider, for example, the common law. How does the common law fit in with the notion of officially promulgated rules? (This question has been an *enormous* source of concern for positivists, and I believe that they have yet to come up with a satisfactory answer).FN10 Or what if you have an officially promulgated rule, but the practice of officials within a state is at variance with the rule? I constructed a story along these lines back in 1978, where the rule of my mythical state was in fact enshrined in that state's constitution.FN11 Nevertheless, I contended then, as I do now, that if you wanted to travel to that state and wanted to know what the rule was, you would be *misled* by an attorney who "looked it up" and told you it was an officially promulgated rule enshrined in the state's constitution, even if all those things were true. Instead, you would be *well-advised* by an attorney who told you that no government official ever pays attention to that old rule any more, and that practice in the state is quite the opposite. It is clear that either to defend the above definition, or to attack it thoroughly, one would need a book-length treatment, with no guarantee that the end result would be persuasive to the reader.

As to the "justice" definition, surely we need to know what "deserves" means before we can make sense of it. But that term "deserves" simply incorporates and replicates all of the content of "justice" itself. So we need a further definition of the term "deserves." Do we deserve something because we've earned it? [pg533] (What about good physical looks? What about talent? What about a propensity to work hard?) Does the person who trains the hardest deserve to win a race—or should the victory go to the swiftest? Does the heir to an estate deserve to

inherit its wealth? These and myriad similar questions suggest that at least a 500-page book is needed to spin out the notion of desert.FN12

Thus, given the shortcomings of the two proposed definitions, what help might we expect in constructing a theory that connects the two?

*But even* if we did construct such a bridging theory, would it not have the same infirmity as the one proposed earlier—namely, that it is simply a tautology? For no matter how we define a term, once we proceed from the definition that we have adopted to an attempt to use that definition to prove something else, we are open to the charge that our entire enterprise is tautological. *If* we have been logically rigorous, the *most* we will have proven is that our conclusion *follows logically* from our initial (definitional) premises. Therefore, the conclusion that we reach is a function of the definitions we have adopted at the outset! It follows from them in the logically deductive sense that our conclusion *adds nothing new* to the definitions we adopted, but rather is a logical reduction of those premises.FN13

But then, how can I communicate with you if I don't define my terms? The question is indeed a contentious one in the philosophy of language.FN14 Briefly, and rather roughly put, I must suggest that our high school teachers were wrong. My task as writer is to [pg534] communicate with you, the reader, according to the meanings of words more or less as you understand them.FN15 I cannot change those meanings for you. I cannot hope to redefine terms that you already use, except to a very limited extent (and then, only if you agree to modify your own definitions). Any definition that I employ that turns out to be at noticeable variance with the definition you have in your mind is simply going to meet with your resistance. You will either reject what I have to say, or perhaps fail to understand it. (The Red Queen may tell Alice that her words mean what she wants them to mean, neither more nor less, but no matter how powerful the Red Queen is, she cannot force Alice to understand strange or idiosyncratic meanings that the Queen keeps in her head or force Alice to adopt strange definitions as her own.) Thus, instead of beginning by stipulating definitions of words as I would want them to be understood, I shall [pg535] adopt an open-ended approach to language.FN16 I shall not impose my semantics on you; rather I (have little choice but to) accept your semantics as I reasonably expect them to be (given our common language), with perhaps minor definitional adjustments that I shall have to justify as I go along. FN17

If a further reason were needed not to begin by defining terms, I might cite Hegel's insistence that reality is contained not in entities but in relationships between entities.FN18 Hegel didn't say that we should build bridges between defined concepts or entities; rather, Hegel argued (as I understand Hegel) that we begin with the bridge itself. Thus, although we may not ever in our lives encounter "law" or "justice" in the abstract conceptual sense, we certainly would encounter a very real problem if we ask whether judges should decide cases according to law or according to justice. Then the two concepts are in direct opposition to each other, and the case at issue could be won or lost depending on the answer to the question. It is in the Hegelian clash of synthesis and antithesis, rather than in the purported "application" of reified and hence unreal concepts, that matters of moment are confronted and adjudicated.

## [pg536] II. THE CASE AGAINST JUSTICE

### *A. It Is Dangerous*

Let us start by examining the case against the following proposition:

PROPOSITION (1): Judges should decide cases according to justice and not according to law.

In the style of Hegel's antitheses, let us consider the case against this proposition in the strongest possible terms. Here goes my version: Human liberty as advanced by the progress of civilization is dependent upon the rule of law. In order for freedom to flourish, people need to know what the law is and need to have confidence that officials will faithfully apply the law as it is written. If a police officer can arrest you because you have somehow violated his sense of justice and if a judge can convict you because she thinks that what you did was unjust, then you might be incarcerated for innocent behavior. There would be no predictability in such a system. We would not know in advance how to control our conduct to avoid landing in jail. Imagine a "hippie" judge on the bench saying to the parties, "Don't confuse me with legal mumbo-jumbo; just tell me your stories, and I'll stop you at the point when I've discovered where justice is in this case." Human liberty would be forfeit at the mercy of officials whose subjective sense of "justice" might be unpredictable as well as collectively incoherent. Moreover, officials are very likely to regard as "just" those measures and actions that are politically expedient. The late Edgar Bodenheimer asked us to imagine

a purely administrative state, in which all official actions are *ad hoc* measures induced solely by considerations of practical expedience in light of a concrete situation. . . . [Such a state] deprives the citizens of the freedom to plan their lives on the basis of previously announced official permissions and prohibitions and introduces an unbearable amount of frustrating unpredictability into the social order.FN19

In short, justice is dangerous as a basis for judicial decision-making because it robs us of predictability and security. Justice undoes all the good that law has done; it transforms legality into nihilism. And the end result is that there can be no justice for anyone. All we have is the Hobbesian state of nature, where there [pg537] is "continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."FN20

Is there any doubt, therefore, that many if not most law professors will fear that their entire enterprise—teaching law to students—is endangered by the claim that judges should decide cases according to justice and not according to law?

### B. IT IS IRRELEVANT

Many thinkers, most notably Hans Kelsen, have argued that law and justice are two different things, each unrelated to the other.FN21 We may fairly infer that Kelsen was animated by the sorts of fears I have outlined in the preceding section. Since Kelsen wanted to achieve a "pure science of law," in which law was ascertainable and predictable,FN22 that goal seemed to

him to preclude infesting law with anything as indeterminate as justice. Justice is indeterminate, according to Kelsen,

because the statement: something is just or unjust, is a judgment of value referring to an ultimate end, and these value judgments are by their very nature subjective in character, because based on emotional elements of our mind, on our feelings and wishes. They cannot be verified by fact, as can statements about reality . . . . This is the reason why in spite of the attempts made by the most illustrious thinkers of mankind to solve the problem of justice, there is not only no agreement but the most passionate antagonism in answering the question of what is just.FN23

Kelsen calls for a "clear separation" of law from justice.FN24 To be sure, Kelsen acknowledges that some laws can be called just or [pg538] unjust, but he relegates the "problematic task" of "justifying" laws to "religion or social metaphysics."FN25

Nevertheless, Kelsen acknowledges a role for justice under the law. "Justice under the law," Kelsen says, "means legality; it is 'just' for a general rule to be actually applied in all cases where, according to its content, the rule should be applied. It is 'unjust' for it to be applied in one case and not in another similar case."FN26

Kelsen thus has made three points in furtherance of his claim that justice should be separated from law: (a) law is determinate but justice is indeterminate; (b) whether or not a law is "just" is a consideration that is external to the legal system; and (c) justice under law simply means that a rule of law must be applied to all cases that come within the rule. I will consider these points later, but for the moment I want to expand on at least one issue in which Kelsen seems clearly right. If I were to argue in court, "My client violated the law, but the law itself should not be applied in this case because it is unjust," I will have made a losing argument. The judge can be expected to reply, "You admit that your client broke the law, so I'm ruling against your client. If you think the law is unjust, take it up with the legislature." How, then, can I reconcile this admission with my opening remarks that justice *arguments* are the most powerful ways of winning cases? I can briefly indicate the answer here, the full exposition of which can only be completed by the rest of this Essay. For present purposes, I would contend that the argument I just made (in court) is a strategically bad justice argument because it concedes the very dichotomy that Kelsen proposes, namely, that the law says one thing and justice another. Once you make that concession, then the justice argument will probably lose. Strategically, the litigator should not make such a concession. Analytically, the litigator need not make such a concession, for reasons that I will develop as this Essay proceeds.

### III. THE CASE FOR JUSTICE

I want to begin the task of refuting the claims made in the preceding section. The capstone of my argument will take the form of an extended hypothetical example (a traffic regulation), in [pg539] which I attempt to demonstrate that justice is an inextricable part of law. But before we get to that demonstration, let me discuss in more general terms the issues raised by the preceding section.

### A. *The Indeterminacy of Law*

The greatest fear about justice on the part of lawyers and legal scholars is that it will introduce indeterminate subjectivity in the courtroom in place of the determinacy of law. I won't hedge by saying that this fear is a mere overreaction; rather, I'll say bluntly that it is entirely misplaced. Justice cannot *replace* law in the courtroom because law is a fact. What the law says is part of the story that the litigating parties tell to the judge. Justice can never *replace* law in the courtroom because the law is as much a fact of the stories the parties tell the judge as are their names, addresses, and eyewitness testimony.

Not only is law part of the story the parties tell the judge, but it shapes the story they tell. Let me illustrate. Suppose you're driving in the southern countryside and come across a grove of orange trees off the side of the road. You say, "Wouldn't it be nice to load up my car with a trunkload of these beautiful oranges!" You stop and pick them and start loading the car. A police car comes by, and the police officer gets out and arrests you. Unjust?

Whether you ought to be arrested or not depends on something that you can't see. There is nothing in the oranges that decides this question. The justness or unjustness of your act depends to a large extent on the laws that are in place. If the orange grove is a farmer's private property, and the oranges are the result of his expenditures and labor, and if the "private property" laws of the area remit to the owner the sole right to dispose of the oranges, then you have unfairly picked the oranges. What you did is unfair because of the laws in place. On the other hand, suppose that the orange grove is part of a state-sponsored communal area where any person can take away all the fruit that he or she can pick. Then it would be fair for you to pick the oranges. In any subsequent judicial proceeding, it would be absurd of the judge not to want to know what laws are in place in area of the orange grove. Only by knowing what those laws are can the judge make at least a *prima facie* judgment<sup>FN27</sup> as to whether it is fair for you to pay a fine (or go to jail, or whatever).

[pg540] In short, the topography of our social interactions is made up not only of persons and things, but also of laws—laws that perhaps reflect shared understandings, laws upon which people may have relied, all kinds of laws. These laws have to be taken into account when any decision-maker<sup>FN28</sup> attempts to resolve people's conflicting claims. We cannot do justice if we are blind to the law.

It is critical to underline the *factness* of law. Law is a topographical fact just like a hill or valley or stream. It is something that exists. But it is *not* something that has normative power. The historical failure on the part of many thinkers to see that law is nothing more than a fact has led to enormous confusion in analyses of law and justice. We must demystify law.

Accordingly, I view as nonsense the bald statement that we must obey the law. The question in each and every instance must be: "What law are we talking about?" Certainly if the law we are talking about is grossly unjust, we must *disobey* it! If the Nuremberg laws of 1935 required state officials to sterilize Jews, then the official (as well as the Jewish citizen) who disobeyed the law was doing the right thing. A law, in essence, is nothing other than someone else telling us what to do. That "someone else" might be a legislature, it might be judges in the

past explicating the common law, it might be an official of any stripe. But surely we recognize no normative claim in the simple fact that someone else has told us to do something. Any normativeness that we attach to what they tell us to do can only depend upon the content of their utterance or (at least in some cases, such as our parents) who they are.

In a relatively just country such as the United States today, we often speak of an obligation to obey the law because it is an easy form of speech built upon years of justified expectations. Our laws are generally just; therefore, we easily slide into a posture of thinking that, in general, we must obey the laws. The situation [pg541] would be markedly different if we lived in a regime where most of the laws were grossly unjust. In such a regime we would not talk of any obligation to obey the law. At most, we would talk about appearing to obey the law, or obeying it only when a state official is looking.

If, as I contend, law in and of itself has no necessary normativity—and whatever "oughtness" we attach to law is only a function of the content of the law and/or who enacted it—then this same consideration that applies to us applies to judges. Why should a judge "apply" the law? My contention is that law is only a fact; when something is a fact, there is no normativity attached to it that compels us to do something with that fact.FN29 Thus, when faced with "the law," a judge still has to decide whether to "apply" it. You might object that applying the law is the judge's job; it's part of the judge's "job description." But that ploy won't work; we can equally argue that a judge's job is to adjudicate fairly so that justice is done. Justice, unlike law, has normative power. If doing something is just, then we ought to do it.

