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Pragmatic Indeterminacy

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Abstract: If, as a result of taking Indeterminacy seriously, we revolutionize the way we teach law and the way we select judges, then we will also revolutionize the way cases are litigated (because the new judges will expect to hear a different kind of argumentation) and the way people order their lives in anticipation of the way their disputes will be decided by these new judges.

Tags: Indeterminacy, Pragmatic indeterminacy, Formalism, Judicial decisions, Benson, Hegland, Kress

[pg148]** The Indeterminacy debate—to which Professors Robert Benson, Kenney Hegland, and Ken Kress have made important contributions as well as being so kind as to respond to four of my "Aspects of Deconstruction" essays—is, according to Professor Steven Winter, the key issue in legal scholarship today. [FN1] The debate has intensified in the United States and will spread to other countries in the near future.[FN2] Professor Winter observes that "the legal academy is experiencing a state of epistemological crisis."[FN3] We are indeed in the midst of an immense paradigm shift in the way we think about law, and no one knows where it may end. Many scholars are confused, disheartened, and anxious to retreat to a bunker mentality of vague and benign Formalism.[FN4] Yet if scholars are going to catch up to what experienced practitioners know—that you can win cases even though the law is clearly against you, and lose cases even though the law is overwhelmingly on your side [FN5]—we should boldly confront [pg149] the possibility of Indeterminacy and its implications for the way we teach and write about law.

In this essay I defend my version of Pragmatic Indeterminacy in response to the main points of my critics. I am indebted to Professors Benson, Hegland, and Kress for participating in the present dialogue and giving me the opportunity to continue it.

I. RATIONAL ARGUMENT IS ALIVE AND WELL

There comes a point in every law school course when a student asks, "Can you tell us what you are looking for on the exam?" I realize the empowerment of that moment: whatever I say, I will get. If I say, "Good penmanship!" I will get flawlessly scripted exam papers. What I actually say is: "Persuasion—the best exam answer is one that best persuades me. Take whatever position you like, the important thing is to write the most convincing argument you can for the position you choose."

I try to practice what I teach. I believe in the power of rational argument to persuade decisionmakers. I have never suggested that there is no forcefulness in legal rhetoric. Yet Professor Hegland says that "[t]o deny that there are 'easy cases' is to deny the possibility of rational argument. . . . I have no real problem with this analysis except that it suggests that we are insane."[FN6] Professor Benson contends that all deconstructionist argument, including my own, "is best explained not as an attempt to change the world, but as an act of intellectual self-gratification by the participants."[FN7] And Professor Kress, charging me with taking the position that language lacks persuasive value, suggests that I write articles "in order to get a good raise next year."[FN8] No one can accuse my critics of pulling their punches.

Their basic position assumes the following argument: (1) legal scholarship consists of rational discourse; (2) rational discourse assumes that one argument can objectively be better than another; (3) when one argument is better than another, it should win; (4) rational discourse

is a better argument than Indeterminacy-deconstructionism; (5) rational discourse should thus win over Indeterminacy; (6) therefore, legal scholarship [pg150] should henceforth consist solely of rationalist discourse. Of course, this line of reasoning ends where it began, completing a harmless circle.

Yet even if logically tautological, my critics' positions may be psychologically necessary. It is hard for some people to accept the possibility that the rational discourse they have come to know and love—and that has garnered them academic and remunerative honors because of their superior verbal ability to engage in it—may have little or nothing to do with judges' decisions in particular cases. If in addition they are convinced, as Professor Kress appears to be, [FN9] that the *legitimacy* of the legal enterprise is jeopardized when the question of indeterminacy is raised, they are apt to circle their wagons.

The problem in today's legal discourse is impatience. Like judges, many scholars think that if someone has anything at all useful to say, it can be said in twenty minutes. And so Indeterminists resort to provocative statements, outrageous hypotheticals, weird counterfactuals—*anything* that within twenty minutes might shake loose the listener's moorings of objective meaning. We say, paraphrasing Lewis Carroll, that it is not so much that our words have meanings as that our words have us. But these gibes hardly ever win the day; rather, they encourage some "serious" mainstream scholars either to sneer and walk away, or to accuse us of being nihilists and irrationalists.

Some Formalist scholars, like Professors Hegland and Kress, have a gibe of their own— actually, an adaptation from the oldest "refutation" of skepticism in philosophy. The classic philosopher says to the Sophist: "If you are truly skeptical as you say you are, why are you not skeptical of your own claim of skepticism?" My critics in effect ask me: "If you don't believe that rational argument constrains judges, why are you resorting to rational argument to convince us?"[FN10] My answer is: "What would you have me resort to instead—irrational argument? [FN11] The only [pg151] way I have any chance of convincing you is to argue in a way that you think is rational, even if secretly I believe that my 'rational' may differ from your 'rational.'" [FN12]

My general reply to this riposte to skepticism is that a skeptic does not have to disbelieve *everything* including skepticism itself. It suffices simply to be unsure about what to be sure about, including skepticism itself.[FN13] If, as I shall argue in a moment, a skeptic does not know where, if anywhere, a line can be drawn between "easy" cases and "hard" ones, then every case is potentially indeterminate. That conclusion is enough to constitute skepticism, even though it falls short of claiming absolutely that every case is "hard."

The proof for a legal Formalist who sincerely wants to understand the possibility that words do not have determinably precise meanings [FN14] is to read the exciting philosophical and artificial-intelligence literature that has enabled twentieth-century philosophical thought to overcome the conceit of the Platonic view that words have determinate meanings.[FN15] The philosophical studies that have helped me the most are indicated in [pg152] an extended footnote. [FN16] The real utility of reading this literature is that it [pg153] can open our own minds to the possibility that we are prisoners of the words we use. To escape from that prison we have to look at words and concepts in a new way. We must somehow get "outside" the words we utter in order to analyze them. Getting outside our words requires us to overcome our own minds' psychological temptation to smuggle in the very notions of meaning that we are trying to discover. What Wittgenstein said of philosophy is equally true of jurisprudence: "[p]hilosophy is a battle against the bewitchment of our intelligence by means of language."[FN17]

My "long" answer to Professor Hegland is that, before pronouncing my views "insane," he might do well to spend a few years perusing the development of twentieth-century linguistic philosophy. He will not necessarily find a cure for insanity. Rather, the process of working through [pg154] the literature is as much psychological as logical, showing us how to get outside our minds with the assistance of philosophers who have tried the same thing in their attempt to come to grips with words. As for Professor Benson's view that this was all said previously by the American Legal Realists, and that we are now only going through a rerun, I would concede that the Legal Realists gave us a taste of something profound. [FN18] However, they wrote with the disadvantage of predating the critical supporting contributions of Wittgenstein, Goodman, Quine, Kripke, and the artificial-intelligence researchers. This time around, I believe, Indeterminacy is here to stay.[FN19]

To respond directly to Professor Hegland's argument that the best "rational" argument must win, let me engage in the following thought experiment. Suppose we have a lawsuit with the ground rule that the decision will be awarded to the side which presents the most rational argument. Surely Professor Hegland cannot object to this starting point, because it is his own. And surely he cannot object if we further assume [pg155] that he is the designated attorney for one of the parties, and that he will devise a brilliant, thorough, scholarly, exhaustive, scintillating legal argument that all observers agree constitutes the epitome of rationality. I still maintain that a judge can decide the case against him. How? The judge says, "Professor Hegland, your argument was undoubtedly one of the most supremely rational arguments I ever heard in my life. But there was one problem: it was *formally* rational, whereas your opponent gave a more *substantively* rational argument. To be sure, your opponent stumbled and faltered, miscited some cases, and played loose with some statutes, and if I were grading her performance I would give her a C and you an A. But her position was more substantively rational than yours, and since I am interested in substantive justice and not in grading lawyers' rhetoric, I must award the decision to her."

Of course, once I make this kind of argument, a critic has two surefire comebacks. The critic either says, "I had already thought of the formalist-substantive distinction and by not mentioning it I meant to exclude it by implication," or "All right, let's change the ground rules—now the best *substantive rational argument* will win the lawsuit, and we assume that I make the best substantive rational argument." This is like my example of the person who was referring to her finger and not pointing at a pelican;[FN20] a critic can always say that he meant to exclude all outrageous cases, or he can amend his proposition so that we exclude references to fingers. All I can do is to ask that if we make whatever amendments in the rules the critic wants, will the critic *now* be satisfied? If the critic says yes, then I move to a subsidiary thought experiment:

We now assume that Professor Hegland as attorney has made the best substantive rational argument. Our judge then replies, "Although you have made the best substantive rational argument from the point of view of goal-rationality, your opponent has made the best substantive rational argument from the point of view of means-rationality. Since law must concern itself with means, and cannot pick and choose among the different values that people assign to goals, I must award the decision to her."

Let us again defer to Professor Hegland's amendatory powers, and assume that he replaces his previous argument with the best substantively means-rational argument. Does he stop here? Does he now claim that a judge would have to be *wrong* to deny him the victory? If so, our judge says: "Professor Hegland, although you have now made the best substantively means-rational argument, your argument is only best within the framework of Kaldor-Hicks optimal rationality.

Your opponent's substantively rational argument exhibits a Pareto-optimal means-rationality. As between two substantive means-rational arguments, the [pg156] Pareto approach overcomes an otherwise better argument based upon the approach of Kaldor and Hicks. Sorry, you lose."

One last time? Professor Hegland now presumably presents the best substantively means-rational Pareto-optimal argument. Again he could lose. The judge could rule that although his argument was more means-rational and Pareto-optimal than that of his opponent, his opponent's argument was closer to a Peircean instrumental rationality than his own argument, which was closer to a Deweyan pragmatic rationality. As between Peirce and Dewey, when Pareto only slightly eclipses Kaldor-Hicks, Peirce wins over Dewey.

The point, of course, is that this sort of thing can go on forever. No initial assumption of rationality can possibly constrain the outcomes of particular cases. The deconstructionist's best rejoinder to critics such as Professors Hegland and Kress is simply to *accept all* their starting points (such as "rationality," "the power of persuasion," and "reasonableness"), and argue *within* these categories for the opposite result. This is the approach I took in my sci-fi example of the under-aged President that bothered Professor Hegland.[FN21] I accepted his premises and then simply changed the context. Then, assuming he would object to the changed context, I shifted back to the present and gave a presently acceptable constitutional argument in support of the Presidency of eighteen-year-olds.[FN22] I tried to do the same with *any* posited *theory* in a previous article, contending that even a court's prior commitment to a particular theory leaves the court free to decide the case for either side.[FN23]

Bottom line, do I believe in the power of rational argument? Of course I do, for a very good reason: it often seems to work. Not that it's meaningful; not that it should work; only that pragmatically it seems to get results. More precisely, my position is like that of the Georgia deacon who was asked if he believed in baptism by total immersion. He replied, "Believe in it? Hell, I've seen it *done*!"

II. WHY DISSENT? WHY NOT?

Several scholars have counted the frequency of dissenting opinions in appellate court cases and found that the rate is rather low—in one [pg157] study, only four percent of the reported cases had dissenting opinions.[FN24] Some scholars have seized upon this statistic and said that it proves that only a minority of cases are indeterminate. I disagree. As Professor Kress fairly summarizes my position, a low appellate dissent rate is more likely to be the consequence of indeterminacy than determinacy.[FN25]

But then, because Professor Kress regards Indeterminacy as just another "theory," he misstates my position. He argues that if I am correct that deconstructionism *causes* a decline in the dissent rate, then deconstructionist *theory* will itself have persuaded judges to alter their behavior, and hence at least *one theory* (i.e., the deconstructionist theory) can make a difference. Ingenious though this argument is on its own terms, it changes what I actually said. In the first place, I did not claim that deconstructionism is a "theory" in the sense that Professor Kress uses, which is that a theory is an explanation for events. In my view, deconstructionism is, among other things, a way of looking at the world that challenges the psychological need to explain events by theories. Secondly, I said that the spread of the deconstructionist outlook may cause some judges to become defensive about the way they present themselves to the outside world. Judges may decide that there is no point in arming critics of their decisions with well-reasoned dissenting opinions. If critics are going to attack the legitimacy of judicial decisionmaking by

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claiming that the case could have gone either way under existing law (judges may say among themselves), then why provide those critics with the ammunition of persuasive dissenting opinions? Hence institutional pressures for dispensing with dissenting opinions may increase in an atmosphere where deconstructionists question the competence of rules of law to decide specific cases. None of this is to say that deconstructionism is a *theory* that *causes* judges to dissent less frequently. Judges need not have a conviction that deconstruction is *correct* if they want to reduce their rate of dissent, but rather they need only to desire to accommodate a readership that (rightly or wrongly) has become deconstructionist-minded about the rationalizations they read in judicial opinions.

Professor Kress further misinterprets me when he says that I attribute no persuasive value to dissenting opinions in terms of their impact upon future judicial decisionmaking. I did not say they lack persuasive value, any more than I claimed that rational argument lacks persuasive value. I concede that I overstated my case when I said that there was "no point in dissenting" when I should have put it less absolutely by saying that *no one can be sure that there is any point in dissenting, for it might just as well work against as for the dissenter*.[FN26]

[pg158] Consider a hypothetical Supreme Court case in which the Court states, "We are now persuaded that Justice Holmes, dissenting, was right and the majority was wrong. Therefore we will adopt the reasoning of Holmes's famous dissent." Does this *prove* that Holmes was vindicated, that his dissent *persuaded* a future Court? I maintain that there are millions of things that can have persuasive value to judges, and one of them *might* or *might not* be Holmes's dissent. The present Court just as easily could have said, "Although Holmes wrote a persuasive dissent, we are bound by stare decisis to follow the majority." This shows that the "persuasive" value of Holmes's dissent turns on whether the present Court prefers to *say* it has "persuasive" value rather than *saying* that the theory of stare decisis has the greater persuasive value. Practicing lawyers are loathe to cite a dissenting opinion for fear of giving the other side a cheap rebuttal: "Our opponents have resorted to citing *dissents*, whereas we rely on *holdings*!" In short, the fact that favorable reasoning can be found in a dissenting opinion does not mean that it has "persuasive" value (unless we look for persuasiveness in the cogency of the reasoning itself—a point I shall return to at the end of this section).

So far we have only begun the Indeterminist account of dissenting opinions. A second point is that *although* the Court *says* that the Holmes dissent had persuasive value, the Justices may have made up their minds independently of Holmes and then cited the Holmes dissent as acceptable window dressing. Again, we cannot know what the Justices thought; the truth value of their *claim* that they were persuaded by Holmes must be indeterminate.[FN27]

Third, since all cases are inevitably distinguishable on their facts from any and all precedents, neither the majority opinion nor the dissent can be "persuasive" in the sense of intellectually constraining. To be sure, a great deal of legal scholarship has been expended on arguing whether case A is really distinguishable from case B, and qualifying terms will often be used to the effect that the distinction (if any) must be "non-trivial," "relevant," "significant," "germane," "pertinent to the theory of decision," and so forth. But the real world of facts does not present itself to us pre-labelled by such terms. Rather, those terms are [pg159] the conclusions we reach—the rationalizations we verbalize—*when* we have decided that a difference in fact between two cases is sufficient for us to "distinguish" the cases on the basis of that difference. If making that distinction seems to entail changing or modifying the decisional rule,[FN28] then our ultimate refuge is to simply say that such are the workings of the common law.

Finally, my charge that dissenting opinions are futile is leveled against dissents that claim the majority misinterpreted the law. Since Pragmatic Indeterminacy contends that law cannot constrain individual case results, it follows that a Pragmatic Indeterminist would see no point in critizing a majority's opinion on the ground that it is contrary to law.[FN29]

But occasional dissenting opinions point out facts in the case that the majority either overlooked, misinterpreted, or suppressed—facts that, when fully acknowledged, indicate that the decision was unjust. Such dissents are indeed valuable as fulfilling a "whistleblower" function that can help keep courts honest.

