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The Player and the Cards: Nihilism and Legal Theory[©]

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In writing this Article, I drew heavily on the arguments advanced in the following works: R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983); R. RORTY, *CONSEQUENCES OF PRAGMATISM* (1982); R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); R. UNGER, *KNOWLEDGE AND POLITICS* (1975); Barnes & Bloor, *Relativism, Rationalism and the Sociology of Knowledge*, in *RATIONALITY AND RELATIVISM* 21 (M. Hollis & S. Lukes eds. 1982); Meyerhoff, *From Socrates to Plato*, in *THE CRITICAL SPIRIT: ESSAYS IN HONOR OF HERBERT MARCUSE* 187 (K. Wolff & B. Moore eds. 1967); Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561 (1983). A witty and cogent article by Clifford Geertz addresses many of my concerns here. Geertz, *Anti Anti-Relativism*, 86 *AM. ANTHROPOLOGIST* 263 (1984).

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INTRODUCTION

Man is the builder of a historical edifice: the House of man. He is the brick and the firm foundation of his own project and also the goal for whom the House is being constructed. . . . Man is the player and the cards; he is at stake but he repeats with Oedipus: "I will search out the truth."

—Marcel Pallas Checa¹

After they had explored all the suns in the universe, and all the planets of all the suns, they realized that there was no other life in the universe, and that they were alone. And they were very happy, because then they knew it was up to them to become all the things they had imagined they would find.

—Lanford Wilson²

What shall we do and how shall we live? According to Plato and Tolstoy and other reliable observers, this is our most important question.³ We should not trust any philosophy that makes this question appear foolish. Nihilism is such a philosophy: Its answer to the question of how we should live is that it does not matter—"just anything goes."⁴ Because nihilism gives this answer to our most important question, John Irving has rightly said that nihilism is "a religion . . . vastly lacking in seriousness."⁵

1. M. Pallas Checa, *Sketches on Hegel's Science iv* (June 1977) (unpublished manuscript on file in Sawyer Library at Williams College, Williamstown, Mass.).

2. L. WILSON, *5TH OF JULY* 127 (1978).

3. "Science is meaningless because it gives no answer to our question, the only question important to us: 'What shall we do and how shall we live?'" W. RUNCIMAN, *SOCIAL SCIENCE AND POLITICAL THEORY* 156 (2d ed. 1969) (quoting Leo Tolstoy).

You are mistaken, my friend, if you think that a man who is worth anything ought to spend his time weighing up the prospects of life and death. He has only one thing to consider in performing any action; that is, whether he is acting rightly or wrongly, like a good man or a bad one.

PLATO, *The Apology*, in *THE LAST DAYS OF SOCRATES* 59 (H. Tredennick trans. 1969).

4. M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 176 (1982).

Nihilism may be used in a somewhat different sense to describe an extreme pessimism that doubts that life means anything or that anything good is possible.

At last the cold crept up my spine; at last it filled me from foot to head; at last I grew so chill and desolate that all thought and pain and awareness came to a standstill. I wasn't miserable anymore: I wasn't anything at all. I was a nothing—a random configuration of molecules. If my heart still beat I didn't know it. I was aware of one thing only: next to the gaping fact called Death, all I knew was nothing, all I did meant nothing, all I felt conveyed nothing. This was no passing thought. It was a gnawing, palpable emptiness more real than the cold. I was a hollow, meaningless nothing, entranced on a rock in a fog.

D. DUNCAN, *THE RIVER WHY* 112 (1983).

5. J. IRVING, *THE HOTEL NEW HAMPSHIRE* 231 (1981). I am using the term "nihilism" in a pejorative sense. This is deliberate; I could just as easily have called myself a "nihilist" and given the term a positive, laudatory meaning. When words are as abstract and uncommon as "nihilism," it is possible to make such choices.

There are advantages and disadvantages to appropriating a label placed on you by your adversaries,

Recently, there has been a lot of talk among legal scholars about nihilism.⁶ This has been more evident in conversations among law professors than in the scholarly literature. When references to nihilism do appear in the law journals, they are vague and generally made only in passing. Nonetheless, nihilism is a central issue of contemporary legal theory.

As I will use it, nihilism has both an epistemological and a moral component.⁷ As a theory of knowledge, nihilism claims that it is impossible to say anything true about the world. No one can properly claim to describe the world accurately: Anything anyone says is as likely to be wrong as it is to be right, and anything is as likely to be right or wrong as anything else. If one takes nihilism seriously, it is impossible, or in any event fruitless, to describe the world; all possible descriptions are equally invalid because we cannot be sure that any description is reliable.

As a theory of morality, nihilism claims that there is no meaningful way to decide how to live a good life. Any action may be described as right or wrong, good or bad. Just as there is no objective way to describe any action, there is no objective way to decide how to act. Because all actions that we think are good are just as likely to be bad, we have no rational way to decide what to do. Since we cannot know what to do, it does not matter what we do.⁸

even when they intend that label to be insulting. The main disadvantage is that use of such a label often confuses issues. Thus, nihilism, as the word is now used in legal debates, may not mean what nihilism has traditionally meant. See *infra* note 7. The advantages, however, can be significant. Appropriating such a label can drive home the difference between your views and the views of others by emphasizing the extent to which you reject their criteria for judging what is and is not praiseworthy. What they consider an insult, you consider a compliment. Moreover, terms of rejection and vilification can sometimes become useful rallying cries to organize opposition to established practices. Mark Tushnet understood this when he gave the word "nihilism" its first usage in an article on the Critical Legal Studies movement. Championing the movement, he gave the term "nihilism" a more laudatory meaning than I am giving it here, see Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1340-59 (1979) (defining nihilism as belief that no consistent principles unify legal reasoning or formulation and application of legal rules, and arguing that we must go beyond nihilism to invent language for expressing conflicting values and discussing prescriptive choices).

6. See, e.g., Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 741 (1982) ("The nihilist would argue that for any text—particularly such a comprehensive text as the Constitution—there are any number of possible meanings, that interpretation consists of choosing one of those meanings, and that in this selection process the judge will inevitably express his own values. All law is masked power."); Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1063-64 (arguing that those skeptical about the possibility of moral statements being true or false—rather than merely good or bad, acceptable or unacceptable—have no firm psychological basis for their beliefs and are in danger of becoming nihilists who lack any convictions).

7. I am not trying to use the word nihilism in the way philosophers have used it. Those philosophical discussions are irrelevant to the current debates among legal theorists about "nihilism," see *supra* notes 5 & 6; none of those theorists (myself included) has paid much attention to that literature, at least not in print. In part, I wrote this Article in order to discuss what "nihilism" means in the context of this debate and to elaborate upon what I think the issues in the debate are.

8. I distinguish nihilism both from what I call rationalism and from my own position, which I prefer not to label but which for clarity's sake I will here call irrationalism, after Clare Dalton's use of that term in Dalton, Book Review, 6 HARV. WOMEN'S L.J. 229 (1983) (reviewing THE POLITICS

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The issues raised by the Critical Legal Studies movement have brought nihilism to center stage. Those of us associated with Critical Legal Studies believe that law is not apolitical and objective: Lawyers, judges, and scholars make highly controversial political choices, but use the ideology of legal reasoning to make our institutions appear natural and our rules appear neutral. This view of the legal system raises the possibility that there are no rational, objective criteria that can govern how we describe that system, or how we choose governmental institutions, or how we make legal decisions. Critical Legal Studies thus raises the specter of nihilism.

So far, Critical Legal Scholars have focused on three topics. First, we have demonstrated in a variety of contexts that law varies according to time and place, and that this historical and social contingency applies to legal reasoning, legal rules, and governmental and social institutions.⁹ Sec-

OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982)). Rationalism encompasses two fundamental assumptions, neither of which I accept. The rationalist believes that a rational foundation and method are necessary, both epistemologically and psychologically, to develop legitimate commitment to moral values; she also believes that such a rational foundation and method either already exist or can be discovered or invented. Nihilism is only a *partial* rejection of rationalism: The nihilist rejects the second assumption, but not the first. Thus a nihilist would argue that a rational foundation is necessary to sustain values but that no such foundation exists or can be identified. This sort of nihilism leads directly to psychological feelings of impotence and despair, and to the sense that nothing matters, because what we desperately require to make our lives meaningful is impossible to achieve. My position rejects *both* assumptions. We do not have a rational foundation and method for legal or moral reasoning (in the sense that traditional legal theorists imagine such rational foundations to be possible); we do not, however, need such a foundation or method to develop passionate commitments and to make our lives meaningful. This formulation removes the dilemma that is the basis for the despair of the middle position. I prefer not to describe my position as "irrationalism"—except for the purposes of this footnote—for the same reason I decline to adopt nihilism as a way to describe myself. It would be misleading and confusing to appear to be advocating that decisions be made "irrationally"—without connection with discernable goals. A better term might be pragmatism. See R. RORTY, CONSEQUENCES OF PRAGMATISM 160–75 (1982). I would prefer, as would Mark Tushnet and Richard Bernstein and Gerald Frug, that we stop thinking about moral, political, and legal choice in terms of the dichotomies between reason and emotion, law and politics, rationality and irrationality, objectivism and relativism. These dichotomies are inadequate to express the dilemmas of social life. See R. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS, 1–49, 223–31 (1983); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1291–92 (1984).

9. I do not intend this tripartite division of Critical Legal Studies to be comprehensive. At the same time, the categories are not mutually exclusive; many articles could be placed in all three categories. See, e.g., R. UNGER, LAW IN MODERN SOCIETY (1976) (describing different legal systems prevalent in different societies); Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) (describing history of different legal conceptions of the municipality); Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981) (describing techniques used by legal scholars to hide from themselves and others the historical and social contingency of law); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979) (describing transition from feudal to modern liberal conceptions of law); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978) (describing changes in legal thought in twentieth century); Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325 (1980) (describing changing conceptions of property rights over the course of the nineteenth century); Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980) (describing changing conceptions of torts, property, and contracts); Mensch, *Freedom of Contract as Ideology* (Book Review), 33 STAN. L. REV. 753

ond, we have shown that legal reasoning is indeterminate and contradictory.¹⁰ By its own criteria, legal reasoning cannot resolve legal questions in an "objective" manner; nor can it explain how the legal system works or how judges decide cases. Third, we have argued that law is not neutral: It is a mechanism for creating and legitimating configurations of economic and political power. We have done this by exploring the relation over time between the legal system and the social structure.¹¹

This scholarship has undermined the traditional idea that legal reasoning is an objective and rational way to decide what rules and institutions we should have. We have proposed instead that legal reasoning is a way of simultaneously articulating and masking political and moral commitment.

The custodians of traditional legal theory have reacted to Critical Legal Studies by suggesting that it embraces nihilism. And these opponents of Critical Legal Studies are not alone; many otherwise sympathetic law students, lawyers, and legal scholars share that view.¹² The charge of nihilism is the most superficially plausible—and therefore the most rhetorically powerful—complaint against those of us who maintain that law is a kind of politics.

If it is true that legal reasoning is indeterminate or otherwise incoher-

(1981) (describing history of concept of freedom of contract). See generally Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. (1984) (forthcoming).

10. See, e.g., Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981) (identifying contradictory assumptions underlying criminal law); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (identifying the assumptions underlying theories that purport to identify efficient legal rules and arguing that changes in those assumptions multiply the number of efficient solutions to any given problem); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (describing the contradictory principles of individualism versus altruism and formality versus informality that pervade legal argumentation); Singer, *Catcher in the Rye Jurisprudence*, 35 RUTGERS L. REV. 275 (1983) (arguing that prevalent conceptions of judicial role are indeterminate and internally contradictory); Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (arguing that legal theories based on developing the implications of rights are indeterminate and internally contradictory); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (arguing that leading themes of constitutional law can be made determinate only by adopting assumptions that contradict basic premises underlying those theories); Dalton, *supra* note 8 (describing the irrationalist school of Critical Legal Studies); Mensch, *supra* note 9 (arguing that idea of freedom of contract is incoherent on its own terms).

11. See, e.g., M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977) (legal rules changed over time to subsidize economic development and to promote class interests); C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) (legal system has helped create and reinforce the social, economic, and sexual subordination of women by tolerating that subordination and failing to provide remedies for sexual harassment); R. UNGER, *supra* note 9 (exploring the relation between law and different social structures); Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55 (1979) (social and legal barriers operating against the successful participation of parents in the labor market primarily disadvantage women); Minow, *The Properties of Family and the Families of Property* (Book Review), 92 YALE L.J. 376 (1982) (discussing the relations between law and social structure, including family and employment).

12. E.g., Levinson, *Escaping Liberalism: Easier Said Than Done* (Book Review), 96 HARV. L. REV. 1466, 1470-72 (1983).

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ent, and that its claims to objectivity are false, then we face two problems. On an individual level, the question is how *can* we know what we should do and how we should live. What makes one person's values better than anyone else's values? If it is impossible to discover or invent objective criteria for determining what people should and should not be allowed to do to each other, how is it possible to live a good life? And if all theories of morality and law are historically contingent, and all values are relative to time and place, how can we develop passionate moral commitments?

On a social level, the question is whether it is possible to set up a legal system based on the rule of law. If legal reasoning is internally contradictory and therefore indeterminate, there are no objective limits on what judges or other governmental officials can do. Thus the goal of constraining government or regulating interpersonal conduct by previously knowable general rules seems impossible. Is the realm of judicial action, then, inevitably governed by whim and caprice?

A philosophical problem is the "product of the unconscious adoption of assumptions built into the vocabulary in which the problem [is] stated—assumptions which [must] be questioned before the problem itself [can be] taken seriously."¹³ Traditional legal theory (what others have called "liberal legalism")¹⁴ is based on certain fundamental assumptions

13. R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* xiii (1979). A great deal of my argument here constitutes an application of Rorty's views of philosophy to legal reasoning. Rorty's book is brilliant, and I recommend it highly. My own ability to express my dissatisfaction with traditional legal theory crystallized after reading Rorty, and I have cited him liberally throughout this Article.

14. See Klare, *supra* note 9, at 276. By referring to "traditional legal theory," I am painting with an extremely broad brush. As I see it, there are currently three basic schools of traditional legal theory and two major schools of criticism. The traditional schools of legal theory are (1) positivism, represented mainly by H.L.A. Hart, see H.L.A. HART, *THE CONCEPT OF LAW* (1961); (2) rights theory, including consensus theorists such as Ronald Dworkin, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), and Bruce Ackerman, see B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980), and social contract theorists such as John Rawls, see J. RAWLS, *A THEORY OF JUSTICE* (1971), and Robert Nozick, see R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); and (3) law and economics, represented by Richard Posner, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); R. POSNER, *THE ECONOMICS OF JUSTICE* (1981), and many others. The critical schools are (1) feminism, represented by Catharine MacKinnon, see C. MACKINNON, *supra* note 11; MacKinnon, *Toward Feminist Jurisprudence* (Book Review), 34 *STAN. L. REV.* 703 (1982); Frances Olsen, see Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983); and many others; and (2) Critical Legal Studies, represented by Duncan Kennedy, Robert Gordon, Mark Tushnet, Clare Dalton and others, see *supra* notes 5, 8, 9 & 10.

In this Article, when I use the term "traditional legal theorists," I am thinking principally of the rights theorists and, somewhat more peripherally, the law and economics writers. In addition, because all judges write judicial opinions in a way that purports to "apply" the law in a relatively uncontroversial fashion or purports to decide unclear cases by a process of legal reasoning that is capable of generating answers, I count them among the traditional legal theorists.

Positivists, unlike members of the other schools, do not purport to describe a *method* for determining what the content of the legal rules should be; rather, they offer a general description of the role of law in society. Criticisms of law and economics theories require more detail than I can provide here. For critiques of those theories, see Kelman, *Choice and Utility*, 1979 *WIS. L. REV.* 769; Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 *S. CAL. L. REV.*

that require its proponents to find, or at least to search for, determinate, objective, and neutral decision procedures. Traditional theorists assert that these procedures ground the legal system on a foundation that is rational, objective, and apolitical, and that therefore transcends conflicts of individual interests or values.¹⁵ To claim that there is no such ground seems to endanger both the possibility of normative discourse and the rule of law itself.¹⁶ The issue of nihilism is really a dispute over this fundamental premise: that reason can adjudicate value conflicts and that it is both possible and necessary to justify legal rules and institutions on the basis of determinate and objective decision procedures.

Rather than explain how we can reform legal theory to solve the problem of nihilism, I will explain why I do not think there is a problem. I will argue for a conception of legal reasoning that is divorced from the search for certainty. I will not demonstrate that the traditional goal is false or irrational. I will merely explain why I refuse to attempt the sort of explanation of legal rules that relies on the assumptions of determinacy, objectivity, and neutrality. In my view, the proper goal of legal theory is precisely the opposite of that articulated by the traditional view. Legal theory should "edify," that is, it should "help . . . readers, or society as a whole, break free from outworn vocabularies and attitudes, rather than . . . provide 'grounding' for the intuitions and customs of the present."¹⁷

Law and morality have no rational foundation that once and for all compels all persons to prefer certain institutions and rules above all others. Nor is there a politically neutral and dispassionate method of decisionmaking that can be justified on the grounds of its rationality. The purpose of this Article is to explain why the absence of determinacy, objectivity, and neutrality does not condemn us to indifference or arbitrariness, nor make it ridiculous to ask, or impossible to answer, the question

669 (1979); Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of Law and Economics*, 33 J. LEGAL EDUC. 274 (1983); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980). Adherents of the law and economics movement share with rights theorists the fundamental assumptions of what I have called rationalism, see *supra* note 8. They both assume that we need to describe a rational method that will constitute a decision procedure and help us figure out what to do. Moreover, they both assume that rational exegesis can demonstrate the legitimacy of such a method.

Because my critique is at such a fundamental level, it is possible to criticize at once competing schools of thought, and both theorists and judges. While I will illustrate my argument with citations to various legal theorists, these citations are not meant to be exhaustive; nor will they demonstrate that my general description of traditional legal theory is a fully accurate description of any particular theorist or judge. By encompassing a wide range of theorists and judges, my argument is designed to clarify the debate about the nature of legal reasoning.

15. Cf. M. SANDEL, *supra* note 4, at 2, 116-18, 154-61 (discussing priority of the right over the good); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 564-73 (1983) (pointing out and criticizing these characteristics of traditional legal theory).

16. See R. RORTY, *supra* note 13, at 316-17; Unger, *supra* note 15, at 576.

17. R. RORTY, *supra* note 13, at 12.

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of what we should do or how we should live. The lack of a rational foundation to legal reasoning does not prevent us from developing passionate moral and political commitments. On the contrary, it liberates us to embrace them.

In this Article, I will talk about why traditional legal theory has failed us, and how, in light of that failure, we can imagine new ways to live together. In Part I, I will describe the claim that legal doctrine is indeterminate. Despite claims by their adherents to the contrary, our prevalent legal theories cannot guide us in deciding what legal rules to enforce or how to apply them once we have chosen them. In Part II, I will argue that the ways in which traditional legal theorists seek to ground the legal system on a rational foundation are illegitimate: Attempts to demonstrate that legal theories are true or grounded in reality are attempts to turn discretionary normative statements into non-discretionary descriptions. Part III will discuss the claim of traditional legal theorists that law can and should be neutral. Advocates of neutrality fail to acknowledge that the principles we use to justify legal rules are not and cannot be based on considerations completely independent of our views of the good life.

Part IV will explain why traditional legal theorists have sought to ground the legal system on determinate, objective, and neutral decision procedures. These theorists believe that law requires a rational foundation in order to avoid both tyranny and arbitrariness. Their fears are unjustified. In Part V, I will argue that we should view legal theory as a form of political activity, rather than as radically distinct from politics. Finally, in Part VI, I will argue that the greatest problems we face are cruelty, misery, hierarchy, and loneliness. Those issues should be at the center of any consideration of what we should do and how we should live.

I. DETERMINACY

These principles are the principles of social justice: they provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation.

—John Rawls¹⁸

A rule is amended if it yields an inference we are unwilling to accept; an inference is rejected if it violates a rule we are unwilling to amend.