Many readers will have a problem accepting my argument here. You might object, first, that judges do justice by applying the law. It follows, you contend, that a judge simply must apply the law. But this objection doesn't work because it raises the question in every case: *Is justice done by applying this law?* If the law is the Nazi sterilization law of 1935, then justice would be done by not applying it. Therefore, we cannot say in general that justice is done whenever a judge applies the law. So you might make a second objection. You might say that judges will often apply the law even when the law is unjust, and therefore it follows that law is more important to the judge than justice. Recall my earlier point that it is strategically unwise to argue to the judge that the judge should not apply the law because the law is unjust. But now I take up the question of what the judge does when the judge (unassisted by the attorney) is faced with applying an unjust law.

My answer is that this question is a non-starter because it hardly ever comes up. Judges are typically not faced with applying a law they think is unjust. Rather, in the typical case—indeed, in every litigated case that I know of without exception—the judge has numerous choices about which law to apply and what facts to apply it to. If you attend or participate in any litigated trial, and [pg542] you have an open mind as to the question we are now considering, you may be amazed to find hundreds if not thousands of problematic issues upon which the judge exercises unreviewable discretion. These issues include the numerous rules of evidence that crop up during a trial—whether the rules apply, which rules apply, whether the facts that might be excluded by the rules of evidence are germane to the trial, and in many situations whether the probative value of the evidence outweighs its potential for prejudice. Then there are all the intangibles—the "demeanor evidence" of the witnesses, the tone and

tenor of the testimony, the degree to which the witnesses (including expert witnesses) appear credible. The comparative skill of the attorneys—and their own believability—plays an important, often decisive, role. When issues of law—apart from the rules of evidence—come up, judges make rulings that are often not reviewable. Even if they are reviewable, the appellate court will often not reverse even an erroneous ruling if the error appears "harmless." So when we finish a trial and read the transcript and try to piece together the facts and the parties' contentions, we find a highly skewed story. The story might have been considerably different if the parties had litigated the case before a different judge and jury.

In brief, what we have at the typical trial is an occasion for hundreds—if not thousands—of turning points, of issues that could sway the decision-maker in one direction or the other. The judge's instructions to the jury typically are in the form of an if-then statement: "If you find facts A and B [for example, that the defendant was negligent and the plaintiff exercised due caution], then you must award the decision to the plaintiff." The "law" at this point—which itself could be problematic—is simply a tauto-logical statement. What counts are the facts that the jury—or the judge sitting in the absence of a jury—"finds" as a result of the trial process.

Law at the trial level, in other words, is so complex and nebulous that we must pronounce it indeterminate. We would be in good company; Judge Jerome Frank wrote convincingly that out of the welter of issues raised in a typical trial, the decision could easily go either way. FN30

Now, if a case is problematic at the trial level, it follows that it cannot be rendered determinate at the appeals stage. The appellate court, after all, builds its story of the "facts" on the basis of [pg543] what occurred at the trial.FN31 But the real facts may only have been hazily sketched at the trial; important facts might have been excluded; unimportant facts might have been given great, prejudicial weight because of the dynamics of the trial process. The appellate court might affirm or reverse, but whichever it does, if the case was problematic at trial it retains that same indeterminacy whether or not it is reversed on appeal. (If you tell me a story that may or may not be true, I can't render it truthful by accepting or by rejecting what you say.) The case that law students finally read about when they read the appellate court's "statement of the facts" may bear only a fictional resemblance to the actual facts as they occurred.

There is more that can be said about the indeterminacy of law even apart from the fuzziness of the story that emerges from the trial process. Since I have written elsewhere at some length on legal indeterminacy, I will simply refer the interested reader to those discussions.FN32 Suffice it to say here that, in any contested [pg544] case, we can find in the plaintiff's brief a plausible and reasonable statement of the "law" that compels a decision for the plaintiff. We can also find, in the defendant's brief, a plausible and reasonable statement of the "law" that compels a decision for the defendant. (You can test this assertion by simply reading the opposing briefs in any case.) Judges can and do disagree about which side should win; there are often dissenting judges, and even where there are no dissents, any critic of the opinion can (with a little imagination) construct a plausible opinion for the losing party. As Professor Richard Hyland has candidly confessed:

I have given up counting the number of times that I have been compelled to change my mind about a case that I had initially considered to be open and shut for the other side. Each time, after a little research and discussion, someone [in the class] has come up with an argument that, even if it did not win, easily could have. If, at any point, we are unable to construct such an argument, the problem does not seem to be that the argument does not exist, but rather that we have not thought about it long enough.FN33

What is true for the law professor is true for the judge. A judge can easily construct a legal argument for either side—the opposing counsel stand ready at every turn in the trial, or in their briefs and motions on appeal, to supply such an argument. Yet the judge's opinion in the case makes it appear as if "the law" has totally determined the result. Any judicial opinion is a carefully constructed exercise in legal rhetoric, designed to convince the reader that the judge had no choice, that "the law" determined everything. (It's as if the judge is saying to the losing party, "blame the law, not me.") Judge Benjamin Cardozo was a typical judge in this regard; his opinions made it appear that an impersonal rule of law hovered and presided over everything, determining with power and certainty the results he reached. Yet in his major book, he confessed that he knew better than that:

I was much troubled in spirit in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found "with the voyagers in Browning's 'Paracelsus' that the real heaven was always [pg545] beyond." As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable.FN34

Let us now take stock of the present argument. I have been contending that *law* is indeterminate at the level of contested cases (which includes all the cases any student ever studies in law school and all the cases one will ever encounter or read about in one's practice of law).FN35 We can *always* come up with a plausible legal opinion justifying *either* side in a contested case. More than that, the myriad uncertain "rules" of law that are "applied" at the trial level ensure that the picture the fact-finder gets of the facts of the case will be skewed to some extent and perhaps to a great extent. In brief, what we have as far as the *law* is concerned is so many *degrees of freedom* that the decision-maker, in any contested case, can plausibly come up with a decision for either side and give a plausible reason why the law "compels" that result. FN36

Allow me to anticipate the objection that might possibly be taking shape for you. It may go something as follows: "O.K., you're trying to convince me not to worry about justice being an [pg546] indeterminate substitute for law in judicial decision-making, because you say that law is also indeterminate. You haven't yet argued that justice is more indeterminate than law, but you have made the argument that law is quite indeterminate in itself, perhaps as indeterminate as justice. However, your argument flies in the face of common sense. Everyone

knows that law structures our lives. If you're driving by an orange grove, get out of your car, hop over the fence, go into the grove and load up bushfuls of oranges and put them in the trunk of your car, do you honestly believe that when you are tried for trespass and theft the trial will be totally indeterminate on the law? Do you honestly believe that you have as good a chance of being let off scot-free as the state has of successfully prosecuting you? If you don't believe this, then you must concede that law, in the everyday working world, works pretty well. You can reasonably anticipate, with a very high level of confidence, that if you pick and haul away those oranges you yourself will be arrested and hauled away to jail."

I hope I've correctly stated your presumed objection to my thesis in forceful enough terms to give you confidence that I am not trying to finesse any part of the present analysis. The point is a critical one, and must not be ducked in any way.

Let's analyze the objection by starting at the end—at my trial for trespass and theft. I concede that I have very little chance of winning at this trial. To be sure, I have some minimal chance of winning—perhaps on a technicality, such as successfully pleading the statute of limitations or failure of the state to prosecute the case in a timely fashion.<sup>FN37</sup> But let's say that I'm about as sure as I can be of most predictions in this uncertain world that I would be found guilty. Let's also throw in the concession that if the owner of the orange grove sued me for damages, I would most likely lose. (In the real world, the owner probably would not sue me for damages. Suppose the oranges are worth, to the owner, \$50. The owner would probably not be able to find a lawyer anywhere who would take the case for as little as \$50.) I'll go further and concede that it would be economically foolish of me to defend the charges of trespass and theft, or to defend a civil action for damages. Rather, given the predictable outcome of both, I would [pg547] plea-bargain with the state and settle with the owner of the oranges. I'll even go farther than that, if you will. I wouldn't pick the oranges in the first place. Why set in motion a disastrous yet quite predictable chain of events resulting in my conviction for a misdemeanor and a judgment against me for civil damages?

What's the real reason why you and I are so convinced that I would lose the criminal and civil cases just described? It is not because we've looked up the law of trespass and theft and mentally "apply" it to the case. Rather, it's because we both know that I have no right to the oranges, and that taking them would unjustly deprive their rightful owner of the fruits of his or her labor. We don't look up "the law" because we can confidently predict what the law will say (though not the details of its wording). We can make that prediction because that's the kind of society we live in and that's the kind of elementary justice that our society reflects. If I want someone else's oranges, I have to earn some money (by doing something other than planting oranges, presumably) and then exchange that money for the oranges. Even the thief, as Diderot pointed out in his famous *Encyclopedia*,<sup>FN38</sup> wants the laws of property to be respected—because once he steals something, he wants to own what he steals and not have it stolen by somebody else! It is indeed the desire to own someone else's property, in the full sense of ownership, that motivates the thief to steal it. The thief therefore accepts the underlying justice of the laws against theft, and only wants to carve out an exception in his own case—if he can get away with it.

Predicting the outcome at my "trial" is thus quite easy. We have just as little reason to believe that I would "get away" with stealing the oranges as we would have reason to believe that I would try to steal them in the first place. If we want to say that this shows the "law" to be quite predictable, I would not object. But if we want to be analytical about it, what really is predictable is a judge's reaction to my trespass and theft. That judge's reaction will of course be informed by the state of the law on the subject, but it will also be impelled, perhaps decisively, by the same sense of justice that you and I have about this case. In general, we can imagine all sorts of silly scenarios—things that people don't normally do in a civilized society—and then contend that it is "the law"—predictable and determinate—that stops people from [pg548] doing these things. But deeper analysis would suggest, I submit, that the reason these things are silly and that people don't do them is that we all know that doing them would be wrong and unjust—so blatantly wrong and unjust that the law (which we may not have even looked up) will be easy for a judge to cite if and when the judge is called upon to decide such a "silly" case.FN39

Accordingly, our sense of justice is informed and shaped by the laws in our jurisdiction. We respect the laws of private property because that is part of the fundamental justice of our society. We might choose to join a utopian community where all the property is held in common and where there is no private property at all.FN40 In that situation, there would be no "theft." (However, there would still presumably be justice. If I take someone else's possessions in such a community, I have to accept the underlying justice of the possibility that that person or someone else will take my possessions.) Or if the thief is a slave, as in the pre-Civil War South, the overwhelming injustice of regarding *him* as "property" would lead me at least to conclude that he has no obligation to respect the property of others.

While the laws of private property in the case we are considering are part of the topography—just as real and just as important as the irrigation canal in the orange grove—it is the justice of the situation (our sense of right and wrong) that helps us absorb and interpret the laws, and not the other way around. We don't have to look up the laws to predict what a court will do. This point becomes especially noticeable if we consider certain actions that could be legally problematic. For example, a century or so ago the orange grove farmer might set a spring gun to protect his property against thieves. It was perhaps not clear back then that the laws of private property precluded him from setting up a spring gun. Perhaps some farmers even consulted literal-minded lawyers who told them that there was nothing illegal in setting up a spring gun. But then, when someone was shot and his estate sued, the farmer's defense of trespass was disallowed. Why? Not [pg549] because the "law" said so, but because justice said so, and justice was used to interpret the law of trespass. The courts said that even though the trespasser had no legal right to be on the farmer's land, the farmer had no right to shoot him for trespassing. Subsequent lawyers thought that perhaps the reason the courts decided the spring gun cases this way was that the trespasser had no notice that there could be a spring gun. So some farmers put up signs saying "Dangerous—Spring Guns Set—You Could Be Shot if You Trespass on This Land." What result? Again, it's our sense of justice that guides us here. Shooting a trespasser is still disproportionately unjust. What about a barbed-wire fence, where a trespasser can be injured if he tries to climb over the fence? Recently some states have outlawed barbed-wire fences (though grandfathering in existing fences) on the basis that it is still unjust to hurt a trespasser in this fashion.FN41

Is our sense of justice a *better* guide than the laws on the books? In some cases, at least, yes. Consider the early farmers who consulted lawyers about the legality of setting up a spring gun. Some literal-minded lawyers probably said, "The law doesn't prohibit it, so I don't see any reason why you can't do it if you want to." Other lawyers said, "Although the law is technically silent on the point—it's a case of first impression—I'd be surprised if any judge would let you get away with killing someone just for trespassing. Your remedy is disproportionate to the harm. What you plan to do would, I think, strike a court as unjust. A plaintiff who is hurt or killed by the spring gun would probably be able to sue you successfully for a great deal of money—maybe more than your crops are worth." The problem with the actual historical record in situations like this is that the latter category of lawyers—those who advised against setting spring guns—are now lost to the historical record. Their clients presumably did not set spring guns, and therefore nothing "happened." It is the former set of lawyers—those who gave misleading advice because their sense of justice was not sufficiently honed—whose clients got into the case archives by setting spring guns.