I would not conclude, however, that dissenting opinions have no persuasive value whatsoever for subsequent courts. Rather, my claim is that millions of things, including a dissenting opinion here and there, have persuasive value. Many things have far more persuasive value. If, during childhood, a Supreme Court Justice witnessed his father beating his mother, and was deeply aggrieved by what he saw, this experience is likely to have a major impact upon the Justice's "reasoning processes" in a case where a battered wife is claiming a deprivation of her constitutional rights. Or if a Justice as a teenager was unfairly rounded up in a police arrest, and beaten in the police station, such an experience will undoubtedly be more "persuasive" in the Justice's attitude toward citizens claiming police brutality than any number of dissenting opinions pointing out that the police do not always tell the truth.

For an advocate to be persuasive, it is very important to know the attitudes and views of the judges. But the difficulty of discovering them is commensurate with their importance. Judges normally do not tell us their personal feelings and attitudes, although some trial judges—in the relatively less constraining oral proceedings of a trial—are often quite candid in referring to their own experiences as support for the numerous [pg160] evidentiary decisions they make. Appellate judges in their written opinions tend to write impersonally and cite "the law" rather than their personal convictions for their decisions. There are at least two reasons for the impersonality of written opinions. First, the judge's readership expects an impersonal, legalistic explanation of why the case had to be decided a certain way. Candid references to the judge's own idiosyncratic experiences could anger a losing litigant who demands impartiality and not whim.[FN30] Second, it is intellectually difficult for anyone, including judges, to fine-tune introspectivity to the point of recognizing personal motivation.[FN31]

When I begin an oral argument to a three-judge panel, I see before me three robed citizens who appear similar to each other in many respects, especially sartorially. But inside they have wildly divergent life experiences, and react differently to each word that I utter. Although my words may produce a surface conformity of judicial behavior, the meanings they evoke in each judges can be different. To take what should be the least controversial example, I start by stating my name. This will produce a certain degree of overt conformity throughout the trial; for instance, if the judges refer to me by name when they ask questions, they will produce sounds like "Mr. D'Amato" or "Professor D'Amato." This surface conformity, however, masks potential whirlwinds of prejudicial thoughts. For all I know, my name conjures up in the first judge's mind reminiscences of the blue skies of Rome, the operas of Verdi and Puccini, and delicious Italian food. For the second judge, my name might trigger images of Chicago gangsters, Mafioso massacres on St. Valentine's day, and Marlon Brando in the role of Godfather. The third judge may silently be condemning me for the affectation of spelling my name with an apostrophe when I should have had it Americanized.

As I proceed with my argument, the judges' images may colorize the next few sentences I utter, until a word or phrase—or an inflection or bit of body language—in one of those sentences

sends a judge down an unwanted byroad (perhaps the scene for the first judge is still Italy, but she now envisions Mussolini during the Second World War haranguing a [pg161] crowd with demagogic oratory).[FN32] Indeed, whatever words I utter—nouns, adjectives, legal phrases, names of other judges, case citations—each utterance will evoke for each judge the different contexts in which that judge has learned the word over time. [FN33] I might cite a case and what runs through one judge's mind is that he had to state that case when he was a student in law school and he was embarrassed and ever afterwards *hated* that case. And so I will have engendered a most unfortunate emotional response simply by referring to a case by its name. As Quine so well put it:

> Different persons growing up in the same language are like different bushes trimmed and trained to take the shape of identical elephants. The anatomical details of twigs and branches will fulfill the elephantine form differently from bush to bush, but the overall outward results are alike.[FN34]

Thus I suggest that when academicians such as Professor Kress confidently assert that a dissenting opinion can *persuade* a future court, we should take it with a grain of salt. *Of course* a dissenting opinion, like anything else in the universe, might or might not persuade a future court. But that does not invest the dissenting opinion with any non-random claim to rhetorical power.

Yet the academy may issue a final rejoinder—one that has the particular echo of the classroom: "Not every dissenting opinion will persuade future courts; only dissenting opinions that are in themselves truly well reasoned, logical, beautiful, argumentatively tight—in short, only *persuasive* dissenting opinions—will have persuasive value for future courts." If *that* is the academy's fail safe position, I cheerfully concede it on the ground that if you've seen one tautology, you've seen them all.

III. THERE ARE NO EASY CASES

Professor Kress asserts that he understands Indeterminacy because, after all, he is one of the few scholars who has taken the trouble to define it.[FN35] I find this claim unintentionally humorous, for if Professor Kress [pg162] actually thinks that Indeterminacy can be defined, then he cannot understand it! [FN36] Professor Kress calls his own position "moderate indeterminacy," which he locates somewhere between determinacy and indeterminacy.[FN37] Although he insists that most cases are clearly determinate,[FN38]he does not give us an example of a clearly determinate case. If there are so many determinate cases to choose from, why does he not identify at least one? His failure to cite a single example may amount to a claim of inability to determine whether any specific, given case falls within the determinate category. But if that is his position, then he must concede that every case is indeterminate, because not knowing whether or not a given case is indeterminate is another way of saying that all cases are indeterminate.

One scholar who *has* tried to find a determinate case is Frederick Schauer.[FN39] Professor Schauer, who views an "easy case" as determinate and a "hard" case as indeterminate, has tried to find a line separating the two types of cases. If a line between the two can be drawn, then he will have vindicated Professor Kress's "moderate indeterminacy" position. The importance of finding such a line for both Professor Kress and me is critical. Professor Kress bases his entire refutation of Indeterminacy on the "pervasiveness" of easy cases as distinguished from the allegedly few controversial ones,[FN40] while I would concede defeat for Pragmatic Indeterminacy if such a line could be drawn. Much is at stake as we follow Professor Schauer in his valiant attempt to draw a line between easy and hard cases.

Professor Schauer starts his quest by attempting to draw a line at the top rung of the legal ladder—the Supreme Court. If he can find an easy case there, then many more easy cases abound below. But he soon admits defeat, explaining that the nature of the Court renders it unlikely that an easy case will ever get there. He concludes flatly that "there *are* no easy cases in the Supreme Court."[FN41]

The second downward rung on Schauer's Ladder consists of appellate court cases, both state and federal. But Professor Schauer soon finds [pg163] himself unable to cite a single example of an easy case at this level. He concludes, "I will concede that there are few, if any, easy cases in any appellate court."[FN42]

Professor Schauer's concession of all appellate cases to the Indeterminacy camp is sound. In *any* appellate case the parties have submitted briefs containing plausible legal arguments for their own positions. [FN43] Perhaps there exists an appellate court case in which one of the parties submitted a wholly frivolous brief, [FN44] but even then, a moderate amount of ingenuity could supply a plausible legal argument for that party. For example, one could contend that the precedents cited by the opposite side are distinguishable, that an applicable statute is unconstitutional, or that equity and fairness demand that the spirit and not the letter of the law be followed (or conversely that the letter of the law be followed even though the other side's position is morally attractive).[FN45]

Thus Professor Schauer must step down to the third rung: the trial level. But no easy case is anywhere to be seen in trial court. He writes:

> In terms of cases that reach trial and decision, there are probably very few [easy cases]. Indeed, easy cases are most likely less prevalent in trial courts than in appellate courts. The appellate process narrows the issues, but, since trials take place prior to this narrowing, they raise a substantially larger number of factual and legal issues. And as the number of issues increases, the potential justifications for making a decision one way or another [pg164] also increase, thus making it more difficult to designate as "easy" any final trial court decision. . . . To Jerome Frank, for example, the injection of contested factual issues at any point in the trial process was sufficient to make uncertain the results in almost every case that in some way wound up in court."[FN46]

Since the top three rungs of Schauer's Ladder comprise *all* contested cases, and since law students are fed an almost exclusive diet of reports and summaries of reports of such contested cases, [FN47] the conclusion of a well-known Formalist such as Professor Schauer is notable:

> I will concede that there are few if any easy cases anywhere in the litigation process, and that any case filed in a court is capable of being decided one way or another relatively unconstrained by precedent or written law.[FN48]

In short, a Formalist has *conceded* that every case on the books—every single case that law students study for three years as well as every single case that they will ever litigate in practice—is not an easy case.

Many American law professors today would routinely agree with Professor Schauer's reasoning and conclusion, yet go about their business as if the point had never been made. The explanation may lie in the possibility that legal scholarship today is characterized by massive cognitive dissonance (which would not be surprising given Professor Winter's description of the present paradigm crisis).[FN49] Each law professor is quite aware of the plasticity of law, and yet writes about law as if it is determinate.[pg165] By talking *as if l*aw is determinate, a professor adds an aura of authority to her teaching and writing. She may not necessarily be dissembling when she writes articles criticizing cases on the grounds of correctness or validity; rather, as an author, she may have simply suspended her disbelief in Determinism. In the classroom she can switch back to Indeterminacy with ease; she can argue not only that the result

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in any assigned case could have come out the other way, but also demonstrate to any student who offers a hypothetical variation that his example contains implicit assumptions each of which can be deconstructed, rearranged, and made to produce the opposite result. Perhaps she rationalizes her formalist authorial behavior on the ground that publication in law journals is a highly constricted form of professional activity that will be judged by certain prevailing standards, which at the present time include mainstream Formalism. What she believes may not necessarily be the same as what she feels obliged to write. An example of this rationalization is the very article by Professor Schauer that I have been recapitulating in this section. Although Professor Schauer ends his article with the concession that there are no litigated or reported cases that are "easy," earlier in the same article he characterizes the legal realist view of decisional indeterminacy as follows: "To take this view as an accurate generalization of *all* or even *most* judicial decisions, however, seems at least erroneous and at times preposterous."[FN50] In brief, Professor Schauer early in his article labels preposterous his own findings later in the same article—a textbook case of cognitive dissonance.

Psychological denial of the truth of Indeterminacy clearly has functional utility in professional life. Determinacy is self-reinforcing, whereas Indeterminacy is dirty linen that is dangerous to expose in public. Even when a scholar such as Professor Kress is writing *about* Indeterminacy, his fears of illegitimacy appear to compel him to insist on the pervasiveness of easy cases although he does not produce an example of a single one.[FN51] At the other extreme from psychological denial of the truth of Indeterminacy is what might be called psychological acceptance. This acceptance is a convenient way of saying, "count me in" while going about one's business in the pre-Indeterminacy fashion. Thus Judge Richard Posner, in his most recent book, concludes " today we are all skeptics."[FN52] Interestingly, he does not aim this newfound skepticism at its most appropriate target—his own previous, Formalistic, economic-analysis-of-law determinism.[FN53] The Coasean cat may have departed, but its grin remains.

[pg166] We have not completed our descent to the bottom of Schauer's Ladder, for there is at least one more rung below the trial level where an easy case might be found: the unreported, unlitigated case. Here, at last, Professor Schauer purports to find a line between hard and easy cases. Easy cases, he says with an implied sigh of relief, are the cases that are *never litigated*. Since an unlitigated case is one that a potential plaintiff decides would be a clear loser in court, Schauer argues, it must be "easy," and that is why the party never takes it to court. And, since unlitigated cases are more numerous than litigated ones, Professor Schauer and his followers are able to assert that much of the law—the law represented by cases that never get litigated—is made up of easy, determinate cases.

But it doesn't work. For one thing, there are many reasons people choose not to litigate their case other than a calculation that they would lose on the merits. They may not have the money to pay lawyers or investigators.[FN54] If they have the money, their expected recovery may not be worth the expenditure. [FN55] If their cases are too "new," they may be discouraged from litigating by unimaginative attorneys. Additionally, some of them may simply be *wrong* in their assessment that they would lose if they took their cases to court. [FN56] Finally, if Professor Schauer were correct that unlitigated cases are easy cases, all we would have to do to transform any unlitigated case he names into a hard case is to offer to one of the parties to litigate it for free. But surely the Formalists cannot [pg167] plausibly assert that a decision to litigate any unlitigated easy case they might choose would move it over the line into the domain of hard cases.[F57]

If any easy case exists at all, it can only be found *within* the category of unlitigated cases—at yet a lower rung on the ladder. Professor Schauer has not descended that far, but to conclude the present analysis we might well ask whether he could. Is there a line between easy unlitigated cases and hard unlitigated cases? The only possible distinction would have to be based on the type or content of the cases. But what type? What content? How could they be characterized?

Some of my colleagues are put off by such questions. Of course, they say, there are millions of easy unlitigated cases. Look in your wallet and take out a dollar bill. There is a statement on each bill saying, "This note is legal tender for all debts, public and private." Cash is used as legal tender in millions of transactions each hour of each day. Surely these are all "easy cases" of law-application.

My reply: Have you ever walked into a Federal Express office and attempted to send a package by paying cash? Your cash will be refused; you must either present a valid credit card or already have an account with Federal Express. What happened to "legal tender"? Is the Federal Express case an "easy" case (easy because you have no right to force anyone to accept cash) or "hard" (hard because you might very well have a right to rely on the wording on the currency and insist that any publicly offered service be payable in cash)? How do we know? Must we wait until such a case is litigated? The problem is that such a case might never be litigated. Anyone in a hurry to send an overnight Federal Express package would not have the time to get an injunction against Federal Express ordering it to accept cash. So we have a potentially never-to-be-litigated case involving U.S. currency that is neither clearly easy nor clearly hard.

One reply to my Federal Express example is that it is unusual, weird, exceptional. Professor Hegland might rejoin: "Cash is always good as cash except for Federal Express and other exceptional cases." But if we exclude *exceptional* cases, we are left with a tautology: cash is good as cash except for exceptions. Such a rule tells us nothing about law or the real world; it is purely an abstract logical construct. Recall the replies my critics made to my examples of the Underaged President[FN58] or the Pelican.[FN59] Once *I've* identified an exception, they say, "Well, it's [pg168] an exception, so we'll exclude it." The more exceptions I identify, the more happy they will be to exclude them all. The problem in real life is that no one can specify the exceptions in advance[FN60]—and that, in a nutshell, is a major reason why law is indeterminate.

But is the Federal Express case really unusual? The real world has an uncanny ability to complexify and degrade legal rules.[FN61] We are beginning to see many diverse examples of cash not being accepted as legal tender. Major automobile rental companies are increasingly rejecting cash and insisting on credit cards; major hotel chains are starting a similar policy. The policy is not irrational: the customer may damage or destroy the automobile or hotel room and then run away. A credit card on file is some protection against these depradations, whereas an advance cash deposit by the customer may be insufficient to cover the damage (or if it is sufficient, there is nevertheless a temptation for an employee of the rental company or hotel to abscond with the cash). Other examples include convenience grocery stores with signs saying that they will not accept large-denomination bills, taxicabs saying that drivers cannot give change in excess of five or ten dollars, buses that refuse to give change, the New York subway system that at current writing is refusing to accept pennies, and even underworld refusals to take suitcases of hundred dollar bills in payment because spending them would attract attention.

Even in ordinary situations where cash is routinely accepted, I would assert to any colleague that he cannot tell me in advance *for certain* that cash will be accepted the next time it is tendered. For example, I ask a colleague to specify for me an easy case of cash being accepted as

legal tender. She says, "This afternoon I will go shopping for groceries. I will pay cash, and it will be cheerfully and legally accepted." But what is there to preclude the possibility that this very afternoon she will walk into the accustomed grocery store and see a sign saying, "Only checks and credit cards accepted"? She protests to her grocer; he says, "Sorry, there have been so many robberies lately that we have decided not to take in any cash." Since my colleague is carrying only cash, she may well have to walk home without groceries. She may be outraged. She may threaten to sue. She may have a lawsuit alleging implied promissory estoppel, but it would not be an "easy case."

