

## Essays

# INDETERMINACY: I HARDLY KNEW THEE

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It was a dark and stormy night. I huddled near the flickering fire. Thunder cracked "Law is indeterminate!", "Law does not constrain!", and, below the roar, the rasping, grating, whispers, "We are Crit Furies! Beware, beware ... all is lost!"

I am afraid. If law does not constrain, the falcon will not hear the falconer, the best will lack all conviction and the worst will be full of passionate intensity. If law is indeterminate, legal decisions are arbitrary, subjective, individualistic. Nothing is predictable; rational arguments don't matter; those of us who think we have "our reasons" are insane. I cry out against the darkness, "Oh let there be easy cases!"

In the shadows beyond the fire, I see movement! Human forms; yes, one a judge, indeed, the Chief Justice, and the other, a small child, reaching toward him.

"Do you, Benjamin, swear to uphold and defend the Constitution...?"

"Stop, he's not 35, he isn't even two! I want my baby back!"

I awake with a cry of despair. I'm a regular wreck, with a crick in my neck, but the darkness is past and it's daylight at last; the night has been long, ditto, ditto this debate and thank goodness both of them are all done.

It was all a horrible misunderstanding. I had misunderstood the furies; perhaps they weren't even talking to me. In any event, law and rationality are safe!<sup>1</sup>

"Bottom line, do I believe in the power of rational argument? Of course I do."<sup>2</sup>

Anthony D'Amato, Radical Deconstructionist, Critical Legal Studies Fury.

Further:

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1. In my panic, I was not alone. See, e.g., Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984), suggesting that law school deconstructionists pack up and leave.

2. D'Amato, *Pragmatic Indeterminacy*, 85 NW. U.L. REV. 148, 156 (1990).

[L]awyers can predict how judges will probably decide a given case or line of cases. If lawyers did not have such an ability, we would have chaos, not law.<sup>3</sup>

Finally:

Thus, when a critic charges Indeterminists with saying that law or language does not matter, the critic indicates she is acquainted only with superficial criticisms of the Indeterminacy thesis, and not with Indeterminacy itself.<sup>4</sup>

Frankly, I am relieved; superficial I can live with.

Legal deconstructionism is part of an academic movement which started in the area of literary criticism. There the argument is that, given the ambiguities of language, the text cannot control; meaning is created by the reader. This movement has political as well as epistemological overtones: if text does not control and meaning resides in the reader, there can be no definitive readings of any text and, indeed, all readings are equally valid. This tweaks the Establishment's nose and angers many an English professor.<sup>5</sup>

In law, deconstructionism asserts that the law does not constrain judicial decisions and that all cases can be legitimately decided either way. Like their literary cohorts, legal deconstructionists point to the ambiguities of language and argue that any given legal rule can be read to support any decision the judge cares to make. In addition to the ambiguities of language, legal deconstructionists rely upon the often contradictory nature of legal doctrines. Legal Realists were the first to pick on this phenomenon. Karl Llewellyn, for example, wrote an article on the canons of statutory construction: for each telling a judge to do "X," another told him never to do "X."

3. *Id.* at 171.

4. *Id.*

5. For a general description of the current academic climate, including the role of deconstructionism, see Paglia, *Ninnies, Pedants, Tyrants and Other Academics*, N.Y. Times, May 5, 1991, § 7, at 1 (Book Review). As is perhaps suggested by her title, she is not entirely sympathetic. Of the three French theorists who are the current rage, she writes:

These minor French theorists have had a disastrous effect on American education. Lacan encourages pompous bombast and Foucault teaches cheap cynicism, while Derrida's aggressive method, called deconstruction, systematically trashes high culture by reducing everything to language and then making language destroy itself.

*Id.* at 29. Professor Paglia disputes the common belief that today's academic radicals were the student radicals of the 1960's:

Most of this country's academic leftists are no more radical than my Aunt Hattie. Sixties radicals rarely went on to graduate school; if they did, they often dropped out. If they made it though, they had trouble getting a job and keeping it. They remain mavericks, isolated, off-center. Today's academic leftists are strutting wannabes, timorous nerds who missed the 60's while they were grade-grubbing in the library and brown-nosing the senior faculty.

*Id.*

Thank goodness nothing serious is at stake.

Indulge a brief biographical rejoinder (or perhaps merely a remembrance). I was a 1960's Berkeley radical and I was in graduate school (if law school counts — which it probably doesn't). As for grade-grubbing and brown-nosing, nothing could be further from the truth. With other Boalt students, I was involved in various student strikes, picketing, singing, shaking my fist and demanding the closure of the University. Until, of course, someone shouted, "It's almost time for Property."

Thrust: A statute cannot go beyond its text.

Parry: To effect its purpose a statute may be implemented beyond its text.<sup>6</sup>

Legal deconstructionists use such examples to assert that a judge can decide the case any way she wants and then simply cite the legal doctrine which supports her position.<sup>7</sup> Law does not constrain her decision, and indeed, either side to every lawsuit can legitimately win.

Legal deconstructionists, a.k.a. "legal crits," sum all this up with a lively taunt: "There are no easy cases!"

I went for it. In a prior essay,<sup>8</sup> I defended the notion that there are "easy cases" and even gave one. A teenager, wishing to be President, argues that the thirty-five-year-old age requirement should not apply to her because the purpose of that requirement is to assure that the President does not have teenage acne and, as all can plainly see, she doesn't. Although her argument has the form of a respectable legal argument (implying an exception to a statute in light of the statute's purposes), my point was that everyone would recognize that her's is a silly argument and, if this is all she has to offer, her case would be an "easy" one. Assuming judicial good faith, a judge would have no choice but to bar her candidacy, the legal requirement constraining the decision. I was rather unclear as to how it was that everyone would recognize the argument as silly but no one seemed to notice.

Enter Professor Anthony D'Amato of Northwestern, a radical deconstructionist and proud of it.<sup>9</sup> While not commenting on my suspicious omission, he argued that my case of the underage president was in fact a "hard" case, one which could go either way; the judge could legitimately allow her to run. First, there would always be other arguments available which would support her candidacy (the democratic nature of our government, gleaned from the Constitution, overriding the age requirement to allow the electorate to elect who it chooses) and second, as for my silly acne argument, that may itself be a winner; what's silly today may be sober tomorrow (perhaps the courts will come to hate the Constitution and thus relish silly arguments dismantling it).<sup>10</sup>

Well, I went for it again and responded to D'Amato who responded to me<sup>11</sup> and this is my response to his. I am somewhat reluctant to admit to my

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6. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950) (citations omitted).

