RETHINKING LEGAL EDUCATION*

BY ANTHONY D'AMATO**

The time has come to rethink legal education. I contend that it lacks a soul—a soullessness that is a consequence of our absorption in and preoccupation with the words of the law and how those words (and their meanings) are manipulated. Law schools’ focus on “law-words” is more than a glorification of gibberish. It tends to convince students of two things: that words are talismanic keys to the kingdom of wealth and prestige, and that morality does not count. Students learn in the space of three years that “good” legal arguments can be adduced for either side of any case and that what wins lawsuits is the most sophisticated legal argument—not what is right, true, or just. The students, in short, absorb the lesson of moral relativism, and it stays with many of them throughout their careers as practitioners.

After my attempt to substantiate these bold charges, I shall recommend a sea change: that law schools should deliberately turn away from the study of law-words and instead study justice.¹ I will contend that justice is the only legitimate goal of the legal profession, and therefore the only legitimate goal of law school study. Law schools should teach students how justice may be achieved through the words of the law by showing them how to see right through the words to the underlying normative concepts of morality and justice. For these normative concepts are the only concepts that really count—in life and in law. Law schools need to turn away from their presently technocratic mode—the teaching of instrumental proficiency through law-word absorption and manipulation—and turn to professionalism.

I acknowledge that a change of focus from law to justice might tilt law school education to the idealistic side as compared to the workday practice

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1. David Barnhizer reaches the same conclusion—that law schools should begin focussing on justice—for reasons quite dissimilar to the ones I give in the present essay. See Barnhizer, The Revolution in American Law Schools, 37 CLEV. ST. L. REV. 227, 263-64 (1989).
of law (where achieving justice may sometimes be looked upon as a luxury that a practicing lawyer cannot afford if the firm's rent is to be paid). Yet I believe that this is a small price to pay for at least four benefits of focusing on justice: Such a focus will make the study of cases in the classroom more relevant and exciting; it will eventually produce better lawyers ("better" in the sense of more efficacious, though perhaps morally better as well); it will restore a sense of normative worth for law professors; and it will impart a sense of professionalism to the practice of law.

To say that these propositions require proof is, of course, an understatement. Since I cannot do the topic justice in the space of a law review essay, I must rely on some previous writings to help fill out my present argument. My citation of these other publications is never intended as substantiation, but only as supplementation. Additionally, I want this essay to be a personal statement. I will refer to some of my own experiences as a teacher and active litigator. I may at times appear to be writing more from the heart than from the head, and if so charged, I plead guilty. Although the propositions I put forth in this essay are bold, they may have the curious virtue of incompleteness. You will not find here the typical "definitive" law review article. Quite the opposite, this essay is deliberately open-ended. Please send your comments and criticisms to this Review. The editors have agreed to print all the correspondence in a future issue,² and to give me the opportunity to respond. In this manner the ultimate content and shape of the present essay will be a function of our joint efforts.

Let us begin by asking: Compared to what is legal education not doing its proper job? The model for comparison that I offer is the apprenticeship system that predated law schools. Although we can only revisit the rough features of that model in our imaginations, I think the picture will suffice as a benchmark to begin evaluating what law schools are doing today.

I. THE PAST

We go back a century or two. We see a young man with a good mind who wants to become a lawyer. (Alas, there were only male lawyers at the time, so I will not be using the pronoun "she.").) The young man finds a practicing attorney who is willing to take him on as an apprentice.

Does the attorney give the young man homework reading assignments, ask him questions about the reading on a daily basis, and then periodically administer written examinations? Clearly not. No such "law school"

². Provided that they meet the editors' standards of usefulness, seriousness, and/or scholarship.
model ever existed in the apprenticeship era. The practicing attorney was too busy to engage in that kind of abstract education. Instead, the young man shows up and immediately tries to learn as much as he can while making himself useful to the attorney. He sits with the attorney and takes notes as the latter interviews clients and asks them questions. The young man serves as general clerk and secretary, rewriting in a careful hand Mrs. Smith’s will and Mr. Perkins’ proposal for a joint venture. Suppose a client has to execute a deed. The attorney might give the young apprentice a book to take home with him that evening, Deeds on Conveyancing. The apprentice duly reads and studies the book, and attempts to familiarize himself with the existing law on conveyancing. The next day he shows up bright and early at the firm, and learns that much of what he read in the book, is unnecessary and misleading, although not all of it. “The way we handle conveyances in this firm,” explains the attorney, “differs in important respects from what you can find in books. I want you to read the books to get a general view, but read them with a skeptical eye. Then come in and learn the way we really do it.”

The apprentice accompanies the attorney to a meeting of the town’s governing body. The apprentice learns firsthand the way legal advice is given to political bodies. He gets to know the important leaders in the town. He sits by the attorney’s side in meetings of boards of directors.

Sometimes the apprentice has to copy a brief written by the attorney. The copying process helps him become familiar with the issues in the brief. As he learns more about how law is practiced, he makes suggestions—“here is one of the cases you asked me to read last night that I think we should cite in the brief,” or “I thought of an argument that the other side might make.” He attends negotiations and courtroom trials, and learns by observation and limited participation how the attorney operates.

If we try to characterize the “message” that the apprentice receives about the practice of law, it might go as follows: An attorney tries first to help people avoid problems, or, if necessary, to help them deal with problems that have arisen. This characterization—either implicit or explicit in everything the attorney does during the day—tells the apprentice the “what” of the law. As his apprenticeship proceeds, he increasingly learns the “how” of the law. Another message he absorbs with time is the “why” of the law. The mere avoidance or solution of problems is not enough to make law a profession. Surely, one should be skeptical about the mere desirability of avoiding problems—perhaps avoiding them may be a bad idea, resulting in a more boring life. Thus, if the apprentice were to ask the lawyer the “why” question, the lawyer might respond: “An attorney tries, in his limited way, to promote justice. If client comes in with a fraudulent scheme in
mind, like Mr. Johnstone the other day, you noticed I tried to talk him out of it. If a client wants to take unfair advantage of another person, I try to show him the disadvantages of that course of action—and I don’t shy away from telling him that it is not morally right, if he’ll listen to that line of argument. I would certainly try to tell him why the course of action may backfire on him. But also, as you’ve noticed, if a client comes in with a just cause—if our client, the Presbyterian church, has been swindled, or if Mrs. Thompson has been hurt by a carriage that was negligently manufactured—then it is our job to obtain redress for our clients in whatever official forums are available. Even if the law seems to be stacked against clients who have a just cause, we have to figure out a way to turn it around and make the law work for them."

I am not trying to paint a Pollyannish picture of the past. There may indeed have been attorneys whose goal was to acquire wealth by advising clients in the techniques of fraud. Rather, I am attempting to reconstruct what an attorney might say to his apprentice that would appeal to the apprentice’s sense, and to our sense as well, of why the practice of law is morally worthwhile. If the apprentice decided to become a lawyer because he felt that he wanted to be part of a noble profession—because he wanted to do some good in the world before passing on—then I think the attorney might tell the apprentice something along the lines of the foregoing. I do not think this general characterization is historically inaccurate. In the United States, at the time of the adoption of the Constitution, lawyering was regarded as a noble profession; indeed, it was lawyers who wrote the Constitution.

The most important aspect of my picture of the apprenticeship system, so far, is what has not been said. I have said very little about “law.” The “content of the law” is not what is important in the master attorney’s daily practice; what is important is people and their problems. “Law” is just a

3. A fictitious attorney-client conversation along these lines, which I offered to throw light on the possible underlying reasons for the court’s decision in a famous case where a beneficiary of a will murdered the testator, was the subject of an earlier article of mine. See D’Amato, Elmer’s Rule: A Jurisprudential Dialogue, 60 IOWA L. REV. 1129 (1975), reprinted in A. D’AMATO, JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW 93 (1984).

4. I said the equivalent once before in an article that has been widely cited and almost as widely misinterpreted:
The Moment of Truth for a practicing attorney occurs whenever a prospective client tells a story that seems morally compelling but legally hopeless. That is where the attorney’s legal research should begin, not where it should end. Too much injustice persists in the world because tired legal thinking has accepted unjust patterns as inevitable.

D’Amato, The Decline and Fall of Law Teaching in the Age of Student Consumerism, 37 J. LEGAL EDUC. 461, 493 (1987).
set of tools that can be utilized to help people avoid or solve their problems. Yet, as we will see later, the "law" that is left out of my account of the apprenticeship system is mostly what is put in to legal education. In essence, that is what is distorting and soulless about legal education.

To the busy practicing attorney, law is nothing more than a set of tools. He does not devote excessive time to the study of these tools. Rather, he is in the "people" business, the "problem avoiding" business, the "problem solving" business, and the "justice" business. His day is full of these concerns. He does not study "the law" in general, and only "keeps up" with legal developments that are very close to the areas of his practice. Nor does he want his apprentice to be the equivalent of our modern computer-retrieval systems, having a head full of legal rules, many of which are wildly inapposite even if superficially relevant. Rather, he wants his apprentice to learn how to help people avoid problems, solve the problems that have come up, and achieve overall justice. Achieving overall justice is not only good for business (the lawyer's reputation for probity in the community will redound to his financial success), but indeed constitutes the reason why the practice of law can be morally self-fulfilling.

Since the point I am making—that law is simply a tool and not an end in itself—is so critical, allow me one other analogy to days of old. Consider an apprentice to a master carpenter. The master carpenter does not spend more than the briefest amount of time introducing the apprentice to the tools of the trade. He doesn't quiz his apprentice on the theory of different kinds of sandpaper. Instead, the carpenter says, "Here, rub this No. 3 sandpaper this way, with the grain of the wood, but keep checking it against the light to see that it is flat." The apprentice completes the task, and the master carpenter says, "Now you want a finer finish. So look for some sandpaper with finer sand on it." Thus the apprentice learns the actual uses of sandpaper, as well as how to use the file and plane to put a smooth finish on the wood. He learns the uses of these and other tools all for the purpose of helping the master craftsman turn out actual pieces of furniture. The "best" tool for a particular job is primarily a function of what the job ought to be, and secondarily a function of what tools are available. It is in the conceptualization of the job that the apprentice learns how to become a

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5. It is noteworthy that although LEXIS® and WESTLAW® have opened up ways of retrieving precedents that would have been lost and buried under older categorization procedures, there has arguably been no net gain to society. Since attorneys for both sides of a case have access to these computer retrieval systems, the result is simply more law-words to cope with as an input in any given case. There is no readily discernible effect upon truth or justice.

6. Many lawyers today, in their 40's, report a sense of burnout. They have achieved success as lawyers, but they wonder if they have contributed anything to society.
master craftsman. A particular table, for example, is being designed for Mrs. Field's living room. She is tall, so the table must be higher than average. She wants a drawer under the tabletop for papers and wants to be able to sit at the table; thus the legs of the table must be free standing and not reinforced by crossbars. Oak would be the best color for the living room, but because oak is one of the hardest of woods, the construction of this table will take twice as long as normal—this has to be figured into the estimated price. Most important of all, the table has to be aesthetically pleasing. It is almost impossible to teach the apprentice aesthetics, but hopefully the apprentice will show an aptitude for it (if not, the apprentice will probably not become a master craftsman). If the apprentice has an innate sense of aesthetics, then the most important thing he can learn from the master craftsman is how to make fine judgments between this alternative and that one (i.e., what this piece of wood will look like when stained, and how strong it is compared to that wood, and whether existing tools can be effectively utilized to achieve the final "look" that is desired).

Neither for the law apprentice, nor for the carpenter apprentice, are the tools the important thing. To focus excessively on the tools would be to distort the mental processes of judgment that must be brought to bear in the successful discharge of the profession. The apprentice carpenter soon discovers, for example, what can best be done with a plane and what can best be done with sandpaper, but he also discovers that if one isn't available you can get along fairly well, although less efficiently, with the other. But it is not by studying sandpaper that he becomes a master craftsman. Rather, it is by studying the problems that people have (Mrs. Field wants a nice looking, serviceable table), and the goals he wants to achieve on their behalf (pleasing her by presenting her with an aesthetically pleasing yet durable and functional table), that he can look forward to a successful and satisfying career as a master craftsman. Mrs. Field is only interested in the resulting table; she has no direct interest (though she may be interested for other reasons) in the tools that were used to do the work.

Professions and crafts are properly judged by the results they produce, and not by the techniques that are brought to bear in producing those results. Yet we see in many aspects of present-day life examples of runaway technique. Consider the pianist in a restaurant or night club who has a dazzling technique, but who produces boring music. Keyboard virtuosity is no substitute for "soul"—for the kind of musical ability that understands what moods and ideas the composer was trying to achieve and how to read
and interpret the composer’s score to recapture those emotions. We see student editors publishing law review articles apparently on the sole basis of the impressiveness of the lengthy footnotes—the trappings, but not the substance, of scholarship. We purchase technologically sophisticated word-processing systems only to discover that the instruction manuals are incomprehensible, incoherent, and disorganized. The manuals give us no sense of what the typical user wants the software to do. Rather, the manuals strive to tell us everything at once that the software itself can do—a glorification of technique over substance. The computer instruction manual is a lot like law school, which teaches students all kinds of forgettable things about the law itself and little about what lawyers need it for.

When, many years ago, the legal apprentice system was gradually replaced by law schools, what happened was that students were taught “the law” in abstraction. Although “cases” were read, the facts of those cases were taken as stated by the courts (which present a highly selective and often misleading picture of the actual facts). In contrast, the apprentice had learned the facts of cases by daily contact with clients. Students in law school get only a truncated and highly selected version of the facts. Moreover, law schools considered it to be entirely irrelevant what happened to the parties after the case was handed down (Did they settle? Did they continue to litigate? Was the judgment ever paid? What effect did the case have on their lives?). In contrast, the young apprentice lawyer had to live with the effects of his legal work on his clients. He had to “follow through” in the lives of his clients, not only because he was dependent upon them for his livelihood but because any legal work he did for them was only part of their general situation. No case was “discrete” in the sense that law stu-

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7. I agree with Stanley Fish that the author’s “intent” does not constrain how we should interpret her work. See S. Fish, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERACY AND LEGAL STUDIES 259-96 (1989). Rather, we need some conception (even if not the true one) of the author's intent in order to read the text (or composition) in a meaningful way. For example, I have heard many recordings of great pianists interpreting Chopin in wildly divergent ways. I have no idea which of them, if any, interpreted Chopin the way Chopin wanted to be interpreted (or perhaps in the way Chopin himself played his compositions). But I do have very strong convictions that some interpretations are far better than others. I would assume (call it a pious hope) that Chopin would have agreed with me.

8. To carry the analogy further, the law school curriculum is as disorganized as the computer instruction manual. Much of the disorganization is due to the abdication of law schools to the consumer marketplace, allowing students to pick and choose courses in any order so that, for any given student, there is no progression in the learning process. Higher-level courses spend half the semester reinventing the wheel, when instead—if there were a rational progressive system in the curriculum—those courses could begin at a more advanced and exciting level. Lack of overall curricular rationality is perhaps one important reason why law students are increasingly “turning off” in their junior and senior years.
dents read cases; nearly everything about the practice of law was, in Ian Macneil’s sense, relational.9

Perhaps the first thing that went wrong with law schools was the fact that they were given the name “law school.” (Things might have turned out differently had they been called colleges of justice.) The name “law school” gave rise to an expectation that this was a school to which a person could go to “learn the law.” At that point, self-defined academic concerns began to reconceptualize what “learning the law” meant. Professors began to write textbooks on what “the law” consisted of, and to sell these books to their students as required reading. To ensure that the students read the books, the professors quizzed the students on their ability to regurgitate the rules contained in the texts. Students “fought back” by inventing the law review, where they could accept or reject professorial essays. A revolution of sorts was accomplished by Christopher Columbus Langdell,10 calling for the replacement of textbooks by appellate court opinions, which served as the new texts. Since this took a source of publication away from the law faculty, they countered by compiling casebooks with cases and excerpts from appellate court decisions. New texts—hornbooks and nutshells—were written to explain to the lazy student what the cases meant. Finally, today, casebooks and texts are merging. We are seeing more and more editorial notes and comments in “casebooks,” and fewer and fewer cases. The cases that are presented are severely truncated, and—what is the worst development of all—the “facts” are often omitted.