Suppose instead she attacks my question as unfairly asking for a prediction instead of a retrodiction. Suppose she says, "I went shopping for groceries *yesterday*, and paid for them in cash, and so *that* was an easy case." But my reply is that in fact it was not a "case" at all.[FN62] No controversy arose between her and her grocer. The idea of "case" or [pg169] "controversy" would be vacuous if we called every event and every transaction that happens in the world a "case." Rather, a "case" is something where people go to enough trouble to make opposing claims against each other. When "law" is invoked to "resolve" such a claim-conflict, then we can properly call it a "case." When no dispute arises, we can never know whether, if a dispute had arisen, what kind of case it would have been. (If one objects that the case was "easy" precisely *because* no dispute arose, the objection is tautological: we mean by a "case" a situation where a dispute arises.)

If Professor Hegland was shopping at my hypothetical grocery store, he might be tempted to amend his proposition: "All unlitigated cases involving the use of cash as legal tender are easy cases, except for those cases in which someone for a good reason refuses to accept cash as legal tender." If Formalists want such a rule, I bequeath it to them. It either shifts attention to the phrase "for a good reason," which is indeterminate, [FN63] or it is a tautology (similar to "except for exceptional cases").

I put it to my critics to identify their own content-distinctions between easy and hard cases. I am confident that however they define it, a case can be invented that clearly fits their specified content for an easy case and yet is not, in fact, easy.

There is the exception of tautologies. A Formalist might specify, for example, "a case in which the plaintiff has no cause of action." [FN64] Such a case, they may claim, is "easy." I would reply with two arguments. First, if you start out by equating "no cause of action" with "zero possibility of winning a lawsuit," then of course it is an "easy case" by definition. But it is only an easy case in a tautological world and not in the real world. It is only an easy case by the operation of language: if we assume X, and say that "X = plaintiff loses," where X can take on any value including "no cause of action," then it follows as a matter of language that the plaintiff must lose. Secondly, suppose we equate "no cause of action" with the empirical observation that, under existing law, there is no precedent to suggest that this plaintiff has a cause of action. I assert that it does not follow that the plaintiff must lose, for the obvious reason that *new* causes of action from time to time win their day in court. "Today's frivolity," says Professor Risinger, "may be tomorrow's law. . . ." [FN65] If we start with the limited number of actions recognized in [pg170] the eleventh century, we will find many subsequent cases that created new causes of action—enough easily to invalidate the proposition that a plaintiff with no "cause of action" must lose.

An example of another kind of tautology is: "Suppose I simply refuse to pay the grocer for the groceries; doesn't he have an easy case against me for the money?" If the speaker is saying that she recognizes a legal obligation to pay but is refusing to pay just to prove there is such a

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thing as an "easy case," then it is an academic or logical exercise and not a real-world case. She does not really have a dispute with her grocer; instead she is having a dispute with *me*. On the other hand, if she refuses to pay the grocer because she does *not* recognize a legal obligation to pay, we would then ask her to state her reasons. She might say a number of things: (a) I have a credit balance at this store; (b) I have a claim against this grocer and I am resorting to self-help; (c) my children are starving and I have no money; (d) I already paid for these groceries at another store; (e) I have been declared legally insane. None of these are "easy" disputes, for we can readily imagine judges who might rule either way on these claims and furnish plausible reasons for their decisions (a job which need be no harder than adopting the winning side's brief).

My general position is that we can never know whether any actual case is easy. [FN66] Nothing in law[FN67] is determinate in the sense that the law constrains a judge to come out a particular way with respect to a particular fact situation where there are opposing parties each claiming a right to the judge's decision.[FN68] Yet it would be unfair to go to the other extreme and accuse Indeterminists of saying that law should therefore be ignored. For the Indeterminist, "law" assists a judge in locating similar cases and thereby helps the judge dispense societal justice. Thus the words of the law serve a retrieval function. They help call up situations (judicial cases as well as hypothetical events addressed by statutes) that may be similar to the present case. Once those precedential situations are called up, the judge examines the decisions reached in those cases and [pg171] decides whether justice compels a similar result in the present case. Although positivism errs in saying that law-words constrain judicial decisions, law-words do play an important heuristic role in initially identifying previous decisions so that they may be compared with present situations.[FN69]

For the Pragmatic Indeterminist, judges do not behave randomly or unpredictably over the long run of cases; far from it. As I will contend later in this essay, lawyers can predict how judges will probably decide a given case or line of cases. If lawyers did not have such an ability, we would have chaos, not law. This general predictability, I shall argue, is expectable in any system that is fairly characterized as legal. Thus, when a critic charges Indeterminists with saying that law or language does not matter, the critic indicates she is acquainted only with superficial criticisms of the Indeterminacy thesis, and not with Indeterminacy itself. Legal writing of all kinds—theorizing, analyzing, articles in law reviews including this one—may have a long-term impact on the direction law takes and on the attitudes that judges and legislators have about the law. Pragmatic Indeterminacy simply doubts that anything that is written can point to the correct answer in the next case. This includes statutes,[FN70] precedents, rules, regulations, and law-words generally.

IV. CRACKS IN THE FORMALIST EDIFICE

A Formalist regards at least some part, and perhaps all, of law as a logically precise system. Statutes, rules, and precedents are premises, and a legal conclusion is a logical deduction from the applicable premises. The law-words that make up this system form the decisional basis for judges, and so long as the system itself is coherent, these law words constrain the judge.[FN71] But one thing has to be assumed in order to make Formalism possible—a fundamental postulate concerning the nature of language. The founders of legal positivism failed to discover it in the nineteenth century, [FN72] but in 1958 H.L.A. Hart found it: *every word has a* [pg172] *determinate core meaning that is not reasonably disputable*.[FN73] This is the Fundamental Formalist Postulate. Under FFP, if the sovereign issues a command, and your conduct falls

within the core meaning of that command, you are constrained to act accordingly. [FN74] Anyone who says otherwise is, according to this view, simply wrong.[FN75]

I have already argued that the absence of "easy cases" deprives Formalism of any useful content.[FN76] But even on the philosophical level, substantial cracks within the Formalist edifice have been found in recent years that render Formalism shaky on its own FFP assumption that words have core meanings:

1. Contemporaneous with Hart's announcement of the "core" postulate, Lon L. Fuller invented a Godelian application of Hart's exemplary statute, one that was undecidable even though by hypothesis it fell within the core.[FN77] Fuller thus showed that determinate core meanings do not necessarily constrain decisions.[FN78] I have discussed this development at length elsewhere.[FN79] Suffice it to suggest here that the number (or more appropriately the density) of Godelian undecidable propositions in law [pg173] may vastly exceed the number in mathematics.[FN80]

2. Even though the FFP is designed for deductive application, the actual *content* of the "core meaning" of any word requires an inductive inquiry. We must look at all the previous instances of the speaker's use of the word in question—including, by implied reference, all previous uses of that word by any speaker throughout history. We then add up all these instances, get the average meaning, and "apply" it to the current case. For example, we find what the term "due process" meant throughout history by all speakers and in every single case in which the term was invoked, and then "apply" its "core meaning" to the present case. But this raises (apart from the unmanageability of the scholarly effort that would be required) the problem of the validity of induction itself. As Nelson Goodman demonstrated, no amount of historical evidence (*i.e.*, not even all the evidence from the beginning of the universe to the present moment) compels the result in the next case. In fact, all the previous evidence can be reformulated so that it is compatible with *any* result in the next case![FN81] Wittgenstein arrived at the same conclusion in his study of ordinary language.[FN82] Saul Kripke has explicated and generalized Wittgenstein's result.[FN83] Kripke has shown that even if you have a rule as determinate as the mathematical law of addition, a person who adds two numbers she has never added before (68 + 57, to use Kripke's example) can give any answer (say, 2,381) and say that she has used "quaddition" which gives the same results as "addition" except when 68 and 57 are [pg174] being added.[FN84] "Law" is an fortiori case from these mathematical examples, not only because legal rules appear on their face to be less rigorous than mathematical rules of addition or multiplication, but also because time is a relevant differentiating factor in law. If someone added 57 + 68 twenty years ago and got 125, it would be hard to make a plausible claim that the same person adding the same numbers today can justify a total of 2,381.[FN85]

But in law, every new case is different from all previous cases at least in so far as time (and probably the identity of the parties) is concerned.[FN86] Thus, Wittgenstein, Goodman, and Kripke have shown that there can be no (legal) rule that compels a given result (no rule that constrains a judge), because any result can be incorporated in a reformulation of the rule.[FN87] Another way of stating this position is to say that no amount of [pg175] legislative history can ever constrain a present case result.[FN88] A decision either for the plaintiff or for the defendant can be justified, using the Wittgenstein-Goodman-Kripke analysis, on the basis of exactly the same legislative history.[FN89]

3. The law of a given legal system may be internally consistent, [FN90] but all the real-world facts and events to which the law *refers* can be consistently exchanged for an entirely different set of facts and events. This is the result reached by Lowenheim-Skolem, which, simply stated, is

that ontology is indifferent to any formal system.[FN91]If we combine the previous Wittgenstein-Goodman-Kripke result with Lowenheim-Skolem, we realize that even a highly formalized set of rules, such as the Restatements of Contracts and Torts, can consistently be said to "apply" to mutually[pg176] inconsistent descriptions of fact situations.[FN92]

4. An important contribution to the breakdown of Formalism was [pg177] made by Professor Kress himself in 1984.[FN93] He showed that the time between when the facts of a case arise and when the case is adjudicated in a court will necessarily affect the state of the law applied to the case. For during the gap between facts and adjudication, *intervening* decisions in other cases will be handed down, and these will have some impact on the content of the law that will be applied to the instant case.[FN94] It follows from Professor Kress's significant thought experiment that the law can never be determinate at the moment that people act; or, in other words, that no one can know precisely what the law is when one needs to know it in order to act legally.[FN95]

5. A possible additional infirmity in the Formalist facade is the formal proof I worked out in 1983 that in all contemplated or actual cases, the party who challenges the applicability of a given rule (call him Jack) has an *inherent advantage*.[FN96] The central proposition in this argument is that Jack has an economic advantage over the person who is trying to utilize the state's judicial machinery to enforce the rule (call her Irma):

First, Jack has a net incentive to discourage Irma from bringing the legal action at all. Second, Jack can more efficiently widen the gap between his own conduct and the law on the books than Irma can restore it. Third, Jack's contemplated transaction costs will be less than Irma's, and hence he can spend the difference in the purchase of legal creativity to unravel the rules of law. All of these asymmetries lead to a systemic bias in favor of persons disadvantaged by legal rules to make the law less certain.[FN97]

This previously unnoticed asymmetry, which I argued is built into the structure of our legal system, leads to the result, entirely within FFP, that rules of law will unravel over time. The result is analogous to the Second Law of Thermodynamics: rules of law will inevitably lose their structural sharpness and tend toward randomness and unpredictability. Accretions made to the rules (such as legislative histories or dense codifications) do not reduce entropy—they actually hasten the race to randomness.[FN98] The conclusion I reached is that whatever our degree of certainty [pg178] might be about the meaning of any given legal rule today, the meaning of that rule will inevitably be less certain tomorrow.

6. To the extent that the Critical Legal Studies movement is linked with the Indeterminacy thesis, the linkage stems from Duncan Kennedy's "fundamental contradiction" which purportedly demonstrated that there was in every case an unresolvable tension between the forces of altruism and selfishness.[FN99] This tension, in Professor Kennedy's view, rendered every right or principle indeterminate and useless as a constraint upon judges in any given case. But now, over a decade since Professor Kennedy announced his theory, it has become evident that no theory, rule, or principle can constrain particular judicial decisions,[FN100] and hence Professor Kennedy's "fundamental contradiction" is not needed. Moreover, his "fundamental contradiction" is *itself* just a pair of theories—one a theory of "altruism" and the other of "selfishness."[FN101] Thus, instead of telling us that all theories are indeterminate, he replaced them with a reductionist account of two overarching indeterminate theories. Although Professor Kennedy's "fundamental contradiction" was of historical importance in the development of Indeterminacy, with the passage of time it appears somewhat less significant as a *logical* crack in the Formalist edifice.[FN102]

Although the preceding demonstrations may not prove conclusively that Legal Formalism is moribund,[FN103] they should be discouraging [pg179] enough to a Formalist to suggest the desirability of seriously investigating the alternative of Pragmatic Indeterminacy.

V. SIGNS ALONG THE PRAGMATIC ROUTE

Indeterminacy rejects FFP.[FN104] A Pragmatic Indeterminist would show that FFP is not the way the mind works, that it is not the way that we learn to speak and to use language. An asserted "core meaning" of a word is a matter of degree and not of kind, and in any event may vary from person to person. Whether real-world conduct "falls within" a "core meaning" of some word or phrase is a matter of human judgment.[FN105]Pragmatic Indeterminacy not only rejects Formalism, but is a *substitute* for Formalism.

For lack of space if not of ability, I cannot give an extended account here of Pragmatic Indeterminacy. No account of the subject can be complete, because Indeterminacy cannot be bounded or circumscribed—that word (or concept) like all other words (or concepts) does not have a determinate core meaning. However, let me try to sketch what at the present time I think are its main procedures and goals: [FN106]

[pg180] 1. The starting point can be labeled the Non-Anarchic Postulate. Law is a *predictable* phenomenon. Experienced lawyers can make educated guesses about how judges will probably decide many cases and controversies. A client walks in the door with a legal problem, and within a few minutes, an attorney can start giving probabilistic legal advice that the client can use to good advantage in planning further behavior. Of course, because each fact situation is unique, we can never know as a matter of "objective probability" that the lawyer's advice is accurate. But "subjective probability" works quite well in these cases, as I have tried to demonstrate in an earlier writing.[FN107]

If the results of courts were *not* fairly predictable, then lawyers could not give probabilistic legal advice and pretty soon no one would pay lawyers for their advice. Lawyers would be out of business, and society would become chaotic.[FN108] For Pragmatic Indeterminacy, some nontrivial degree of judicial regularity and predictability is required. So long as we have a non-chaotic society, we can be fairly confident that "law" works in that society.

2. What is our evidence that law works? The evidence, I submit, cannot be found in legal materials. All the reported cases in the world cannot give us any assurance about what courts will actually decide. This apparently startling proposition can be readily tested by a thought experiment. Suppose you come across fifty volumes of the reported cases of a particular jurisdiction. You read all the cases and note an amazing consistency: there are no overrulings, each case cites precedents, and when you look up the precedents, you find that they are "on all fours" even by your own standards, no matter how rigorous your standards are.[FN109] None of this means that real people have in fact been treated predictably or consistently. For all you know, the statements of facts in the reported cases are actually misstatements, invent the facts, misinterpret[pg181] the facts, or are so highly selective of the facts as to constitute uncandid accounts of what really took place.[FN110] In particular, all the "law-facts" (such as "the plaintiff was also negligent") can be wildly at variance with the real-world facts. You might even find, on further investigation, that all the reported cases in this jurisdiction were *plagiarized* from case reports of another jurisdiction. The judges in "our" jurisdiction simply copied the opinions of other judges and tacked them on to their own cases in an attempt to "look legal." I am not saying that this strange state of affairs is likely, only that it is conceivable.[FN111] The thought

experiment simply shows that we cannot use court reports as *evidence* of what is happening in the real world.[FN112]

Our evidence that law works must instead come from lawyers and the public. If most people, including lawyers, believe that litigated cases are not decided randomly but can be predicted at a confidence level ranging, say, from fifty-five to ninety percent depending on the case, then they are probably right because they are talking from experience with decisions the courts have made in their own jurisdictions. Societies that view their court systems as generally issuing unsurprising rulings are probably accurate in viewing their courts as behaving within predictable limits. Our evidence for popular belief in judicial predictability is the care people take to structure their transactions by taking into account the risk of having them upset by challenges in court. If the risk were wholly unspecifiable, people would not make plans in light of what courts might decide.