7. Llewellyn's position was not so simple. He tells us that "to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the canon: the good sense of the situation and a simple construction of the available language to achieve that sense, by *tenable means, out of the statutory language*." *Id.* at 401 (emphasis in original). For Llewellyn, although there were contradictory canons, this did not mean the judge was free to choose; she/he was constrained by the "good sense of the situation." I will have more to say on this later.

8. Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203 (1985).

9. His actual words, "an extreme-radical deconstructionist." D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U.L. REV. 250, 252 n.13 (1989).

10. Even so, the judges would know that the acne argument was silly; they would buy it because they hated the Constitution, not because they found it convincing.

11. Our exchange was part of a larger exchange on the issue. See D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 NW. U.L. REV. 113

friends in Arizona that this is the way I spend my time. Actually, the debate is crucial. Professor Steven Winter terms the Indeterminacy Debate the key issue in legal scholarship today.<sup>12</sup> Thanks to Professor D'Amato's sustained and rigorous attack on the common sense version of the world, I now realize that the issue, at bottom, concerns communication: are words of sufficient clarity to constrain a decision or, indeed, communicate a thought? Indeed, now I think I understand the process by which most would recognize that the acne argument is a silly one.

Despite Professor D'Amato's conciliatory tone in conceding that law matters, he continues to taunt: again and again he assures us that there are no "easy" cases. This essay will review and comment upon his analysis. I will conclude that there are, indeed easy cases, even more than I originally thought there were.<sup>13</sup>

Before that, however, some speculation as to how it is possible for us to communicate at all. Perhaps communication is an illusion; perhaps we attach different meanings to words.<sup>14</sup> In discussing how law-words communicate, D'Amato offers a significant analysis:

For the Indeterminist, "law" assists a judge in locating similar cases and thereby helps the judge dispense societal justice. Thus the words of the law serve a retrieval function. They help call up situations (judicial cases as well as hypothetical events addressed by

(1990); Benson, *Deconstruction's Critics, the TV Scramble Effect, and the Fajita Pita Syndrome*, 85 NW. U.L. 119 (1990); Hegland, *Goodbye to 2525*, 85 NW. U.L. Rev. 128 (1990); Kress, *A Preface to Epistemological Indeterminacy*, 85 NW. U.L. REV. 134 (1990); D'Amato, *supra* note 2.

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

13. As Professor D'Amato points out, this debate is not a walk in the park; profound psychological stakes are involved. He asserts that some of us can't live with Indeterminacy because we have a "psychological need to explain events by theories." D'Amato, *supra* note 2, at 157: He makes it sound so adolescent; but I'll 'fess up.

I'm not alone. Young children, according to Piaget, explain events by theories. They are told a story: "Two children steal some apples and on their way home, they walk across a small bridge which breaks, tossing them in the creek. Why did the bridge break?"

"Because the children stole the apples!"

"Oh yeah," demands Quarrelsome Adult, "if that's so, how did the bridge know the children stole the apples?" and, without missing a beat, the Child responds, "The wind told it." See J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 250-61 (1965). Older children reject this explanation and see the collapse of the bridge as the work of termites. They cannot explain however, nor can we, why the termites picked the particular moment they did.

Explaining events by theories is psychologically reassuring as it suggests that we can control events. Literature's arch-villain, Iago, plays upon this emotional need and denies us this reassurance. After his plot has destroyed, Iago is exposed as the villain he is and Othello instructs another to "demand that demi-devil, / Why he hath thus Ensnared my soul and body?" Iago responds, "Demand me nothing: what you know, you know: / From this time forth I never will speak word." W. SHAKESPEARE, *OTHELLO*, Act V, Scene 2 (H. Craig ed. 1961).

I admit to a strong psychological need to explain events by theories and I admit, intellectually but not emotionally, that I might have it all wrong and events are either arbitrary and random or their causes are beyond human comprehension. Indeed, it has always struck me as problematic that the universe is so simple, or that the human mind is so facile, that we can understand it at all. The analogy is to my dog, Dusty, staring at my home computer. Perhaps, he too has a theory of computers.

Nonetheless, I will still go on trying to figure things out as will, of course, Professor D'Amato.

14. D'Amato, *supra* note 2, at 151 n.14.

statutes) that may be similar to the present case. Once those precedential situations are called up, the judge examines the decisions reached in those cases and decides whether justice compels a similar result in the present case. Although positivism errs in saying that law-words constrain judicial decisions, law-words do play an important heuristic role in initially identifying previous decisions so that they may be compared with present situations.<sup>15</sup>

This strikes me as so clearly right that I kick myself for not publishing first. But upon reflection, all words serve a retrieval function and all language is based ultimately upon what we have experienced, through sight, taste, smell, touch and emotion. It is nonsense to think that words can operate other than by retrieval function; without an experiential base, words mean nothing, and surely cannot constrain anything. Mygtopighz!

Arno Penzias, a Nobel Prize-winning head of the Bell Computer Lab, describes the process: "From childhood on, each human being develops a personal vocabulary based on the integrated sums of categorized experience" and that "human language understanding depends on access to experience-based knowledge."<sup>16</sup> One of the difficult problems in teaching computers to communicate is that they lack the experience-based knowledge; without it, they are caught in an endless verbal definitional loop. ("How high is that building?" "Well, let's see, my dictionary defines 'high' in terms of 'tall' and, let's see, my dictionary tells me that 'tall' means 'high' and, zipzap, fuse blown."). The solution is to build robots that will acquire rudimentary equivalents of human manipulation and sensing capabilities;<sup>17</sup> they move about the lab, bumping into things and spilling other people's coffee. (But it's OK, they're so cute.).

"Law-words" operate by retrieving images and experiences. Does this important insight support the assertion that law is indeterminate? I think not. In fact, I think it helps solve the Riddle of Communication.

For the retrieval to help Indeterminacy, the assertion must be that the images we retrieve differ. Most of us, however, "see" the same general image when we hear the word "dog" — presumably, few of us conjure cats, bats or video tape recorders. Few of us play cruel hoaxes on our kids, "Ben, that's a Mygtopighz."<sup>18</sup>

"Law-words" constrain images and images constrain decisions, thus "law-words" constrain decisions and radical deconstructionism is kaput, unless, of course, retrieved images radically vary. At first blush, the additional step seems to open the possibility of additional ambiguity or "noise." When I say "dog" not everyone retrieves an image based upon my dog "Dusty" (who is, ironically, himself a Retriever). Differing images can cause Indeterminacy at

15. *Id.* at 170-71.

16. A. PENZIAS, IDEAS AND INFORMATION 53 (1990).

17. *Id.* at 55.

