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ANALYTIC DECONSTRUCTIONISM? THE INTELLECTUAL VOYEURISM OF ANTHONY D'AMATO

ALAN R. MADRY*

Philosophy may in no way interfere with the actual use of language;
it can in the end only describe it.

For it cannot give it any foundation either.

It leaves everything as it is.

Ludwig Wittgenstein**

INTRODUCTION

AMONG the preoccupations of the Critical Legal Studies Movement ("CLS") is its insistence that the law is radically indeterminate, which is to say, in any concrete dispute any party might in fact prevail.¹ The significance of this feature of law to many of those in the Movement who believe it, at its mildest, is to require a reexamination of the role and legitimacy of the judiciary.² For many others it is part and parcel of a larger attack on law and legal reasoning as no more than tools of oppression used by those with the simple raw power to keep marginalized people at the margins of American life.³

The academy's concern with indeterminacy is far from new. It was one of the threads in the legal realist critique earlier in the century.⁴ In the sixties, H.L.A. Hart revisited the "open texture" of legal lan-

* Assistant Professor, Marquette University Law School. B.A., 1974; J.D., 1981, University of Michigan. I would like to thank Jacquelyn Core, whose acute sense of detail and sympathy for the reader unfamiliar with philosophy saved many parts of this Article from remaining as sketches, and Joel Richimer for taking time away from his own projects and reading early drafts of this work. His comments greatly improved both its substance and presentation. I would also like to thank Richard Bronaugh for his generous editorial comments and Anthony Peressini for reviewing the discussion of Quine.

** Ludwig Wittgenstein, *Philosophical Investigations* § 124 (G.E.M. Anscombe trans., 3d ed. 1953).

1. See, e.g., Ken Kress, *Legal Indeterminacy*, 77 Cal. L. Rev. 283 (1989); Brian Leiter, *Legal Indeterminacy*, 1 Legal Theory (forthcoming 1995). Professor Leiter usefully distinguishes global from local indeterminacy. Global indeterminacy is the claim that all legal disputes are indeterminate. Local indeterminacy concedes that some, perhaps even many or most, disputes can be determinate but that some disputes, including disputes in important areas of social policy, remain indeterminate.

The claim examined in this Article, that the law is indeterminate because language is indeterminate, is a claim of global indeterminacy.

2. For a thorough and critical discussion of this position, see Kress, *supra* note 1.

3. See, e.g., Robert W. Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57, 93 (1984).

4. See, e.g., Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev. 465, 470 (1988) (reviewing Laura Kalman, *Legal Realism at Yale: 1927-1960* (1986)).

guage in his monumental book *The Concept of Law*.⁵ Nor is the concern groundless. Anyone who has spent any time in the courtroom must have been struck by the extent to which outcomes are determined by factors having nothing to do with the merits of a dispute: the care, insight, and predispositions of the judge and jury; the ambiguity of a relevant statute or precedential opinion; the skill and preparation of the lawyers; the performance of witnesses; and many other factors, each of which is difficult or impossible to control in practice. Moreover, anyone who has made it through the first year of law school knows that to speak of the "open texture" of some statutes and common law doctrines is simply charity.

What is new to the current debate over indeterminacy is the CLS diagnosis of its causes. Influenced largely by the French philosopher Jacques Derrida and French deconstructionism, many in CLS now argue that the law's indeterminacy is a function of a radical indeterminacy inherent in language itself, all language, not just that of the law.⁶ The indeterminacy contemplated by deconstructionism is not merely the result of some ambiguity in an utterance in a particular context, one that might be clarified by further discussion. Nor is it the result of differences of opinion about the application or domain of a particular concept, as might occur, for example, when reasonable people differ in their judgment about whether some particular conduct is just or reasonable. Rather, deconstructionism insists that no utterance, no "text" in the parlance of deconstructionism, in any context has a determinate meaning: any text can be shown to imply its opposite or to bear completely unexpected meanings.

