Legal Indeterminacy

Ken Kress†

Our discussion will be adequate if it has as much clearness as the subject-matter admits of, for precision is not to be sought for alike in all discussions . . .

—Aristotle

The practical reason is concerned with practical matters, which are singular and contingent: but not with necessary things, with which speculative reason is concerned. Wherefore human laws cannot have that inerrancy that belongs to the demonstrated conclusions of sciences.

—Aquinas

Critical legal scholars, building on the work of legal realists, have developed an extensive array of arguments concluding that law is radically indeterminate, incoherent, and contradictory. Law is indeterminate to the extent that legal questions lack single right answers. In adjudication, law is indeterminate to the extent that authoritative legal materials and methods permit multiple outcomes to lawsuits. If arguments for radical indeterminacy are valid, they may raise serious doubts about the possibility of legitimate, nonarbitrary legal systems and adjudicative procedures.

In this Article, I defend the claim that the indeterminacy of the law is no more than moderate and reject critical legal scholars' arguments for radical indeterminacy. In addition, I argue that indeterminacy is a much less serious defect in the law than it is often thought to be. In particular, I maintain that moderate indeterminacy does not undermine the law's legitimacy.

My main argument contains two major strands. Part I argues that

† Associate Professor of Law, University of Iowa College of Law. B.A. 1978, University of California, Los Angeles; M.A. (Jurisprudence and Social Policy) 1983, J.D. 1985, University of California, Berkeley. Portions of this Article have been presented at the University of California, Berkeley, at the University of Iowa, at Northwestern University, at McGill University, and at the Law and Society Association Annual Meeting. I am grateful to members of the audiences at these presentations for their comments. For helpful discussion or comments on drafts, I am especially indebted to Randy Barnett, Steven Burton, Melvin Eisenberg, Robert Gordon, Gary Lawson, Michael Moore, Stephen Perry, Michael Perry, Joseph Raz, John Reitz, Philip Selznick, John Stick, Serena Stier, Mark Tushnet, Jan Vetter, Jeremy Waldron, and the members of my Spring 1988 Seminar on Legal Reasoning. Jake Holdreith and J. Paul Oetken provided superior research assistance. Oetken's substantial contributions to the examination of Kelman's contradiction between intentionalism and determinism were especially helpful.

1. NICOMACHEAN ETHICS, bk. I, ch. 3. at 10946, 13-14 (W. Ross trans. 1940).
2. SUMMA THEOLOGICA II (Part I), question 91, article 3, reply objection 3.
moderate indeterminacy, even if true, has at most modest and not devastating consequences for political legitimacy and kindred concepts, contrary to the conclusions of Kennedy, Singer, and other critical legal scholars. Part II urges that critical legal scholars’ arguments for radical indeterminacy fail, and that indeterminacy is at most moderate.

The argument in Part II that there is at most moderate indeterminacy proceeds in stages. Section A employs the pervasiveness of easy cases to challenge the alleged existence of radical indeterminacy and support the claim that indeterminacy is at most moderate. The burden of proof then shifts to advocates of radical indeterminacy to rebut this claim. Section B examines legal realists’ arguments for indeterminacy from precedent, and critical legal scholars’ arguments for indeterminacy from ideological struggle and internal contradictory attitudes. Section C looks specifically at four allegedly contradictory dichotomies. Section D describes three mistaken assumptions about legal reasoning that critical scholars make in their arguments for indeterminacy. These mistaken assumptions substantially exaggerate critical legal scholars’ assessment of the extent of legal indeterminacy. After consideration of the various arguments for indeterminacy, Part II concludes that critical legal scholars have failed to prove that indeterminacy is radical, and that to the extent that indeterminacy exists, it is moderate.

Before proceeding with the argument, I want to exclude from consideration two ways in which critical legal scholars deploy the indeterminacy thesis. First, some critical legal scholars treat the indeterminacy thesis solely as instrumental to their political agenda. Critical legal scholars note that judicial opinions and legal briefs are frequently written as though the law “necessitated” the outcome. Critical legal scholars believe that the use of this rhetoric creates a false social consciousness which unduly restricts imaginative thought and solutions to legal problems. These scholars employ the indeterminacy thesis to unfreeze this false sense of necessity, allowing consideration of alternative forms of social life more congenial to their political vision. Second, the indeterminacy thesis is sometimes intended simply as an attack (“immanent critique”) on popular culture and not as an attempt to describe accurately the underlying phenomena.

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3. I return to the first aspect at the conclusion of the Article.
6. Informal conversation with Mark Tushnet (June 9, 1988).
Neither of these uses of the indeterminacy thesis has substantial consequences for the actual, as opposed to the perceived, legitimacy of the state, and each is therefore foreign to my main purpose here. This Article challenges the truth of the indeterminacy thesis, and thus, such instrumental functions are irrelevant to my inquiries.

I

INDETERMINACY AND LEGITIMACY

With these considerations set aside, we can ask “Why do and should we care about indeterminacy?” Indeterminacy matters because legitimacy matters. Many legal scholars hold that the legitimacy of judicial decisionmaking depends upon judges applying the law and not creating their own. They claim that judicial decisions are legitimate only if judges are constrained either completely or within narrow bounds. The term “legitimate” is used here as it is used in classical political philosophy: If a judicial decision is legitimate, it provides a prima facie moral obligation for citizens to obey the decision. This use of “legitimate” should be sharply differentiated from the sociological, Weberian notion of legitimation, or perceived legitimacy. The sociological notion of legitimation asks a causal question about how the legal system induces belief in its authority and compliance with its laws.

The claim that courts’ legitimacy requires constraining the judiciary is not limited to legal academics. The debate about judicial activism within the nonlegal academy, the political community, and popular culture rests upon a similar presupposition that a judicial decision is legitimate if it accurately applies the law, but it is open to question, if not downright immoral, if it reflects nonlegal factors such as the judge’s personal preferences or political ideology. The indeterminacy thesis asserts that law does not constrain judges sufficiently, raising the specter that judicial decisionmaking is often or always illegitimate.

I do not claim that the only reason indeterminacy matters is its consequences for legitimacy. But the consequences for legitimacy are prima facie the main reason why legal scholars do and should care about indeterminacy. Few are interested in indeterminacy purely as a metaphysical or epistemological issue. If critical legal scholars could show that the legal system is indeterminate and therefore illegitimate, they would have

8. See J. Raz, The Morality of Freedom 100-01 (1986); see also A. Simmons, Moral Principles and Political Obligations 6-7, 12, 195-96 (1979).
a powerful critique. Liberal\textsuperscript{11} theorists would be obligated to acknowledge that critique and revise their theories to accommodate it, or if that is not possible, to relinquish belief in conventional theories of law and justice.\textsuperscript{12}

Many critical legal scholars do urge that law is illegitimate because it is indeterminate. Joseph Singer claims that liberal legal theory requires substantial determinacy to satisfy the requirements of the rule of law.\textsuperscript{13} Determinacy is desirable because it restraints “arbitrary judicial power.”\textsuperscript{14} Although complete determinacy is attainable in a legal system (Singer considers the rule: The plaintiff always loses), any completely determinate system would fail to be “just or legitimate” because it would insufficiently protect “security, privacy, reputation, freedom of movement” and other competing values.\textsuperscript{15} On Singer’s reading, liberal legal theory therefore attempts to provide the right mix of determinacy and indeterminacy. But, Singer argues, no existing legal system or legal theory provides anywhere near the amount of determinacy that is required:

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

\textsuperscript{11}“Liberal” is used throughout this Article to refer to the tradition of political philosophy that is based upon the moral authority of the individual, a tradition exemplified by Locke, Hume, Kant, Bentham, Mill, and Rawls. In this usage, Reagan, Bush, Bork, and Posner, as well as Dworkin, Dukakis, Carter, and the Kennedys are liberals.

\textsuperscript{12}Actually, there are two separable questions here. First, why would conventional, liberal legal theorists care if the indeterminacy thesis were true? Second, what do critical legal scholars claim that the indeterminacy thesis shows to be wrong with conventional legal theory? My suggestion is that both conventional legal theorists and some influential critical legal scholars accept the view that significant indeterminacy undercuts the legitimacy of courts, although the attribution of that view to liberal legal theorists is more certain than the attribution to critical legal scholars.

Even if some critical scholars would not locate the significance of the indeterminacy thesis in its consequences for political legitimacy, there is certainly a significant strain within critical legal scholarship that would. It will therefore repay our patience if we examine the connection between these critical legal scholars’ claims of indeterminacy and legitimacy by brief consideration of the texts of Singer, Altman, and Kennedy.

It should be acknowledged that there is a third view in critical legal scholarship regarding the significance of the indeterminacy thesis in addition to its consequences for legitimacy, and its instrumental value in unfreezing legal consciousness and effectuating critical scholars’ political agenda. If law is indeterminate, then judges are political actors wielding great power. Law is politics. Indeterminacy thus raises issues concerning the proper and best exercise of that power by judges, and of which institutional frameworks are most conducive to the wise exercise of that power. But these inquiries raise, albeit indirectly, much the same questions as would be raised by inquiring directly about the legitimacy of adjudication under conditions of indeterminacy. This is especially so if the conditions for wise exercise of judicial power and the legitimacy of adjudication are, as this Article suggests, largely dependent on the substantive virtues of the decisions judges make.

\textsuperscript{13}Singer, The Player and The Cards: Nihilism and Legal Theory, 94 YALE L.J. 1, 12-13 (1984).

\textsuperscript{14}Id. at 12.

\textsuperscript{15}Id. at 11.
In an especially clear discussion of indeterminacy, Andrew Altman argues that the indeterminacy which flows from inconsistencies that reflect ideological struggle among lawmakers demonstrates that Dworkin's legal philosophy fails to legitimate judicial decisionmaking because it fails to put practical constraints upon judges. Perhaps Duncan Kennedy, in his first published attack upon liberal legal theory, best described the connection between indeterminacy and legitimacy inherent in critical legal theory:

My... purpose in this essay is to clarify that version of the liberal theory of justice which asserts that justice consists in the impartial application of rules deriving their legitimacy from the prior consent of those subject to them... [and] to contribute to the critique of [that theory].... My argument is that a distinction between rule making and rule applying cannot be made to legitimate the coercive power of judges.... [T]his version of liberal thought has been unsuccessful in the attempt to use a theory of rules to transfer the postulated legitimacy of decision based on consent to the judicial administrators of a body of legal rules.

The core connection between indeterminacy and legitimacy explicit or implicit in this critical legal scholarship can be understood as follows. Critical scholars assume (either for purposes of internal critique or without reflection) that legislative enactments are legitimated by consent. Insofar as judges are merely applying rules created by the legislature, their actions are legitimate and enforcement of their decisions is justified. On some accounts, judges enjoy a carefully limited discretion to "legislate interstitially" to smooth out the rough edges in statutes and to correct minor legislative oversights. Thus, judges may legitimately legislate in what H.L.A. Hart calls the "penumbra of uncertainty." According to Hart, the penumbra of uncertainty derives from the vagueness and open texture of the language of enactments. But any more extensive lawmaking by the judiciary would be a usurpation of the authority of the people's representatives.

Radical versions of indeterminacy threaten this formalistic model by

16. Id. at 14.
19. The requisite consent could be to the entire constitutional framework. Alternatively, it might be thought that voting for legislative representatives is a form of tacit consent.
20. B. Cardozo, The Nature of the Judicial Process 102-05, 113-15 (1921); see Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.").
22. Id.
claiming that there are very few or no clear cases where law is strictly applied. The penumbra of uncertain cases swallows up the core of formalistic rule application. Every case of adjudication requires judicial legislation. In consequence, adjudication is illegitimate.

But the problem with this argument is two-fold. First, the assumption that consent legitimates the state is dubious, because almost no one actually or tacitly consents to the state except perhaps immigrants or foreign visitors. Second, and more importantly, the argument implicitly assumes that the only way judicial decisions could be legitimate is if they rigidly follow ("strictly interpret or construe") statutory or constitutional provisions, themselves legitimated by consent. This implicit assumption—indeed, fixation—of many legal scholars is a serious mistake. I cannot overemphasize how much mischief has been caused by this failure to acknowledge the possibility of other ways of legitimating adjudication. The existence of other ways of legitimating adjudication is as telling against conventional scholars who advocate strict construction or neutral principles as it is against critical scholars who employ the conventional framework for legitimating judicial review in the service of more radical ends. Thus, the argument which follows, if successful, has broad implications extending beyond the critique of critical legal studies scholarship.

I will clarify my objections to the argument that the pervasiveness of judicial legislation entails that adjudication is illegitimate by analyzing the logical structure of the assumptions and claims of both liberal legal theory (as articulated by critical legal scholarship) and the critical legal response. For simplicity of exposition I restrict the analysis to statutory law.

Critical scholarship reads liberal legal theory to assert:

1. Citizens have consented to rules duly enacted by the legislature and are therefore obligated to obey them.
2. When judges apply legislative rules (or, in some versions, interstitially legislate) citizens are obligated to obey those decisions in consequence of (1).
3. All judicial decisions are applications of duly enacted statutes (or interstitial legislation thereof).
4. Therefore, citizens are obligated to obey judicial decisions.

Critical legal scholars accept arguendo (1) and (2), but urge that the indeterminacy thesis shows (3) to be false. Thus, they urge that (4) has not been demonstrated. But note that the order of these premises is not


24. See, e.g., Kennedy, supra note 18, at 351-54.

25. For an analogous reconstruction of the formalists' argument that adjudication is illegitimate because judges do not always apply law, see S. BURTON, supra note 23, at 183-84.
arbitrary. Each premise's relevance depends upon the truth of the prior premise. It is because (1) proclaims the legitimacy of legislative rules that (2), the claim that adjudication is legitimate when the judge applies legislative rules, is plausible. The logical form of (2) "if judges apply rules, then judicial decisions are legitimate" makes its antecedent, (3) "judges always apply rules," relevant to legitimacy. And it is because (3) is relevant to legitimacy that the critical legal scholars' denial of (3), in consequence of the indeterminacy thesis, is relevant to legitimacy.

But because (1) is false, and patently so, (2) is irrelevant. In consequence, (3) also is irrelevant, as is the critical scholars' denial of (3). Indeterminacy may be a red herring.

I took care to not yet claim that indeterminacy is a red herring, that it is irrelevant to legitimacy. This is because, as should have been obvious, there are many potential grounds for legitimizing judicial decision-making, and those grounds may turn out to be affected by the truth of the indeterminacy thesis. Although the above argument from consent fails, that does not end the matter. Some other potential ground for legitimacy may succeed. Thus, contrary to the desires of many critical legal scholars and strict constructionists, indeterminacy, even if true, does not, for all we have seen so far, entail that adjudication is illegitimate. At most, indeterminacy shows that one route to legitimacy has been blocked. We must still examine the other routes. For the same reason, the rejection of consent as legitimating the legislature does not show that indeterminacy is irrelevant to legitimacy. It merely shows that one argument connecting the two fails. To ascertain whether indeterminacy is relevant to legitimacy, we must consider each of the potential grounds for legitimacy that liberal theory invokes, and see if indeterminacy of the law is relevant, or decisive, to any such ground.

On what basis does liberal theory claim that political decisionmaking is legitimate? It is now a commonplace assertion of liberal political theory that not one of the most prominent and plausible grounds of political obligation alone is sufficient to establish a general obligation to obey the law. Not consent, tacit consent, fair play, the duty to uphold just institutions, legitimate authority, fraternity, utility, nor gratitude succeeds, by itself, in generating political obligations applicable to all or most citizens. While no potential ground of legitimacy succeeds in establishing a general obligation for all citizens to obey the law, some grounds may nonetheless, under certain circumstances, obligate some citizens to obey some, or all, laws.