Much the same set of considerations attends any case of first impression. Consider the famous New York case where it was [pg550] held that a murderer could not inherit under the terms of a will if he kills the testator.FN42 Suppose that Elmer, the would-be murderer, first consulted a lawyer. I've invented a scenario where the lawyer tells Elmer that, although there is no law that seems to prohibit inheritance if the heir murders the testator, the lawyer's sense of justice suggests that no judge would want to participate in the actualization of Elmer's plan. A judge who awarded the inheritance to Elmer would probably feel a complicity in the nefarious scheme and hence would be inclined to think of various legal reasons why the inheritance should be blocked.FN43 My contention, in effect, is that if considerations of justice motivate a judge toward a result that the law does not seem to allow, the judge will find a way to interpret the law to justify that result. (If the judge—or, more likely, the attorney arguing the case—cannot imagine how to interpret the law that way, the judge could resort to overruling the prior law. I personally believe that overruling is never necessary, that any prior difficult case or any apparently controlling statute can be "distinguished away" by a sufficiently imaginative judge.) Hence, I contend that a judge's sense of justice comes first, and interpreting the law comes second. The law will be interpreted according to the judge's sense of justice, not the other way around. Indeed, one could go as far as the American legal realists who contended that the law is simply a rationalization for a result reached by the judge on non-legal grounds. I don't quite hold to this position. Rather, I contend that the law is a fact that is part of the topography that the judge considers in deciding what justice requires. The law, in my view, is not an *ex post facto* rationalization. But neither is it a primary compelling force. Legal considerations are for the most part intermingled with the judge's sense of justice. Which one wins out in the intermingling process? Since justice is normative and law is existential, one might reasonably suppose that in most cases justice wins out over law. Normative things usually win out over descriptive things. (However, the mind is an elusive mechanism; a judge might not overtly allude to the "justice" considerations which, nevertheless, may help "select" out of a welter of conflicting legal [pg551] arguments the legal considerations that seem to accord best with the judge's underlying sense of justice.)

## *B. Law as Fact*

One of my main arguments so far is that the mere fact that something is a law is nothing more than a mere fact.FN44 Law has no per se normative power. If otherwise, then the Nuremberg sterilization laws of the 1930s, duly enacted under the legal procedures of the Third Reich, were laws that every person had a moral obligation to obey.FN45 I think it is clearly accepted that every knowledgeable adult in the Third Reich had a moral obligation to avoid obeying the Nuremberg sterilization laws. As a solid wall is an obstacle to my behavior—I have to go around it to get to the other side—so too an unjust law is an obstacle to my behavior in that I have to get around it somehow. Both the wall and the law are facts. There is nothing wrong in my going around a wall, and there is nothing wrong in my going around an unjust law.FN46

You might object: "Stressing law as a fact is a form of rhetorical argument. Because many people look on law as normative, you want to drain all that normativity out. But that draining process is only psychological, and that's why your argument is rhetorical. Even if I grant your rhetorical argument, I can still argue that law-as-a-fact leaves us in the same position we were in before you made your argument. You concede that in every case, the relevant law is part of the facts of the case. Well, the relevant law has always been part of the case; you are now calling it part of the facts of the case. But you have not shown that calling law a fact makes a difference. In Karl Popper's terms,FN47 you have not shown that your law-is-a-fact hypothesis is testable, in the sense that it can lead to a different result from a contrary hypothesis."

To meet this objection, I shall present a situation where the law-is-a-fact hypothesis does produce a difference compared to [pg552] what the opposite hypothesis (law-is-not-a-fact) would produce. The situation is the so-called secret law.

We can certainly conceive of a secret-law situation. A legislature meets in closed session and duly enacts a statute containing a provision that the statute shall be kept secret from the public. The statute goes on to provide that its content shall be made known only to the state police—the Gestapo—so that they will enforce it. Whenever a citizen is seen violating the secret law, the police shall arrest the citizen and inform the citizen only that the citizen has violated the law, without revealing to the citizen the content of the law.FN48

Legal positivists, with no exception that I'm aware of, maintain that a secret law, no matter how morally regrettable it might be, is certainly a law. For the positivist, the only criterion of law is that it be duly enacted according to the procedures set forth in the jurisdiction's constitution.FN49 Hans Kelsen took positivism to the extreme of its logic. According to Kelsen, a norm of law is one "in which a certain sanction is made dependent upon certain conditions."FN50 He gives this example:

One shall not steal; if somebody steals, he shall be punished. If it is assumed that the first norm, which forbids theft, is valid only if the second norm attaches a sanction to theft, then the first norm is certainly superfluous in an exact exposition of law. If at all existent, the first norm is contained in the second, which is the only genuine legal norm.FN51

In other words, the only real law about theft in Kelsen's system is the legal command issued to the police, to the judges, and to other officials in the system, to punish individuals who steal. What constitutes theft may be defined in the penal code, but it is not necessarily defined in terms that are addressed to the citizen. The code isn't saying to the average citizen, "Don't steal," but rather defines theft and prescribes punishment for it. If you look at your state's penal code, you will probably form the conclusion, [pg553] consistent with Kelsen's, that the code is a set of rules addressed to police officials and to judges and not to the general public or the would-be thief. Thus, what the code presumably is telling you and me is not "Don't steal," but rather, "If you choose to commit theft as defined in the penal code, you can expect to be punished by so many years in prison." Indeed, it is only a lawyer's *interpretation* of the code that yields the preceding if-then sentence I have put in quotation marks. The code doesn't address you or me at all; it only addresses the police and judges. What a lawyer does is read the code, figure out what the police and judges are likely to do, and then advise her client about what *not* to do in order to avoid the wrath of police officers and judges. In brief, a lawyer becomes familiar with the (wholesale) rules of the system that are addressed to the police and to courts, and then infers from them various guides to conduct which the lawyer then *retails* to her clients.

I regard Kelsen's view as logically valid within the assumptions of positivism. It is, so far, the clearest exposition of positivism. To positivists, it is the command prescribing sanctions from the Leviathan (the legislature or dictator) to the state officials (the police and courts) that "counts" as "law." You and I, the citizens, are only the third party beneficiaries of this system. We are merely the objects against whom this set of commands (from legislature to police) is applied.

It follows that the law can exist without our knowing it. Often we don't know much of it (when we can't afford to hire a lawyer to tell us what the law is, or when the legal rules are particularly dense and murky, as in certain parts of the Internal Revenue Code). But even if we don't find out about it all, it is still "law" because it fulfills the criterion of being a command from legislature to police.

When I talk about law as part of the "fact" of the contending parties' stories, I am rejecting the positivist account of law. For if a particular law is a secret law, then it cannot be part of the facts of the parties' stories. A secret law cannot have played a part in the behavior of the party whose conduct is the subject of complaint in court. A judge should not take into account a secret law in deciding a particular case.FN52 Hence, the proposition I am [pg554] asserting is not vacuous. The "law" is part of the "facts" of any case in a court only when it is clear to a judge that the said "law" influenced, or could have influenced, FN53 the behavior of the party whose behavior is being called to legal account.

### *C. Justice Is Reasonably Determinate*

The objection I attributed to you in the preceding section raised not only the issue of the indeterminacy of law, but also the issue of the determinacy of justice. In comparing justice to law, if I've so far argued convincingly (here and in other writings) that law itself, in contested

cases, has sufficient degrees of freedom to enable the judge to decide the case either way, is it possible for me to argue that anything so nebulous as "justice" can *improve* our ability to predict what the judge will do?

I offer three arguments, none individually conclusive, and not necessarily decisive when taken together. You may be persuaded in whole, in part, or not at all.

First, a lawyer's sense of justice can improve the ability to predict what a court will do in a case of "first impression." I've mentioned two such cases: the spring-gun case, and Elmer's case (murdering the testator). There are of course many more in the legal literature. And, paradoxical though it may seem, one could argue that every case is a case of first impression. Ask any trial judge, and you may elicit an admission that every day brings something new, that no case is so much like any previous case that the decision is routine. Even in traffic court, where hundreds of cases are dispatched daily, the judge will probably find new elements, new considerations, and new facts that call for novel "applications"FN54 when any defendant vigorously contests his or [pg555] her case. It is my impression that a trial judge (or jury) listens to the first few witnesses, gets a sense of what the case is about, and then spends the rest of the time trying to figure out (a) who's lying, and (b) who's taking advantage of whom. This process has little to do with law and a lot to do with the decision-maker's sense of justice. Correspondingly, a good lawyer, listening to a client's story, may advise the client whether or not to sue or take or refrain from some other action, primarily on the basis of whether the client's story engages the lawyer's sense of justice.FN55 This sense of justice may in fact be a better prediction of what a court will ultimately decide than any amount of research into the legal issues raised by the client's story. (Of course, consistent with what I said earlier about law being part of the topography, a lawyer's sense of justice is itself partially informed by a knowledge of many cases and the way the legal system works.)

My remaining two arguments are answers to the following objection that you might raise at this point: "Maybe in cases of first impression—which may include every case, for all I know—the most important predictor of what the judge will do is not the law but rather the judge's sense of justice. But every judge has a different view of justice. We can never know the content of the particular sense of justice of the judge assigned to our case. Therefore, while justice may determine the outcome, what good does that do us as lawyers when we don't know what the judge thinks about justice?"

My main reply is that we do know a great deal about what the judge thinks about justice. But before getting to that, let's consider the implications of the assertion that we don't know what the judge thinks about justice. Let's think of the judge's mind as an electronic thought-line going initially through a black box and then through one of two electronic pathways leading through [pg556] legal considerations and ultimately ending up at points labelled "decision for the plaintiff" and "decision for the defendant." The input from the trial goes first into the black box. On the assumption we've been making, the black box contains the judge's thoughts about justice. By assumption, we have no idea of its particular content. Upon emerging from the black box, the judge's thought is channeled into one of two paths—decision for the plaintiff or decision for the defendant. Along the pathway, legal considerations are amassed that will serve as rationalizations for the decision that emerged from the black box. If

the ultimate decision is for the plaintiff (for example), then all the legal considerations that can be culled to support a decision for the plaintiff will be written in the judge's opinion. (It's not hard for the judge to find these legal considerations; they will normally be found on a silver platter in the plaintiff's brief.)

That at least is the picture of law that American legal realism has bequeathed to us. It has been revived in recent years by the critical legal studies movement. It's not important that the black box is labelled "justice"; it could be labelled anything or even have no label, since we don't know its contents. For instance, there could be an electronic randomizer in the black box—the equivalent of a coin-flipping machine.<sup>FN56</sup> Or it could contain a report of the state of the judge's digestive system; the legal realists often quipped that what the judge had for breakfast could be the true determiner of the outcome of cases. Our question is: is the picture of law painted by the legal realists a true picture?

I believe that it is not a true picture, but it is a possible picture at least on some occasions. Suppose a Supreme Court Justice actually decided every case for a ten-year period by privately flipping a coin. I would contend that no one would be able to figure out that this is how the Justice decided cases, even though opinions of the Supreme Court are the most carefully scrutinized documents in all of American law. The Justice will have several clerks whose job it is to provide rational opinions to support the Justice's decisions when the Justice announces those decisions to the clerks. Not every vote by the Justice will require an opinion; often the Justice can simply join either with the majority opinion or the [pg557] dissenting opinion. In those cases where the justice is assigned the task of writing the majority opinion, or for some other reason wishes to present a reasoned opinion, the clerks are perfectly capable of the task. Even if there are cases where the justice apparently has gone against one of his or her own prior opinions, the clerks can be relied upon to show how the new case differs from the old one and represents a further refinement of the justice's evolving jurisprudence.

But if we extend this possibility further, we run into pragmatic difficulties. It's probably harder for a trial judge to make entirely random decisions than it is for a Supreme Court justice. Consider my previously discussed orange grove case. If the judge at my trial says, "Nothing wrong with loading up a trunkful of oranges; case dismissed," perhaps it will be regarded as a local aberration, or might not even be noticed at all. But if people, encouraged by my case, start taking oranges from orange groves all over the state, soon there would be a major judicial scandal. Editorials would be written; appellate court judges would be interviewed; prominent state politicians would huff and puff; and soon things would change. Purely randomized decision-making, at the trial level at least, will eventually be noticed and the situation will eventually be changed. If necessary, sitting judges who disbelieve in private property will be replaced by those who consider private property to be a cornerstone of the American way. In brief, real-world feedback will eventually correct an aberrant judiciary.<sup>FN57</sup>

But we don't need this scenario to know that judicial [pg558] decisionmaking is not random. Lawyers are able, with a high degree of confidence, to assign probabilities to various case scenarios. I know that if I wanted to load up my car with oranges from a nearby grove I did not own, I would have an extraordinarily low probability of winning my case in court.<sup>FN58</sup> In general, if we could not predict what judges will probably do, civilized social interaction would

probably come to a halt, and the law of the jungle would take over. The very fact that people are able to get along with a reasonably secure sense of what the law allows and prohibits is the best refutation of the randomized black box theory.