"Law" in this view means *only* a lawyer's prediction that on such-and-such facts a court will decide with a certain percentage probability for the client.[FN113] The "law" can be different depending on the facts, the client, *and* the lawyer. For example, a client tells two attorneys, A and B, the same story. Attorney A says the client's chance of prevailing in a lawsuit is fifty percent, attorney B says it is seventy five percent. Both may be precisely correct; the law can be *different* for the client depending upon choice of counsel. For lawyer A may be inexperienced in this area of the law, and may have a poor record of dealing with similar cases. Lawyer B may have more talent, experience, and success, fully justifying a seventy five percent confidence level of winning the case.[FN114]

[pg182] 3. What reason does an Indeterminist give for the fact that law works in non-chaotic societies? A clue can be found if we look closely at what we mean by predictability. If I can predict that a certain set of real-world events—assuming competent description of those events in court clothed in appropriate legalist rhetoric—will have an eighty percent chance of obtaining a favorable judicial decision for my client, then I must have some elementary notion of *similarity* in my ability to make this prediction. I must have mentally *compared* my client's set of real-world events to other *similar* sets, and made the judgment that the result in my client's case will track the results previously obtained by similarly event-situated persons.[FN115]

I did not necessarily need *words* to go through the mental process of similarity-comparison. A word is a conclusion I reach when I have already decided that two things are more similar to each other than they are to a third thing. For example, if the color I now see is similar enough to red colors I have seen in the past, I call it "red."[FN116] If my client's contract is sufficiently similar (in my own view) to adhesion contracts I have seen or read about, I venture to call it an "adhesion contract" (of course, my label is a shorthand for a prediction of how a court might view the contract).[FN117] Our mental ability to sense similarities is prior to our ability to learn a language.[FN118] Indeed, our language ability itself [pg183] could not have arisen if we lacked a prior mental ability to determine similarities and differences. Rudolf Carnap noticed this fundamental point in his masterwork *The Logical Structure of the World*.[FN119] The basic unit of his system is the *erleb*, a momentary cross section of the total stream of experience. Erlebs are related to each other by "part identity" and "part similarity."[FN120] The relationships of erlebs are preverbal.[FN121] A word is simply a label we learn to attach to erleb relationships that we notice.[FN122]

[pg184] The importance of similarities for law study has, of course, been noted long ago. *Reasoning by analogy* is said to be the basic way that we "think like a lawyer."[FN123] Lawyers are able to make predictions for their clients because of their ability to notice similarities across

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real-world situations. This may seem quite obvious and elementary, but it is a long way from the Formalist notion that lawyers learn rules of law and then apply them to the facts of a case (and even farther away from Dworkin's view that judges find the best theory of law and apply *that*).

Decisionmaking by reference to similarities in prior decisions is not just an attribute of the legal system. It applies in nearly all social situations: in the family, in the office, in voluntary organizations. The Similarity Engine (real-world similarities fueled by our inductive expectation that similar situations should yield similar results) keeps society running with a minimum of unfair surprises. The legal system is simply a more formal example of the workings of this Similarity Engine. By becoming familiar with it, lawyers can make useful predictions to clients, and judges can maximize their own effectiveness and power by behaving in a manner that actualizes the utility of lawyers' predictions.[FN124]

4. Law, however, works only probabilistically. Similarities, basic though they are, can only be a matter of more-or-less. Compounding the difficulty is the possibility that differently situated observers may draw different distinctions between similar cases. [FN125] The result is that law-words, absolute though they may appear when printed on paper, can at best point to likely or probable results in particular cases (which is another way of saying that there are no easy cases). Pragmatic Indeterminacy not only regards each judicial decision as indeterminate, but also—if it were possible to exclude the normative dimension of justice or morality[pg185] from law and mean by "law" only the words of the law (statutes, precedents, *etc*.)[FN126]—considers it to be a category mistake to use notions of "legally right" or "legally correct" in criticizing a given decision.[FN127] Although we often use the words "correct" or "incorrect" in criticizing judicial decisions, the fact that any decision is a matter of probability combined with the fact that no case is "easy" means that either side can *legitimately* win any individual case.[FN128] I maintain not only that our real world is one of probabilities and not certainties, as quantum theory has [pg186] amply demonstrated, [FN129] but also that our legal world is made up only of probabilities and not certainties.

The realization that law only tells you what might happen to you and not what will necessarily happen [FN130] is perhaps a "soft" view of law. I think it is more humanistic than the dictatorial view of legal positivism which regards laws as determinate commands that bind judges as well as us.[FN131] The soft view of law considers human deciders (judges) as being part of, rather than apart from, the law.[FN132]

5. Yet my contention that the language of law at best serves a retrieval function[FN133] is admittedly a deflationary view of law.[FN134] Many people, accustomed to nobler sentiments where law is concerned, may regard the retrieval thesis as a disaster. I suggest that it is a gain. If we have been fooling ourselves that law words constrain judges in individual cases, then we can dispense with a considerable amount of time-consuming theorizing about law and about whether specific decisions were correctly[pg187] decided under the law. We will then have time to turn our attention to things that matter, such as justice.[FN135]

Justice matters not only in itself, but also because it may be able to point us to the right decision in any given case—something the words of the law cannot do. A judge *ought* to decide a case in the interests of justice. Where justice is concerned, there can be easy cases. Not all cases are easy; some are very hard in terms of sorting out the justice interests. But I think it can be done, although the task is formidable. In law school education we have barely scratched the surface.

6. How should law be taught? First, by giving a lot more attention to the facts of cases and to how those facts are ascertained and proven.[FN136] The tendency of recent casebooks to

truncate the statement of facts of cases and instead pile on legal rhetoric is a move in precisely the wrong direction.[FN137] Second, attention should be paid to morality and justice. These are the engines that move impartial judges (if anything moves impartial judges). Law-words do not constrain judicial decisions, but sentiments of what is moral, fair, and just may have a powerful, normative impact upon decisionmakers. Law school curriculums need to focus on how normative elements are best identified and argued—instead of assuming that students pick it up through osmosis.[FN138]

7. Perhaps the most important nonacademic consequence of Pragmatic[pg188] Indeterminacy is the issue of how we select judges. Societal justice depends on having good and fair-minded judges making decisions. The more convinced we are about the inability of law-words to constrain particular judicial decisions, the less we should require technical legalist competence in candidates for judgeships. Although media commentators urge us to appoint judges who are learned in the law, who did well in law school, and who have the ability to craft sophisticated, persuasive opinions, the media is as usual a couple of decades behind. For the ability of a judge to state the law in a sophisticated way has, in my opinion, practically nothing to do with what we should really be concerned about—fairness and justice.[FN139] The more we require our judges to be verbally skilled practitioners of the legal art, the less we can expect them to have found room in their lives for actual empathic experiences, for the wisdom that comes from contemplating the human condition, and for the maturity of judgment that comes from reflecting upon what to do in thousands of daily interactions with other people in diverse contexts. What we need on the bench are qualities of compassion, fairness, mercy, good judgment, experience of many walks of life, sensitivity, humanism, and empathy.[FN140] Since judges cannot be constrained by law-words,[FN141] they should be the kind of people who feel constrained by justice.[FN142]

[pg189] VI. CONCLUSION: CONSEQUENCES OF PRAGMATIC INDETERMINACY

When a sympathetic commentator such as Professor Benson suggests that the Indeterminacy debate is a tempest in an academic teapot, reflective of a mix-and-mash culture and useful only for the purpose of self-indulgence, I would like to underline for him the last two consequences of Pragmatic Indeterminacy that I have listed in the preceding section. If, as a result of taking Indeterminacy seriously, we revolutionize the way we teach law and the way we select judges, then we will also revolutionize the way cases are litigated (because the new judges will expect to hear a different kind of argumentation) and the way people order their lives in anticipation of the way their disputes will be decided by these new judges. I doubt that a debate about law can be dismissed as academic if it entails societal consequences such as these.

Footnotes

**Numbers in the format pg148 etc. refer to the pagination of the original article.

[FN1] Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990).

[FN2] Its impact in Continental Europe may exceed its impact in the United States because of the pervasive tradition of the civil code system which engenders the false popular conviction that cases are actually resolved by the impersonal dictates of the comprehensive codes. Of course the European judges know better, but their own professional standing and socially perceived worth is a function of their playing the game.

[FN3] Winter, *supra* note 1, at 679. Professor Winter's unconventional title and methodology are further illustrations of Thomas Kuhn's account of crisis and revolution in scientific inquiry: "The proliferation of competing articulations, the willingness to try anything, the expression of explicit discontent, the recourse to philosophy and to debate over fundamentals, all these are symptoms of a transition from normal to extraordinary research." *Id.* at 680 (quoting T.S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 91 (2d ed. 1970)).

[FN4] Witness the great popularity of what I call the Reassurance Article—the essay that tells mainstream scholars that what they have been doing all along is, when the smoke clears away, quite sound. Prominent authors of Reassurance Articles include Professors Ken Kress, Kenny Hegland, Frederick Schauer, Lawrence Solum, Steven Burton, and Judge Richard Posner.

[FN5] I have formulated this clause in the way that practicing attorneys might say it. They say, "the law was clearly on my side, yet I lost." By that they mean that they have an intellectual conviction, based on everything they know and have studied about law, that the law favored their client's position. They are always open to the counter-argument, "but obviously you must have been wrong on the law." Yet that counter-argument is not a clincher, because the judge, too, could be wrong on the law. Moreover, the same attorneys have told me, "there were cases I should have clearly lost on the law, and yet we won." But if I were formulating the sentence in the text not to express the way lawyers talk, I would have to replace the strong verb "is" with the more indeterminate verb "seems."

[FN6] Hegland, *Goodbye to 2525*, 85 Nw.U.L. REV. 128, 130 (1990)

[FN7] Benson, *Deconstruction's Critics, the TV Scramble Effect, and the Fajita-Pita Syndrome*, 85 Nw.U.L.REV.119,121 (1990).

[FN8] Kress, *A Preface to Epistemological Indeterminacy,* 85 Nw. U.L. REV.134 (1990).
In what might be the world's first case of self-destructing and self-deconstructing text, the quoted language does not appear in the cited article. I quoted Professor Kress's partial manuscript upon which he knew I would rely in preparing this reply. He thus rendered indeterminate his own sentence and in the process pulled the punch I said he did not pull—all, I am sure, for the kindliest of reasons.

[FN9] Kress, *Legal Indeterminacy*, 77 CALIF.L. REV. 283, 285 (1989).

[FN10] I could reply, but will only do so in a footnote, that their very question plus their resolve not to be convinced by whatever I say, proves my point. They in effect acknowledge that even if my arguments are "rational," they will remain unconvinced. Thus, they admit that rational arguments no more "constrain" themselves than they constrain judges.

[FN11] For instance, Professor Hegland imagines a teenager elected President arguing to a judge that the constitutional age requirement "was intended to assure that a President did not have teenage acne, and as the judge could see, this candidate has a clear complexion." Hegland, *supra* note 6, at 129. Professor Hegland says that this argument "stinks now and it will stink in 2525. A judge, even one desperately wanting to throw out the age requirement, could not, with a straight face, use this rationale to do so." *Id*. The only saving grace in Professor Hegland's total misperception of the Indeterminist position is his clever play on the word "rationale" to suggest "rational." Other than that, no Pragmatic Indeterminist would ever suggest that any argument is as *useful* as any other argument. One must always adapt one's argument to the listener. If a judge isn't going to like an acne argument, don't argue acne to the judge. Always show the judge a way of *presenting* a decision in your favor with *socially acceptable legal rationales*. That is why I presented what Professor Hegland characterizes as my "traditional, mainstream, dull, and indeed, somewhat Republican, argument" in favor of the underaged President. *Id*. I did this precisely because it is the kind of argument that, given an appropriate context, a judge is likely to accept and use in her written opinion.

Does that mean that my argument *convinced* the judge and the acne argument *would not convince* the judge? Not at all. The absolute statement that an acne argument would not convince a judge is, like all other Formalistic statements, subject to contextual deconstruction. Suppose a future context in which most people have come to *hate* the Constitution. In that context, a judge might demonstrate her own judicial contempt for that document by *accepting* the acne argument. The acne argument would serve her purpose in that context by trivializing the Constitution.

[FN12] There is at least one fundamental way that my rational is anyone's rational. I believe that any argument must be internally consistent. The reason I believe this is not because I accept a "theory" of coherence, but rather simply because if a person contradicts himself he is *not saying anything that we can figure out*. Rationality, in this application, is simply a matter of choosing between communication and non-communication. (I omit figurative uses of contradiction as suggested by P. STRAWSON, INTRODUCTION TO LOGICAL THEORY (1952), such as the answer to the question "Is it raining" consisting of the statement, "It is and it isn't." These figurative uses of contradiction have communication value, but only because we have learned that the speaker's point in such cases is not logical precision but rather a deliberate indeterminacy.)

[FN13] *See* Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory,* 75 CORNELL L. REV. 401, 412 n.42 (1990) (suggesting two replies for the skeptic).

[FN14] I do not mean to imply that the sounds we utter and the words we write have no meaning. I contend only that we can never be sure that the meaning we ascribe to a word will be the same meaning that someone else ascribes to the same word.

[FN15] Plato himself is famous for having taken the extreme position that our mental concepts are real, and that the world we see only imperfectly approaches that reality. And yet, in an early dialogue—one that has been almost entirely neglected—Plato dissects a subtle nominalist argument. The labyrinthian difficulties of his dialogue *Cratylus* suggests the possibility that in his more famous later works, notably *The Republic*, Plato shifted to idealism either because he

despaired of the philosophical barrenness that would result from the anti-metaphysics suggested in *Cratylus* (a despair also evident in Wittgenstein's *Tractatus*), or because his later works were really public-relations tracts aimed at laypersons in order to convince them, in terms they were accustomed to hearing, to defer to real philosophers (make them philosopher-kings).