Law schools occasioned an explosion of legal writing. Every published essay potentially gave birth to a host of competing critical essays. Much of the writing concerned the interpretation of legal texts, and the theories that could be invented and used to construe those texts. Theories spawned more theories. At the present time, to exaggerate only slightly, a single case or statute is significant only because it instantiates—or in the alternative repudiates—Hobbes, Hegel, Hume, Habermas, Heidegger, Heisenberg, Hayek, or hermeneutics.11

11. One of the costs of excessive theory-spinning in law schools is that there seems to be a shift away from practical experience as a qualification in the recruiting of new professors. Many professors begin in law school with experience only as a clerk to a judge (where there is practically no contact with the real-world problems and choices of real-world clients). They are soon judged by their ability to turn out theoretical essays in their first couple of years as professors. Wouldn’t it be wonderful if law schools gave entering professors an immediate one-year leave of absence to do pro bono litigating work (at the full salary of an entering professor) in public interest cases? Such actual litigating experience might do as much good for the professor’s future sense of the reality of law as it might do for the pro bono clients.
Instead of learning, as through the apprenticeship system, that law was a set of tools whose function was to help people avoid or solve problems in the interests of societal justice, students began to be examined on their mastery of the content of the tools themselves. The result was a wrenching distortion of what "law" is all about. Yet I must make it clear that I am not advocating a return to the apprenticeship system. Law schools historically have played the immensely important role of destroying the "old boy" network of legal apprenticeship and opening the legal profession to all persons. We are a much more egalitarian society as a result of the law school movement. Nor am I necessarily advocating an expansion of "clinical education" in law schools or the "legal skills" movement. My present concern is not with techniques of teaching but with justice as an organizing principle that could realign the way we teach substance as well as technique.

At this point a reader might make two critical comments, which I label "cynical" and "extra." The cynical argument, one version of which I heard expressed in a meeting of students last week at Northwestern, was "Let's assume that you learn absolutely nothing in law school. Your $45,000 tuition is still worth it because it gets you a Northwestern diploma, which is your ticket to a high-paying job with a major law firm." Another spin on the cynical view is that law schools are socially important because they slow down by three years everyone who wants to become a lawyer, even weeding out a few along the way. Bar associations would not dream of abolishing law schools because of the flood of new entries into lawyering that would ensue, driving down existing quasimonopolistic fees.

Whether or not these cynical views appeal to some academics, I am confident that they do not appeal to anyone who cares enough about legal education to read an essay on the subject. I assume that my readers (both

12. There are many things about clinical education that I admire. In 1968, I joined several other colleagues in advocating the establishment of a serious full-time clinical education program at Northwestern Law School; our lobbying efforts were successful, and so has been the clinic that resulted. But the way clinics in general have fitted into the overall legal educational enterprise has been, in my view, inimical to the benefits that they could have conferred upon our students. It is as if they have been corrupted by their association with the aimlessness and lack of soul of the normal curriculum. To give just one example (because this is not an article about clinical education): Clinics tend to select their real-world cases for their "legal" instructional value to students, and not because a client has been the victim of a clear injustice.

13. I am all in favor of using simulation for classroom teaching, of classroom advocacy training including hypothetical cases, (a technique I helped introduce in B. WESTON & R. FALK & A. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK (2d ed. 1990)), alternative dispute resolution exercises, interviewing, counseling, negotiation, etc. But all of these techniques need the same focus on justice, in my opinion, that I urge for the law curriculum as a whole.
of them) would not be in legal academia if they didn’t care whether what they are doing has intrinsic value. Therefore, with some confidence, I simply mention the cynical arguments and then drop them as irrelevant to the present enterprise.

The second kind of criticism could be labelled the “extra” argument. If three years of legal education are spent in largely ineffectual or misguided studying, our students become apprentices anyway by apprenticing themselves to the senior partners in a law firm. So perhaps we should look upon law training as a pre-apprenticeship “extra” and not worry too much about its content.

But the answer to this argument is that the true apprenticeship system is no longer available. There are no longer any traditional attorneys out there who themselves learned law through the apprentice system. Every attorney in legal practice today and every sitting judge who is a lawyer is a product of a law school education. None of our students can get the equivalent of a classical apprenticeship after graduating from law school.\footnote{For students who “hang up a shingle” directly after law school, there is no further education in the law at all (except for bar-mandated continuous legal training courses).} They are only getting an experience that is skewed by senior attorneys who themselves were the product of a similar law school education.\footnote{Aggravating the problem is the increasing specialization of attorneys. In large firms it is practically impossible to practice holistic law—the client’s problem is divided and subdivided and parcelled out to specialists in the firm. A more holistic practice would appear to be possible for in-house corporate attorneys, but while they may get to “know” the corporation over a long period of time, the corporation is an abstraction. To some extent in-house counsel get to know long-staying management personnel in the corporation (and often handle their personal problems), but the representation of such personnel is somewhat skewed because it always has to be checked and balanced against the attorney’s primary duty to the corporation. Of course, a small number of small-town general attorneys still practice holistic law, but their number is declining and even their clients are increasingly going to the nearest big city to find attorneys for their more important problems.} The law school experience thus perpetuates itself. Law schools have, over time, unalterably affected everyone’s perceptions about what “law” consists of because no lawyer today has begun the practice of law uncontaminated by a law school education. Hence, law schools are not simply an add-on to the old apprenticeship system, but a total—and alien—substitute for it.

So far I have argued that by focusing on tools rather than on real-world practices and goals, law schools distort and misdescribe for students what “law” is for and what it is all about. But if this were all there were to the story, it might be considered to be weak tea. A skeptical reader might shrug her shoulders, and say: “So learning how to be a lawyer has changed from the way it was a couple of hundred years ago—what else is new?”
To answer the skeptic's challenge, I must turn from the past to the present.

II. THE PRESENT

My charge that law school education lacks a soul is in part evidenced by numerous symptoms of discontent in the legal academy. Consider the plethora of "law and" courses that increasingly fill our curriculum. These courses couple law with subjects as diverse as literature, economics, sociology, political science, psychology, philosophy, and medicine. Moreover, there are courses whose purpose is to attack other courses, such as Critical Legal Studies and Feminist Jurisprudence. I have no criticism of any of these new courses as such. Rather, I welcome them and have on occasion taught some of them. But their proliferation is a sign that collectively we are groping for a cure for educational malaise and aimlessness.

In addition, students are coming to class less prepared than in past years, and are increasingly cutting classes when they can get away with it. They are also beginning to work in law firms the summer after their first year in school, and many of them continue to work at the firm on a part-time basis (but nevertheless logging a great many hours) during their second and third years of law school. When they are engrossed in law-firm work (which is often a form of glorified paralegal practice), they can hardly devote their attention to what is going on in class. There is scarcely a law school not characterized by third-year apathy, and this apathy is spreading at an alarming pace into the second year.\(^\text{16}\) Students are increasingly coming to law school with a jungle-realist attitude firmly in place: that they are going to law school primarily to find their first job and that everything else is just a matter of hurdle-jumping (getting adequate grades, passing the bar examination). A typical student's attitude might be: "law school is just one more obstacle they've put up in the way of my right to go out and practice law."

\(^{16}\) This apathy may be in part the result of the failure of law schools to prescribe curricular sequencing and building. I know from personal experience that even if a faculty chooses to adopt a rational sequencing curriculum, it may be undermined by individual faculty members (exercising "academic freedom") to allow students into their courses who have not taken the prerequisite course. The result is that each course, no matter how ostensibly high the level, must reinvent the wheel in order to accommodate the students who did not take the prerequisites. If it were politically possible to establish a tight sequencing program with no deviations, I suspect that the upper level classes would be more exciting for the students (who will be dealing with more intellectually challenging material) as well as for the professors (who might finally be able to teach at the level of their own research).
These and other observations that could be adduced add up to a very real educational crisis. In my view, legal education has lost its mooring and is adrift on a horizonless ocean. We are in the midst of enormous "paradigm shift," as Steven Winter has called it.\textsuperscript{17} It is scary, because no one can see where it will end.

Fortunately, at least in my view, there is one dominant reason for the malaise. Although still perhaps subconscious in the academic community, it is daily becoming more noticeable. It is summed up in the word "indeterminacy." It is the growing, gnawing realization in the collective professorial mind that \textit{law does not matter in the decision of cases}. As the collective academic mind becomes more and more convinced of this proposition, brutal and fundamental questions will be raised about why law is studied at all. This is the paradigm shift that Professor Winter has described, and this I submit is the root cause of the present malaise about legal education.\textsuperscript{18}

I hasten to say that indeterminacy is \textit{not} tantamount to asserting that it does not matter which way any given case is decided. (That would truly be frightening!) Yet some mainstream scholars accuse indeterminists of nihilism; they say that indeterminacy stands for "anything goes" in judicial decision-making. But their view is a perversion of the indeterminacy idea. It stems from their mainstream conviction that if law doesn't constrain the results of cases, then \textit{nothing} constrains those results. But surely this is not true, neither logically nor empirically. The indeterminist maintains that while \textit{law} does not constrain judicial decisions, normative factors ought to, and do, exert constraint upon judges who are sensitive to moral values. Cases ought to be decided according to justice and fairness. Nothing more or less than \textit{justice} ought to constrain the results of cases. Indeed, upon reflection, justice as a normative notion \textit{means} that we can properly use the word "ought" in the preceding sentence. In contrast, "\textit{law}" is not normative—it is a fact (a fact concerning certain markings in ink in certain books that we interpret as having certain meanings). These markings in and of themselves cannot have any morally compelling role to play in the decision of cases. Only those inked markings whose meanings track \textit{normative considerations of justice} have any claim upon our decision-making, and then


\textsuperscript{18} David Barnhizer says that the present malaise in law teaching is the result of the shattering of the "myth of science" which has led to "idiosyncratic fragments of challenge to mainstream articulation of primary interests" instead of the old "linear sense of shared scientific or rational progress." Barnhizer, \textit{supra} note 1, at 246. I suspect that people felt exactly the same way in 1870 (reconstruction), 1890 (pragmatism), 1910 (special relativity), 1930 (quantum theory), 1950 (ordinary language philosophy), and 1970 (flower age children). There is always a sense that the old ways are shattered, that the younger generation has brought chaos to the academy.
only because—and to the extent to which—they track and reflect our sense of justice. It is only the justice component that is (usually) found underlying law-words that can exercise any normative pull. 19

The germ of the idea that law-words themselves do not in fact constrain judges was planted by the American legal realists in the late 1920s. It became the dominant theory by the 1950s, yet was somewhat half-hearted (it still lacked a strong philosophical base). Many law professors only gave it lip service. Realism went into decline in the period roughly from 1960 to 1980, but then the pendulum started to swing back in the realist direction, fueled at first by the critical legal studies movement, then by feminist jurisprudence, and now by the more politically neutral deconstructionist and indeterminist movements. I call this present form of legal realism “Pragmatic Indeterminacy” and have attempted elsewhere to sketch its history and main features. 20

My best brief statement of the core idea of Pragmatic Indeterminacy is the following: If we regard the law as all the law-words written in all the law books (case reports, statutes, monographs, retrieval computers, graphs, mathematical formulae, economic theories, philosophical theories—anything in a law library), 21 no conceivable organization of any or all of these law-words will constrain a judge to decide any given case a particular way. The judge can always “find” a meaning in the words that will favor whichever party to whom the judge wishes to grant the decision. No matter how “clear” the statute and no matter how much it strikes us as “applicable” to the case at hand, the judge can always state and interpret the facts of the case in such a way that they do not appear to come under the statute or that they appear to constitute an equitable exception to the statute. Moreover, a judge can select those facts favorable to one side and downgrade or even omit those facts that would suggest that the other side should have been

19. If a judge is bribed, corrupted, or has an undisclosed material conflict of interest, is dishonest, is extremely lazy, or the like, then “justice” arguments may not work. But even then, the only argument that has any chance of working is a “justice” argument. If compelling enough, then a strong justice argument may overcome a mild case of corruption.


21. When I say “law-words” I include, of course, the meanings that we attribute to those words. That two people may attribute different meanings to the same word is nearly a truism of twentieth century philosophy. But there is no point in concluding, from this truism alone, that there is no such thing as a meaning that each of us attributes to words. See, e.g., Searle, Indeterminacy, Empiricism, and the First Person, 84 J. PHIL. 123 (1987).
awarded the decision.\textsuperscript{22} Even if the facts are conceded (as in a stipulated set of facts), the facts as stated still need to be interpreted. By emphasizing some facts and downplaying others, the judge can put her own "spin" on the facts. Finally, the judge is free to interpret the rules of law that both parties serve up in briefs for her to choose from. Since the briefs will state opposing rules of law (or opposing interpretations of the same rule), the judge's job is easy. She simply has to choose the brief of the side she has selected to win the case. That brief will contain a ready-made rationalization of the result that the judge has chosen to reach. Isn't it ironic that we spend three years teaching our students to come up with the best legal brief on their client's side of the case—in full knowledge that other law schools will teach their students to come up with the best legal brief on the other side of the case—when the net result of all this teaching and effort is to present the judge, on a silver platter, two utterly conflicting, but excellent, legal rationales for whichever side the judge chooses to win the case? We may be actually encouraging judicial arbitrariness by all this effort. The judge simply picks the side she wants to win, and then instructs her clerk to incorporate that side's brief in writing the rationalizing opinion.

To be sure, some people may claim that the judge's decision is "wrong on the law." (Years later, law students may say it when they read her decision in their casebooks.) But others (including the judge, and the winning party) will say that the decision was "right on the law." There is no process for resolving this matter, for even an appellate court, including the Supreme Court of the United States, can be criticized for having reached a decision that was "wrong on the law." Thus, all of this kind of criticism, in my view, is misguided. I realize that this is one of the boldest statements in the present essay, for maybe 90\% of everything that appears in law reviews and law journals is devoted to evaluating decisions as either right or wrong on the law.\textsuperscript{23} When we use the words "right" and "wrong," what we really mean—and what we can only mean if we want to avoid nonsense—is morally right or wrong. Any use of "right" or "wrong" to apply merely "to the law" (as Dworkin uses them in his "right answer" thesis) is, and must be, parasitic upon the moral content that we have learned to invest in those words. Such use confuses and muddies the precision of our language and

\textsuperscript{22} See, e.g., D'Amato, The Ultimate Injustice: When a Court Misstates the Facts, 11 Cardozo L. Rev. 1313 (1990).

\textsuperscript{23} To a large extent, this furious publishing activity helps student editors become even sharper manipulators of law-words. Hence, even though much of this law-journal outpouring may have no effect whatever on the real world, it may be a (rather expensive) way of teaching students and professors to become better manipulators of legal language by rewarding them with seeing their writings published.
our thoughts. (The next time you get really angry about a judicial decision, ask yourself whether your criticism that the decision “is contrary to the law” is not really based on your conviction that the decision was in fact contrary to your deepest sense of justice. You are only criticizing the decision in conventional legal terms because that is the standard, normal mode of criticism of decisions. But what motivates you to say that the decision is “wrong” is your sense that it was an unjust decision—even though you don’t say this in your analysis because our currently preferred mode of legal analysis does not encourage saying it.)