18. Being straight with your kids is more of a guideline than a rule. ("Here, you'll like this medicine."). Professor D'Amato has suggested that we who reject Indeterminacy do so because of our psychological need to explain events by theories. See *supra* note 13. Perhaps the Indeterminacy movement can be explained by the psychological need to get even with one's parents.

On the distinction between rules and guidelines, see *Ghostbusters* (Columbia Pictures 1984).

the edges. However, all forms of communication involve "noise"; that language is linked to experience-based knowledge may explain why there is less noise (Indeterminacy) than we are led to believe when we focus on the slippery nature of words.

"Spot" is an "easy" dog, at least until a deconstructionist snaps at our heels. To prove to a deconstructionist that "Spot" is a "dog," we make a fatal mistake; we use words (we should just point at Spot and shrug our shoulders).

"You claim that Spot's a dog but cats have four legs, bats have two eyes, and video recorders are nice things to have around the house. Besides, if that's a dog, where's his collar?"

This attack confuses explanation with knowledge. To determine whether Spot is a dog, we do not run "its" attributes against a set of definitions; we look at Spot and intuit that he shares common characteristics with Dusty. To explain our knowledge, we use words and, at the verbal level, we are vulnerable to the nips of ambiguity, vagueness and infinite regress.<sup>19</sup>

How will Professor D'Amato respond to my dog example? At the cost of another article (I can keep this up indefinitely and it is more fun than writing about widgets), I will anticipate his response. D'Amato has written of dogs and, indeed, of pelicans.<sup>20</sup> As for dogs, he offers a delightful story showing that they aren't always:

Consider Franklin D. Roosevelt's brilliant deconstruction of the doghood of his famous Scottie, Fala. Fala had a tendency to climb on both furniture and visitors.... One visitor whom Fala obviously distressed and who thought dogs should not be given such freedom was Secretary of State Cordell Hull. Calling upon his diplomatic skills, he said to the President, "A dog exists very well out in a yard." FDR replied smoothly, "Ah, my dear Hull, that is just the point; Fala is not a dog."<sup>21</sup>

As to pelicans, he considers the assertion of Professor Schauer that "[i]f someone ... points at a living, breathing flying pelican and says, 'This is not a bird,' she simply does not know what the word 'bird' means."<sup>22</sup> D'Amato comes to the pointer's defense: she may be referring to her finger. Therefore, we cannot say that she doesn't know the definition of the word 'bird'.

As to not knowing what meaning others attach to words, D'Amato uses an argument of W.V. Quine:

19. That I believe communication is possible does not mean that I think it is perfect or certain. I think failure of communication stems mostly, however, from differing knowledge backgrounds between communicators rather than the ambiguity of language (or whether words have "core" meanings). At places, D'Amato loses me, not because I cannot understand his words but because he is writing from a different knowledge basis. Indeed, he flouts it. "My 'long' answer to Professor Hegland is that, before pronouncing my views 'insane,' he might do well to spend a few years perusing the development of twentieth-century linguistic philosophy." D'Amato, *supra* note 2, at 153. That's a lot of work just to pronounce his views insane.

20. D'Amato, *Aspects of Deconstruction: The Failure of the Word "Bird,"* 84 NW. U.L. REV. 536 (1990).

21. *Id.* at 540 (citing F. SCHULER & R. MOORE, THE PEARL HARBOR COVER-UP 90-91 (1976)).

22. *Id.* at 538 (citing Schauer, *Formalism*, 97 YALE L.J. 509, 512 (1988)).

A rabbit scurries by, the natives say "Gavagai," and the linguist notes down the sentence "Rabbit" (or "Lo, a rabbit").... If we are wondering whether to translate ... "gavagai" as "rabbit" or as "undetached rabbit part" or as "rabbit stage," we can never settle the matter simply by ostension — that is, simply by repeatedly querying the expressions "gavagai" for the native's assent or dissent in the presence of assorted stimulations.<sup>23</sup>

"We can never know for sure," concludes D'Amato from this discussion, "what is in the native's mind — or anyone else's — when we talk about and point to things."<sup>24</sup>

What is one to make of this? D'Amato makes a very convincing case that communication is not certain; that ambiguity and misunderstandings are ever present. But we know that; that's why speakers, and writers, unless they are out to fool us, take pains.<sup>25</sup> That's why we have follow up questions, "By any chance, are you referring to your finger?"

The process described by Quine is the process by which we learn language. I imagine what saves us is that we get more than one example, perhaps, alas, a detached rabbit part. But, then again, no doubt we all attach slightly different meanings to words. But that doesn't matter very often; for communication to work, close is good enough. On a hunt, for example, the anthropologist shouts "Gavagai!" (meaning "rabbit"); whether the person with the spear hears "rabbit," "unattached rabbit part," or "rabbit stage," things will go rather badly for the rabbit.

But enough of D'Amato's rabbits and presidents, time to return to the main argument.

Is language hopelessly ambiguous? Thus far I have argued it isn't but then again I have been using concrete examples: dogs, pelicans, and fingers. Does what works for "dog" work with "justice"? One might assume that, the higher the abstraction, the greater the possibility of radically different retrievals. But I am unsure of this possibility. Parents don't play hoaxes at this level either ("Ben, you getting all of the cookies is what I mean by 'fair'."). No doubt that situations in which children first learn words like "fair" will vary greatly, but so too will the first dogs they encounter. From three or four dogs, kids sense the needed attributes and are thereafter able to identify a dog not yet named by an adult. So too there might be identifiable attributes of the "fair"

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23. *Id.* at 537-38 (citing W.V. QUINE, *WORD AND OBJECT* 29 (1960) and W.V. QUINE, *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 30-31 (1969)).

24. *Id.* at 538. Two Chinese philosophers at the Summer Palace, stopped to admire the goldfish. "The fish are swimming happily," remarked one. "How do you know they are swimming happily?" replied the other, in a brilliant deconstruction of fishhood, "you are not a goldfish." "True," replied my hero, "but how do you know what I know, you are not me."