Judges are, after all, part of the establishment. They are paid by the government. They don't want society to be disrupted. They want society to function smoothly. They are called upon to settle disputes, and they want to settle those disputes in a fashion that does not cause a riot outside the courtroom. Thus, even though an individual judge may not personally care one whit about justice—even if that judge is a thorough-going existentialist who recognizes no internal voice or conscience—that judge will still want to decide cases justly, because a just solution is a stable one. If people see that courts are by-and-large rendering justice, life will function more or less smoothly. But if courts are engines [pg559] of injustice, then mutterings about revolution will be increasingly heard in the streets.FN59 But even if a particular judge doesn't think or worry about revolutions, the judge will still gravitate toward the just solution because "it plays well." The losing party will always grumble and appear dissatisfied, yet the judge knows that the losing party would be far more upset if the decision were unjust. The judge wants to send people out of the courtroom as pacified as can reasonably be expected under the circumstance that one side has to win and the other side has to lose. Decisions that are just are the most stable.

For these reasons, the picture of the black box must be rejected. We in fact know quite a few things about the contents of the box. Although we have no direct access to it (we can never access anyone else's mind or feelings), we have a great deal of circumstantial evidence.FN60 The box is not black, but rather is translucent or even partially transparent. I suggest that it can appropriately be labelled "justice."

Perhaps it seems quite remarkable that we can know a lot about what's in the mind of a judge whom we know nothing about, whom we see in court for the first time when our case is called. In fact, it's not remarkable at all. The very predictability of how courts will respond to our social and business interactions is another aspect of the same predictability that makes civilized social and business interactions possible. We can make those predictions because we have a good sense that our sense of justice is likely to be the same as, or very similar to, that of an anonymous judge. And thus I can report a very high degree of confidence that, whoever the judge turns out to be, I'm going to lose my orange-picking case.

Of course, no one is likely to have the identical sense of justice [pg560] as anyone else. But if everyone's sense of justice were plotted out as circles on a plane, we would find that most people's circles overlapped with most other people's. The amount of shared similarFN61 experiences about justice that we have, in this society,FN62 probably far exceeds the number of disparate experiences. Consider, as one example, the "justice" we learned in the schoolyard. A large "bully" snatches the warm mittens of a smaller child; some children tease and "make fun of" a child who has a stutter disability; the boys exclude a girl from one of their games even though she can play it as well as any of them. Even at that early age, our sense of justice was developed enough so that we were appalled by those behaviors. (If we participated in them, we later felt quite ashamed of ourselves.) I have some confidence that I am talking here about *universal* reactions to the same events. I would be quite surprised if anyone reading this Essay

would disagree with any of these three examples and assert sincerely that the bully was acting properly or that the children who teased the stutterer were behaving justly.

Many of the examples we learned about justice in the schoolyard were (unfortunately) negative examples. We learned about justice, even from these negative examples, because we (or others whom we respected and trusted) *criticized* the unjust behavior. Yet our childhoods were filled for the most part with thousands of positive examples of justice: the way our parents treated us, the way we "got along" with friends in the neighborhood, the stories we heard at Sunday School or read in the comics and graphic novels, the movies we saw, the anecdotes we heard—we can't remember them now, and we couldn't even remember all of them then. But we did learn a "lesson" from them, and that was that the right way to behave was to behave fairly toward other people. Those who behaved unjustly in the stories were punished in the end (sometimes only by God, if it was a biblical story). And we learned not simply the fact that they were punished, but that they deserved to be punished for what they did. When we ourselves were punished by our mother or father for a bad thing that we did, we learned that it was bad and that the punishment was appropriate. Of course, not everyone learned these lessons and [pg561] not everyone's parents were fair. (But even the child of unfair parents soon learned, from talking with playmates, that her parents were unfair; and she, perhaps, grew up to be a much fairer person than everyone else because she was reacting strongly to the bad example set by her parents.)

We had thousands of experiences, we heard thousands of stories, and we learned (among many other things, of course) what constituted justice and fairness. We probably were never given a *definition* of justice. We were rarely, if ever, told by our parents or teachers what in general we had to do to be just, although we may have been told what we had to do to be just in specific situations. As we grew older, we continued to hear stories and we refined our notions of justice and fairness. In law school (or at least, when I went to law school),FN63 we read thousands of cases. These cases are all little morality plays about what people did and how they were judged. They, too, hone our sense of justice.

The only way I could communicate my sense of justice to you would be to recount the hundreds of thousands of experiences and stories that through my life have made up my sense of justice. If I could recap these for you—if my mind were a video recorder—I would simply run the tape for you and trust that you would draw the same lessons from these stories that I drew. But that can't be done (it would take a few years, probably, and I could hardly run for you the emotions that I felt at the time when, for example, I felt outraged or sorry when someone acted unjustly). Yet if you ask me what I *mean* by justice, the only way I could tell you would be to run that imaginary video recorder for you. I can't put justice in words, because I never learned it "in words" in the first place. I learned it through personal experiences, including the vicarious experiences of hearing stories.

But even if we had the time and technology, and I played the mental videotape for you, I suspect that you would quickly become bored. You would say something like, "Except for a change of characters and locale, the fact is that I've heard and experienced all these stories before. I heard some of your stories just the way you heard them—stories from the Bible, stories from history, stories of heroic deeds, etc. There's practically nothing new in these stories

for me. [pg562] There's practically nothing you can teach me about justice that I don't already know."

Some writers, notably Edmond Cahn, have suggested that we have a better sense of injustice than we have of justice.FN64 They point out that when we see something that is unjust, or hear about something that is unjust, most everyone's reaction is the same as ours. We can all agree on what is unjust, whereas we find it hard to say what justice is.

If you believe that it's easier to spot an injustice than to say what justice is, I would have no objection to that description. Perhaps many judges on the bench listen to the testimony and arguments until something strikes them as unjust. Their "sense of injustice" may tell them that one of the parties tried to take unfair advantage of the other side. Analytically, however, I contend that if you know what injustice is, you also must know what justice is. The real reason why there is attractiveness in the notion of one's sense of injustice is that it always comes into play when a story is told that strikes the listener as unjust. On the other hand, it seems difficult to *say* what constitutes justice in the absence of a collection of stories. But this is, in effect, the point I've been making all along. Our notion of what "justice" is—as well as our notion of what "injustice" is—comes from the conclusions we have drawn about thousands of stories and experiences. Naturally, we find it hard to specify what *justice* is because we are writing on a blank slate, so to speak, in the absence of a collection of stories. Yet when we hear a single story, we can readily tell whether the outcome is just or unjust (or, in many instances, we know what additional information to request to reach a just verdict).

The very confidence that people who speak about our "sense of injustice" have—that everyone has the same, or practically the same, sense of injustice—is another way of demonstrating my contention that our notion of justice is far more likely to be largely shared with other people in our community than it is to be different from the notions of other people. These other people include judges. That is why, when as a lawyer we listen to a client's story and make an initial determination whether the client is likely to prevail if the story is tested at a trial, we test the story [pg563] against *our own* sense of justice. For we are quite confident that *our* sense of justice is rather likely to be shared by whatever judge is assigned to our case.FN65

#### *D. The Relevance of Justice*

We saw earlier that Kelsen claimed that justice was, at best, a commentary about the law (the idea of an "unjust law"), or in the special context of the administration of the law, a concept that reduced to legality (according to Kelsen, the just administration of the law "means legality"). In other words, Kelsen is saying that justice makes sense *above* the law (as a commentary on it), or *under* the law. We can concede these uses of the term "justice," and yet maintain that they do not rule out the possibility of justice *within* the law in the sense that I've been talking about it (justice as part of what directly influences the judge in deciding a case).

The idea of an "unjust law" is of course perfectly comprehensible. We can assert that some laws are plainly unjust; for example, the Islamic law that treats the courtroom testimony of a woman as [pg564] equivalent in weight to one-half that of a man's testimony.FN66 We can also assert the comprehensibility of justice under the law: that a just law can be justly or unjustly administered.FN67 But the strategy that some writers use—to dwell on the notions of

justice above the law and under the law, and then suggest that these *exhaust* the ways that justice can be relevant to law—is plainly a non sequitur. For even if it makes sense to talk about justice above the law and under the law, the question remains open whether it makes sense to talk of justice as part of the law. It is to that question that I now offer an extended hypothetical example.

#### IV. JUSTICE IS PART OF THE LAW: A HYPOTHETICAL CASE

##### A. Case and Criteria

The argumentative use of hypothetical cases not only characterizes good classroom teaching in law schools,<sup>FN68</sup> but is found in questions judges ask from the bench during oral argument and in many other areas of law study and practice. My intention here is to use a single, extended hypothetical case to prove the proposition that justice is an integral part of law. Immediately you will object that this is far too heavy a load to place on any one example. If I can pull it off, the hypothetical case has to be well selected.

The most important criterion is that it must be general. If there is any element of idiosyncrasy, the hypothetical case will not work as a general argument. Thus it should be set in any jurisdiction, and not a particular jurisdiction (such as the United States). It should also be an ordinary, even humdrum, example, to avoid charges that I have reached for something unusual and hence inapplicable to ordinary circumstances.

I will choose a motor vehicle regulation that, as far as I know, is fairly standard throughout the world: the parallel (double) white lines down the center of a road. I will focus on the parallel lines and not the statutory regulation behind it, because once we look at a particular statute, we have an interpretive problem that could [pg565] vary from country to country or from language to language. The parallel lines therefore offer a purely semantic and generalizable legal rule, meaning, in effect, "don't cross me." The driver of a car understands the parallel lines as a legal prohibition, barring vehicles from driving over and hence crossing the parallel lines. It is this *meaning* that I will focus upon, rather than any particular set of statutory words that purports to express the meaning. Nevertheless, in order to make the example realistic, I will invent a back-up example of a regulation that gives legal effect to the white lines.

Since this example will involve justice, I must make the justice element in itself completely uncontroversial. For no purpose will be served by getting into an extended discussion of whether an act related to this example is itself just or unjust, and then having to *assume* its injustice in order to get on with the project. Hence, the act that is uncontroversially unjust is running over and killing a child. The child is an "innocent child" in the sense that she has not committed a crime such that her execution is an appropriate penalty. But it is a "darting child"—one who runs out in front of a moving automobile at the last minute. If the driver of the car wants to avoid killing the child, the driver's only option (as I construct this hypothetical case) is to drive across the parallel lines.

Before I sketch in the details of this imagined case, let me comment on the phrase that I have placed in quotation marks: "innocent child." A person could argue that a child who darts out into the street at the last minute in front of a moving car is hardly "innocent." The child is at least guilty of an error in judgment, and perhaps guilty of disobeying her parents' instructions. Nevertheless, I suppose that no one would argue that killing the child is an appropriate penalty for the child's error in judgment or her disobedience of parents. To be sure, we might imagine a society—H.G. Wells imagined one in his famous short story, *The Time Machine*—where killing pedestrians is a routine aspect of driving a car.FN69 (In Wells' future society there is a severe overpopulation problem, so no one objects to the bizarre practice of killing pedestrians.) But I don't think that any reasonable person would maintain, in today's world, that justice is served by running over the darting child.

Let us now sketch in a few details. The darting child runs out into the street from behind a car parked at the curb. No driver of [pg566] an oncoming car could have seen the child because the child was small in size and completely hidden by the parked car; only when the child darted out into the street was the child visible. Hence we completely rule out any possible negligence on the part of the driver of the car. Moreover, let us stipulate that it is physically possible, without risk of personal injury, for the driver to avoid hitting the child by crossing the parallel white lines. There is no car coming in the opposite direction in the other lane that would hit the driver's car head-on if the driver crossed the lines. Moreover, the driver cannot steer to the right because there are parked cars along the curb and he would hit those cars—and even possibly glance off them and run over the child in any event. Hence, what we have is a road with two lanes, one going in each direction, with parallel white lines down the middle, a driver proceeding in one of those lanes, a child who darts in front of the driver at the last minute, and the opportunity for the driver to avoid hitting the child by crossing the parallel lines and driving (temporarily) in the other lane. There is no car or other vehicle in the other lane at the moment when this event occurs.

Now let us split this hypothetical case into two similar cases. In the first one, driver A sees the child at the last minute, drives across the parallel lines, avoiding the child, and then drives back into the proper lane after the child is passed. In the second case, driver B sees the child at the last minute, refrains from crossing the parallel lines (though physically able to do so),FN70 and runs over and kills the child. In both cases, a police officer is present at the scene, observing everything that occurred. In neither case is there any factual dispute or conflicting testimony. I will mostly discuss the first case of driver A (Alice); driver B (Bruce) will serve primarily as a reference point.