For example, consent does not create a general obligation for all

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26. See infra note 30.
27. A. SIMMONS, supra note 8, at 191.
citizens to obey law because most citizens have not consented to the state. But some naturalized citizens may have consented to the state, and government officials may have agreed to follow the law in their official capacities. Thus, consent may obligate some citizens to obey all laws and others to obey some or all laws in their official capacities. Similarly, the other theories of political obligation, such as the principle of fair play, may be seen to generate grounds which, under particular circumstances, obligate some citizens to obey some or all laws. Thus, the situations where there are obligations to obey, and the range of laws which are obligatory, may vary among citizens, depending upon which, if any, grounds apply to each citizen. For some, there may be no obligation to obey, or only obligations over limited areas. Summing the obligations arising from each of the particular grounds yields the full scope of citizens' obligations to obey law. This is the new orthodoxy. Indeterminacy will be relevant to legitimacy only to the extent of the sum of its relevance to each of these particular grounds of obligation. If indeterminacy turns out to have little relevance to each ground on an individual basis then its overall relevance will be modest at best.

My argument proceeds as follows: There is no general moral obligation to obey the law just because it is the law. But there may be particular local and context-dependent grounds that obligate particular individuals over some portion, or over the entirety of the law. For nearly every such alleged ground, with only occasional exceptions, either (1) the ground fails to generate a true moral obligation to obey, or if it does obligate, then (2) it obligates even where the law is indeterminate.

Consider, for example, consent. Since most citizens have not freely consented to the state (perhaps some naturalized citizens are the exception), consent does not generate a general obligation for all citizens to obey the law. Moreover, for those who have consented, the scope and content of the obligation will depend upon the particulars of the act that constitutes undertaking a voluntary, deliberate obligation to obey. Did they consent to obey all judicial decisions? Or only those decisions that are grounded in determinate authoritative sources? It is thus in part


29. This may appear incoherent because where law is indeterminate, there is no action which must be performed or avoided. Where law is indeterminate, there is no norm to obey. But the point is that citizens are obligated to obey official acts that specify or concretize the law, thus making it determinate where it was formerly indeterminate.

30. The claim that most or all citizens have consented to the law is considered a fantasy by most contemporary political theorists. See, e.g., R. Dworkin, Law's Empire 194 (1986) [hereinafter, Law's Empire]; D. Lyons, Ethics and the Rule of Law 211 (1984); Smith, Is There a Prima Facie Obligation to Obey the Law?, 82 Yale L.J. 950, 960-64 (1973).
an empirical matter how often indeterminacy is relevant to consent-generated legitimacy. Thus, although it is possible that some might consent to government only if law is not too indeterminate, or only over the range where law is determinate, it seems unlikely that this is frequently the case. Most who consent will have consented to the government or some institution in toto, indeterminacy (if any) and all.

Tacit consent arguments fare no better. The most common version of tacit consent as a general ground of obligation is residence. Rousseau, for example, contends: "After the State is instituted, residence implies consent: To inhabit the territory is to submit to the sovereign." But residence cannot constitute tacit consent to government because it is unreasonable to suppose that resident revolutionaries, anarchists, and outlaws consent to a government which they actively oppose. Moreover, as Hume argues, the costs of emigration vitiate the voluntariness of a decision not to emigrate:

Can we seriously say, that a poor peasant or artizan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires? We may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her.

Perhaps a foreign visitor tacitly consents to the state's laws when his passport is stamped upon entering the jurisdiction. But even if that is so, would not that tacit consent extend to areas where the law is indeterminate?

Indeterminacy is even less likely to be relevant to obligations stemming from the principle of fair play than it is to be relevant to obligations based on consent or tacit consent. Speaking very roughly, the principle of fair play holds that those who voluntarily accept the benefits of a scheme of social cooperation must accept the burdens of that scheme. This ground of political obligation differs from consent in that one need not voluntarily commit to undertake the burdens of the scheme to be obligated; one need only voluntarily accept the benefits. (Indeed, this is its advantage over consent as a ground of political obligation.) Thus, the scope of the obligation depends not on the content of some voluntary

33. Hume, supra note 32, at 475; see Law's Empire, supra note 30, at 192-93.
undertaking by the citizen, but rather upon the terms of the scheme of social cooperation. The scheme can (though it need not) obligate a participant to the outcome of an adjudicatory process even if the outcome is indeterminate, provided that the outcome is not excessively unjust. Indeed, as part of the overall cooperative scheme, individuals accepting a fair share of governmental benefits may well be obligated to comply with unfavorable outcomes of both determinate and indeterminate adjudicatory processes.

The relevance of the duty to uphold just institutions to indeterminacy and legitimacy requires more extended discussion.\(^3\) The standard criticism of the duty to uphold just institutions is that it fails to capture the intimate nature of a citizen's obligation to his country;\(^3\) it cannot explain, for example, why Americans have a special duty to the United States government that they do not have to other equally just governments. Thus, it could be argued that the duty to uphold just institutions, even if it exists, does not explain political obligation.

This conclusion, however, is premature. The argument only shows that current expositions of the duty to uphold just institutions are incomplete. It is not implausible to suppose that one has a duty to uphold all just institutions, but that what that duty requires may be highly context-dependent. Thus, assuming that the British, French, and American governments are just, an American's duty to uphold just institutions may require only that she not hinder the just actions of the French government. Yet her obligations to Britain, which she frequently visits, may be far greater, and might include obeying British law while visiting, but would not extend to supporting or fighting in its armed forces. Certainly, her obligations to her country of citizenship would be greater still. That she has little opportunity to uphold French institutions, modest opportunities to aid British institutions, and frequent opportunities to support American institutions does not explain these varying obligations.\(^3\) After all, she could as easily send a check to the French government as to the Internal Revenue Service, and if she can travel to Britain, surely France is within her means. So advocates of the duty to uphold just institutions still owe us an explanation for why what the duty requires varies in the ways we have just seen. If that explanation is sound and does not smuggle in some other ground of political obligation, the traditional objection will be tamed. Hence, rejection of the duty as a ground of political obligation is premature.

\(^{35}\) For discussion of the duty to uphold just institutions, see A THEORY OF JUSTICE, supra note 34, at 333-42; A. SIMMONS, supra note 8, at 143-56; see also Rawls, The Justification of Civil Disobedience, in CIVIL DISOBEDIENCE: THEORY AND PRACTICE 240, 241 (H. Bedau ed. 1969).

\(^{36}\) LAW'S EMPIRE, supra note 30, at 193.

\(^{37}\) These practical distinctions still "fail[ ] to capture the intimacy of the special duty." Id.
We must therefore ask whether indeterminacy is relevant to obligation under the duty to support just institutions. Critical legal scholars will undoubtedly argue that an institution plagued by indeterminacy is less just and therefore less legitimate than a determinate one, all else being equal. This is so, they argue, because in practice indeterminacy is a cloak for partial and arbitrary actions in the interest of the ruling elite. But then it is the partiality and arbitrariness of the institution, and not its indeterminacy, that makes it unjust. Moreover, it is arguable that justice not only permits, but indeed requires moderate indeterminacy. Although justice demands that most things be settled in advance, there must be room for flexibility in marginal and exceptional cases in order that equity be done.

Under Raz's normal justification thesis for legitimate authority, an authority is legitimate for an individual over a particular subject matter if (among other conditions) the individual is more likely to do the act required by the reasons that apply to him if he attempts to follow the directives of the authority than if he makes his own independent calculation of what right reason requires. Where indeterminacy prevails, courts, owing to their impartiality, training, and experience, are especially likely to be better guides to what right reason requires than citizens who have only untutored judgments to guide them. Under the normal justification thesis, far from delegitimating courts, indeterminacy may well enhance courts' legitimacy and citizens' obligations to obey.

It must be conceded, however, that for a small class of individuals in certain areas, indeterminacy may be relevant to courts' authority over them. Indeterminacy will delegitimate courts' authority respecting particular areas for those individuals who are better than courts at calculating what reason requires where legal reasoning is indeterminate yet worse than courts where legal reasoning is determinate.

Moderate indeterminacy is no bar to legitimacy under Dworkin's recent revival of the ideal of fraternity or associational obligation. Rather, it is the occasion for dialogue, and necessary for the flourishing of the interpretive attitude which plays a central role in his political and legal theory. Indeterminacy would bar legitimacy for Dworkin only if it reflected a substantial breakdown in community that ensured that dialogue about the best interpretation of our legal practices could not succeed.

Utilitarianism is in such disrepute these days that one might be

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38. J. Raz, supra note 8, at 53.
39. Law's Empire, supra note 30, at 195-216.
40. Id. at 88-89, 136-39; Kress, The Interpretive Turn, 97 ETHICS 834, 836 (1987) ("Law, Dworkin contends, requires disagreement at the appropriate golden mean to flourish. Too little and law stagnates; too much and law founders." (page reference omitted)).
excused from discussing utilitarian grounds for legitimacy. Although I am sympathetic to many of the standard objections to utilitarian thinking, it would nevertheless be a mistake not to consider utilitarian grounds for legitimacy. For under some utilitarian and coordination of behavior arguments, indeterminacy may well be relevant to legitimacy. Bentham, for example, thought that the purpose of law was to settle people's expectations. If a government failed in this task, it would, for Bentham, lack legitimacy. Yet even here complete determinacy and predictability must be weighed against the need for flexibility. Flexibility is needed to permit experimentation with and investigation of alternative normative structures, to assure fairness, and to promote other substantive values in situations not anticipated or fully appreciated in advance. Additionally, the inefficiency of indeterminacy can be mitigated insofar as areas of indeterminacy can be identified. We may be certain that here the law is uncertain.

Moreover, even if law were fully determinate and predictable, public expectations would not be perfectly settled, because public knowledge would not reflect that determinacy. Even attorneys would be likely to give mistaken advice on occasion. It is possible, therefore, that moderate indeterminacy will have only minimal consequences for public expectations, and that minimal loss in settled expectations will be outweighed in a utilitarian calculus by the substantive values the indeterminacy promotes. Thus, as I concluded in my discussion of the duty to uphold just institutions, indeterminacy that cloaks unjust and arbitrary decisions undercuts legitimacy, but indeterminacy that promotes the doing of equity enhances legitimacy.

The duty of gratitude may be dealt with summarily. The duty of
gratitude is insufficient on its own to generate political obligations, although it may enhance the force of other potential grounds of obligation.\footnote{But see Walker, \textit{Political Obligation and the Argument from Gratitude}, 17 \textit{Phil. \& Pub. Aff.} 191 (1988) (defending the argument from gratitude).}

In summary, indeterminacy appears to have limited relevance to legitimacy because only infrequently does any valid ground of obligation require determinacy to succeed. For each potential ground of political obligation, either the specified ground fails to obligate, or if it does obligate where law is determinate, it also obligates (with respect to judicial decisions) where law is indeterminate. In essence, determinacy is neither necessary nor sufficient for legitimacy at the global level, and only rarely necessary or sufficient at the local or individual level.

Much more than these primitive thoughts must be ventured before it can be conclusively concluded that indeterminacy is in fact largely irrelevant to legitimacy. But suppose that large claim could be defended. Where would we be? Critical legal scholarship often aims at exposing liberal reform as at best a palliative for patriarchal, hegemonic, and oppressive social structures. Radical surgery is required if we are to have even a hope of achieving a moderately just and egalitarian society. The indeterminacy thesis plays a crucial role in the critique of the rule of law and liberal claims of the legitimacy of adjudication and the legitimacy of the law. But, if one may critique the critics, their attack on judicial decisionmaking itself appears superficial, the removal of a minor and perhaps irrelevant blemish on a liberal doctrine with a decayed foundation. Insofar as critical legal scholarship accepts the postulate that the state is legitimated by the consent of the governed, it fails to go for the jugular and enfeebles its critique. In this way, it is insufficiently radical. It should regroup and address the legitimacy of the state and of adjudication at its foundation.

II

MODERATE INDETERMINACY

Assuming the argument that moderate indeterminacy presents only minimal legitimacy problems succeeds, my argument that indeterminacy has not undermined legitimacy is still incomplete until I have shown that at most only moderate indeterminacy exists. My argument that indeterminacy is at most moderate proceeds in stages. Section A advances the pervasiveness of easy cases as strong support for the thesis that at most there is moderate indeterminacy and shifts the burden of proof to advo-
cates of radical indeterminacy to demonstrate law's radical, and not merely moderate, indeterminacy.

But advocates of radical indeterminacy fail to carry this burden. Section B considers traditional arguments for indeterminacy from the doctrine of precedent and concludes that they do not establish the existence of radical indeterminacy. Section C considers critical legal scholars' arguments that law and conventional legal theory contain pervasive contradictory principles which give rise to radical indeterminacy. Two explanations for pervasive inconsistency—the patchwork quilt argument and the fundamental contradiction argument—are examined and found wanting. The patchwork quilt argument assumes that the forces and motivations which produce law become law, contrary to plausible holistic positivist and natural law theories. Because critical legal scholars fail to refute these theories, the patchwork quilt argument is unpersuasive. The fundamental contradiction argument supposes that psychological conflict gives rise to doctrinal inconsistency. Yet the theory neither convincingly establishes the connection between psychology and doctrine, nor sets forth why the conflict gives rise to contradiction rather than reconcilable tension.

Section C also considers four allegedly contradictory structures believed to inhere in conventional legal doctrine and theory: rules vs. standards; altruism vs. individualism; objectivism vs. subjectivism; and free will vs. determinism. I conclude that each of these alleged contradictions either reflects only tension or uncertainty, not contradiction, or else is set up only to attack a straw position.

Section D shifts gears and argues that critical scholars' arguments for indeterminacy make three mistaken assumptions about legal reasoning. Critical legal scholars unnecessarily impoverish the premises available to judges. They also incorrectly limit the inferential techniques that judges may deploy. Finally, critical scholars assume that conflict between standards leads to indeterminacy unless there are explicit metaprinciples, stated in advance, to resolve the conflict. Each of these mistakes leads critical legal scholars to exaggerate the indeterminacy in adjudication.

A. Easy Cases

The pervasiveness of easy cases undercuts critical scholars' claim of radical indeterminacy. Preoccupation with controversial appellate and Supreme Court cases engenders the illusion of pervasive indeterminacy. Focusing instead on everyday acts governed by law reveals the pervasiveness of determinate and correct legal outcomes. For instance, in writing the first paragraph of this Article, I did not commit assault and battery
on George Bush. Nor did I slander Gore Vidal. If I drove eighty miles per hour on the way home from work, however, I clearly would have violated laws prohibiting speeding.

Think of the tens, if not hundreds, of actions you perform everyday. You shut off the alarm clock, arise from bed, walk to the bathroom, brush your teeth, shower, dress, make coffee, prepare breakfast, eat breakfast, wash the dishes, put on a warm coat, exit your house, lock the front door, walk to work, enter your place of business, unlock your office door, enter your office, take off your coat, hang it up, sit down at your desk, open your mail. The overwhelming majority of individuals' actions give rise to determinate legal consequences.

I will not belabor this argument as it has been developed at great length by others. The pervasiveness of easy cases with determinate legal consequences generates near certainty that the amount of indeterminacy which exists is not radical but at most moderate. The burden is therefore on advocates of radical indeterminacy to overcome the implausibility of their thesis. The remainder of this Article argues that this burden has not been met.