—Nelson Goodman¹⁹

18. J. RAWLS, *supra* note 14, at 4.

19. N. GOODMAN, *FACT, FICTION, AND FORECAST* 64 (4th ed. 1983) (original italicized).

A. *Internal Critique*

Everyone is confused about what Critical Legal Scholars mean when we say that law or rights or legal theory is indeterminate. The claim that legal theory is infinitely manipulable expresses a universal experience of lawyers;²⁰ at the same time, it seems to be contradicted by the ability of experienced litigators and court watchers often to predict with surprising accuracy what judges are going to do. If legal reasoning does not determine the outcomes, what does? And if that something else determines outcomes, why isn't that just legal reasoning by another name?

Two points must be made at the outset about the character of the claim that law is indeterminate. First, it is an empirical claim about existing legal theories and arguments. It is not a claim that it is impossible to invent determinate theories. It is also not a claim about the nature of reason or the human mind or anything like that. Rather, it is a description of the arguments and theories that are currently used by judges and scholars to justify outcomes and rules.²¹

Second, it is an internal critique. This is a critique from within, a critique that uses the premises of traditional legal theory against itself. Legal scholars and judges claim that the theories or arguments they develop necessarily lead to certain results, or at least define a narrow range of alternatives and thus severely constrain the possible outcomes. We take these claims seriously and examine them to see if they are true. When Rawls²² or Nozick²³ or Ackerman²⁴ invents a theory of justice, or Ely²⁵ invents a theory of constitutional adjudication, or Radin²⁶ invents a theory of property, or Posner²⁷ invents a theory of efficiency, they each claim to have found or invented a small set of general principles that can be applied in many specific instances to tell us what sort of institutions and rules we should have. If we agree with their general premises, they argue, then we must logically favor such and such institutions or such and such rules. My contention that their theories do not determine the outcomes that they propose falsifies a claim that they themselves have made.²⁸

20. Unger, *supra* note 15, at 570.

21. The claim that legal theory is indeterminate is a descriptive claim. Traditional theorists usually claim that their theories are determinate in the sense that they help us decide what the legal rules are or should be. They also claim that theories should be determinate because theories that leave the judge free to choose what to do allow judges to act arbitrarily and therefore do not sufficiently constrain the exercise of governmental power.

22. J. RAWLS, *supra* note 14.

23. R. NOZICK, *supra* note 14.

24. B. ACKERMAN, *supra* note 14.

25. J. ELY, *DEMOCRACY AND DISTRUST* (1980).

26. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

27. R. POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 14.

28. I do not mean that these theorists claim that their theories provide the answer to every legal question. All these theorists carefully carve out areas of uncertainty or indeterminacy as integral parts

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Indeterminacy is a claim about legal doctrine. “Doctrine” is an ambiguous term that includes both legal rules and arguments. Legal rules or standards govern the relations among individuals and organizations, between those persons and various governmental bodies, and among the governmental bodies themselves. Legal theories, arguments, or principles are justifications for or criticisms of alternative rules. Depending on how they are treated, general principles may be described either as rules or arguments. If those principles are used to justify the result directly, they are being used as rules; if they support more specific rules or standards which are said to determine the result, they are being used as arguments.

A legal theory or a legal rule is determinate if it tells us what to do. A completely determinate theory or rule will leave us no choice; a relatively determinate theory or rule will constrain our choices, more or less narrowly, within boundaries. The claim that a legal doctrine is indeterminate means that the doctrine allows choice rather than constraining or compelling it.

It is easy to create completely determinate legal rules and arguments. For example, an absolutely determinate private law system could be based on the rule that no one is liable to anyone else for anything and that everyone is free to do whatever she wants without government interference. Relentless application of this rule would produce a state-of-nature legal system that would be fully determinate: The plaintiff would always lose. The problem is that this or any other determinate system bears no relation to anything anyone would consider to be just or legitimate. The reason is obvious. We cannot accept such a system because it would not protect other important, competing values—security, privacy, reputation, freedom of movement. We invent more complicated rule systems to accommodate our contradictory values. Thus, in our current way of thinking about law, we have to draw lines between principles and counter-principles, determine the scope of existing rules, and decide whether to change the rules.

Traditional legal theory therefore incorporates both determinacy and

of their theories. Nonetheless, each claims that his or her theory will help judges make decisions about what the legal rules should be. Those rules will limit the number of available alternatives in a way that will constrain choices within certain boundaries, *see* H.L.A. HART, *supra* note 14, at 132–37 (law is framework of general, determinate rules with pockets of indeterminacy that allow discretionary choice by judges), or they will constrain choice by limiting the kinds of reasons judges can offer for their decisions, *see, e.g.*, B. ACKERMAN, *supra* note 14, at 3–12 (describing the principles that should constrain discourse about rules decisions); R. DWORKIN, *supra* note 14, at 81–130 (judicial decisions in hard cases should be made on basis of arguments of principle rather than of policy); *see also* J. RAWLS, *supra* note 14, at 4 (“[T]he principles of social justice . . . provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation.”); Radin, *supra* note 26, at 958 (her theory of property rights “can help decide specific disputes between rival claimants”).

indeterminacy.²⁹ For example, H.L.A. Hart asserts that the legal rules in force dictate the result in many "plain cases,"³⁰ or "paradigm, clear cases."³¹ He acknowledges, however, that: "In every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents."³² Similarly, Ronald Dworkin distinguishes between easy cases and hard cases.³³ Nonetheless, Dworkin claims to have identified a "technique" of adjudication³⁴ that will aid judges in deciding which legal rules to apply in hard cases.³⁵ At the same time, Dworkin claims that his theory recognizes the possibility of disagreements; his theory involves decisions of "political conviction about which reasonable men disagree"³⁶ and is not intended to be applied mechanically.³⁷ Thus, his theory carefully attempts to allow some amount of indeterminacy.³⁸

Determinacy is necessary to the ideology of the rule of law, for both theorists and judges. It is the only way judges can appear to apply the law rather than make it. Determinate rules and arguments are desirable because they restrain arbitrary judicial power. At the same time, determinacy is threatening. A completely determinate set of rules would require judges to apply existing rules mechanically even in unforeseen circumstances where the policy underlying the rule might not apply. Adopting a completely determinate set of rules would therefore substitute one form of

29. See J. RAWLS, *supra* note 14, at 10 (defining a "concept of justice" as a way of "assigning rights and duties and . . . defining the appropriate division of social advantages"). Rawls further explains:

No doubt any conception of justice will have to rely on intuition to some degree. Nevertheless, we should do what we can to reduce the direct appeal to our considered judgments. For if men balance final principles differently, as presumably they often do, then their conceptions of justice are different. The assignment of weights is an essential and not a minor part of a conception of justice. If we cannot explain how these weights are to be determined by reasonable ethical criteria, the means of rational discussion have come to an end. An intuitionist conception of justice is, one might say, but half a conception. We should do what we can to formulate explicit principles for the priority problem, even though the dependence on intuition cannot be eliminated entirely.

Id. at 41.

30. H.L.A. HART, *supra* note 14, at 123.

31. *Id.* at 125.

32. *Id.* at 132.

33. See, e.g., R. DWORKIN, *supra* note 14, at 127 (discussing "clear cases"); *id.* at 83 (discussing "hard case[s]").

34. *Id.* at 81-130.

35. *Id.* at 130.

36. *Id.* at 123.

37. *Id.* at 81.

38. I am reminded of the comment of the philosopher in Douglas Adams' *The Hitchhiker's Guide to the Galaxy*: "That's right," shouted Vroomfondel, "we demand rigidly defined areas of doubt and uncertainty!" D. ADAMS, *THE HITCHHIKER'S GUIDE TO THE GALAXY* 172 (1979).

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arbitrariness (over- and under-inclusiveness of rules) for another (over-broad discretion).³⁹

Indeterminacy, like determinacy, is both desirable and threatening. It is desirable because it allows judges, in generating or applying rules, and juries, in applying flexible standards like due care, to appeal directly to their intuition and fit the law to particular situations. This power accords with our sense that individuals should have justice done in their particular cases. At the same time, indeterminacy is threatening because it appears to allow judges and juries too much discretion.

Thus, legal theories and sets of rules incorporate both determinacy and indeterminacy. Those who fashion them want us to believe that we have the right mix: We have each to the extent that it is desirable but not to the extent that it is threatening. As Hart argues:

In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.⁴⁰

Legal doctrine—rules and theories—incorporates both rigid rules and flexible standards, general principles and particular principles.

While traditional legal theorists acknowledge the inevitability and desirability of some indeterminacy, traditional legal theory requires a relatively large amount of determinacy as a fundamental premise of the rule of law.⁴¹ Our legal system, however, has never satisfied this goal. The

39. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689 (1976) (rigid rules require “the sacrifice of precision in the achievement of the objectives lying behind the rules”). See H.L.A. HART, *supra* note 14, at 126–27 (“We shall be forced by this technique to include in the scope of a rule cases which we would wish to exclude in order to give effect to reasonable social aims, and which the open textured terms of our language would have allowed us to exclude, had we left them less rigidly defined.”).

40. H.L.A. HART, *supra* note 14, at 127.

41. *Id.* at 121 (“If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist.”); *id.* at 132–37 (arguing that public officials and private citizens are largely guided by determinate legal rules, with uncertainty existing only at margins or interstices of legal system); R. DWORKIN, *supra* note 14, at 5 (“a judicial decision is fairer if it represents the application of established standards rather than the imposition of new ones”); *id.* at 81 (“It remains the judge’s duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.”); J. RAWLS, *supra* note 14, at 235:

A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men’s liberties.

critique advanced by certain Critical Legal Scholars is that neither the theories proposed by the theorists, nor the arguments used by judges to justify their decisions, nor the legal rules in force are as determinate as traditional theorists and judges claim. This is an empirical question, and its truth depends on specific demonstrations of how individual theories or rules fail to provide determinate resolutions of competing principles.⁴² Theorists and judges are almost always mistaken when they claim that they have discovered a set of arguments that, by itself, provides the requisite amount of determinacy for the legal system. Legal doctrine is far more indeterminate than traditional theorists realize it is. If traditional legal theorists are correct about the importance of determinacy to the rule of law, then—by their own criteria—the rule of law has never existed anywhere. This is the real bite of the critique.

B. *Why Legal Doctrine Does Not Compel Our Choices*

A legal theory or set of legal rules is completely determinate if it is comprehensive, consistent, directive and self-revising. Any doctrine or set of rules that fails to satisfy any one of these requirements is indeterminate because it does not fully constrain our choices. I will discuss each of these qualities in turn.

1. *Comprehensive.* A legal theory or set of rules is comprehensive if it covers all fact situations. Legal theories may be incomplete in several ways. First, a theory or set of rules may have limited scope. Theories of justice, such as those of Rawls, Nozick, Ackerman, and Dworkin, and theories of efficiency, such as that of Posner, are comprehensive in the sense that they purport to apply to all or almost all fact situations. These theorists claim that their theories can guide judges in most situations.⁴³ Other theories, such as Radin's theory of property,⁴⁴ purport to apply only to specific segments of the legal system. To the extent such theories do not cover certain fact situations, they cannot determine judicial decisions in those areas.

See also R. UNGER, *supra* note 9, at 176-77 ("In the broadest sense, the rule of law is defined by the interrelated notions of neutrality, uniformity, and predictability. Governmental power must be exercised within the constraints of rules that apply to ample categories of persons and acts, and these rules, whatever they may be, must be uniformly applied.").

42. This Article is not intended to demonstrate that traditional legal theory is indeterminate, but only to clarify the nature of the Critical Legal critique of that theory. For a detailed discussion of how certain classical analytical jurists proffered indeterminate theories, see Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975; see also M. SANDEL, *supra* note 4, at 104-32 (critiquing Rawls).

43. Those theorists do not pretend that their theories give determinate solutions in every fact situation. Each theory encompasses a certain amount of indeterminacy. Nonetheless, each theory—determinate or indeterminate—is intended to be generally applicable, as opposed to a theory that deals, for example, only with ownership of tangible objects.

44. Radin, *supra* note 26.

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Second, the legal rules in force may contain gaps. Cases of first impression are cases that appear to be so different from any decided cases that they are not covered by any existing rule. Such cases occur far more frequently than most theorists imagine. They not only occur when there are no sufficiently specific rules to provide a result in a given case, but also when no precedent exists in the jurisdiction that is to decide the issue. Legal scholars create seemingly comprehensive bodies of law, such as contracts, torts, or property, by gleaning decisions from many states. Many of the basic rules of law described in law treatises or casebooks have been established in only some jurisdictions. These treatises, as well as the various Restatements, seek to influence judges in all jurisdictions to adopt basic rules that are accepted in other jurisdictions. Thus, when the highest court of a state addresses a basic rule of contracts, such as a rule about consideration, and that court has not rendered a definitive decision in the past, it is free to adopt or reject the law of other jurisdictions.

Third, arguments addressed to specific issues may not decide other issues. Judges and legal scholars present arguments to justify their choice of certain rules over others. The number of possible rules, however, is infinite. Any choice between two or three structured alternatives is greatly constricted. Even if we can come up with an argument or theory that can choose definitively among a small set of alternatives, we still have not ruled out other possibilities. For example, if we are choosing between strict liability and negligence standards for injuries caused by faulty automobile repairs, we can give a set of rights and utility arguments for adopting a strict liability test and a different set of arguments for adopting a negligence test. However the discussion turns out, we have still not discussed the countless other possibilities, such as universal car repair insurance or the abolition of cars altogether and reliance on mass transport.

2. *Consistent.* If legal theories and rules are internally contradictory or inconsistent, they cannot determine our choices. Nonetheless, contradiction is a common characteristic of legal doctrine. First, when we choose among a small list of candidates, the arguments we typically advance to decide among alternative legal rules turn out to be contradictory. In other words, all of us accept certain arguments in some situations and reject those same arguments in other situations.⁴⁵ This characteristic applies

45. For example, in *Thurston v. Hancock*, 12 Mass. 220 (1815), the defendant, a property owner on Beacon Hill in Boston, excavated his land in order to construct a building. In doing so, he removed the lateral support for the plaintiff's land, causing some of the plaintiff's soil to cave in on defendant's land and also causing plaintiff's house to subside. Writing for the court, Chief Justice Parker treated the case as involving two questions, for which he gave inconsistent answers. First, the court asked whether the plaintiff had a right of lateral support for his soil requiring that the defendant excavate so as to maintain lateral support. The answer was yes: The plaintiff had a right to have his soil supported in its natural condition because he had a right of security not to have his property injured

both to rights theories and utilitarianism. The metatheories that have been proposed to resolve the contradictions are hopelessly vague, ambiguous, or themselves internally contradictory. Nothing tells us conclusively when to accept and when to reject a particular argument.

The internal contradictions in our metatheories sometimes take the form of rules with exceptions or of principles with limiting counter-principles. Because the line between the rule and the exception or the principle and the counterprinciple may be moved, we require a metatheory at a higher level of generality to tell us where to draw the line. At other times our metatheories take the form of highly ambiguous, abstract concepts, like freedom, equality, privacy, democracy, or property, which themselves in our current discourse mean contradictory things. Terms like these hide the underlying contradiction by their convenient vagueness. In both of these situations, we require a metatheory that can tell us precisely how we are to choose between the available alternatives. In the absence of such a metatheory, we are left free to choose between the contradictory principles. The arguments therefore do not determine the result.⁴⁶

by the acts of his neighbor; the defendant was not legally free to use his property in a way that injured the plaintiff's property. *Id.* at 223. Second, the court asked whether the defendant had a duty to provide lateral support for the weight of plaintiff's house. The answer was no: The plaintiff had no right to be secure from having his neighbor excavate his own land in such a way as to cause plaintiff's house to fall down; plaintiff had the right of support for the soil only and the defendant was legally free to excavate on his own land in such a way as to provide only such support as plaintiff's soil would have required in its natural condition and was free not to provide support for the weight of plaintiff's house.

On the first issue, the court accepted the argument that plaintiff had a right to security and rejected defendant's argument that he had a right of freedom of action; on the second issue, the court rejected the plaintiff's argument that he had a right to security and accepted defendant's argument that he had a right of freedom of action. The court advanced no metatheoretical explanation for this contradiction.

Arguments based on social utility lead to a similar contradiction. Defendant's argument for allowing him to excavate without either compensating plaintiff for removing lateral support or providing precautions against the removal of such support is the argument that freedom of action stirs economic development. Allowing property owners in the city to build houses without having to worry about the consequences of such construction on their neighbor's property stimulates construction. The counter-argument is that unless property owners know that the law protects the value of their investment against injury by their neighbors, they will have no incentive to invest in construction. Security, rather than freedom of action, promotes investment and stimulates economic development. *See Kennedy, supra* note 9, at 358-60.

46. For example, John Stuart Mill offered a metatheory intended to draw a line between rights of freedom of action and rights of security. This was the metatheory of self-regarding acts: You have a legal liberty to do anything that legitimately concerns only yourself, but you cannot do anything that harms others. *See Singer, supra* note 42, at 995-99. This categorization cannot withstand scrutiny. Mill argued, for example, that alcohol consumption was a self-regarding act and could not be legitimately prohibited. *Id.* at 996-97. In this age of crackdowns on drunk drivers, it is easy to see that alcohol consumption is not necessarily a self-regarding act. In fact, any action that some people might consider self-regarding might be viewed by others as other-regarding. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942) (growing wheat on one's own land for home consumption affects interstate commerce). The metatheory therefore fails to generate determinate solutions to legal questions.

Mill also created an exception allowing harmful other-regarding acts if allowing such acts would maximize social welfare. *See Singer, supra* note 42, at 998. This metatheory was intended to reconcile the contradictory principles of freedom and security, but it failed to accomplish this goal. The manip-

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Second, rules may be indeterminate because of conflicts. A logical contradiction between two rules means that the rules are specific enough for there to be general agreement that they apply to a particular case, yet at the same time the two rules require opposite results. For example, a logical contradiction exists between the rules: (1) anyone over eighteen years old may vote, and (2) only people over twenty-one years old may vote.⁴⁷

A logical contradiction between two rules must be distinguished from a contradiction between two principles. Principles that are too general to be treated as rules are offered as justifications for specific legal rules. Principles that tell us to do opposite things create a contradiction of policy or principle. For example, there is a contradiction between the principle that people should have freedom to do whatever they like to pursue happiness and the counterprinciple that freedom of action should be limited so that people will not do anything that harms others. If these principles are stated in their absolute form, they create a logical contradiction because they cannot both be true at the same time. If they are not intended to be absolute, then they are competing general principles between which a line—the legal rule—must be drawn.⁴⁸

Third, rules at varying levels of generality cause indeterminacy. Even if a specific rule exists that has no exceptions and that everyone agrees how to apply, such as “one must be at least eighteen years old to vote in governmental elections,” there is always a more general rule or principle that could plausibly be used to nullify it, such as equal protection of the laws.⁴⁹ This is true even if everyone agrees that the general principle does not apply to that particular rule. This is because use of the general principle to nullify the specific rule would represent a plausible, although unconventional, legal justification for the result.

The availability of general principles, whether of constitutional or of common law, to nullify or limit the application of specific rules is a potentially devastating critique of the determinacy of legal doctrine. No matter how specific and easy to apply a set of rules is, its application is rendered less determinate if it coexists with legally enforceable standards that potentially could be used to eviscerate it. For example, no matter how rigid and easy to apply we make rules against trespass, they are rendered uncertain if we allow a vague defense that the trespass was justified on the

ulability of social utility or general welfare arguments would allow the exception to swallow the rule; at least it makes the line between the rule and the exception uncertain.

47. Rule one says that someone may do some act (a 19-year-old may vote), but rule two says that the same person may not do the same act (a 19-year-old may not vote).

48. A logical contradiction exists when two rules that draw the line at different places exist in the same jurisdiction.

49. The argument is that 17-year-olds are as mature as 18-year-olds and that to deny 17-year-olds the right to vote deprives them of equal protection of the laws.

grounds of public policy. A consensus may exist that the defense should apply only in cases of victims fleeing criminal assault or firefighters crossing land to save a house. Nonetheless, a judge could always use the public policy standard in any case to justify allowing the trespass. In every case, a conscientious judge must determine whether to interpret the standard so as to narrow existing rules. We know judges will not in fact do this, but it is strong evidence of the indeterminacy of legal rules that they can do this.