25. Redundancy, the villain of high school essays, plays an important part in reducing the noise and error in our communications. Redundancy can play an important role in reducing ambiguity. See J. CAMPBELL, *GRAMMATICAL MAN* 67-74 (1982).

situations that kids can glean from their initial exposures, such as sharing between equals (equality), and listening to both sides (due process).<sup>26</sup>

The fascinating thing is how it is possible for us to recognize the key attributes of "dogs" and "justice." There are so many possible attributes that no amount of adult pointing will do the trick (point to a running Golden Retriever; to be a dog is it essential to be running and red?). Further some of our concepts appear to be formed independently of adult pointing, such as our sense of what constitutes good writing. Again, we are able to learn from our experiences, but in each experience we have, there are many possible lessons, some of which are contradictory. How is it possible to learn the correct lesson? Because the external world offers only infinite possibilities, I am left with the uncomfortable view that we somehow know, going in, the key attributes of dogs, justice, good writing and life's important lessons. More of this, later in the essay.<sup>27</sup>

Let us return to Llewellyn's example of contradictory canons governing statutory construction, one saying a statute cannot be interpreted beyond its text, the other saying that it can. Relying on the formulations alone, we could never know when we should exceed a statute's text and we would forever chase our tails. However, just as words have experience-based grounding, so too do legal rules, the cases in which they were announced. At this level, much (but surely not all) of the contradictory nature of verbal rules vanishes.<sup>28</sup>

Thus the retrieval model explains how law and language, despite their bloomin' confusion, do as well as they do. It also acknowledges the central importance of law-words. Our society is different (and better) when the words are "Employers cannot fire employees solely because of HIV infection" than if there were no such law-words. The centrality of the words is true even though judges may retrieve different images of "sole reason" and thus decide some cases differently.

To recap, Professor D'Amato tells us that Indeterminacy is not as radical as shrill critics have accused (law is somewhat predictable and rational discourse somewhat effective) and offers a provocative insight as to how law works. However, he still insists that there are no "actual" easy cases. Before I

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26. This is not to say that, given any particular situation, all will agree as to what is "fair"; however, this may not prove verbal indeterminacy as much as factual indeterminacy. Some may see the situation as one of "not sharing," while others might see it as one of "not listening." If these attributes of fairness trigger different outcomes, it does not mean disagreement about "fairness."

27. See *infra* note 54 and accompanying text. As to the possible inborn nature of the attributes of justice, ask a group of adults to retell incidents from their childhood that they thought were unfair, you will likely hear tales of denial of equal protection ("my sister got to go to bed later") and of denial of due process ("the teacher didn't even let me tell my side of it"). I am indebted to Jack Himmelstein for this exercise.

28. What of statutes? We are often faced with the task of interpreting words without knowing the context in which they were written (unless there is a clear legislative history). How can we do this if we need a context in which to ground the words? We engage in a curious process. We use the words we have to project a context and then turn around and interpret the words from that context. In class, faced with a Restatement section and a difficult case, I ask the students to give me, first, a case where the Restatement rule would clearly apply and, then, give me a case where it clearly would not. Then we ask which of our hypothetical easy cases our difficult case most resembles. The relationship between contexts and words is not always a one-way street: words can project contexts which turn around and define the words.



turn to his arguments, it is important to ask what the debate is about: What difference does it make if there are, or aren't, easy cases?

For me, it makes a great deal of difference. If there are no easy cases, law and language can never restrain (or guide) and Spot may very well be a video recorder and I might be insane. In short, I don't understand how D'Amato can concede that lawyers can "predict how judges will probably decide," that rational arguments have "power" and that "law and language ... matter" and then turn around and deny that there are easy cases.<sup>29</sup>

For Professor D'Amato, he may feel that if there are easy cases then legal Formalism will prevail, along with its yucky politics.<sup>30</sup> But no one I know thinks the law is simply a matter of logical deduction; everyone now knows that in law, life, and indeed, quantum theory, "certainty is an illusion."<sup>31</sup> Further, some of us who believe in easy cases are politically okay.<sup>32</sup>

That the law is not certain does not mean that it collapses. Professor D'Amato relies upon quantum theory. True, quantum theory suggests that cause and effect is not as neat as Newton would have it (thus vindicating, years too late, many a failed high school physics project). Even if we were to know everything about the forces in the universe and the current speed and position of every particle, it would be impossible to predict *exactly* where a given particle would be two seconds hence. Importantly, however, quantum theory does not assert that the laws of the physical universe are indeterminate (or that they do not exist); the claim is *not* that particles move helter skelter. While we cannot predict a precise location, we can predict a range of locations.<sup>33</sup> Let's be clear: it would violate the laws of the physical universe if our particle suddenly showed up in Duluth (as it would be a clear violation of law if a judge, facing a tough evidentiary ruling, decided it by ordering the defendant's summary execution).

Time to define my terms. By an "easy case," I mean one that a vast

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29. D'Amato, *supra* note 2, at 156.

30. For a fascinating account of the legal realist attack on formalism, see Horwitz, Book Review, 27 BUFFALO L. REV. 47 (1978) (reviewing G. GILMORE, *THE AGES OF AMERICAN LAW* (1977)). His thesis is that they were motivated for political reasons; they did not like the politics of *Lochner*. However, rather than attacking Formalism politically, and thus becoming politically vulnerable themselves (the other option being Socialism), the realists choose to attack its methodology.

31. The phrase is, of course, that of Holmes. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897). Writes D'Amato, "I maintain not only that our real world is one of probabilities and not certainties, as quantum theory has amply demonstrated, but that our legal world is made up only of probabilities and not certainties." D'Amato, *supra* note 2, at 185-86 (footnote omitted). So far, so good. However from this premise, D'Amato concludes that no case is "easy" because "either side can *legitimately* win any individual case." *Id.* at 185 (emphasis in original). As I will later argue in the text, uncertainty means that the precise outcome is uncertain, it does not mean that all outcomes are possible or, indeed, legitimate. In a close case, the judge may legitimately admit or exclude the evidence. He cannot, however, legitimately, eat it.

32. If it is unfair for me to accuse D'Amato of believing that law does not matter (and he claims that it is), it is unfair for him to accuse me of believing that law is "certain," and calling me a positivist and, even worse, a formalist. On the other hand, in a perfectly fair world, no one gets published.

33. See generally J. GLEICK, *CHAOS: MAKING A NEW SCIENCE* (1987).

majority of lawyers would agree is a clear winner, a clear loser, one which should never be filed, one which should be settled or pled. No doubt an occasional "easy case" becomes "hard" — something unforeseen happens which turns the tables (a juror goes to sleep, a judge goes mad, a witness tells the truth). This is the stuff of cocktail parties. That lawyers recount losing the "sure winner" does not attest indeterminacy,<sup>34</sup> it suggests certainty. Surprise is the essence of humor; if all cases were "hard," lawyers would be even more boring dinner guests.

Wait! By conceding that easy cases can become hard have I conceded all are hard? The argument would run thusly. Going in, you cannot tell which easy case will become hard; if you could, then that particular case would be hard and all the others, easy. Thus, if all easy cases are potentially hard, all easy cases are hard. This analysis, superficially appealing, falters.

First, it also proves that all cases are easy. Some hard cases become easy (and we don't know which is which, going in). The lore of trial advocacy is rich with hard cases blowing up; they are the stuff of many Valuable Lessons, such as "Never ask a question too many."