[FN16] At the turn of the century, leading writers who made important inroads into the insidious tautology of the ascription of Platonic meanings to words included Jeremy Bentham; J. DEWEY, RECONSTRUCTION IN PHILOSOPHY (1920); J. DEWEY, EXPERIENCE AND NATURE (1958); G. FREGE, PHILOSOPHICAL WRITINGS (M. Black & P.T. Geach eds. 1962); W. JAMES, PRAGMATISM (1907); and C.S. PEIRCE, VALUES IN A UNIVERSE OF CHANCE (1958). Frege's frustration with the problem led him to try to find the meanings of words in the sentences that contained them, and then reduce all sentences to analytic propositions; thus he set up a target for later twentieth-century logicians. Bentham said that the meaning of sentences began to be said to be determined by the meaning of the paragraphs in which the sentences were embedded, a method he called "paraphrasis." *See* W.V. QUINE, THEORIES AND THINGS 69-70 (1981). The ordinary-language philosophers down through the first half of the twentieth century carried this project further: the meaning of paragraphs depended upon whole texts, and finally the meaning of whole texts was determined by the meaning of the entire culture. This extension either proved determinism writ large or rendered it vacuous, depending on your perspective. Frege's works influenced Bertrand Russell. *See, e.g.*, B. RUSSELL, THE PROBLEMS OF PHILOSOPHY (1912); B. RUSSELL, OUR KNOWLEDGE OF THE EXTERNAL WORLD (1914); B. RUSSELL, THE ANALYSIS OF MIND (1921); B. RUSSELL, AN OUTLINE OF PHILOSOPHY (1927); B. RUSSELL, AN INQUIRY INTO MEANING AND TRUTH (1940). Russell's bibliography alone runs seventy-nine *pages*. *See* THE PHILOSOPHY OF BERTRAND RUSSELL 746-825 (P.A. Schilpp ed. 1944). Russell and Alfred North Whitehead attempted their own systematization of logic, B. RUSSELL & A.N. WHITEHEAD, PRINCIPIA MATHEMATICA (1913). Perhaps the best critique is Godel, *Russell's Mathematical Logic*, in THE PHILOSOPHY OF BERTRAND RUSSELL 125-53 (P.A. Schilpp ed. 1944). Russell's pupil, Ludwig Wittgenstein, proved that all metaphysical statements were intrinsically meaningless. L. WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (1922). Important contributions were made by the logicians of the Vienna Circle, notably John L. Austin, *see* J.L. AUSTIN, PHILOSOPHICAL PAPERS (3d ed. 1979), and Rudolf Carnap, *see, e.g.*, R. CARNAP, THE LOGICAL STRUCTURE OF THE WORLD & PSEUDOPROBLEMS IN PHILOSOPHY (R.A. George trans. 1967);R. CARNAP, MEANING AND NECESSITY (2d ed. 1956); R. CARNAP, THE LOGICAL SYNTAX OF LANGUAGE (1937). In his later years Carnap became critical of the phenomenological approach he had used in THE LOGICAL STRUCTURE OF THE WORLD. *See* The PHILOSOPHY OF RUDOLF CARNAP 16-20, 944-47 (P.A. Schilpp ed. 1963) (autobiography—reply to Nelson Goodman). The logical positivists added important elements to the critique of the Frege-Russell-Whitehead program, while Kurt Godel used that program to prove the indeterminacy of well-formed propositions within what had previously been considered to be logically tight systematizations. The standard exposition of Godel's 1931 paper, "On Formally Undecidable Propositions of Principia Mathematica and Related Systems," is E. NAGEL & J.R. NEWMAN, GODEL'S PROOF (1958); *see also* D.R. HOFSTADTER, GODEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID (1979). Alfred Tarski's disquotational theory of truth appeared to reduce problems of meaning to common sense (Tarski's disquotational formula says, for example, "snow is white' is true if snow is white'), Tarski, *The Semantic Conception of Truth*, 4 PHIL. & PHENOM. RES. 341 (1944); *see* M. BLACK, LANGUAGE AND PHILOSOPHY: STUDIES IN METHOD 91-107 (1949); M. DUMMETT, TRUTH AND

OTHER ENIGMAS (1978); D. DAVIDSON, TRUTH AND INTERPRETATION 23-54, 125-54 (1985). But C.I. Lewis undermined the common notion that a word "corresponds" to something in the real world by showing that locating or even pointing to any object presupposes a frame of reference. C.I. LEWIS, AN ANALYSIS OF KNOWLEDGE AND VALUATION 50-55 (1946). Since no frame of reference can be bounded, but rather must include the entire universe, every true statement must refer to the same thing, namely, the universe. Like the previously mentioned extension of meaning to include the entire culture, Lewis's extension of truth to include, vacuously, the universe, shows the inherent indeterminacy of words (whether or not they are embedded in texts).

The most significant work, in my view, was contributed in the second half of the twentieth century with the publication of (a) Wittgenstein's empiricist investigations into the utility of language; *see* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (Anscombe trans. 1953), plus Saul Kripke's important gloss on those views, *see* S.A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982); (b) Nelson Goodman's analysis of induction and counterfactuals, *see* N. GOODMAN, FACT, FICTION AND FORECAST (4th ed. 1983); N. GOODMAN, THE STRUCTURE OF APPEARANCE (3d ed. 1977) (contains extended analysis of Carnap's *The Logical Structure of the World*); and (c) Willard Van Orman Quine's demonstration of the impossibility of radical translation and (by implication) the impossibility of being certain about all translation and interpersonal "meanings"; *see* W.V. QUINE, WORD AND OBJECT (1960); W.V. QUINE, FROM A LOGICAL POINT OF VIEW (1964); W.V. QUINE, ONTOLOGICAL RELATIVITY AND OTHER ESSAYS (1969); W.V. QUINE & J.S. ULLIAN, THE WEB OF BELIEF (1970); W.V. QUINE, THEORIES AND THINGS (1981); W.V. QUINE, PURSUIT OF TRUTH (1990); *see also* L.E. HAHN & P.A. SCHILPP, THE PHILOSOPHY OF W.V. QUINE (1986) (contains twenty-four critical essays on Quine and his reply to each).

More recently, work in artificial intelligence has exemplified the theories of Quine, and in the process undermined the inherent-meaning ideas of Noam Chomsky; *see, e.g.*, N. CHOMSKY, CARTESIAN LINGUISTICS (1966). Chomsky, of course, held that there are deep rules of grammar, and not necessarily "meaning." Yet every example of forms of sentences he gives depends upon the meaning of the words in the sentence, and so I think that it is a very short step from claiming that there is an inherent grammar imprinted on our brains to saying that there are inherent meanings to words. Important writers in this vein are Marvin Minsky, Herbert Simon, and John Searle. *See* M. MINSKY, THE SOCIETY OF MIND (1986); H. SIMON, THE SCIENCES OF THE ARTIFICIAL (1969). John Searle offers a corrective to any easy equation of minds with machines, but the best AI researchers themselves eschew any such equation; *see* J. SEARLE, MINDS, BRAINS AND SCIENCE (1984). An instructive demonstration of how new insights of artificial intelligence changed an author's own theories of language can be found in Hilary Putnam's succession of books and articles on the "meaning of meaning." *See* H. PUTNAM, MIND, LANGUAGE AND REALITY 215-71, 362-85 (1975) (mental states are micro states of the brain); H. PUTNAM, MEANING AND THE MORAL SCIENCES (1978); H. PUTNAM, REASON, TRUTH AND HISTORY (1981); H. PUTNAM, THE MANY FACES OF REALISM (1987) (criticizing his former view that mental states are the functional states of an abstract digital computer); H. PUTNAM, REPRESENTATION AND REALITY (1988).

Finally, rounding out the circle is a sophisticated return to the Peirce-Dewey pragmatic view of language contained in scattered form in the writings of Richard Rorty. *See, e.g.*, R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 70-127 (1979) (extending Putnam's functionalism to a description of mental states); R. RORTY, CONSEQUENCES OF PRAGMATISM 72-89 (1982) (Dewey's

metaphysics); R. RORTY, CONTINGENCY, IRONY AND SOLIDARITY 3-22 (1989) (accepting Davidson's view that language does not intervene between self and reality). Reflective of many of these philosophical developments, and provocative in its own right, are the literary and legal criticisms of Stanley Fish. *See* S. FISH, IS THERE A TEXT IN THIS CLASS? (1980); S. FISH, DOING WHAT COMES NATURALLY (1989).

[FN17] L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 109 (1953).

[FN18] American Legal Realism finally petered out in the 1960s because, in my view, the realists failed to bequeath to us a viable legal research program. After a few decades of rather spare analysis, the academic law field was ripe for a new approach. Ronald Dworkin supplied it: theorizing with a vengeance! We have now had three decades of theory; nothing succeeds like excess. But theory has peaked and is rapidly plummeting. Fun though it is, it cannot solve any individual case—a proposition I believe I have shown in D'Amato, *Can Any Legal Theory Constrain Any Judicial Decision*? 43 U. MIAMI L. REV. 513 (1989).

But why should Indeterminacy last any longer? Why won't Indeterminacy simply have its day in the sun and then, like Legal Realism, fade away? I suggest that Indeterminacy is here to stay because there *is* now a viable research program—one that focuses on justice rather than on law. I deal with this matter briefly at the end of the present Essay.

Furthermore, Legal Realism itself may not have gone far enough in its heyday; it may not have had the courage of its own convictions when it came to dealing with the facts of cases. *See infra* notes 135-36.

[FN19] Professor Benson appears to believe that Indeterminacy is a passing phenomenon. His characterization of the Indeterminacy debate as the "TV Scramble Effect" is amusing even though it has no biographical application to me. I was brought up on "radio" (*i.e.*, a TV set with a permanently broken picture tube). The worlds I visualized as I listened every weekday after school to Jack Armstrong, Captain Midnight, and Tom Mix ("Shredded Rawlston for yore breakfast gives ya cowboy en-er-gy") were worlds unconstrained by pictures. I had no way then of knowing how different my visualization of these worlds was from those of other kids across the country listening to the same words. Occasional feedback was possible in those days. I remember my amazement once when I sent in two boxtops and twenty-five cents for Captain Midnight's Secret Compartment Ring. It had been billed as the most fantastic, magical ring in the known universe, capable of storing any message you desired. When I received it, I saw a pretty ordinary plastic ring with a really tiny secret compartment. The mind's recuperative power of reconceptualization, however, is strong. My initial deflationary experience was replaced by reinterpretation: the ring was pretty fantastic after all, and if it wasn't quite everything for me that it was for Captain Midnight, my ring was, after all, only a *copy* of his.

My main reason for believing that Indeterminacy is here to stay is that, this time around, we have a research program. (American Legal Realism led to some good empirical sociological research, but the large questions of law were not addressed.) Pragmatic Indeterminacy will begin its research program, I believe, by investigating how law is taught, how judges are selected, and what normative (moral, justice) arguments are the most persuasive.

[FN20] D'Amato, *Aspects of Deconstruction: The Failure of the Word "Bird,"* 84 Nw.U.L. Rev. 536 (1990)

[FN21] D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 Nw. U.L. Rev. 250 (1989)   It is possible that Professor Kress used a similar technique in defending his article on Legal Indeterminacy: he now says that he was focusing primarily on metaphysical indeterminacy and not epistemological indeterminacy, thus appearing to make a move similar to the bifurcation I invented in the text between formally rational and substantively rational. *See* Kress, *supra* note 8, at 138-39. *But see* Kress, *supra* note 9, at 332-33.

[FN22] For a real-world instance of the same temporal contextual shift, *see* D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 Wm. & Mary L. Rev. 329 (1991)(no one thirty years ago argued that pornography was political speech; today, radical feminists have convinced us that it is a core instance of political speech).

[FN23] D'Amato, *supra* note 18.

[FN24] Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values,* 72 Calif. L. Rev. 200, 204 (1984) (all federal courts for the year ending June 30, 1983).

[FN25] *See* Kress, *supra* note 8, at 136.

[FN26] Professor Kress concludes by saying "even if a dissenting argument fails to persuade in this case, it might well, with other factors, be decisive in some later case." Kress, *supra* note 8, at 136. Surely if the dissent is "decisive" in a later case, it is because the later court *says* that it is "decisive." The later court could equally well have said that, given the prior court's awareness of such a persuasive dissent, its decision to reject that dissent is a decision we must honor here in following the majority opinion.

[FN27] Even if a Justice believes she *was* persuaded by Holmes's dissent, it does not mean that she is an accurate reporter of her own mental processes. Because of the elusive way our minds work, it is possible for us to believe that we are persuaded by an argument when, in fact, the argument only served as an ex post facto rationalization of a decision we already had made. And if the "ex post facto rationalization" explanation is too strong, a weaker but roughly equivalent version of the same thing is the possibility that the Justice was already mentally predisposed to the view contrary to the precedent case, and when she read the Holmes dissent she discovered a "convincing" piece of rhetoric that she could cite in support of her mental predisposition.

[FN28] It is never necessary to change the decisional rule. The rule itself can always be restated to accommodate any new "application." *See* S. Kripke, Wittgenstein on Rules and Private Language (1982).

[FN29] Of course, a great deal of legal scholarship is devoted to criticizing judicial opinions on the basis that they departed from the *law*. One revolutionary aspect of Pragmatic Indeterminacy is the conclusion that all such scholarship is futile. It's just words chasing words.
    This is not to say that judicial decisions can't be criticized. Criticism from the standpoints of fairness, justice and morality is precisely what legal scholars ought to do. The criticism ideally

should show that the judge had a *choice* between two interpretations of existing law, but proceeded to make the choice that was more unfair to the losing side than it was fair to the winning side.

[FN30] Of course, even if the judge recognizes that whim enters into it, the litigants may not. Hence the judge, to avoid friction, delivers to the litigants the magisterially impartial opinion which they expect and want to hear, and which will tend to keep the losing party from complaining too much. In fact, litigants never get impartiality; they only get whim. The real task of the legal system is to place judges on the bench whose whim is reflexively attuned to considerations of justice.

[FN31] Even deep psychoanalysis may not uncover the sources of foundational attitudes. According to my colleague Arthur Jacobson, Freud was not seeking the *explanation* of human behavior but rather sought the kind of "explanation" that was startlingly new to the patient. The therapist could then use this apparent "explanation" as a tool in reorienting the patient. Freud was teaching the technique of psychoanalysis, rather than searching for the true motivations of human behavior. Yet Freud's own effectiveness as a teacher depended on creating the appearance of searching for objective behavioral truth.

[FN32]We have a naive belief that when a judge has an emotional response to words she will "recognize" her biases and "discount" them so that they do not prejudice her decisional processes. But *every word* we use in addressing a judge carries emotional freight. A judge cannot even resort to synonyms to express to herself my argument in more neutral garb, because all the synonyms she uses will have their own emotional connotations. Moreover, the very attempt to de-bias oneself may open up room for a deeper unnoticed bias. Suppose, for example, the judge says to herself, "No, not *Mussolini*—strike that, it's biased," nevertheless her own "command" to her mind to "strike that" may have the perverse result of convincing her that she has overcome the bias, while underneath her subconscious mind is whispering "Mussolini, Mussolini" with increasing persuasiveness.

[FN33] In a luncheon conversation, the topic of freedom of speech came up, and I used the term "chilling effect." A judge sitting at the table said, "I've always found that to be a ridiculous idea. There is no chilling effect." Surely if I were arguing a free-speech case with that judge on the bench, it would be disastrous if I used the term "chilling effect" in my argument. But how would I have known this, if not for the happenstance of a luncheon conversation?

[FN34] W.V. QUINE, WORD AND OBJECT 8 (1960).

[FN35] Kress, *supra* note 8, at 134.

[FN36] To "define" a concept is to specify its meaning; the true Indeterminist attacks the notion that words can have definably specific, bounded meanings. In particular, the word "indeterminate" cannot have a specific, bounded meaning.

[FN37] Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 297 (1989)

[FN38] Professor Kress believes there is only a "modest number" of indeterminate cases. Kress, *supra* note 8, at 141.

[FN39] Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

[FN40] "The pervasiveness of easy cases undercuts critical scholars' claim of radical indeterminacy. Preoccupation with controversial appellate and Supreme Court cases engenders the illusion of pervasive indeterminacy. Focusing instead on everyday acts governed by law reveals the pervasiveness of determinate and correct legal outcomes." Kress, *supra* note 39, at 296. His subsequent "examples" of "easy cases" are not "cases" at all: they are mere events lacking the element of conflicting claims. *See id.* at 296-97.

[FN41] Schauer, *supra* note 39, at 409.

[FN42] *Id.* at 411. Since Professor Schauer has not found a single example of an easy case, for him to say that there are "few, if any" appears to be a literally true but misleading rhetorical device.

[FN43] The following kind of "easy" case is imaginable at the appellate level. The appellate court states the "facts" of the case in legally conclusory language (*e.g.*, "the parties entered into a contract . . ." or "the defendant negligently drove his car . . ."). It is no surprise when the court reaches a determinate legal conclusion that logically follows from such statements of fact, because the entire construction is a tautology. The indeterminacy in the case inheres in the opportunity the court had of stating the same facts in *different* legally conclusory language or in selecting *different* facts from the trial record. (The argument in this footnote assumes what I call later the Fundamental Formalist Postulate. *See infra* notes 73-74 and accompanying text. This is a "strong" assumption in favor of the anti-Indeterminists.)