3. *Directive*. Principles or theories are non-directive if they do not help us choose among alternative possible rules; rules or standards are non-directive if they do not help us determine the outcome of a particular legal dispute. Principles and rules may be non-directive for several reasons.

First, legal doctrines are non-directive if they are ambiguous. Ambiguity may result from rules such as "be fair" or "liability is based on fault," that are too general to generate specific outcomes. Ambiguity may also result from highly abstract concepts within rules, such as the concept of "duress" in the rule that contracts made under duress will not be enforced. In a wide variety of cases, people will disagree about whether a contractual party was subject to "duress."⁵⁰ The outcome will depend on judgments about whether the situation presented illegitimate pressures such that the contract should not be enforced. To make this sort of rule determine outcomes, it would have to be far more specific in detailing when it applies.

Second, principles are indeterminate if they are circular. Tautological statements do not guide us in deciding what to do. For example, the principle that like cases should be treated alike does not help us decide what to do, since no two cases are alike or unlike in every respect. The question becomes whether to treat the cases alike for the purpose of a given rule. Therefore, "like cases" are simply "cases that should be treated alike."⁵¹

50. See Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 476-78 (1923); Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 576-83 (1982).

51. Even the most sophisticated traditional thinkers consider the principle of treating like cases alike to be meaningful. See, e.g., R. DWORKIN, *supra* note 14, at 113 ("The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike."); J. RAWLS, *supra* note 14, at 237 ("The rule of law also implies the precept that similar cases be treated similarly."). The only way to escape the principle's circularity is to assume that we can identify what cases are like each other without knowing the purposes for which we are comparing them. This assumption would be true if fact situations could be said to exhibit or contain some intelligible essence which is simply there, and makes the cases, of necessity, fall into the same category for any and all purposes. See R. UNGER, *KNOWLEDGE AND POLITICS*, 31-32 (1975).

Another example of a circular principle is the doctrine of *sic utere tuo ut alienum non laedas*: Use your rights so as not to injure the rights of others. This principle cannot help us decide whether a property owner's actions on her property have exceeded the bounds of her property rights and encroached on those of her neighbor. The principle merely states that, to the extent one's neighbors have

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Third, rules are indeterminate because they generally do not determine the scope of their own application. We can treat any rule as *sui generis*; at the same time, we can apply any rule broadly to a wide range of situations. Moreover, seemingly broad rules may be narrowed through later construction of exceptions or defenses.⁵²

Fourth, legal theories or rules may narrow choice within specified boundaries but not tell us what to do within those boundaries.⁵³ To the extent they leave the lawmaker free to choose what to do, they are non-directive.

4. *Self-revising.* Even if a legal theory or set of rules appears completely determinate—even if it appears comprehensive, consistent, and directive—it may still allow choice if it does not specify under what circumstances existing rules should be followed and when and how they should be changed. One of the fundamental principles of both common law and public law adjudication is that the legal rules may be changed in appropriate circumstances.⁵⁴ A fully determinate legal theory must provide for the possibility of its own revision; it must tell us when to follow precedent and when to reverse or overrule the precedent in the interest of fairness or policy or social welfare. If it does not do this, we are free to choose whether or not to follow the precedent; it therefore cannot determine the outcome.

C. *Why Legal Doctrine Is Predictable*

The main problem with the claim that law is indeterminate is its failure to explain how we can predict, sometimes with surprising accuracy, how the rules are going to be applied in specific cases. If we can predict the outcome of a case, then it appears that the legal system or rights or legal theory or something has determined the result in a way that is coherent and understandable. This problem can be resolved by distinguishing between indeterminacy and arbitrariness. This distinction will clarify why the claim that legal reasoning is indeterminate does not conflict with the insight that legal results may be predictable.

Existing legal doctrines do not require judges or scholars to reach the

legal rights, one is not free to harm their interests. The principle does nothing to establish what substantive rights are to be enforced by the law and does not tell us where to draw the line between a property owner's liberty to act on her property and her neighbor's legal right to security from harm. I have developed this point elsewhere at greater length. See Singer, *supra* note 42, at 1011–12.

52. See H.L.A. HART, *supra* note 14, at 126–27; Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 217 (1931) (differences in fact situations can always be used to distinguish cases).

53. H.L.A. HART, *supra* note 14, at 132.

54. See Singer, *Catcher in the Rye Jurisprudence*, *supra* note 10, at 278 n.9; cf. J. BENTHAM, OF LAWS IN GENERAL 191 (H.L.A. Hart ed. 1970); 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69–70.

results they reach because the doctrines are sufficiently ambiguous or internally contradictory to justify any result we can imagine. Indeterminacy does not mean that the *choices* that are made by those individuals are arbitrary or capricious. It also does not mean that all outcomes are equally likely to be considered or chosen by the decisionmaker. *The indeterminacy of arguments is logically distinct from the arbitrariness of choices.*⁵⁵ It is perfectly possible for there to be predictable patterns of behavior and decisionmaking even though the arguments advanced to justify the choices do not determine the outcomes. Saying that decisionmaking is both indeterminate and nonarbitrary simply means that we can explain judicial decisions only by reference to criteria outside the scope of the judge's formal justifications.⁵⁶

Decisions can be arbitrary in two ways. First, they can be made in an unconsidered manner. For example, one can decide to vote for someone by flipping a coin or simply by choosing the name at the top of the ballot. Decisions are also unconsidered if they are the result of whim or caprice ("If the Dodgers don't win tonight, I'll vote for Reagan!"). In each of these cases, the decision is made in a manner that demonstrates that the decisionmaker does not care about the result.⁵⁷ By their very nature, these decisions are unpredictable.

Second, decisions can be "arbitrary" because they are based on relatively controversial values about which we do not expect unanimity. Those decisions are "arbitrary" not because they are unconsidered, but because they vary depending on the decisionmaker's beliefs.

Judges and scholars do consider their decisions or policy recommendations, and considered choices are "arbitrary" only in the second sense.

55. As Gordon argues:

The other argument rests, I think, on a misunderstanding of what the Critics mean by indeterminacy. They don't mean—although some times they sound as if they do—that there are never any predictable causal relations between legal forms and anything else. As argued earlier in this essay, there are plenty of short- and medium-run stable regularities in social life, including regularities in the interpretation and application, in given contexts, of legal rules. Lawyers, in fact, are constantly making predictions for their clients on the basis of these regularities. The Critical claim of indeterminacy is simply that none of these regularities are *necessary* consequences of the adoption of a given regime of rules. The rule-system could also have generated a different set of stabilizing conventions leading to exactly the opposite results and may, upon a shift in the direction of political winds, switch to those opposing conventions at any time.

Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 125 (1984).

56. Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 22-26 (1924).

57. Some decisions of this sort may actually be considered. For example, one might argue that the fairest way to implement a military draft is to use a lottery. In cases like this, however, a considered decision is made to adopt an arbitrary procedure. The results are arbitrary as they affect specific individuals, but the original decision to adopt the procedure is reached after reflection and conscious choice. Moreover, the decision is justified by reasons that can be articulated (such as: "This is the fairest way to distribute the calamity of military service"; "This method generates the least controversy").

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This kind of arbitrariness does not, by itself, make prediction impossible. Decisions that are not determined by a coherent theory, but which are considered, may be predictable if we know enough about the context in which the decision is made. This context includes the institutional setting (for example, court or legislature), the customs of the community (such as standard business practices), the role of the decisionmaker (judge, legislator, bureaucrat, professor), and the ideology of the decisionmaker. Legal doctrine is a part of this context, and both influences and is influenced by it. There are several reasons why an understanding of the legal context may enable us to predict legal results.

First, an existing structure of legal argumentation orients thought according to a predictable scheme.⁵⁸ As long as we think of corporations as private entities and municipalities as public entities, we are likely to apply very different sets of rules and principles in judging their conduct.⁵⁹ As long as we think of the separation of powers as governing solely the relations among the judiciary, the legislature, and the executive, we are unlikely to view corporations as repositories of sovereign power and include them in considerations of how to balance power among governmental institutions.⁶⁰

Second, that orientation of thought limits the number and variety of perceived ways to resolve conflicts.⁶¹ As long as we think of labor law as a set of rules and institutions to govern collective bargaining between unions and employers, we are unlikely to consider the remedy of employee ownership of large enterprises.⁶² As long as we think of torts as involving a choice between strict liability and negligence, we are unlikely to consider adopting universal health and accident insurance coupled with regulatory control of harmful behavior.

Third, the choices made by judges or legal theorists are often predictable because these decisionmakers share a legal culture. Although legal doctrine may be sufficiently indeterminate that it *could* be used to justify any outcome of a legal dispute, some rules and outcomes are more likely to be considered attractive than others. For example, principles and counterprinciples are often formulated as rules and exceptions; judges are

58. As Vandeveldt points out:

Legal thought is, in essence, the process of categorization. The lawyer is taught to place phenomena into categories such as fact or law, substance or process, public or private, contract or tort, and foreseeable or unforeseeable, to name but a few. Categorizing phenomena determines how they will be treated by the legal system.

Vandeveldt, *supra* note 9, at 327.

59. See Frug, *supra* note 9, at 1128–54 (1980).

60. See Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

61. See Gabel, Book Review, 91 HARV. L. REV. 302, 313 n.18 (1977) (reviewing R. DWORIN, *TAKING RIGHTS SERIOUSLY* (1977)).

62. See Klare, *supra* note 9.

more likely to fit cases within the rule than the exception. Over time the identification of which principle is the rule and which is the exception may change.⁶³ Nonetheless, it is often possible to predict that the rule rather than the exception will be used by the judge to decide the case.

Moreover, legal doctrines determine outcomes when those doctrines are specific.⁶⁴ If the rule is that only eighteen-year-olds are allowed to vote, then seventeen-year-olds will not be allowed to vote. Viewed at this level of specificity, the rule is sufficiently determinate to generate the outcome. The rule becomes indeterminate only when viewed in conjunction with more general principles that potentially could be used to nullify the rule, such as the right to equal protection of the laws.

Legal doctrines are always potentially indeterminate. Judges can move the line between rules and exceptions, or create new exceptions. They can nullify the application of a rule to a particular case by widening a legally enforceable standard so far that it eclipses the apparently applicable rule. Ultimately, judges always have the power to revise the rules. That judges may do these things, however, does not mean they will do them. Because judges participate in a legal culture that suggests how they are to act as judges, we can often predict how they will act.

The legal culture shared by judges and theorists encompasses shared understandings of proper institutional roles and the extent to which the status quo should be maintained or altered. This culture includes "common sense" understandings of what rules mean as well as conventions (the identification of rules and exceptions) and politics (the differentiation between liberal and conservative judges).⁶⁵

Convention, rather than logic, tells us that judges will not interpret the Constitution to require socialism.⁶⁶ Nothing in the *logic* of constitutional argumentation requires us to interpret it as supporting capitalism. A plausible argument can easily be constructed to show that the Constitution prohibits capitalism as it is currently practiced in the United States. For

63. See Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984) (arguing that although consideration used to be the rule and promissory estoppel the exception—promissory estoppel is now the rule while consideration is the exception).

64. See Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 10, at 1687-89 (rules are formally realizable if they are capable of being applied in a determinate way).

65. Mark Tushnet has written:

[A]lthough we can . . . use standard techniques of legal argument to draw from the decided cases the conclusion that the Constitution requires socialism, we know that no judge will in the near future draw that conclusion. But the failure to reach that result is not ensured because the practice of "following rules" or neutral application of the principles inherent in the decided cases precludes a judge from doing so. Rather, it is ensured because judges in contemporary America are selected in a way that keeps them from thinking that such arguments make sense. Tushnet, *supra* note 10, at 823 (citations omitted).

66. By logic, I mean necessary implications of constitutional principles (such as "the President must be at least 35 years old"). Convention refers to commonly accepted interpretation of general constitutional principles. See *id.*

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example, in order to pay dividends to stockholders, corporations must pay employees a sum that is less than the full market value of what they produce. This is true if we accept John Locke's argument that the value of a good is completely due to the labor that was expended to create it.⁶⁷ If we also accept Locke's argument that individuals have a natural right to the full product of their labor, then to take some of the value of this product to give to stockholders is to take a part of the employees' property. If we accept Morris Cohen's argument that property rights are delegations of sovereign power,⁶⁸ the corporation's act can be attributed to the state, and is therefore subject to regulation under the Fourteenth Amendment. The employees' property is taken without just compensation. The entire structure of wage labor on which capitalism is based therefore violates the Constitution unless the government compensates workers for corporate profits paid to shareholders.⁶⁹

It is unlikely that a court in the United States would accept this argument. Yet there is nothing illogical about it. It is an elaboration of rights arguments current in legal discourse. It simply uses those principles in an unconventional fashion.⁷⁰

Politics, as well as custom, tells us that the Constitution is not going to be interpreted to prohibit wage labor. Politics, rather than legal reasoning, tells us that Justices Brennan and Marshall are far more likely than Justices Burger or Rehnquist to nullify a state statute on the basis of race or sex discrimination. There is nothing mysterious about this. We know who the liberals are on the Court and who the conservatives are by the positions those individuals generally take on key political issues. This is not to say, however, that Justice Marshall's theory of equal protection determines his decisions any more than Justice Rehnquist's theory does his. These two Justices are able to rule in opposite directions precisely because equal protection law plausibly can be used to justify both liberal and conservative outcomes.

This does not mean that judges enforce only rules they think are good or that comport with their political views. Judges enforce rules with

67. J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 17 (1952) (1st ed. London 1690) ("Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property.") *But see id.* at 18 (arguing that I have a right to "the turfs my servant has cut").

68. See Cohen, *supra* note 60.

69. For a different argument that the Constitution requires socialism, see Tushnet, *Dia-Tribe* (Book Review), 78 MICH. L. REV. 694, 696-705 (1980).

70. See R. RORTY, *supra* note 13, at 321 ("[W]hen a practice has continued long enough the conventions which make it possible—and which permit a consensus on how to divide it into parts—are relatively easy to isolate."); Tushnet, *supra* note 10, at 823-25 (arguing that predictable patterns of judicial behavior can be described on the basis of conventional images of institutional behavior).

which they strongly disagree. Every judge does this sometimes; most do it often. At times, judges enforce such rules because they mistakenly believe that legal reasoning requires them to do so. At other times, they are influenced by their perceptions of how their actions will be greeted by their relevant constituencies—other judges, lawyers, politicians, law journals, professors, and the public. Or they may value predictability in that area of law. Sometimes they act out of the belief that they are deferring to the will of another branch of government, and that the political process worked well enough and the rule is not oppressive enough to overturn the apparent intent of that other governmental entity. To the extent we can predict when judges will act contrary to their political views, we rely on our knowledge of their past behavior and of their understanding of proper institutional roles and of legal reasoning.

To the extent legal decisions are predictable, they can be explained by legal culture. This does not mean that legal decisions are completely predictable. On many issues, no conventions are available. Many other issues are outside mainstream political controversy and therefore we cannot predict what individual judges will think about them. It is precisely because of these uncertainties as well as gaps in the legal rules, and because legal reasoning is indeterminate and manipulable, that judges often surprise us by using existing arguments to justify results that we did not expect.

For a legal theory to appear to determine results, one of two tricks must be used. First, the theorist can define criteria for rule choice or can define a rule that is sufficiently specific that there will be little or no disagreement about the result it suggests. The theorist can then “apply” the rule to get that result. But in doing so, the theorist must ignore counterarguments or potentially contradictory principles that could plausibly be used to justify a different result, even though the same theorist might wholeheartedly accept those positions in other situations.

Second, the theorist can make a series of limiting assumptions that so narrow the field of choice as to make a principle appear to determine outcomes. This method masks the underlying politically controversial choices that have to be made before applying the theory.⁷¹

In summary, the legal theories advanced to justify our rules and institutions are indeterminate. The same theories could be used to justify very different sorts of institutions and very different rules. This does not mean, however, that outcomes in our legal system are completely unpredictable or that the choices made by judges are arbitrary in the sense that they are unconsidered. Considered choices can be described and even predicted to

71. This is the typical procedure of the law and economics literature. See Kennedy, *Cost-Benefit Analysis of Entitlement Problems*, *supra* note 10.

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some extent because they are conditioned by legal culture, conventions, “common sense,” and politics. Custom, rather than reason, narrows the choices and suggests the result.

II. OBJECTIVITY

Virtue is knowledge.

—Plato⁷²

Man is the measure of all things.

—Protagoras⁷³

A. *The Search for Certain First Principles*

Might does not make right. But what does? The project of objectivity is creating standards by which we can judge the legitimacy of our political institutions and our legal rules.⁷⁴ Not just any standards will do; they must be correct and founded on reason.⁷⁵ This is the quest started by Plato: The search for rational criteria that will tell us that a moral view is not just someone’s considered opinion or even the opinion of everyone, but that it is right and true, an accurate representation of the good.

The view that morality, legal rules and political institutions can be judged and legitimated by objective standards is the view that morality is a matter of knowledge rather than conviction.⁷⁶ Virtue, according to Plato, is knowledge. Moral positions are not merely acceptable or unacceptable; they are true or false, and one can demonstrate their truth or falsity by rational argument.

I reject this view. The attempts to provide a rational foundation for

72. See PLATO, PROTAGORAS 99 (W. Guthrie trans. 1956). See E. BARKER, THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE 47 (1959) (calling this principle “Socrates’ great maxim”).

73. E. BARKER, *supra* note 72, at 32.

74. As Rawls states:

[T]hese principles are objective. They are the principles that we would want everyone (including ourselves) to follow were we to take up together the appropriate general point of view. The original position defines this perspective, and its conditions also embody those of objectivity: its stipulations express the restrictions on arguments that force us to consider the choice of principles unencumbered by the singularities of the circumstances in which we find ourselves. The veil of ignorance prevents us from shaping our moral view to accord with our own particular attachments and interests. We do not look at the social order from our situation but take up a point of view that everyone can adopt on equal footing. In this sense we look at our society and our place in it objectively: we share a common standpoint along with others and do not make our judgments from a personal slant.

J. RAWLS, *supra* note 14, at 516–17.

75. See *id.* at 517–18 (“But unless there existed a common perspective, the assumption of which narrowed differences of opinion, reasoning and argument would be pointless and we would have no rational grounds for believing in the soundness of our convictions.”).

76. I assume here that morality is intersubjectively valid, that it is true for all persons (at least within the same culture).

legal theory have been incoherent. Theories are "incoherent" when they set impossible tasks for themselves: They purport to give us guidance in deciding what to believe and what to do, yet they are either so vague or ambiguous as to give us no real help, or they are internally contradictory, telling us to do opposite things.⁷⁷ In my view, the question of what we should do, or of which rules and institutions we should create, is not a matter of truth or falsity. It is not a question of accurate representation of the "good," and it is not a question that can be resolved once and for all by a rational decision procedure. Rather, our views of what we should do are the result of experience, emotion, and conversation. This conversation occurs in a social and historical context. The conversation will continue as long as human beings live in a society that permits them to talk freely with each other. And as long as the conversation continues, we will reconsider and sometimes revise our beliefs.

The issue of objectivity is related to, but different from, the issue of determinacy. The question of determinacy asks: Do our theories determine our rules and institutions and do those rules determine outcomes? The question of objectivity asks: Even if those theories determine results, what makes those institutions and doctrines legitimate?⁷⁸ The issues are related because indeterminate theories leave us free to choose, and if we are free to choose, we have no assurance that our choices accord with the good. The issues are separate because determinate theories may or may not be legitimate, and legitimate rules and institutions may or may not be supported by determinate theories.

Unlike the critique of claims of determinacy, the critique of objectivity is for the most part an external critique. Rather than a demonstration that traditional theory does not live up to its own promises, it is a dispute about what the fundamental premises of law and legal reasoning should be.

The project of creating criteria for legal theory assumes that it is possible to ground the legal system on a rational foundation. This assumption means that the first principles from which we derive the legal rules should have some kind of inherent validity independent of our individual beliefs. A rational foundation for legal doctrine may be based on either a substantive or a procedural theory. Legal doctrine has a substantive foundation if it accurately reflects some external source that is asserted to be foundational.⁷⁹ Legal doctrine has a procedural foundation if, regardless of its

77. I will not prove that it is impossible to provide a rational foundation for moral or legal theory; I will merely explain why the prevalent attempts to do so either founder on their internal contradictions or are circular.