Many scholars (and judges) object that legal realism and pragmatic indeterminacy amount to saying that judges simply use the law to rationalize results that they have reached by other means and that such a characterization of their decision-making processes is empirically inaccurate. They say that most judges do not first decide which side to award the decision to and then rationalize the result. Rather, they claim that judges listen to the legal arguments and then decide the case according to the law. Indeed, the Pragmatic Indeterminist may concede that many judges believe they are constrained by the law. But Pragmatic Indeterminacy challenges whether they are in fact constrained. The philosopher who has looked most deeply into this matter is Wittgenstein.24 As Saul Kripke has explained, there simply can be no behavior that is truly constrained by any specific rule.25 The

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24. Wittgenstein is generally conceded to be the greatest philosopher of the twentieth century, but most people think that Wittgenstein simply contributed to the growth of “ordinary language philosophy.” Some people know that in his first book, L. WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (1922), Wittgenstein demolished the basis for metaphysics. But only a few people have recognized that Wittgenstein’s most important contribution is also of revolutionary importance in our daily lives—the downfall of the notion of “following a rule.” The essence of the idea is contained in L. WITTGENSTEIN PHILOSOPHICAL INVESTIGATIONS § 202 (Anscombe trans. 1953): “[i]t is not possible to obey a rule ‘privately’; otherwise thinking one was obeying a rule would be the same thing as obeying it.” This simple sentence contains what I think is the most significant truth in all philosophy. It is extraordinarily difficult to understand, but once it is understood, Wittgenstein’s immense revolution in human thought can be glimpsed. Wittgenstein’s position (encapsulated in the sentence) entails many significant consequences for law. For one thing, it would dismiss as nonsensical the “internal aspect” of rules championed by H.L.A. HART, THE CONCEPT OF LAW (1971), and generally thought of as essential to our understanding of law. More than that, it demolishes all of legal positivism (the notion that law is a command, the idea that there is in each state a “sovereign”). It pulls the rug out from under all claims by judges that they are “constrained” by existing law to decide cases a certain way. But it also opens up an entirely new approach to the idea of legitimacy and the basis for statutory interpretation. I feel safe in predicting that the next few decades of legal scholarship will be characterized as an effort to come to grips with the consequences of the Wittgensteinian revolution.

25. No matter what the rule, any fact is compatible with a reinterpretation of that rule, and there is no “fact of the matter” that rules out any reinterpretation. See L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953); S. Kripke, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982).
reason for this is that we (and judges) are always free to reinterpret the rule in such a way as to justify any decision we want to make.26 We can say: "Yes, Rule X applies in this case, and it has always applied to cases like this one, and we are not deviating from it at all; but properly interpreted, Rule X is in fact slightly different from what meets the eye." To be sure, such reinterpretations may strike the reader as "weird" and hence unjustified. For example, I wrote an article recently that characterized Judge Edwards' view of the constitutional provision "Judges shall hold their offices during Good Behavior" as if it read "during Good or Bad Behavior."27 Judge Edwards' reading, I contended, simply made nonsense out of the Good Behavior Clause. But I am only a writer of law review articles; Judge Edwards is a sitting judge. If in a case that comes before him he were to hold that the Good Behavior clause means "Good or Bad Behavior," his word will be the final one.28 He will win and I will lose, no matter how "weird" I think his interpretation is.29 The more I argue that his view is "weird," the more he can reply that I simply do not understand the law.

Pragmatic Indeterminacy is not "nihilistic"—it does not claim that judges totally disregard the law.30 The reason that judges do not simply

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26. Technically, Wittgenstein has shown that any stated rule cannot constrain behavior because the rule can be reinterpreted to be consistent with any behavior of the actor's choice. See Yablon, Book Review, 96 Yale L.J. 613 (1987) (reviewing S. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982)).


28. There is always a theory available to Judge Edwards to support his result. Suppose the case involves a judge accused of deciding cases invariably according to which lawyer gave him the most money for his judicial campaign. Judge Edwards can fashion a theory to the effect that, under our present political system, a state judge is free to raise money for his campaign. The Good Behavior Clause must be construed in accordance with the American political process, which allows the popular election of judges.

The world is full of rationalizations and reinterpretations. Endless amounts of ink can be spilled spinning them out. Pragmatic indeterminacy says, in effect, "Wake up—the law is never going to force a judge to decide a case a certain way if the judge wants to decide the case the other way!"

29. A famous example of a decidedly "strange" interpretation issued from on high is Wickard v. Filburn, 317 U.S. 111 (1942). The question was whether Congressional power to regulate interstate commerce applied to home-grown and home-consumed wheat. The Supreme Court said "yes" because a farmer's consumption of his own home-grown wheat meant that some other wheat that might have moved in interstate commerce to supply the farmer's personal consumption needs would not in fact move in interstate commerce because the farmer had no need for it!

30. Pragmatic indeterminacy does not say that statutes and cases have no effect on public behavior. The "law" has an immense effect on aggregate social conduct: raise the speed limit on highways and the average vehicular speed goes up, institute taxation and a large number of people will pay taxes. What those of us who teach law have to disabuse ourselves of is the notion that the law determines the way a judge will rule in a given case. The law may help us predict the way a judge will probably rule, but it cannot determine the way a judge must rule.
dismiss law out of hand is that the law contains within it a great deal of accumulated wisdom about justice. Many, although certainly not all, judicial precedents reflect an attempt to be fair and just to the parties. Many, although not all, judges feel an obligation to be fair and just to the parties. Therefore, for these judges, the law-words of statutes and judicial precedents have an important role to play. I have argued that these "law-words" act as a heuristic device to help the judge's thought processes in calling, collating, and sorting out relevant justice factors.31

Ordinary citizens take the prescriptions of the law into account in reaching their decisions in daily life, but they implicitly have to guess how some future judge might interpret those prescriptions in light of the particular fact situation.32 Often citizens are guided by their own sense of justice; for example, they may not know the intricacies of the criminal code, but they can tell when an act is right or wrong.

Of course, judges will give reasons why a result was reached. These reasons will almost inevitably be of the type: "the law admitted of only one result." The decision will then explicate "the law" that apparently constrained the judge. Judges tend to avoid talking about fairness or justice because those terms seem subjective. Judges want to make it appear to the litigants that their own judicial preferences did not enter into the decision—the decision reached was a scientific, objective result of finding and applying the law. By clothing the decision in neutral sounding law-words (often available in byte-size chunks in the winning side's brief), the judge succeeds in diverting the losing party's expectable dissatisfaction with the verdict to "the law," away from the judge. The law is to blame, not the law-finder.

Is this a matter of a lack of candor on the part of judges? Are they just fooling us with their opinions that are replete with legal reasoning that rationalizes the result they have reached? This is not the place for me to attempt a full answer to that question, but it is appropriate here to suggest that the question itself masks an important part of the story. A judicial opinion, as Stanley Fish has pointed out, is a "presentation" of the judge's

31. I have spelled out this notion of law as a heuristic device in D'Amato, supra note 20, at 179-81.
32. Suppose you are driving along a highway and see a sign: "Construction zone—35 mph limit." Neither you, nor any other driver, slows down to 35 mph. You know "from experience" that construction zone speed limits are set unreasonably low by the highway department in order to reduce civil liability resulting from automobile collisions with construction equipment. It is theoretically true that you might be arrested for speeding when you drive in excess of 35 mph, but experience tells you (and all the other motorists) that the police do not enforce this kind of speed limit posting. You might reasonably guess that a traffic-court judge would agree with you in the unlikely event that you are arrested for exceeding 35 mph.
It is an attempt to put into words a justification of the decision the judge has reached that will be acceptable to the legal community. At the present moment in history, the legal community wants, and insists, upon having judicial opinions that appear to state legally compelling reasons why the decision reached was the only decision that could have been reached under the law. Given this insistence on the part of the legal community, it follows that judges will present to the legal community what it wants to read. Judges will duly deliver opinions that make it appear that the decisions they reached were constrained by the law. Thus, if “law-rationalization” is the currently preferred rhetoric, then judicial opinions will unsurprisingly be replete with “law-rationalization.” If the society were different—if people insisted on incense-burning, animal sacrifice, and prayer—we can imagine that judges would engage in such rituals in order to shift the blame to the gods for their decisions. In an important aspect, therefore, judicial candor is not what the legal community is prepared to accept at the present time. If and when law schools leave the law business and go into the justice business, judicial opinions may be startlingly different from what we get at the present time. They may then contain a more complete statement of the facts and a far fuller account of the facts of previous cases that guided the judges to the just result in the present case. They will not contain the hocus-pocus of judges simply “finding” the law and “applying” it to the facts in an “objective” manner. In short, we (the practicing bar) tend to get what we ask for (from the judges).

The underlying Pragmatic Indeterminacy reason that law-words do not really constrain a judge is that the sum total of law-words is only a descriptive fact. There is no normativity in these law-words that rises from the text, so to speak, and grabs hold of the judge and says: “You ought to decide the case this way.” The words of the law simply exist—in books, advance sheets, slip sheets, articles, computers, and in the oral arguments of counsel in court. These words can be moved around like dominoes until they are arrayed in a pretty pattern in the court’s written opinion, a pattern that satisfies the legal community’s quest for sophisticated legal argument.

33. S. Fish, supra note 7, at 388-91 (Judicial opinions are the judge’s mode of self-presentation.).

34. Legal positivists may argue that a judge must obey the commands of the legislature expressed in statutes, whether these commands are just or unjust. However, the statutes must still be interpreted by the judge, and the judge can always attribute any result to the legislature’s command.

35. For a brief compilation of meaningless legal terms that are daily employed in instructions to juries and in rationalizations of legal decisions, see D’Amato, Harmful Speech and the Culture of Indeterminacy, 32 WM. & MARY L. REV. 207, 214-16 (1990).
In saying this, I do not disagree with Kent Greenawalt’s observation that “legal materials . . . themselves contain explicit normative criteria.”\footnote{Greenawalt, Book Review, 84 J. Phil. 284, 288 (1987) (reviewing R. Dworkin, A Matter of Principle (1985), and R. Dworkin, Laws Empire (1986)).} Surely most criminal prohibitions, for example, can be interpreted as normative prescriptions.\footnote{Following Kelsen, we might interpret them instead as conditional statements: “[I]f you choose to do act X, then the state will punish you.” But (I would argue) the level of normativity changes to that of the state official, to whom the statute implicitly says, “if you find that D did act X, then you ought to punish D.” Kelson recognized this problem in what seems to me to be his ad hoc solution (posing an overall Grundnorm). H. Kelsen, The Pure Theory of Law (Knight trans. 1987).} Yet, the reason we know that some legal materials contain explicit normative criteria is that we can recognize explicit normative criteria when we see them, whether or not we happen to see them encapsulated in legal materials. Professor Greenawalt does not tell us what word is implied between the words “themselves” and “contain” in the sentence quoted above; the implied word could be “always,” “necessarily,” “sometimes,” or “often.” But the first two of these possibilities cannot be true. It cannot be true that legal materials always or necessarily contain explicit normative criteria of the sort that we recognize as normative. The Nazi law “You must salute the Fuehrer” was not recognized as containing a normative prescription by persons who despised Hitler—at best, they recognized the law as something to be obeyed only if someone else (a Gestapo agent, for example) was looking.\footnote{The post-war Nuremberg tribunal was shown in one case a horrifying example of the enforcement of this Nazi law. An eleven-year-old child refused to give the German salute at school. Her parents were interviewed, and it was found that they declined to influence the child to the contrary. They pointed to a passage in the Bible: “Do nothing with an upraised hand for it displeases the Lord.” The Court of Guardians decreed on September 21, 1940, that a probation officer should supervise the situation. The Third Reich’s court of appeals rescinded the decision of the guardianship court, and deprived the parents of the right to look after their children on the ground that they were not fit to bring them up. (noted in United States v. Alstoetter, Case III, Nuremberg Military Tribunals (Germany, 1946)).} At most, legal material only contingently recapitulates certain underlying normative criteria. The law’s normative criteria are not necessarily our own normative criteria—the kind that we respond to by accepting the term “normative.” We cannot tell from the law-words themselves that they make a morally prescriptive claim upon us. Rather, we must necessarily evaluate any law-words in the light of norms that we already hold.

But law-words can sometimes, or even often, reflect justice. The following diagram may clarify the distinctions I have been assuming between law-words and justice.
There are two circles: everything inside the first is law-words, and everything inside the second is justice. The portion of the first circle denoted as A consists of all law-words that are unjust, B consists of the law-words that are just, and C consists of everything outside the law that is just.

Some examples of A readily come to mind: The unjust law of compulsory sterilization of minorities of Nuremberg in 1935, the apartheid legislation of South Africa, the antimiscegenation laws (until recently) of the United States. But there are other laws, found in the unlikeliest places, that are unjust. Consider this excerpt from a rule of practice of the United States Supreme Court, prescribing that all documents filed with the Court “shall be produced on opaque, unglazed paper 6-1/8 by 9-1/4 inches in size, with the type matter approximately 4-1/8 by 7-1/8 inches, and margins of at least 3/4 inch on all sides.”

This kind of rule may not cause a serious problem for large law firms that have their own printing departments. An initial order of the right sized paper and an initial configuration of the firm’s computers and printing equipment should suffice for all their filings with the United States Supreme Court. But consider small law firms and solo practitioners who once in a decade may have a case that goes all the way to the United States Supreme Court. Suddenly they are faced with the above rule. What if they can’t find paper that measures exactly 6-1/8 by 9-1/4 inches? The rule does not say that this figure is “approximate.” Indeed, since the rule uses the word “approximate” in connection with “type matter,” and not in connection with paper size, any submission of paper size not exactly 6-1/8 by 9-1/4 inches might result in bureaucratic rejection of the entire filing by a clerk’s office. Moreover, the client of the solo practitioner or small law firm may not have the financial means to find the exact size paper, and print it exactly so that the fastidious eyes of the Justices will not be strained. If they find the right paper, they must submit

40. The rules are more liberal for submissions in forma pauperis (see Sup. Ct. R. 46), but there are many relatively poor people who are faced with court expenses and who do not quite qualify for in forma pauperis status.
Why that many? The Supreme Court's rules are reminiscent of the elaborate rules of court prescribed by Louise XIV of France—the precise way a petitioner must bow or curtsy to the king, the elaborately munificent forms of address, the oppressive and dandified courtesy. Why do the justices of the Supreme Court of the United States require paper exactly 6-1/8 by 9-1/4 inches before they will deign to read it? Why do lawyers open their remarks with, "May it please the Court"? What does pleasing the judges have to do with the merits of the case? Why do judges expect to be called "Your Honor"? Why isn't the word "judge" good enough for Supreme Court "Justices"? Why should any litigant be placed in the posture of seeking justice as a "favor" of the court?

At the risk of belaboring what is after all a trivial example, let me suggest the important difference between the rule that the paper must be 6-1/8 by 9-1/8 inches, and a rule, for example, that all papers filed with the court must be approximately 8-1/2 by 11 inches. The first rule is a stumbling block to practitioners who are not in large law firms. It creates an unnecessarily precise hurdle that has no legitimate purpose, but can give rise to clerks who do nothing more than measure with precision instruments the size of papers that are filed in Court and smile as they ship them all back (all forty copies) to the attorney with a form letter enclosed stating, "Submission rejected; see Rule 33."

41. Sup. Ct. R. 12, 16.
42. Further, why doesn't the United States Supreme Court, of all institutions, respect the words of the constitution which prohibit the granting of titles of nobility by the federal government (article I, section 9), and by the states (article I, section 10)?
43. An individual judge may tell you that he disregards entirely the form of address and could not even imagine being displeased by an attorney who fails to say, "May it please the court" or "Your Honor." But then the question arises: why do highly paid attorneys persist in using these obsequious forms of address? My guess is that they do so because they believe that judges really will hold against them their failure to bow and scrape. I have seen many attorneys who outside of court are boisterous macho types become groveling cowards when facing a panel of judges, and I am certain that they do so not out of respect or because of the dignity of the surroundings, but because they are trying to win for their clients, and they know that even if judges do not respond positively to flattery they may respond negatively to attorneys who refuse to flatter them. If judges truly believe that the Louis XIV trappings should have no part in the adjudication of cases, then they could easily interrupt attorneys who use that phraseology and make it clear that they should not use titles of nobility in addressing the court. The practice would soon cease. More importantly, the judges should revise their rules of practice so that attorneys who are trying to represent clients do not have to jump through absurd hurdles such as finding 6-1/8 by 9-1/4 paper.
44. In arguing before the Seventh Circuit, I found that there were three sets of rules that I had to contend with: the published rules of Appellate Practice, the Seventh Circuit's own published additional rules, and a set of mimeographed supplementary rules also put out by the Seventh Circuit. I found in one instance, that something that the published rules required me to put into my brief was contradicted by the mimeographed rules. I called the Clerk of the Court and
Contrast that with a hypothetical alternative rule: "all paper must be approximately 8-1/2 by 11." This rule has the saving grace "approximately." Moreover, it is the currently standard paper size used in all duplicating machines, printers, correspondence, and so forth. Thus it does not present the "justice hurdle" erected by the first rule.

