LOOKING FOR CERTAINTY IN ALL THE WRONG PLACES

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Professor D'Amato's central thesis is that no argument, including all legal arguments, can constrain a decision, force decision contrary to one's predilections. I disagree and said as much in my prior essay. In reply, Professor D'Amato, without noting the irony, advances a flurry of arguments in support of his position, only occasionally catching his breath to shout across the pages: "Yet is there any chance that my reply has changed Professor Hegland's mind?"[1] Nice move, suggesting that my pig-headedness proves his point, making me the loser and him the winner. Of course, if I concede defeat and admit the correctness of his position, he loses because I have been constrained to go against my predilection. As to my status in the event of my concession, I am unsure. At worst, I too lose and hence we tie. The rule clearly says "At home, play for the tie," but frankly, that's not my predilection.

The major thrust of Professor D'Amato's response is to pave the way for the acceptance of "pragmatic indeterminacy" by showing how legal formalism can result in unjust results. He relies upon *United States v. Locke*.[2] He states the case as follows:

> [T]he Lockes were working a mining claim on public lands that produced gravel and building materials valued at several million dollars. Congress in 1976 enacted legislation that required claimants initially to record their mining claims and then, each year, file a notice of intention to hold the claim "prior to December 31." After initially recording their claim, the Lockes contacted the U.S. Bureau of Land Management[].... They were told to file [their] claim "on or before December 31, 1980." On December 31st, they hand-delivered their claim.... Afterwards, they were told that they failed to file their claim "prior to December 31," and that therefore they forfeited their entire claim. The trial court reversed the forfeiture, but the Supreme Court reversed the trial court and held, in the words of Justice Stevens who

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1. D'Amato, *Counterintuitive Consequences of "Plain Meaning,"* 33 ARIZ. L. REV. 529, 557 (1991).
2. United States v. Locke, 471 U.S. 84 (1985).

> dissented, that the Lockes "lost their entire livelihood for no practical reason."[3]

Professor D'Amato discusses numerous legal doctrines which could have been employed by the Court to rule in favor of the Lockes (basically, any damn fool knows "prior to December 31" means "prior to the end of the 31st of December"). Then he blames me for the entire debacle, concluding that the judgment was "outrageous, absurd and unjust."[4]

Unjust?

Does D'Amato actually know the Lockes? Does he have them over for dinner?

Unless D'Amato knows things he is not telling, how can he conclude the decision is unjust? He must be *equating justice with the proper application of law*; laws further "practical reasons" and if they are applied arbitrarily, not to further such practical reasons, they are applied unjustly. This sounds pretty good to me, but I would think that Professor D'Amato would reject it as adolescent, reactionary formalism, the doctrine that collapses justice into law and gleefully announces to its disappointed audience, "That's all folks." Although it is quite clear that Professor D'Amato hates formalism, the counterintuitive consequences of his discussion of *Locke* is that he is a formalist himself. It is, of course, with great reluctance that I bring that to your attention.

Putting aside this narrow, indeed, "repugnant," formalist definition of justice, what is one to make of the justice of the *Locke* decision? Does Justice, writ large, demand that the Lockes keep their mining claim? Perhaps not. Perhaps other folks have a more just claim to it — perhaps they have more kids (thus needing the money more) or less kids (thus having acted in a more socially responsible manner). Perhaps, too, all private mining claims are unjust (thus making just any judicial decision which makes them more difficult to get). There is the moral claim that humans should not exploit the earth's treasures and, further, the once popular moral claim, recently fallen upon hard times, that community resources should be held in common.

"Predicting outcomes according to justice," D'Amato asserts, "is more reliable than predicting outcomes according to law."[5] To take this claim seriously, however, D'Amato has to show us that concepts of justice are shared, either by intuition, convention or as the result of thought and reason. I invited him to make that case but he neglected to do so.

Judges, when deciding close cases between competing legal doctrines must obviously, and correctly, take into account their own concepts of justice. D'Amato urges that concerns of justice take the main stage; that judges should use formalism when it furthers justice, reject it when it does not. This process

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3. D'Amato, *supra* note 1, at 535 (quoting 471 U.S. at 125 (Stevens, J. dissenting)).
4. *Id.* at 538.
5. *Id* at 574. D'Amato feels that law school should be more concerned with teaching justice. *Id.* at 566-67. I anxiously await his forthcoming explanation of how he would go about this. I think we all get into that subject because none of us teach that law is certain and can mechanically resolve all cases. We all know, from Justice Holmes, that one can always imply a condition and the question is why one will do so and, further, that the "[l]ife of the law is experience, not logic." O.W. HOLMES, THE COMMON LAW 1 (1881).

quickly resolves into decisions based on justice, and law withers away. Is this a good idea?

Compare the assertions:

> The Lockes should lose because the plain meaning of the statute is that claims must be filed *prior to* December 31.
>
> The Lockes should lose because it is immoral to destroy the earth for human fancy.