78. Institutions and doctrines are legitimate if they accurately embody or express the good.

79. If this seems to be circular, it is. But all theorists recognize that, at some point, the search for first principles has to stop, and we simply have to assert that something is the basis for everything

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specific content, it is reached through a decision procedure that is theoretically capable of producing agreement.⁸⁰

The traditional nineteenth-century substantive foundations of the legal system were positivism and natural law. These two philosophies each define the source of law. Positivism is the belief that commands of the sovereign are the source of law.⁸¹ These commands are legitimate because the sovereign is legitimate.⁸² Natural law is the belief that a structure of individual rights founded in nature is the source of law.⁸³ The structure of these rights may be found either outside human beings, in nature or God, or inside human beings, in their thinking patterns.⁸⁴

Both substantive theories assume that a method exists to determine, more or less accurately, what rights are and how they can be applied. Traditional theorists have offered two methods: rights analysis and utilitarianism.⁸⁵ Each assumes that one can identify (or invent) a process of reasoning prior to reaching specific conclusions that will both help determine outcomes in many specific cases and accord with some criteria all rational individuals must accept.⁸⁶ Because both rights and utility theories

else. See Moore, *supra* note 6, at 1072–75, 1106–16.

My distinction between procedural and substantive foundations is not intended to describe separate classes of theorists. Many, if not most, theorists combine both sorts of arguments. The distinction is derived from Duncan Kennedy. See Kennedy, *supra* note 9, at 259 (“The basic alternatives here are (a) that rational reflection on human nature and the structure of social life will tell us what rights we have, or (b) that we can arrive at legitimate decision rules about how to specify rights even if we can’t guarantee that all rational people will agree on the substantive outcomes of this process.”).

80. The qualification “theoretically” is important. All theorists recognize that people do not agree, even when they are trying to apply the same decision procedure—for example, Rawls’ theory of justice. This failure to agree does not by itself destroy the validity of the decisionmaking procedure or its claim to objectivity. The claim of unanimity is more limited. Rawls and others contend only that everyone would agree *if everyone applied the method correctly*. See J. RAWLS, *supra* note 14, at 21 (“[T]he conditions embodied in the description of the original position are ones that we do in fact accept. Or if we do not, then perhaps we can be persuaded to do so by philosophical reflection.”).

81. 2 J. AUSTIN, LECTURES ON JURISPRUDENCE 550–51 (3d. ed. 1869); J. BENTHAM, *supra* note 54, at 1, 18–30.

82. The source of nineteenth century legal positivism was Hobbes. See T. HOBBS, LEVIATHAN 264–65 (1968) (1st ed. London 1651) (“For it has been already shewn, that nothing the Sovereign Representative can doe to a Subject, on what pretence soever, can properly be called Injustice, or Injury; because every Subject is Author of every act the Sovereign doth; so that he never wanteth Right to any thing, otherwise, than as he himself is the Subject of God, and bound thereby to observe the laws of Nature.”).

83. The source of nineteenth century natural law theory was Locke. See J. LOCKE, *supra* note 67, at 48–50, 70–73 (asserting that people institute governments to preserve their natural rights).

84. See R. RORTY, *supra* note 13, at 177–78, 316.

85. While most positivists are utilitarians and most natural law theorists are rights analysts, there is no logical reason why this must be so. A positivist could believe that rights analysis is the proper method to determine what the commands of the sovereign are. In other words, a positivist could believe that the sovereign has adopted utilitarianism as a method of deciding which commands to issue, or the positivist could assume that the sovereign has adopted rights theory as its ruling principle. The natural law thinker can believe that the content of natural law is defined by the method of utilitarianism or by rights analysis.

86. See J. RAWLS, *supra* note 14, at 517–18.

share this assumption, I see them as having far more in common than their champions will allow.⁸⁷

Underlying the traditional sources and methods of legal reasoning is one fundamental premise: The assumption that it is at least theoretically possible to achieve a rational consensus among interlocutors that will tell us, once and for all, how we should go about deciding moral and legal questions.⁸⁸ This premise must be taken apart because it is at once the heart of traditional legal theory and its Achilles heel.

B. *Substantive Foundations*

1. *Are moral values true?* As in the nineteenth century, contemporary legal theorists who seek to provide a substantive foundation for legal rights generally divide into two camps: positivists and rights thinkers. H.L.A. Hart has modernized John Austin's view of legal rights as commands of the sovereign.⁸⁹ The modern positivists tend to equate law with canonical texts—constitutions, statutes, regulations, judicial opinions, court rules, legislative reports, executive orders—that have been promulgated by some authoritative governmental source, and with unwritten rules that are accepted by the sovereign as having coercive power. Ronald Dworkin is the most famous of the rights thinkers.⁹⁰ The modern rights thinkers tend to equate law with rights that individuals simply *have*, regardless of whether the state has promulgated any authoritative expression of those rights.

The concept of accurate representation assumes that law is a matter of knowledge rather than judgment. Law is something that can be perceived; it does not have to be created. The weakness of the theory that law is found and not made⁹¹ is apparent when we notice that this theory is both

87. In the eighteenth and nineteenth centuries, the rights thinkers were generally the conservatives and the utilitarians were the progressives. Today, the rights thinkers are the progressives and the utilitarians (law and economics thinkers) are the conservatives. This alignment is not logically necessary: Progressives used economic theory in the 1960's to justify regulation of pollution, see Kennedy, *Cost-Benefit Analysis of Entitlement Problems*, *supra* note 10, at 393-95, and conservatives have used rights theory to further libertarian programs.

88. See, e.g., J. RAWLS, *supra* note 14, at 11, 17; cf. R. RORTY, *supra* note 13, at 316-18 (discussion of commensurability); M. SANDEL, *supra* note 4, at 104-05 (describing the basis of social contract theory). When I say "once and for all" I do not mean to suggest that whatever answer is reached could never be changed (although that is certainly what the rhetoric of these theorists suggests) but that the procedure for determining that answer must be irrevocably set. Such a procedure might include criteria for determining when to revise substantive results, as well as criteria for determining when and how to revise procedures for determining results.

89. See H.L.A. HART, *supra* note 14.

90. See R. DWORKIN, *supra* note 14.

91. *Id.* at 81 ("It remains the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively."); H.L.A. HART, *supra* note 14, at 92-93 (discussing rules of recognition which purport to identify which rules are to be legally enforced). Both Hart and Dworkin recognize that while judicial decisions simply represent the external source, other

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descriptive and normative. It uses the metaphor of discovery and accurate representation to describe both the legal rules that are in force and the legal rules that *should* be enforced. We can know what the rules should be—as well as what they are—if we examine the Constitution or the concept of rights. Thus, these theories turn normative statements into descriptive statements. To know what we should do, we simply have to develop a true picture of something out there. If the rules correspond to what is out there, then they are right and good.

The motive that underlies the metaphors of discovery and accurate representation is the search for certainty. We can *know* what is right and wrong, or what the law should be, if we can *perceive* it. If making legal decisions is a matter of accurate representation, rather than choice, it is possible to argue that rights are matters that can be proven to be right or wrong. If a viewpoint is a matter of perception rather than judgment, it can be thought to be true or false rather than merely preferable or inferior.

I reject the view that legal rules are legitimate if they accurately represent some external source. This position converts questions that require active judgment and choice—normative questions—into questions that seem to require only passive mimicry.⁹² It is wrong to turn discretionary normative decisions into non-discretionary descriptions. Such theories mystify us by obscuring important facts: To figure out how we should act and live together, we must make moral choices. The answers are not sitting out there ready for us to pick up, like manna from heaven.

2. *Accurate representation and the problem of method.* Legal theories that purport to provide a substantive foundation for legal rules assume that we can know what the legal rules should be by describing such things as the Constitution or rights. Positivists point to the Constitution, meaning both the text of the authoritative document and the unwritten rules that judges recognize as having coercive power.⁹³ Rights theorists point to nature or reality or consensus or reason or some combination of those.⁹⁴ In either case, the thing to be described must be described *accu-*

decisions involve creativity. Nonetheless, both assert that the basic structure of the legal system can and should be set by describing an external source.

92. The dispute between these two methods of justification of social institutions is an old one. The philosophical differences between Socrates and Protagoras fall along these lines. Socrates' maxim was "virtue is knowledge"; this maxim meant that morality is a matter of truth and of accurate representation of the good rather than mere opinion. E. BARKER, *supra* note 72, at 47. See also PLATO, *supra* note 72, at 99. Protagoras denied that morality is a matter of truth; he believed that morality is a matter of individual conviction: "[M]an is the measure of all things." E. BARKER, *supra* note 72, at 32.

93. See H.L.A. HART, *supra* note 14, at 92-93.

94. See, e.g., R. DWORKIN, *supra* note 14, at 129 ("Hercules must defer, not to his own judgment of the institutional morality of his community, but to the judgment of most members of that community about what that is."); Moore, *supra* note 6, at 1144 ("[I]t is the nature of things, and not social

rately for the foundation to be genuine. The problem is that both the Constitution and rights are too general to describe accurately without saying much more about them. Legal theorists who rely on the metaphor of accurate representation therefore become obsessed with the problem of method. If the mind is a mirror of external reality, then the goal of legal theory must be to polish the mirror so that the representations of the world outside are accurate and detailed.⁹⁵ This preoccupation with polishing makes substantive theories resemble theories that are based *solely* on method.

Rhetorically, however, substantive theories of law are quite different from purely procedural theories. The goal of substantive theories is to represent accurately substantive rules that exist somewhere. Theories that are based solely on identifying an objective decision procedure do not assume that any particular right answer exists. On the contrary, they assume that objectivity is reached by using a proper decision procedure, and that the rule, *whatever it turns out to be*, is the right one. The substantive theory assumes that right rules exist and that we can find them. A procedural theory assumes that no rule is right apart from a method; the right method yields the right rule. The sense in which such a method is "objective" is the subject of the next section.

C. *Decision Procedures*

1. *Legal reasoning.* Procedural theories assume that law is justified only if it is reached through a decision procedure that properly assesses all the relevant factors and generates outcomes. This decision procedure is what most law professors mean when they talk about "legal reasoning." When legal scholars claim that legal reasoning is justified only if it is objective, they have at least two points in mind. First, they distinguish between subjective, personal preference, and objective, interpersonal validity. The subjective/objective dichotomy assumes that a basic distinction exists between opinions that are merely a matter of personal preference about which we do not expect agreement, and opinions that are intersubjectively valid and about which, as a result, we do expect intelligent persons of good will to be able to agree. Moral views are intersubjectively valid if they are views that everyone who thought about moral issues from a legitimate common perspective such as Rawls' veil of ignorance would

conventions, that determines the extension of a moral word."); Radin, *supra* note 26, at 969 n.44 ("[O]ur present state of philosophical enlightenment on the subject of moral objectivity seems to be consonant with the argument that 'deep' moral consensus—not mere social consensus, or subjective preference counting—should be treated as objective for political purposes.") (citation omitted).

95. See R. RORTY, *supra* note 13, at 131-64.

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accept.⁹⁶ Proponents of procedural objectivity expect agreement not about the particular substantive outcomes (the legal rules and standards) but about the method of reaching outcomes (legal reasoning).

Second, theories of procedural objectivity seek to separate individual intuition from rational technique. The underlying assumption is that we should not trust our intuitions about how the rules should be set. Because they are unprincipled, those intuitions are unjustified and may reflect merely personal preference. They can be justified only by showing how they relate to some process of legal reasoning that generates them. Legal reasoning therefore appears as a decision procedure that is removed from those intuitions.

The appearance of objectivity is generated by combining two assumptions: intersubjectivity and logical technique. To appear intersubjectively valid, the first principles of legal reasoning are made sufficiently vague so that it will appear that there is, or should be, general agreement about their validity. No one is against liberty, fairness, efficiency, or equality. The generality, ambiguity, and impersonality of these concepts allow enemies to appear to agree. These concepts are further removed from specific outcomes by a process of legal reasoning that itself appears impersonal and logical rather than controversial and ideological. This process may take the form of balancing tests, social contract theories, or economic analysis. Both the first principles and the decision procedure appear to be removed from the specific outcomes and unrelated to them in any obvious, direct way. To assume that this method justifies legal rules is therefore to assume that our intuitions have no independent validity.

*Roe v. Wade*⁹⁷ typifies this method. Justice Blackmun acknowledged at the very start that the abortion issue was highly controversial:

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.⁹⁸

96. See J. RAWLS, *supra* note 14, at 516–18.

97. 410 U.S. 113 (1973).

98. *Id.* at 116.

Nonetheless, legal reasoning would answer the constitutional question perfectly free from such controversial considerations: "Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this . . ." ⁹⁹ This sort of argument illegitimately turns controversial judgments into matters of logical technique, to matters, as Justice Blackmun says, of "measurement." This rhetoric obscures what is really going on and is wrong.

I find this example typical because it demonstrates that even when everyone agrees that a legal issue is politically controversial and that its resolution depends on choosing between irreconcilable religious views and visions of social life, jurists persist in asserting that the issue must be decided in a manner that thrusts such considerations aside. It is obvious that a decision on the constitutional legitimacy of laws limiting access to abortions must reflect controversial judgments. Thus any intimation that the decision could be made in a logical manner is ridiculous. Nonetheless, Justice Blackmun made the traditional claim that he possessed a method of constitutional analysis—of legal reasoning—that avoided the necessity of moral choice. According to Justice Blackmun, the Constitution had already made the requisite moral choice; the only task for the Court was to determine what that choice was. Legal reasoning, Justice Blackmun suggested, involved the application of universal principles about which we should all agree (constitutional analysis) rather than of particular principles about which we do not expect agreement (religion, politics, morality).

It is understandable that the more controversial and politicized the decision, the more a court will want to appear above controversy. Such false appeals to neutrality are, nonetheless, illegitimate. When judges write opinions justifying their disposition of cases and their choices of rule, they should feel free honestly to express what they really were thinking about when they decided the case. These revelations will clarify the moral and political views at stake in legal controversies. Judges should also explicitly discuss the social context surrounding the legal dispute. There is precedent for the form of expression I am advocating: Many judges have provided legitimate arguments to justify what they have done without pretending that their decisions were derived in some logical (uncontroversial) fashion from precedent. For example, in *State v. Shack*,¹⁰⁰ the Supreme Court of New Jersey held that a property owner could not exclude legal services and health workers from visiting migrant farmworkers on his property. In a short, beautifully written opinion, Chief Justice Weintraub described the values at stake in the controversy and the social context sur-

99. *Id.*

100. 58 N.J. 297, 277 A.2d 369 (1971).

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rounding the legal relationships.¹⁰¹ He argued rightly that migrant farmworkers were powerless in relation to many others in society, that they provided needed services to the economy, and that they themselves were in great need of communal assistance. He discussed the interests at stake on both sides, and, referring to other situations in which property owners were under a legal duty to allow others access to their property, stated that property owners' rights to exclude others were not unlimited. Further, Justice Weintraub acknowledged that the law "is not static,"¹⁰² and that vast changes had occurred in the legal rules governing legal relations among persons with respect to the use of land. Finally, he asserted:

We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility.¹⁰³

This approach to legal argumentation differs markedly from Justice Blackmun's false assertion that *Roe v. Wade* was decided on the basis of "constitutional measurement."¹⁰⁴

2. *Commensuration and normal discourse.* Two concepts, commensuration and normal discourse, describe two different ways of viewing the objectivity of legal reasoning. The first possible meaning of objectivity is commensuration: Legal reasoning is objective if it accords with an innate, antecedently existing thinking process common to all people or, at the very least, to everyone in our culture.¹⁰⁵ The commonality of this thinking process is what makes it objective rather than subjective. Subjective views are

101. Justice Weintraub wrote:

Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.

Here we are concerned with a highly disadvantaged segment of our society. We are told that every year farmworkers and their families numbering more than one million leave their home areas to fill the seasonal demand for farm labor in the United States. . . . The migrant farmworkers come to New Jersey in substantial numbers.

The migrant farmworkers are a community within but apart from the local scene. They are rootless and isolated. Although the need for their labors is evident, they are unorganized and without economic or political power. It is their plight alone that summoned government to their aid.

Id. at 303, 277 A.2d at 372.

102. *Id.* at 305, 277 A.2d at 373.

103. *Id.* at 307, 277 A.2d at 374.

104. 410 U.S. at 116.

105. See R. RORTY, *supra* note 13, at 316.

those reached by individual, personal considerations; objective views are those reached by the framework for discussion that constitutes a common ground for all people. Legal reasoning is rational if it is based on this common ground. To assume that all discourse about law can and should be commensurable is to assume that all human beings innately possess a common thinking process.¹⁰⁶ This common ground constitutes a permanent, neutral framework for inquiry.¹⁰⁷ If all conversation about law is capable of being conducted within a single framework through a decision procedure, then all disagreements among lawyers, judges, and scholars do not simply involve differences of opinion but must be explained as mistakes. If people do not agree, someone is thinking incorrectly.

I do not accept the proposition that all discourse about law can be rendered commensurable—that theoretically we all should be performing the same decision procedure (legal reasoning) that, if performed correctly, will generate determinate and valid answers to all questions about what the legal rules should be. Not all discourse about law can be crammed into a single decision procedure, and human beings simply do not have an innate thinking process that unites us all in a common framework of inquiry.

The second possible meaning of objectivity is normal discourse. “Normal discourse” is Richard Rorty’s extension of Thomas Kuhn’s concept of normal science.¹⁰⁸

[N]ormal discourse is that which is conducted within an agreed-upon set of conventions about what counts as a relevant contribution, what counts as answering a question, what counts as having a good argument for that answer or a good criticism of it. Abnormal discourse is what happens when someone joins in the discourse who is ignorant of these conventions or who sets them aside.¹⁰⁹

If normal discourse is what we mean by objectivity, then a view is objective if it has been discussed by a group of persons who agree on the criteria for describing and judging it, and they do in fact agree about it.¹¹⁰

106. *Id.* at 316–18.

107. By “neutral” I mean unrelated to considerations that vary from person to person. Also, a “permanent” framework may provide for the possibility of evolution of legal rules.

108. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 23–51 (2d ed. 1970) (normal science establishes a paradigm of rules governing questions that are interesting, evidence that would answer those questions, and answers that are acceptable).

109. R. RORTY, *supra* note 13, at 320.

110. As Rorty says:

To sum up this “existentialist” view of objectivity, then: objectivity should be seen as conformity to the norms of justification (for assertions and for actions) we find about us. Such conformity becomes dubious and self-deceptive only when seen as something more than this—namely, as a way of obtaining access to something which “grounds” current practices of justification in something else.

Id. at 361. See also L. WITTGENSTEIN, *ON CERTAINTY* § 404, at 52e (D. Paul & G. Anscombe

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If people within a relevant community agree to a certain proposition, then the proposition satisfies criteria or arguments that they accept. All objectivity means is agreement among people. Under this view, the word “objective” is an empty compliment we confer on principles with which we agree. The compliment is empty because it is circular: People accept a legal rule if it is based on objective principles; objective principles are principles those people accept; people therefore accept the legal rule because they agree with it.

To escape this circle, it is necessary to believe that human beings possess an overarching and antecedently existing rational method that tells us how to decide legal or moral questions. This is the belief that reason can adjudicate value conflicts. But we have no antecedently existing rational method to determine whether people are justified in accepting the criteria they accept. We can judge the criteria that others accept only by whatever criteria we accept. If they do not accept our criteria, there is no way to prove that they are wrong. As Richard Rorty has said, “We have not got a language which will serve as a permanent neutral matrix for formulating all good explanatory hypotheses, and we have not the foggiest notion of how to get one.”¹¹¹

3. *Rational consensus.* Rational consensus is the most common decision procedure that traditional legal theorists contend provides an objective foundation for legal rules.¹¹² Rational consensus does not assume merely that it is possible for intelligent people to agree on important moral and political issues if people think carefully about them; it assumes that rational agreement is the ultimate *source* of those values or is the foundation on which they rest. It assumes not only that if reasonable people talk long enough they will agree on the criteria for determining the legal rules but

trans. 1969) (“I want to say: it’s not that on some points men know the truth with perfect certainty. No: perfect certainty is only a matter of their attitude.”).