What about the alternative of no rule at all? Although mainstream scholars might charge "nihilistic" indeterminists with advocating the abolition of rules, nothing could be farther from the case. For a no-rule regime would simply result in injustice. In the particular case of the Supreme Court rules about briefs, we might find in a no-rule regime that large law firms with deep-pocketed clients might present their briefs on beautifully printed paper with elaborate original leather bindings edged in gold foil. This could give them a psychological advantage over poor persons. Thus a rule prescribing the size of paper (roughly), the type of printing (roughly), and the kind of binding (roughly), is necessary as a matter of justice in order to give equal legal treatment to the rich and the poor. I would put a rule along the lines just mentioned in the section marked B on the diagram; it would not only be a rule of law, but also a rule of justice, since it treats everyone equally.

In a roughly just society in the Rawlsian sense, most legal rules track justice considerations. I suspect that the vast majority of law-words in the statutes and precedents of the United States can properly be located in section B of the above diagram. This does not mean, of course, that the results reached in all the cases interpreting those rules were just, for the words of the law can be interpreted to produce either a just or an unjust result in any asked him what I should do. He responded: "Yes, everyone has that problem. The rules are inconsistent." He refused to give me any further advice. My "legal reasoning" was no help: although the mimeographed rules were the last in time, and therefore might be said to supersede any earlier, contradictory rule, the earlier rule was in fact printed, and therefore might have a higher stature. Either way, the court had nailed me. I was going to violate one of their rules no matter what I did.

45. See J. RAWL'S, A THEORY OF JUSTICE (1970). Rawls' society is only roughly just. There are many micro-injustices, but Rawls believes that overall these cancel each other out. (For example, a steeply progressive income tax may be unjust to the rich, but if there is also a sales tax, it operates regressively and is unjust to the poor. The two "roughly" cancel each other out.) It follows (although the topic is far too broad to consider in the present essay) that a claim of distributive injustice cannot, after Rawls' analysis, be fairly made in a narrow focus. A given rule may indeed be unjust to a class of persons, but if you are litigating on the opposite side of a case, against a person who makes such an injustice claim, it would be your job to find countervailing rules that have a roughly equal unjust impact on your own client. The strategy can lead to rewarding insights into macro-justice, and I could imagine a law school of the future having several courses in distributive justice. (We now teach, almost exclusively, compensatory justice. But compensatory justice is also "narrow" in the sense just mentioned; any claim of compensation is not prima facie separable from a countervailing claim of distributive justice.)
conceivable case. But it does mean that the law-words, in general, paint a picture of social and individual justice.

As to section C, it is clear that there are many areas of life—some would say the most important areas—that are relatively untouched by law-words. For example, the authority of parents over their children is largely left untouched by the courts (though clear cases of abuse of authority, such as child-beating or infanticide, are now considered within the province of the legal system). Today the law does not select a spouse for a young person, nor does it enforce an agreement to go out on a date, nor does it compel the choice of beneficiaries of one’s estate, nor does it prescribe (except in Iran and certain other countries) religious practices for the citizens. In all of these areas of life there are vital questions of justice and injustice; they simply are not presently regulated by the law.

In section B of the chart, it is important to note that the law-words do not constitute justice, but merely reflect underlying justice considerations. Even then, they do so only under interpretations of those words that readily come to mind. Yet, in particular contexts, our interpretations of those words might change. A rule that looks fair on its face may be construed unfairly. Indeed, any given law text can be misconstrued so that the underlying justice considerations are hidden or lost. Justice considerations are always separate from any “law-words” or other texts that purport to encapsulate or reflect justice. This fact, indeed, enables us to be critical of legislation, precedents, and philosophical theories.

Apart from the question of the degree to which statutes, precedents, rules, and regulations might encapsulate morally obligatory prescriptions, the very encapsulation of a moral prescription in a legal text means that the text itself will be subject to interpretation. What the interpreter reads into the text is a function of the interpreter’s values as well as the values that he

46. What could be clearer that the outright illegality, unconstitutionality, and injustice of jailing an innocent man? Yet, in the Branion case, see infra pp. 31-35, the judge's “interpreted" the facts so as to incarcerate a provably innocent man. Their “interpretation" amounted to misinterpretation and invention of facts, but the net result was that a panel of circuit court judges solemnly condemned a provably innocent man to rot away the rest of his life in prison.

47. In fact, as a pragmatic indeterminist, I cannot quite make this claim! We can never specify exactly what areas of life are unregulated by law. Child abuse at some point became regulated by law. In the first common-law case of regulation (where a parent clearly overstepped the bounds of parental authority), the court’s decision must have come as a surprise to the parent. And so it will always be; the first time the law regulates something, somebody will be caught by surprise. Hence it follows as a matter of logic that I cannot say for sure what the law will regulate and not regulate—otherwise the one who will someday be caught by surprise will be me.
finds to be expressed in the text.\footnote{48} Surely the interpreter's own values will color what he will "find" in the text.\footnote{49}

All law-words, including normative criteria expressed in the law-words, are manipulable in this fashion. We should not be surprised since every fact in nature can be interpreted and manipulated. Twin children growing up in the same household, and sharing experiences can get into a fight with each other because of their different interpretations of events. A marriage can break up because the same set of facts has been wildly and irreconcilably interpreted differently by husband and wife. Works of literature are notoriously subject to radical reinterpretation.\footnote{50} If we look around us at the natural world, some people will interpret it as exemplifying the benign gift of God or even as a physical part of the Deity; others, looking at the same facts and noticing things such as the suffering and predation of innocent animals may conclude that no benevolent God could be responsible for the natural world. Even historical fact is constantly being upset by revisionists. Can there be any doubt that the judge, looking at a group of precedents and statutes, is capable of interpreting this material in a way that would favor whichever side the judge wants to win the decision?\footnote{51} Surely this capability is available even to a judge who knows nothing about law, and has just been

\footnote{48} For example, a statute may criminalize an act on "strict liability" ground, and take away a defendant's claim of lack of intent. Nevertheless, the trier of fact could substitute her own values into the text, either by saying: (a) Due process requires that we find intention anyway, or (b) this defendant simply is not guilty (i.e., despite the evidence of overt acts, the compelling defense of lack of intent has led me to find him "not guilty" as a matter of law without the need for me to explain my finding). Often the trier of fact is unaware of substituting her own values for the values in the text; rather, the values she happens to "find" in the text will often track her own values simply because her own values are the values she is mentally prepared to find in the text.

\footnote{49} To paraphrase Einstein, we only find in the world what our mental theories tell us we will find. For example, in the Middle Ages (when it was believed that meteorites were rocks that bubbled up from hell), anyone at the time who might have said that they fell from the sky would have been branded insane because it was common knowledge that rocks were heavier than air and thus could not be up in the sky in the first place.

\footnote{50} This is Judge Posner's point about literature, but as Stanley Fish points out, it applies equally as well to law. See R. Posner, LAW AND LITERATURE (1988); S. Fish, supra note 7, at 294-307. As a lark, I have essayed my own radical reinterpretation of Hamlet as a comedy! See D'Amato, Can Legislatures Constrain Judicial Interpretation of Statutes?, 75 VA. L. REV. 561, 590-92 (1989). I was not saying in that article that Hamlet "is" a comedy (Hamlet isn't anything except words in a book), but rather that the universally received view that Hamlet is a tragedy is itself subject to radical reinterpretation (one that colleagues who have read my article described as "strange," and "off the wall," but notably not "nonsense").

\footnote{51} Let me stress again that I am not advocating that judges should be free to make arbitrary decisions in any given case. I only argue that the "law" does not and cannot constrain the judges. What should constrain the judges is their sense of justice.
elected to the bench. All he has to do is decide which side he wants to win, and then adopt that side’s brief as his “opinion.”

The sobering reality that is gaining grudging acceptance in the law-teaching world is that no array of law-words can decide anything. All the law-words in all the law books are just facts; they are words printed on paper that retain their size and shape even though different people read them—this is the irreducible “fact” about words. Since what is cannot ever tell us what ought to be, it should not be surprising that no existential array of “law-words” can constrain any judge in any given case.

Only normative considerations—not facts—can move a judge in the direction of deciding a case one way rather than another. The judge may recognize the law-words, cited by the attorneys, as being a repository of normative considerations that were poured into those words in the past (for example, the legislature was motivated by some normative considerations to enact a statute, and what we now have are the law-words that were enacted). But it is also possible for the judge to believe that there are competing and more important moral considerations beyond those encapsulated in the law-words. If a judge feels any normative constraint to decide the case in favor of one of the parties, then that normative constraint may well be decisive. That normative constraint does not necessarily arise out of the law-words that were urged upon the judge by counsel. What the judge will do, of course, is to interpret the law-words provided by counsel in such a way as to justify the result that the judge feels ought to be reached as a matter of justice.

None of this is to claim either that judges always decide cases according to justice or always decide cases randomly. I am not even claiming that judges are free to decide cases any way they choose, if we interpret “free” in a moral sense. Most judges may well want the party with the more just cause to prevail. In many cases, the justice of the cause may coincide with the judge’s interpretation of the law-words. Saying that the judge can pick either side to win, irrespective of the words of law, does not mean that judges in fact decide cases arbitrarily. I believe that many judges feel themselves constrained by their sense of justice. I only claim that we should be teaching students how to marshal and structure the facts of cases in order

52. Traditionalists believe that if the judge chooses the “wrong” brief he will be reversed on appeal. This pious hope is not supportable by any empirical evidence. The appellate court is not necessarily better at selecting the “right” brief.

53. Not to mention the fact that each case contains two opposing briefs, each stating forcefully that the law compels a decision in its favor. A judge who secretly decided cases by flipping a coin might never be found out! All that judge has to do is to adopt the brief of the side that wins the coin toss, and no one will be the wiser.
to get through to the judge's sense of justice. To ignore, relativize, or factor out the "justice" goal and instead spend three years teaching our students law-words amounts simply to providing them with tools that a judge can employ to make a pretty pattern that rationalizes (the rationalization, of course, takes the forms of more law-words) a decision for whichever side the judge has chosen to win the case. The ability of judges to interpret facts and law to let either side win in any case is the way the world is (and not the way that I or anyone else might want the world to be). If we are looking for constraints upon judges, we have to look in areas where law school education does not now look. Law school education looks at the content of the law, which is precisely the wrong place to find any constraints. It is a massive, yet societally well-entrenched illusion, to think that the content of the law actually constrains any judge in any particular case.

Thus, the present crisis in legal education can be summarized as follows. As we become increasingly aware that the words of the law do not constrain judges in deciding cases, we get the sickening feeling that the entire legal content of what we teach our students for three years also does not matter. No matter what that legal content may be, it will not compel a judge in the future to decide any given case any given way. Some professors fight back by retreating to full-blown formalism. They attempt to teach their classes as if the words of the law determine the correct result in every case. (They buttress this conviction by the spinning of theories and policy arguments.) This is a somewhat desperate attempt to deal with the crisis in law school education. It is doomed to fail both because it is incorrect (formalism does not and cannot work), and because some, many, or most of

54. My colleague John Elson, commenting on a draft of this Article, said "the strategic development of facts in litigation is one of the most critical lawyering skills and one that law schools pay almost no attention to outside of live-client clinics." Communication from Professor Elson (January 14, 1991).

55. For example, a statute may have a preamble explaining its policy and goals. If the judge called upon to "apply" that statute disagrees with those policies and goals, the judge merely has to write that he agrees with them but that the legislature did not intend the policies to apply beyond the scope of the statute itself. The judge adds that the facts of the present case (as interpreted and selected, of course, by the judge) do not constitute an instance of that policy (expressed, perhaps, in other statutes that also "apply" to the present case). Finally, any policy statement, like any theory, can be interpreted to apply to either side of any given case. See A. D'AMATO, JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW 84-88 (1984) (discussing policy); D'Amato, Can Any Legal Theory Constrain Any Judicial Decision?, 43 U. MIAMI L. REV. 513 (1989).

the professors who try it are not inwardly convinced, and their lack of conviction seeps through to their students.

If you accept Pragmatic Indeterminacy, it follows that law schools should not be teaching law.\textsuperscript{57} Law is only a tool, a language; it simply exists; it is a description of what legislatures have enacted and courts have decided. There is no point learning it because any judge in any case can reinterpret or misinterpret it differently from the way you interpreted it when you learned it. There is no reason to spend three years teaching students the descriptive content of law. It would be like teaching theology by studying the vestments that priests wear.

Does indeterminacy depress me? Quite the opposite! I know now that the entire formalist claim is an illusion. I do not long for the good old days when law could be taught formalistically, because no matter how intellectually satisfying those days seemed to be at the time, in retrospect they consisted of spinning tautologies that had no relation to the very thing that we insisted in the classrooms that law did—namely, constraining judges to decide cases according to the law. We used to analyze the law and ask the students whether the judge reached the “right” decision. Our notion of “right” was Dworkin’s notion—that the “right answer” could be found in the legal materials. We failed to realize that “right” has a normative meaning that cannot be derived from a legal text. I look back on my class-preparation notes of the 1970s and see with dismay how caught up I was in the policy and theory argumentation of the times. I had no clear notion then that such talk was nothing more than illusion and rhetoric and that I was subconsciously selecting my favorite theories and policies to fit what I had subconsciously decided was the just result. I did not know then, as I know now, that even when one chooses a theory or policy to fit a line of cases, there are waiting in the wings to be discovered a plethora of other competing theories and policies, each of which had equivalent explanatory power. As Skolem and Lowenheim found in the 1920s with respect to mathematics, there is no end to theories that can “explain” any mathematical result

\textsuperscript{57.} One of the most respected spokespersons in the law school world on the subject of law teaching, Francis Allen, says: “The farther law school scholarship strays from the law as a source of values and methodology, the more unlikely it becomes that it will influence the behavior of legal institutions.” Allen, \textit{Legal Scholarship: Present Status and Future Prospects}, 33 \textit{J. Legal Educ.} 403, 404 (1983). Professor Allen is imprisoned in law-words. He is upset by new challenges to the verities of the law. Thus he resorts to a belief that if legal scholarship changes from its formalistic traditions, it will be ignored by judges. What he apparently cannot understand is that formalist legal scholarship is already, and has always been, ignored by judges. But even if he understood this, he would still have to explain why law is a source of values. Surely laws can be evil and unjust—what values find their sources in such laws? As for law being a source of methodology—well, what can that possibly mean?
you want to reach.\textsuperscript{58} By extending the Skolem-Lowenheim result to ordinary English—which is essentially what Wittgenstein accomplished—we find that whatever the explanatory theory or policy, there is an infinity of other equally explanatory theories and policies that are inconsistent with the one you started with.\textsuperscript{59} When we construct an "ingenious" theory of law (for example, in a law review article), we may believe that we have finally explained a case or a line of cases. In fact, sooner or later another scholar comes along with a different theory that explains the same cases.\textsuperscript{60}

Not only is there an endless supply of theories that will explain any given set of facts in different ways, but it is also true that the same theory can account for opposite judicial outcomes in any given case. This latter proposition, of course, cannot be demonstrated as to each theory that could ever be imagined in all the reported cases in human history—the task would take forever—but I have recently presented a general algorithm for reaching this result in eight different (and probably mutually exclusive) categories of theories.\textsuperscript{61} A decade earlier I had suggested in a less rigorous way the opposing conclusions that could always be drawn from any "policy" standard or "standard of social desirability."\textsuperscript{62}

I have personally come to the conclusion that the construction of theories to explain the law ends in a blind alley, even though theory-spinning may well be an enjoyable and intellectually stimulating pastime. This is not to say that theorizing in general should be abandoned. Indeed, as Einstein and many others have pointed out, we can only "see" the world through the theories we have in our minds that precondition us to expect to see certain

\textsuperscript{58} This follows from the Skolem-Lowenheim demonstration in mathematics of the early 1920s. See the extended footnote discussions in D'Amato, supra note 50, at 597 n.96, 599 n.102. Professor Kress has objected that the English language is not like mathematical language and hence the Skolem-Lowenheim theories do not apply to English; see Kress, A Preface to Epistemological Indeterminacy, 85 NW. U.L. REV. 133, 144 (1990), for a reply, see D'Amato, supra note 20, at 176 n.92. But even if we put aside Skolem-Lowenheim, Wittgenstein has shown that the very idea of "following a rule" is indeterminate insomuch as whatever set of facts is given, there are infinitely many rules that the facts can be shown to exemplify. See generally S. KRIPKE, supra note 25; L. WITTGENSTEIN, WITTGENSTEIN'S LECTURES ON THE FOUNDATIONS OF MATHEMATICS (C. Diamond ed. 1976).