### *B. The Arrest*

In the first case, right after Alice has succeeded in avoiding the darting child, the police officer on the scene flags her down and gives her a ticket:

[pg567] ALICE: Why are you giving me a ticket? I avoided killing that child.

OFFICER: I know. I'm glad you did. But you still committed a traffic violation.

ALICE: Are you saying that I should have stayed in my lane and run over the child?

OFFICER: You have to realize that by saving the child's life you violated the law. I'm sure you felt it was the right thing to do.

ALICE: Yes, I did. And didn't you?

OFFICER: Yes. It was the right thing to do. I'm sure the judge in traffic court will agree, and say that the violation was only a technical one.

ALICE: Then why give me a ticket?

OFFICER: Well, it was a violation. Technical or not, you violated the law. My job is to arrest anyone who violates the law. It's not my job to make a judgment on why you did what you did, even though, as I said, I think you did the right thing in this case.

ALICE: But this means I have to show up in traffic court. And already your stopping me has delayed me from my business appointment.

OFFICER: I'm sorry. The judge will be sympathetic, take my word for it.

### *C. Traffic Court*

The next scene is in traffic court, where the judge listens patiently to the Police Officer and to Alice. There is no conflicting testimony.

JUDGE: I find the defendant guilty of crossing the parallel lines. Please pay the clerk fifty dollars. This will be entered on your driving record as a moving traffic infraction. A third conviction for such an offense within a two-year period means suspension of your driver's license.

ALICE: Wait a minute. Are you saying I should have run over the child?

JUDGE: This court will not give legal advice. The duty of this court is to pass judgment on past events, not to advise you about what you should have done or what you should do in the future. But having said this, let me add a personal observation. I am frankly surprised at your behavior here this morning. You are taking the attitude that the law should somehow grant you a personal exception for crossing the parallel lines, something which the law does not do for any other driver. We are all subject to the law: you, myself, and everyone else.

ALICE: But judge, I did the right thing. I avoided killing an innocent child.

JUDGE: Do you really believe that you did the morally right thing?

[pg568] ALICE: Yes, I do.

JUDGE: Then why are you complaining about paying the fine? Surely fifty dollars is a trivial price to pay for saving the life of an innocent child! If you are as morally secure in your convictions as you say you are, then you should pay the fine cheerfully, and go home with the feeling that you saved a life and did the right thing. Next case!

ALICE: Well, I want to appeal your decision.

JUDGE: That's your privilege. You have thirty days to file an appeal. But you have to pay the fine on your way out this morning.

#### *D. The Appeal*

Alice's friends try to dissuade her from proceeding with the appeal. They point out that she has lost the time spent in court already, plus fifty dollars, plus the time when she was arrested in the first place. They tell her that an appeal will be expensive, far more expensive than the fifty dollars she might get back if she wins. But they don't know Adamant Alice. She has no intention of accepting the status of a lawbreaker when she did nothing wrong, even though it was only a relatively minor infraction of a traffic regulation.

She looks up the jurisdiction's traffic regulations. Since this is a "generic" hypothetical, let us assume that the following is found in the state's traffic code:

Section 205. Streets shall be clearly marked for the purpose of traffic regulation.

(a) If a roadway is marked by a broken white line which traverses its length, motorists may cross the broken white line if it is safe to do so and only after first signalling their intention to do so.

(b) If a roadway is marked by a solid white line which traverses its length, motorists may not cross the line except: in an emergency, and then only if safe to do so.

(c) If a roadway is marked by double white lines (parallel lines) which traverse its length, motorists may not cross the lines.

Section 206. The penalty for violating any provision of section 205 shall be fifty dollars. The defendant shall be charged with a moving vehicle traffic violation.

In her brief before the Intermediate Appellate Court, Alice argues that the parallel line rule, while reasonable in the vast majority of cases, worked an injustice in her case. The court should carve out an exception for "darting-child cases" in the name of justice.

[pg569] Here are some excerpts from the appellate court's majority opinion:

Normally we would affirm without opinion a case such as this one. However, because of the philosophical issues involved, we have decided to append a brief written opinion to our judgment of affirmance.

The appellant argues that section 205, as applied, works an injustice. It is unjust to penalize her, she argues, for temporarily and technically violating the parallel-line rule when her purpose was to save the life of an innocent child.

The law, however, is plain and admits of no exceptions. There is nothing in section 205 that can fairly be read as providing an exception in cases where, in the driver's judgment, there is an important need to violate the rule.

Our interpretation of section 205 is based on the section as a whole, not simply on subsection (c) (the parallel lines paragraph). The statutory scheme is comprehensive and admits of no exceptions. In particular, if the legislature had wanted to allow the appellant to cross a dividing line under the facts of her particular case, it would have provided for a *single* white line under subsection (b). But in fact the traffic department, on the roadway the appellant used, painted parallel lines as provided in subsection (c). This may be taken as a deliberate legislative decision to bar the crossing of the dividing lines even in the event of an emergency.

We are not unmindful of the appellant's courageous decision to violate the law in order to save a child's life. But the fact is that she violated the law. The law's penalty is, as the trial judge said, a small price to pay for saving the life of a child.

This court does not have the power to change the law. That power is reserved to the legislature. A court has a far more limited role: to apply the law as written. To be sure, if we were persuaded that if a court were ever to depart from the plain meaning of a statute, then the instant case is the most justifiable case for such a departure. Nevertheless, there is a vast hidden cost in such a departure. We would thereby erode the public's confidence in the plain meaning of statutes. Further, we would undermine the legislature's confidence in the judiciary. We would be setting up the courts as the ultimate, unelected, undemocratic arbiter of the law.

Courts must respect the plain meaning of statutes. As the Supreme Court of the United States said in *United States v. Locke*,<sup>FN71</sup> even if the legislative rule is *arbitrary*, it must be accorded [pg570] its plain meaning.<sup>FN72</sup> If that was true in *Locke*, it is certainly true in the present case. The parallel-line rule is not arbitrary. It is the rule selected by the legislature. If on occasion its application appears to work an injustice, a court may not invoke the concept of injustice to overrule the law itself. We have no constitutional mandate to invalidate laws, or write exceptions into laws when their plain language admits of no exceptions, all in the name of justice. The history of constitutional democracy argues to the contrary. It is only the legislature, representing the will of the people, that is entitled to create laws and create exceptions to laws. If a court were to take on a legislative role, the court would eventually imperil its own

existence. The ensuing uncertainty would far outweigh the occasional injustice felt by some persons when a law is applied exactly according to its terms.

The appellant in her brief virtually concedes that the parallel-line rule was correctly applied in her case. She asks this court to create an "exception" to the rule. But our job is simply to apply the law as written. We would suggest that the appellant expend her energies in petitioning the legislature to amend the parallel-line rule, instead of asking this court to act as a legislature.

If the preceding opinion strikes you as eminently reasonable and persuasive, it is because I have deliberately used concepts and phrases that are hallowed in judicial history. These concepts are familiar to all lawyers. They "resonate" in some of our deepest conceptions of the limited role of the judiciary. But although I have made the argument as persuasive as I can, I want to show that it is really constructed on a bed of sand, that it is ultimately unconvincing, that it is rhetoric and not sound analysis.

To begin the process of chipping away at the majority's opinion, here is an invented excerpt from the dissent in Alice's case:

Assume for a moment that the parallel divider lines had no legal significance. Suppose they were simply painted on the roadway as a guide for motorists. Indeed, in the early days of automobile travel, road signs were placed simply to help traffic flow more easily. The early traffic signal light was invented simply to reduce the confusion at intersections when drivers at right angles to each other misinterpreted each other's signals as to who should proceed first. It was only after traffic signals were installed and working that some state legislatures began making the signals legally compulsory.

Under our temporary assumption that the parallel lines in the present case are without legal significance, no one would seriously maintain that the appellant should run over a child when she had the clear alternative of running over the white lines. In fact, if the appellant did kill the child instead of observing [pg571] the (legally insignificant) parallel lines, she could be prosecuted for manslaughter or even murder. There is hardly a clearer case of injustice than one in which a temporary and safe deviation from a given route is not taken when the cost of not taking it is the life of an innocent child.

The only difference between our assumed case and the actual instant case is that the parallel lines are backed by a statute. But why should that make a difference where a child's life is concerned? For in the present case, the appellant made a temporary and safe deviation from a *prescribed* route in order to save a child's life. It would have been morally monstrous of her to run over the child in such circumstances.

Yet the majority is penalizing her for *not* killing the child. I'm afraid that Charles Dickens' observation in *Oliver Twist* will be applied by commentators to the holding in the present case: "The law is a[n] ass-a[n] idiot... FN73 When the law itself is the only

difference between saving or not saving the life of a child, how can my colleagues vote to penalize the appellant for what she did?

The appellant's obligation in driving her car was not to drive blindly. Our obligation is not to apply the law blindly. The decision below should have been reversed.

The dissenting judge has made an emotional appeal. But the judge has not been articulate as to exactly how the appellant's conduct comes within the law. The connection between justice and the law, in other words, is not explicit in the dissenting judge's opinion.

### *E. The Television Special*

Let us develop the hypothetical case further. Suppose soon after Alice's case, Bruce's case occurs. Bruce ran over the darting child. The officer on the scene assisted in calling the ambulance (useless, the child was dead), but otherwise did not give Bruce a ticket.

Shortly thereafter, there was a TV special on the darting child. Alice and Bruce were interviewed. Here are some excerpts from Bruce's interview:

BRUCE: It was horrible. Tragic. I saw the child dart out in front of my car.

TV REPORTER: Did you think of crossing the double white lines so as to avoid hitting the child?

BRUCE: I don't know. I did and I didn't. I'm just not a person who breaks the law. I've never been arrested. Even for a traffic [pg572] violation. I've tried and tried to think about that moment, the poor child, but some voice was telling me not to cross the double lines. I mean, I've never crossed the double lines. Even if I was going to be injured myself, like by hitting something solid in front of me, I still wouldn't have crossed the lines.

TV REPORTER: If you had it to do over again, would you cross the white lines to avoid hitting the child?

BRUCE: Well, sure. But it's easy to say that now. If you're a law abiding citizen, and you've ever been in that kind of situation, your instinct is to obey the law. I can't be sure that I would have acted differently, knowing what I know now. Although I hope I can act differently if, God forbid, it should ever happen again.

The parents of the dead child are interviewed, followed by an interview with a member of the state legislature:

TV REPORTER: Do you think that the driver, Bruce, did the wrong thing?

MOTHER: Of course. He's a monster. I can't believe he would deliberately run over my child. He should be prosecuted for murder.

FATHER: It's more the law's fault than Bruce's fault. Alice, you've interviewed her on this program, did the right thing. She avoided hitting a darting child. But some dumb judges found her guilty of violating the traffic regulation!

TV REPORTER: So the really guilty parties are the judges?

FATHER: Right. How can they penalize Alice for saving a child, and do nothing about Bruce, who ran over our own daughter?

MOTHER: For shame.

VOICEOVER: But the traffic rules say you can't cross double white lines. Aren't the legislators who passed the law in the first place the real murderers here?

LEGISLATOR: My committee is going to hold hearings on this white line business.

TV REPORTER: Did you ever intend that the white line law should stop people from crossing it even to save the life of a child?

LEGISLATOR: We never thought of that contingency. But the answer to your question is no. Certainly, if someone had asked us whether the law prohibited a driver from crossing the white lines to avoid hitting a child, every legislator, myself included, would say that saving the child's life comes first.

TV REPORTER: Would you have ever expected that a court would fine Alice for crossing the white lines to save a child?

LEGISLATOR: Of course not. Those judges were out to lunch.

TV REPORTER: But you passed a statute with no exceptions.

LEGISLATOR: True. But we passed the statute in the expectation that human beings, people who are called judges, would apply the statute [pg573] in a sensible way. The so-called judges in Alice's case acted like robots, like computers. If the legislature wanted computers to apply the law, then we might save a lot of money. But we have judges to apply the law so that they can apply it in light of the requirements of justice.

TV REPORTER: And a computer can't do that?

LEGISLATOR: Right. The one thing we can't program into a computer is a sense of justice. So that's why we pay judges their high salaries, and give them lifetime tenure. We legislators expect the judges to act like sensible human beings. And here they do dumb things, like fining Alice for saving a child's life.

TV REPORTER: So you think it was unfair for the court to fine Alice fifty dollars?

LEGISLATOR: It's not the fifty dollars that bothers me. I don't think it's the fifty dollars that bothers Alice, judging from what she said on this program.

TV REPORTER: Well, then what does bother you?

LEGISLATOR: The precedent of it. The outcome in Alice's case sends a message to the public—to people like Bruce. It says, "it's always illegal to cross the parallel white lines, no matter what." And some people out there absorb the message, people like Bruce. They decide that if a court tells them something is illegal, then they won't do it. Period. It builds up an instinctive reaction in people: never cross the double lines. Even if you have to run over a child. That's what troubles me about what the court did in Alice's case.