111. R. RORTY, *supra* note 13, at 348–49. Rorty is undaunted by these limitations.

The question is not whether human knowledge in fact has “foundations,” but whether it makes sense to suggest that it does—whether the idea of epistemic or moral authority having a “ground” in nature is a coherent one. For the pragmatist in morals, the claim that the customs of a given society are “grounded in human nature” is not one which he knows how to argue about. He is a pragmatist because he cannot see what it would be like for a custom to be so grounded.

Id. at 178. When lawyers and judges talk about “sound arguments,” they vacillate between meaning that the arguments are conventional and that they are rational. A conventional argument accords with traditional rhetoric; a rational argument is based on the common ground supposedly shared by everyone engaged in legal reasoning.

112. See, e.g., R. DWORKIN, *supra* note 14, at 125–30; J. RAWLS, *supra* note 14, at 516–18; Radin, *supra* note 26, at 969 & n.44. The metaphor of rational consensus underlies virtually every major current legal theory, including social contract theories and theories of efficiency. For an example of the latter, see R. POSNER, *THE ECONOMICS OF JUSTICE*, *supra* note 14, at 88–98 (outlining the consensual basis of wealth maximization and efficiency as criteria for legal rules).

that reason will generate an accurate picture of our society's rational consensus.

The possibility of accurately describing our society's rational consensus provides a foundation for legal theory and allows us to believe in the objectivity of legal reasoning. If we go through the proper method of figuring out what our society's rational consensus is, then we will know what to do. This procedure *combines* the metaphor of accurate representation and the metaphor of a decision procedure. We are trying to generate an accurate picture of the considered judgment of the community; at the same time, we are trying to figure out what the considered view of others *would be* if everyone thought in a sufficiently rational way.

The idea of rational consensus is a mixed metaphor in a second way. It repeats, rather than resolves, the subjective/objective dichotomy. Accurate representation of community views appears objective because the view of a substantial segment of the community—consensus—is distinct from the particular views of any individual. At the same time, accurate representation of community views appears subjective because the answer is simply whatever the considered majority opinion happens to be; there is no guarantee that that opinion is right by some other standard. Similarly, the decision procedure of discerning what the consensus would be if the community thought properly about the issue appears objective because the decision procedure constrains arbitrary choice. At the same time, the decision procedure of rational consensus appears subjective because the goal is to discover what people want rather than what they should want.

Rational agreement appears both objective and subjective because it combines two competing foundations for legal theory: consensus and reason. These are the two—and the only two—foundations that have been proposed by traditional legal theorists to provide the objective procedure for legal reasoning.

Consensus is a necessary basis for the liberal society because governments derive "their just powers from the consent of the governed."¹¹³ One strand of liberal thought stresses the fact that individuals have different but equally legitimate values and goals.¹¹⁴ According to another strand, people have the same but competing goals: They all seek power, wealth, and prestige,¹¹⁵ and these individual goals are achieved at the expense of

113. The Declaration of Independence, para. 2 (U.S. 1776). Political power is assumed here to surge upward from the people to the government, and not, as the medieval thinkers assumed, from God down to the sovereign. See W. ULLMANN, *LAW AND POLITICS IN THE MIDDLE AGES* (1975).

114. See J. RAWLS, *supra* note 14, at 254; M. SANDEL, *supra* note 4, at 9-10, 116-17; R. UNGER, *supra* note 51, at 42-46, 76-81.

115. The foremost proponent of this view is Hobbes:

[T]he Passions that most of all cause the differences of Wit, are principally, the more or lesse Desire of Power, of Riches, of Knowledge, and of Honour. All which may be reduced to

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other individuals. In either case, people must structure society in a way that enables them to achieve those individual goals. They must form a social contract¹¹⁶ under which they agree to a form of government that will limit their freedom in some ways to ensure that they will be able to obtain their individual goals to some extent. The laws governing us therefore cannot be legitimate unless we somehow agree to them, either through custom or legislation.

Consensus theorists acknowledge, however, that consensus alone is an insufficient basis for government and law. Everyone could agree to something horrible, like slavery.¹¹⁷ We all have deeply felt moral beliefs that would prompt each of us to believe that certain practices are evil, even if everyone in the world believed otherwise. Thus theorists who claim that consensus is a sufficient basis for objective legal decisions invariably introduce competing criteria to take care of these situations.

The consensus theorist envisions a certain kind of social agreement. It takes place under certain conditions and presupposes certain sorts of mental gymnastics. In Rousseau's version, a participant in the social contract seeks the good of everyone, not just herself.¹¹⁸ This ensures the proper limits to individual self-assertion. In Rawls' version, a participant in the social contract seeks her individual goals under certain conditions that will ensure an enlightened outcome.¹¹⁹

Consensus theories incorporate the second foundation for legal theory—reason. The social contract never took place; it is an intellectual construct designed to help us determine, not what other people around us

the first, that is Desire of Power. For Riches, Knowledge and Honour are but severall sorts of Power.

T. HOBBS, *supra* note 82, at 139. See generally C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 29–46 (1962) (discussing Hobbes' analysis of individual motivation).

116. Since the seventeenth century, the idea of a social contract has played a central role in the thought of many prominent liberal thinkers. T. HOBBS, *supra* note 82, at 228 (“[M]en agree amongst themselves, to submit to some Man, or Assembly of men, voluntarily, on confidence to be protected by him against all others.”); J. LOCKE, *supra* note 67, at 54 (“The only way whereby any one divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties and a greater security against any that are not of it.”); J. RAWLS, *supra* note 14, at 11 (The principles of justice “are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association.”); J. ROUSSEAU, *THE SOCIAL CONTRACT* 15 (G. Cole trans. 1950) (“Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.”) (original italicized).

117. *E.g.*, U.S. CONST. art. I, § 9, cl. 1 (importation of slaves shall not be prohibited before 1808).

118. J. ROUSSEAU, *supra* note 116, at 26–28.

119. J. RAWLS, *supra* note 14, at 11–22.

think, but what reasonable people of adequate experience would think if they followed a rational decision procedure.

We must be able accurately to describe rational consensus if it is to provide an objective basis for our moral or political views, or for legal rights. If we cannot accurately describe it, then rational consensus cannot provide a determinate answer to our question of what the legal rules should be.

Rational consensus cannot form an objective foundation to legal reasoning because it cannot, by itself, generate determinate answers; it cannot do this because it founders on its internal contradictions. Because the idea of rational consensus is internally contradictory, it cannot determine our conclusions, nor can it function as the source of those conclusions or as a procedure for generating objective results. Michael Sandel has eloquently described the internal contradictions in the theory of rational consensus.

If the parties to the original contract *choose* the principles of justice, what is to say that they have chosen *rightly*? And if they choose in the light of principles antecedently *given*, in what sense can it be said that they have *chosen* at all? The question of justification thus becomes a question of priority; which comes first—really ultimately first—the contract or the principle?¹²⁰

The idea of rational consensus conflates its two underlying assumptions; it therefore hides the underlying contradiction. Because there is no answer to the contradiction, we find ourselves going back and forth between the principle that a certain social practice is justified because others agree with it and the principle that the social practice is justified because reason (our innate decision procedure) tells us that it is right, regardless of what others currently say.

It is therefore impossible to describe rational consensus accurately. It is never clear whether one is describing what people actually believe or what they should believe if they thought about it rationally. We cannot have it both ways. In the absence of a metatheory that can tell us how to limit consensus through reason, we are left free to choose between them. Because legal reasoning does not describe an antecedently existing common ground, it cannot tell us what to do.

D. *A Parable*

Let me conclude this section with an anecdote, an anecdote that I consider a parable. When I was in college, I became close friends with some-

120. M. SANDEL, *supra* note 4, at 119 (emphasis in original).

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one whose political beliefs were different from mine. We are still good friends. We disagreed about certain matters that we considered important. We talked about these issues a lot, partly because we found them interesting and partly because we could not understand why we disagreed. Most important, however, we were close friends, and we each cared a great deal about what the other thought. After four years of these discussions, I became frustrated because I could not convince my friend that he was wrong about certain things. He believed things that I considered, and still consider, morally wrong. I had assumed all along that if we talked long enough, and that if we were both people of good faith trying to reach the right answer, we would eventually agree. But we did not agree.

I found that I had to give up one of the underlying assumptions on which I had based our long conversations. I could give up the idea that my friend was intelligent. In that case our disagreement could be explained by his stupidity. Or I could give up the idea that I was intelligent and explain our disagreement by my inadequate mental capacity. Alternatively, I could give up the idea that we were both acting in good faith, that we were both trying to reach the right answers and were not just playing games with each other. But I believed that we were intelligent people of good will. I could also conclude that one or both of us were mistaken about what was right. But this did not make sense to me. We held our different positions because of values that were important to us, and I did not see how we could be mistaken about what was important to us. The only alternative was to give up the final assumption: the belief that if we talked long enough we would eventually agree. And that is what I did.

The point of this story is not that agreement is impossible, nor is it that conversations must end—they can continue forever despite the absence of agreement. The point is that morality is not a matter of truth or logical demonstration. It is a matter of conviction based on experience, emotion and conversation. When I say that legal reasoning is not objective, I am merely emphasizing that I observe substantial political and moral controversy about what we should allow people to do with themselves and each other. Since legal reasoning includes and systematizes all of the conflicting arguments that people find plausible, there is no reason to expect it to provide a basis for decisionmaking that transcends these ordinary value conflicts.

III. NEUTRALITY

Liberty in adopting a conception of the good is limited only by principles that are deduced from a doctrine which imposes no prior constraints on these conceptions.

—John Rawls¹²¹

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.

—Anatole France¹²²

A. *Political Vision*

Traditional theorists claim that law is, or should be, neutral.¹²³ Neutrality encompasses two quite different claims. The first claim is that individuals should be allowed the freedom to have different conceptions of the good life and should be permitted to pursue their particular ideas of happiness.¹²⁴ The second claim is that the limits to individual freedom of action set by the legal system should be based on independent principles of justice that do not themselves presuppose any particular conception of the good.¹²⁵

These two claims together represent a political vision. This vision is associated with a series of dichotomies that purport to divide the world between non-controversial values and relatively controversial values: reason and desire, control and freedom of action, law and politics, law and morality, objective and subjective, the right and the good, state and individual, public and private, principled and arbitrary, universal and particular.¹²⁶ These dichotomies repeat over and over the basic message of neu-

121. J. RAWLS, *supra* note 14, at 254.

122. A. FRANCE, *LE LYS ROUGE* (1894), *quoted in* J. BARTLETT, *FAMILIAR QUOTATIONS* 802 (14th ed. 1968).

123. *See* B. ACKERMAN, *supra* note 14, at 11 (“*Neutrality*. No reason [for political authority] is a good reason if it requires the power holder to assert . . . that his conception of the good is better than that asserted by any of his fellow citizens. . . .”); J. RAWLS, *supra* note 14, at 254 (arguing that legal principles of justice are independent of individual conceptions of the good); J. ROUSSEAU, *supra* note 116, at 13–14 (“The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.”); M. SANDEL, *supra* note 4, at 5 (“Persons . . . differ in their conceptions of what happiness consists in, and to install any particular conception as regulative would impose on some the conceptions of others, and so deny at least to some the freedom to advance their own conceptions.”).

124. M. SANDEL, *supra* note 4, at 177 (“And as independent selves, we are free to choose our purposes and ends unconstrained by such [a teleological] order, or by custom or tradition or inherited status.”).

125. Ackerman and Rawls think that law should be neutral in this fashion. *See supra* notes 121 & 123.

126. These dichotomies have been discussed at length elsewhere. I will describe them here only to

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trality: Although we have different and conflicting ideas of how to live, the basic rules limiting our freedom of action can and should be set by relatively non-controversial criteria. These criteria are relatively non-controversial because they are based on shared interests that are independent of considerations that cause us to have different notions of the good life.

This political vision is non-neutral in the sense that it is value-laden. It is squarely opposed to political visions that do not recognize the legitimacy of individual pursuit of happiness or of conflicting notions of the good life.¹²⁷ Yet it is powerful and persuasive to those who accept it precisely because it appears to be value-neutral as between individuals with different views of how to live. It appears to let everyone live as she likes, subject only to minimal legal controls.¹²⁸ The limits are minimal both in the sense that they allow wide freedom of action and in the sense that they are based on criteria that are theoretically less controversial than the criteria underlying views of the good life.

1. *The private realm and the pursuit of happiness.* Unlike classical and medieval political thought,¹²⁹ classical liberalism does not define the good life.¹³⁰ The Declaration of Independence states that individuals have the natural right “to pursue Happiness”; it does not define what it means to be happy, and it does not tell individuals what they should do. They are free, within legal limits, to do what they like.

In the private realm, individuals are free to pursue their subjective desires. Those desires are assumed to be arbitrary in that they are unprincipled: They are not constrained by any overarching theory that determines what one’s desires should be, or that entitles one person’s goals to more respect than someone else’s. Desires are also arbitrary in that they

the extent required by my argument about nihilism. For a more detailed examination of these dichotomies, see M. SANDEL, *supra* note 4, at 2 (right/good); R. UNGER, *supra* note 51, at 38–55 (reason/desire); *id.* at 67–69 (rule/value); *id.* at 76–103 (law/morality; law/politics; objective/subjective); *id.* at 125–37 (universal/particular); Kennedy, *supra* note 9, at 261–72 (public/private); *id.* at 286–89 (state/individual); *id.* at 294–99 (security/freedom of action); *id.* at 355–62 (altruism/individualism); F. Olsen, *The Sex of Law 1* (1983) (unpublished manuscript on file with author) (rational/irrational; reason/emotion; objective/subjective; abstract/contextualized; principled/personalized).

127. See, e.g., T. AQUINAS, *SELECTED POLITICAL WRITINGS* (J. Dawson trans. 1959); ARISTOTLE, *ETHICS* (J. Warrington trans. 1963); ARISTOTLE, *POLITICS* (E. Barker trans. 1946); ST. AUGUSTINE, *THE POLITICAL WRITINGS OF ST. AUGUSTINE* (H. Paolucci ed. 1962); CICERO, *DE REPUBLICA, DE LEGIBUS* (C. Keyes trans. 1928); PLATO, *THE REPUBLIC* (A. Bloom trans. 1968).

128. See M. WALZER, *Nervous Liberals*, in *RADICAL PRINCIPLES: REFLECTIONS OF AN UNRECONSTRUCTED DEMOCRAT* 92, 95 (1980) (“The root conviction of liberal thought is that the uninhibited pursuit of private ends (subject only to minimal legal controls) will produce the greatest good of the greatest number, and hence that every restraint on that pursuit is presumptively wrong.”).

129. See *supra* note 127.

130. See R. UNGER, *supra* note 51, at 66 (“Freedom . . . is the power to choose arbitrarily the ends and means of one’s striving. In principle, nothing makes one man’s goals worthier of success than another’s.”); see also *supra* notes 123 & 124 (according to Sandel, people legitimately differ in their conceptions of what happiness is and how to pursue it).

are freely chosen; human beings create their own destinies unconfined by any natural purpose other than satisfaction of desire.¹³¹

Although individual value choices appear arbitrary and subjective from the point of view of the state, the individual does not necessarily experience them as arbitrary. Thus, we can describe individual choice as either subjective (unconstrained individual value choice) or as objective (individual rational maximization of satisfaction). Moreover, individuals may feel constraints within the private realm of freedom (the pursuit of happiness); the absence of government regulation allows "private" persons to exercise power over each other.¹³² Furthermore, the private realm is also the sphere of morality, which is thought to contain certain universal principles that constrain individual choice. Within the sphere of morality, some principles are believed to be so fundamental (i.e., objective) that all people should follow them (even though the state will not enforce them); other principles are viewed as matters of individual (subjective) conscience. Thus, the subjective element of the concept of neutrality (legal liberty to pursue happiness) contains within itself the possibility of being described as either subjective or objective.

2. *The public realm and the rule of law.* The liberal justification for liberty is that individuals must be allowed to choose what they want to do because they have different and potentially conflicting ways of pursuing happiness. As long as individuals do not violate the boundaries of their legal liberty by infringing on someone else's legal rights, they should be allowed to do whatever makes them happy. Since it is illegitimate to impose anyone's view of the good life on anyone else, the limits to freedom of action must be defined by reference to criteria that are independent of ordinary value conflicts that cause people to have different ideas of how to live.¹³³ In defining legal rights (boundaries on legal liberty), liberal theorists abandon the rhetoric about the pursuit of happiness and use rhetoric about rational bases for the legal rules. At this level of abstraction, there is therefore a gross disjunction between rhetoric about legal liberties and rhetoric about legal rights.

Liberals base law in universal principles that can be demonstrated rationally, not on arbitrary desires of particular individuals or groups. To

131. R. UNGER, *supra* note 51, at 42-46; Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1060-62 (1980).

132. See Cohen, *supra* note 60.

133. See M. SANDEL, *supra* note 4, at 1-11, 116; *cf. id.* at 1 ("[S]ociety, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not *themselves* presuppose any particular conception of the good. . . .") (emphasis in original); R. UNGER, *supra* note 51, at 84 ("The justification of the laws would consist in showing that the restraints put on men's struggle for comfort, power, and glory are fair because no man's freedom is set without reason above another's and each man is allowed the maximum freedom compatible with the prohibition of arbitrary preference.").

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the extent moral principles govern the private realm of individual freedom of action, they fall into the category of the *good*. The principles that govern the public sphere of law fall into the category of the *right*.¹³⁴ The principles of the good are assumed to be more controversial than the principles of the right. Traditional theorists presume the possibility of agreement about the principles governing legal rights; they presume that agreement about the principles of the good life is either impossible or unlikely. They also assume that it is legitimate for there to be diverging views of the good life, but that the legal system of rights and duties is illegitimate unless it is based on principles about which we should theoretically be able to come to agreement.¹³⁵

The asserted neutrality of legal rules limiting freedom of action therefore implicates the belief in the availability of rational decision procedures. No one's freedom of action is limited by anyone else's particular, arbitrary, subjective, and value-laden ideas of the good life; shared interests that can engender principled, objective, and rational legal rules provide the limits to freedom of action. The liberal notion of legal rules requires a procedure for deciding what the rules should be that is completely independent of the controversial value judgments that cause us to have different moral views.

3. *Law and politics.* The preceding discussion may be summarized in a table. The terms on the left represent the more controversial, individualized, and open-ended components of our rhetoric about neutrality; the terms on the right represent the supposedly less controversial, more rational and principled components of our rhetoric about neutrality.

Private Realm (The Good)	versus	Public Realm (The Right)
desire		reason
freedom of action		control
individual		state
morality/politics		law
arbitrary		principled
autonomy		community
particular		universal
legal liberties		legal rights
subjective		objective
pursuit of happiness		rule of law

134. See M. SANDEL, *supra* note 4, at 9–10.

135. As Sandel explains:

On the full deontological view, the primacy of justice describes not only a moral priority but also a privileged form of justification; the right is prior to the good not only in that its claims take precedence, but also in that its principles are independently derived. This means that, unlike other practical injunctions, principles of justice are justified in a way that does not

Traditional theorists recognize that substantial controversies exist about the content of the legal rules.¹³⁶ Nonetheless, they claim that those controversies differ in character from the controversies about the good life. They differ because rational techniques can resolve the legal controversies.¹³⁷ Differing value systems cause political and moral disagreement, but disagreement in law is explained by the claim that one or the other party to the controversy has made a mistake, not by reference to conflicting values.¹³⁸

It is now possible to outline the relationships among the concepts of determinacy, objectivity, and neutrality. I have argued that traditional theorists think of neutrality as the allowance of arbitrary freedom of action (legal liberty) within state-imposed limits (legal rights and duties). The limits on free actions are legitimate because they are both *determined* by and based on *objective* criteria.

This simple picture breaks down, however. Both the concept of determinacy and the concept of objectivity repeat within themselves the subjective/objective dichotomy that characterizes the concept of neutrality. The subjective element of neutrality is the idea of legal liberty: Individuals should be allowed to pursue their own conceptions of happiness, whatever they are.¹³⁹ The objective element of neutrality is the idea of legal rights or duties: Principles about which everyone should be able to agree impose limits to freedom of action. In this view, both determinacy and objectivity appear to be "objective."