In the argument over the first assertion, both proponent and opponent share a common criteria — the meaning and application of various canons of statutory construction. Evidence and arguments can focus on this criteria, and it seems possible that reasonable minds could conclude that, given the criteria, one side has the best of the argument. The loser, while not convinced, will come away thinking that the winner had "at least some good arguments."

In the argument over the morality of mineral exploitation, it is likely that the competing sides do not share common ground or common goals. If they did, then evidence and argument might matter, as in the first case. For example, if both sides agreed that "human happiness" is the ultimate goal, then the arguments for and against exploitation could be weighed. However, quite likely there is no common ground: "Humans are not the only ones here and it is immoral to prefer one species to another," or "Yes, human happiness is a goal, but not in this life." When the sides don't share common goals, resolution cannot turn on reason or discourse; it turns on power.[6]

Another way of saying all of this is: we think of law instrumentally and are willing to compromise; contrariwise, we think of justice as bedrock and compromise is viewed as immoral.

Reading D'Amato it seems the rule of law (which he labels "formalism") was invented by a bunch of stodgy academics either to create injustice in the world or, more charitably, to get tenure.

The rule of law was invented because those in power thought justice was doing whatever they wanted, as in "Off with their heads!"[7] It was invented (and fought for) *because* folks define justice differently; the rule of law is a good way, not a perfect way, of getting people to peacefully resolve their disputes.

D'Amato trots out South America and Nazi Germany. OK, several years ago I went to China and learned much about the Cultural Revolution. It ranks near the top of the great unjust upheavals in history, individuals destroyed at the whim of essentially teenage gangs, doing proletarian justice. When I was in China, folks were building law schools.

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6. Kuhn makes a similar point discussing the contest between competing paradigms. As they will project different scientific criteria for validity (each being valid under its own criteria) there is no scientific way to resolve the conflict. Opponents are not convinced, they simply die out. Kuhn says this is akin to political revolutions where differing sides have incompatible views of the just society. T. KUHN, STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

7. Herzog, *As Many as Six Impossible Things Before Breakfast*, 75 CALIF. L. REV. 609 (1987).

Contrary to D'Amato's understanding, belief in law does not mean that one collapses "ought" into "is" as in "the law's the law and that is it." One can argue that the law is wrong morally and should be changed but that, with the limiting case of civil disobedience, it should be followed.

One can also believe in the law while recognizing that following the law can result in injustice. I quite agree that *Locke* is an unjust decision. I think it is an unjust decision because it reaches an absurd result from a legal standpoint; formalistic or not, I believe that one form of justice lies in the correct application of law.

My solution to this problem (although, admittedly not a complete solution) is to ban nit-picking, to prevent lawyers from raising rules when their application would not further the "practical reason" justifying the rule.[8] D'Amato's solution is to reject law when it conflicts with justice. There is a big difference in these approaches. My solution is a "legal" solution — that is, it turns on a narrow legal question: what is the "practical reason" behind the rule? D'Amato's solution throws the entire matter open, and decisions would turn on free-wheeling judgments as to justice.

D'Amato's rejection of my solution banning nit-picking deserves a paragraph. He claims nit-picking is needed to further justice and, to support his claim, recounts two quite moving, indeed heroic, cases he handled. However, these were both criminal cases and I would exempt such cases from my ethical prohibition, briefly on the basis that, in criminal matters, unlike civil, there is a good reason to prefer one side to the other. Nit-picking in the civil context, while it might achieve justice in some cases, is, I believe, most frequently used to throw out legitimate claims, as was done in *Locke*.[9]

To change the subject, abruptly: "Professor Hegland still has not given us a single easy case."[10] Give me a break.

I gave the easy case of the teenage Presidential candidate arguing that the constitutional age requirement was designed to assure that the President did not have acne, and, to defeat it, Professor D'Amato takes us to a time far in the future when folks hate the Constitution and relish silly constitutional arguments. I gave the easy case of the customer refusing to pay for her groceries, not because her children were starving but because she preferred to keep her money, and Professor D'Amato changes the subject. Finally, I gave the case of the judge, facing a difficult evidentiary ruling, suddenly ordering the summary execution of a party, and Professor D'Amato takes us to a foreign dictatorship where, lo and behold, "'there is indeed a rule of law passed last year by the military dictatorship, and fully promulgated, that gives extraordinary powers to judges, including the power of summary execution, in order to prevent the

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8. Hegland, *Quibbles*, 67 TEX. L. REV. 1491 (1989). I use a more complicated formulation than "practical reasons" but that works as well.

9. In my prior essay, I gave the case of the individual who refused to pay for her groceries because she preferred to keep her money. At time of trial, she raised the defense that the grocer did not have a current business license. D'Amato does not comment on this case although it seems quite close to that of *Locke*. It would be unjust for the grocer to lose on this basis. *See* Hegland, *Indeterminacy: I Hardly Knew Thee*, 33 ARIZ. L. REV. 509 (1991).