"Now sir, you have just admitted to me that you didn't see my client bite off the victim's nose. So how can you sit there and tell this jury that you know it happened?"

"Because I saw him spit it out."

Second, the analysis suffers from a serious time problem. True, all easy cases are potentially hard cases; but we don't live potentially; we live currently. We can't leap ahead, peek back and then decide (if we could, of course, then there would be clearly easy cases, perhaps only easy cases). Cases are hard or easy when we decide what to do about them; of course, we might be wrong about our decisions or we might be right; we'll never know: that is one of the costs of living in the present tense.

This raises a neat philosophic point. It acknowledges that all cases, as they exist in the abstract, by themselves, brooding out there somewhere, are hard. It is only when something external happens, that is, our decision, that their complexity collapses and some become easy. Thus "easiness" is not a function of cases but is somehow our fault, due to our impatience and perhaps lack of imagination. However, we can't have cases without decisions, a case without a decision is an endless argument.

An analogy to quantum physics might help. (It will both help and hurt, be both "right on point" and "insanely irrelevant" until I have finished developing it and then decide whether to keep it or press "delete." Going in, however, it feels right, but I've been wrong before.)

Quantum physics is weird. Little is predictable, little observable, and, frankly, little comprehensible. Electrons defy predictive formula, jumping orbits without rhyme (but perhaps with reason); photons defy the hard choice, being both waves and particles; observation defies neutrality, changing what is observed; and, weirdest of all, events defy local cause, with one event impacting

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34. D'Amato apparently believes that it does. D'Amato, *supra* note 2, at 148.

on another at great distances and without mechanical link.<sup>35</sup> All of this suggests that the Newtonian worldview, where we sit back and watch the world behave as we know it will, is wrong. But what I want to talk about, what I sense impacts on our discussion of hard cases collapsing into easy cases when we act upon them, is Schrödinger's cat.

Schrödinger's cat illustrates the fundamental paradox of quantum theory. Danah Zohar, in *The Quantum Self*,<sup>36</sup> describes the paradox:

If, as mainstream quantum theorists believe, reality at its most fundamental level is just an indeterminate porridge of many possibilities, a teeming flux of hybrid matter waves, how do we ever get the familiar world of definite, solid objects that we see around us? At what point, and why, is reality real-ized? To illustrate the problem and its paradox, Erwin Schrödinger, one of the founding fathers of quantum theory, introduced his cat into the debate.<sup>37</sup>

The cat is placed in a cage with solid walls — it is essential that we cannot see the cat until the end of the story. With the cat is placed a bit of radioactive material which has, to keep things simple, a fifty percent chance of shooting a decay particle upward (which, due to another mechanism, will kill the cat) and a fifty percent chance of shooting it downward (which, due to another mechanism, will feed the cat). Continues Ms. Zohar:

That choice of outcomes, at least — “up,” he dies; “down,” he lives — is the choice we would expect in the everyday world. But things are not so simple for quantum cats. Indeed they are not simple at all, because according to mainstream quantum theory, the cat is *both* alive *and* dead. He exists in a superimposed state of both conditions at once, just as electrons are said to be *both* waves *and* particles at the same time.... [T]he being of Schrödinger's quantum mechanical cat is “spread out” through space and time. His possible aliveness and possible deadness “fan out” as a probability wave to fill the cage. The best we can do to pin him down is to describe *all* of his possible states ... with a mathematical equation that lists his many possibilities, just as the rules of poker lay out the many possible hands we might draw and what we can do with them while leaving us ignorant of exactly which hand we will actually be dealt. That is a matter of probability.<sup>38</sup>

When we open the cage, we find either a dead or alive cat (in Schrödinger's example, dead). What has happened? The wave function has collapsed. How so?

In some strange way that nobody yet understands, he died precisely *because* we looked at him. Observation killed the cat.<sup>39</sup>

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35. See generally D. ZOHAR, *THE QUANTUM SELF* (1990).

36. *Id.*

37. *Id.* at 38-39.

38. *Id.* at 39 (emphasis in original).

39. *Id.* at 42 (emphasis in original). My colleague, Jamie Ratner, a rather young dog refusing to learn new tricks, was incensed when learning of Schrödinger's cat. “Curiosity killed it and to hell with quantum physics!” Unlike most academic discussions seeking truth, ours did

I find this analogy helpful in thinking about theoretically hard cases becoming easy at the point of decision. Until we act, all is possible, but unless we act, nothing is possible.

Some have used Schrödinger's cat to support radical subjectivity and hence indeterminacy: it does seem that the observer creates reality (she's the one who killed the cat). However, this pushes too far.

At the moment of observation, some dialogue between the quantum wave function and the observer ... *evokes*, and thus gives concrete form to, one of the many possible realities inherent within that wave function. But there is already the potential for some very definite sort of reality there — the wave function of a table can't collapse into a cat or kangaroo. It can become only a table.

Furthermore, once the wave function has collapsed, its reality is as objective as anything else science studies. Any two (or more) people looking at Schrödinger's cat will agree that he is objectively dead — he won't look dead to one and alive to another. His mortality is not a matter of anyone's "point of view," and certainly not of someone's "value judgment." He is just simply, and finally, dead.<sup>40</sup>

Enough of quantum theory. After writing it, I think it helps; you may disagree but you've probably been wrong before as well.

"Easy cases" empirically exist; daily, lawyers advise clients not to sue, to settle, or to cop a plea. But should easy cases exist as a theoretical matter?

D'Amato insists not. He has his reasons. First, easy cases should not exist because the controlling rule can always be changed, *ex ante*, so as to make the winner the loser. Second and third, even if the controlling rule could be fixed, it would not lead to determinant results as the facts to which the rule applies are indeterminate and because both sides can make compelling arguments as to why they should win under the controlling rule.

To respond, first, surely no one can be assured victory if the rules can always be changed. Can they? I'll use my example, not Professor D'Amato's, because, frankly, mine's funnier.<sup>41</sup>

Judge: "I'll decide this case on the basis of the best argument."

Lawyer A clearly makes the best logical argument. Judge:

"Lawyer A, you made the best logical argument, but I wanted the

not end with lifelong hatred nor in major litigation. We compromised. Observation killed the cat but curiosity made us look.

40. *Id.* at 48 (emphasis in original).

41. Actually D'Amato's example isn't funny at all. Like so many other radicals of all stripes and persuasions, Professor D'Amato, who would lighten and enrich our lives, is so busy telling us Important Things so that Tomorrow Things Will Be Brighter, he doesn't realize that We Deserve a Break Today.

"Dost thou think, because thou art virtuous, there shall be no more cakes and ale?"