As I argued earlier, however, prevalent notions of what determinacy and objectivity mean contain potentially contradictory qualities. Prevalent conceptions of objectivity are based on the idea of rational consensus, which includes the separate ideas of consensus and reason, both of which can appear to be either subjective or objective. Consensus appears subjective because we cannot know beforehand what the people involved will want. Reason appears objective because it assumes one can identify principles that are intersubjectively valid. Consensus can appear objective because it is based on commonality and agreement rather than on individual

depend on any particular vision of the good. To the contrary: given its independent status, the right constrains the good and sets its bounds.

Id. at 2. For an example of traditional thought on the relationship between principles of justice and the good, see R. NOZICK, *supra* note 14, at 271-73 (arguing that rules that generate unequal outcomes are neutral if based on independent justifications).

136. See, e.g., R. DWORKIN, *supra* note 14, at 126-27.

137. See *id.* at 72-74.

138. See *id.* at 128-30. See also ARISTOTLE, *ETHICS*, *supra* note 127, at 133-39 (distinguishing between theoretical and practical wisdom); J. HABERMAS, *THEORY AND PRACTICE* 3-24 (J. Viertel trans. 1973) (distinguishing between theoretical and practical interests).

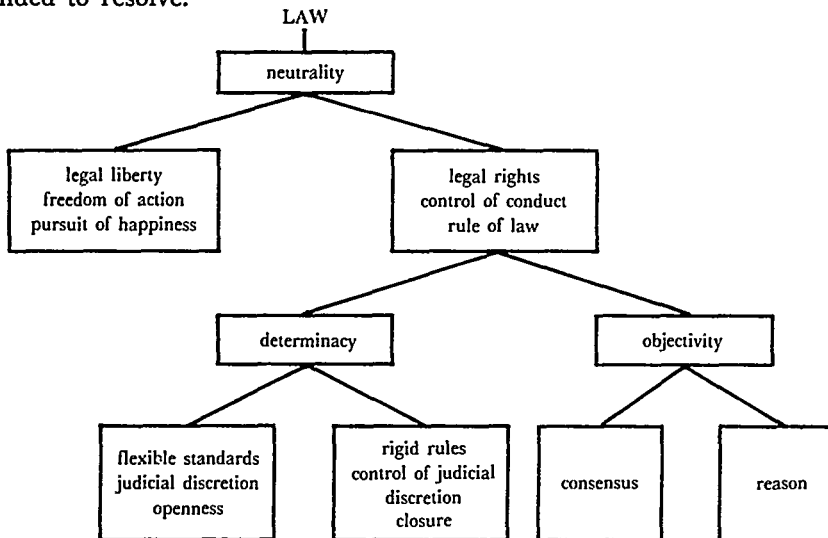
139. As I have argued, legal liberty can also be described objectively as the rational maximization of individual satisfaction.

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preferences; reason appears subjective because it places apparently arbitrary (or unfounded) limits on what people are allowed to want.

Notions of determinacy also encompass contradictions. Procedures for deriving specific rules from objective principles require both determinacy and indeterminacy. We need a certain amount of determinacy to allow us to believe that objective principles actually tell us what to do. At the same time, we need some indeterminacy to maintain the appearance of intersubjective validity. A fully determinate theory—a comprehensive set of rigid rules that directs outcomes in all cases—does not appear to be objective because it presupposes a level of unanimity that does not exist. Conversely, the more objective a theory appears, the less determinate it can be, because agreement about first principles is more likely to occur when they are stated as general standards, rather than as specific rules. Thus, it appears that determinacy both creates an appearance of objectivity—by demonstrating that valid first principles actually constrain judicial discretion by telling judges what to do—and undermines the appearance of objectivity—by preventing judges from using the discretion needed to fit principles to specific cases.

Therefore, the notions of determinacy and objectivity both support and undermine the central justificatory premise of the liberal social contract view of the state, the notion of neutrality. All three concepts can be subdivided into components that can be characterized as either objective or subjective: neutrality (pursuit of happiness v. rational legal rules); objectivity (reason v. consensus); determinacy (rigid rules v. flexible standards). All three notions repeat within themselves the contradictions they were intended to resolve.



B. *Transcending the Dichotomies.*

Liberals believe decisions about legal rules must be made without consideration of the values that cause us to have different views of the good life. They argue that no one will be willing to obey legal rules limiting her freedom of action unless those limits can be justified in a compelling fashion. Since no one is justified in imposing her moral views on others, the most compelling way to convince people to give up some of their legal liberty is to base the limits to legal liberty on principles that all people should theoretically accept.

While there is no way to prove that the distinctions between reason and desire, and between law and politics, are false, it is possible to argue that those dichotomies no longer serve a useful function. They are no longer useful because they obscure important facts.

First, those distinctions obscure the extent to which views of the appropriate area of freedom determine what limits on freedom of action are allowable. Views of morality contain within themselves permissible limits on freedom of action. Hardly anyone thinks that the freedom to pursue happiness includes the freedom to kill one's neighbors if they play their stereos too loudly. One might argue that such an act would deprive the neighbors of equal liberty to pursue happiness. But this argument begs the question. The right to pursue happiness includes the right not to be killed for such a flimsy reason. The very question, then, is where to draw the line between freedom of action and limits on freedom of action. The notion of the right to pursue happiness obscures the fact that it includes *within itself* contradictory principles: freedom and control.

Second, the general distinctions between law and politics, between law and morality, and between the good and the right obscure the extent to which the particular dichotomies reappear within the legal system and recur within categories that are subsidiary to the general distinctions.¹⁴⁰ The fact that the various dichotomies and contradictory categories occur again and again within the realm of law means that no rational decision procedure based on such distinctions is possible. The manipulation of these categories and arguments related to them accounts for a great deal of what we call "legal reasoning."¹⁴¹ Legal reasoning fails to transcend con-

140. Law itself is divided between legislation and adjudication. Traditional thinkers see legislation as part of the political realm of arbitrary desire, subjective morality, and freedom of action; adjudication is apolitical and characterized by rational principles, objective decision procedures, and collective control. But we sometimes think of the system of legislation as the result of naked power struggles, sometimes as the result of policy science or economic analysis. And within the system of adjudication of legal rules reappear the contradictions between objective and subjective tests, between autonomy and community, and between liberties and rights.

141. For an analysis of the way in which doctrinal manipulation operates in a specific context, see Frug, *supra* note 8, at 1312-18 (arguing that corporate and administrative law doctrines are best

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tradictory value choices; it merely repeats and systematizes them. Because it fails to resolve the contradictions, it cannot transcend the ordinary value conflicts that cause people to have different views of the good life.

IV. NIHILISM

Why should it be possible to have grounds for *believing* anything if it isn't possible to be certain?

—Ludwig Wittgenstein¹⁴²

We should not regret our inability to perform a feat which no one has any idea of how to perform.

—Richard Rorty¹⁴³

A. Reason and Tyranny

At this point in any conversation I have had with someone who believes that legal theory has a rational foundation, I have always been asked the same series of questions: If you are right that legal reasoning has no objective basis and you have no general theory that tells us what we should do in particular cases, how do you figure out what is the right thing to do? Do you just “grok” the answer?¹⁴⁴ Do you do just what you like?

The fact that I am always asked these questions is instructive. It sug-

understood as mediating devices designed to mask unresolved, underlying value choices).

142. L. WITTGENSTEIN, *supra* note 110, at 48e (italics in original).

143. R. RORTY, *supra* note 13, at 340.

144. Robert Heinlein uses the word “grok” to describe accurate intuition:

“‘Grok’ means ‘identically equal.’ The human cliché. ‘This hurts me worse than it does you’ has a Martian flavor. The Martians seem to know instinctively what we learned painfully from modern physics, that observer interacts with observed through the process of observation. ‘Grok’ means to understand so thoroughly that the observer becomes a part of the observed—to merge, blend, intermarry, lose identity in group experience.”

R. HEINLEIN, *STRANGER IN A STRANGE LAND* 213–14 (1968). Grokking requires us to assume both that an accurate answer exists and that we can accurately perceive it. The process of getting the answer, however, cannot be described; it can only be experienced.

David James Duncan has recently described a similar human capacity as “native intelligence”:

Native intelligence develops through an unspoken or soft-spoken relationship with . . . interwoven things: it evolves as the native *involves* himself in his region. A non-native awakes in the morning in a body in a bed in a room in a building on a street in a county in a state in a nation. A native awakes in the center of a little cosmos—or a big one, if his intelligence is vast—and he wears this cosmos like a robe, senses the barely perceptible shiftings, migrations, moods and machinations of its creatures, its growing green things, its earth and sky. Native intelligence is what Huck Finn had rafting the Mississippi, what Thoreau had by his pond, what Kerouac had in Desolation Lookout and lost entirely the instant he caught a whiff of any city. But some have it in cities—like the Artful Dodger, picking his way through a crowd of London pockets; like Mother Teresa in the Calcutta slums. Sissy Hankshaw had it on freeways, Woody Guthrie in crowds of fruit pickers, Gandhi in jails. Almost everybody has a dab of it wherever he or she feels most at home.

D. DUNCAN, *supra* note 4, at 53–54 (emphasis in original).

gests that they incorporate the most fundamental assumptions of traditional theory and that those assumptions are widely held. Moreover, these questions demonstrate the concerns that make people believe that legal reasoning is based on a rational foundation. As Rorty puts it, this is "the fear that there really is no middle ground between matters of taste and matters capable of being settled by a previously statable algorithm."¹⁴⁵

The unstated premise behind this fear is the idea that we are entitled to have an opinion only if we can back it up by a method for deciding legal and moral questions that can compel agreement by its inherent rationality. If we do not have a rational foundation for our moral beliefs, we are not entitled to have an opinion, or our opinion is not entitled to be taken seriously. And if we do not believe in the possibility of using reason to adjudicate value conflicts, we have given up on morality and law entirely. If it is not at least theoretically possible to be certain, it is impossible to believe anything at all.

This position is not new. It resembles the attacks on legal realism. The legal realists systematically and powerfully attacked formalistic, deductive methods of legal reasoning.¹⁴⁶ The strand of contemporary Critical Legal Studies that focuses on demonstrating the contradictions and indeterminacy in legal theory is an extension of this aspect of legal realism.¹⁴⁷ The critics of legal realism seized on Llewellyn's maxim that the law is what officials do about disputes.¹⁴⁸ Morris Cohen and others concluded that this form of positivism "naturally leads to the assumption that what is, is right."¹⁴⁹ If law is simply what judges say it is, and values have no rational basis, we have no way to criticize what the government does. The only appropriate response is complacency.

Some of the critics of legal realism, such as Lon Fuller, argued that the absence of any rational basis for values and legal reason "logically left physical force as the only arbiter of human affairs."¹⁵⁰ The inability to prove that any view was better than any other view apparently led not only to complacent acceptance of the status quo but to the idea that might was right.¹⁵¹ Without any rational standards to restrain human behavior,

145. R. RORTY, *supra* note 13, at 336.

146. See E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 74-94 (1973) (discussing the legal realist critique of traditional legal thought).

147. See Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 HARV. L. REV. 1669, 1673-74, 1679-82 (1982) (analyzing relationship between Critical Legal scholarship and legal realism).

148. E. PURCELL, *supra* note 146, at 161.

149. Cohen, Book Review, 22 CORNELL L.Q. 171, 177 (1936) (reviewing E. ROBINSON, *LAW AND THE LAWYERS* (1935)); see also E. PURCELL, *supra* note 146, at 92, 161 (discussing Cohen's philosophical critique of legal realism).

150. E. PURCELL, *supra* note 146, at 163 (describing Fuller's position).

151. See PLATO, *GORGIAS* 78 (W. Hamilton trans. 1971) ("[N]ature . . . herself demonstrates

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the government would rule not because it was just but because it monopolized the use of force. Without any external standard of adjudication, value disputes would be solved not by discussion and agreement but by the application of governmental power. The critics of legal realism further argued that it not only led to complacency and deference to the powerful but also led logically to a particular form of government—totalitarianism. As Roscoe Pound said, “The political and juristic preaching of today leads logically to [political] absolutism.”¹⁵² If there is no rational way to prove that certain actions are wrong, the powerful will do what they want. And since the government monopolizes the legitimate use of force, it will feel no constraints on what it does; it will assert complete power over everyone, and there are no horrors that it will not perpetrate with impunity. The critics of legal realism concluded that legal realism led logically to Nazism and Stalinism.

Current discussions about Critical Legal Studies and nihilism are not identical to the old discussions about the relation between legal realism and totalitarianism. But the similarities are enough to give a sense of *déjà vu*. I want to flesh out a little more what I think people mean when they say that Critical Legal Studies leads us into the abyss of nihilism. We can then get a clearer sense of what they fear and can better judge whether their fears are justified.

The crux of the argument is that both the good life and just government require a rational foundation. Without a rational method to adjudicate value conflicts, nothing is certain. Everything is up for grabs. We do not know what to do because we are left free to choose. And freedom of choice, according to this view, is dangerous in two potentially contradictory ways.

First, there is the danger of uncertainty. Uncertainty will affect morality, private law, and public law. Uncertainty will affect morality because we will not know how to live a good life. If reason cannot adjudicate value conflicts, we will not know what to do. If living a good life means doing what we are supposed to do, rather than what we feel like doing, we must have a way to figure out rationally what to do. Without reason, we cannot figure out which of our preferences are good and which are bad; we are left free to do what we like.

Perhaps more important, we do not know what other people are going to do. Without reason, we are relegated to passion or desire. Under one

that it is right that the better man should prevail over the worse and the stronger over the weaker.”); THUCYDIDES, *THE PELOPONNESIAN WAR* 331 (J. Finley trans. 1951) (“{R}ight, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”) (quoting the Athenian response to the Melian commissioners).

152. R. POUND, *CONTEMPORARY JURISTIC THEORY* 9 (1940).

version of liberalism, this means that individuals want different and unpredictable things. They pursue happiness in surprising and diverse ways. And some of the things they will want to do will affect us and interfere with the things we want to do. This creates an uncomfortable level of insecurity.

The effect of uncertainty on private law is similar to its effect on morality. Judges who adjudicate conflicts between individuals often have to choose between incompatible and conflicting life plans. Under the liberal view, individuals have the right to pursue happiness, but conflicts arise when someone does something that someone else finds objectionable. The judge has to determine which person will be allowed to be happy: the one who wants freedom to act or the one who wants security from harm. Moreover, judges have their own personal views of how to pursue happiness. Without any rational way to adjudicate the conflict, judges will either impose their personal views or will act in a manner that is unpredictable. Without legal reasoning, judges will not know what to do, and we will not know what the legal system will do to us if we try to do what makes us happy.

A similar uncertainty will characterize public law disputes between individuals and government entities. If reason does not tell the judge or the president or the legislator or the town councilor what to do, we will never know what they are going to do to us. We face the same insecurity as in private law.

Second, there is the danger of predatory conduct. In an alternative view of liberalism, it is not true that individuals have diverse ways of pursuing happiness. Everyone wants the same things: wealth, power, and prestige. And all of these things can be obtained only at the expense of others. While it is true that some people are content with less wealth, power, and prestige than others, there are enough people who want them in such great amounts that if we let these people do what they wanted, they would grab everything from us.¹⁵³ Giving up reason as a basis for morality will lead not to uncertainty, but rather to unrestrained competition for

153. Individual self-assertion affects morality by splitting our moral lives in two. On the one hand, we are concerned with living a good life. This means doing what we ought to do. We associate this with kindness, religion, family life, and friendship. See Olsen, *supra* note 14, at 1499-1528. Living a good life means acting toward others as we would like them to act toward us. On the other hand, most of us have been taught to desire *the* good life. Living the good life means being wealthy and powerful. We associate this mode of behavior with public life outside the home—with the sphere of politics and the market. See *id.* at 1520-22. We expect people in those situations to be competitive, individualistic, and predatory. In the absence of a rational foundation for a good life, nothing will restrain people from trying to live *the* good life. Under this view, the result of giving up the idea of a rational basis for morality is that our public moral code of individualistic self-assertion will replace our private moral code of kindness and altruism.

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wealth and power, or as Hobbes put it, the “time of Warre, where every man is Enemy to every man.”¹⁵⁴

Giving up reason as a basis for legal reasoning will have a similar effect on private law. Without a rational basis for holding that individual acts to maximize wealth, power, and prestige are wrong, the judge will have no basis for restraining anyone’s conduct. Since law involves restraint on freedom of action, the absence of a rational basis for law will cause judges to abandon all legal rules that protect us from being harmed by others. Again, we will have the war of all against all.

In public law, we are even worse off. Without any rational basis to restrain governmental actions, government, like private individuals, will maximize its wealth and power. Such a government will not worry about prestige; it will worry only about being feared.¹⁵⁵ Thus, without reason to serve as the basis for restraint, we get a government that does not restrain itself: in other words, totalitarianism. And without a rational foundation for constitutional theory, we have no basis for saying that such a government is evil.

The upshot of all this is that traditional legal theorists assume that if we do not believe that reason can adjudicate value conflicts and determine the legitimacy of governmental actions, we are relegated to arbitrariness, insecurity, physical and emotional harm, and tyranny. These horrors cause traditional legal theorists to attack Critical Legal Studies as nihilistic. They assume that we face a simple choice: We can believe in an objective, determinate, and neutral decision procedure for moral and legal questions, or we can resign ourselves to shouting matches. Shouting matches lead to shoving matches, and shoving matches lead to calamity.

B. *Conversation and Responsibility*

1. *Moral confidence.* Legal reasoning, as I understand it, consists of conversation. Legal reasoning is not an accurate representation of natural rights or sovereign commands. It is not the expression of an innate antecedently existing decision procedure of rational consensus that unites all persons involved in legal discourse. Traditional legal theorists assume that if legal reasoning is neither accurate representation nor an intersubjective decision procedure, then we are left intolerably free to say anything.

This fear is not surprising. Conversations are often free-wheeling. They can take unexpected and dangerous turns. Nonetheless, rejection of the

154. T. HOBBS, *supra* note 82, at 186.

155. See N. MACHIAVELLI, *THE PRINCE* 90 (L. Ricci trans. 1952) (1st ed. Florence 1513) (“The reply is that [the prince] ought to be both feared and loved, but as it is difficult for the two to go together, it is much safer to be feared than loved, if one of the two has to be wanting.”).

metaphors of accurate representation and decision procedures does not logically require us to become agnostic about all our moral and political values. To assume that it does unnecessarily and illogically pegs commitment to a privileged form of justification. Adoption of the metaphor of conversation does not logically commit us to anything in particular. It does, however, allow us consciously to assume responsibility for what we do.

When I convince someone that her theory did not compel her to reach the normative results she advocated, she does not immediately give up all her moral beliefs or her political positions. She continues to hold certain beliefs deeply despite an inability to derive them logically from principles that are grounded in reason or consensus. And she is right to do so.

2. *The substance of nihilism.* As a normative theory, nihilism is not contentless. Nihilism as a moral theory is not simply a negation of every other theory; it is, instead, the view that it does not matter what we believe, and that no one is entitled to say that anyone else is wrong. Traditional legal theorists fear that adopting the metaphor of conversation as a description of legal reasoning logically requires the moral vacuum of nihilism. But that metaphor hardly requires such a substantive result; it also does not require the various consequences commonly assumed to flow from it—indifference, personal imposition, majority rule, totalitarianism, or doing just what you like.

3. *Indifference.* The idea that our moral beliefs are neither grounded in nature or reason nor logically derived from general principles does not force us to adopt nihilism; we are not required to believe that we should have no beliefs or that it does not matter what we believe. People can hold moral beliefs deeply without believing that they are “true” or “grounded in reason.” Our legal and philosophical discourse has confused the issue of whether a belief is justified with the issue of whether it is true.¹⁵⁶

Many fear that if we give up the idea of rational decision procedures, nothing will be left. But the metaphor of conversation does not require us to become indifferent to what happens around us. It could require indifference only if morality required decision procedures. But morality cannot require anything because it is an abstraction, and abstractions are what

156. See R. RORTY, *supra* note 13, at 333–34 (“This confusion is aided by our use of ‘objective’ to mean both ‘characterizing the view which would be agreed upon as a result of argument undeflected by irrelevant considerations’ and ‘representing things as they really are.’”); *id.* at 383 (“This attempt to answer questions of justification by discovering new objective truths, to answer the moral agent’s request for justifications with descriptions of a privileged domain, is the philosopher’s special form of bad faith—his special way of substituting pseudo-cognition for moral choice.”); *id.* at 9 (“If we have a Deweyan conception of knowledge, as what we are justified in believing, then we will not imagine that there are enduring constraints on what can count as knowledge, since we will see ‘justification’ as a social phenomenon rather than a transaction between ‘the knowing subject’ and ‘reality.’”).