B. Indeterminacy and Precedent

Perhaps the most famous argument for indeterminacy is Llewellyn's argument in *The Bramble Bush* (and elsewhere) that the common law is indeterminate because there are two different, contradictory doctrines of precedent, each of which is available to the judge. Llewellyn claims that our legal system countenances both a strict and a loose doctrine of precedent. In its most extreme version, the loose view of precedent accepts as law any language found in past opinions. It is "loose" because
it cuts judicial language loose from the facts of the case that spawned it, and thus legitimizes even the most outrageous dicta.\textsuperscript{49} It is loose also because it accepts so much language as legally authoritative. More moderate versions of the loose view may accept as authoritative not all judicial language, but only those "points on which [the court] chose to rest a case, or on which it chose, after due argument, to pass."\textsuperscript{50} Regardless of the version, the loose view of precedent is a technique for capitalizing on welcome precedents.\textsuperscript{51}

By contrast, the strict, or orthodox, view of precedent is used to whittle away or eliminate unwelcome precedents. It is the technique of distinguishing cases.\textsuperscript{52} Instead of embracing all language in the opinion as legitimate, it employs a strict version of the doctrine of obiter dicta as a weapon to minimize the scope of judicial pronouncements.\textsuperscript{53} This strict doctrine of dicta maintains that the judge has authority to pronounce only on issues that are properly raised by the particular facts of the case before her. Any rationale or rule in an opinion not strictly necessary to reach the judgment is considered excess verbiage, mere obiter dictum, and not binding on later courts.\textsuperscript{54} Carried to the extreme, this strict view of precedent limits the rule's applicability to only the precise facts of the decided case.

This orthodox view of precedent can be stated formally. Assuming that judicially created rules of law can be formulated as "If $A$ and $B$, then $Z$," where $A$ and $B$ are facts and $Z$ is a legal consequence, Llewellyn's strict theory of precedent is a technique for generating ever narrower rules of law as follows.

1. Start with the rule of the case as stated in the opinion.\textsuperscript{55}

2. Suppose it has the form "if $A$, then $Z$.” Then for each fact $B$,\textsuperscript{56} true of the decided case, the court’s failure to limit the scope of its opin-

\textsuperscript{49}. Id. at 67-68.
\textsuperscript{50}. Id. at 68.
\textsuperscript{51}. Id.
\textsuperscript{52}. Id. at 67.
\textsuperscript{53}. Id.
\textsuperscript{54}. See J. Gray, The Nature and Sources of the Law 261 (2d ed. 1921). This doctrine of dicta may not be coherent. In a case with two or more alternative rationales, each sufficient to support the outcome, neither rationale is necessary to the outcome. Arguably such cases would have no ratio decidendi, and therefore would stand for nothing. (The formal structure of this argument presents a difficulty which parallels the problem that multiple causes, each sufficient for the plaintiff's injury, pose for the traditional \emph{sine qua non}, or "but for," test of causation.)

To circumvent this difficulty one could claim that such cases stand for the proposition that at least one of the alternative rationales is correct. While this solution provides a rule of the case, its ad hoc quality and employment of disjunctive rules makes it unattractive.

\textsuperscript{55}. Llewellyn does not indicate how to proceed if there is no rule stated in the opinion.

\textsuperscript{56}. Nothing in this procedure is limited to positive facts. In addition to $B$, for example, not-$C$ could be a fact true of the decided case.
ion to that fact constitutes an overreaching of its authority. Thus, the proper rule should be “if \( A \) and \( B \), then \( Z \).

3. By successive iterations of this technique, the rule can be narrowed until it has the form “if \( A \) and \( B \) and \( C \) and \( D \) and . . . , then \( Z \),” where \( A, B, C, D, \ldots \) are facts whose conjunction is uniquely true of the decided case and holds of no other factual situation. This is confining a case strictly to its facts.

4. Without confining a case to its facts, a clever advocate can nonetheless always distinguish an unwelcome precedent by finding a particular fact \( F \) true of the decided case yet false of his client’s situation, thus making the unwelcome rule inapplicable to his client’s case. “If \( A \), then \( Z \)” yields the legal consequence \( Z \) (assuming \( A \) is true). But, by hypothesis, \( F \) is false of the client’s case and therefore the revised rule “if \( A \) and \( F \), then \( Z \)” is inapplicable and does not result in \( Z \) in the client’s situation.

In this way, Llewellyn argues that in each factual situation, a judge, by invoking the loose and the strict doctrines of precedent, can interpret any relevant precedent in at least two differing ways (“if \( A \), then \( Z \)” and “if \( A \) and \( F \), then \( Z \)”), one of which recommends a particular outcome and the other of which does not. This result is sometimes described as a consequence of the problem of determining the appropriate level of generality of the ratio decidendi.\(^7\)

Interestingly, Llewellyn actually understates the apparent power of precedential techniques to generate inconsistent rules and outcomes. Perhaps because he concentrates on individual precedents rather than lines of precedent, Llewellyn fails to note the powerful precedential technique of reconstruction. This technique permits an entirely novel statement of the rule or rationale of a line of precedents on the condition that the new rule justifies the outcomes in all of the precedent cases. Various versions of this technique have been championed by Justice Cardozo, Felix Cohen, Edward Levi, and Ronald Dworkin.\(^8\) This reconstructive doctrine of precedent enriches Llewellyn’s argument. It substantially increases the potential for contradiction since it generates many more


\(^{8}\) B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); F. COHEN, supra note 57, at 33-40 (especially at 33-37); LAW’S EMPIRE, supra note 30, at 247-48; R. DWORFIN, TAKING RIGHTS SERIOUSLY 118-19 (1978) (describing Brandeis and Warren’s argument for a right to privacy as an attempt to reconstruct precedent) [hereinafter TAKING RIGHTS SERIOUSLY]; E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-27 (in particular, at 3) (1949). But see Kress, The
possible rules than are allowed under the orthodox, strict doctrine of precedent. These potential interpretations include some which exceed the scope of application of the ratio decidendi stated in the opinion. Indeed, the orthodox theory is a special case of the reconstructive technique, since the orthodox method ensures that each rule generated coincides in outcome with the prior case or line of cases.\textsuperscript{59} This is because the orthodox doctrine allows the addition of a fact $F$ to the antecedent of the rule “if $A$, then $Z$” yielding if “$A$ and $F$, then $Z$” only when $F$ is true in the factual settings of each of the precedent cases which state the original rule “if $A$, then $Z$”. Thus, any rule generated by the orthodox theory could also be generated by the reconstructive technique. But the converse is not true. The reconstructive technique can generate rules that do not follow from the orthodox technique.

Discussion of the reconstructive technique might be thought to be overkill because the contradictions emanating from Llewellyn’s loose and strict doctrines of precedent are enough to demonstrate pervasive indeterminacy. This objection is premature. It is engendered by the uncritical reception I have so far afforded Llewellyn’s orthodox and loose techniques. Even Llewellyn has acknowledged that not every rule or ratio decidendi generated by the orthodox and loose techniques is defensible.\textsuperscript{60} This is especially true of the orthodox technique.

For example, Llewellyn states that the strict doctrine can be used in an extreme application to restrict a rule to “redheaded Walpoles in pale magenta Buick cars.”\textsuperscript{61} Yet it is clear, and no doubt Llewellyn would agree, that distinguishing a precedent in this way when your client happily is not a redhead or else prefers green Pontiacs should not persuade a judge. This is because most of us consider hair color and preference in automobiles irrelevant to the application of any legal rule (except under very bizarre circumstances). Thus, the precedential techniques must be restricted to ensure that only relevant facts appear in the rules they generate or that the rules are defensible or justified.\textsuperscript{62} In effect, a theory of

\textit{Interpretive Turn}, \textit{97 ETHICS} 834, 847-48 (1987) (noting a criticism of Dworkin’s reconstructive technique). The technique described in the text might be labelled the strong reconstructive technique. Under more moderate versions, justifying all or most prior cases is a necessary, but not a sufficient, condition for a successful reconstruction. Dworkin, for example, requires that the reconstruction be more morally attractive than any alternative that explains the past decisions reasonably well. For elaboration, see Kress, \textit{Legal Reasoning and Coherence Theories: Dworkin’s Rights Thesis, Retroactivity, and the Linear Order of Decisions}, 72 CALIF. L. REV. 369, 377-78 & n.53 (1984) [hereinafter Kress, \textit{Legal Reasoning}].

\textsuperscript{59} The above discussion of the orthodox technique assumes that only one case is under discussion. With minor changes, the technique can be generalized to apply to lines of precedent.

\textsuperscript{60} K. LLEWELLYN, supra note 47, at 73.

\textsuperscript{61} Id. at 67.

\textsuperscript{62} Felix Cohen argues that the orthodox doctrine of precedent should create narrower rules only when the distinction from the wider rule which is urged is morally relevant. F. COHEN, supra
which facts are relevant would be a theory of common law adjudication. It will generate amended strict and loose doctrines of precedent which may not lead to contradictory rules for every factual situation. Thus, the reconstructive technique might be thought necessary to sustain the claim of pervasive inconsistency.

But it is unclear that the reconstructive technique, properly construed, will lead to pervasive inconsistency. Notice that the reconstructive technique can lead to legal categories that are every bit as arbitrary as those that result from application of the strict, or orthodox, doctrine of precedent. This must be so because the reconstructive technique is a generalization of the orthodox doctrine. As noted earlier, every rule or ratio decidenti that can be generated by the orthodox theory is also a consequence of the reconstructive technique. It follows that not every output of the reconstructive technique is defensible. Thus, the reconstructive technique must also be restricted to relevant or morally justifiable legal categories.

For example, Dworkin’s version of the reconstructive technique chooses from among all those rules that coincide in outcome with most prior precedents the one that is preferred on moral grounds. So construed, the reconstructive technique will lead to indeterminacy only when there are contradictory legal standards that fit most precedents and tie as morally best. Given a dense and discriminating moral metric, such ties will be sufficiently “rare as to be exotic.” On this interpretation, the reconstructive technique will lead to little, if any, indeterminacy. It will fall far short of generating radical indeterminacy. In the absence of a convincing refutation of this interpretation of the reconstructive technique, or of a plausible interpretation of the technique that leads to radical indeterminacy, realist and reconstructive arguments from precedent do not demonstrate the existence of radical indeterminacy.

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note 57, at 37; see also S. Burton, supra note 23, at 31-39, 50-56, 81-107; E. Levi, supra note 58, at 6.

63. TAKING RIGHTS SERIOUSLY, supra note 58, at 340-42, 360; LAW’S EMPIRE, supra note 30, at 231, 246-47, 254-58.

64. R. DWORKIN, A MATTER OF PRINCIPLE 143 (1985) [hereinafter A MATTER OF PRINCIPLE].

65. This interpretation of the reconstructive technique therefore assumes that there are right answers to moral questions and that legal standards can be compared in terms of moral value. But the argument may remain neutral among various particular justifications for that claim. For arguments that there are right answers to legal and moral questions, see Id. at 119-45; LAW’S EMPIRE, supra note 30, at 76-85; Moore, Moral Reality, 1982 Wis. L. Rev. 1061; Moore, Metaphysics, Epistemology and Legal Theory (Book Review), 60 S. Cal. L. Rev. 453 (1987).

66. The realists’ claim of indeterminacy did not rest solely on the vagueness, ambiguity, or contradictory character of precedent. Although many realists did view (the two doctrines of) precedent as the richest source of indeterminacy, they also argued for indeterminacy in constitutional and statutory interpretation, and in ascertaining the facts. See J. Frank, COURTS ON TRIAL 14-36, 168-69 (1949); J. Frank, LAW AND THE MODERN MIND 125, 144-45 (1963); K.
C. Critical Legal Scholars and Radical Indeterminacy

Critical legal scholars accept many realist arguments for indeterminacy. They also greatly enrich the theoretical grounds for indeterminacy, arguing that there are deeper and more pervasive forms of indeterminacy than the realists recognized. Many critical legal scholars claim that the law is radically and pervasively incoherent and contradictory.67

Critical legal scholars maintain that each area of law embodies conflicting principles and counterprinciples that cannot be reconciled, balanced, or harmonized.68 Nor can the applications of these principles and counterprinciples be confined by metaprinciples to mutually exclusive spheres of social activity.69 The principles and counterprinciples are manifestations of broader social visions or "prescriptive conceptions of society" which are themselves inconsistent.70 Some critical legal scholarship claims that unresolvable conflicts arise in every or nearly every case.71 More moderate positions make less extreme claims. According to one such position, there are matched stereotyped pairs of pro and con arguments resulting in "opposing positions seeming to cancel each other out. Yet this is not always the case in practice."72 In some factual situations, one side appears more plausible than the other.73

Llewellyn, supra note 47, at 88-90; K. Llewellyn, The Common Law Tradition: Deciding Appeals 521-35 (1960); Braden, The Search for Objectivity in Constitutional Law, 57 Yale L.J. 571 (1948). They claimed that in most cases, not just one precedent, but many lines of precedent or authoritative provisions might be relevant. This creates the possibility of inconsistency, or that vagueness in more than one of the relevant rules will combine to generate an indeterminate result. Interesting as these arguments are, they show at most modest amounts of indeterminacy.


68. Unger, CLS, supra note 67, at 578.

69. Id. For example, Unger claims that no metaprinciple can distinguish circumstances where the courts will not review the substantive fairness of bargains from situations where bargains will be unenforceable because unconscionable. See id. at 625.

70. Id. at 578, 619.

71. Kairys, Legal Reasoning, supra note 67, at 11, 14; Kennedy, Legal Education, supra note 67, at 40, 47-48; Singer, supra note 13, at 6, 20.

72. Kennedy, Form and Substance, supra note 67, at 1723 (emphasis in original).

73. Id. at 1724; see also id. at 1773 & n.158.
however, no available metaprinciples that explain why the apparently more plausible side is preferable and frequently it turns out not to be preferable.74

Two major explanations have been advanced by critical legal scholars for the existence of pervasive conflicting principles: the patchwork quilt argument and the fundamental contradiction argument.75

1. Patchwork Quilt Argument

Doctrinal materials, critical legal scholars urge, are the contingent and unstable compromise of ideological struggle among competing social groups and visions.76 Since this compromise allegedly corrupts, impairs, adjusts, and pollutes the inherent rationality and coherence of these various social visions, it would be surprising if those doctrinal materials embodied a coherent rationality or an intelligible social vision.77 Thus, Unger states:

It would be strange if the results of a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law. The many conflicts of interest and vision that lawmaking involves, fought out by countless minds and wills working at cross-purposes, would have to be the vehicle of an immanent moral rationality whose message could be articulated by a single cohesive theory.78

Unger adds that it would be a "miracle" for there to be a "preestablished harmony between the content of the laws and the teachings of a coherent theory of right."79 Law is as incoherent as a patchwork quilt.