\textsuperscript{59} "Indeterminacy" means not that there is no acceptable explanatory theory but that there are many. Cf. Quine, Indeterminacy of Translation Again, 84 J. PHIL. 5, 9 (1987).

\textsuperscript{60} Scholars generally accept the demolition of their own theories gracefully. After all, the new theory is good academic publicity for the old.


things and not others.\textsuperscript{63} We need to be conscious of the way theories shape and sometimes distort, our own vision. We even need to be aware of the role that theories, including legal theories, may play in shaping and sometimes distorting the attitudes that judges bring to their task of deciding cases. All that Pragmatic Indeterminacy says is that no collection of law-words (including theories about law-words) will ever \textit{constrain} a judge in any given case to decide the case one way rather than the other.

When I was finally prepared to sweep out of my own mind the metaphysical cobwebs of formalism,\textsuperscript{64} I saw a new and liberating potential for law school education. Instead of fooling ourselves that judges are constrained by the law, we would open our minds to the stark reality of judicial decision-making. We would see what is really going on in the courts. Law, as the late Robert Cover said, is conducted on a field of "pain and death."\textsuperscript{65} There is a brute force in judicial decision-making that gives it, for some people, its "authority"—namely, that whether you like it or not, the state will physically enforce the judgment reached by the court. The court's final judgment is the reality, and everything that precedes it is words. The only way we can criticize the court's final judgment—that is, the only way that makes any sense and is worthy of our time and effort—is to criticize it from the normative standpoint of justice. Fortunately, it remains open to us to say whether a given decision is fair or unfair. In asking the justice question, we uncover new avenues for criticizing counsels' performance in the case, and learn better lawyering strategies in the process.

It is worth reemphasizing my previous point that we should not spend our time and effort arguing whether a given decision is right or wrong according to the law. For the "right answer" in the Dworkinian sense of the legally right answer is a complete illusion. It blinds us to the truth. The truth is that a case is decided either justly or unjustly. Those are the only two real alternatives: Has the person won who morally should have won, or has the other side won by a combination of legal trickery and judicial misfeasance? In contrast, the Dworkinian approach leads to an endless

\begin{footnotesize}
\bibitem{63} As\ Mary\ Jane\ Morrison\ puts\ it, \"we\ do\ not\ have\ theory-independent\ ways\ of\ assessing\ what\ 'the\ facts'\ are.\\"\ Morrison, \textit{Excursions\ into\ the\ Nature\ of\ Legal\ Language}, 37\ CLEV.\ ST.\ L.\ REV.\ 271,\ 195\ (1989).\ \textit{See\ also\ supra\ note\ 49.}

\bibitem{64} I was, of course, aided greatly by the writings of legal scholars as well as by my own continuing interest and study in relativity and quantum theory and the work of Wittgenstein. Two of my earlier essays that now look to me like rattletrap bridges between the old formalism and the new indeterminacy are D'Amato, \textit{Legal\ Uncertainty}, 71\ CALIF.\ L.\ REV.\ 1\ (1983),\ and\ D'Amato, \textit{The\ Limits\ of\ Legal\ Realism}, 87\ YALE\ L.J.\ 468\ (1978).\ But\ my\ own\ personal\ watershed\ was\ the\ experience\ I\ had\ in\ federal\ court\ in\ the\ Branion\ case.\ \textit{See infra}\ notes\ 69-73\ and\ accompanying\ text.

\bibitem{65} Cover, \textit{Violence\ and\ the\ Word}, 95\ YALE\ L.J.\ 1601\ (1986).
\end{footnotesize}
search into legal texts, a truly Herculean task. And even at the end of the task, Judge Hercules will find deep contradictions in the underlying political theories that will allow reasonable judges (who have undertaken the same laborious research) to differ utterly in their conclusions. Legal formalism is simply words chasing other words.

Many clear-minded lay observers throughout history have concluded that justice and injustice are all that matter in a legal system. The person on the street is apt to be skeptical about lawyers who simply know how to twist the meaning of words. Underworld slang for attorney is “mouthe piece.” Many novelists have shown how legalism can be employed in the service of state oppression. Historians have explained how the arcane processes of trials and inquisitions have been perverted to serve the ends of the state or, more specifically, the ends of a group of persons who are in effective control of the state at a given time. The grossest forms of injustice can be given the patina of legality by the solemnities of law-words spoken in official settings. Public prosecutors and defense attorneys can lose sight of justice and, in cowardice induced by the relativity of law-words, can become capable of unfairness so perverse that they fail to recognize how unfair they have become.

How capable of injustice are our present judges? Is there not a threshold problem of defining injustice? I had the unfortunate experience of seeing pure injustice at first hand, perpetrated by honored and nationally renowned federal court judges. In the experience I shall briefly describe,


67. Compare what Judge Richard Posner says about the role of a judge. A judge is “a decision maker in a system of government, and such a decision maker must be concerned not only with doing substantive justice in the case at hand but also with maintaining a legal fabric that includes considerations of precedent, of legislative authority, of the framing of issues by counsel, of the facts of record, and so forth.” R. POSNER, THE PROBLEMS OF JURISPRUDENCE 156-57 (1990). I regard this notion of “maintaining a legal fabric” as hocus-pocus in the same category as witchcraft. What is remarkable about Judge Posner’s sentence is its explicit justification of placing substantive justice on an equal level with legal (i.e., law-word) appearances. Of course, on a deeper level, any articulate judge is capable of keeping up legal appearances irrespective of which side wins the case. Hence, Judge Posner’s sentence is a mumbo-jumbo justification for allocating to judges an arbitrary power to decide a given case either in accordance with or in violation of substantive justice.

68. See R. WIEBerg, THE FAILURE OF THE WORD (1984). For example, an attorney in Texas makes a substantial contribution to a state judge’s election campaign; the judge is elected; and the attorney appears in the judge’s courtroom arguing an important case. The judge may very well think, “I owe this attorney something because he helped me get this job,” and thereupon award the attorney the decision. See Sixty Minutes: Justice for Sale? (CBS television broadcast, Dec. 6, 1987) (discussing the Texaco-Penzoil litigation). The judge’s sense of “owing” the attorney something is normative, but except in a very narrow sense (justice requires that we repay favors) it is clearly unjust to the parties in the litigation.
there is no definitional problem. There is no indeterminacy about what was just and what was unjust. The case is about a provably innocent man whom the judges, for their own reasons, refused to free from prison. The judges’ decision—to cage this man for the remainder of his life, like an animal in a cell—is, I state with confidence, incontrovertibly unjust.

Five years ago I was asked to take on a pro bono case—the case of Dr. John Marshall Branion. He worked at a hospital, and three days before Christmas, 1967, he left the hospital at 11:30 a.m. and picked up his four-year-old son Joby at a nursery school. They went home for lunch only to find Mrs. Branion brutally murdered. Dr. Branion summoned neighbors who called the police. A next-door neighbor told the police that she had heard shots at about 11:20 a.m. and no later than 11:25 a.m. The detectives also determined from their investigations that Dr. Branion was in the hospital at that time—a mile and a half away from his home. Dr. Branion saw his last patient of the morning at 11:27 a.m. Dr. Branion was briefly questioned and then informed that he was not a suspect in the murder.

A month later, after futile efforts to find the killer or killers, the Illinois State’s Attorney’s office decided to indict Dr. Branion for the crime of murdering his wife Donna. They had no evidence against him. There was no financial motive.69 But the state wanted to “nail” Dr. Branion because the State’s Attorney hated him for his role in the civil rights movement of the 1960s, specifically for treating gunshot wounds of civil-rights activists (wounds inflicted by the police) without reporting the names of his patients to the police. Another reason for prosecuting him was to quiet the public, which was agitated about the failure of the police to apprehend the killer of Donna Branion (she came from a socially prominent family, and the murder made local headlines).

Unlike The Thin Blue Line (a movie that came out many years later in which the prosecutor suborned witnesses to give false testimony against an innocent defendant), the Branion trial was fair. The prosecutor put the earwitness on the stand, and she told the jury that she heard the shots no later that 11:25 a.m. She gave her evidence for the state, and what she said went uncontroverted. The prosecutor informed the jury that Dr. Branion (who did not take the stand) left the hospital at 11:30 a.m. But despite the clear impossibility of Dr. Branion’s having murdered his wife no later that 11:25 a.m. when at the time he was seeing patients at a hospital a mile and a half away—and did not leave the hospital until 11:30 a.m.—Dr. Branion’s

69. In fact, there was a reverse financial motive. Dr. Branion’s wife would have inherited a fortune had she stayed alive and outlived her father, Sydney Brown. Mr. Brown, who died a few years later, was one of the wealthiest blacks in the United States.
defense attorney did not pound this "impossibility defense" home to the jury, and the prosecutor did a clever job of confusing the jury and built a highly emotional case against Dr. Branion. The prosecutor was helped by the fact that at the time of the trial Chicago was racked with civil-rights riots and burnings—it had been a month after Martin Luther King was assassinated. The jury of eleven whites and one middle-aged black woman returned a verdict of guilty.

When I found the transcript of the trial,\textsuperscript{70} I decided to pursue a \textit{habeas} remedy in federal court. The transcript made it crystal clear that on the basis of the state's own evidence—none of which was challenged in any way by either side—it was physically impossible for Dr. Branion to have committed the crime. He was a mile and a half away from the scene of the crime treating patients at a hospital. I felt that all I had to do was state this evidence clearly and present it to a federal court. The judges would surely free Dr. Branion forthwith, and a gross miscarriage of justice would finally be righted.

I was utterly unprepared for the spectacle of federal judges deliberately distorting and misstating the record evidence. I was unprepared for federal judges manipulating and inventing facts. The district court\textsuperscript{71} and the Seventh Circuit Court of Appeals denied \textit{habeas} relief—not on any "legal" grounds that an innocent person who has been convicted by a jury should remain in prison (for whatever reason), but on the factual ground that a rational jury had enough evidence to find Dr. Branion guilty of murdering his wife.\textsuperscript{72} Dr. Branion was a sick man at the time of these federal appeals and subsequently died in the prison hospital.\textsuperscript{73}

To present a factual case against Dr. Branion, the court of appeals had to do something with the earwitness's testimony. What the court did was to \textit{omit} this testimony from its statement of the facts!\textsuperscript{74} By such an omission, the court could suggest that it was possible for Dr. Branion to have committed the crime after he left the hospital at 11:30 a.m. The shots heard by the

\textsuperscript{70} All copies were apparently lost. But, after extensive effort, one copy turned up in the vaults of the Supreme Court of the United States.


\textsuperscript{72} Branion v. Granly, 855 F.2d 1256 (7th Cir. 1988), reh'g denied, No. 87-3052 (Sept. 2, 1988), cert. denied, 109 S. Ct. 1645 (1988).

\textsuperscript{73} While Dr. Branion was on his death bed and unable to speak coherently, Governor Thompson—responding to the public outrage about the case that had been depicted on several national and local television programs—commuted his sentence to time served. He died within a month in the hospital bed.

\textsuperscript{74} There is a brief reference in another context in the circuit court's opinion to "commotion" heard by the next-door neighbor. For an analysis, see D'Amato, \textit{supra} note 22, at 1325.
next-door-neighbor no later than 11:25 a.m. became a nonfact. At trial, the
state had presented the uncontroverted evidence of its own witness that the
shots were heard before Branion left the hospital. In a circumstantial evi-
dence case, the state has the burden of proving opportunity. At the Branion
trial, the state—remarkably—proved that there was no opportunity. What
the federal judges did on habeas was simply to take away—by not mention-
ing it—the state's own proof that there was no opportunity. Thus the
reader of the federal court opinion might assume that there was oppor-
tunity. If the reader of the opinion is simply not told by the federal judges
that Dr. Branion was treating patients in a hospital at 11:25 a.m. at the time
his wife was murdered a mile and a half away from the hospital, then the
reader would not conclude that it was physically impossible for Dr. Branion
to have murdered his wife. Hence the reader might go on to assume that
Dr. Branion could have murdered his wife. Once the reader assumes that,
the reader might be persuaded by the federal judges that the jury could
reasonably have found Dr. Branion to be guilty. End of case.75

I gave a paper on the Branion case for the Derrida Conference in New
York in October, 1989, and the paper was reported in the New York
Times.76 Judge Frank Easterbrook, who wrote the opinion for the Seventh
Circuit, was asked to respond, but he told the Times that anything he had
to say he had already said in his published opinion. He added that he “put
a lot of time into writing that opinion.”77 I also presented the paper to the
Inns of Court of Chicago, consisting of leading members of the Chicago
bar; and Judge Easterbrook was invited to come and debate me, but he
deprecated to attend. My paper was recently published in the Cardozo Law
Review,78 and I will not attempt to recapitulate it here. A brief summary of
the paper was given by Professor Monroe Freedman in a recent issue of
Legal Times.79

I learned several bitter but eye-opening lessons from the Branion case:

1. If lower-court judges change facts, no appellate court has any inter-
est in reviewing the case. Appellate courts (like law schools, like law
professors) only care about legal questions; never mind that “legal” ques-
tions are infinitely elusive, unreal, and indeterminate. When appellate
djudges were students in law schools, they were taught that only the “law” is
interesting, not the “facts,” and that lesson unfortunately was well ab-

75. There is, of course, much more to the story than the skeletal outline I have presented
here. For a full account, see D'Amato, supra note 22.
77. Id. at B5, col. 2.
78. See D'Amato, supra note 22.
sorbed. If law schools focused upon justice, they would have a high regard for facts; instead, law schools disregard facts. Does the Branion case break any new legal ground? No. Did anyone care? No (except for Dr. Branion).

2. Since judges can and do change the facts, it is crystal clear that law words cannot constrain the way judges decide cases. Dr. Branion’s is the most extreme and conspicuous case. How can our legal system produce a result such that a person proven to be innocent is left to rot in jail? I experienced this tragedy as Dr. Branion’s attorney. If federal judges can engage in this monstrous perversion of justice and condemn Dr. Branion to prison, they can do anything they want to anybody at any time in any case. The “law” is no safeguard. It is illusory to pin your hopes on the law. Our only possible safeguard from becoming victimized by the law, as Dr. Branion was, is to make sure that only fair and honorable persons are selected to be judges.80

3. A judge who cares nothing for the life or freedom of demonstrably innocent persons accused of a crime can get away scot-free with judgments that condemn such persons to prison. The judge can simply make up a story that the defendant is guilty and solemnly tell that story to the public in the form of a judicial opinion. No matter: the judge will still be venerated in the public media, the judge will still be invited to law schools to give occasional lectures and judge moot-court competitions, and the judge’s every word will be taken seriously by an admiring coterie of law students (who aspire to clerk for the judge), law professors, and practitioners. The judge will clink glasses at a cocktail party of law school alumni and bask in the deference that others give to his exalted position of public trust. Compare the judge to Dr. Branion. A judge can be a political appointee to the bench who has never done anything noteworthy in his life. Dr. Branion earned three medals in World War II in a segregated black South Pacific army medical unit; he mastered five languages; he obtained a medical degree in Switzerland where he had to learn French and German to understand the lectures and the reading; he participated, at great personal risk, in the famous black civil rights housing marches in Chicago; he marched

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80. The Supreme Court of the United States denied certiorari in the Branion case, even though my argument was based upon the distortions and inventions of fact by the Seventh Circuit. Two lessons may be derived from the denial of certiorari. First, the Supreme Court Judges no longer care about the life or freedom of an individual; they only deal with cases that have broad social consequences irrespective of the amount of injustice that may have been suffered by any person. For an expansion of this position, see D’Amato, Aspects of Deconstruction: Refuting Indeterminacy With One Bold Thought, 85 NW. U.L. REV. 113 (1990). Second, Supreme Court Judges are jaded; they either go along with this outrage or have decided that they do not want to waste their time attempting to correct the practice.
alongside Dr. Martin Luther King, Jr. and served as Dr. King’s personal physician. When his wife was brutally murdered, the legal system responded by incarcerating him and leaving him to die in a prison hospital. Dr. Branion is dead, but the federal judges who were morally responsible continue to enjoy the highest social status and esteem. These judges only actualized methods they learned in law school: that appearance is more important than substance, that legal rationalization is more important than justification, and that legal rhetoric is the key to ultimate power—the heady power to command the overwhelming resources of the state to punish the guilty or the innocent. Such judges are the examples of a legal education that has no soul.