#### *F. The Legislative Hearings*

The TV program generated intense public disapproval of the Intermediate Appellate Court's holding in Alice's case. Alice asked the state's Supreme Court to review her case. The next event to occur was the legislative hearing on revision of the traffic code.

It was soon apparent to any impartial observer of the legislative hearings that reforming the traffic code was an enormously complex problem. Testimony was first heard from people who sympathized with Alice and who asked the legislative committee to add a final clause to section 205(c) so that the provision would read in full as follows:

(c) If a roadway is marked by double white lines (parallel lines) which traverse its length, motorists may not cross the line except if it is safe to do so and if it is absolutely necessary to save the life of a darting child.

But later witnesses said "absolutely necessary" replicates all the previous problems because drivers like Bruce will be wondering [pg574] whether it really is "absolutely necessary" and their hesitation might be fatal for the darting child. Others pointed out that the phrase "darting child" is underinclusive; what if a child is suddenly seen by the driver as simply standing in the road, instead of "darting"? A legislator suggested omitting the phrases "absolutely necessary" and "darting." But another legislator said that then the phrase "save the life of a child" might apply to a child inside the driver's car, as would be the case if the driver were hurrying to get the child to the emergency room of a nearby hospital. Others pointed out that "save the life" was underinclusive; a driver should not be required to hit the child, instead of crossing the white lines, if the driver reasonably believes that the child will only be seriously injured by the collision but not actually killed.

Then came the senior citizens lobby. Why "child" at all? Why not just "person"? After all, a senior citizen might wander out into the middle of the street at the wrong time. What if

someone fell out of the trunk of a car, or the back of a truck, in front of the driver? Suppose that person had jumped out of a car of kidnappers. The person would, through no personal fault, suddenly be sitting, standing, or lying directly in front of the motorist. Therefore the statute should specifically exclude all persons who, for whatever reason, find themselves in the street in front of an oncoming car which has the choice of averting them by crossing the dividing lines. As a result of this onslaught of citizen testimony, some legislators suggested that the word "child" be changed to "person."

But then the animal-rights lobbyists showed up. Why shouldn't it be right to cross the double white lines to save the life of a darting squirrel? Or cat? A legislator replied that it is preferable to run over the squirrel than to allow drivers to cross the double white lines because crossing the double white lines creates a significant risk of accident to human life; after all, that's why the double white lines are there in the first place. But the lobbyist replied that the language "if safe to do so" solves this problem; it means that a motorist certainly cannot cross the double lines if it is unsafe to do so, even if the purpose is to save the life of a dog or cat or other beautiful animal.

After several days, a legislator proposed cutting through the morass simply by using the general term "emergency." Double white lines could be crossed, if safe to do so, in any emergency.

For a few moments it seemed as if this was the most reasonable [pg575] way out of the difficulty. But then one legislator pointed out that the new change would render the double white divider lines exactly the same as the single white divider lines. In other words, section 205(c) would read the same as section 205(b). Someone pointed out that this was the simplest and most elegant solution; by simplifying the traffic code instead of adding to it, it would solve everyone's problems. But another legislator suggested that there must have been a legislative reason in the first place to have double white lines, and we shouldn't do away with them before considering what that reason was.

Some research revealed that, in the beginning, there were only single white divider lines on roadways. It was permissible to cross those lines when safe to do so in the event of an emergency. But it was soon found in practice that motorists got into the habit of crossing the single white line too often. The concept of "emergency" became attenuated in the minds of motorists. When stopped by police officers, the motorists would argue vehemently that there was indeed an emergency. "Emergencies" included the following: a need to get to the airport in time to catch a plane; a need to get to an important business meeting on time; a need to avoid hitting a darting squirrel; a need to "save a marriage" by getting home for dinner in time; and so forth. So the legislature, in its wisdom, decided to use double white lines to eliminate all these "excuses" that motorists were concocting.

So, it seemed to the committee that the double white lines served a useful function. Nevertheless, Alice's case was troubling. How could an exception be written to solve Alice's case and yet not be as broad as "emergency," which would open the door to all the problems formerly connected with the single white line?

No matter how they struggled with the statute, the legislators could not come up with a form of words that would solve Alice's problem (and related problems, such as darting persons who are not children), and yet keep the double-lines "tight" so that motorists would not, over time, disregard them by concocting excuses.

An expert in psychological linguistics was called to the legislative hearings. She told the committee that words, symbols, and signs, such as double white lines down a highway, only make sense to the human mind in the context in which they occur and with the history that they have in the mind of the observer. For example, a "stop" sign on a street corner would be unintelligible to a visitor from outer space. Assuming the extraterrestrial visitor [pg576] could read English, what is it that should stop? Should the visitor stop breathing? Stop every internal organ from functioning? How long should they stay stopped? By observing traffic patterns, the visitor would conclude that "stop" means "stop, then go," and appears to apply only to motor-driven vehicles and not pedestrians, and so forth. In other words, the extraterrestrial visitor would begin to fill in the context and begin to make sense out of the "stop" sign.FN74

Any law is necessarily general, the expert continued. Even if the law contains an exception, the exception itself is a generalization. Laws, like words and signals and signs, can only have a general signification. But real people working in the real world can only use these generalizations as guides to their behavior in the context in which they (necessarily) interpret the generalizations. For example, Alice interpreted the double white lines as a general prohibition on her driving behavior. But she regarded that general prohibition as trumped in the unforeseen case of a darting child. Why did she "interpret" the double white lines as not constraining her to run over the child? Simply because, in the situation she confronted, it struck her as absurd that a traffic regulation should require her to deliberately kill a child. And therefore, she interpreted that traffic regulation as *not* requiring her to kill the child.

We use general words, signs, and symbols, and enact general rules, because they are the most efficient ways of communicating to people in general about situations in general. But general efficiency should not equal general compulsion. The double white lines, the expert summed up, are efficient just the way they are in conveying a message to drivers. That message may amount to: "don't cross the dividing lines unless there is an objectively compelling reason rooted in justice that overrides the lines." But the important point, she concluded, "is that you don't want to put into the statute what I've just said, because if you did, you would simply erode and undermine the very message that the dividing lines are meant to convey. You will open the door to self-serving excuses from drivers about what constitute objectively compelling reasons. My opinion is that the dividing lines already contain this [pg577] very message if they are reasonably interpreted by reasonable drivers and reasonable judges."

### *G. The Supreme Court*

Alice's petition for certiorari is accepted by the Supreme Court of the jurisdiction in which she resides. The justices of the Court are aware of the developments and arguments as I have recounted them above, but of course do not refer to them. (Courts want the public to think

that their judgments are based on existing law, and not on the twists and turns of political arguments and media coverage.)

The Supreme Court unanimously decides to overrule the Intermediate Appellate Court and enter a judgment in Alice's favor. (How do I know this? Because I'm making it all up.)

Let us assume that the Court in its opinion restates and revisits all the arguments that we have examined so far. I will only present a few excerpts from the Court's opinion that either make new arguments or present the old ones with a different slant:

Difficulties arise in statutory interpretation when a statute is viewed as a computer program. A computer lacks human reason, human judgment, and human sensitivity. It will literally do what the programmer wants it to do. (Parenthetically, it is interesting to note that in this age of computerization, we can see more clearly than ever the difference between people and machines. In the nineteenth century's age of industrialization, a machine was regarded as the height of efficiency and rationality. Perhaps the leading legal positivists of that era were attracted to a mechanical jurisprudence because of the general fascination with machines. Today, because computers can do so much, we see more clearly than ever that which they cannot do.)

The police officer who arrested Alice acted in the manner of a computer. He found that Alice had crossed the double white lines and he believed that the traffic regulations prohibited such crossing. There was no thought involved; the actions could have been handled by a computerized robot wearing a police uniform.FN75

The traffic court similarly acted in computerized fashion in finding Alice guilty of a traffic infraction. To be sure, the presiding judge indicated by his remarks that he realized the moral ramifications of the situation. But since these moral considerations had no bearing on his decision—indeed, he explicitly [pg578] disavowed any bearing that they might have on his decision—he acted, for all intents and purposes, as a computer.

What is worse, both the arresting officer and the traffic court judge treated Alice as if she were also a computer. A robot that is programmed to drive a car, if given the instruction never to cross a double line divider, would never cross those lines. Even if the car were to run over ten schoolchildren crossing the street, the car would not cross the white lines.

We cannot imagine that the legislature intended the result in Alice's case when it enacted section 205 of the Motor Vehicle Act. As representatives of the people, we must give the legislators the interpretive courtesy of regarding their statutes as addressed to human beings and not computers. And we must attribute to them their own interpretive expectation that their statutes will be enforced by human police officers and human judges, and not by computers.

But we do not rest our opinion on any assumptions of interpretive courtesy to the legislature. Let us consider what the legislature would have enacted if the legislators had thought of the possibility of a case such as the darting child. The legislature could have taken two paths. First, it might have written an exception for the darting-child case into the statute. Second, it might have written an exception for the darting-child case out of the statute, that is, by deliberately excluding such an exception. These are the only two possibilities. Let us consider each of them.

First, let us assume that the legislature wrote into the double white lines provision an exception for avoiding darting children. [Here, the Supreme Court recounts the arguments given above in the discussion of the legislative hearings. The court concludes by agreeing with the expert in psycholinguistics.]

For these reasons, we conclude that the best "exception" provision the legislature could have written into the law would have been an exception "if justice so requires." But the problem is that if the exception were written exactly like that, drivers would construe it too broadly. So we must assume that the exception is to be construed ultimately by courts as a part of this regulation. The regulation in the present case is no different from any statute in any case. The only reasonable way for a court to interpret a statute is to interpret it in light of the context of justice in which it is designed to play a part. In particular, courts should not interpret statutes literally if literal interpretation would do violence to the dictates of justice. For it is only a humane concession to the public interest to assume that rational adults are entitled to interpret statutes as if they are written against a societal background of justice, and not as if they are disengaged from all social and human considerations (like a computer program).

The justice considerations we have just mentioned will of [pg579] course vary depending upon the situation and context to which the statute applies. This is not a weakness, but a strength. Courts must interpret statutes not mechanically, but as people faced with new situations (many of which the legislature never contemplated) and who will reasonably interpret them.

In the particular case of a traffic regulation, the broad context is that of traffic safety and efficiency. Traffic regulations are designed to allow drivers of motor vehicles to proceed efficiently to their destinations with due regard to their own safety, the safety of other drivers, and the safety of pedestrians. Each regulation is a legislative attempt to balance these considerations. Thus, for example, the double white divider lines are intended to keep drivers in their own lanes and prohibit them, in general, from crossing the lines. Crossing the lines might endanger their lives and the lives of drivers of oncoming vehicles. But the "safety" aspect of the double white lines is contradicted if they are interpreted in such a way as to endanger pedestrians. To interpret the double white lines as requiring a motorist to run over a darting child, when the motorist could have safely crossed the lines, is to contradict the broad purpose of the legislature in enacting traffic regulations. If the "plain meaning" rule as enunciated by the appellate court below is given unbridled priority, then such a contradiction would indeed be expected to occur. The "plain meaning" rule, as the court below interpreted it, would

mean that in the name of safety, innocent children should be run over. The inconsistency is manifest. No so-called rule of interpretation, whether "plain meaning" or any other, should hinder a court from interpreting a statute according to the fundamental dictates of justice that underlie the legislature's broad purpose.

Second, let us assume that the darting-child exception is explicitly excluded from the statute. For example, section 205 might read:

(c) If a roadway is marked by double white lines (parallel lines) which traverse its length, motorists may not cross the lines, even to save the life of a darting child.

This latter clause, as we have imagined it, seems outrageous. It seems unlike any bill that any legislature would enact. Yet we must note that it constitutes the exact interpretation that the police officer and the traffic court gave to the existing section 205(c). For both the police officer and the traffic court judge found the petitioner to have violated section 205(c) by crossing the lines, even though it was an uncontroverted fact that the petitioner crossed the lines to save the life of a darting child.

The fact that the clause we have imagined seems outrageous, is just another way of concluding that it is outrageous for any court to assume that the legislature intended that section 205(c) be interpreted as if such a clause were contained in the statute. As we said above, we cannot imagine that the legislature intended that a motorist should not cross the white lines, when [pg580] safe to do so, even if not crossing the lines means running over an innocent child.

But we can extend the analysis farther than that. Suppose the legislature *did* propose the clause we have just imagined. Surely there would have been a public outcry—indeed, the same kind of public outcry that we take judicial notice has occurred in recent weeks in connection with such "darting child" cases. The public surely would have found it outrageous for a legislature to contemplate the death of innocent children in a legislative provision that was deliberately intended to bring about such a horrible result. Indeed, any legislator who is at all attuned to public concerns would reasonably expect such a public outcry to attend any attempt to pass a bill containing the clause we have just imagined. And therefore, such a clause simply would not have been proposed, much less enacted.