In this way, Unger links a causal thesis about the genesis of doctrine to a logical thesis about the possibility of a consistent and coherent rational reconstruction of law.80 But this causal argument for incoherence is vulnerable if the forces that produce law are not themselves law. It may well be true that authoritative legal actors have widely varying political motivations and that right-wing motivations play a significant causal role in some official acts and left-wing motivations play the same role in others; still other acts may reflect a compromise of competing motivations. But unless the motivations as well as the official acts become law, it is not clear why law should be inconsistent simply because some of its motivations are. Of course, conflict among different legal offi-

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74. Id. at 1724; see also id. at 1773 & n.158.
75. This Article focuses on critical scholars' patchwork quilt and fundamental contradiction arguments for radical indeterminacy and not on the linguistic or post-modern arguments because the former are more plausible and have received greater attention.
76. Unger, CLS, supra note 67, at 571.
77. Id.; see also Altman, Legal Realism, Critical Legal Studies, and Dworkin, 15 PHIL. & PUB. AFF. 205, 221 (1986).
78. Unger, CLS, supra note 67, at 571.
79. Id.; see also id. at 566.
80. Altman, supra note 77, at 221.
cials' motivations reminds us that nothing about law's creation guarantees us that it will be coherent. But legal theory attempts to "impose order over doctrine, not to discover order in the forces that created it." Viewed somewhat differently, the legal principles, if any, that are created by a legitimate official act may well diverge from the justification employed by the actor. For example, the principles employed in an opinion may be considered dicta, the real rationale involving quite different principles. Reconstructing in this manner, the rationale is the ambition, however successful, of much legal argument. Consider, for example, Brandeis and Warren's argument for a right of privacy. Warren and Brandeis explain cases the courts justified with property and contract doctrine as following instead from principles of privacy. They claim that the courts' rationales failed to account for the outcomes in all the precedents and that the cases were better justified by a general right to privacy.

For most official acts of legislation and adjudication, left-wing, centrist, and right-wing justifications are devisable. Thus, a theory of law that contemplates that official acts generate underlying legal principles may allow construction of a coherent scheme of legal principles which justify official acts if the actual justifications, or motivations of, the legal actors may be disregarded. This is particularly plausible if the theory need not explain every institutional act and contemplates discounting some (but not too many) decisions as institutional mistakes.

Theorists have developed both positivist and natural law theories that need not accept the justifications given in judicial opinions. Sartorius advocates a positivist theory of binding law consisting, in the first instance, of constitutional provisions, legislative enactments, and judicial decisions (conceived as the judgments given the facts, but not including the rules or principles stated in opinions). In addition, law would include those principles and policies that imply the above authoritative sources. On this view, the principles and policies that imply the

81. LAW'S EMPIRE, supra note 30, at 273 (1986).
83. Respecting property cases, Warren and Brandeis argue, "Although the courts have asserted that they rested their decisions on the narrow grounds of protection to property . . . [t]he principle which protects personal writings . . . against publication in any form, is in reality not the principle of private property, but that of an inviolate personality." Id. at 204-05. Respecting contract cases, they assert, "We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust . . . the principle which protects [them] . . . is the right to privacy." Id. at 213. Brandeis and Warren's argument is an application of the reconstructive doctrine of precedent, discussed above. See supra text accompanying notes 58-66.
84. See TAKING RIGHTS SERIOUSLY, supra note 58, at 118-23.
86. Id. Sartorius actually states that the additional principles and policies are those implied by or incorporated into law, directly or indirectly, by constitutions, statutes, and particular judicial
authoritative sources need not be those articulated in judicial decisions. For one thing, the principles and policies judges employ may in fact fail to imply the decisions they make. Second, even where the outcome does follow from the principles and policies employed in an opinion, a holistic account of all judicial decisions may find alternative principles and policies preferable. Suppose that opinion $A$ employs principles $A'$ while opinion $B$ employs principles $B'$; yet principles $B'$ imply the decisions in both case $A$ and case $B$. In that event, considerations of theoretical simplicity may recommend accepting principles $B'$ yet rejecting principles $A'$ as otiose. Or it may be that principles $B'$ lack internal theoretical fit with principles $D'$, which are required to explain decisions $D, E,$ and $F$. In that case, principles $B'$ may be rejected in favor of principles $C'$ which explain decisions $A$ and $B$, and fit well with principles $D'$.

Natural law theories can even more easily reject the principles appearing in judicial opinions. In *Taking Rights Seriously* Dworkin endorses as legal principles those principles that form part of the best explanation and justification of settled law. Thus, Dworkin, like Sartorius, rejects the principles judges use when these principles do not explain the settled law as well as alternative principles. In addition, Dworkin may even reject judicial principles that fit the settled law well if they do not satisfactorily justify it. Dworkin's justification requirement permits rejection of principles on substantive moral grounds. Thus, both positivist and natural law theories of law and adjudication may resist the force of the patchwork quilt argument for indeterminacy by driving a wedge between judicial justifications and legal principles. In the absence of a convincing refutation of these plausible theories, the patchwork quilt argument does not prove that law is radically indeterminate.

2. **Fundamental Contradiction Argument**

Some critical legal scholars, rather than emphasizing inconsistency arising out of struggle among ideologically opposed factions, emphasize inconsistency within individual lawmakers and within each one of us: “[W]e are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically dif-

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ferent aspirations for our common future."\textsuperscript{88}

This contradiction consists in a psychological ambivalence or simultaneous commitment in each of us to contradictory visions, such as altruism and individualism. This ambivalence, however, is deeper than abstract theoretical political commitment. It reflects a "fundamental contradiction" between the deeply felt desire to fuse with others and the desire to retain one's separateness, between the need to express individuality and to recognize that one's self is largely socially constructed, between society's nurturing and its demand for conformity.\textsuperscript{89} Put briefly, individual freedom is both dependent upon and incompatible with community.\textsuperscript{90} This fundamental contradiction is alleged to be at the core of every legal problem.\textsuperscript{91}

But it is unclear what is meant by contradiction in this context, as well as in the patchwork quilt argument. Our need for others and fear of them is surely not "contradictory" in the strict sense in which logicians use the word: that is, \( P \) and \( \neg P \).\textsuperscript{92} Advocates of the fundamental contradiction are not saying that we need others yet it is not the case that we need others.\textsuperscript{93} Rather, it appears that the fundamental contradiction consists in our having opposed though not formally contradictory feelings. For example, we may have both contempt and admiration for the same individual. ("He's a consummate villain.")\textsuperscript{94} Yet it is unclear why these opposed feelings should be thought to result in irresolvable conflict. We need water to survive, yet we fear that large quantities of it can drown us.\textsuperscript{95} We need others, yet we fear pervasive interaction can suffocate us. Advocates of the fundamental contradiction need to explain

\textsuperscript{88} Kennedy, \textit{Form and Substance}, supra note 67, at 1685; see also id. at 1774, 1776.
\textsuperscript{90} Kennedy, \textit{Structure}, supra note 89, at 211-12.
\textsuperscript{91} Id. at 213; Kennedy, \textit{Form and Substance}, supra note 67, at 1776. In later writings, Kennedy renounces the fundamental contradiction and the abstract concepts of individualism and altruism. Gabel & Kennedy, \textit{Roll Over Beethoven}, 36 Stan. L. Rev. 1, 15-16 (1986). Kennedy's most recent writing on the subject interprets indeterminacy as the experience one has when one is unsure how the law comes out in a particular concrete context. Kennedy, \textit{Freedom and Constraint in Adjudication: A Critical Phenomenology}, 36 J.L. Educ. 518 (1986). This phenomenological or psychological account of indeterminacy, in contrast to an ontological account, has no troublesome implications for the legitimacy of adjudication.

\textsuperscript{92} As logicians use the word, two propositions are contradictory if some proposition and its external negation are derivable from the original two propositions within standard first-order logic. The external negation of "John is six feet tall," for example, is "It is not the case that John is six feet tall." For a discussion of first-order logic, see 1 A. Church, \textit{Introduction to Mathematical Logic} (1956).

\textsuperscript{93} Nor are critical legal scholars claiming that there is an internal contradiction: we need fusion with others and we need that there not be fusion with others.

\textsuperscript{94} See, e.g., Kennedy, \textit{Structure}, supra note 89, at 257.
\textsuperscript{95} Herzog, \textit{As Many as Six Impossible Things Before Breakfast}, 75 Calif. L. Rev. 609, 610 (1987).
why we cannot achieve a balance of human interaction and solitude, community and autonomy, just as we can quench our thirst without drowning ourselves. Even where we experience conflict between our desire for ice cream and desire to avoid cholesterol and calories, it appears that we can best satisfy our overall desires by eating some but not too much ice cream, or by eating more of a low calorie, cholesterol-reduced ice cream, or by eating frozen yogurt. Admittedly, achieving maximally satisfying relations with others is a more complicated task; nevertheless, advocates of the fundamental contradiction argument have not convincingly demonstrated that it differs in principle.

Advocates of the fundamental contradiction argument must explain the sense in which the principles and counterprinciples of legal doctrine are contradictory. Insofar as the principles and counterprinciples of legal doctrine reflect psychological tension rather than a strict contradiction, it would appear that only competition, not contradiction, in principle should emerge.96

Advocates of the fundamental contradiction argument must also clarify the connection between the psychological conflicts they allege and legal doctrine and moral theory. Is the connection conceptual? If so, must an accurate moral and legal theory reflect the structure of psychological facts? Or is the connection causal? If causal, does legal doctrine result from a conscious attempt to cover up the psychological conflict?97 Or does legal doctrine result from an unconscious manipulation of that psychological conflict?98 Or does legal doctrine reproduce the conflict without, or despite, any conscious or unconscious attempt to hide it?

The sense of contradiction in the fundamental contradiction argument and its relation to legal doctrine and moral theory are too vague to be part of a persuasive argument for radical indeterminacy. Construed in its most plausible light, the fundamental contradiction argument reflects opposed feelings that appear prima facie in tension. Advocates of the fundamental contradiction argument have not shown that the tension cannot be resolved, or how the tension is reflected in legal doctrine, or that the tension leads to contradiction rather than competition in legal principles. The fundamental contradiction argument does not establish that there is radical indeterminacy.

3. Particular Contradictions

Critical scholars have elaborated and supported their claim that law is radically contradictory by arguing that particular contradictory struc-

96. This terminology derives from Dworkin, LAW'S EMPIRE, supra note 30, at 241, 268, 269, 274-75.
97. Kennedy, Structure, supra note 89, at 210, 218, 219, 279, 294.
98. Id. at 220.
tures permeate large areas or the entirety of the law. This Section discusses four of the major dichotomies that are alleged to underlie legal doctrine: rules vs. standards; altruism vs. individualism; objectivism vs. subjectivism; and free will vs. determinism. After examining these four dichotomies, this Section concludes that none of these contradictions demonstrates the existence of radical indeterminacy. The first two, like the claim of fundamental contradiction discussed above, employ exaggerated rhetoric and only demonstrate tension and competition among principles. The third misrepresents and distorts liberal political and legal theory. And the fourth makes both errors; it misrepresents and distorts liberal law and it demonstrates only tension and uncertainty, not contradiction.

Critical scholars argue that in private law adjudication there is a conflict in the purely formal dimension concerning whether to employ rules or standards in formulating legal directives. There are many arguments for and against employing each form, and many methodologies for choosing among them, most of which Duncan Kennedy deftly summarizes in a widely cited article, *Form and Substance in Private Law Adjudication*. Generally, rules are considered relatively determinate because they require only "hard" factual findings for their application. Standards, by contrast, are vague and require discretionary policy judgments in their application. Rules provide certainty and restrain official arbitrariness but they exact a high price. Because rules do not directly express their underlying purposes, those objectives may not be achieved. Thus rules are both over- and underinclusive; a rule that is designed to punish immoral acts may proscribe some innocent behavior and fail to sanction some immoral behavior. Conversely, the advantage of standards is that they directly set forth their purposes. Thus, those applying standards may be able to comply with the underlying purposes. Because standards cannot be as rigidly applied as rules and because they give only broad guidance, however, they require greater discretion in their application. As a consequence, this discretion often results in uncertainty and arbitrariness.

Kennedy believes that liberal legal thought arbitrarily privileges rules over standards, overemphasizing the virtues of rules and the vices of standards. He therefore takes special care to discuss rules' defects.


100. Kennedy, *Form and Substance*, supra note 67, at 1685.

101. Id. at 1687-90, 1697-1701. For further discussion, see M. Kelman, *Guide*, supra note 67, at 15-63.

102. See sources cited supra note 99; Kennedy, *Form and Substance*, supra note 67, at 1770.

103. Kennedy, *Form and Substance*, supra note 67, at 1695.
Kennedy notes that rules may be particular or general. Particularity in rules leads to their multiplication, which in turn leads to the increased possibility of conflict between rules.\textsuperscript{104} The exercise of discretion necessary to resolve these conflicts undermines the certainty and restraint of arbitrariness allegedly characteristic of rules. Additionally, to the extent that the structure of rules becomes unwieldy, sophisticated legal actors may employ their greater familiarity with its intricacies, and thus take advantage of others and magnify the problem of over- and underinclusiveness. The more general the rules are, the fewer opportunities there are for conflict.\textsuperscript{105} But with greater generality comes increased over- and underinclusiveness. Moreover, the more general a rule, the more likely it is to chill desirable voluntary activity.

In those situations where rules are formalities intended to facilitate private transactions, it is not clear that individuals will in fact respond to the threat of the sanction that the transaction will be nullified by learning to operate the system, or that a stable, highly formal regime of rules is possible. Therefore, rules cannot bring about the objectives that they purport to ensure.

In these ways, Kennedy argues that the assumptions underlying arguments for the superiority of the "mechanical" arbitrariness of rules over the "biased" arbitrariness of standards are implausible. Yet Kennedy does not argue that standards can be rationally demonstrated to be superior. Rather, he maintains that we are simultaneously committed to both rules and standards and that there is no way to "balance... rules against equitable standards."\textsuperscript{106}

Clearly the arguments for employing rules and for using standards compete with one another, and we may have great difficulty deciding which arguments are more powerful in particular contexts, or how to reach the best compromise between them. But this tension falls far short of strict contradiction. Kennedy's arguments do not show that this conflict is as problematic as strict contradiction. Thus, it is does not appear that the "contradiction" between rules and standards yields radical indeterminacy.

Nevertheless, Kennedy maintains that there is a formal\textsuperscript{107} contradiction between rules and standards, which in turn reflects a deeper substantive contradiction between individualist and altruist visions of human interaction. Kennedy's paradigm of individualism is two self-interested,

\textsuperscript{104} Id. at 1690. Increased conflict, however, will not arise if the rules are confined to mutually exclusive areas.

\textsuperscript{105} Id. at 1699-1700. This argument assumes that because there are fewer rules, there will be fewer conflicts between them. Yet their enlarged scope might lead to more frequent conflicts.

\textsuperscript{106} Id. at 1775.

\textsuperscript{107} "Formal" invokes here whether to use the rule or standard form. The logician's sense of strict, formal contradiction is not intended.
self-reliant strangers meeting at high noon to conduct a one-time arm’s
length transaction. But because this individualism invokes mutual
respect for the rights of others, it falls short of pure egoism.08 In con-
trast, altruism conjures up images of community, sacrifice, sharing, and
mercy, yet it does not require saintliness.09

Kennedy, Unger, and other critical legal scholars have developed
the contradiction between altruist and individualist social visions largely,
but not exclusively, in contract law. In Unger’s variation, the role played
by altruism in Kennedy’s version is played by an area of family, friend-
ship, and community with “reciprocal loyalty and support,” which
neither “need[s] much law nor [is] capable of tolerating it.”10 This
vision conflicts with an ideal of “contractual freedom” in a “world of
self-interested commerce.”11 Each vision of social life “both denies the
other and depends on it. Each is at once the other’s partner and its
enemy.”12 The contradiction between altruist and individualist social
visions is an earlier and more concrete version of the fundamental con-
tradiction discussed above.13 The difficulties noted with the fundamen-
tal contradiction argument apply, mutatis mutandis, to this earlier
incarnation.