[FN44] The fact that a court finds a Rule 11 violation does not necessarily mean that the attorney's position is wholly without merit; the court's view is not necessarily objective. For a particularly egregious example of a Rule 11 citation where the sanctioned attorney had a sound legal position, *see* Santany v. Reagan, 886 F.2d 438 (D.C. Cir. 1989). The plaintiffs sued the heads of government of the United States and Great Britain for violating the laws of war in ordering the dropping of bombs on civilian areas in Libya and killing hundreds of innocent civilians. The Court of Appeals found the lawsuit so frivolous that it sanctioned the attorneys under Rule 11. But a good argument can be made on the merits that the action was a war crime and that the Nuremberg war-crime principles apply as part of American law. Apparently the judges were offended that heads of state were accused in a court of committing war crimes, for they paid no attention to the merits of the case. For an analysis and criticism, see D'Amato, *The Imposition of Attorney Sanctions for Claims Arising from the U.S. Air Raid on Libya*, 84 AM. J. INT'L. L. 705 (1990)

[FN45] Occasionally the State, as appellee, fails to show up or present any arguments. The state in effect is saying, "the appellant's case is so frivolous that the State does not want to waste money in arguing it." I've witnessed cases like this; sometimes the appellant wins, and

sometimes the State wins (with the court supplying the necessary arguments for the State).

[FN46] Schauer, *supra* note 39, at 411 (*citing* J. FRANK, COURTS ON TRIAL (1949)). Judge Frank elaborated on this point in his book, and concluded that in any given trial there are so many judgment calls about the facts, so many conflicting versions of the facts, and so much evidence that rightly or wrongly is excluded by virtue of the rules of evidence, that the trial judge's decision is by no means constrained by the "facts" of the case. Professor Hegland says he sat in on a trial this summer, and found that many of the court's rulings on evidence were constrained by the law of evidence. Hegland, *supra* note 6, at 131. I suspect that most jurors probably share Professor Hegland's impression. A trial is, after all these centuries, a fairly polished public performance. Rules are invoked that seem to justify this and constrain that. Professor Hegland was impressed by the solemnity of this verbal legerdemain. He writes, "The State wanted to introduce grisly post-autopsy pictures. Again the law was clear; it couldn't." *Id*. Surely Professor Hegland must realize that if the trial judge wanted the jury to see the photos, he could have said that they were not "grisly." Or he could have shown them to the jury with an admonition that the jurors should not allow their emotional reactions to the pictures to interfere with their judgment. And if we go "outside" the "boundaries" of the trial, there are other possibilities. I know of one case where the coroner's photos were excluded. The prosecutor early in the morning placed the photos on the table in front of the jury box. When the jurors came in, they looked at the photos. The prosecutor entered the court, made a show of searching his briefcase for the photos, then suddenly "realized" that they might be on the juror table. He went over there and grabbed them up. If law is the science of predicting what courts will do, we ignore at our peril the things that go on at trial that might not be readily apparent to first-time observers.

[FN47] What about summary judgments? These range from highly "litigated" cases (interrogatories, depositions, affidavits), which are subject to the same infirmities that Judge Frank noticed about trials, to summary dismissals of badly pleaded complaints, which can be analyzed similarly to the discussion of "tautologies," *infra* note 64 and accompanying text.

[FN48] Schauer, *supra* note 39, at 411.

[FN49] *See* Winter, *supra* notes 1, 3 and accompanying text.

[FN50] Schauer, *supra* note 39, at 411.

[FN51] *See supra* note 40.

[FN52] R. POSNER, THE PROBLEMS OF JURISPRUDENCE 453 (1990).

[FN53] Judge Posner defends economic analysis of law on other grounds. *See id*. at 327-29, 362-70, 440-44. He also has a few words of defense against one glancing attack on Formalist economic determinism. *Id*. at 257-59. But the more serious critics, and their criticisms, are not confronted.

[FN54] If we think of all the people who cannot afford litigation, and all the legal situations that

may be frustrating for them, we might be talking about a majority of all potential cases that do not make it into a courtroom. Those cases may be exceptionally difficult. If you have ever listened to a divorce dispute from both sides, you will know what I mean. I have heard a number of these stories, and ended up with the absurd conviction that the two people I was listening to could not possibly have lived together. Their versions of their marriage were so divergent, and yet convincing, that they could not possibly be talking about each other. And yet they were. How could "facts" such as these possibly be established by courtroom testimony? The answer is that the facts are not established; the judge quickly becomes bored and decides that one party is telling the truth and the other is lying. Then the judge only has to pay attention to the truth-teller. But in fact, it is almost impossible that one side is telling the entire truth and the other side is entirely lying. There is probably more commonality of fact in a multi-million dollar antitrust case than there is in a thousand-dollar divorce case. If the same amount of money were available for legal fees in a divorce case as in an antitrust case, major law firms could bill Mr. and Mrs. Kramer millions of dollars litigating *Kramer v. Kramer*. Because no such funds are available, those cases are not the subject of expensive litigation. As a result, law students are not interested in them. Legal commentators do not think they are "real." The major law firms are not interested in hiring students who profess an interest in family law. But none of that means that *Kramer v. Kramer* is an "easy case."

[FN55] A general contractor friend of mine says that in his home state, Connecticut, general contractors never sue suppliers or customers if the damages are less than $10,000, because on the average the ultimate legal fees exceed this amount.

 If the vast majority of potential lawsuits involve amounts smaller than $10,000—a reasonable assumption—then even though a number of these are litigated in regular courts and another number are brought to small claims court, surely a large number are not litigated at all. How often have people said, "the lawyer asked for a larger retainer than the case was worth"?

[FN56] *See generally* Levinson, *Frivolous Cases: Do Lawyers Really Know Anything At All*?, 24 OSGOODE HALL L.J. 353, 354-58 (1986).

[FN57] I once litigated an "impossible" case where the defendant was admittedly *guilty* of two traffic violations and yet the court accepted my argument and dismissed one count. *See* A. D'AMATO, HOW TO UNDERSTAND THE LAW 74-75 (1989). After the case was over, I realized that if I had been more alert, I might have gotten the second count dismissed by an extension of the logic of my first argument.

[FN58] D'Amato, *supra* note 21.

[FN59] D'Amato, *supra* note 20.

[FN60] A full-fledged Indeterminist would not even call them "exceptions." The word "exception" presupposes a given context. But as we imagine other contexts, what would have seemed "exceptional" can well appear to be normal. *See* D'Amato, *supra* note 21.

[FN61] I made this argument in D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV.1, 10 (1983)

[FN62] *See* D'Amato, *supra* note 21, at 255-56.

[FN63] Any reason is apt to strike somebody as a good reason, starting with the person who gives that reason.

[FN64] This is akin to the Singer-Kress rule "the plaintiff always loses," which I think Professor Kress in his critique has conceded cannot be applied to any legal system on earth (although he reserves its possible applicability to angels—a reservation I do not strenuously contest). *See* Kress, *supra* note 8, at 135 n.7.

[FN65] Levinson, *supra* note 56, at 372 (*quoting* Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 57 (1976)). Professor Levinson struggles gamely with the dual difficulty of defining what a "frivolous" case is and his acceptance that some cases are in fact "frivolous" (from the point of view of Rule 11 sanctions). I suggest that the cases he actually finds frivolous are those *not* "contrary to law" but those devoid of any claim of justice.

[FN66] *See supra* notes 39-48 and accompanying text; D'Amato, *supra* note 21, at 255-56.

[FN67] That is, nothing in "law" as authoritative words written in books and promulgated by legislatures. But if we import morality into law and make it normative, then the situation changes. Some case results would definitely be unfair. "Fairness" is, however, only contingently related to what the law provides; hence, a conclusion of "unfairness" must go beyond the verbal provisions of the law.

[FN68] The important word here is "law." Certainly considerations of justice will usually favor one side over the other in a given case.
    For those who would argue that if I regard "law" as indeterminate I must also regard "justice" as indeterminate, my capsule reply here is that the two are not the same because "justice" is not a matter of words—it is a matter of similarities (treating like cases alike). Whether one case is "like" another case can *only* be a normative matter dependent upon our judgment about the similarities between the cases. It can *never* be a matter that can be conclusively decided by the words of the law—even using all the words in all the law books in all the libraries of the jurisdiction—for the Pragmatic Indeterminacy considerations I have adduced in this Article.

[FN69] Of course, the idea that legal language serves a retrieval function may be of small comfort to Formalists who have a grander view of law as a constraint upon judicial decisionmaking.

[FN70] *See, e.g.*, D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes*? 75 VA.L.REV.561 (1989)

[FN71] It is an interesting question whether Formalism thus defined is compatible with Professor Kress's "moderate indeterminacy." How can a Formalist system constrain judges in some cases

but not in others? Where does Professor Kress find justification, within Formalism, for saying that some cases are nevertheless indeterminate? He could find that justification by saying that the indeterminate cases are Godelian undecideables, but he rejects that approach in his most recent claim that legal English is dissimilar to mathematics. *See* Kress, *supra* note 8, at 144-45. I am left with the tentative and unsettling conclusion that Professor Kress is more of a Pragmatic Indeterminist than I am, despite his protestations to the contrary.

[FN72] I am omitting here a step in the argument which would take another article at least to demonstrate, namely, that legal Formalists must to some extent be legal positivists. For example, regardless of the noises Dworkin makes from time to time that seem to place him in a natural-law camp, down deep he is a positivist. His Judge Hercules may ultimately rely on the "best theory" to decide a hard case, but that theory can only be found in the *legal materials*—that is, it must exist in the form of words in some book or other. At this most fundamental level, the positivist and the Formalist both purport to find meaning in the authoritative words of the law. For a schema locating Dworkin within positivism, *see* D'Amato, *Lon Fuller and Substantive Natural Law*, 26 AM. J. JURIS. 202 (1981). Dworkin has transmuted his view that "law" is something apart from judges that constrains the decisions they make, into his "law as integrity" theory, a sort of right-answer thesis writ large. *See* R. DWORKIN, LAW'S EMPIRE 239-413 (1986) (discussing Judge Hercules).

[FN73] *Hart, Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-08 (1958) Of course, I am paraphrasing Hart in my statement of this postulate. In retrospect, it is clear that both Bentham and Austin assumed that words had core meanings. For a discussion of the command theory of Bentham and Austin and its relation to core meanings, *see* A. D'AMATO, JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW 118-29 (1984).

[FN74] Of course, positivists agree that if your conduct falls outside the core of the rule, then law does not constrain your conduct. I have previously argued that the "line" between the "core" and the "penumbra" is itself inherently indeterminate. *See id*. at 136-39.

[FN75] No legal theorist needs to claim that judges in fact will decide thus-and-so. All that Formalism requires is a theory that can determine whether a judge is correct or incorrect in deciding any given case. A condition of a theory doing this work is, I argue, the FFP.

[FN76] *See supra* notes 35-70 and accompanying text.

[FN77] Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958)

[FN78] Professor Kress criticizes my application of Godel and of Skolem-Lowenheim to law, saying that their results depend upon the precision of the formal languages in which they have been proven. Kress, *supra* note 8, at 144-45. He seems to forget that I am *assuming* that English is a precise language in order to criticize the Formalist theory. My criticism of Formalism accepts FFP. If English is not precise, then Formalism is out the window and we don't need Godel and Skolem-Lowenheim; only Indeterminacy remains. But if English is precise under the FFP, the Godel and Skolem-Lowenheim results are applicable with suitable modifications to the

language of law. Formalist English is an a fortiori case from mathematics, as Raymond Smullyan has shown. *See* R. SMULLYAN, FOREVER UNDECIDED 173-80 (1987).

[FN79] A. D'AMATO, JURISPRUDENCE, *supra* note 73, at 132-39; D'Amato, *supra* note 70, at 595-602.

[FN80] True mathematical undecidables are not easy to find, and there is always the possibility that they will someday be proved, *e.g.*, the four-color mapping problem (recently proved by computer). But in law, if we peruse the most recent 1,000 cases on free exercise of religion under the first amendment, for example, I would not be surprised if at the very least 999 of them are Godelian undecidables.

I am talking only of discovered mathematical undecideables. Theoretically, it follows from Godel's proof that there are an infinite number of undecideable mathematical statements, hard though they may be to discover. But then there are an infinite number of legal undecideables as well. There is no point in dealing with magnitude comparisons of infinities (Cantor is inappropriate here). It is more helpful to think in terms of densities. Legal undecideables are demonstrably denser with respect to all the legal propositions we know than discovered mathematical undecideables are dense with respect to all the mathematical theorems that we know.

[FN81] This is Goodman's famous showing that all emeralds examined before this moment are "green" and all subsequent emeralds are "grue," with the latter term applying to all things previously examined that are green and all other things just in case they are blue. Then a prediction that all future emeralds will be "grue" is based on the same evidence as a prediction that all future emeralds will be "green." *See* N. GOODMAN, FACT, FICTION, AND FORECAST 72-75 (4th ed. 1983).

[FN82] L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 201-42 (1953).

[FN83] S.A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982); *see also* Landers, *Wittgenstein, Realism and CLS: Undermining Rule Scepticism,* 9 LAW & PHIL.177 (1990); Yablon, *Law and Metaphysics,* 96 YALE L.J. 316 (1987). Professor Landers, with some support in Wittgenstein (who is not always consistent), seems to regard "following a rule" as an elementary proposition exemplified by the practice and behavior of the rule-follower. But Kripke was interested in determining which rule the rule-follower was purportedly following. It is that skeptical challenge to the notion of "following a rule" that Landers sidesteps.

[FN84] "Quaddition" leads to exactly the same results in every single case of addition in that person's life except when 68 and 57 are added. Since she never before added those two numbers, no one can tell on the basis of all the numbers she *did* add previously that her operative theory was "addition" and not "quaddition," since both theories up to now have generated the same results. In short, complete inductive evidence is not enough to determine which rule she is following in the next case.

Nor is "quaddition" dismissible on a ground that Professor Kress prefers—that it is a nonstandard theory. After all, Einstein's theory of special relativity was definitely nonstandard and even "weird" compared to Newton's.

Suppose we add 10 plus 11 and get 101 and call it "quaddition." Might one object that this is a "weird" type of mathematics and hence is not allowable under the formal rules of mathematics? The problem is that we do not know in advance how to define weirdness. In this particular case, 10 plus 11 is exactly equal to 101 under generally accepted rules of mathematics so long as we are operating within the binary number system, which is as equally permissible a system as is the decimal system. In fact, the binary system probably is used today with far more frequency than the decimal system, since computers and hand-calculators all use the binary system. What is "weird" in this case depends on where you look for the evidence of usage.

[FN85] Yet it is still possible to make such a claim. "Quaddition" can be defined as "addition" except when 68 and 57 are added anytime after January 1, 1985.

Of course the example is unusual. We should instead ask: Why would anyone want to get the total 2,381 instead of the total 125? Once we ask *that* question, furnishing an appropriate context may make the example anything but weird. If the adder's circumstances or rational purposes are relevantly different from her purposes twenty years ago, she might very well wish to employ a different mathematics, such as a mathematics to a different base or a modular arithmetic. In that case, the *numerals* 57 and 68, and the sign +, would have a different interpretation within the new mathematical system, one that would suit her present purposes. The total that she reaches, namely 2,381, would thus be more useful to her than the erroneous total 125.

[FN86] In some cases, the time element is explicit. *E.g*., what was not "cruel and unusual punishment" two hundred years ago may be "cruel and unusual" today by virtue of the contemporaneousness built into the notion of "unusual." For an example that challenges the validity of precedents from the standpoint of temporal analysis, *see* D'Amato, L*egal Aspects of the French Nuclear Tests*, 61 AM. J. INT'L L. 66 (1967) (radioactive build-up from nuclear tests in the South Pacific render subsequent tests more dangerous than previous ones and thus the precedent of legality of prior tests should not be conclusive).