If such a clause would neither have been proposed nor enacted, then a court, interpreting the provision that *was* enacted, should not read into it such a clause. To do so is to do interpretive violence to the provision that was in fact enacted.

Finally, let us imagine the outrageous. Let us consider the effect of a legislature actually enacting section 205(c) as we have imagined it, with the clause that motorists may not cross the lines even to save the life of a darting child. If there were such a statute, which after all is the clearest possible case from the view-point of the police

officer who arrested the petitioner in the present case, would a traffic court be entitled to find the petitioner guilty of a traffic offense?

We think not—even in that clearest of cases. A court should instead hold such a statutory provision invalid as contrary to the elementary considerations of justice that underlie the legal system as a whole.<sup>FN76</sup> When the state sentences someone to death, the accused person is entitled to a fair and public trial. The accused person must be found guilty beyond a reasonable doubt of a capital offense. These hallowed procedural safeguards are required in all cases where the legal system enforces the ultimate penalty of death against any individual. Accordingly, any traffic regulation that condemns to death an innocent child, when the child's death could have been safely averted by the driver, violates these societal considerations of elementary justice. A court simply will not give effect to a statute, even a lowly statute such as a traffic regulation, if it contains a provision that requires a [pg581] motorist to run over a child or other person. That person cannot be sentenced to death by a traffic regulation.

For all these reasons, therefore, we conclude that it makes no sense to interpret section 205 the way it was interpreted by the courts below. The real meaning of section 205—the meaning as exactly enacted by the legislature—is not contained in the words of section 205 apart from the societal context in which those words were intended to apply. Rather, the real meaning is contained in the way the legal system as a whole impacts the social system, namely, to help deliver justice to that social system. To omit considerations of fairness and justice in interpreting statutes is to fail to do justice to the reason for the existence of statutes.

#### CONCLUSION

If the preceding hypothetical case strikes you as a generic one-applicable, with modifications, to any real-life situation where a statute impacts human behavior—then I hope I have proved that it is legally impermissible to omit “justice” considerations from the interpretation and application of statutes. For the “justice” considerations are built in to the very enterprise of affecting human behavior through law.

I have said little about the common law. If I have proven that justice is an inherent part of what statutes mean, then in the absence of statutes—when a court is simply engaging in common-law adjudication—justice considerations are just as compelling if not more compelling. If a court must interpret statutes in light of a justice context, then surely they must interpret their own previous decisions in the same light.

The most important factor in the entire legal equation is that of a court made up of human (not robotic) judges. These judges are called upon to decide cases and controversies: to apply "the law" to human conflicts. The point of this Essay has been to show that "the law" *includes* considerations of justice. More precisely, the legal system is a system of the application of justice to human conflicts. As I hope to have shown, a court cannot simply apply "justice" without law, because the law—the full panoply of rules, statutes, and precedents—is part of the facts of the parties' situation. No decision can be based on justice if relevant facts are

unknown to the decision-maker. Since law is part of the *facts* of any case, the law must be made known to the decision-maker (as it is, through the services of counsel) and must be taken into [pg582] account by the decision-maker in order to render full justice to the parties.

Thus, what I presented above as "Proposition (1)" should now be reformulated as follows:

PROPOSITION (2). Judges should decide cases according to justice. The law is a fact that is as relevant as any other material fact in the determination of what is just under the circumstances.

### Footnotes

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\*\*Numbers in the format pg527 etc. refer to the pagination of the original article.

FN1 My usual opening salvo: Law schools don't teach justice for the same reason that medical schools don't teach health; namely, if there were perfect justice and health in the world, we might not need lawyers or doctors. Nevertheless (I add), the lawyers' professional responsibility is to promote justice, and the professional responsibility of doctors is to promote health. It's just a matter of bringing the teaching institutions in line with our professions' goals.

FN2 See Anthony D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461 (1987).

FN3 Clearly, the more justice is done to individuals, the more just is the society as a whole.

FN4 Including, if it's a negotiation, the person you're trying to persuade.

FN5 I assume throughout that the decision-maker is not bribed, is not corrupt, and does not have a conflict of interest. These can surely be more powerful motivating forces than "justice". But if they exist, then you're whistling in the dark. Neither legal arguments nor justice arguments will work.

FN6 If we had infinite time and resources, a heroic judge, like Ronald Dworkin's mythical Judge Hercules, might ultimately come up with a better legal-political rationale for one side in a given case. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977). My guess is that even then, another equally talented and infinitely patient judge, Judge Apollo, could very well be persuaded of the opposite result!

FN7 See generally Anthony D'Amato, *Rethinking Legal Education*, 74 MARQ. L. REV. 1 (1990).

FN8 *Not* just as a course in Jurisprudence. Our coursebook uses materials from the everyday practice of attorneys.

FN9 For a thorough review and citations, see David Barnhizer, *The Justice Mission of Law Schools*, 40 CLEV. ST. L. REV. 285 (1992).

FN10 If the most sophisticated book on positivism is H.L.A. HART, *THE CONCEPT OF LAW*, his oblique discussions of common law are easily the weakest parts of the book. *See* H.L.A. HART, *THE CONCEPT OF LAW* 43-48, 138-44 (1961). Positivists are so accustomed to thinking of law as a set of rules that, like Hart, they don't seem to grasp how the common law gets started or persists.

FN11 Anthony D'Amato, *The Limits of Legal Realism*, 87 YALE L.J. 468 (1977-78).

FN12 Suppose you define justice as "treating like cases alike." But every reported case, and every case you can imagine, is in some respects like every other case and in some respect differs from them. Any two cases are more or less similar or dissimilar. The definition is not very helpful.

FN13 A logical deduction is in fact a reduction in our knowledge, even though it may reveal to us something that we did not perceive in the premises. For example, if I were to tell you that "17" is my conclusion, you would not have much information. But if I were to tell you the premises: example (a)  $9 + 8$ , or example (b)  $32 - 15$ , or example (c) square root of 256 plus 1—then you would know *much more* than you know if I simply give you the logically deduced conclusion "17." You could not possibly derive with certainty any of my premises from the mere conclusion "17." However, if I were to give you examples (a), (b), or (c), you *could* derive the logical conclusion "17." Hence, as I say in the text, the conclusion (in this case, 17), adds no new information to the premises.

FN14 For an excellent survey of the main philosophical positions, see *THE PHILOSOPHY OF LANGUAGE* (A.P. Martinich ed., 2d ed. 1990).

FN15 I intend, by the use of the written language (as in this Essay), to elicit a response in you by getting you to recognize that I intend to bring about that response. *See* H.P. Grice, *Meaning*, 66 PHIL. REV. 377, 383-84 (1957) ("[F]or A to mean something by X . . . A must intend to induce by X a belief in an audience, and he must also intend his utterance to be recognized as so intended."). In so doing, I must work with the meanings you give to words. But I cannot know what meanings you give to words, so I assume that your meanings roughly correspond to my meanings, and then proceed as best I can. If I try to change the meanings you give to certain words—which is what I am doing when I "define my terms"—I can either raise a resistance on your part, which is then inimical to my overall purpose, or I am at the mercy of the meanings you may give to the undefined terms that I employ in defining my words. (An example in the text is: if I were to define "justice" as giving each person what he or she deserves, then I am at the mercy of the meaning that you give to the undefined term "deserves.")

I have found over the years an astounding degree of misunderstanding of my arguments on the part of highly intelligent readers. As I've discussed this problem with some readers who were kind enough to correspond with me, I have come to learn that the preconceptions they bring to a reading of an essay of mine are more determinative of what they get out of it than what I say. This is a particularly acute problem in our field of legal scholarship because many people who read my essays are in the process of writing their own essays. Hence they "want" to fit me into the point they are making, even when the point they are making is to *disagree* with me. It is easy, therefore, for them to assume that I'm saying a certain thing, when in fact I might be saying something entirely different.

If readers bring preconceptions to my work, I may very well have made the same mistake in reading their works. The only remedies I know that can assist in this difficult problem of communication are to go over your own draft and clarify, clarify, clarify.

FN16 Philosophically minded readers will note that I fully accept Wittgenstein's approach to these matters. Our words are all *public* vehicles; their meaning is determined by the community in social interaction. Why? Because the only way we can be said to consistently follow the rules of semantics is for those rules to be publicly accepted and acknowledged rules. As Wittgenstein summarized in a critical passage: "Hence it is not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying it." LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 202 (1953); see SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982).

FN17 The "minor adjustments" I talk about are a consequence of the fact that definitions are open-ended. We *learn* a little of what words mean when we first encounter them, we learn more about them with every exposure and use, and we are forever adjusting our meanings of terms. This is particularly noticeable in the development of slang; words that become slang expressions often are used in direct contradiction to their former meanings (as if it is a youthful form of rebellion against language). The new meaning gradually becomes accepted and understood, even though it is noticeably confusing to people who encounter the particular expression for the first time.

FN18 For a discussion of Hegel's position on relationships, see Anthony D'Amato, *Towards a Reconciliation of Positivism and Naturalism: A Cybernetic Approach to a Problem of Jurisprudence*, 14 W. ONTARIO L. REV. 171 (1975).

FN19 EDGAR BODENHEIMER, *TREATISE ON JUSTICE* 12 (1967).

FN20 THOMAS HOBBS, *Leviathan* pt. I, ch. 13 (Oakeshott ed., 1955). However, Hobbes himself did not contend that justice was incoherent in a state of nature. Rather, he contended that there was such a thing as natural justice in a state of nature: injustice is not performing one's covenants. *Id.* at ch. 15. The problem of the state of nature was not that we cannot determine what justice requires, but rather that we cannot enforce the demands of justice even after we determine what justice requires. That was the main reason Hobbes concluded that we need an all-powerful government.

FN21 *See* HANS Kelsen, WHAT IS JUSTICE? (1960).

FN22 *See* HANS Kelsen, THE PURE THEORY OF LAW 1 (M. Knight ed., 1967) (stating that pure theory "attempts to answer the question what and how the law is, not how it ought to be. It is a science of law ... not legal politics.").

FN23 Kelsen, *supra* note 21, at 295-96.

FN24 *Id.* at 302.

FN25 *Id.*

FN26 HANS Kelsen, GENERAL THEORY OF LAW AND STATE 14 (1945). Lon Fuller later made the same point in his discussion of the "internal morality of law." *See* LON L. FULLER, THE MORALITY OF LAW 33-94 (2d ed. 1969).

FN27 But the law may not necessarily tell the judge what the ultimate judgment should be. My reasons for this qualification will appear in the course of this Essay.

FN28 It doesn't have to be a judge in a court. *Any* person called upon to decide a dispute between two or more other persons cannot do justice to the task of dispute-resolution without inquiring into what laws impinged upon the parties' behavior. Sometimes there may not be any laws that enter into the picture. However, when any contending party cites a law as a reason why he or she did or did not do something, or a reason why he or she expected the other party to do or refrain from doing something, then that law is part of the landscape. To ignore it would be to risk doing injustice.

FN29 For Hume's classical demonstration of this point, see DAVID HUME, A TREATISE OF HUMAN NATURE, Book III, pt. I, sec. I (1739).

FN30 JEROME FRANK, COURTS ON TRIAL 14-61 (1949).

FN31 This assumes that the appellate court honestly does its best to reconstruct the facts of the case from the trial transcript as assisted by the briefs of counsel. What if the appellate court is dishonest? What if the facts it recounts in its opinion are not the facts of the case as developed at trial? Unfortunately, there may be no higher court to review such dishonesty. The result is that the appellate court, by misstating and inventing "facts," can do *anything it wants* to the parties, no matter how unjust. Is this horrible thought a pure speculation on my part? Unfortunately, no. *See* Anthony D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 Cardozo L. Rev. 1313 (1990).

FN32 *See* Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983); Anthony D'Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513 (1989); Anthony D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 VA. L. REV. 561 (1989); Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy With One Bold Thought*, 85 NW. U. L. REV. 113 (1990); Anthony D'Amato, *Aspects Of*

*Deconstruction: The "Easy Case" of the Under-aged President*, 84 NW. U. L. REV. 250 (1990); Anthony D'Amato, *Aspects Of Deconstruction: The Failure of the Word "Bird,"* 84 NW. U. L. REV. 536 (1990); Anthony D'Amato, *Aspects of Deconstruction: Thought Control in Xanadu*, 84 NW. U. L. REV. 1086 (1990); Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 207 (1990); Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148 (1990); Anthony D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 CARDOZO L. REV. 1313 (1990); Anthony D'Amato, *Rethinking Legal Education*, 74 MARQ. L. REV. 1 (1990); Anthony D'Amato, *Counterintuitive Consequences of "Plain Meaning,"* 33 ARIZ. L. REV. 529 (1991); Anthony D'Amato, *Post-Revolutionary Law and Economics: A Forward to the Symposium*, 20 HOFSTRA L. REV. 757, 772-74 (1992).