W. SHAKESPEARE, *TWELFTH NIGHT*, Act II, Scene 3 (H. Craig ed. 1961).

As to Professor D'Amato's example, which you probably thought you were getting in this footnote, I'll give in the next; that way, you will read mine first, unless, of course, you cheat.

best emotional argument and B beat you here." Lawyer A: "Give me another chance." Lawyer A now makes a compelling, tear-drenched, emotional argument. Judge: "Lawyer A, you made a compelling, tear-drenched, emotional argument. However, you didn't mention pickup trucks, prison, your mother or blue eyes crying in the rain. That's what I wanted and that's what I got from B. Sorry, you lose again."<sup>42</sup>

One gets the unpleasant feeling that one is appearing before the grade school nerd who gets you to commit to the fact that whales are fish and then shrieks, "They're mammals!" I assume that D'Amato is not resting his case on the possibility of smart-ass judges.<sup>43</sup>

It is worth noting that both my example and his concede the determinacy of rules prior to their possible revision. Rules (best *logical* argument, best *emotional argument mentioning Mom*) produce winners. The judge does not say, "Gee, Lawyer A, I really have no idea what a logical argument is and B's meandering musings strike me as better than your tight argument about Socrates's mortality."

It is true, however, that all rules are subject to revision and that there is a vibrant relationship between a controlling criterion and that which is controlled. The process of argument (or application) informs and perhaps shifts the criterion: "I knew I wanted an emotional argument but only after hearing the arguments do I realize that by an emotional argument I mean one mentioning Mom." Judging is a dynamic process, a two-way street.

The relationship between criterion and decision, process and outcome, and perhaps even cause and effect, is not as linear as it might seem. Take John Rawls. He asks how we can determine the just society. It would be that society produced by a just procedure, the society we would choose if we choose behind a veil of ignorance. But Rawls makes an interesting point: we cannot be sure if

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42. In Professor D'Amato's example, the criterion the judge first posits is "most rational argument wins." Lawyer A (I have changed his name to protect his identity from further scorn) makes the best *formally* rational argument; despite this, the judge awards victory to Lawyer B who had made the most *substantially* rational argument. Lawyer A gets another chance and now makes the best *substantive rational argument* only to find that, while he made the best argument on that score from the point of view of *goal-rationality*, lawyer B wins again because she made the best substantive rational argument from the point of view of *means-rationality*. You get the drift; Lawyer A now makes the best substantive rational argument from the point of view of means-rationality, only to lose again because his argument is only best within the framework of *Kaldor-Hicks optimal rationality* and Lawyer B made the best in terms of *Pareto-optimal means-rationality*. I take at face value D'Amato's assertion that he can keep this up forever. If he can't, of course, he loses.

43. There are two problems with the smart-ass judge move. First, at some point along this infinite regress, everyone in the courtroom, even the smart-ass judge, will realize that judge is being no more a judge than the judge who says "Lawyer A, you made the best argument but, quite frankly, I wanted the best argument from someone I liked. You lose." Second, like all arguments supporting Indeterminacy, D'Amato's Infinite Qualification Regress denies the smart-ass judge any basis on which to decide against lawyer A, even personal hostility:

"I don't like you Lawyer A except when you talk about Mom" or "I don't like you Lawyer A, even when you talk about Mom, but I'll let you win this one so you'll have farther to fall when I get you next time."

Thus the smart-ass judge is out in space, forever orbiting, never touching ground. He deserves it, but the rest of us don't. If Indeterminacy is correct, then we can never reach a decision, we can only decide.

the procedure is just unless we peak at its result. If it produces an unjust society, we go back and tinker.<sup>44</sup> Circular, no doubt; but a lot of things seem to be.

Let me take two examples from things I might actually know something about, writing and grading. Topic sentences and grading grids strike me as analogous to rules — they give direction and determine contests. Boldly I write my topic sentence and then go about developing it in the paragraph. Once I'm done, however, frequently I have to sneak back to rewrite the topic sentence in light of its development (thus creating the illusion I knew where I was going all along).<sup>45</sup> Grading, I know the issues and the analysis, hell, I wrote the question. But my students always see additional arguments, additional issues; I adjust the grid.

The veil of ignorance, topic sentences and grading grids are all subject to revision in light of what happens. This shows that they, by themselves, do not totally nor mechanically control. Something separate tells us when we must adjust our original formulations to comport with our sense of the proper society, the cogent paragraph and the good exam. The original formulation itself cannot make that adjustment.

44. Rawls says that this back and forth process leads to "reflective equilibrium." J. RAWLS, A THEORY OF JUSTICE 20 (1971).

45. I hate to give a cite to my opponents but it is so well written that I must. Mark Twain was of the view that the original idea may not always hold and, because he is Twain, I quote at length:

And I have noticed another thing; that as the short tale grows into the long tale, the original intention (or motif) is apt to get abolished and find itself superseded by a quite different one.... Much the same thing happened with *Pudd'nhead Wilson*. I had a sufficiently hard time with that tale, because it changed itself from a farce to a tragedy while I was going along with it — a most embarrassing circumstance....

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When the book was finished and I came to look around to see what had become of the team I had originally started out with — Aunt Patsy Cooper, Aunt Betsy Hale, the two boys, and Rowena the lightweight heroine — they were nowhere to be seen; they had disappeared from the story some time or other. I hunted about and found them — found them stranded, idle, forgotten, and permanently useless. It was very awkward....

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I didn't know what to do with [Rowena]. I was as sorry for her as anybody could be, but the campaign was over, the book was finished, she was side-tracked, and there was no possible way of crowding her in, anywhere.... I must simply give her the grand bounce....

"Rowena went out in the backyard after supper to see the fireworks and fell down the well and got drowned."

It seemed abrupt, but I thought maybe the reader wouldn't notice it, because I changed the subject right away to something else.... It seemed a prompt and good way of weeding out people that had got stalled, and a plenty good enough way for those others; so I hunted up the two boys and said, "They went out back one night to stone the cat and fell down the well and got drowned."... I was going to drown some of the others, but I gave up the idea, partly because I believed that if I kept that up it would arouse attention, and perhaps sympathy with those people, and partly because it was not a large well and would not hold any more anyway.