It is time for a sea change in the way we teach law.

III. THE FUTURE

The change I advocate, stated in its simplest and perhaps most controversial manner, is that law schools should stop teaching law. Instead, we should teach justice. Justice is the purpose and goal of law. It is the reason the law exists. It animates and breathes life into the law. The professional calling of a lawyer is to help achieve justice in society. The skill of an advocate is the ability to convince a judge that his client’s cause is a just one and his client should win the lawsuit. The role of a judge is to decide cases justly. Since the judge is presented with plausible legal arguments from both sides, the judge will usually pick the side that she believes *ought* to win.\(^8^1\) This “ought” is a *moral* imperative and is part of her sense of justice. It is not a *legal* imperative except to the extent that the judge feels that one side’s interpretation of the law is coincident with the dictates of justice. When the judge couches her opinion in terms of “law” (which is indeed the presently acceptable way of presenting a judicial opinion to the legal community), we can interpret her opinion as showing that she has chosen the more deeply sound *legal* position by using justice as a guide to the choice

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81. Of course, judges do not necessarily decide cases according to their sense of justice. The possibility always exists that bribery, corruption, political dealing, conflict of interest, and prejudice can eclipse for a judge the dictates of justice. See G. Spence, *With Justice For None* 101-02 (1989) (“I saw a judge throw out the just case of a widow whose husband had been murdered because the jury’s verdict would have been an embarrassment to the governor who had appointed him. I saw a judge permit the prosecution of an innocent man because the man was unpopular in the judge’s club.”). Some judges are unaware of the malleability of the law, and reach results that they admit are unjust because—as they put it—the “law” compelled that result. But Pragmatic Indeterminacy says that the law cannot compel any result. A judge who says so either is fooled by the law (as advanced by the more clever advocate in the case) or is being disingenuous.
between the two conflicting legal arguments presented by the parties to the court.

Justice, of course, is not entirely absent from the law school curriculum. It peeks in now and then, and the students absorb some of it by osmosis. Professors will often spend time discussing which result in a case is "fair." Often the answer cannot be found because the critical facts of the case are not stated in the court's opinion. However, in the main, the present law school curriculum is devoted to imparting to the students descriptive knowledge of rules of law. Each course is slightly different in content, just as the priest wears different vestments for high mass, low mass, and special functions. Students are trained to become verbally adept at manipulating rules in a variety of legal specialties.

But the enterprise is hardly ennobling. A student trained in manipulating rules is no more likely to take up a career in serving the public than in cheating the public. We train our students to shoot, and some of them become legal gunslingers. We rationalize this endeavor to ourselves by thinking that at least if there are two lawyers in every case, the "truth" will come out. But we also know down deep that the clever lawyer and not the one with truth on her side will usually win. In fact, some of the cleverest lawyers are in the employ of the most affluent persons and corporations, and it is their job to make their clients even more wealthy. Truth and justice do not necessarily have anything to do with such a task.

At present, law schools primarily teach the facility of manipulating law-words so students may utilize these words in presenting arguments in court, in negotiation sessions, or in structuring a client's deals. Since we teach law-words *interchangeably* for P and D, the *purposes* P and D might have, get canceled out. We simply assume that Patricia calls an attorney's office and says: "This is what I need." Then, the attorney starts the meter running. We simply assume that David walks into an attorney's office and says the same thing. Then Patricia sues David, and money flows from each of them to their respective attorneys. To be sure, we often suggest that the attorney has a loftier role. The attorney might say: "Are you sure you want what you say you want," or "If you consider changing your preferences, it may cost you less and save you future grief." But for the most part, law schools are indifferent as to the comparative truth or justice of any potential client's cause.

Even though clever lawyering may have little to do with justice or truth, I am not for a moment arguing that the adversary system itself derails us from the search for truth. I disagree totally with Anthony Kronman who, in a much discussed article, claims that teaching advocacy in law schools entails an "indifference to truth that . . . is likely . . . to affect the character
of one who practices the craft for a long time and in a studied way."82
What is lawyering apart from advocacy? If we fail to teach advocacy to our
students, what relation will law school possibly have to what our students
will be doing for the rest of their professional lives? Professor Kronman has
selected the wrong target. It is not training in advocacy that leads to an
indifference to truth, but rather it is the failure—*in the course of teaching
advocacy*—to consider the comparative justice of opposing claims that leads
not only to indifference to truth, but to general moral relativism. Quite the
opposite of what Professor Kronman says, I believe that law schools need to
sharpen their students’ ability to be advocates. Successful advocacy will
entail, in my view, ferreting out the factual basis in justice for their client’s
claims, and organizing and presenting those facts so as to elicit resonance
with the decision-maker’s sense of justice.

One may object: What if in a given case P’s claim happens to be just
and D’s claim happens to be unjust? How can a law school train students
to be an advocate of D’s position when that would amount to instructing
students to win for an unjust position? In the first place, I would say that it
is extremely rare for one side of a case to have a purely unjust position. I
encountered such a rarity in the case of Dr. Branion.83 In that case, the
only moral approach would have been to urge the state to desist from prose-
cuting Dr. Branion. His case was simply one in which there were not “two
sides” to the question of whether an innocent man should be incarcerated.84
In any event, in most cases, what appears to be the comparatively unjust
side of a case will have its own justificatory elements. These elements may
have to be sought out by counsel; there may be “hidden facts” that have to
be brought to light to explain why D did what he did and why P is not
100% right.85 In law school, no matter how extensively the facts of a case
may be presented in a casebook, there are still unknown and perhaps un-
knowable facts. These facts can make up a host of “what if” questions.
Additionally, the facts as presented can be interpreted. Students may argue
either side of a case in a classroom by interpreting the given facts in a differ-

83. See *supra* notes 69-73 and accompanying text.
84. But even this proposition is possibly indeterminate. I have suggested a utilitarian justifi-
cation for incarcerating an innocent man. See, D’Amato, *The Ultimate Injustice: When a Court
Misstates the Facts*, 11 Cardozo L. Rev. 1313, 1333 n.59 (1990). Since I don’t personally believe
that utilitarianism is a moral position, I am hardly in a position to suggest that the utilitarian
justification I outlined in that article is really a “justification.” But I of course recognize that
utilitarians may sincerely believe that their position is a moral one. See, e.g., H. Sidgwick, *The
Methods of Ethics* (1874).
85. By enlarging the “frame” of discourse, additional justificatory facts will appear to be
relevant.
ent light. (This happens all the time in the moot-court hypothetical exercises I use in my course in International Law.)\textsuperscript{86} The result finally reached should be the one that is comparatively the more just. But along the road to reaching that decision, many competing "justice-factors" can be taken into account and assessed.

In brief, training in advocacy is not only possible in law schools, it is desirable—so long as the training does not reduce to a question of which side is slicker and more glib in rattling off sophisticated legal arguments. As long as we keep the goal of searching for the just solution in mind (even if there is a great difference of opinion in the classroom about which position is the more just), then I do not believe that advocacy training can produce an indifference to truth. Just the opposite can occur. Advocacy training in the search for the just solution can help us collectively converge upon truth.

Through our hands as professors of law pass some of future society's most important people. We have three years of their lives to make an impression on them. Then they will leave us and take up "the law," whether in politics, in business, in private practice, or on the bench. They will influence and, in some cases, judge or govern our society. If we teach them merely how to understand, use, and manipulate law-words, there is no doubt that they will use these tools to whatever ends they choose. But why do we take such a stunted view of our role as their teachers? Why do we think that we must impart to them and implant in them more and more rules of law? No one is forcing us to teach students rules. We should use the three years of law school to pry open these rules. We should hold up hundreds of cases to the light of legal rules (even if that light is dim and glancing) to see whether a superficial interpretation of those legal rules would lead to an unfair decision in those cases. If it would, then we should teach ways of reinterpreting those rules in light of an assumed legislative purpose to be just, as well as ways of looking for additional facts in the richness of the factual settings of those cases.\textsuperscript{87} We should reinterpret rules in light of the sense of justice that emerges in the classroom discussion, as well as looking for more facts as that sense of justice dictates. In doing so,

\textsuperscript{86} See supra note 13.

\textsuperscript{87} I believe that there is nothing wrong with reinterpreting rules in the interest of justice and everything wrong with reinterpreting them in the interest of injustice. The legal formalist may reply: why reinterpret the rules at all? Why not just interpret them the way they were meant to be interpreted? But those questions are precisely what is wrong with legal formalism. Rules are never just interpreted; there is no such thing as a plain interpretation of a rule. There is no such thing as the sanctity or integrity of a rule. See generally S. Fish, Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literacy and Legal Studies 259-96 (1989).
we will be helping to shape our students' abilities to search for and articulate the normatively persuasive facts in their future clients' claims to a just and fair legal decision. If our students do that in their practice, they should achieve greater success as advocates.

What is the content of this sense of justice? After perusing much that has been written on justice, including philosophical, legal, sociological, and psychological books and articles, I have come to the conclusion that no one will ever be able to tell us what constitutes justice. For I believe that justice does not have a "content" that can ever be expressed in words. My conclusion is not a negative one, but is, perhaps surprisingly, optimistic. For if anyone could state the content of justice in a Text, then the Text itself would be subject to interpretation, misinterpretation, application, and misapplication. The Justice Text would become just one more set of words.\(^{88}\)

Suppose that a nation simply enacts the Justice Text as its basic law. Would law and justice then be fused? Clearly not; the Justice Text would be nothing more nor less than law-words, and thus it would be subject to our interpretation or misinterpretation in the light of our sense of justice! (There is also a second reason: general statements about justice can never solve specific cases.)\(^{89}\) My conclusion is simply that justice cannot, by its nature, ever be reduced to words.\(^{90}\)

But that is a far cry from saying that justice is a purely subjective notion lacking in content. If justice lacked content and were purely subjective, the following claim might be controversial: "It is clearly unjust for a judge to knowingly incarcerate an innocent man." But I doubt whether anyone would dispute that claim. I doubt whether anyone would say that Dr. Branion, in the case I described earlier, was justly denied habeas relief despite the fact that he was provably innocent.\(^{91}\) The fact is that we all share a great deal of common ground in our assessment of justice claims. I call this common ground our sense of justice. It may not be expressible in a text, but

\(^{88}\) Consider the history of using the Bible as a justice text. One would have to then accept the Old Testament view that children who disobey their parents should be stoned to death. One would have to accept the wild misinterpretations that have been given to Biblical phrases. As Shakespeare wrote, "The devil can cite Scripture for his purpose." SHAKESPEARE, The Merchant of Venice, Act I, sc. III. For an account of Milton's ingenious reinterpretation of the of the New Testament's attitude toward divorce, see S. Fish, supra note 87 at 8-9.

\(^{89}\) Cf. J. Fletcher, SITUATION ETHICS (1966).

\(^{90}\) For further discussion, see the chapter entitled "Justice" in A. D'AMATO, HOW TO UNDERSTAND THE LAW 141 (1989).

\(^{91}\) To be sure, a person who believes in utilitarianism as a principle of justice might fashion an argument that would deny habeas relief to a provably innocent person. I have constructed such an argument in my essay on the Branion case. See D'Amato, supra note 84. Even if the argument is accepted (I don't accept it), it would still be difficult to argue that justice to Dr. Branion himself was served by the denial of habeas relief.
it exists. Indeed, its existence is one of the things that we are most sure about in this uncertain world.

If we cannot teach students what justice is, or even pick out justice rules from a given legal or philosophical text, we can do the next best thing by considering the epistemology of justice. This epistemology is, I contend, common to the experiences of all or nearly all of our students.

To begin, it is clear that we did not obtain our sense of justice from definitions of justice or theories of justice. We have a sense of justice, but we learned it in a different way. We learned it by observing, hearing, and reading about hundreds of thousands of incidents and how they were resolved. We started at a very early age. We saw how our parents made decisions, and we soon learned what was “fair” and what was not. We saw how our playmates behaved and often argued questions of fairness in the playing of games. We were read stories of just decisions in the Bible; we heard sermons about incidents that were fairly decided; we saw and heard many stories about decisions that were unfair (and we drew conclusions in our minds about what would have been the fair decision). We heard our relatives and friends talking all the time about who was unfair to whom. “Justice” is the conclusion we reached about how competing claims in the stories we heard (or the daily incidents we participated in) were fairly resolved so that the outcomes were stable and accepted. By the age of ten we already had a highly developed sense of fairness and justice, and by the time we went to law school that sense of justice had been sharpened and made more sophisticated through our additional years of reading, listening, and experiencing.92

It would be impossible to recall all the stories we have heard in our lives that make up our memory bank of “justice” incidents. Each person, of course, has a different constellation of stories. But the fact is that many of these stories overlap, and the “justice” outcomes are fairly stable across stories and across minds. Each year I try the following simple experiment on my students in my course on Justice, and every time I get the same unanimous answers:

A mother of two children cuts the dessert cake; she hands a large piece to Jane and a small piece to Tom. Is this just or unjust? (Unanimous answer: Unjust, in the absence of a reasonable explanation.)

92. Perhaps our sense of justice was even more acute when we were ten years old than when we became adults. For in our childhood we had to think about justice all the time in our relations with our parents, siblings, and friends. Those were intensely personal encounters with justice. Later, we began to think of justice in more abstract terms, and perhaps we unlearned some of the basics and lost some empathy in the process.
Now consider each of the following explanations that the mother might offer:

**Examples:**

(a) "I like Jane more."
(b) "Jane is a girl."
(c) "Jane is cute; Tom is plain looking.”
(d) "The doctor put Tom on a low sugar diet.”
(e) "Because it’s Tuesday.
(f) "Tom hates cake.”
(g) "They’ve got to learn that the world isn’t fair.”

**Answers Given:**

Unjust, in the absence of a reasonable explanation.
Unjust.
Unjust.
Just, but there should be some corresponding compensation for Tom.
Unjust, unless the mother is alternating days of the week, so that on Wednesday, for example, Tom gets the bigger piece of cake.
Just.
Unjust.

I suspect that as you read these examples you agreed with all or most of the answers. Note that, presumably, the “cake” example was a new one—especially with the variations I proposed—to the students who have participated in this experiment. Presumably you have not previously though of it—at least with these variations. Yet the students’ answers (and yours) are congruent.