A third contradiction announced by critical scholars is Kelman’s
contention that liberalism is simultaneously committed to value subjec-
tivity and value objectivity.14 The discussion is marred by Kelman’s
biased reading of liberalism, and by his failure to distinguish different
senses of value subjectivity. Kelman interprets liberalism as committed
to extreme individualism and to the subjectivity of values. He views lib-
erarianism and utilitarianism as the major traditional liberal move-
ments.15 Among modern theories, he considers Posner’s law and
economics the quintessential liberal doctrine, presumably because it more
completely embodies and privileges individualism and value subjectiv-
ity.16 In consequence, Kelman employs a biased interpretation which
identifies liberalism with its most conservative, right-wing strains.17

108. Kennedy, Form and Substance, supra note 67, at 1713-16.
109. Id. at 1717-22 (esp. 1717-18).
110. Unger, CLS, supra note 67, at 622. But see Waldron, When Justice Replaces Affection: The
Need for Rights, 11 HARV. J. L. & PUB. POL. 625 (1988) (arguing that rights are necessary as a
safety net when affectional relationships go awry).
111. Unger, CLS, supra note 67, at 622. It should be noted that Unger also provides a “more
subtle and justifiable” account of the dichotomy. The details of this more subtle account are
unnecessary for present purposes.
112. Id. at 623.
113. See supra text accompanying notes 88-98.
114. M. KELMAN, GUIDE, supra note 67, at 65. See generally id. at 64-87.
115. Id. at 118.
116. Id. at 4, 5.
117. Kelman’s right-wing interpretation of liberalism reveals a formalist strain in his thought.
Right-wing libertarian and economic versions of liberalism are more truly liberal because they are
Kelman claims that despite its "somewhat . . . extreme" "right-wing" "bias," the version of liberalism he attacks is not a straw man.\textsuperscript{118} He produces two arguments, neither of which justifies this startling claim. First, Kelman argues that liberals are more "culturally and intellectually self-confident" with a libertarian stance than with left-wing positions.\textsuperscript{119} In particular, they can argue more articulately and coherently for "right-wing libertarian[ism]" than for their more left-wing beliefs.\textsuperscript{120} But how does this allegation aid Kelman’s defense to the straw man charge? If it followed from left-wing liberals’ articulateness in defending libertarianism either that left-wing liberals are really committed to libertarianism or else that libertarianism is a more worthy opponent because it is supported by stronger arguments, then Kelman would be justified in taking libertarianism as his liberal opponent. But this is not an inference Kelman can sanction. He admits that:

CLS adherents find themselves in roughly the same relationship to their actual political beliefs as left liberals are [in] to theirs. That is, they have all learned to argue confidently for a position one step to the right of their actual position. CLS proponents have, in a sense, developed a coherent and self-confident left-liberal discourse that the left liberals have not yet devised. . . . [CLS arguments for their actual vision seem far vaguer and more unfocused . . . .]\textsuperscript{121}

If Kelman argues that left liberals are really libertarians, then he must concede that critical legal scholars are really left liberals. If Kelman claims that libertarianism is a more worthy opponent than left liberalism because it is more coherently articulated, then he must concede that left liberalism is superior to critical legal scholars’ radicalism because it is more coherently articulated. Moreover, if Kelman is correct that critical scholars have devised a coherent defense of left liberalism, then the claim that libertarianism is superior to left liberalism because it is more coherent is undermined. Thus, this defense of Kelman’s libertarian interpretation of liberalism is unpersuasive.

Kelman’s second defense is more direct, but no more successful. He claims that all liberals

\textit{must} adopt . . . the social theory of the Chicago school adherents, even if they genuinely bristle at any summary statement of the theory, because it really is the social theory . . . of a coherent liberal individualism that sees

\textsuperscript{118} M. Kelman, Guide, supra note 67, at 4, 5.
\textsuperscript{119} Id. at 5.
\textsuperscript{120} Id.
\textsuperscript{121} Id. (emphasis in original).
society as fundamentally successful when it responds to the will of individuals, and mediates the conflicts between individuals simply by making everyone pay his way.\textsuperscript{122}

This defense begs the question against liberals such as Rawls who do not view government's primary role as responding to the will of individuals.\textsuperscript{123} This defense also unnecessarily constrains the options of left liberals who accept that facilitative role for government. Even if Kelman were correct that Chicago law and economics follows from this facilitative vision of government's role, such liberals have two options, not just one. They can accept Chicago law and economics, or they can reconsider their acceptance of the facilitative view of government. Kelman provides no argument why the second option would not be preferable. Thus, Kelman's second defense, like his first, fails to demonstrate that all liberals are committed to right-wing liberalism. The charge that Kelman's interpretation of liberalism is a straw man stands.

More importantly, Kelman's discussion of liberalism's contradictory commitments to value subjectivity and value objectivity is unsuccessful because he neglects to distinguish differing senses of value subjectivity, and various senses of value objectivity.\textsuperscript{124} Economists contend that values are subjective in the sense that the value of a commodity, or the value of satisfying a consumer's preference, is measured by the price that the consumer will pay, which in turn reflects the intensity of the consumer's subjective desire. A related utilitarian position would urge that in summing utilities, the utilities depend upon the actual satisfaction or happiness derived by individuals. Utility is subjective because different individuals may derive varying levels of satisfaction from the same experience. At the same time, the utilitarian can consistently maintain that the determination of which actions are morally preferable is objective, because it results from an objective summing of the subjective utilities of all who are affected by the considered actions. All of these positions should be sharply distinguished from the liberal principle that government should be strictly neutral among citizens' visions of the good. Finally, none of the above positions is inconsistent with the claim that some political arrangements are objectively superior to others. Liberals endorse this claim by advocating liberalism over alternative schemes of government. These distinguishable meanings of value subjectivity and distinguishable meanings of value objectivity are confused in critical legal scholars' assertion of liberalism's contradictory commitment to subjectivity and objectivity, as the following summary discloses.

\textsuperscript{122} Id. at 118 (emphasis in original).
\textsuperscript{123} A THEORY OF JUSTICE, supra note 34, at 520-29.
\textsuperscript{124} Stick, Charting the Development of Critical Legal Studies (Book Review), 88 COLUM L. REV. 407, 416-17 (1988); accord LAW'S EMPIRE, supra note 30, at 440 n.19 & 441 n.20.
Critical legal scholars assert numerous respects in which liberalism is committed to value subjectivity. Thus it has been urged that “[f]rom the start, liberal political thought has been in revolt against the conception of objective value.” Liberals, it is said, must treat each person’s “values” (desires) as having equal weight. Beliefs about what to pursue or what is worth pursuing are mere “tastes, the purely arbitrary assertions of individuals.” The job of the state is merely to facilitate the satisfaction of as many of these “values” as possible.

Critical scholars claim that this commitment to value subjectivity is forced upon liberal theorists by the denial of the doctrine of intelligible essences. Intelligible essences are humanly perceivable properties which form the basis for classifying objects into separate categories. The denial of the existence of intelligible essences, it is alleged, means that there are no predetermined ways of cutting up the world into discrete categories. There are numberless equally justified (or equally unjustified) ways in which objects and events may be classified.

The world does not determine our system of names, rather our system of names determines the world. Critical scholars claim that in the absence of intelligible essences classification can be justified only by reference to human purposes and desires. This includes classification of moral, political, and legal terms. But desires, being psychic events, cannot ground the objectivity of moral, legal, political, or other values. Psychic events, like all events, are not objective because objectivity requires the doctrine of intelligible essences.

This argument is fallacious. Objectivity could be a consequence of essences that were not humanly perceivable, but which nevertheless exist. They might be inferable, even if not directly perceivable. Even if essences could not be humanly determined, even by inference, that would not cast doubt on the world’s objectivity, but merely speak to our knowledge of that objectivity. More importantly, objectivity could derive from agreement in concrete judgments among language users regardless of

125. R. Unger, Knowledge and Politics 76 (1975) [hereinafter Knowledge and Politics]. The contradiction between value subjectivity and value objectivity has been elaborated more in the realm of political theory than in legal doctrine.


128. Knowledge and Politics, supra note 125, at 31. While philosophers have frequently discussed essences and essential properties, the notion of “intelligible essences” is not in current philosophical usage. Unger claims that the doctrine of intelligible essences has a long philosophical pedigree, but the attributions he makes of his definition to various philosophers are dubious. Ewald, Unger’s Philosophy: A Critical Legal Study, 97 Yale L. J. 665, 693-95 & n.120 (1988).

129. Knowledge and Politics, supra note 125, at 32.

130. Id. at 79.
what grounded that agreement. Critical scholars appear to acknowledge this possibility but ultimately reject it on the ground that agreement would have to be a matter of shared group values and not mere convergence of interests to ground objectivity.\textsuperscript{131} It is unclear why this should be so, or why shared social practices irrespective of shared values would not suffice.

Critical scholars claim that liberal legal thought is simultaneously committed to value objectivity on several grounds. First, liberal theorists must believe that objective moral reasons require the state to satisfy as much individual subjective desire as possible.\textsuperscript{132} Put differently, utilitarianism is an objective moral theory, and not merely the subjective preference of its advocates. Second, subjective desires will take shape only in the context of a preexisting arrangement of entitlements. That preexisting arrangement of entitlements cannot then be justified by its ability to maximize preference satisfaction on pain of vicious regress.\textsuperscript{133} Preexisting entitlements therefore require objective moral justification. Third, rule-following behavior cannot be fully justified in terms of rational self-interest because on at least some occasions there will be a low likelihood that one's lawbreaking will be detected, or if detected that one will be caught, or that knowledge of one's lawbreaking will induce others to noncompliance. Thus, the justification for compliance requires substantive moral principles.\textsuperscript{134}

This description of liberal legal theory lies somewhere between grossly unsympathetic and fraudulent. Although Hobbes maintained that values were subjective,\textsuperscript{135} his liberal credentials are surely suspect since he believed in absolute sovereignty. Locke, Mill, Rawls, and Dworkin all deny that values are subjective.\textsuperscript{136} It does not demonstrate that liberalism is inconsistent to show that one liberal thinker held that values were subjective, while another rejected that claim.\textsuperscript{137} More important, critical scholars confuse the liberal principle that government should be neutral respecting visions of the good life with value subjectivity. The duty of government to treat each person's desires as being of equal

\textsuperscript{131} Id. at 101-02.
\textsuperscript{132} M. Kelman, Guide, supra note 67, at 64, 66.
\textsuperscript{133} Id. at 75 (stating an analogous dilemma in the context of Posner's doctrine that legal rules should mimic the market); see also Kelman, Trashing, 36 Stan. L. Rev. 293, 294 (1984).
\textsuperscript{134} M. Kelman, Guide, supra note 67, at 69-70.
\textsuperscript{135} T. Hobbes, Leviathan ch. 6 (Liberal Arts Press ed. 1958) (1651).
\textsuperscript{136} See, e.g., J. Locke, An Essay Concerning Human Understanding bk. IV, ch.3, paras. 18-20 (Fraser ed., Dover Press ed. 1959) (v.2 at 207-12); J. Mill, Utilitarianism ch. 2 (Liberal Arts Press ed. 1957) (1863); A Theory of Justice, supra note 34; Taking Rights Seriously, supra note 58.
\textsuperscript{137} See Ewald, supra note 128, at 673-91, for a powerful criticism of Unger's attempt to describe and critique the core of liberalism in order to avoid consideration of differences among liberal theories.
weight is not value subjectivity in a sense which contradicts the claim that moral and political theory are objective. Liberals may embrace equal treatment of individuals' desires on objective moral grounds, for example, a principle of human equality. 138 Finally, modern liberals are hardly committed to utilitarianism despite the fact that many historical liberals were. Rawls, for example, explicitly denies that the only purpose of the state is to satisfy individuals' desires. 139

The contradiction between subjective and objective theories of values that critical legal scholars claim inheres in liberal theory, in fact inheres only in a strawperson's version of liberal theory, and not in modern liberal political theory. Moreover, critical scholars confuse different senses in which values may be subjective. Therefore, they have not demonstrated the existence of radical indeterminacy as a product of contradiction between objectivity and subjectivity.

A fourth major substantive contradiction is Kelman's claim that the law, particularly criminal law, is simultaneously committed to free will (intentionalism) and to determinism. In consequence of this commitment to apparently polar values, Kelman claims law is contradictory and attempts to provide moral justifications for law are unstable. 140 He asserts that liberalism makes use of two distinct discourses to describe human action: intentionalist discourse, which involves free will and therefore the possibility of moral responsibility; and determinist discourse, which pictures human action as resulting from a predetermined chain of events and therefore as amoral. He contends that we are "actually simultaneously drawn" to both discourses, so that "our relationship with the discourses is . . . contradictory." 141 The potential of conduct to be characterized under either discourse yields indeterminacy in the justifications underlying legal rules and decisions. The heart of Kelman's argument consists of a discussion of criminal law cases intended to demonstrate the indeterminacy resulting from this contradiction.

As my discussion of the other alleged contradictions in liberal theory has made apparent, critical scholars maintain that liberal discourse privileges one side of each dichotomy. It prefers rules over standards, individualism over altruism, subjectivism over objectivism. Likewise, Kelman claims, liberal theory privileges intentionalism over determinism. Liberalism privileges intentionalism either by ignoring the difficulty

138. A MATTER OF PRINCIPLE, supra note 64, 191-92, 203.
139. A THEORY OF JUSTICE, supra note 34, at 520-29.
141. Id. at 87 (emphasis in original). There are at least two separable notions of free will. One is understood as the absence of material causation, or the absence of externally determined action. Human agents are "uncaused causers." The other appears to require causation, as it is defined either in terms of the agent's ability to have done otherwise, or as an act which flows from some aspect of the agent's personality. Most current theorists opt for some version of the second notion.
in choosing between intentionalistic and deterministic descriptions of action or by "purportedly confining determinist discourse." This privileging, according to Kelman, takes the form of claims that we can distinguish between domains of freedom and domains of determinism, and that social life is improved to the extent that it is increasingly occupied by domains of freedom.

Kelman's treatment of this contradiction and its privileged pole is seriously confused. This confusion is demonstrated by Kelman's alternating use of two different levels of discourse relevant to the notion of free action.

On the first level is the opposition between free will and determinism as fundamental ways to describe the nature of human action. At this level, we raise such questions as: Are all human actions causally determined? Are any human actions free? Are any human actions free in a sense that permits moral agency and responsibility? Is the exercise of free will compatible or incompatible with the claim that human actions are causally determined? Kelman appears to accept the popular notion that determinism is incompatible with free will in spite of most current philosophers' preference for the compatibilist thesis that human actions can be free even if they have antecedent, external causes.