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we make them. Virtue may not be knowledge, but it certainly is not callous indifference. Why? Because I assert it to be so. What we do and believe matters. It does *not* matter that I cannot prove this to be so; what matters is the human assertion of responsibility.

4. *Personal imposition.* Giving up the metaphor of rational decision procedures also does not mean that judges will impose their personal views of the good life on others. We are the heirs of three hundred years of rhetoric about individual freedom of action and the right of individuals to pursue their own conceptions of happiness. People (including judges) will not immediately give up this ideal merely because it is not based on a rational foundation or because we cannot prove that it is a position that reasonable people would accept if they thought about it.

It is true, however, that judges impose their personal views of law. It could hardly be otherwise. Judges do not all agree on what the legal rules should be. Enough dissents are written to demonstrate this. Under the traditional view, disagreement is evidence of mistake on one side or the other. In my view, disagreement is evidence of disagreement about what the rules should be, and nothing more.

5. *Majority rule.* Some legal realists became so disillusioned with the idea of moral conversation that they believed they were forced, as a matter of logic, to defer on all issues to the will of the legislature or the politically powerful.¹⁵⁷ The retreat of these realists to the dictates of the majority is logically incoherent. Majority rule possesses no privileged position in a moral skeptic's universe. The fear of judicial tyranny is that, in the absence of objective and principled limits on what judges do, judges will interfere too much with the legislature. The goal is a principled division of labor between the courts and the legislature. The lack of a principle—moral skepticism—cannot logically require acceptance of the principle of deference to the majority.

The answer to this conundrum is for judges to resort to ad hoc, contextualized judgments about the division of power between judges and legislators. Sometimes judges should defer to the expressed will of the legislature; at other times they should overrule it. Sometimes judges should fail to provide remedies for injured plaintiffs in the absence of any legislative direction; at other times, they should provide remedies without waiting for legislative action. The idea that we do not have a decision procedure for solving legal questions does not mean either that judges should always defer to the legislature in creating and defining legal rights or that judges

157. See E. PURCELL, *supra* note 146, at 197–217; see also *International News Serv. v. Associated Press*, 248 U.S. 215, 248–67 (1918) (Brandeis, J., dissenting) (elaborating philosophy of deference to legislatures).

should ignore the legislature. It simply means that judges have to make judgments about the proper exercise of their power in specific cases.

6. *Totalitarianism.* The same incoherence infects the idea that the metaphor of conversation leads to totalitarianism. The critics of legal realism asked: Who is to say what government does is wrong? If there is no way to demonstrate rational limits to government power, government will exert unlimited power.¹⁵⁸ But this does not follow. If there are no rational limits to the legitimate exercise of government power, there are also no rational reasons for exercising that power at all. The idea that government may legitimately do anything, including exercise absolute control over everyday life and thought, is a principle; the idea is not neutral. It does not make sense to say that open-ended conversation logically leads to political absolutism. We could just as easily go the other way: The absence of a rational basis for government power could mean that we should have no government at all. But a nihilist will have no greater reason for advocating anarchy than for advocating totalitarianism.

Traditional theorists have therefore confused the issue of restraint of governmental power with the issue of the epistemological foundations of those restraints. They have assumed that those restraints will be insufficiently certain without a belief in their rational necessity and determinacy. But to argue against the idea that moral or political or legal principles have an epistemological foundation is not to argue against restraints on governmental power. It is also not to argue that individual official decisions should be made by whim. Giving up the idea that reason can adjudicate value conflicts does not require us logically to support either unlimited governmental power or unlimited legislative power. It simply requires us to make judgments about the legitimacy of various exercises of governmental power.

7. *Doing just what you like.* The horror of people doing just what they like is based on two ideas. The first is that what people *really* like is doing horrible things to each other. If we let them do just what they like, they will all choose to be awful to each other. We impose law on them to require them to refrain from doing these horrible things. And since judges are people, if we let judges do just what they want, they would inevitably exercise judicial power in oppressive ways.

But people do not want just to be beastly to each other. To suppose so is to ignore facts. People want freedom to pursue happiness. But they also want not to harm others or be harmed themselves. The evidence is all around us that people are often caring, supportive, loving, and altruistic, both in their family lives and in their relations with strangers.

158. E. PURCELL, *supra* note 146, at 161-62.

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It is also not true that, if left to do “just what they like,” government officials will necessarily harm us or oppress us. They may do these things if that is what they want to do. But it is simply not the case that all government officials admire Hitler and Stalin and use them as role models.

Posing the question as whether people should do “just what they want” is an effort to scare us into accepting the idea that reason can adjudicate value conflicts. The underlying message of the question is that if you reject the idea that there is a logic to value choice, then you have given up the right to criticize barbarism. But this does not follow. Moreover, belief in the existence of a logic of value choice does not necessarily protect us from barbarism. The Nazis had their philosophers and they were not legal realists. What protects us against Nazism is not the belief that reason can prove that it is wrong. What protects us is outrage.

The second idea is that “just what you like” will not correspond to the “good.” Doing just what you like is acting randomly or on the basis of feeling rather than knowledge. People should not do what they want to do. They should follow their reason, which will tell them accurately what is and is not good. The problem with this view is that there is no “idea of the good” out there, waiting to be discovered. “Doing *just* what you like” is redundant—there is nothing else to do but what you like.¹⁵⁹

Rorty deals with this issue by distinguishing two senses of the word “good.” The first is the one used by philosophers since it was invented by Plato. Good refers to the rational foundation on which all important values are assumed to rest.¹⁶⁰ The second sense of “good” is the way we use it in everyday discourse to compliment something or someone. In this more humdrum sense, we recognize that our judgments may change over time and that they are based on intuition and considered judgment rather than syllogism. Abandoning the metaphor of accurate representation or decision procedures does not leave us with nothing. As Rorty explains:

There is . . . an ordinary sense of “good,” the sense the word has when used to commend—to remark that something answers to some

159. Robert Pirsig has made a similar point:

Then he saw it. He brought out the knife and excised the one word that created the entire angering effect of that sentence. The word was “just.” Why should Quality be *just* what you like? Why should “what you like” be “just”? What did “just” *mean* in this case? When separated out like this for independent examination it became apparent that “just” in this case really didn’t mean a damn thing. It was a purely pejorative term, whose logical contribution to the sentence was nil. Now, with that word removed, the sentence became “Quality is what you like,” and its meaning was entirely changed. It had become an innocuous truism.

R. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* 226–27 (1974) (emphasis in original).

160. R. RORTY, *supra* note 13, at 306–07.

interest. In this sense, too, one is not going to find a set of necessary and sufficient conditions for goodness which will enable one to find the Good Life, resolve moral dilemmas, grade apples, or whatever. There are too many different sorts of interests to answer to, too many kinds of things to commend and too many different reasons for commending them, for such a set of necessary and sufficient conditions to be found. . . .

. . . .
. . . Nobody thinks that there are necessary and sufficient conditions which will pick out, for example, the unique referent of "the best thing for her to have done on finding herself in that rather embarrassing situation," though plausible conditions can be given which will shorten a list of competing incompatible candidates. Why should it be different for the referents of "what she should have done in that ghastly moral dilemma" or "the Good Life for man" or "what the world is really made of?"¹⁶¹

The answer to the question—"Do you do just what you want?"—is yes. The problem is that neither the question nor the answer tells us anything. The way the question is posed assumes that either we apply a decision procedure that is sufficiently determinate to generate an answer that can compel agreement by its inherent rationality, or we are relegated to tossing a coin. But those simply are not the only choices available to us: The absence of a decision procedure for moral dilemmas does not require us to act randomly or viciously. Traditional legal theory assumes that morality is a matter of truth, and that disagreement about moral questions is therefore always a matter of mistake or bad faith. I view legal and moral questions as matters to be answered by experience, emotion, introspection, and conversation, rather than by logical proof.¹⁶² The question then becomes how we are supposed to make up our minds and whether my view leaves anything at all for legal theory to do.

161. *Id.* at 307, 373-74.

162. See Gabel, *supra* note 61, at 312 (arguing that Ronald Dworkin seeks to reduce "all questions of justice to questions of logical technique").

V. LEGAL THEORY

“Never again,” cried the man, “never again will we wake up in the morning and think *Who am I? What is my purpose in life? Does it really, cosmically speaking, matter if I don’t get up and go to work?* For today we will finally learn once and for all the plain and simple answer to all these nagging little problems of Life, the Universe and Everything!”

—Douglas Adams¹⁶³

Where could I go, yet leave myself behind?

—Saint Augustine¹⁶⁴

A. *Edification*

What shall we do then about legal theory? I think we should abandon the idea that what we are supposed to be doing is applying or articulating a rational method that will tell us once and for all (or even for our generation) what we are supposed to believe and how we are supposed to live. We should no longer view the project of giving a “rational foundation” for law as a worthwhile endeavor. If morality and law are matters of conviction rather than logic, we have no reason to be ashamed that our deeply felt beliefs have no “basis” that can be demonstrated through a rational decision procedure or that we cannot prove them to be “true” or “right.”

Rorty has distinguished between two broad types of theory: systematic and edifying.¹⁶⁵ Systematic philosophers build systems of thought that they claim explain large bodies of material, guide theoretical development, and generate answers to difficult questions. Systematizers can be either normal or revolutionary philosophers. The normal systematizers work within established tradition; the revolutionary systematizers seek to replace the established paradigm with a new, better, or truer paradigm of thought. Both try to establish a framework that will set bounds on the legitimate content of discourse.

Edifying philosophers, on the other hand, seek to shake the rug out from under existing normal or abnormal systems of thought. They seek to make us doubt the necessity and coherence of our views. They seek to free us from feeling that we have “gotten” the answer and that we no longer need to question ourselves about what we stand for. Edifying philosophers do not seek to induce people to give up their moral views. They do not

163. D. ADAMS, *supra* note 38, at 176–77 (emphasis in original).

164. ST. AUGUSTINE, *CONFESSIONS* 78 (R. Pine-Coffin trans. 1961).

165. See R. RORTY, *supra* note 13, at 357–94 (contrasting systematic and edifying philosophies).

argue against profound political commitment. Rather, they strive to make us realize that our views are matters of commitment rather than knowledge.¹⁶⁶

Legal scholars can perform an edifying role by broadening the perceived scope of legitimate institutional alternatives.¹⁶⁷ One way to do this is to demonstrate the contingent and malleable nature of legal reasoning and legal institutions. The greatest service that legal theorists can provide is active criticism of the legal system. Criticism is initially reactive and destructive, rather than constructive. But our mistaken belief that our current ways of doing things are somehow natural or necessary hinders us from envisioning radical alternatives to what exists. To exercise our utopian imagination, it is helpful first to expose the structures of thought that limit our perception of what is possible. Judges rationalize their decisions as the results of reasoned elaboration of principles inherent in the legal system. Instead of choosing among available descriptions, theories, vocabularies, and courses of action, the official who feels "bound" reasons from nonexistent "grounds" and hides from herself the fact that she is exercising power.¹⁶⁸ By systematically and constantly criticizing the rationaliza-

166. Rorty comments:

[T]he point of edifying philosophy is to keep the conversation going rather than to find objective truth. Such truth, in the view I am advocating, is the normal result of normal discourse. Edifying philosophy is not only abnormal but reactive, having sense only as a protest against attempts to close off conversation by proposals for universal commensuration through the hypostatization of some privileged set of descriptions. The danger which edifying discourse tries to avert is that some given vocabulary, some way in which people might come to think of themselves, will deceive them into thinking that from now on all discourse could be, or should be, normal discourse. The resulting freezing-over of culture would be, in the eyes of edifying philosophers, the dehumanization of human beings.

Id. at 377.

Richard Bernstein argues that Rorty's distinction between systematic and edifying philosophy is a rhetorical device "employed to cure us of the expectation that philosophy must be 'constructive,' must be conceived of as a form of inquiry that provides us with foundations." R. BERNSTEIN, *supra* note 8, at 202.

167. The range of legal actions perceived as legitimate changes over time. Scholars can help expand that range. The actions of participants in the legal system can also alter perceptions of legitimacy. For example, Judge Paul Garrity of the Superior Court of Massachusetts recently ruled that conditions at the Essex County Jail in Lawrence, Massachusetts violated the constitutional protection against cruel and unusual punishment. He gave the county officials six months to remedy conditions. His decision to impose a six-month deadline was overturned on appeal, and the case was remanded to Judge Garrity for further proceedings. Garrity refused to comply with that decision. He quit the case. See King, *Garrity cites morality in quitting case*, Boston Globe, Sept. 9, 1983, at 1, col. 3. To my knowledge this behavior is unprecedented. Because it was unusual, it predictably received considerable publicity and stirred significant controversy. Whether one sees Garrity's action as legitimate or illegitimate, it permanently altered the legal system in the United States: As a factual matter, judges are far more likely to do something if someone else (even one other judge) has done it first. By doing something unconventional, one judge provides a precedent that others can use in later crises. The pool of available responses by judges has been broadened.

168. Rorty makes a similar point in his discussion of Sartre:

From Sartre's point of view, the urge to find such necessities is the urge to be rid of one's freedom to erect yet another alternative theory or vocabulary. Thus the edifying philosopher who points out the incoherence of the urge is treated as a "relativist," one who lacks moral

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tions of traditional legal reasoning, we can demonstrate, again and again, that a wider range of alternatives is available to us.

I therefore advocate the persistent demonstration in all doctrinal fields that both the legal rules in force and the arguments that are presented to justify and criticize them are incoherent.¹⁶⁹ They are incoherent because they are constructed in ways that make it impossible for them to satisfy their own claims to determinacy, objectivity and neutrality.¹⁷⁰ Legal theory is at war with itself. This kind of criticism would be useful even if we could not imagine a satisfactory alternative to traditional legal theory. Such criticism reminds us that legal theory cannot answer the question of how we are going to live together. We are going to have to answer that question ourselves.

B. Reconstruction

The demonstration that legal theory is incoherent is often thought to leave us with a void. How do we figure out what to do? I believe this question has an answer, but it is not the kind of answer that traditional legal theorists have come to expect. The answer is not to divide the world into the realms of objective and subjective, rational and irrational. As Hans Meyerhoff has argued, we should reject the idea that “[e]ither philosophy is the Truth (with a capital T) or it is nothing—or it is ‘Sophistry’.”¹⁷¹ We are not destined to live in a world in which we must choose between believing in some ultimate permanent foundation for law and morality (rationalism) or believing that all views are as good as all others and it does not matter what we believe or do (nihilism).¹⁷² We need to get

seriousness, because he does not join in the common human hope that the burden of choice will pass away.

R. RORTY, *supra* note 13, at 376.

169. For other defenses of the practice of criticism of legal reasoning, see Freeman, *Truth and Mystification in Legal Scholarship*, 90 *YALE L.J.* 1229 (1981); Kelman, *Trashing*, 36 *STAN. L. REV.* 293 (1984).

170. This does not necessarily mean that the existing rules are bad. It means that their goodness or badness depends on political or moral judgments, rather than “reason.”

171. Meyerhoff, *From Socrates to Plato*, in *THE CRITICAL SPIRIT: ESSAYS IN HONOR OF HERBERT MARCUSE* 187, 201 (K. Wolff & B. Moore eds. 1967). See also R. BERNSTEIN, *supra* note 8, at 18 (“Either there is some support for our being, a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos.”) (emphasis in original); C. GILLIGAN, *IN A DIFFERENT VOICE* 58–59 (1982) (describing the difference between “either/or” views of morality and contextual judgments).

172. R. BERNSTEIN, *supra* note 8, at 2–3, 18 (1983). Rorty agrees:

“Relativism” is the view that every belief on a certain topic, or perhaps about any topic, is as good as every other. No one holds this view. Except for the occasional cooperative freshman, one cannot find anybody who says that two incompatible opinions on an important topic are equally good. The philosophers who get called “relativists” are those who say that the grounds for choosing between opinions are less algorithmic than had been thought. . . . So the real issue is not between people who think one view is as good as another and people who do not. It is between those who think our culture, or purpose, or intuitions cannot be supported except

over the feeling that a view is either one that all persons should accept because it is grounded in reality or it is "just your opinion." The proper question is not "how can we be certain that we are right?" but "how should we live?"¹⁷³

The fact that contemporary legal theory is internally contradictory is not, by itself, something to bemoan. The contradictory principles in legal reasoning accurately reflect the fact that we have conflicting goals and we are not at all sure how to reconcile them. Traditional legal theory is objectionable, not because it is contradictory, but because it claims to give us determinate, objective, and neutral decision procedures to resolve the contradictions. None of these things is true: Legal theory is far more indeterminate and open-ended than its adherents claim, and it expresses controversial political and moral commitments rather than universal principles grounded in human rationality.

Theory expresses our values; it does not create or determine them.¹⁷⁴ Theory is useful to the extent that it articulates what we value. Since our values conflict, legal theories express our competing values.¹⁷⁵ We "draw a line" between competing principles and then create a theory to describe where we chose to place the line. But the theory does not itself reconcile those values or tell us where to draw the line. It cannot because it is something we made up to express those values and the "line" between them. To think otherwise is to reify theory, to remove it from human control and to pretend that it is telling us what to do. But it cannot tell us what to do—we created it. I am not suggesting that theory is meaningless. As I argued earlier, it can structure our thinking in a way that limits our perception of the available alternatives. But it is important to remember that this is because *we* structured *it* to do this. We told ourselves what to do.

Criticism cannot magically generate answers. Internal criticism—criticism that uses a paradigm's criteria against the paradigm itself—merely shows that a certain theory does not do what it purports to do. For example, demonstrating that a theory that claims to be determinate is in fact indeterminate is purely negative; this sort of demonstration

conversationally, and people who still hope for other sorts of support. *Id.* at 201 (quoting Rorty, *Pragmatism, Relativism and Irrationalism*, 53 *PROC. & ADDRESSES AM. PHIL. ASS'N* 727-28 (1980)).

173. R. BERNSTEIN, *supra* note 8, at 203 ("It means turning away from the obsession 'to get things right' and turning our attention to coping with the contingencies of human life.").

174. For elaborations of this point, see D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 82-84 (1983); R. RORTY, *supra* note 13, at 359.

175. For a rich, contextualized analysis of contrasting social visions, see Peter Arenella's discussion of criminal law, Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 *GEO. L.J.* 185 (1983).

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does not then tell us how the theory can be made determinate or whether we should be interested in determinate theories at all.

On the other hand, external criticism—criticism that challenges the fundamental assumptions of a mode of discourse (Rorty's "abnormal" discourse)—also cannot generate answers. Any alternative premises that might be the basis of a new paradigm have already been assumed before the critique began. Thus, the external critique of the old paradigm does not give us anything new except a striking contrast with the new paradigm we have already invented.

We cannot expect the new to emerge phoenix-like from the old. Traditional legal theorists have assumed that theory is, or should be *determinative*—that the goal of theory is to *generate answers*. For this view to make sense, we must believe that it is possible to find out what to do by thinking in the right way. It is possible to caricature this view of theory as the belief that important questions about life can be answered by use of a formula, a mechanical decision procedure. As I have explained, however, the sophisticated versions of this view of normative theory are not mechanical at all: They explicitly account for the active role of the theorist in decisionmaking. They even combine in ingenious ways elements of both determinacy and indeterminacy, objectivity and subjectivity, to give us the sense that theory constrains our choices only to the extent constraint is desirable and allows innovative judgment and flexibility only to the extent those qualities are desirable.¹⁷⁶ But in the end, all the sophisticated versions of theory that seek to describe it as a decision procedure based on a sure foundation are supremely unconvincing; they cannot convince precisely because they are so sophisticated. The dilemma comes down to this: For a theory to generate answers, it must be mechanical, yet no mechanical theory can render an adequate account of our experience of legitimate moral choice. We cannot even escape the dilemma by trying to make some of our choices (the "core") mechanical and some (the "periphery") open-ended: *No* mechanical choices appear to be unequivocally valid. Moreover, the history of legal thought has repeatedly demonstrated that *any* indeterminacy in a theory fatally undermines the appearance of determinacy elsewhere; if the theory really contains indeterminate principles, someone who opposes a rule or an outcome within the supposedly determinate, objective core will inevitably use an open-ended standard to reopen an issue that was supposed to have been laid permanently to rest, and the theory itself will enable her to do this.