In addition, consider your mental processes as you answered the above points. Did you consciously apply some theory or conception about justice? I suspect that you simply arrived at your answers without the need to identify a theory and then apply it. Of course, you may have had a general theory—that the two children ought to be treated equally. But this theory is too abstract to account for the different answers to the mother’s various explanations.93

I suggest that we answer these questions—as we answer all justice questions—by mentally comparing the picture suggested by the situation under

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93. In saying this, I do not subscribe wholly to Professor Peter Westen’s theory that equality is an empty concept. See D’Amato, Is Equality a Totally Empty Idea?, 81 Mich. L. Rev. 600 (1983).
discussion with thousands of pictures in our brains. 94 We process these thousands of pictures extremely rapidly; indeed, our mental processes themselves already reflect our amalgamation of these pictures, as well as what we have learned from them. 95 As a result, we recognize fairness and unfairness quite rapidly. When fairness or unfairness is not immediately apparent from the picture-data we are given, we quickly know what additional questions to ask. Our ability to formulate these “justice-questions” is neither a matter of instinct nor a matter of having learned the theory of justice. 96 Rather, it stems from our rich experience in listening to justice stories and learning how to arrive at conclusions about whether such stories end in a decision that is just or unjust. 97

By the time students enter law school, they already have a finely tuned sense of justice. There is very little need to further develop their sense of justice, even though the range of application of their “justice-thoughts” to new situations is extended by the law school experience of reading hundreds of cases and pondering whether the decisions in those cases were just or unjust. I believe that the three year law school as presently constituted diminishes the students’ sense of justice. At present we are unteaching justice. We are presenting to the students truncated fact situations and slabs of rhetorical justification. We do not inquire whether there were other facts that those stated by the court, nor do we ask what the parties actually did to solve their problem before, during, and after litigation.

Although there is no need to teach students a sense of justice—they already come to law schools with it—we must at least stop imparting the incessant message in our courses that justice is not relevant to the law. I do not claim that we impart this message explicitly. Indeed, most professors I

94. The “pictures” in our brains are not necessarily images we have stored in our memory banks. Rather, they may also consist of processes of analysis—what Minsky has called K-lines. See M. MINSKY, THE SOCIETY OF MIND 82 (1986).
95. Id. at 81-92.
96. The picture of a justice situation I have described in the cake-slicing example is specific and extendable. In contrast, theories about justice tend to be amorphous and vague. In PLATO, THE REPUBLIC, Plato engages in extensive dialogues addressing whether justice means “the interest of the stronger” (Thrasymachus) or whether it means “happiness,” or “truth.” The net result, I submit, tells us nothing useful about justice.
97. Indeed, the way we “solve” justice problems is the same as the way we engage in problem-solving behavior generally. We learn to solve problems by dealing with problems (at a very early age) and solving them by trial and error. We learn to solve problems rapidly because the correct answer is usually quite apparent (e.g., if the baby pushes the food away, the baby will not be able to eat the food; so the baby quickly learns to bring the food toward its mouth). Similarly, we learn to solve justice problems by listening to the thousands of stories we hear as a child, formulating our own answer, and comparing it with the answer of people we trust (our parents, the clergy, authors of books we read, and so on).
know will occasionally or even usually ask whether the result reached by the court was fair. Rather, we convey the message that justice is irrelevant in a far more profound and subtle fashion: by insisting that the court’s decision is “right” or “wrong” on the basis of purely legal analysis (i.e., on the basis of stitching together the appropriate pattern of law-words).  

Some of our leading theorists have, in effect, argued for the irrelevance of justice by concentrating on other allegedly normative decisional criteria. In so doing, these theorists deflect our concern away from justice considerations. For example, although Judge Richard Posner has shown that resort to economic criteria in deciding cases may promote market efficiency, he has not been able to go the next step and convince his readers that market efficiency (and/or wealth maximization) is justice driven. Indeed, he seems to suggest that justice itself reduces to a market function of getting the economic analysis right. A more subtly insidious message is contained in Ronald Dworkin’s “law as integrity” thesis. By insisting that “the law” should be followed because it has integrity, his entire construct boils down to a claim that in a case where law-as-integrity is on one side and justice on the other, law-as-integrity trumps justice. The Nazi case of judges zealously applying Aryan principles to thwart the justice claims of minority groups is just as much an exemplification of the law-as-integrity thesis as it was of Dworkin’s prior “right answer” thesis (where the right answer was discoverable from the existing legal materials). From the point of view of the Nazi judge, both law-as-integrity and right-answer help to reinforce the judge’s decision to interpret Nazi law as embodying and reflecting the Aryan “philosophy.”

98. As previously discussed, I regard the use of the words “right” and “wrong” in the context of legal analysis as impermissibly parasitic upon the moral content that we invest in those words. See supra note 23 and accompanying text.

99. For an example of how wealth maximization can be deconstructed, see D’Amato, Can Any Legal Theory Constrain Any Judicial Decision?, 43 U. MIAMI L. REV. 513 (1989).


102. See, R. Dworkin, TAKING RIGHTS SERIOUSLY (1977). It is high time that defenders of Dworkinism stop objecting to the “Nazi” example as pathological. The fact is that it persists as a vivid exemplar of the consequences of Dworkin’s theories as defeating justice claims. If the “Nazi” example is a real consequence of the application of Dworkin’s theories, then there are millions of less noticeable examples where justice is also trumped as a consequence of those theories.

103. There are times when Dworkin seems to hover ambiguously between a positivist and a naturalist position, such as in his early “Model of Rules” essay. See Id.; cf. D’Amato, Lon Fuller and Substantive Natural Law, 26 AM. J. JURIS. 202 (1981). But I believe a very careful reading of Dworkin’s works would result in finding that he has consistently found the ultimate source of all legal decision-making in written texts (in short, in law-words), whether those texts are statutes, cases, political philosophies about law, or theories about everything that can be found in a law
Current theoretical approaches to law may thus contribute to the problem of deflecting justice concerns in favor of the pet illusory theoretical constructs of a given author. Classroom teaching surely will reflect some of the academy's leading theoretical positions, and therefore a wholesale re-evaluation of these theories may be necessary before the clouds of theory that overhang our classrooms can be dissipated.

In the classroom, there is, in my view, only one initial question to be asked of any case: "Was the result fair (or just)?" If the professor's view of the result reflects a certain policy or theory, then that professor ought to ask the further question: "Does the policy (or theory) comport with justice?" Constant classroom attention to the normative dimension of justice will help our students become better lawyers because, as lawyers, they will only succeed in persuading judges to the extent that they can convince the judge or decision-maker (or the other side in a negotiating session) that their client's position is fair and just.

There is no textual answer to the question whether a given judicial decision is fair. The question should be posed to law students to elicit their sense of justice. Often I suspect that the best answers will be: "We need to know more facts—specifically, we need to know whether . . . ." And if this is the answer, then the next line of inquiry should be: "What did the lawyers do to elicit (or suppress) those particular facts? Why weren't those facts part of the plaintiff's or defendant's case? Why weren't those facts brought out at trial? Did rules of evidence unfairly suppress them? If the facts were elicited at trial, why didn't the judge mention them when he summarized the facts of the case?" These, in my view, should be the sorts of questions that go back and forth between professor and student in any course. The legal subject matter of a given course (say, tax, or antitrust, or white-collar crime) will put a spin on the questions asked. What seems to be relevant missing factual information in a tax course might be different from, or only overlap partially with, relevant missing factual information in white collar crime that considers a case of a tax evader. (Course-specific relevance here is part of the heuristic function of legal rules that I mentioned earlier.)

As students get more proficient in asking these kinds of issues, they will be better able to see the weaknesses in their professor's arguments and to see the weaknesses in their own arguments. In the end, that is what they will be asked to do as lawyers in practice. And if they are able to see the weaknesses in their professor's arguments, they will also be able to see the weaknesses in their own arguments.

library or on a LEXIS® or WESTLAW® computer. In brief, I believe the Dworkin is, au fond, a positivist. If so, he is vulnerable to the "Nazi" argument (and to the South Africa argument and indeed to any legal pathology); he cannot escape (although he and others often try) by saying that the Nazi example is weird or pathological. For many German citizens during the Third Reich, the Nazi laws seemed somewhat excessive but not at all weird. I am sure that many Americans have similarly viewed many American laws (consider the views American women must have had about nineteenth-century laws in the United States).

104. See supra note 23 and accompanying text.
questions and pursuing them down whatever avenues they open up, students will be getting training in effective lawyering.

I have so far argued for two broad propositions: First, that justice and law are separate; in precisely the same way that a normative statement and an empirical statement are separate; and second, that justice cannot be reduced to words. To complete the picture, I would like to add a third proposition: that justice is in fact pre-verbal. I have spelled out this argument in some detail elsewhere. Here I want to stress only that our sense of justice depends fundamentally on our sense of similarity. The sense of similarity, as Rudolf Carnap demonstrated in his masterwork, *The Logical Structure of the World*, is a more primitive notion than language. Indeed, language ability would be impossible without it.

When one stops to think how dependent law is on similarity, one finds that similarity is no less than the engine that makes law work. For example, how do we determine what cases constitute precedents for the case at hand? We look to see whether their facts are similar or analogous to the facts of the present case. We expect the judge to decide our case in conformity with the decisions of the closest similar precedents. Or consider how we determine that a statute applies to a given case. We form a mutual picture of the kind of situation that the statute is generally considered to apply to, and see if the present case is similar to that general picture. For instance, consider the simplest of all possible pieces of legislation: a stop sign at an intersection. We cannot tell just from the word "stop" what we are supposed to do (Should we *stop* talking when we see the sign? *Stop* walking? *Stop* breathing?). Rather, we form a picture of what the sign signifies. Our mental image is that of an automobile coming to a stop at the intersection. Then if we see a real automobile coming down the street—or a truck or a bus—we compare the scene to our mental image and *expect* the real car, truck, or bus to come to a stop just as our minds play for us an internal motion picture consisting of a vehicle coming to a stop at the stop sign. But even that is not the end of the movie. If it were, we would end with a stopped vehicle. Should it remain stopped forever? Again, we consult our mental image and view on the movie screen of our minds an automobile coming to a stop at the intersection, then starting and moving on. It is this full motion picture that we utilize when we interpret the stop sign. It will coincide with many real world scenes, but of course it will not solve all

problems. For example, does a bicycle rider have to stop at the stop sign? How close is a bicycle to our mental image of the automobile? Why was the sign put there in the first place? We start to fill in our mental image with justice considerations. The stop sign was placed there to avoid accidents between vehicles coming into the intersection simultaneously at right angles to each other and to avoid pedestrian accidents at the crossing. These considerations of justice might help us take a reasonable position whether the stop sign ought to apply to bicycles.

By calling justice “pre-verbal,” I open myself to the objection that one person’s pre-verbal conception of justice may differ from another person’s, and because both conceptions are pre-verbal, it is impossible to find rational grounds for settling their differences. If rationality is out the window, what point is there in teaching justice? This objection proves too much because it applies not only to justice but to all the values that we have. All our values are “pre-verbal.” But our values can be shaped as we learn more about the world. Our “justice” value is shaped by the stories we hear about human situations and how those situations were resolved. Indeed, law school can be a very efficient place to refine and develop our innate conception of justice. In arguing before a court, we can only hope that the main value the judge has is justice. (If the judge instead values more than anything else his friendship with the attorney opposing us, we are probably going to lose the case.) We can only hope that the judge has also developed a refined sense of justice by virtue of a good law school education, so that the facts we raise on behalf of our client may resonate with the judge’s conception of relevant justice-facts.

My adjuration that law schools should teach justice and not “law” may seem to reduce to a verbal question that might be asked as follows: What do we mean when we say we teach “law”? If this reduction seems correct to you, then my answer would be: teaching justice is a way to teach law. Since law is taught by the mental operation of similarity and analogy and since common law depends on precedents, the law depends on precedents and the legal process works when we compare past decisions to present ones. All we have to add is the normative component: that we ought to

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107. I was once ticketed for going through a stop sign. In traffic court, I admitted that I did not stop, but argued that the sign itself was misplaced. It was in the middle of a street, not at the end, and I did not see it because it was raining and I was looking out for pedestrians and other traffic. To the great surprise of the state’s attorney, the judge ruled in my favor. However, the judge could easily have held against me on the same facts and on the same “law.”

108. Cf. United States v. Murphy, 768 F.2d 1515, 1538 (7th Cir. 1985) (“A judge could be concerned about handing his friend [the prosecutor in the Murphy case] a galling defeat on the eve of a joint vacation”).
decide present cases similarly to the way past cases were decided. And this "ought" is provided by the consideration of justice. Justice requires the perpetuation of precedents because that is the only way to treat present litigants fairly. As the old cliché puts it, justice means treating like cases alike. This is not a tautology; it is a profound truth. It is a tautology only at the verbal level, but since (I claim that) justice notions are pre-verbal, what case is "like" another is a primitive pre-verbal notion that cannot be defeated by verbal logic constructs.

In order to study whether a past decision is similar to a present case, we need to know the facts of the past decision, and compare them to the present facts. Legal training thus consists of reading hundreds of cases and comparing them with each other and with present fact situations. In doing this work, we will sharpen our sense of justice by honing our ability to recognize patterns of factual similarity and analogy.109

But one might object that factual patterns are always both similar and dissimilar to other factual patterns. Which dissimilarities should we ignore? If the previous automobile accident case involved a collision between a Toyota and a Honda, is it similar to the present case involving a collision between a Volkswagen and a Chevrolet? Such questions cannot be decided on either a verbal level or on the level of physical reality. Instead, we must resort to our mental pictures about "justice" stories. Would it be unfair to treat the latter collision differently from the former one if the only difference is in the makes of the automobiles? Our answer, as usual, is "Yes, unless. . ." The "unless" part of the answer suggests the subsidiary question: Did the makes of the automobiles have anything to do with any of the factors that were involved in the accident (i.e., visibility, braking power, cornering power, etc., and whether drivers knew about these factors and could have taken reasonable precautions)? If we cannot find any further facts along these lines, then I suggest we would all agree that the makes of the automobiles should not result in dissimilar judgments between the two cases.

It is clear from these examples that teaching justice instead of "law", does not entail wholesale jettisoning of existing courses or casebooks. I am

109. A lazy move in precisely the wrong direction is to say that the case at hand is like the precedential case if the rule of decision is similar. After Wittgenstein, we can no longer characterize a previous case by its "rule of decision" because there are an infinite number of "rules of decision" that equally fit its facts. Additionally, there are an infinite number of "rules" that characterize the facts of the case at hand. To compare one infinite collection of rules to another is to waste one's time. If we are to understand law as it really is, we must abandon the notion that a case is an illustrated rule. One case is "like" another in the only sense that we care about whether the facts of the two cases are similar.
talking about a change of focus, of emphasis—but it is a change that would reverberate in every course and in every class session. The question we should ask of every case is not, “What is the rule of law that this case lays down?” but rather, “Was justice done to the parties?” If we find that justice was not done, we should examine how the legal system went wrong. Perhaps it went wrong because of bad lawyering. Perhaps the “rule” that the case could be said to exemplify should have been interpreted differently by the court. Perhaps certain facts were not adduced in court because a lawyer thought that those facts were not legally relevant. Indeed, bad lawyering—a product of the way law schools train future lawyers—is often associated with blunders at the trial level concerning the introduction of evidence; the incompetent attorney is too readily convinced of the legal irrelevancy of potent evidence. Yet, if we are trying to achieve justice, we may find that facts that appeared to be legally irrelevant are significant from a justice standpoint. Since the rules of evidence are intended in the aggregate to promote justice, any one of them is open to challenge or reinterpretation.

More particularly, rules of evidence are the legal system’s way of framing the issues at trial in a manner that makes those issues manageable to a judge and jury. Yet, the very framework can keep out facts that are highly relevant to a fair resolution of the issues. We are always putting legal frames around factual situations—temporal frames and spacial frames. An important article by Mark Kelman discusses the tensions that operate on these frames in the field of criminal law. Although Professor Kelman’s self-selected perspective is that of legal neutrality, in fact each of the issues he discusses can be reinterpreted as a dispute over justice—whether criminal law should come down on the side of justice to the individual defendant or justice to society. Of course, these are broad antithetical positions;

110. The very question, “What rule of law does this case stand for?” is metaphysically absurd. There is no ontology about the matter. All cases have to be interpreted, all rules purporting to stem from cases have to be interpreted, and the indeterminacy of a case is such that any number of conflicting rules may explain the case equally well.