FN33 Richard Hyland, *The Spinozist*, 77 IOWA L. REV. 805, 807 (1992).

FN34 BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166-67 (1921). Cardozo's "solution" was to say that the judge acts as a mini-legislator, filling in gaps in the law. But a legislator is not constrained by the law; even a mini-legislator has a great many degrees of freedom. For a further discussion of Cardozo on this point, see Anthony D'Amato, *Judicial Legislation*, 1 CARDOZO L. REV. 63 (1979).

FN35 What about uncontested cases? Are they also indeterminate? Although the question is not germane to the present discussion, I have answered it affirmatively. See Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148, 166-71 (1990). So far as I am aware, this argument has not been refuted. For a skeptic's reply to my argument, see Kenney Hegland, *Indeterminacy: I Hardly Knew Thee*, 33 ARIZ. L. REV. 509 (1991). For my rejoinder, see Anthony D'Amato, *"Counterintuitive Consequences of "Plain Meaning,"* 33 ARIZ. L. REV. 529 (1991).

FN36 Judges and other decision-makers typically write their opinions as if to say that they are not themselves exercising discretion. Instead, they suggest that their results are compelled by the law. There are basic psychological reasons why judges say this. These psychological reasons involve the disputing parties' expectations and judges' fear of being criticized for exercising discretion. But lawyers also typically argue that way; they argue that the law compels a decision for their client. And professors often teach classes that way—that a certain decision is "correct" and another decision "incorrect." If we're going to be realists about law, justice, and society, we have to look beyond the self-serving statements of many lawyers and many judges.

FN37 Suppose the court is bogged down in drug prosecutions and that my trial for theft of oranges is so "low level" it keeps getting postponed—until I successfully move for dismissal of the charges for want of timely prosecution.

FN38 DENIS DIDEROT, *ENCYCLOPEDIA* (Nelly S. Hoyt & Thomas Cassirer trans., 1965).

FN39 Indeed, a scholar who argues that the law is determinate will usually cite a silly case—one that would never have been contested. But the *reason* we feel that the outcome is

determinative in such a case is that the opposite outcome would strike us as decidedly unjust—and silly.

FN40 In most actual utopian community experiments, people have been found to retain some personal possessions that they are unwilling to surrender to the community—such as certain clothes, personal photographs, etc.

FN41 *See, e.g.*, Cal. Penal Code § 12355 (West 1992) (declaring use of booby traps a felony). "[B]ooby trap means any concealed or camouflaged device designed to cause great bodily injury. . . [and] may include. . . wire with hooks attached." *Id.* § 12355(c).

FN42 *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889).

FN43 The scenario is spelled out in terms of an imaginary dialogue between Elmer and his attorney. *See* Anthony D'Amato, *Elmer's Rule—A Jurisprudential Dialogue* 60 IOWA L. REV. 1129 (1975), *reprinted* with minor changes in ANTHONY D'AMATO, JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW 93, 114 (1984).

FN44 *See, e.g.*, Gary Lawson  
, *Proving the Law*, 86 NW. L. REV. 859, 862-66 (1992).

FN45 To be sure, considered solely as factors, the sterilization laws impacted on behavior: to openly disobey them was to risk arrest and imprisonment.

FN46 On the other hand, if the law is itself just and/or is part of a generally just regime of laws, then I should not try to circumvent it. But my reason has nothing to do with the law per se; it is because of the normative force of justice behind the law.

FN47 *See* KARL R. POPPER, OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH (rev. ed. 1979).

FN48 An analogous, though not exactly identical, situation is the "license to kill" privilege accorded Secret Agent James Bond in the Ian Fleming novels and successful movie series. James Bond may summarily dispatch any person whom he decides is a threat to national security. (I haven't heard any complaints about Mr. Bond's license to kill from citizen watchdog groups, who complain about violence or pornography in movies.)

FN49 *See, e.g.*, HART, *supra* note 10, at 22; JOHN AUSTIN, LECTURES ON JURISPRUDENCE 94-98 (1897); KELSEN, *supra* note 26, at 37-39, 44.

FN50 KELSEN, *supra* note 26, at 45.

FN51 *Id.* at 61.

FN52 That is, under the theory of law I am proposing. Certainly we might expect a Nazi judge to take the Nuremberg sterilization laws into account. Yet even the Nazi judge "should not"

have taken them into account. That certain Nazi judges did take those laws into account may simply have reflected their own prudential behavior in a regime that could have punished *them* had they done otherwise.

FN53 I add this proviso because we all agree that "ignorance of the law is no excuse." A given law in fact may not have influenced K's behavior because K was unaware of it. Yet if K *could have discovered the law*, then we hold K accountable *as if* K had actual knowledge of the law. The reason for this, I believe, is not logical but pragmatic. If we excused behavior on the grounds of ignorance of the law, people would soon become actively ignorant of all laws—a premium would be placed on ignorance. Hence, the legal system has no choice but to rule out the defense of ignorance of the law. (Yet the legal system certainly allows defenses when parties, such as the insane or infants, lack capacity to discover the law even if the law is discoverable.)

FN54 I put quotes around this word because I don't believe that law is ever actually "applied." To say that a judge "applies" the law is either a myth or a rough way of speaking when we mean something deeper than that. Every case of purported "law application" is in fact an instance where a judge must make a judgment. That judgment is deciding whether a certain verbal formula contained in a statute or prior case can be correlated with a set of given facts in a way that satisfies the judge that a different, alternative verbal formula seems less correlated. And that's all there is to it, I think.

FN55 As one successful securities attorney told me, you can write a prospectus or a memo any way you want and make it conform to the letter of the law, but the important thing is whether it passes the "smell test." If it smells fishy, he said, then advise the client not to do it.

FN56 With devastating effectiveness, Rabelais satirized the situation of the judge who decides cases according to chance and then clothes his decisions in convoluted Latinisms. *See* FRANCOIS RABELAIS, GARGANTUA & PANTAGRUEL 321-23 (Sir Thomas Urquhart & Peter Le Motteux trans.).

FN57 My analysis here parallels a previous criticism of a rule alleged to be purely determinate: "plaintiff wins." Professors Joseph Singer and Ken Kress claimed that such a rule is at least one example of pure determinacy. Therefore, they concluded that not every legal rule is indeterminate. Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 11(1984); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 286 (1989). My criticism is that the rule itself cannot be a rule of law, for if it were, the entire legal system would self-destruct:

If the plaintiff always loses, in practice nobody is going to want to be a plaintiff. Thus, if you defraud me out of \$1,000 of my money, I would not want to be a plaintiff against you in court, because plaintiffs always lose. So instead I will buy a gun and threaten to shoot you until you return my money. Suppose you go to court to get a restraining order against me; no luck, because you will be a plaintiff and plaintiffs always lose. Suppose instead that you persuade the state to prosecute me for threatening you with a gun. Too bad; the state is the plaintiff and so it loses also.

Now suppose that, emboldened by my successful physical assault against you, I decide to embark on a career of robbing banks. I hire accomplices, we shoot our way into banks, we take money; the state cannot prosecute any of us because plaintiffs always lose. Soon everyone goes into the assault and robbery business. The police shoot to kill because they have no incentive to arrest anyone; all court cases against arrested persons are losers because the defendants always win. The scenario can be extended, but the picture should be clear. In a word, it's anarchy. It is the entire absence of any law and order; indeed, it is the absence of anything that can be called a "legal system."

Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 NW. U. L. REV. 113, 113-14 (1990).

FN58 The assignment of a probability to a case (say, "your chance of winning in court is 70%") and the degree of confidence a lawyer has in making such a prediction ("I'm 90% confident that your chance of winning is 70%") should be combined so that the final prediction to the client is a single number (e.g.,  $90\% \times 70\% = 63\%$ ). Thus, the lawyer should say to the client, "I think your chances of winning are somewhere between 60% and 65%." For an extended analysis, see Anthony D'Amato, *The Limits of Legal Realism*, 87 YALE L.J. 468 (1977-78).

FN59 I made this point some years ago a slightly different way, in terms of judges maximizing their power. *See id.* at 469.

FN60 Philosophically minded readers will recognize the pitfalls associated with the term "circumstantial evidence" here. Strictly speaking, the judge's behavior is *not* evidence of what is in the judge's mind because we can never know what is in another person's mind. As B.F. Skinner and other behaviorists might put it, a person's behavior is only probable evidence of other behavior by the same person. The mind, in the behaviorist sense, is just an "intervening variable." *See* K. MacCorquodale & P.E. Meehl, *On a Distinction Between Hypothetical Constructs and Intervening Variables*, 55 PSYCHIATRY REV. 95 (1948). In fact, we don't need to know what is in the judge's mind. All we have to do is predict, with a reasonable degree of confidence, the judge's behavioral outputs (decisions).

FN61 Of course, similar does not mean "identical."

FN62 There could be important differences about justice across nations. No one has made a study of this, but I suspect that, even if we look at quite disparate societies, we will find a great deal of congruence in this regard.

FN63 I deplore the gradual substitution of theories and commentaries for actual cases in many of the recent coursebooks. We seem to be retrogressing to the pre-Langdell days when law was taught by reading scholarly texts. *See* D'Amato, *supra* note 2.

FN64 *See* EDMOND CAHN, *THE SENSE OF INJUSTICE* (1949). Professor Bodenheimer agreed with this sentiment. *See* BODENHEIMER, *supra* note 19, at 1-4, 33-43.

FN65 There are unfortunately very few empirical studies about the commonality of perceptions of justice. One study is PAUL ROBINSON & J. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL*, Westview Press, 1996. In a series of 18 empirical studies, the authors examined a wide range of factors that might affect the amount of punishment that lay persons said criminal offenders would or would not deserve. These factors included such things as how close the actor came in her attempt to commit an offense, the extent of an actor's contribution to another's offense, the extent of the harm caused, the risk of harm created, the actor's culpable state of mind with regard to the offense, whether the actor caused the harm through omission or commission, the strength of the causal connection between the actor's conduct and the harm, and the effect on punishment of multiple offenses and the time interval between them. The authors report a striking degree of agreement among lay subjects on many of the rules that govern the assignment of blame and punishment, and conclude that there exists a "shared common intuition of justice" on a host of fundamental matters relating to blame and punishment.

I begin my class on justice with an experiment suggested in our coursebook. *See* ANTHONY D'AMATO & ARTHUR JACOBSON, *JUSTICE AND THE LEGAL SYSTEM* 12, Q.3 (1992). Although the hypothetical fact situation is new to the students, I have found *total* agreement as to whether a series of outcomes are just or whether factual variations on those outcomes are just or unjust. In eight years of teaching this course, as a matter of fact, not a single student has dissented from the view of the others. This is not because my students are afraid to speak up or to dissent, as anyone who is acquainted with law students would know!

FN66 In a Shari'a court (a civil court in Saudi Arabia), a woman's testimony is accorded one-half the weight of a man's. *See* U.S. DEPARTMENT OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990*, at 1625 (1990).

FN67 Whether an *unjust* law can be justly administered has the air of paradox. I am in the process of finishing an essay on this subject, entitled "Can an Unjust Law Be Justly Administered?"

FN68 *See* D'Amato, *supra* note 2, at 461.

FN69 HERBERT G. WELLS, *THE TIME MACHINE* (1895).

FN70 Philosophers will recognize this as a "counterfactual." *See* 2 DAVID LEWIS, *PHILOSOPHICAL PAPERS* 3-31 (1986). Whatever the difficulties of modal logic in asserting the possibility of doing something other than what the actor did, law has always proceeded on the assumption that a defendant is "blameworthy" in the sense that she could have acted differently. (If the defendant were insane, or were physically coerced, and hence unable to act differently, all legal systems would recognize this as an excuse.)

FN71 471 U.S. 84 (1985). For a critical analysis of the Court's reasoning, see Anthony D'Amato, *Counterintuitive Consequences of "Plain Meaning,"* 33 *ARIZ. L. REV.* 529, 535-39 (1991).

FN72 471 U.S. at 93-96.

FN73 CHARLES DICKENS, *OLIVER TWIST* 415 (1939).

FN74 For a discussion of related interpretive problems with "stop" signs, see Anthony D'Amato, *Judicial Legislation*, 1 *CARDOZO L. REV.* 63, 74-75 (1979).

FN75 For an early discussion on the limits of computerized justice, see Anthony D'Amato, *Can/Should Computers Replace Judges?* 11 *GA. L. REV.* 1277 (1977).

FN76 I am purposefully keeping this language in abstract terms. If the court is in the United States, then the Due Process Clause can be invoked as a specific constitutional provision invalidating such a statute. *See* U.S. Const. amend. V. In addition, the Bill of Attainder Clause might be invoked, as well as the more generalized notion of "implicit in the concept of ordered liberty." *See* U.S. CONST. art. I, § 9, cl. 3; *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).