M. TWAIN, *Author's Note*, in *PUDD'NHEAD WILSON* 157-60 (Airmont Classic Series 1966).

Does this acknowledge indeterminacy? I hope not. If it does, it acknowledges a weak form. The strong form of indeterminacy makes "controlling criteria" *ex post facto* justifications of decisions based upon other considerations. The weak form of indeterminacy makes "controlling criteria" central, albeit not exclusive. We are to apply a "rule" to a case. What that rule is is of central importance, even though in applying it (or in listening to the arguments made under it) we might revise it. The original formulation directs our efforts, makes some things relevant and others not and sets the parameters of revision. When the judge says "I want an emotional argument," we stop making wisecracks. While it makes sense for a judge to say, "Now that I've heard the arguments, I now realize that a good emotional argument must mention Mom," it would not make sense for the judge to say, "Now that I've heard the arguments, I now realize that a good emotional argument must leave me laughing."

I spoke of a "something" that tells us when we must revise our original criteria in light of its applications, the "sense of revision" that tells the judge that "emotional argument" includes Mom but not raucous laughter. Where do we get that "sense"? It seems to me that it is very much of the same stuff as our original criteria. When I am applying a criterion I created (as does a writer with topic sentences and does Rawls with his veil of ignorance), this "sense of revision" is a further manifestation of the mind rumblings which first produced the criterion ("Oh, I see now that I didn't state it quite right.").<sup>46</sup> When I am applying an external criterion (as does a judge), this "sense of revision" comes from our experience-based understanding of the words used to express the criterion or, if you prefer, the "heuristics" they trigger.

This takes us directly back to how human communication and law work: by retrieving experience-based knowledge. I know that Spot is a dog because he looks something like Dusty; I know that emotional arguments do not leave you laughing because none of the countless emotional arguments I have heard share that characteristic and, finally, I know that the teenage acne argument stinks because it doesn't fit with my model of "winning argument" based on my experiences of making them, reading them, and hearing them (and, of course, their converse).<sup>47</sup>

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46. All of this sounds something like collapsing waves and quantum physics. There may be something there. Writes Danah Zohar:

It was nearly forty years ago that David Bohm first drew out the many striking similarities between the behavior of our thought processes and that of some quantum processes.

Who, for instance, has not had the experience of entertaining a vague train of thought, only to find that the act of concentrating in order to bring it into better focus somehow changes the original sequence or "flavor"? Like the electrons governed by Heisenberg's Uncertainty Principle, which are never the same again once they've been looked at (measured), a thought that has been highlighted through attention is different from the vague musing that preceded it. We might say the focused thought has "position," like the particle aspect of an electron's two-sided nature, whereas the vague musing had "momentum," like the wave aspect. We can never experience (measure) both simultaneously.

D. ZOHAR, *supra* note 34, at 76.

47. Thomas Kuhn, in *Structure of Scientific Revolutions*, speaks of scientific education. Students repeat the grand experiments of yesterday, not to learn their results, but to learn,

All of that was to answer D'Amato's Infinite Qualification Regress: there are no easy cases because a case can be easy only under a controlling criterion, and criteria can always be qualified so as to make an easy winner the clear loser. This line of analysis renders the original statement of the criterion worthless. They become, at most, statements of justification of decisions based on something else all together. The thrust of my response is two-fold. First, although further qualification is always a theoretical possibility, at some point it becomes bad faith ("whales are mammals!"). Second, while acknowledging that it is impossible to state, up front, a controlling criterion that specifically accounts for all arguments and facts to which it must apply, the initial statement of the criterion is of central importance: it directs the inquiry and sets the parameters of revisions. It is the main thought, not the after thought.

Hopefully, my response to factual indeterminacy will not be as long, as involved, nor involve as many concessions.

Once we have set out the criterion, the next step is to apply it to the facts. Does factual uncertainty destroy the possibility of "easy" cases? Professor D'Amato relies on the insights of Jerome Frank to argue that facts are often in dispute and thus litigation is uncertain.<sup>48</sup> No doubt this is true. Not always, of course; the fact that the defendant will testify that he was playing pool will likely not overcome the three eyewitnesses, his confession and the loot. Nonetheless, in many cases, the facts are seriously at issue and hence the outcome is uncertain. What to make of this? Factual dispute does not render Truth indeterminate. That parties dispute who ran the red light doesn't mean that there is no truth about that event nor does it mean that the jury can't determine that truth. Jurors struggle hard, applying implicit and explicit criteria of truth. In cases of doubt, they fall back on burden of proof. They do not, however, say "Well, Jerome Frank told us there would be days like this so let's all go have tea."

Difficult calls don't invalidate the criterion; the search for Truth may be hard but we still search. If we decided the case on the basis of which is our favorite car, we would be deciding illegitimately, and we would know it. As to law, even if both sides can always present compelling arguments, this does not render law indeterminate; it simply means law must determine tough cases.<sup>49</sup> That judges might come out either way does not mean that the law did not constrain their decision; if they decided the controversy on hair color, they decided illegitimately.

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at an implicit level, what constitutes good science. He states that graduates may not be able to define "good science" but they can do it and they can recognize "bad science." T. KUHN, *STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). The acne argument is simply "bad" law.

48. D'Amato, *supra* note 2, at 164.

49. Jeffrey Murphy makes a similar point in responding to those ethical relativists who argue their position by positing tough ethical dilemmas. Should Sarte join the Nazi Resistance or should he stay home to care for his aged mother? Murphy responds that these examples just show ethics can be tough but that it isn't always so. What if Sarte's choice was between joining the Resistance and staying home because it would be easier to buy his favorite brand of cigarettes? Interview with Jeffrey Murphy (1976).



But, do both parties always have compelling arguments? This is a key point in D'Amato's argument for Indeterminacy for, if it is correct, then "either side can *legitimately* win any individual case."<sup>50</sup>

To support his "always good argument" position, Professor D'Amato plays "rope-a-dope." He posits the case where someone refuses to pay for her groceries and the grocer brings an action for the price. "Easy case" we conclude and are about to shout "Egg on your face!" when D'Amato turns the tables. The shopper, it develops, had her reasons:

(a) I have a credit balance at this store; (b) I have a claim against this grocer and I am resorting to self-help; (c) my children are starving and I have no money; (d) I already paid for these groceries at another store; (e) I have been declared legally insane.<sup>51</sup>

Come on, Tony, people shoplift.

Lawyer: Why didn't you pay?

Client: I wanted to keep my money.

Lawyer: No doubt to feed your starving kids?

Client: I don't have any kids.

Do these cases exist? Of course they do. People (and count me in here) break rules for despicable reasons as well as for good reasons. The problem I see in this regard is that often lawyer cunning is employed to make these easy cases hard, by mucking things up with nit-picks, quibbles and afterthoughts: "Not wanting to pay isn't a good excuse but perhaps the grocer didn't have a current business license." I find this practice repugnant but that's another essay.<sup>52</sup>

Bottom line, I think there are easy cases. Most are not litigated, but some are, perhaps as a means of negotiation, or the infliction of pain, or on the basis that "things can't get worse and maybe the judge actually likes Country and Western music." Fewer "easy" cases reach the appellate level, but some do. Criminal defendants are notoriously poor sports, and in the civil area, some (perhaps many) cases are appealed, not because they are hard, but as a negotiation ploy or, alas, as a way to run up lawyer fees.