112. Take the notion of deterrence. Deterrence has nothing to do with the individual defendant. He is punished only because of the exemplary value of his punishment on future would-be criminals. Punishing him raises the cost-effectiveness of crime to others. It follows from a pure deterrence theory that a defendant who is perceived by the public to be guilty yet who is in fact innocent should be punished. The deterrence theory thus encourages prosecutors to suppress exonerating evidence, to argue that certain proffered evidence is “irrelevant,” and to resort to “dirty tricks” to get the jury to return a verdict of guilty. Writers who champion an “economic” approach to law are apt to favor the theory of deterrence over all competing theories of criminal-
truth in any individual case requires delicate shading of the various justice claims.

When we ask the justice question of legal materials, we find that the things edited from contemporary casebooks are the most perspicuous. The casebook is likely to give a condensed summary of the facts—condensed by the editors from the court’s own opinion, which itself was already a highly selective and summarized account of the facts. The casebook then goes on to present portions of the court’s reasoning. What we need to know most of all are the facts that are missing. What were the real facts of the case? What stories did the parties tell their attorneys? What did the attorneys do with those stories? Did the attorneys advise the parties to take further steps either to improve their eventual litigating position or to avoid litigation entirely? What was that advice? Did the clients take it? Was it good advice? When the case got to trial, what did the jury hear? What can we find in the transcript of the trial? What about evidence that the jury did not hear because the judge ruled that it was inadmissible? How did the attorneys argue the inadmissibility questions? What were the attorneys’ final statements to the jury? All of these questions arise before the appellate court ever gets the case and before the appellate court summarizes the facts. We need to know the answers to some of these questions before we can determine whether the appellate court’s summary of the facts is fair and accurate. Furthermore, there are factual questions that arise after the appellate court has ruled. Was the judgment ever collected? Was the case settled after the court’s ruling came in? If it was a criminal case, what happened to the defendant? If the defendant was later pardoned by the governor on the ground of innocence, should not that fact alone cast doubt on the fairness of the court’s proceedings? Finally, what role did the judgment play in the lives of the parties? Did both sides accept the judgment and move on with their lives, or was one side permanently embittered by the judgment? In commercial cases, what steps were taken by the losing party to change its ways of doing business? If the losing party regarded the judicial decision as unjust, what steps if any did it take to retaliate against the winner?

Many of my colleagues will immediately cry to such questions: “Irrelevant! What happened to the parties before or after the case—that the court

ity. I suggest that all their theories, as well as the theory of deterrence itself, be reexamined in law school classes in criminal law in the context of specific cases to see if the rhetoric of deterrence operates to exclude justice-relevant categories of evidence from the trier of fact.

113. The worst examples in this regard are the “illustrations” given in the various Restate-
ments of law. These are nothing other than tautological repetitions of the black-letter “rules.” For some additional invective against restatements, see D’Amato, Legal Uncertainty, 71 CALIF. L. REV. 1, 54 (1983).
did not know about or mention—can have absolutely nothing to do with the law.”

But it is precisely this notion of irrelevance that I am attacking. Why are the questions of what really happened to the parties irrelevant? Whether or not they may appear to be legally irrelevant under the law as we presently conceive it says nothing about what the law ought to be; it only betokens our presently myopic view of “law.” Law, as it is presently conceived, wears blinders that block out observation of what happened to real people in real situations.\textsuperscript{114} Yet, what happens to real people in real situations is what justice is all about. Thus it is our present notion of “law” that needs rethinking. For “law” is and can be only the existential appearance of words printed on paper. Changes in those texts are perhaps curious phenomena, worthy of an arcane scholar’s inquiry (although our law reviews are full of such endeavors). But in every case that our students will ever be called upon to handle in real life, the words on the law book pages have no intrinsic interest—they are simply the “given.” The attorney is called upon to take what is “given” and show the court that a proper, fair, reasonable, and just interpretation of the “given” is necessary in order to do justice to the parties. The opposing attorneys will disagree as to what interpretation is proper, fair, reasonable, and just. And the question will be settled—assuming there is a fair-minded judge interested in doing justice—according to a comparative evaluation of the facts as presented by both sides against the judge’s sense of justice. The “facts” cannot be legally circumscribed without falling back into the regressive view of “law” that I am attacking. Rather, it is the inherent sympathetic\textsuperscript{115} appreciation of the facts that should drive our interpretation of the “relevant” legal rules. To do it the other way around—to say that the legal rules tell us what facts are relevant—is to put on legal blinders (blinders of our own making) and thus to perpetuate injustice and bad lawyering.

Perhaps the claim with the most practical pay-off that I am making in this essay is my argument that if we teach justice, and not law, our students will receive better legal training than they now get. This practical argument is one not normally associated with discussions about “justice.” Indeed, if a law school were to suddenly announce that it will henceforth teach justice, and not law, the outside community reaction might well be negative: Law schools should develop the groundwork for professional competency, and not pursue justice or truth. Thus, the change that I am advocating would require a re-education of the public as to what good law schools are all

\textsuperscript{114} As a result, law, on the whole, ill-fits the real interests of real people in real situations.
\textsuperscript{115} In Hume’s sense of “sympathy.”
about. But re-education, even of adults, is possible if it is grounded in a firm conviction that the shift to justice will result in doing the professional competency job better.

To indicate how "justice-teaching" could work, let us first consider the basic structure of law the way it is presently taught. Consider the basic case, Plaintiff v. Defendant. Law schools today teach students the best legal arguments for both P and D. This is what the subject matter of courses on Contracts, Torts, Criminal Law, Antitrust, and Tax have in common. We look at a reported case, we analyze why one side won, we consider the arguments for the other side, and we pit the arguments against each other. We might say that P seems to win under the relevant statutes, but D has a good case under the relevant precedents whereas P can come back with a policy argument, and D can rejoin with an economic theory; but P can rebut with an exception to the economic theory, and so forth.

But much more is needed. The ideal classroom exercise would go on to question whether there might have been other facts that the attorneys could have adduced that would have shifted the justice considerations to the other side. What kinds of facts might they have been? Do we have any evidence that these facts were in fact available to the attorneys? Were important "justice-facts" excluded at trial for evidentiary or strategic reasons? And are we unintentionally excluding a set of relevant facts because they seem to come under the aegis of some law school course other than the present course?116

Indeed, the "justice dialogue"—whether in the classroom or among a group of friends conversing socially—invariably consists of adducing more facts and arguing for their analogical relevance. To revert to the cake dividing example, some of the mother's explanations for giving the larger slice to Jane seem to call out for additional elucidation. When she answers, "Because it's Tuesday," we want to know more facts. Is she alternating between her two children depending on the day of the week? Is there some

116. For example, the "duty to warn" and the "duty to rescue" are topics of perennial interest to first year-law students. They learn that in Anglo-American law, a person has absolutely no duty to warn a perfect stranger of impending disaster or to rescue an imperiled stranger even if the cost of rescue is trivial. See Buch v. Amory Mfg. Co., 69 N.H. 257, 44 A. 809 (1898); Osterlin d v. Hill, 263 Mass. 73, 160 N.E. 301 (1928). But the students learn this "lesson" in the confines of the Torts course. Their conclusion may be nothing more than an artificial consequence of the curricular decision to have separate courses in Torts and Criminal Law. A solution to the moral dilemma posited by the cases can be found, I believe, if we look at Criminal Law. The justice considerations do not play out when confined to Torts but require going to a different set of concepts taught in a different course (Criminal Law). For the full argument, see D'Amato, The "Bad Samaritan" Paradigm, 70 NW. U.L. REV. 798 (1976), reprinted with minor additions in A. D'AMATO, JURISPRUCENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW 287 (1984).
other form of compensation for Tom (who on Tuesday is getting the smaller slice)? A classroom discussion of a case can elicit questions as to the sort of facts that might make a justice-difference to the decision-maker. Some of these facts might be available in the court’s own summary of the facts; others might be provided by the casebook editor; and still others would be speculative. Consider the typical first interview between an attorney and a prospective client. The attorney is not content just to listen to the client’s story; rather, she asks questions and follow-up questions in order to get the kind of factual picture that she can then examine to see whether there is any cost-effective recourse for the client that the lawyer can provide.

The justice-dialogue in the classroom may or may not lead to a conclusion that one side is “right” and the other “wrong.” But this conclusion will be debated, and the debate will focus primarily on the competing stories of the clients, fleshed out by the further elucidation of facts (or hypothetical facts) resulting from the classroom discussion. Legal theories serve as heuristics in the minds of students who are elucidating these further facts. But the theories are not themselves the end of the story—any theory over-determines the facts and any set of facts under-determines the theory. What finally counts, when heuristics are exhausted, is the sense of justice that one party’s story is more morally compelling than the other’s story.

Can such “justice-dialogues” be taught? Obviously yes, but classroom dialogue is required. Lecturing does not work here.\(^\text{117}\)

The classroom dialogue is enhanced because students know the actual result that was reached by the court. They can then ask whether the court reached a just result. If unjust, what did the parties do (or what could they have done) after the judgment was rendered in order to ameliorate the injustice? What steps could either party take in the future to change its behavior in order to live with the result reached by the court?

The “analytical skills” we teach might not be noticeably different if our focus is on justice instead of law. Students will still receive the same basic and, I think, excellent law school training in analysis, organization, and persuasion. But I think the students’ level of interest will be much higher

\(^{117}\) I have argued that lecturing does not even work for traditional law instruction. See D'Amato, The Decline and Fall of Law Teaching in the Age of Student Consumerism 37 J. LEGAL EDUC. 461 (1987). It certainly cannot work for discussions of justice. Nor can any textbook do the justice job. There is no lecture or textual substitute for teaching justice in the classroom. In one sense, my argument for teaching justice in law schools and not “law” is a return to the value of civilized dialogue. This value is largely being lost in a media-hyped age. When we actually have the luxury of a classroom dialogue, it is a sheer waste for the professor to deliver a lecture. For a lecture can be written and distributed to the students to read at their own leisure (i.e., when they are watching television). It cannot do the justice job, which is a conversation job.
because the exercises are conducted with a purpose—a human purpose, the purpose of discovering more about justice and how fair solutions to problems can help people live better and more satisfying lives (which includes lives that are not wrenched and distorted by the intrusion of law and litigation).

But it is quite clear that the analytical questions professors would ask, when justice is the focus of the classroom exercise, will be more factual. Law-questions tend to pile theory upon theory, rationalization upon rationalization, invented category upon invented category. These may be intellectually stimulating exercises, but they have nothing to do with influencing the decisions that judges make. In contrast, justice-questions will be more factual—we need more and more evidence of what people did, what they did not do (perhaps on advice of counsel), and what happened to them when they acted or avoided acting. It should be the facts that drive the theory (including the theory that is the course on Contracts, Torts, Property, or whatever) and not the other way around.

The fact intensiveness of many justice-questions means that current casebooks will need revision and expansion in order to accommodate the new curriculum that I am proposing. It will no longer be sufficient for a casebook compiler merely to present snippets of appellate court opinions. Instead, a “case” should be presented in a much fuller version than is available in the court reporters. With very old cases, the research may be difficult, but fortunately the vast majority of cases studied in law schools are recent decisions. The casebook editor should read the transcripts of the trials of the cases and present excerpts of the evidence presented to the trial court. In addition, the editor should look at the briefs of the contending parties and compare their statements of facts. When there are facts in the briefs that have been ignored by the court in its own summary of the facts, the casebook should present those ignored facts. Facts and issues should not be excised simply because they would come under the rubric of some other law school course.118 It would be additionally helpful if the casebook editor contacts the lawyers in any given case and interviews them as to

118. This is perhaps the hardest task to assign to a compiler of a coursebook on Contracts, Torts, Property, or whatever. Editors believe that it is only the “contracts issue” in a particular case that is relevant to the course on Contracts. But the real world is not like that. In the real world, cases contain interconnected issues. It is the case that should drive law school study, not just the aspect of the case that “fits” an artificial legal distinction (i.e., the “distinction” between Torts and Contracts). This is not to say that every aspect of every case needs to be included in every coursebook. Editorial judgment is still needed as to the issues that are factually interconnected (these should be included whether they come under the rubric of Torts or Contracts, for example) and issues that are factually separable (these may, with caution, be selected according to the pedagogical needs of the moment).
other facts that seem missing from the court’s account of the facts. The lawyers will also be a source of litigating strategies that can usefully be added to the account of the case.\textsuperscript{119} Finally, the editor should discover, if possible, what happened to the parties after the decision was rendered. Was the judgment collected? Were there other lawsuits? Did the parties enter into a new contract? Did they modify their subsequent behavior in order to avoid—or take advantage of—the ruling in the case? Did the law firms themselves revise their “boilerplate” and legal file-library in order to accommodate the decision?\textsuperscript{120}

Teaching from a justice perspective does not mean that a case will be analyzed from only one side. Law schools should teach both sides of the case, not only because practicing attorneys must be prepared to argue for their clients regardless of what side of a case their clients are on but also because it is necessary in preparing one side of a case to imagine what the best arguments are on the other side of the case. Teaching from a justice

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\textsuperscript{119} Obviously the approach I am suggesting will mean that the number of cases in casebooks will have to be drastically reduced in order to accommodate fuller account of the cases that the editor decides to include. But that is no real loss if we take seriously the idea that law schools should not be in the business of imparting the detailed content of existing rules of law. Rather they should be in the business of training students to be good attorneys. This training requires study of cases in their full dimensionality and not merely in the time-slice of the appellate court’s decision. In this connection, it has never ceased to amaze me how many professors seem to feel the need to “cover the field” in their approach to any course they teach. They will cover the field rapidly like a jet plane zooming over a landscape. All the rich details of the landscape will be lost in the effort to impart an overview of their subject. They feel that every aspect of their course is of vital importance. What is amazing is that these same professors champion the idea of student choice in course selection. In other words, it may be absolutely vital that a student cover every aspect of corporate law in a course on Corporations, but at the same time a student may choose to go through law school without taking the Corporations course at all. From an overall educational perspective, I find the juxtaposition of these two principles to be ironic. If it is vital for a student to learn every aspect of corporate law, then how can we justify giving a law school degree to students who do not take Corporations at all? My guess is that there is no educational principle at work here. Instead, law school curricula are the product of political accommodations among existing faculty members and a perceived need to hire new professors according to available “slots.”

An intense, dimensional experience with a few cases is, in my view, better for the students’ education than a repetitive, shallow overview of a great many cases.

\textsuperscript{120} I have written these sentences in the text in light of my previously expressed position—one that may not be familiar to the reader and hence should be noted here because it links what I say to a larger picture of law—that has been summarized by Arthur Jacobson:

Law in D’Amato’s jurisprudence constitutes a conspiracy between citizens and authoritative legal institutions—each acting within their sphere to maximize their power. The broker of the conspiracy at the center of the legal system is the lawyer. American jurisprudence—from Madison to Llewellyn—has traditionally regarded power as the destroyer of law. D’Amato has found a way to turn power into law’s chief creative element.

A. D’AMATO, supra note 116, at vii (Foreword by Jacobson).
perspective means looking at both sides of the case critically and coming to a conclusion that, on the facts as given, one side had the better claim in justice than the other side. Moreover, one of the most important "justice" lessons that can be learned is the ability to put oneself in the other person's shoes or what Hume called "sympathy" and what we now call "empathy."121 Putting oneself in another person's shoes requires knowing a lot more about that person and the facts of that person's situation than simply knowing the content of law-words. Thus, teaching from a justice perspective can significantly improve empathic argumentative ability—something that law schools are already doing fairly well.

VI. CONCLUSION

We should phase out the teaching of law because it amounts to navel-contemplation. Excessive preoccupation with the tools (the law-words) of the legal system distorts, in some students perhaps irrevocably, what law is all about and what it is for. It elevates tools over goals, form over substance, manipulations over justice.

If we begin to teach our students that what matters is justice, sooner or later society will learn the same thing. For some of our students will someday fill the benches of the courts throughout the country. What they think the law is will be what the law will become. If we should succeed in broadening their conceptions of "law" while they are in law school, even though that broader conception right now appears to be radical, sooner or later that same conception will define what law is and then be accepted as conservative and traditional. Just as medicine is all about health and architecture is all about aesthetically acceptable buildings that do not fall down, ultimately everyone should perceive that law is all about justice.