If the possibility of free action giving rise to moral responsibility is accepted at this first level, a second level discourse and set of inquiries arises. At this second level, which presupposes the discourse of intentionistic action and free will, we distinguish acts that are voluntary for purposes of assigning responsibility, from those that are involuntary. It must be emphasized, however, that the doctrine of free will does not include the claim that all human actions are voluntary, but only the claim that some are. Even an advocate of both free will and incompatibilism can maintain that some human actions are determined, while others are free. Contrary to Kelman's apparent suggestion, one can find an action involuntary, and thus not subject to moral or legal sanction, without giving up intentionalist discourse, and returning to a deterministic world view that rejects the doctrine of free will. Rather, involuntariness

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142. Id. at 91 (emphasis in original).
143. Id. at 86-87.
144. Stick, supra note 124, at 414.
145. M. KELMAN, GUIDE, supra note 67, at 87.
146. Foot, Free Will as Involving Determinism, 66 THE PHILOSOPHICAL REVIEW 439, 439 (1957) ("The idea that free will can be reconciled with determinism is now very widely accepted."); see also A.J. Ayer, Freedom and Necessity in PHILOSOPHICAL ESSAYS 278-84 (1954); D. HUME, AN INQUIRY CONCERNING HUMAN UNDERSTANDING 90-91, 105-11 (C. Hendel ed. 1955) (§ 8); 2 J.S. MILL, AN EXAMINATION OF SIR WILLIAM HAMILTON'S PHILOSOPHY 265-304 (1873); M. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 360-65 (1984); Hobart, Free Will as Involving Determinism and Inconceivable Without It, 63 MIND 1 (1934); Smith, Free Will and Moral Responsibility, 57 MIND 45, 45-46 (1948).
is an issue arising entirely within intentionalist discourse. Confusion arises because we sometimes express our belief in free will by saying that an action is free while other times we express the idea that a particular action is voluntary by saying it is free. To avoid this confusion, it is useful to restrict use of the terms “free”, “intentional”, and “determined” to discussions at the first level and to employ the terms “voluntary” and “involuntary” at the second level.

The central problem with Kelman’s argument is that he needs to show liberal theory’s commitment to both terms of the intentionalism-determinism dichotomy to establish his contradiction claim, but his examples deal only with the voluntary-involuntary dichotomy. The examples, therefore, support only the view that intentionalism is a presupposition of our legal system and of liberal thought. Kelman certainly does not show that liberalism is also committed to determinism.

But perhaps there is more to Kelman’s argument. It might be that our legal system is simultaneously committed to calling actions both voluntary and involuntary (if not intentional and predetermined) and it is therefore contradictory and results in indeterminacy. Kelman does show how in some criminal cases action may be characterized as voluntary (blameworthy) and also as involuntary (blameless). From these cases, he concludes that we are drawn to both discourses and possess no metaprinciple that allows us to choose between them. Thus, perhaps the contradiction does exist after all, but Kelman is simply mistaken about the level at which it is found.

The first response to be made to this approach is to deny that there is “simultaneous commitment” to both poles in the voluntary-involuntary dichotomy. Rather, the legal system distinguishes between voluntariness and involuntariness and mandates that we determine whether a given action is voluntary or involuntary. Of course this is no easy task. As Kelman’s examples illustrate, factors are often present that mitigate the voluntariness of actions; the conditions for a voluntary act can be present in varying degrees, creating a spectrum of voluntariness. At what point, then, are we to call an action voluntary for the purpose of assigning blame? Although the answer to this question will be easy in many cases, there will be cases, as Kelman demonstrates, in which it is difficult to determine whether an action is voluntary or involuntary. The point is that this amounts to some uncertainty in understanding the psychological and ethical requirements for moral and legal

147. Showing liberal theory’s commitment to both free will and determinism is necessary, but not sufficient, to establish a contradictory commitment. Kelman must also establish incompatibilism. See supra text accompanying notes 145-146.

responsibility. It does not show that liberalism is committed to contradictory discourses.

In order for Kelman to demonstrate indeterminacy, he must show that this uncertainty in how we should classify actions on the borderline between being voluntary and involuntary reflects a pervasive incoherence in the proper classification of actions. He must show that any attempt to distinguish voluntary from involuntary actions would be unsuccessful or arbitrary. Yet even if the precise location of the line is not clear, it does not follow that the drawing of this line is necessarily an arbitrary matter.

It will be useful here to examine how Kelman takes himself to have established the impossibility of a coherent classification of actions as voluntary and involuntary. He argues, for example, that “[i]n many cases a more covert battle between intentionalistic and determinist discourses goes on in the criminal area precisely because each discourse is so available to us.”149 Here he supplies sample cases and illustrates how they can be described equally well in both volunteristic and involunteristic terms. For example, he notes that in a case like *Martin v. State*,150 in which the defendant is apprehended at home while drunk, brought to a public place by police officers, and arrested for public drunkenness, the common interpretation is that the public appearance is involuntary. Even though the defendant voluntarily got drunk, his actions are characterized as involuntary because he did not choose to go out in public, and it was not “reasonably foreseeable” that he would end up there. By contrast, in a case like *People v. Decina*,151 where the defendant was convicted of negligent homicide even though he was unconscious when he hit the victim with his automobile, the common interpretation is that the defendant’s actions were voluntary and, hence, blameworthy. His actions were voluntary because he chose to drive, fully realizing the possibility that he might have an epileptic seizure and kill someone. In each case the defendant voluntarily performed some action that contributed to his arrest, yet involuntarily brought about some consequence that he did not specifically intend. Kelman claims that in each case we can use either description since both are readily available.

But what does Kelman mean by “available?” If he means that either description can be used without a formal contradiction, then he is correct. But in the context of justificatory schemes, if one description is more appropriate or the arguments for it are better than those for the other, then it is the only description “available” in the relevant sense. Even in each of Kelman’s examples it appears that one description is more appropriate than the other. In *Martin*, the voluntary act, getting

149. *Id.* at 87.
150. 31 Ala. App. 334, 17 So. 2d 427 (1944).
drunk at home, is done with no reasonable expectation of making a public appearance, and the public appearance results from the intervening voluntary act of the police. Thus, the overall occurrence of public drunkenness is best characterized as involuntary. In *Decina*, the voluntary act of driving is performed with awareness of both the possibility of an epileptic attack and the risks of such an attack. For this reason, the killing of the victim is more appropriately characterized as a voluntary act. A similar analysis applies to Kelman’s examples of status crimes, strict liability, and provocation and duress.152

In all these cases Kelman contends that we are simultaneously drawn to two different “discourses.” In fact, in each case we are working completely within the discourse of intentionalism. Furthermore, we are not “drawn” to both a voluntaristic and an involuntaristic description; rather we are convinced that these are borderline cases in which we experience some uncertainty in characterizing the actions as either voluntary or involuntary. This is because the cases: (1) exhibit a certain degree of voluntariness; or (2) involve more than one act to be tested for voluntariness; or (3) involve an action with two aspects, one of which is voluntary and one of which is involuntary. Despite this lack of clarity, we may still find that one description is more appropriate than the other. Thus we do have a kind of “metaprinciple” or method that guides us in choosing between descriptions: our rationality, moral sensitivity, and ability to use words meaningfully. This “metaprinciple” cannot be made completely explicit nor captured mechanically, but this reflects the limits of our knowledge, not the ineliminable incoherence of law.153

Kelman does not deny that the outcome in *Martin* was predictable, but he does assert that it was not the characterization of the act as involuntary that determined the outcome. Rather, Martin’s behavior was either justified because we consider public drunkenness a lesser evil than resisting the police, or excused because the police involvement amounted to entrapment.154 If Kelman is correct, then in fact the case is not indeterminate. The case generates confusion because its true rationale differs from that stated in the opinion. If Kelman is correct, the true justification for Martin’s acquittal rests not on Martin’s act being involuntary, but rather on its being justified or excused. Thus, Kelman’s critique, stripped of its philosophical cloak, is just a normative criticism of the court’s analysis, the stock-in-trade of traditional scholarship. Nevertheless, Kelman succeeds in establishing that there are tensions, difficulties, and some mistaken decisions in criminal law cases as well as inadequa-

152. M. KELMAN, GUIDE, supra note 67, at 93-96.
153. For additional discussion of our inability to provide complete and explicit metaprinciples in advance, see infra text accompanying notes 202-215.
154. See M. KELMAN, GUIDE, supra note 67, at 93.
cies in the criminal theories he considers. This, however, falls far short of demonstrating that we are simultaneously committed to contradictory principles.

Kelman's work evokes an additional comment. Just as Kelman discovers inadequacies in criminal law and theory, so other critical scholars make useful critiques of other areas of the law and legal theory. But critique is not enough. All legal systems and all legal theories are flawed. We are, after all, humans, not gods. Legal argument is comparative, and so is theory. We decide which theory to believe by provisionally accepting that theory which has the best overall combination of virtues and vices. It is therefore incumbent on critical scholars to present not only critiques, but also alternatives preferable to the doctrine and theories they critique. (Some critical scholars are now vigorously making that attempt.) Otherwise, critical scholars give us no cause to change our beliefs or our actions.

D. Errant Legal Reasoning and Indeterminacy

This Section focuses on three mistakes advocates of indeterminacy make in their accounts of law and legal reasoning. Each of these mistakes generates the illusion of greater indeterminacy than actually exists. I do not claim that all advocates of radical indeterminacy make all three mistakes. But one can find each mistake in the literature, and some authors make more than one.

The close conceptual connection between indeterminacy and legal reasoning explains why critical scholars' incorrect views about legal reasoning can have consequences for indeterminacy. Indeed, legal indeterminacy may properly be defined in terms of legal reasoning, as follows: Law is indeterminate where the correct theory of legal reasoning fails to yield a right answer or permits multiple answers to legal questions. Insofar as the theories of legal reasoning employed by critical scholars do not produce right answers while more accurate theories of legal reasoning yield right answers, critical scholars' mistakes about legal reasoning inflate their assessment of the extent of indeterminacy.

Before summarizing the three respects in which critical scholars' mistakes about legal reasoning lead to exaggerated indeterminacy claims, it is necessary to mention some basic features of legal reasoning. First, any theory of legal reasoning must have a method for determining which general propositions of law are permissible premises in legal argument


and in adjudication. Specifically, the theory of legal reasoning must determine whether such propositions encompass only rules, or include principles, policies, and other standards. Additionally, the theory must provide criteria with which to determine which specific propositions within the categories it permits are legitimate and which are illegitimate, in legal argument. Second, a theory of legal reasoning must determine which inferences from the legitimate premises are authorized. Are only deductive inferences allowed, or are arguments by analogy, or to standards which cohere with accepted standards also permitted? Third, a theory of legal reasoning must provide for the prospect of conflicting legal standards. This may be accomplished by delegitimizing one of the conflicting standards, by accommodating the conflicting standards in a concrete compromise, or by generating revised, compatible standards. These three features fall considerably short of constituting a complete theory of legal reasoning, but these aspects will suffice for the argument that follows.

I argue that critical legal scholars' arguments for radical indeterminacy explicitly or implicitly presuppose claims about these three aspects of legal reasoning each of which is rejected by numerous plausible theories of adjudication accepted or advocated in recent conventional legal scholarship. The positions taken by critical scholars respecting each of these aspects impoverish legal reasoning in a manner that increases prospects for indeterminacy. The critical scholars' arguments for indeterminacy, however, do not purport to demonstrate, and therefore do not demonstrate, that the claims of conventional scholars about these three aspects of legal reasoning are incorrect. The critical arguments for radical indeterminacy are thus inadequate because they do not refute plausible conventional accounts of legal reasoning which are significantly more determinate.

Before more fully developing this argument, I will summarize the three respects in which critical scholars hold mistaken assumptions about legal reasoning. First, critical scholars unnecessarily limit and impoverish legal reasoning in a manner that increases prospects for indeterminacy. Second, a theory of legal reasoning must determine which inferences from the legitimate premises are authorized. Are only deductive inferences allowed, or are arguments by analogy, or to standards which cohere with accepted standards also permitted? Third, a theory of legal reasoning must provide for the prospect of conflicting legal standards. This may be accomplished by delegitimizing one of the conflicting standards, by accommodating the conflicting standards in a concrete compromise, or by generating revised, compatible standards. These three features fall considerably short of constituting a complete theory of legal reasoning, but these aspects will suffice for the argument that follows.

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157. Developed in this way, the provision for conflicting standards may be seen as part of a complex method for determining the legitimate premises. The conflicting standards were only the result of an initial stage in determining the legitimate premises. Standards which pass this initial test may nevertheless ultimately not be legitimate because they do not survive when the first stage standards are reconstructed to eliminate inconsistency and conflict. Only those propositions which form part of the reconstructed set are truly legitimate.

Alternatively, each of the conflicting or inconsistent standards may be seen as legitimate, but the methods of inference permitted by the theory of legal reasoning cannot then be standard deduction, but must be considerably more sophisticated. In first-order logic, any proposition at all follows from two inconsistent premises. Under a theory of legal reasoning which legitimizes inconsistent standards, rules of legal inference must be designed to avoid the consequence that every proposition is legally true. Consequently, such theories of legal reasoning cannot deploy the standard axioms and rules of inference of first-order deductive logic.
ish the premises that may be employed in legal argument. Some critical scholars' arguments presuppose that only rules are law, while standards, such as principles, policies, legal culture, and social context are not law. If it were true that law encompassed only black-letter rules, there might well be radical indeterminacy. The use, however, of nonrule standards in legal argument substantially reduces indeterminacy.

Second, critical scholars frequently presuppose that only deductive inferences are permitted in legal argument. They therefore deny legitimacy to inference to standards that cohere with accepted principles and to argument by analogy. Nondeductive inferences to standards that cohere with settled principles, and to analogous outcomes, substantially reduce the indeterminacy which might emerge if legal reasoning permitted only deductive inferences.

Third, critical scholars assume that the existence of conflicting principles yields indeterminacy in the absence of explicit metaprinciples that resolve those conflicts. Even without such metaprinciples, however, conflicts may be resolved by concrete compromises reflecting the contribution of each of the conflicting principles. Moreover, even where legal principles are truly contradictory, they can be reconstructed into a revised and consistent set. Such a method of reconstruction is valid even if it cannot be accomplished mechanically and even if the reconstructed principles could not have been explicitly stated in advance.

I. Impoverished Premises

In this Section, I argue that many critical scholars' arguments for radical indeterminacy are flawed because they too strictly limit the premises that may be deployed in legal arguments. Subsequent sections examine critical scholars' mistakes about the inferences permitted in legal argument, and the methods necessary to resolve prima facie inconsistency in legal standards.

I argue in this Section that the predictability of legal practice embarrasses advocates of radical indeterminacy. Critical legal scholars reject the plausible claim that law is reasonably predictable because law is reasonably determinate. Instead, critical legal scholars urge that law's predictability is a consequence of judges illegitimately deciding cases in accordance with their hidden ideologies. I claim, in contrast, that the predictability of legal practice is better explained by sophisticated theories of legal reasoning that yield at most moderate indeterminacy.

Arguments for radical indeterminacy artificially limit the types of legal standards judges may employ as premises in reaching legal conclusions. Some arguments assume that only black-letter rules are authorized, others countenance as well policies, principles, and standards derived from institutional roles. However, arguments for radical indeter-
minacy almost invariably assume that standards derived from social con-
text, legal culture, and morality are extra-legal standards which judges
may not consider in reaching legal decisions.

Critical scholars urge that judicial use of these extra-legal standards
explains how legal practice can be predictable despite law's radical inde-
terminacy. By contrast, recent liberal legal scholarship denies that these
standards are extra-legal. Numerous recent theories describe them as
legally authoritative standards. Theories that permit use of such stan-
dards in adjudication are descriptively and normatively superior to theo-
ries that do not.

One theme running through this Section as well as the next Section
is that arguments from stringent theories of legal reasoning to radical
indeterminacy are best reconceived as demonstrating the invalidity of the
stringent theory of legal reasoning. Such stringent theories should be
replaced by richer theories of legal reasoning which result in less indeter-
minacy. After a brief section describing the logical basis for reconceiving
an argument to an implausible conclusion as demonstrating the falsity of
the argument's premise, the method is applied to arguments for radical
indeterminacy.