[FN87] Professor Kress might reply to this argument (as he does specifically to my Lowenheim-Skolem analogy) that "the interpretations which it provides are generally nonstandard. We want to know whether there are multiple, equally good intended interpretations." Kress, *supra* note 8, at 145. Of course, this criticism begs the question. What is "nonstandard"? What is "equally good"? What, indeed, is "intended"? Take the arithmetic progression: 1, 2, 3. Is the next term 4 or is it 5? It is 4 if we happen to be denumerating the ordinary numbers, it is 5 if we are denumerating the prime numbers. Or consider 2, 4, 6. What is the next term? What is the "standard" interpretation? What is the "intended" one? Is it 8, or is it 10? How can we know? 8 is the next term if we happen to be adding 2 to each term; 10 is the next term if we are adding the two preceding terms. Is home-grown home-consumed wheat part of interstate commerce? The answer is either "No, because it did not move in interstate commerce," or "Yes, because its addition to the nation's supply of wheat means that some other wheat failed to move in interstate commerce." Is the answer "No" the "standard" interpretation and "Yes" the nonstandard one? Who is to know? Was "Yes" nonstandard just before the Supreme Court's decision in *Wickard v. Filburn,* 317 U.S. 111 (1942), and standard right after it? For further discussion of the non-determinability of mathematical sequences and the Schauer-Tushnet debate, *see* D'Amato, *supra* note 70, at 597 n.96.

[FN88] The opinions of Justice Scalia urging courts not to use legislative history is in my view a welcome development from the perspective of reducing the legal fees that otherwise would be run up by lawyers on both sides poring over volumes of legislative history. But Justice Scalia has no doctrinal justification for his stance; his preference for "plain meaning" of statutes is no less indeterminate than recourse to legislative history. He has simply traded one indeterminacy for another. The trade is desirable only to the extent that it may reduce transaction costs (legal fees).

[FN89] Professor Kress appears to lean toward the view that the availability to everyone of all legally relevant evidence guarantees that most cases are not indeterminate and hence the legal system is legitimate. *See* Kress, *supra* note 8, at 141. Perhaps he is only saying that such availability guarantees metaphysical determinism, but even then his conclusion might turn on what he means by "relevant evidence" and who decides what is "relevant." But if he is saying that because the law books are open to lawyers on both sides of a case as well as to the judge, it follows that a decision for one side can be recognizably "better" than another, then I disagree with him totally. Our disagreement may turn on what we mean by "better." Professor Kress appears to mean *logically better*, but if so, he contradicts the entire thrust of his criticism of me that I am not entitled to use Skolem-Lowenheim for imprecise languages such as legal English. Or he may mean *morally better,* but then he has imported an ad hoc normative element into his hitherto entirely descriptive account of "legally relevant evidence" as the words in all the law books, and is in fact moving, albeit ambiguously, toward my own position.

[FN90] For consistency we need a set of primary rules plus a set of tie-breaker rules (secondary rules such as "if two statutes conflict, the federal statute is supreme over the state statute; if both are federal statutes, the more recently enacted one wins"). Fuller's Godelian result is compatible with legal consistency.

[FN91] In particular, ontological indifference is fully proven by a combination of the theorems of Lowenheim, Skolem, Hilbert, and Bernays. For a clear exposition, see W.V. QUINE, METHODS OF LOGIC 209-12 (4th ed. 1982). Skolem extended Lowenheim's theory to infinite classes of schemata. Skolem's extension is important for law, for the number of constructible sentences ("rules" of law) is infinite. For further explanation of the Skolem-Lowenheim results and citations, *see* D'Amato, *supra* note 70, at 597 n.96, 599 n.102.

Another way to conceptualize one of the Skolem-Lowenheim results is suggested by Felix Cohen:

> Elementary logic teaches us that every legal decision (particular proposition) can be subsumed under an indefinite number of different general rules, just as an indefinite number of different curves may be traced through any point or finite collection of points. Every decision is a choice between different rules which logically fit all past decisions but logically dictate different results in the instant case.

F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 35-36 (1933). Consider a number of judicial precedents as represented by points on a graph. An infinite number of lines can be drawn—some curved, some straight—that connect all these points to each other. The infinite number of lines represent different legal theories of the cases. But suppose it is objected that the "best" theory is the "straightest" line that connects all the points. Skolem and Lowenheim proved algebraically the following proposition which I represent geometrically: that no matter where you place the points on a piece of paper, an infinite number of *different* yet *perfectly straight* lines can be used to connect the points! To do this, all you have to do is to use appropriate *graphs*. For example, logarithmic graph paper would make some lines come out straight that would come out curved

on "regular" graph paper. By suitable choice of graphs, any curved line on one type of graph paper can be transformed into a straight line on another type of graph paper. The judge, writing an opinion, can select the background considerations that best frame the theory the judge uses to connect the precedents. This is the same as choosing the appropriate graph paper.

Professor Kress asserts that my use of the Lowenheim-Skolem theorem is inapplicable to English because English is a second-order, and therefore incomplete, language. Kress, *supra* note 8, at 144-45. But surely an incomplete language is an a fortiori case from a complete language; if something is true of mathematics, it is true of English given the FFP. Only trivially can Lowenheim-Skolem or Godel be true of English and not true of mathematics. That occurs only if English turns out to be self-contradictory. But if English is self-contradictory, then any result reached by a court is "true" and hence the Pragmatic Indeterminist thesis that law does not constrain particular results would be validated anyway.

[FN92] A *described* fact situation either "falls within" a rule tautologically (because the description of the facts tracks the rule) or can be *restated in greater contextual richness* so that reasonable people can differ whether it "falls within" the stated rule.

Professor Kress doubts that the Lowenheim-Skolem theorem applies to law. If it applies to mathematics, then as I argued above, *supra* note 91, it applies to law *given the FFP*. Although Professor Kress is technically correct in saying that Lowenheim-Skolem (as well as Godel-Church) were designed to apply to formal systems, my position is that either they apply a fortiori to non-formal systems such as law, or if they don't apply because law is a non-formal system, then for that reason the Indeterminacy thesis is proven.

Professor Kress would be right if law is partially formal and partially indeterminate. But such a position requires the existence of some provably easy cases. For reasons given earlier in this Article, I assert that there is not even one easy case. Moreover, Professor Kress's assertion that law is partially formal and partially indeterminate—without specifying where the boundaries between the two may be located—may itself be unstable. *See infra* note 105.

Professor Kress further objects that the Lowenheim-Skolem interpretations "are generally non-standard." Kress, *supra* note 8, at 145. But how does anyone *know* that a given interpretation is a "standard" one? Suppose 19 out of 20 lawyers interpret a given rule of law a certain way; is their interpretation "standard"? What if the first court that is called upon to apply that rule agrees with the one lawyer out of the 20 who had the "nonstandard" interpretation? Doesn't the court's *act of interpretation* itself *create* a standard? Of course, if a court can create a standard, then whatever standard previously existed was illusory. This is my *Wickard v. Filburn* example, *supra* note 87.

[FN93] Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decision,* 72 CALIF. L. REV. 369 (1984)

[FN94] Professor Kress demonstrated one possibility where an outside decision that is part of a formally consistent chain would have a *decisive* impact on the decision in the instant case.

An attempt by S.L. Hurley to avoid Professor Kress's intervening-cases thesis only results in restating it. *See* Hurley, *Coherence, Hypothetical Cases, and Precedent,* 10 OXFORD J. LEGAL STUD. 221 (1990). Ms. Hurley argues that when the intervening decision incorporates extra-judicial changes in settled law, adopting it is simply a matter of prospective-only adjudication.

Id. at 244. But if we unpack the phrase "prospective-only" we find an unscathed recapitulation of everything Professor Kress successfully attacked.

[FN95] It is remarkable that Professor Kress's partial defense of formalism indicates that he has not fully assimilated the lesson of his own theory.

[FN96] D'Amato, *supra* note 61.

[FN97] *Id*. at 29.

[FN98] Such accretions can just as easily confuse the law as clarify it, and may also lend credibility to inconsistent interpretations. *Id*. at 9. An example is the Code of Internal Revenue, which has been repatched and replugged so much that it may have exceeded the point of comprehensibility even for the Internal Revenue Service. *See* D'Amato, *supra* note 70, at 584-87.

    Moreover, no matter how fast new rules and regulations are generated, the pace of real-world change outstrips the rules. "The complexity and variety of new types of personal and commercial interactions due to population growth, increasing education, and technological innovation may provide many new possibilities for legal disputes that fall outside reported precedents. Additionally, people may readjust their activity because of a newly announced rule. . . . A new rule may indeed make a particular legal niche predictable, but perhaps few disputes will again present the sort of problem of which the rule was intended to dispose." D'Amato, *supra* note 61, at 10.

[FN99] *See* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-13 (1979); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1700 (1976)

[FN100] *See, e.g*., D'Amato, *supra* note 18.

[FN101] The particular application of Professor Kennedy's fundamental contradiction to any given case can itself raise more theoretical problems than it solves. For instance, *P* has been hit by *D*'s car and sues *D* in tort for damages. Is *P* acting selfishly in suing *D*? Or is *P* acting altruistically—to deter drivers like *D* from driving negligently? If we cannot decide whether *P* is motivated by altruism or by selfishness or by some unspecified combination of the two in this elementary case, how can the "fundamental contradiction" theory help us in general? Professor Kennedy himself recognized the indeterminacy in his own notion of "fundamental contradiction," but apparently did not see how that indeterminacy defeated his claim that the fundamental contradiction produced indeterminacy.

[FN102] For an earlier critique of Professor Kennedy's "fundamental contradiction" and Professor Roberto Unger's use of the same concept, *see* D'Amato, *Whither Jurisprudence*?, 6 CARDOZO L. REV. 971, 975-80 (1985).

[FN103] Recall that all of these demonstrations accept the FFP. If FFP is rejected, as I believe it should be epistemologically, then Formalism fails conclusively.

[FN104] The Pragmatic Indeterminist does not necessarily have to assert that words *lack* determinate core meanings—for that would be an absolute claim. Rather, it is sufficient for a Pragmatic Indeterminist to assert that there can be no determinate evidence that one person's "core meaning" for a given word is the same as another person's, or that one person's "core meaning" in a given context does not vary from that same person's "core meaning" in a different context.

[FN105] The conduct in question can never be *bounded*. Hence it is inevitably a matter of interpretation whether real-world conduct "falls within" the meaning of any word or phrase, because the decision-maker must arbitrarily exclude extensions of that conduct that she considers irrelevant. The judgment of relevancy—critical to *all* legal determinations—thus begs the question. *Cf.* C.I. Lewis's demonstration of the failure of the correspondence theory of meaning, *supra* note 16. On the arbitrariness of frames of reference in criminal adjudication, see Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

   Of course, I am not asserting that everyone disagrees about the meaning of every word. There may appear to be a considerable degree of agreement on what a "tree" or a "book" is— although marginal cases can be hotly disputed—and a much lesser degree of agreement on the meaning of "due process of law" or "unreasonable search and seizure." But it is constantly surprising that when you get down to specific contested cases in a courtroom, opposing parties often seem to attribute totally different meanings and understandings to rather ordinary contractual words that are in dispute.

   Meanings can also change dramatically depending on the tone and tenor of the spoken word. Trial transcripts are notoriously defective in their inability to capture the emphasis that witnesses put on the words they utter. Consider the optimistic statement of Dr. Pangloss: "This is the best of all possible worlds!" Then consider how a pessimist would say it: "*This* is the *best* of all possible worlds!" meaning: not only is life terrible, but on top of it, all the other possible worlds are worse than ours! *See* D. C. DENNETT, ELBOW ROOM 144 (1984).

[FN106] I omit here Professor Kress's elaborate discussion of the relation between metaphysical and epistemological indeterminacy. He argues (correctly in my view) that epistemological determinacy usually presupposes metaphysical determinacy. Kress, *supra* note 8, at 138-39. But he errs (in my view) in implicitly suggesting that epistemological indeterminacy presupposes metaphysical determinacy. There is no reason why it should, Jeremy Bentham to the contrary notwithstanding. Because Professor Kress assumes FFP and its consequences (easy cases, right answers, better arguments), he disables himself from being able to describe epistemological indeterminacy, much less derive from it metaphysical determinacy.

[FN107] A. D'AMATO, JURISPRUDENCE, *supra* note 73, at 21-34 (subjective probability).

[FN108] The word "anarchic" might be substituted for "chaotic," but as Professor Jaffee pointed out when he read a draft of this Article, a Kropotkinian anarchy is a possible kind of non-chaotic social system. I would nevertheless argue that even in such a system there would be "lawyers"— perhaps using a different term because there would be no recognition of formal "law." These "lawyers" would be paid predictors of what decision-makers will decide, and their efficacy will

depend upon the regularity and predictability of the decision-makers' decisions. But irrespective of the system, the ability of lawyers to assign a probability between 0 and 1 to judicial outcomes of present controversies is, I submit, the difference between law and chaos. If courts behaved randomly, then we would not have a legal system—as I argued in D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 Nw. U.L.REV. 113 (1990)

[FN109] Some Formalists say that law works because new cases are decided consistently with precedents. They offer as proof of this proposition the fact that the new cases do not reject the precedential law. Of course, all they have shown is that present judges are adept at repeating the words and phrases of the precedents. The consistency of a set of law reports over time has only literary significance; it has nothing to do with the real predicaments of real people in the real world.

[FN110] *See* D'Amato, *Self-Regulation of Judicial Misconduct Could Be Mis-Regulation*, 89 MICH. L. REV. (1990).

[FN111] Comparative law scholars familiar with European decisions may recognize an element of truth in this scenario. Sometimes the judicial rationales explicating "the law" appear to be free-floating boilerplate opinions unrelated to the facts of the case at hand (except for an occasional "fill-in-the-blanks" kind of reference to the instant case).

[FN112] It is an example of the Lowenheim-Skolem demonstration that ontology is indifferent to any formal system. *See supra* note 91 and accompanying text.

[FN113] This is the Holmes plus Llewellyn prediction theory. *See* A. D'AMATO, JURISPRUDENCE, *supra* note 73, at 19.

[FN114] *Id*. at 23-28.

[FN115] Of course, this does not guarantee that judges will themselves decide cases according to the same tenets of similarity. But as I have argued previously, judges must to a large extent strive to complete the predictability chain that lawyers initiate. If judges did not do this, then legal advice wouldn't work, law wouldn't work, and the judges themselves would soon be out of business. *See* A. D'AMATO, JURISPRUDENCE, *supra* note 73, at 26-30.

 Note that this idea of similarity is *primitive*. It does not depend upon any *theory* about law, upon any *policy* about judicial decisionmaking, nor even upon language (except to the extent that language helps us in the communication process—soundless movies could do the same thing though less efficiently in most cases). My colleague Mark Grady analyzes tort law along these lines. *See* Grady, A Theory of Precedent and Legal Evolution (faculty paper presented to Northwestern faculty seminar) (copy on file with Northwestern University Law Review).

[FN116] An infant hears the word "mom" and soon begins to recognize its referent. In what sense is the infant employing a preverbal concept of similarity? The infant has no idea of distance; his mother's face thus appears to him to get larger until it fills his entire vision when in fact she is only moving her face close to his. He must therefore decide at some point that the smaller face is similar to the big one until he realizes that the word he hears—"mom"—refers to

the same face. Also, when his mother turns her face, the infant sees a different face that has some elements similar to the previous one. Eventually he learns that these several similar faces are the same face. Further, the infant has to learn to separate his mother's face from the crib, the rest of the room, and his own body; these latter are dissimilar to the face. Finally, the infant sees other people's faces. When he calls them "mom," he is indicating that he has learned an important similarity—that of one face to another. At this point the infant may think that "mom" means what we call "face." When he later learns that the other faces he sees have other names and are not called "mom," he has learned important differences within the similarities.