10. D'Amato, *supra* note 1, at 557

admission of evidence that would be seriously embarrassing to the government or upset the stability of the state.'"[11]

Professor D'Amato doggedly insists that no case can be "easy" unless it is easy for all times, in all places and in all circumstances. If that is the indeterminist position, then, really, who cares? The only interesting question, the only important question, is whether judges in downtown Tucson, today, are constrained by law. They are.

D'Amato does have one here and now response to one of my easy case examples. I argued that a judge, facing a tough evidentiary ruling, cannot *legitimately* order the summary execution of the defendant. D'Amato answers by pointing out that this may, in fact, have happened. There is a "suggestion," he tells us, that Judge Irving Kaufman, facing a tough evidentiary point, instead ordered the execution of Ethel Rosenberg.[12]

Now *if* Judge Kaufman did that, that was monstrous. Surely Professor D'Amato's position cannot be that it is *legitimate* to execute someone to shut them up. (Yet is there any chance that my reply has sent Professor D'Amato reeling, stammering "When I use the word 'legitimate' I use it in a technical sense, without any moral overtones, as are associated with words, like, say 'legitimate'.") If D'Amato is correct in his basic theory, then all decisions are legitimate, which comes down to all decisions are decisions, which comes down to might makes right (but, of course, we can still criticize your sense of justice, or politics, but if we can't convince you here, we're sunk).

Well, law can't restrain, but justice can. Oh yeah?

> Without Ethel Rosenberg, the Soviets would not have the bomb. Without the bomb, they would not have backed North Korea. Without the backing of the Soviets, north Korea would not have invaded South Korea, an invasion that lead directly to over 50,000 American deaths. Any rule which prevents me from executing Ethel Rosenberg is a formalist ploy; I can, and I should, ignore it to do justice.

Professor D'Amato tells a moving story where he won a case even though the "judges did not share" his belief that the war in Vietnam was immoral, and were likely "active partisans of the war."[13] Three cheers for formalism.

Two last points. First, as to what quantum theory teaches. I marveled in, greatly enjoyed, and learned from Professor D'Amato's insights and descriptions of quantum theory. However, was I wrong about the electron suddenly appearing in Duluth? Professor D'Amato says that I was; electrons that orbit my thumb can be very far away indeed, perhaps even in Duluth. If cor-

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11. *Id.* at 556.

12. *Id.* at 557. In the first draft I saw of D'Amato's response, he said that the "suggestion" was that the execution was ordered in order to suppress evidence unfavorable to the government. I put a lot of eggs in that basket and, I felt, fairly well skewered him. Such an obscenity cannot be considered a legitimate use of law. In his final draft, however, Professor D'Amato drops all reference to suppression of evidence and instead tells us, in a wondrously mysterious sentence, complete with emphasis added, that the "suggestion" was that Ethel Rosenberg's execution was ordered "because there was a *lack* of evidence against her for the capital crimes of treason." *Id.* (emphasis in original). Write if you can figure that one out.

13. *Id.* at 549.

rect, this proves only that an electron is *already* there, not that it might suddenly appear there. Electrons jump orbits randomly; that is, the jump can neither be predicted nor explained. However, unless an electron in close orbit of my thumb suddenly jumps to the faraway orbit in Duluth, my argument is saved. And even if it does, while my example would be flawed, my argument would stand. Quantum theory does not argue that the universe is random. If it was, scientists would give up as one cannot understand a truly random system. Once in Duluth, our electron does not suddenly reverse its direction, go into a square orbit or become a raisin.

Second, as to who has the biggest psychological problems. Deconstructionists like to ridicule the rest of us because we are uncomfortable in a world of uncertainty. But they're the ones who can't abide uncertainty; they're the ones who pathologically reject everything which isn't perfect.

—Legal doctrines cannot resolve all cases so they resolve none.

—Darwin's theory, because it doesn't tell everything about nature, tells us nothing about nature.[14]

—The same goes for Newton (who can't explain *why* gravity works).[15]

—And, as for theories, because alternative theories can explain the same events and, because all theories can be displaced down the road, "theories don't work."[16]

Lighten up, folks. Life is hard, things are complicated. We are doing the best we can. *F=MA* and the germ theory, while not perfect, help.

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14. *Id.* at 555.

15. *Id.* at 554-55. Newton was no fool and realized that one might ask "Why does gravity work?" Indeed, that was a pressing scientific question before and during his time. B.F. Skinner tells us that "Aristotle argued that a falling body accelerated because it grew more jubilant as it found itself closer to home." B.F. SKINNER, BEYOND FREEDOM & DIGNITY 6 (1971). Newton, however, purposefully waived off the "why?" question as being too "metaphysical." This was part of science's early compromise with the Church, "We'll have our domain, explaining how things work, and you have yours, explaining why things work." *See* Mendelson, *A Human Reconstruction of Science*, 21 BOSTON U.J. 45 (1973).

16. D'Amato, *supra* note 1, at 561. Of course, that a theory might be overthrown tomorrow does not rob it of its vitality today. We do not live as if our theories are passing fads. Finally, our theories constrain our activities. *See generally* T. KUHN, *supra* note 8 (on the role of normal science).