The argument will be similar to critiques of skepticism which claim
that skeptics employ an excessively demanding criterion of knowledge.
For example, one modern response to skeptical arguments that conclude
that we cannot have knowledge of the material world has been to stead-
fastly deny their conclusions. The response contends that we are much
more convinced that material objects exist than we are of the validity of
any sophisticated philosophical argument concluding that we cannot
know if the material world exists. The interesting philosophical chal-
lenge, therefore, is to find the fallacy in the sophisticated argument.\textsuperscript{158}
This requires examination of the premises and inferences of the
argument.

If the conclusion is false and the inferences from premises to conclu-
sion valid, it follows that one, or more, of the premises is false. The
argument may be turned on its head so that the negation of the false
premise becomes the conclusion and the negation of the conclusion
becomes a premise.\textsuperscript{159} An argument from a false premise by valid infer-
ences to a false conclusion is reconceived as a sound argument from the
negation of the original conclusion to the negation of the original prem-
ise. In essence, this is merely an application of the classic rule of infer-
ence \textit{modus tollens}.

Consider the skeptical argument from the premise that knowledge

\textsuperscript{158} This argument is sometimes attributed to G.E. Moore. See G. Moore, \textit{Philosophical Papers} chs. 2, 7 and 9 (1959); G. Harman, \textit{Thought} 3, 7 (1972).

\textsuperscript{159} The negation of the proposition \( p \) is "It is not the case that \( p \)."
requires absolute certainty to the implausible conclusion that we know little, if anything.\footnote{160} This argument can be turned on its head, as follows. The argument can be reconceived as from the plausible premise that we know many things to the conclusion that knowledge does not require absolute certainty. Consider, as a second example, a slight variation on the classic syllogism:

\begin{align*}
\text{Premise (1)} & \quad \text{All people are immortal.} \\
\text{Premise (2)} & \quad \text{Socrates is a person.} \\
\text{Conclusion (3)} & \quad \text{Therefore, Socrates is immortal.}
\end{align*}

Clearly this inference is logically valid.\footnote{161} Necessarily, if the premises were true, the conclusion would be. Yet the conclusion is surely false. It follows that (at least) one of the premises is false. Since (2) is true, the troublemaker must be (1) All people are immortal.

Thus, we can turn the above valid (but not sound) argument to a false conclusion on its head so that it yields a true conclusion.

\begin{align*}
\text{Premise (a)} & \quad \text{Socrates is not immortal.} \\
\text{Premise (b)} & \quad \text{Socrates is a person.} \\
\text{Conclusion (c)} & \quad \text{Therefore, not all people are immortal.}
\end{align*}

I.e., some people are mortal.

The predictability of legal practice may serve a role in rejecting radical versions of indeterminacy analogous to the role our belief in the existence of material objects plays in rejecting skepticism about the external world.\footnote{162} Those who claim that the law is radically indeterminate must account for the fact that most legal results are not open to serious doubt and are highly predictable. Justice Cardozo once claimed that in no more than ten percent of the cases that courts decide was there any indeterminacy or doubt about the correct outcome.\footnote{163} Recent empirical studies confirm Cardozo’s intuition. For example, in his Berkeley Centenary Lecture Judge Jon O. Newman stated that in the year ended June 30, 1983 dissents were filed in federal courts of appeals in less than four percent of the cases.\footnote{164} Judge Alvin Rubin similarly reported that from 1981 to 1985 dissents were filed in less than four percent of all Fifth

\begin{footnotes}
\footnote{160.} The argument requires a second plausible premise that we are absolutely certain of very few things.
\footnote{161.} Logicians distinguish logical validity from soundness. An argument is logically valid if the truth of its premises necessitates the truth of its conclusion. An argument is sound if the argument is logically valid, and all of its premises are true. The conclusion of a logically valid argument may (but need not) be false, if one or more premises is false. The conclusion of a sound argument must be true. See I. COP, INTRODUCTION TO LOGIC 24-25 (3d ed. 1968).
\footnote{162.} To be precise, the analogy is between our belief that the best explanation of legal predictability is determinacy and our belief that the best explanation of our perceptions is the existence of middle-sized material objects.
\footnote{163.} B. CARDOZO, THE GROWTH OF THE LAW 60 (1924).
\end{footnotes}
Circuit cases. These reports confirm J. Woodford Howard's 1965-67 study which found mean dissent rates for individual appellate judges to be under four percent. Of course, dissent rates are not precise measurements of judicial disagreement. No doubt many judges reject the majority opinion but do not write a dissent because they do not think the issue is sufficiently important or simply because they are overworked. Howard, for one, considered a number of explanations for the low dissent rate and concluded that "the magnitude of routine litigation in the circuits was undoubtedly a major factor in depressing dissents." Nonetheless, studies of appellate decisionmaking certainly provide at least modest support for Cardozo's estimate. It would be surprising to find that the dissent rate was four percent yet judges disagreed in forty percent of all cases. Moreover, if we look at trial courts, or disputes not leading to formal legal action, or merely at events governed by law, the levels of agreement and thus the predictability of outcome may be even higher. Academic attention to appellate decisionmaking should not blind us to the bulk of social activity where law plays a role. Belief in indeterminacy results in part from a bad diet.

The existence of widespread predictability is a potential embarrassment to claims of radical indeterminacy and suggests that their supporting argument must be flawed. One place to look is in the theory of legal reasoning implicit in the indeterminacy thesis. Characterizations of indeterminacy and theories of legal reasoning can be matched up via the following definition. The legal system is indeterminate to the extent that, according to theory of legal reasoning LR, multiple outcomes are possible. Thus, each new theory of legal reasoning LR may generate a different conclusion respecting the extent of indeterminacy. One way to turn an argument for radical indeterminacy on its head in light of predictability is to attack its associated theory of legal reasoning as unnecessarily impoverished.

The recent history of legal theory confirms this hypothesis. The legal realists attacked the formalist theory that legal reasoning consists solely in deductive argument from legally authoritative rules. The realists argued that since those doctrinal materials fail to determine the outcomes of lawsuits, something else must determine the outcome. Some

168. J. Howard, supra note 166, at 193.
realists claimed that this something else was what the judge ate for breakfast, or judicial personality. More thoughtful realists, or some realists in their more thoughtful moments, said that the something else was social policy. If, however, social policy is legally authoritative, then law is not indeterminate. Rather, the correct theory of legal reasoning is richer than mechanical jurisprudence contemplates. In a sense, the legal realists anticipated this position with their demand that judges reveal the true grounds of legal decisions so that those grounds would be open to public scrutiny.

Thus, we find that in addition to rules, theories of legal reasoning came to countenance social policy. In more recent theories of legal reasoning, principles and other standards are added to the judge’s stock of authoritative materials. Of course, besides filling gaps, adding materials can create conflicts between authoritative materials. Thus, the addition of nonrule standards does not necessarily eliminate indeterminacy. Indeed, the critical legal scholars’ arguments for indeterminacy, such as the patchwork quilt argument and the fundamental contradiction argument, enrich realist skepticism by invoking deeper forms of conflict.

But these arguments for the existence of more radical forms of indeterminacy are therefore more deeply embarrassed by the reasonable predictability of legal outcomes. Naturally, the critics are aware of the need to reconcile indeterminacy with predictability. Like the legal realists before them, critical scholars explain predictability as a consequence of “something else,” something beyond the elements of legal reasoning. That something else may include social context, legal culture, institutional roles, convention, or the ideology of the decisionmaker. But

172. E.g., Cohen, Field Theory and Judicial Logic, in The Legal Conscience, supra note 171, at 146.
174. Dworkin appears to fall victim to this fallacy in Taking Rights Seriously, supra note 58, at 29-30.
The strongest realist arguments are based on conflict, not gaps. Yet conflict can be conceived as a form of gap: namely, no metaprinciple to resolve the conflict.
175. Dalton, supra note 67, at 1009-10; Singer, supra note 13, at 10, 19. The consequences of conflict for legal indeterminacy are discussed in detail infra at text accompanying notes 199-215.
176. Singer, supra note 13, at 21-25. Singer also mentions “existing structure of legal
traditional legal theorists can counter the critical scholars’ explanation of predictability by developing an even richer theory of legal reasoning that includes social context, legal culture, and many of the other elements which critical legal scholars employ to explain predictability. If the richer theory of legal reasoning provides a better explanation of predictability than that supplied by the critical scholars, the plausibility of indeterminacy is eroded.

Each of the elements in the critical scholars’ explanation of predictability has been employed in a richer theory of legal reasoning than formalist doctrinal deduction. For instance, institutional role is the bedrock of the legal process school developed by Hart, Sacks, and Fuller. Social context, convention, and legal culture are legitimate sources of law in some conventional theories of adjudication. Some such theories authorize judges to employ conventional morality, others view the legal profession or the judiciary as an interpretive culture whose practices and dispositions determine legal truth. Even political ideology, interpreted as the judge’s sincerely held political convictions, is authoritative in some recent legal theories, such as Dworkin’s.

Advocates of naturalist or natural law theories are not alone in legitimizing “political ideology” in adjudication. Some positivists, while denying that moral principles are legally authoritative based upon their substantive merits, argue that substantive moral principles are incorporated into the law by conventional practices among judges to employ them in legal argument.

Other positivists, such as Raz, reject this incorporation thesis, but argumentation” and existing “orientation of (legal) thought.” Id. at 21. These also seem to be authoritative.


179. LAW’S EMPIRE, supra note 30. Law’s Empire may be read as requiring each judge to act on her sincerely held political convictions. Alternatively, it may be read as requiring each judge to act on what true political morality would require. Dworkin leans toward this latter interpretation when he claims that there are right answers to legal issues. When he wishes to emphasize how legal reasoning looks from the judge’s point of view, Dworkin employs the first version. Of course, in attempting to follow true political morality, the judge must rely on her own convictions about political morality, so in practice the two recommendations yield indistinguishable outcomes. The difference between the two versions is reflected in whether a judge who sincerely holds incorrect political views and acts on them is to be described as violating her judicial duties, or as satisfying them, but poorly.


are free to develop a theory of adjudication in hard cases that requires judges to employ moral principles. The difference is that such a positivist will not label those moral principles "law" (until after the decisions).\(^{182}\)

These enriched theories of legal reasoning provide a better explanation for law's predictability than critical scholars' claim of a hidden political ideology. These theories explain judges' frequent references to social and public policy, moral principles, and institutional competence. Such judicial references would be a mystery under the critical scholars' claim that such standards are not authoritative. Moreover, were judicial opinions mere pretense, hiding decisions reached on other grounds, it would be astonishing that the pretense could be successful for so long. Besides, many judges and legal theorists do not hide their political visions, but rather celebrate them.

In addition to these descriptive arguments, normative considerations support interpreting our legal institutional history as embracing arguments from ethics, policy, and political theory, rather than hiding them. If moral and political argument is a legitimate tool of judicial decision-making (at least in hard cases), then it is appropriate for legal actors and citizens to engage in a dialogue about what constitutes a good society, or the best conditions for human flourishing, or the best understanding of our common culture. Public officials would be held accountable in the public arena for the moral decisions they make. The vision of officials and citizens engaging in this enterprise is far nobler than the image of public officials oppressing the populace in the interest of a dominant elite while falsely invoking the name of justice. For these and like reasons, predictability is better explained by enriched theories of adjudication than by hidden ideology.

Critical scholars' explanation of predictability as a consequence of hidden and tilted political ideology is, thus, best reconstrued as a normative attack on the moral principles judges employ. So conceived, it is simply good legal analysis, not qualitatively different from traditional legal scholarship.

In summary, the law's predictability is better explained by rich theories of adjudication than by radical indeterminacy and judges' hidden ideology. Critical scholars unnecessarily impoverish the premises judges may deploy in adjudicating conflicts. Institutional role, legal conventions, conventional morality, critical morality, and political theory enrich legal reasoning and reduce indeterminacy.

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182. Notably, this response shifts the issue from whether law is indeterminate to whether proper outcomes of adjudication are. But this shift seems appropriate. It is proper outcomes of lawsuits and legal issues, and not the correct usage of the word "law" or the concept of a legal system about which critical legal scholars are concerned.
2. Inferential Techniques

A second respect in which critical legal scholars set incorrect standards for adjudication relates not to the premises they find legitimate but to the inferential techniques that they find legitimate. Critical scholars assume that legal right answers must flow from legally authorized premises by deductive or similarly watertight inferential techniques to avoid indeterminacy. When formalist methods prove unworkable, they infer that law is arbitrary, incoherent, or indeterminate. They fail to contemplate less stingy inferential techniques such as argument by analogy and those deployed in coherence theories.

The critics' arguments go awry, like those of skeptics, in setting unrealistic and unattainable standards for the law and then failing to envision a middle ground between formalism and radical indeterminacy. Critical legal scholars are, in Hart's fine phrase, "disappointed absolutist[s]." 183 Critical scholars implicitly, and often explicitly, assume that law is satisfactory only if legal reasoning is deductive or demonstrable. For example, some critical scholars may have thought or hoped that a formalist, deductive approach to adjudication was workable. 184 Disabused of that notion, they have gone to the other extreme and have claimed that law is arbitrary and completely indeterminate. This is a form of the irrationalist fallacy. 185 It is a myopic view which fails to envision a middle ground between formalism and radical indeterminacy. It also fails to recognize the common ground between formalism and radical indeterminacy. Both views presuppose an exceedingly strict standard for adjudication, legal truth, or legal knowledge. The difference is that only the formalist believes that the strict test can be met. 186 Critical scholars demand that for something to be law it must meet an impossibly high standard. The consequence of critical scholars' unrealistic requirement for law is that there can be no law. But this is too high a price to pay. For the most part, critical legal scholars themselves refuse to accept this consequence of their deductive standard for legal truth. 187

As disappointed absolutists, the critical scholars embrace the same extremist position as the caricature of right-wing theorists and strict constructionists, who are allegedly committed to the unattainable watertight standard for law and adjudication. 188 Some critics' error appears to be

186. S. BURTON, supra note 23, at 191.
187. See, e.g., Kennedy, Form and Substance, supra note 67, at 1724, 1773 n.158.
188. Stick, supra note 156, at 346, 363-65. The attribution of deductive standards to strict constructionists and right-wing theorists is a caricature and does not survive a careful reading of
the acceptance of this conservative criterion as the standard of adequacy for law. Other critics claim that their attack on legal theory is intended only as internal ("immanent") critique, a means of criticizing liberal legal theory according to its own criteria of adequacy.189 So viewed, these critics' error is to attribute to all of traditional legal theory the criteria of adequacy currently embraced, if at all, only by a few right-wing scholars and politicians.190 Thus, the attack on legal reasoning is against a straw man, not traditional legal theory.191

Critical scholars' assumption that legal reasoning is deductive manifests itself in their claim that even limited or occasional inconsistency demonstrates the inadequacy of law and legal theory.192 Yet coherence theories of legal reasoning193 can handle minor inconsistencies by classifying them as mistakes to be eliminated from the scheme of principles that they recognize as authoritative.194 Coherence theories of law maintain that a proposition of law is true if it fits well, or coheres, with other legal propositions held to be true.195 More precisely, a proposition is true if it is part of the best coherent justification and explanation of legal institutional history. A judge following coherence methodology would collect the constitution, statutes, regulations, precedents, and administrative writings in her jurisdiction. She would then attempt to develop a coherent scheme of principles that would explain and justify
the institutional facts she had collected. In a mature and complex legal system, it is unlikely that any scheme of principles would explain all of the institutional facts. Some statutes and precedents will not cohere with the rest of the settled law. This is the kernal of truth in the patchwork quilt argument. The judge then would adjust the principles she had developed and reject some precedents and other parts of the institutional history as mistakes. Adjustment of general principles and institutional facts continues until the overall scheme fits together without inconsistency. At this point the judge will have reached what Rawls has described as "reflective equilibrium," where the final scheme of principles explains and justifies the institutional history remaining after institutional mistakes are deleted. Coherence theories of legal reasoning are thus a generalization of moderate versions of the reconstructive doctrine of precedent to accommodate statutes and constitutions. Thus, minor inconsistencies in institutional materials are unproblematic for coherence methodology.