[FN117] For a related analysis of "contract," *see* A. D'AMATO, JURISPRUDENCE, *supra* note 73, at 66-70.

[FN118] How can we account for this mental ability? Let me suggest the following. In the billions of years it took to evolve a human being with a mind, the mind that evolved was equipped for survival in this world. If a mind had evolved that could pass memories (information) to the next generation, then soon the mind would be too big for the body to support, because the data bank would be enormous. Instead, an entirely different kind of mind evolved—a learning machine built on principles of economy. Our minds leap immediately to generalizations based upon our observations of similarity. This is the most efficient form of learning machine. It ignores slight differences between objects and instead focuses on their similarities in order to make generalizations. These generalizations have equipped us for survival. (If they had not equipped us for survival, we wouldn't be here. Moreover, if the external world was not *generalizable*, then also we wouldn't be here.) Hence, I would conclude that we have evolved a mind that is pre-wired to notice *similarities* in the external environment and make generalizations.

　　Yet once you brood about it, a "similarity" is a strange thing. Logically speaking, everything in the world is at once similar and dissimilar to everything else. If our world were more *random* than it is, then perhaps similarity-recognition would be useless and our minds wouldn't have evolved it. Perhaps all we can say is that our world does exhibit gross regularities, and that our minds evolved in such a way as to enable us to survive in such a world by recognizing gross similarities.

[FN119] R. CARNAP, THE LOGICAL STRUCTURE OF THE WORLD: PSEUDOPROBLEMS IN PHILOSOPHY (R.A. George trans. 1967). A brilliant, extended commentary on Carnap's work is N. GOODMAN, THE STRUCTURE OF APPEARANCE 110-89 (3d ed. 1977). For Carnap's brief reply to Goodman, see THE PHILOSOPHY OF RUDOLF CARNAP 944-47 (P.A. Schilpp ed. 1963).

[FN120] Sections 67 to 93 of Carnap's book contain an informal account of his system, whereas §§ 108 to 120 present a formal statement of it. The erleb (abbreviation for *elementarerlebnisse*) is presented in § 67 and formalized in § 109. If life were a succession of unrelated erlebs, we would not know that we were alive. The fact is that each erleb can be related to preceding erlebs by a "Part Identity" (§ 76) or "Part Similarity" (§ 77) relationship. Thus, to continue the example given in note 116, supra, when the mother turns her head to the side, the infant sees a face being replaced by an object that is in part *similar* to the face and in part *identical* to it. Thus the initial erleb (frontal view of a face) is replaced by succession of erlebs that are related to the initial one by "part similarity" and "part identity."

[FN121] Suppose there are only two cases, A and B, in a jurisdiction. We could with equal plausibility claim that they are similar or dissimilar. Similarity thus turns out to require more than two instances. Once we are given a new case, C, it can be said to be "more" similar either to A or to B. And that, I would say, is all that we can ever know for sure—about cases or anything else. The words we use are our imperfect attempts to pin down similarities, but they can never fully accomplish this job because nature does not oblige. Hence I would regard all language as a heuristic device: it helps our minds to advert to similarities and differences. Similarly, a common-law rule is (and is only) a heuristic device. It organizes a line of cases so that we can examine them for similarities. But (importantly) the "rule" is inevitably an imperfect means of doing this organizational work, as every litigator knows.

[FN122] A color-defective person may still say that grass is "green" even though to him it looks grey. He has learned to use the word "green" in connection with blades of grass even though he does not know what it means to persons who are not color-defective. In ordinary conversation with him, we might not be able to detect that when he calls something green he is not seeing green. On the other hand, we can test him. We show him a red paper and a green paper and ask him if they are the same color. He uses his elementary erleb sense to make the comparison. If he answers "yes," then he may be color-defective. Some partially color-defective persons do not realize their disability for many years.

[FN123] *See* Balkin, *Nested Oppositions,* 99 YALE L.J. 1669, 1671 (1990) ("the logic of law is to a large degree the logic of similarity and difference"); R. POSNER, *supra* note 52, at 86-93 (criticizing typical examples of enthymematic reasoning from "analogy").

[FN124] I have previously described the mutually-reinforcing mechanism of judicial self-interest in actualizing lawyers' predictions in A. D'AMATO, JURISPRUDENCE, *supra* note 73, at 6-34. To be sure, reasoning from analogy is inductive reasoning, and inductive reasoning can never be determinate. *See supra* note 16. But this is only to say that lawyers' predictions can never reach the level of certainty; it does not say that the predictions are useless.

[FN125] I do not accept Professor Robert Lipkin's view that rationality requires intersubjective agreement, for reasons including those given by Professor Kress. *See* Kress, *supra* note 8, at 140-41 (commenting on Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory,* 75 CORNELL L. REV. 401 (1990)). I think our minds are wired to notice similarities and differences in the environment; this wiring has enabled us to survive as a species. Suppose nine primitive hunters noticed a similarity between a new animal they encountered and a friendly animal of their previous acquaintance, but the tenth hunter noticed what was to him a critical difference that suggested that the newly encountered animal was vicious. If the nine hunters perished and the tenth ran safely away, his gene that passed on to future generations might well be characterized as "don't let people talk you out of a dangerous situation." Intersubjective agreement, or rule by consensus, would have been fatal in the hunter situation.

[FN126] Of course, the last thing a Pragmatic Indeterminist would concede is the possibility of bifurcating descriptive and normative legal propositions. *Cf.* R. RORTY, CONSEQUENCES OF

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PRAGMATISM xv-xvii (1982).

[FN127] "Legally right" and "legally correct" are logical notions. They refer to the consistency of formal deductive systems. These terms have a place in the abstract construction of tautological legal systems, such as the black-letter rules of the various Restatements. (Even there, it is not the occasional judicial decision which is "incorrect" but rather the Restatement which has failed to "restate" it properly!) But a term like "legally correct" cannot be used in the empirical criticism of cases without smuggling in a normative element. Dworkin makes precisely this error in his "law as integrity" thesis, where he conflates logical error with empirical error. *See* Kress & Waldron, Integrity is Our Vulcan (unpublished manuscript). Dworkin's essential positivism fairly compels him to find a value in the consistency of law per se. But as Professors Kress and Waldron point out, once an intrinsic value is attributed to *law*, then it can override claims of justice—and that is precisely what is perverse about Dworkin's system.

[FN128] "Correctness" is *either* a term of logic or a term of moral appropriateness. If we exclude morality from law and say that law is simply the words of law on the books (and their "meanings"), it follows that we can only use the term "correctness" as a matter of deductive logic. But except for "tautologically easy cases," as I argued above (*supra* note 64 and accompanying text), logic cannot tell us which side should win a particular case. It follows that we make a category mistake in labelling any given decision as "correct." Either side can *legitimately* win a case, which is another way of stating the thesis of Pragmatic Indeterminacy.

Professor Kress interprets me as saying that "no matter what argument is given for the plaintiff, there is always a better argument that can be produced for the defendant . . . ." Kress, *supra* note 8, at 146. I would not use the word "better" that way. Clearly what is "a better argument" is in the eyes of the beholder. There are no standards for "a better argument" just as there is no core meaning of that phrase. In front of a Chicago audience, Professor Kress and I in a debate might alternatively present better and better arguments until one of us collapses from exhaustion, throws in the towel, or is booed off the podium. To an audience in Iowa City, the outcome might be different—not to mention an audience in Tehran.

If I say that one argument is "better" than another, since I am not making a logical claim I can be making either a rhetorical claim (a claim parasitic on logic) or a moral claim. The latter is excluded by definition. However, if we expand our notion of "law" to include morality— something the positivists such as H.L.A. Hart say we cannot do—then I would be the first to say that some arguments are "better" than others. As a moral non-relativist, I would never assert that "no matter what argument is given for the plaintiff, there is always a better argument that can be produced for the defendant." If the plaintiff is arguing that children should not be tortured or elephants should not be shot for the value of their tusks, I would say that the defendant simply does not have a better argument. But I say this only because of the moral content of the law; stripped of its moral content, if it can be so stripped, the law might well countenance a more persuasive (not "better") argument for the defendant.

I have of course used the word "legitimacy" in the sense of "legal legitimacy." The word can also connote, for some people, "moral legitimacy." In international law, the term tends to be used in the sense of "legal *and* moral legitimacy." *See* T. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

[FN129]*See* 1 L. KRUGER, L.J. DATSO & M. HEIDELBERGER, THE PROBABILISTIC REVOLUTION

237-60, 295-304 (1987); 2 L. KRUGER, L.J. DATSO & M. HEIDELBERGER, THE PROBABILISTIC REVOLUTION 373-435 (1987); P. SUPPES, PROBABILISTIC METAPHYSICS 85-99 (1984). The mistake that many newcomers to quantum theory make is to assume that it predicts the *probability* that electrons (or other quanta) can be found at a particular place. This is quite wrong; in fact, the electron itself is a probabilistic phenomenon and not an "entity," or as Max Born put it, there are "waves of matter." M. BORN, THE RESTLESS UNIVERSE 151-54 (1951). The Fermi-Einstein statistic suggest "not merely that elementary particles are unlike bodies [but] that there are no such denizens of space-time at all . . . ." W.V. QUINE, PURSUIT OF TRUTH 35 (1990). In short, the real world we see—the world of matter and space—is itself, in a way that no one can fathom except through the mathematical language of quantum theory—probabilistic and not solidly certain. I think that exactly the same point can be made about law. I am not saying that law is like quantum mechanics, but only that if the universe we live in is a probabilistic and not a determinate one, it is not so strange to argue that law is also just a matter of probabilities. *Cf.* Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Nuclear Physic*s, 103 HARV. L. REV. 1 (1989); D'Amato, Quantum Theory and Legal Indeterminacy (workshop paper presented to Northwestern faculty seminar, February 1989) (copy on file with Northwestern Law Review).

When we predict how a case will come out, we are not predicting what the law "is" at a certain level of confidence the way the meteorologist predicts tomorrow's weather. Rather, our prediction *constitutes* the law. I have spelled this argument out in A. D'AMATO, JURISPRUDENCE, *supra* note 73, at 18-19.

Of course, such a statement is subject to H.L.A. Hart's immediate rejoinder: "If law is a prediction from the point of view of an attorney, it is not a prediction from the point of view of a judge—a judge decides what the law is, and does not predict the law." I believe that I successfully countered this argument, and showed that even judges who decide what the law is are engaging in a prediction—in their case, in a retrospective prediction. *Id*. at 21-30, 35-45.

[FN130] *See* A. D'AMATO, JURISPRUDENCE, *supra* note 73, at 6-45.

[FN131] *See* H. KELSEN, PURE THEORY OF LAW 33-37 (Knight trans. 1967); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[FN132] Ultimately, the subjects of law (you and I) are also as much a part of the law as are judges—an insight of Hegel's. *See* Jacobson, *Hegel's Legal Plenum*, 10 CARDOZO L. REV. 877 (1989).

[FN133] *See supra* note 133 and accompanying text.

[FN134] It is much in the spirit of Richard Rorty's deflationary view of philosophy. *See* R. RORTY, CONSEQUENCES OF PRAGMATISM (1982); R. RORTY, CONTINGENCY, IRONY, AND SOLIDARITY(1989).

[FN135] In my view, the legal profession has nothing to do with serving law and everything to do with serving justice. To say that a lawyer is bound by "law" is in effect to enlist lawyers in implementing the state's policies, whether those policies be enlightened or brutal. It is to a dictator's advantage to say that lawyers should be guided by "law." But "law" is not worth being

guided by, except to the extent that it reflects justice. If we don't say that a plumber serves his tools, we should not say that a lawyer serves the law. To the extent that we lawyers are professionals, our allegiance is to justice in society.

[FN136] Looking back over my student days at law school (1958-61), I think that many of the professors were half-realists. They were sufficiently convinced by the American realist movement to put a lot more stress on the facts of the cases we read than do professors today. But the problem was that they spent a great deal of class time *telling* us the facts of the cases. Although they knew more about the facts of the cases than what was reported in the courts' opinions, what they apparently did not realize well enough was that their own "statement of the facts" was highly selective and personally biased. What they did *not* tell us was how shaky many of the "facts" were, how much the "facts" depended on what the trial attorneys decided to tell the judge and jury, and how distorted the facts were as a result of judicial rulings on evidence. Beyond that, what they did not tell us was the *strategic* effect on the "facts" that a good lawyer exerts in advising her client to do things one way rather than another in the event that what the client does results in a lawsuit.

    As far as teaching students how to deal with facts is concerned, law schools today are worse than they were when I was a student. In this respect, the Indeterminacy movement is not at all a re-run of legal realism. Rather, it is a call for a degree of "realism" (in accounting for what lawyers actually *do*) that Legal Realism never attained.

[FN137] I have made this suggestion previously in D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 485 (1987).

[FN138] Professor Arthur Jacobson at Cardozo Law School, and I at Northwestern Law School, have been teaching a "Justice" course based on materials that we have been developing over the past six years. But adding one course on justice to the curriculum—even, or especially, if it is ours—falls far short of doing the job I am advocating in this Article.

[FN139] For an example of a case in which an opinion by Judge Frank Easterbrook, writing for a three-judge panel of the Seventh Circuit, misstated the facts of the case in order to couch in acceptable rhetoric the court's refusal to grant habeas corpus relief to a provably innocent man, see Branion v. Gramly, 855 F.2d 1256 (7th Cir. 1988), *cert. den.* 109 S.Ct. 1645 (1989). For commentary on this case, *see* D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 CARDOZO L. REV. 1323 (1990); D'Amato, *supra* note 110.

[FN140] If you read this sentence and ask, "but what about *legal* ability?" you will appreciate what Pragmatic Indeterminacy stands for. The Pragmatic Indeterminist says that no amount of legal ability can produce any of these human qualities. Of course, humanist decision-making is itself subject to satire: witness Judge Richard Posner's rebuttal to essays by Professor Robin West and me. He writes sarcastically that if we just dump the rule of law we could get on with the task of "building a warm, loving, caring, open, hopeful, hugging, unmediated, hierarchy-free, prelinguistic, empathic, affective (but not sentimental—liberals are sentimental), happy, herbivorous, weaponless, wholegrain, solar-powered, polymorphously perverse, classless, Utopian society for the Whole Human Family." [Posner], *Gregor Samsa Replies*, 83 NW. U.L. REV. 1022, 1025 (1989) *Compare* Jaffee, *Empathic Adjustment—An Alternative to Rules,*

Policies, and Politics, 58 U. CINN. L. REV. 1161 (1990). *See also* Hirshman, *Bronte, Bloom, and Bork: An Essay on the Moral Education of Judges,* 137 U. PA. L. REV. 177 (1988).

[FN141] This assertion is philosophically warranted as a consequence of Gödel's theorem. There can be no general algorithm or proof of justification. *See* H. PUTNAM, REPRESENTATION AND REALITY 115 (1988) ("truth does not transcend use"); *see also* Kress, *supra* note 9, at 332 ("judgment . . . cannot be fully characterized in an explicit metatheory").

[FN142] If law-words do not constrain judges, why should justice-words fare any better? If justice were only a matter of words (for example, "principles" of justice) then it would not constrain judges either. But justice is normative, consisting of the judgments that we make all our lives when we consider facts and situations and compare them mentally to other facts and situations that were resolved in the past by other persons whom we consider just. I believe that words may at best reflect justice, but words do not constitute justice and cannot encapsulate justice.