The way out of this seemingly hopeless situation is simply to give up

176. Cf. J. CROWLEY, *LITTLE, BIG* 90 (1983) ("A sort of Calvinist dogma, where you never knew when you were right, but must be constantly vigilant against error.").

both the assumption that the proper role of legal theory is to generate answers and the concomitant assumption that no moral or legal choices are legitimate unless they are generated by an abstract formula. The formulas that have been proposed by legal theorists have been ingenious, but essentially wrongheaded. Whether they take the form of balancing tests or sophisticated Rawlsian social contract theory or wealth maximization, they have all sought to convince us that they could do something that is impossible: give us answers without illegitimately relieving us of the burden of moral choice. No theory can legitimately choose our moral ends for us; we should not want theory to do this for us.

How then do we make value choices? The desperation with which people ask this question rests on the assumption that legal rules obtain whatever legitimacy they have by being chosen in a way that is *essentially different* from the way in which we make everyday moral decisions. By now it should be clear that I do not think that there *is* a difference. And this revelation should not be experienced as leaving us helpless; rather, it should be experienced as empowering us.

Everyone has had the experience of making important, difficult moral decisions. And almost no one does it by applying a formula. When people decide whether to get married, to have children, to go to law school, to move to another state, to quit their jobs, they do not apply a theory to figure out what to do. They do not "balance all the factors" or add up the pros and cons. In short, they do not follow a procedure that generates, by itself, an answer. They do think long and hard about what they want in life; they imagine what their lives would be like if they were to follow one path rather than another; they talk with the people who are most important to them and whose opinions they value; they argue with others and with themselves; and in the end, they make a decision. And later, in looking back at it, they are sometimes pleased with their decisions, sometimes not. But they knew how to do it.

Everyone knows how to do this. Some people do it better than others, because they know more facts, or because they are not afraid of asking their friends for advice, or because they consider what to do more carefully than others. But it is in any event an experience that everyone has had. Legal decisions—deciding a case, voting on a statute, electing a president—are no different: Judging, in whatever context it appears, is just decisionmaking. Of course, we may act differently in different roles. We might believe that it is improper for a judge to do something that a legislator could legitimately do; we might not say something in a classroom as a teacher that we might feel free to say as a student (or vice versa). But the experience of moral choice is always the same.

The alternative to traditional legal theory, then, is to view legal theory

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as expressive rather than determinative. Legal theory cannot tell us what to value, but it can help us (judges, scholars, citizens) make choices by helping us to articulate what we value. I have a few words to say about what kind of expressive theory we should be aiming for. In figuring out what to do and how to live, we should recognize not only our active role in shaping both our thoughts and actions, but also the social and ideological context in which we operate. “[People] make their own history,” Marx tells us, “but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly found, given and transmitted from the past.”¹⁷⁷ We should be comfortable viewing both rationality and social life as historically and culturally situated.¹⁷⁸ Viewing legal theory in this way will allow us to exorcise the wrongful expectation that some politically neutral, ahistorical method can generate answers to questions about what the legal rules should be.

Moreover, we cannot respond adequately to problems faced in life by generating abstract moral categories. Discussion of moral and legal choices must focus on the rich context in which those problems occur. For some purposes, it may be useful to characterize two persons as “employer” and “employee” and to develop generalizations to describe and govern their relationships. But it is important to remember that these are real people we are talking about, and when we describe them in this way for the purpose of judging what their relations should be like, we are closing ourselves off from their actual life experiences. We can think impersonally about a busboy as simply representing the table-clearing function; or we can describe him, say, as a forty-year-old man, recently divorced, with back trouble and money problems. As Robert Gordon argues, we need “to unfreeze the world as it appears to common sense as a bunch of more or less objectively determined social relations and to make it appear as (we believe) it really is: people acting, imagining, rationalizing, justifying.”¹⁷⁹

It may indeed be useful to develop general models to describe social life. But when it comes time to make decisions, we should recognize that we are making decisions rather than discovering ourselves. In making those decisions, it is right to focus on the particular social context, to decide whether our descriptive model actually applies in that case and whether we are allowing the model to turn our attention away from facts that we would otherwise consider to be important.

177. K. MARX, *The Eighteenth Brumaire of Louis Bonaparte*, in *THE MARX-ENGELS READER* 595 (R. Tucker 2d ed. 1978) (1st ed. New York 1852).

178. See R. BERNSTEIN, *supra* note 8, at xiv, 37.

179. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW : A PROGRESSIVE CRITIQUE* 289 (D. Kairys ed. 1982).

Expressive theory emphasizes the active role of the theorist in deciding how to characterize situations, and in deliberating, conversing, introspecting, and judging.¹⁸⁰ Expressive theory also emphasizes the communal nature of theory and its complex relations with social life. The kernel of truth in the idea of rational consensus is that all ideas and actions involve relations among people. "Individuals do not simply 'have' opinions, they *form* opinions. . . . The formation of opinions is not a private activity performed by a solitary thinker."¹⁸¹ Traditional theorists have reified the idea of rational consensus by treating it as a basis for what we do, as a source of answers, as a generator of outcomes. But consensus, if it exists, is not something that just happens to be there, that we could describe accurately. It must be *created*, and the work of creating it is the work and play of daily life, of living, contending, sharing, and being with other people. Like law, consensus must be made, not found.¹⁸²

Emphasis on the creative, communal nature of common understanding creates an appropriate relationship between thought and action. The process of generating values is something we do with others in the context of relationships that continue over time.

Democratic politics is an encounter among people with differing interests, perspectives, and opinions—an encounter in which they reconsider and mutually revise opinions and interests, both individual and common. It happens always in a context of conflict, imperfect knowledge, and uncertainty, but where community action is necessary. The resolutions achieved are always more or less temporary, subject to reconsideration, and rarely unanimous. What matters is not unanimity but discourse. The substantive common interest is only discovered or created in democratic political struggle, and it remains contested as much as shared. Far from being inimical to democracy, conflict—handled in democratic ways, with openness and persuasion—is what makes democracy work, what makes for the mutual revision of opinions and interest.¹⁸³

Legal theory can help create communal ties and shared values by freeing us from the sense that current practices and doctrines are natural and necessary and by suggesting new forms of expression to replace outworn ones. For example, Gabel and Harris have suggested replacing our cur-

180. R. BERNSTEIN, *supra* note 8, at xiv-xv, 203; Meyerhoff, *supra* note 171, at 200-01.

181. R. BERNSTEIN, *supra* note 8, at 215-16.

182. *Id.* at 203-04, 223-24, 229; Tushnet, *supra* note 10, at 826 (communities of understanding must be created).

183. R. BERNSTEIN, *supra* note 8, at 223-24 (quoting Pitkin & Shumer, *On Participation*, in 2 DEMOCRACY 43, 47-48 (1982)).

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rent rights orientation with a power orientation.¹⁸⁴ They would shift our focus from viewing individuals as abstract citizens whose relations to each other are governed by rights enforced by the state to viewing them as active participants in shaping their relations in daily life. Such changes in language may help focus our attention on facts we had previously ignored and make us more keenly aware of alternative social arrangements.¹⁸⁵

We may also use the principles and counterprinciples in traditional legal theory to criticize or applaud social practice. Once we have envisioned how we would like to do things, we can then use the principles and counterprinciples in legal discourse to describe what we value about these alternative arrangements. As Unger explains:

You start from the conflicts between the available ideals of social life in your own social world or legal tradition and their flawed actualizations in present society. You imagine the actualizations transformed, or you transform them in fact, perhaps only by extending an ideal to some area of social life from which it had previously been excluded. Then you revise the ideal conceptions in the light of their new practical embodiments. You might call this process internal development. To engage in it self-reflectively you need make only two crucial assumptions: that no one scheme of association has conclusive authority and that the mutual correction of abstract ideals and their institutional realizations represents the last best hope of the standard forms of normative controversy.¹⁸⁶

When judges decide cases, they should do what we all do when we face a moral decision. We identify a limited set of alternatives; we predict the most likely consequences of following different courses of action; we articulate the values that are important in the context of the decision and the ways in which they conflict with each other; we see what relevant people (judges, scholars) have said about similar issues; we talk with our friends; we drink enormous amounts of coffee; we choose what to do. There is nothing mysterious about any of this. The only thing that makes it appear mysterious is the myth that judges have an advantage that ordinary citizens do not have that allows them to adjudicate value conflicts rationally: legal reasoning. But there is really nothing about legal reasoning that gives judges an edge on difficult political and moral questions. All it does is articulate in a more systematic fashion the conflicting arguments that are generally considered relevant to political and moral questions.

184. See Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 371-72 (1982-83).

185. *Id.*

186. Unger, *supra* note 15, at 579-80.

Judges have no better knowledge than anyone else of how to answer those questions. Their power is legitimate only to the extent we view their decisions as good and to the extent we view the current methods of choosing judges and allowing them to adjudicate disputes as a valid alternative to other sorts of dispute resolution and lawmaking.

It is wrong to wait around for the new Hobbes, the new Blackstone, the new Holmes, the new Marx, the new Rawls. It is wrong to expect that some brilliant new philosopher will come up with some grand theory that will answer our questions of what to believe and how to live. There is nothing to wait for. We do not need a new general theory that can by itself both explain the rules in force and judge them. And if anyone comes up with such a theory, we should view it with distrust. General theories do not answer our great questions; if those theories could answer such questions, they would not be great questions.

When we give up the idea that the legal system has a foundation, a "rational basis," we are not left with nothing. We are left with ourselves, and we are not nothing. As Gerald Frug notes: "The alternative to 'foundations' is not 'chaos' but the joint reconstruction of social life . . . the quest of participatory democracy."¹⁸⁷ We imagine a better life in the context of living with others and we work to bring it about. Whether some imagined practice will be better or worse than current practice is a question of moral judgment. It is not a matter of finding a foundation on which to stand, or of finding the truth. It is a matter of conviction. We cannot answer our question of how to live together by applying a noncontroversial rational method. We will have to take responsibility for making up our minds.

VI. IMAGINATION

The gypsy wanted to stay in the village. He had been dead, but he had returned from the other world because he could not stand the solitude.

—Gabriel García Márquez¹⁸⁸

What Joel saw before him he had a terrible wish to speak out loud, but he would have had to find names for the places of the heart and the times for its shadowy and tragic events, and they seemed of great magnitude, heroic and terrible and splendid, like the legends of the mind.

—Eudora Welty¹⁸⁹

187. Frug, *supra* note 8, at 1386.

188. G. GARCÍA MÁRQUEZ, CIEN AÑOS DE SOLEDAD (ONE HUNDRED YEARS OF SOLITUDE) 49 (1976) ("El gíitano iba dispuesto a quedarse en el pueblo. Había estado en la muerte, en efecto, pero había regresado porque no pudo soportar la soledad.") (translation by J. Singer).

189. E. WELTY, *First Love*, in THE COLLECTED STORIES OF EUDORA WELTY 165 (1980).

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People usually enter law school with both trepidation and eagerness. They are eager because they believe that law has something to do with both rationality and social justice. They come to law school filled with deeply felt political and moral commitments, and they expect that legal training will help them both to justify those goals and to work for them. They are fearful because they have heard that lawyers know how to argue for and against everything; they know how to make the weaker argument the stronger.¹⁹⁰ And indeed, they shortly learn how to argue for and against everything, including their most profound commitments. They also learn that torturers justify their conduct by the same kind of arguments that they use. Moreover, the ability to argue for and against everything is accompanied by a distressing inability to resolve the contradictions. There are no killer arguments. And if they are thoughtful, most law students come to feel, at some point in their education, that they are losing their souls.

The experience I have just described is the direct result of the belief that morality and law require rational foundations. If we feel we need to ground our beliefs in a way that will remove all doubts, and if such a firm ground is unavailable, we respond with either despair or apathy or cynicism. This way of thinking about moral choice is a mistake. The absence of secure foundations or decision procedures for belief should be experienced not as a void but as an opportunity. It is up to us to live in a way that can create commitments and communities.

To make this sense of hopefulness more concrete, I thought I would end this Article by telling you some of the things that I believe about what we should do and how we should live. These comments are not intended to represent a program; rather, they are general goals that describe a social vision.¹⁹¹

We should prevent cruelty. Right now, people are being dragged from their homes, in darkness, and even in broad daylight. It is someone's daughter, someone's son, someone's husband. They are tortured and raped and made to endure cruel games. Then they are killed in gruesome and inventive ways.¹⁹²

190. Socrates was put to death for this crime. PLATO, *supra* note 3, at 47.

191. To speculate about institutional and legal arrangements that could actually be implemented to achieve these goals would require the kind of contextual analysis I discussed earlier. *See supra* pp. 33-34, 64-67. Valid programmatic alternatives to the status quo would also have to be worked out in the context of participatory democratic politics. For a highly detailed political program, including recommendations for legislation, that seeks to advance this social vision, see S. BOWLES, D. GORDON, & T. WEISSKOPF, *BEYOND THE WASTELAND* (1983).

192. *See* AMNESTY INTERNATIONAL, *TORTURE IN THE EIGHTIES* (1984) (describing governmen-

In some instances, the American government subsidizes the people who commit these acts. The government reprimands the people, sternly. And the subsidies continue.¹⁹³

Whatever else a government does, it should not do these things. And our government, whatever else it does, should not aid, financially or militarily, public or private organizations that routinely inflict such unbelievable cruelty.

We should alleviate misery. There are people in my community, the community where I live, where I work, who are hungry, cold, sick, homeless. Without arguing about whether these are rights, or what sort of rights they are, I think people should have adequate and not merely minimal allotments of food, clothing, medical care, shelter. They should have these things outright, whether they are industrious or lazy, working or unemployed, old or young, smart or dumb. I do not know whether the providers should be agencies of the federal government, municipalities, courts, or communities. But these things should not be left to chance; they should not be left to the kindness of strangers.

We should democratize illegitimate hierarchies. Too many people have nothing to say, nothing at all, about what happens to them, day in and day out. They take orders. This is a shame.¹⁹⁴ I do not know exactly how the workplace should be organized, but it should be more subject to the collective control of its members and less subject to the dictatorial control of its directors.

We live in what we call a democracy, and yet we are ruled in myriad

tally institutionalized torture around the world).

193. See Nairn, *Behind the Death Squads*, THE PROGRESSIVE, May 1984, at cover, 20 (private and public organizations in El Salvador, receiving substantial military, advisory and financial assistance from various United States governmental agencies, are responsible for torture and murder of thousands).

194. Many socially conscious rock musicians have portrayed the frustration of having no control over one's daily life. See, e.g., J. COUGAR MELLENCAMP, *Authority Song*, UH-HUH (Copyright 1983 Riva Records, Inc.) ("I fight authority. Authority always wins."); B. SPRINGSTEEN, *Factory*, DARKNESS ON THE EDGE OF TOWN (Copyright 1978 B. Springsteen (ASCAP)) ("End of the day, factory whistle cries,/ Men walk through these gates with death in their eyes,/ And you just better believe, boy,/ somebody's gonna get hurt tonight,/ It's the working, the working, just the working life."); DIRE STRAITS (M. Knopfler), *Telegraph Road*, LOVE OVER GOLD (Copyright 1982 Chariscourt, Ltd.) ("I used to like to go to work but they shut it down/ I've got a right to go to work but there's no work here to be found"); THE CLASH, *The Equaliser*, SANDINISTA! (Copyright 1980 Nineden Limited) ("We dont want no gangboss/ We want to equalize"); B. SPRINGSTEEN, *My Hometown*, BORN IN THE U.S.A. (Copyright 1984 B. Springsteen (ASCAP)) ("They're closing down the textile mill/ across the railroad tracks/ Foreman says these jobs are going boys/ and they ain't coming back to your/ hometown"); B. SEGER, *Feel Like a Number*, STRANGER IN TOWN (Copyright 1977 Gear Publishing Co. (ASCAP)) ("I take my card and I stand in line/ To make a buck I work overtime/ Dear Sir letters keep coming in the mail/ I work my back till it's racked with pain/ The boss can't even recall my name/ I show up late and I'm docked/ It never fails/ I feel like just another/ Spoke in a great big wheel/ Like a tiny blade of grass/ In a great big field/ . . . And I feel like a number/ Feel like a number/ Feel like a stranger/ A stranger in this land/ I feel like a number/ I'm not a number/ I'm not a number/ Dammit I'm a man/ I said I'm a man").

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ways by little and not so little tyrannies. Monarchy and aristocracy may have gone out of fashion in 1776, but in our economic system, they are all the rage.

The organization of daily life into a series of hierarchies prevents us from developing genuine social connections.¹⁹⁵ We are led to see each other not as people trying to live together but as functionaries occupying ranks within organizations, with some ranked higher than others. This situation is further worsened by the current fairly rigid separation of work and family life, a separation that primarily disadvantages women but that also impoverishes men.

We need to increase the amount of collective participation in all sorts of decisions and settings in our economic lives. The absence of such collective processes stultifies us in our daily lives and reduces our potentially rich and varied relationships with others to role-playing.

We should alter the social conditions that cause loneliness. Loneliness as a quality is a bit tricky, a bit hard to define. In another mood, I would call it alienation. But loneliness has a sharper bite to it; it is more evocative. I am thinking of Michael Walzer's description of liberalism.

For liberalism is above all a doctrine of liberation. It sets individuals loose from religious and ethnic communities, from guilds, parishes, neighborhoods. It abolishes all sorts of controls and agencies of control: ecclesiastical courts, cultural censorship, sumptuary laws, restraints on mobility, group pressure, family bonds. It creates free men and women, tied together only by their contracts—and ruled, when contracts fail, by a distant and powerful state. It generates a radical individualism and then a radical competition among self-seeking individuals.¹⁹⁶

Of course, liberalism creates forms of control as well as of freedom, but Walzer's image, with its implicit criticism, is correct.

We have separated our lives into the public realms of the market and politics, in which we wage Hobbes' war of all against all, and the private realms of family, friendship and religion, in which we practice cooperation and community. On a small, local scale, our public lives should somehow come to resemble our private lives more closely. I do not know how we can accomplish this. But the loneliness of the world of the market is wrong.¹⁹⁷

195. See Gabel & Harris, *supra* note 183, at 369, 371-72; see also Coles, *Hierarchy and Transcendence* (Book Review), 97 HARV. L. REV. 1487 (1984).

196. M. WALZER, *supra* note 128, at 97-98.

197. "[H]uman beings need all the relatives they can get—as possible donors or receivers not necessarily of love, but of common decency." K. VONNEGUT, SLAPSTICK 5 (1976).

We view each other with both fear and longing.¹⁹⁸ We want mutually satisfying relations with other people, not only at home or at church, but in our daily lives at work. Yet we often experience those relations as threatening. The goal of politics and law should be to organize social life in a way that will maximize the number and variety of social situations in which contact among people is experienced as mutually self-validating and loving rather than mutually isolating and threatening.¹⁹⁹ If we indeed view each other with a combination of fear and longing, then it seems good and right to me that we should work to reduce the fear and satisfy the longing.

* * *

Near the end of *Winter's Tale* by Mark Helprin, Mrs. Gamely reveals to her daughter Virginia an act of kindness performed in good will toward Virginia by a family friend. But Virginia will have none of it; the act appears to have been futile, and Virginia asks her mother what good it did. Mrs. Gamely replies:

“No one ever said that you would live to see the repercussions of everything you do, or that you have guarantees, or that you are not obliged to wander in the dark, or that everything will be proved to you and neatly verified like something in science. Nothing is: at least nothing that is worthwhile. I didn't bring you up only to move across sure ground.”²⁰⁰

Surely that is right: no guarantees—and at the same time, no passivity.

198. R. UNGER, *PASSION* 95-100 (1984).

199. *Id.* at 117-18.

200. M. HELPRIN, *WINTER'S TALE* 597 (1983).