3. Explicit Metaprinciples and Conflicting Standards

Critical scholars' assumption that legal reasoning is formalist and deductive is revealed again in their demand for explicit metaprinciples to resolve conflicts between rules, principles, and other authoritative materials. The critics enrich legal realist arguments for indeterminacy by claiming that law embodies conflicting principles and counterprinciples which cannot be reconciled, balanced, or harmonized. For example, critical scholars assert that in contract law, a principle of altruism and community conflicts with the perspective of self-interested autonomous individualism. Because of these commitments to seemingly conflicting principles, critical scholars invoke the need for—and criticize the lack of—guiding metaprinciples specifiable in advance. They argue that these metaprinciples are necessary for determinate outcomes because without them decisionmakers cannot justify their choice between opposing alternatives. In consequence, there is rampant indeterminacy. Kennedy, for example, claims that there is no available metaprinciple to explain in particular concrete contexts which principle should prevail. Altman faults Dworkin's theory of adjudication for its failure to provide such metaprinciples.

We require a metatheory that can tell us precisely how we are to choose

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196. See supra text accompanying notes 76-87.
197. See supra note 58.
198. See supra note 58.
200. Altman, supra note 17, at 218-19. Altman also claims that Dworkin's theory requires these metaprinciples because it rejects intuitionism. Id.
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.\textsuperscript{201}

This demand for an explicit, mechanically applicable, metatheory is unrealistic and unnecessary. That law lacks the mechanical decision procedure for determining theorems of simple logical systems like the logic of propositions is neither surprising nor cause for concern.\textsuperscript{202} Law may be determinate without there being a mechanical method for deciding legal questions. Indeed, standard first-order logic lacks a mechanical decision procedure for determining its theorems (although of course it has a proof procedure).\textsuperscript{203}

It is hardly a fault that law is not more determinable in this respect than standard first-order logic! Of course, given an alleged argument (i.e., proof) in first-order logic, we can mechanically check its correctness. But nothing in logic, arithmetic, or geometry, for that matter, guarantees us a proof of any debated proposition. It may require nonmechanical creativity and insight, as Fermat’s Last Theorem demonstrates.\textsuperscript{204}

Like classical mathematics, law may be ontologically determinate, even if there is no explicit metatheory that “tells us precisely”\textsuperscript{205} what the law is. Unlike mathematical arguments, however, legal arguments do require judgment in the assessment of their validity. (Why else do they call those people in the black robes “judges”?) The exercise of judgment, as Aristotle, Kant, and Wittgenstein clearly saw, cannot be fully characterized in an explicit metatheory. Kant, for example, argued that concepts, including legal concepts, are best understood as rules for

\textsuperscript{201} Singer, supra note 13, at 16 (1984) (emphasis added); see also id. at 15-18.

\textsuperscript{202} The logic of propositions, or propositional calculus, covers the logic of the sentential connectives (operators that take sentences as objects to form other sentences). The standard sentential connectives are: negation—it is not the case that \( P \); disjunction—\( P \) or \( Q \); conjunction—\( P \) and \( Q \); implication—if \( P \), then \( Q \); equivalence—\( P \) if and only if \( Q \). See, e.g., A. Church, supra note 92, at 69-166.

A decision procedure is an effective procedure or algorithm (i.e., a mechanically applicable means) by which to determine for any arbitrary sentence of a logical system whether or not it is a theorem, and if so, to provide a proof of it. (Some writers omit the requirement that a proof be provided.) Id. at 99 & n.183.

\textsuperscript{203} This result was first proven by Alonzo Church. See Church, A Note on the Entscheidungs Problem, 1 J. Symbolic Logic 40 (1936); Church, Correction, 1 J. Symbolic Logic 101 (1936). For more accessible proofs, see G. Boos & R. Jeffrey, Computability and Logic 115-24 (1974) and S. Kleene, Introduction to Metamathematics 432-35 (1950). Standard first-order logic contains, in addition to the propositional calculus, means to express the quantifiers, all and some. A. Church, supra note 92, at 168-76.

\textsuperscript{204} Fermat was a famous mathematician who wrote a “theorem” on the margin of a book with the remark that the margin was too small to contain the proof. Generations of mathematicians have been unable to verify Fermat’s claim.

\textsuperscript{205} Singer, supra note 13, at 16.
classifying objects. Thus, the concept "offer" is a rule we use to determine whether particular manifestations of intent are offers. Kant argues that understanding how to apply a rule cannot consist solely in mastering some additional secondary rule or rules, because we would also need to understand how to apply the secondary rules, and they would then require tertiary rules, and we would be stuck in an infinite regress. At some point, the ability to apply rules must rest on some capacity other than mastering rules. This ability, which Kant called judgment (mutterwit—literally, "motherwit" or "native smarts"), is a knack for determining whether something falls within the scope of a rule. Once one recognizes the necessity of this separate faculty of judgment, principles of theoretical simplicity and elegance provide strong reasons for not positing any rules beyond this first level. However, this notion of judgment, for Kant, is unstatable. A fortiori it is unstatable in a "metatheory that can tell us precisely" which things fall within the scope of the rule or under the concept, as the vicious regress argument shows.

Wittgenstein makes a slightly different argument but arrives at a similar conclusion.

"[T]here is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call "obeying the rule" and "going against it" in actual cases.

Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term "interpretation" to the substitution of one expression of the rule for another."

For Wittgenstein, understanding a rule simply consists of the ability to apply it.

Unlike Kant, Wittgenstein did not think that this ability required a separate faculty of judgment. He would deny that the acquisition of a metarule for applying a rule in controversial cases would itself constitute understanding the rule. Only correct application of the rule could demonstrate understanding. Thus, Wittgenstein would stop the regress one step earlier than Kant.

The law cannot be fully spelled out in advance since each explanation for how to apply a rule, principle, or concept will itself require

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207. C. LARMORE, supra note 206, at 2-3.

208. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 201 (G. Anscombe trans. 3d ed. 1958) (italics in original); see also id. § 1 ("Well, I assume he acts as I have described. Explanations come to an end somewhere.") (italics in original); S. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982). But cf. C. McGINN, WITTGENSTEIN ON MEANING (1984) (criticizing Kripke's interpretation).
explanation in novel situations or where conflict arises. Thus critical scholars' claim that we cannot provide, in advance, fully explicit metaprinciples to resolve all conflicts accurately describes a limitation of all rules of behavior, not just legal theory. The question is what attitude we should take towards this fact. Since the request for mechanically applicable metaprinciples to resolve conflicts and vagueness cannot be satisfied, we should accept our lot and give up the demand. To retain the demand would set an impossibly high standard whose acceptance in turn would invite disappointment and skepticism. To give up the demand is to be realistic.

We should accept the richness and complexity of the moral decisionmaking and interpretive methods which inform law. We may not be able to deduce legal outcomes in advance, but nonetheless we have a rational, nonarbitrary process by which we can implement the abstract demands of justice.

While this process can never be fully articulated, it can be more completely elaborated and understood. We can construct deeper and more fundamental justificatory schemes through experience, insight, inspiration, and just plain hard work. The unarticulated aspects of legal systems need not be irrational or arbitrary. Resolving conflicting principles in concrete settings or deciding cases of first impression requires judgment which may be more akin to art than to science. It is a skill requiring sensitivity from its practitioners. Judgments can be better or worse, even when we cannot yet articulate why. It is no flaw in a legal theory that it employs terms and concepts whose meanings are only fully manifest in their use and application by the appropriate linguistic community. Nor is it a flaw that judges do not write infinitely long opinions, but rather eventually act, and reach a decision. It is unrealistic to demand more. The finitude of theory and practice are not tantamount to their inconsistency and illegitimacy.

Critical scholars correctly perceive that law cannot be made fully explicit and deductive, yet misconstrue the significance of this fact. The issue of conflicting principles and the lack of explicit metaprinciples which resolve the conflict has been discussed at some length because beneath it lies critical scholars' most powerful argument for indeterminacy. The critics' attack would be more powerful if they deemphasized the demand for explicit metaprinciples and argued—not merely asserted—that the conflicting principles are either equally balanced or incommensurable. This would, of course, be difficult to prove because

209. Thus, either an infinite regress ensues, or the explanations fold back onto themselves resulting in vicious circularity.


211. Stick, supra note 156, at 362 n.130, 364 n.141.
it would have to be shown, not that some particular attempt to balance, reconcile, or combine the principles fails, but that no attempt could succeed.

A normative argument suggests that it would be difficult to establish that conflicting principles are frequently of equal weight, so that they balance to a tie, leading to indeterminacy between the outcomes urged by the respective conflicting principles. Notice that the more fine-grained one's measure of weight of principles, the fewer ties one is likely to find. Assume that there were only three measures of weight of principles: weak, moderate, and powerful. Consider cases where one principle is pitted against a single counterprinciple. If principles were randomly distributed among the three categories of weight, then we would expect ties between conflicting principles and counterprinciples one-third of the time, whenever the principle and counterprinciple were in the same category. But if there were twenty categories of strength of principles, not three, then under the assumption of random distribution we would expect ties in only one-twentieth of the conflicts.212

Since the law's function is to settle disputes, a litigant has a right to a decision in her favor if the principles that can be adduced in support of her claim are the tiniest bit more powerful than the principles against it.213 It follows that judges should employ the subtlest, most fine-grained measure of weight possible. The complexity of mature legal systems and density of their precedents and statutes have been urged in support of the claim that the measure of weight in those systems is very fine grained indeed.214

Descriptive and normative considerations suggest that critics cannot establish that conflicting principles are incommensurate or that incommensurability would lead to illegitimacy. The descriptive consideration is that we combine principles all the time. The normative consideration, which returns us to the issue of legitimacy, is that if conflicting principles were truly incommensurable or were of precisely equal weight, there would, in the end, be no reason for choosing among a number of alternative outcomes. If, however, there is no ultimate reason for preferring one possible outcome over a number of alternatives, then there can be no ground for criticizing the judge no matter which outcome she chooses. She fulfills her duty and her decision is legitimate as long as she chooses from among the set of equally good outcomes.215

212. Of course, the assumptions of equal distribution among the categories of weight, and the artificial restriction of one principle to each side are false. The lesson remains valid nevertheless under realistic conditions.
213. TAKING RIGHTS SERIOUSLY, supra note 58, at 44.
214. Id. at 286-87.
215. One could argue that the existence of judicial choice among equally acceptable outcomes or incommensurate principles shows that judicial decisions may not represent determinate
Before concluding, a few brief comments are in order concerning the instrumental use of the indeterminacy thesis to unfreeze the legal mind and encourage creative legal solutions. First, if the argument of this Article is valid and the indeterminacy thesis is false, its strategic employment will involve deception and manipulation of the audience. Even if the end is valuable, its instrumental use may not justify the disrespectful means employed. Second, if the indeterminacy thesis is perceived as false, its strategic employment will be rhetorically ineffective. Third, if believed, the thesis might enervate rather than mobilize political action. Finally, and most importantly, if judges and other legal actors accept the indeterminacy thesis, they may read this as license to decide cases in accordance with their political convictions. Given the current composition of the judiciary, this is likely to engender a more conservative legal doctrine, hardly a result in which critical scholars would delight.

CONCLUSION

I have argued that the plausibility of extensive indeterminacy derives from attention to controversial appellate and Supreme Court cases. When focus is shifted to garden variety actions governed by law, determinacy predominates. The pervasiveness of easy cases makes it implausible that there is radical indeterminacy. I have further urged that critical scholars' arguments fail to satisfy the burden of dispelling this appearance of at most moderate indeterminacy. The patchwork quilt and fundamental contradiction arguments for pervasive contradiction do not yield radical indeterminacy for two main reasons. First, the arguments do not refute plausible holistic theories which reject the claim that judicial and legislative rationales and motivations are necessarily law. Second, they fail to demonstrate the existence of strict contradiction rather than reconcilable tension. This last reason explains, in large part, why the particular contradictions between rules and standards, altruism and individualism, and free will and determinism fail to yield radical indeterminacy. The alleged contradictions between free will and determinism and between subjective and objective views of value in liberal theory are flawed because they misdescribe modern liberal theory. In short, neither the abstract explanations for pervasive contradiction nor compromises between conflicting principles. Thus, the claim that judges resolve conflicts all the time is suspect. While the logical possibility of principles being equally balanced or incommensurate must be conceded, the pervasiveness of the practice need not be. If courts frequently choose between equally good outcomes or incommensurate principles, one would expect judicial opinions to occasionally acknowledge such decisions. Yet I know of no opinion which does so.

For an argument that even if outcomes are equally good, judges should not act as if they are, but should rather strive to find a best answer, see Sartorius, *Bayes' Theorem, Hard Cases, and Judicial Discretion*, 11 GA. L. REV. 1269 (1977).
particular alleged contradictory structures demonstrate radical indeterminacy.

This conclusion is further supported by exposing three errors about legal reasoning commonly made by critical scholars. Critical arguments impoverish the premises and limit the inferential techniques available in legal argument. Moreover, they mistakenly suppose that conflicting standards can be reconciled only by explicit mechanical metaprinicples, stated in advance. This requirement of explicit metaprinicples is too demanding. Law is not mathematics, and cannot deploy only deductive, watertight methods. Law is not contradictory because its "life . . . has not been logic."216

I have urged also that moderate indeterminacy, even if true, has little or no consequences for political legitimacy because only rarely will anyone's obligations depend upon whether law is determinate. This conclusion emerges from a systematic consideration of the relevance of determinacy for each of the commonly alleged grounds of political obligation. For each such ground, with only occasional exceptions, I have claimed that either the ground fails to obligate or else it obligates even where law is indeterminate.

But where does this leave the issue of indeterminacy itself? Is it simply irrelevant? Not at all. Radical indeterminacy may vitiate legality, as Fuller argues.217 It may betoken that in fact no legal system exists. Moderate indeterminacy, in contrast, is compatible with legality. But it serves to put us on inquiry. Why is this rule, area of law, or entire legal system indeterminate? It may be to allow flexibility in application, given our inability to determine the ramifications of unforeseen circumstances, as the due care standard in negligence law is said to do.218 Or it may be because the requirements of justice are inherently abstract, or simply because no authority has had the need or the occasion to resolve the indeterminacy. On the other hand, indeterminacy may be a cloak for partial or arbitrary action. In short, indeterminacy may exist for any one of a myriad of reasons. It may, on occasion, be the visible manifestation of serious trouble at a deeper level. But we must engage in a contextually sensitive inquiry into the reasons for the indeterminacy before reaching that grave charge. No blanket condemnation—or celebration—of indeterminacy is possible, or desirable.

218. H.L.A. Hart, supra note 183, at 129.