In D'Amato's world, no one acts, litigates or appeals unless she has good legal reasons for doing so. In that world there are only hard cases; but that world is a tautology.

Let's move on. At the end of his essay, D'Amato makes a series of proposals which he feels are justified by Indeterminacy, such as that judges and law schools should be more concerned with matters of justice. These proposals can be justified on their own account and do not live and die with Indeterminacy. However, there is something much more basic at stake.

D'Amato believes that the world would be better if people did more justice and less law. He drops an explosive footnote:

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50. D'Amato, *supra* note 2, at 185 (emphasis in original).

51. *Id.* at 170.

52. Hegland, *Quibbles*, 67 TEX. L. REV. 1491 (1989).

"[J]ustice" cannot be manipulated as can "law" because "justice is not a matter of words — it is a matter of similarities (treating like cases alike)."<sup>53</sup>

Law is external and justice internal, perhaps inborn. Indeed, he tells us that the human mind may be pre-wired to look for similarities and differences.<sup>54</sup> Provocative stuff.

But treating like cases alike doesn't get us very far.<sup>55</sup> We have all seen (participated in) cases which were resolved unjustly (recall the playground). Surely we would not want to treat new like cases like these old cases, even if they were on "all fours." D'Amato has anticipated this point:

[J]ustice is normative, consisting of judgments that we make all our lives when we consider facts and situations and compare them mentally to other facts and situations that were resolved in the past by other persons whom we consider just.<sup>56</sup>

I have one smarty-pants point, what's the fuss? The distinction D'Amato makes between "law" and "justice" is important only if "law" is determinant, that is, only if the law forces judges to rule against justice. If law is as indeterminate as D'Amato claims, then judges have been deciding on their normative feelings all along and deconstructionism bites its tail.

53. D'Amato, *supra* note 2, at 170.

54. *Id.* at 182. That a sense of "justice" is inborn is not as improbable as it may seem. A recent study suggests that our sense of "beauty" may be. Perceptions of beauty may develop in the first months of life (surely pre-language) and may derive in part from innate influences. Six month old babies were shown pictures of attractive and non-attractive faces, as previously judged by a group of male and female college students. The babies looked much longer at the attractive faces. Even with little exposure to cultural standards of beauty, "infants treat attractive faces as distinctive regardless of the sex, age and race of the stimulus faces," concluded Judith H. Langlois of the University of Texas at Austin in the study reported in Langlois, Ritter, Roggman & Vaughn, *Facial Diversity and Infant Preferences for Attractive Faces*, 27 DEVELOPMENTAL PSYCHOLOGY 79-84 (Jan. 1991). One suggestion explaining this heightened interest is that attractive faces may be perceived as "best examples" of a face as they may possess features that approximate the mathematical average of all faces. This would go to model building but, if the dictates of human logic apply here, the knowledge of "best examples" must come from somewhere other than the examples themselves. Cf. *supra* text accompanying note 27.

A significant implication of the study is that perceptions of beauty, whether or not inborn, are in fact shared. Hence subjective decisions need not be unpredictable. Thus the study, although somewhat disappointing on a personal note, is good news jurisprudentially.

Two other, hopefully, provocative points in regard to the possible inborn nature of justice. The work of Piaget indicates that even small children are comfortable with moral philosophy and show remarkable consistency in judging events as "fair" or "unfair." See J. PIAGET, *supra* note 13. Second, although we admit to being influenced by others, we retain a sense of our "real selves" which we take to be basic, existing prior to and free from external pressures. When we act out of that level, we may be more kind, compassionate and just. See generally C. ROGERS, ON BECOMING A PERSON 163-82 (1961).

55. My point here is not that of Peter Westen who argues that the notion of equality is at heart empty because it is of no help in deciding whether two cases are alike. To do that, we must judge the substance of their differences and, once we have done that, we know how to handle them; the adage "treating the like cases alike" does not further the analysis. See Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). The retrieval/heuristics analysis might be an answer to Westen: we know when cases are alike heuristically, not verbally. That is, we know if they are alike before we then go about verbally describing why their differences should, or should not, make a difference.

56. D'Amato, *supra* note 2, at 188 n.142.

But put aside clever rejoinders. I have both a serious question and a serious concern. First, the question: if we have the ability to distinguish just from unjust persons, why can't we rely on that ability to judge situations directly; that is, why do we need comparisons?

Perhaps the notion is that it is simply easier for us to recognize good people than good acts, (good acts becoming those things that good people do). Thomas Shaffer, in a recent article, distinguishes between "virtue words" and "principle words."<sup>57</sup> Virtue words speak to good habits, such as honesty, fairness, independence, courage, devotion, honor, and trust, whereas "principle words":

speak of things that should be done, right and wrong actions that must be chosen; of moral dilemmas; and of rival courses of action in particular situations. Virtue words focus on persons more than on actions; on good habits rather than quandaries and choices.<sup>58</sup>

Perhaps D'Amato is making this kind of analysis; if so, I want to hear more. It is interesting to note here the same kind of circularity encountered previously: one of the ways we recognize the "just" person is because that person makes "just" decisions. Further, as much as I like the sound of it, I don't do it; generally, facing a difficult moral decision, I focus on the issue at hand rather than think of how "just" folks have decided similar dilemmas.

All of that was my question; here's my concern. I too sense that justice is more basic than law and I too wish that the law schools and judges were more concerned with justice. But I need help and I need reassurance. How do we come to consider persons "just." Is this inborn? Do people share normative judgments, thus making them predictable? Finally, are these judgments in fact just? Even if they are more basic than law-words, this does not necessarily mean that they are more social, loving or kind.

I am quite sympathetic to D'Amato's call; reading his words elevating justice over law, I was reminded of the similar plea of Portia, who spoke of Mercy and Justice.

The quality of Mercy is not strain'd,  
It droppeth as the gentle rain from heaven  
Upon the place beneath: it is twice blest;  
It blesseth him that gives, and him that takes:

\* \* \*

Though justice be thy plea, consider this,  
That in the course of justice, none of us  
Should see salvation: ....<sup>59</sup>

Portia's Mercy robbed Shylock of his money and forced him to renounce his religion. There's the rub.

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57. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393, 396 (1990-91).

58. *Id.*

59. W. SHAKESPEARE, *MERCHANT OF VENICE*, Act 4, Scene 1 (C. Kean arr. 1858).