Because logic operates over propositions expressed in language, because the medium of reason is language, because truth is a property of propositions, the radical indeterminacy of language also implicates the meaningfulness of logic, reason, and truth. It is a principal tenet of

5. H.L.A. Hart, *The Concept of Law* (1961).

6. A useful, though insufficiently critical, recent discussion of the influence of French deconstructionism on Critical Legal Studies and of French deconstructionism generally is Peter C. Schanck, *Understanding Postmodern Thought and its Implications for Statutory Interpretation*, 65 S. Cal. L. Rev. 2505 (1992). An excellent and thorough critical discussion of deconstructionism by a distinguished analytic philosopher is John R. Searle, *The Word Turned Upside Down*, N.Y. Rev. Books, Oct. 27, 1983, at 74. See also Iris Murdoch, *Metaphysics as a Guide to Morals* 185-216 (1992); Hilary Putnam, *Renewing Philosophy* 108-33 (1992); Dale Jamieson, *The Poverty of Postmodernist Theory*, 62 U. Col. L. Rev. 577 (1991); and Neil MacCormick, *Reconstruction after Deconstruction: A Response to CLS*, 10 Oxford J. Legal Studies 539 (1990).

French deconstructionism has not received a great deal of attention from British and American philosophers. The reason was explained to me by a number of professional colleagues: the "theory" is so bad and its errors at such a superficial level that correcting those errors does nothing to further the current projects of philosophy. What literature does exist is addressed to colleagues in disciplines that lack the methodological rigor to appreciate deconstructionism's lack of philosophical merit.

deconstructionism that our faith in reason and truth, "logocentrism" in the cant, is a form of false consciousness.⁷

Derrida himself arrives at this conclusion by two distinctly different methodologies. On the one hand, he constructs arguments, as would any philosopher (though in the case of Derrida, he more accurately alludes to arguments⁸), purportedly based upon or in reaction to the ideas of his predecessors in the tradition of modern European philosophy and linguistics, particularly those of Heidegger and Saussure.⁹ Additionally, he applies to texts a set of quasi-analytic strategies that purport to unfold the possible and unexpected meanings contained in the texts. The result of this deconstruction of a text is not a reasoned conclusion but a psychological state of "aporia." Derrida has characterized aporia as a state of "terminal confusion" in which the false consciousness of logocentrism is revealed¹⁰ and, supposedly, evaporates like the morning mist exposed to the heat of the new sun.

This is a truly radical critique. Among other things, if this critique is accurate, there is no hope of reforming language to make it more precise and determinate. Nor, as applied to the law, can the law be made more rational and certain. The problem is not simply a matter of our facility with the language; it is an inherent feature of language itself. Nonetheless, to this point the radical critique is merely a critique of language. The implications of the critique for reason and truth are significant, but it is still possible that the world might nevertheless impose some constraints, some boundaries that could yet provide us with a determinate experience of the world, providing the basis, perhaps, for reliable knowledge apart from its expression. Derrida severs that last anchor by declaring, and simply declaring, that "il n'y a pas de hors-texte."¹¹ The world, reduced to text, is just as indeterminate as language.

Many have found in French deconstructionism a frightening rationale for moral anarchy.¹² For its followers within CLS and their post-modern colleagues in other disciplines, however, it has been an epiphany and a liberation. To these scholars the discovery that the so-called "privileged" meaning of a text is an illusion also destroys the foundations underlying any targeted institution that claims legitimacy by an appeal to justice or moral right. Political institutions, cultures, social

7. See Schanck, *supra* note 6, at 2522-38; Searle, *supra* note 6, at 74.

8. See Putnam, *supra* note 6, at 123.

9. See Murdoch, *supra* note 6, at 185-202; Putnam, *supra* note 6, at 123-33; Schanck, *supra* note 6, at 2522-34; Searle, *supra* note 6.

10. See Schanck, *supra* note 6, at 2524-34; Searle, *supra* note 6, at 74.

11. Jacques Derrida, *Of Grammatology* 158 (Gayatri Chakravorty Spivak trans., 1976).

12. See, e.g., Putnam, *supra* note 6, at 130-33; David Lehman, *Signs of the Times: Deconstruction and the Fall of Paul De Man* 141-268 (1991) (connecting De Man's proto-deconstructionism with his recently revealed Nazi allegiances).

norms, all are nothing but the structures of power and can have no special claim to legitimacy.¹³

This critique serves ambiguously those who would tear down existing institutions to enfranchise peoples now barely at the margins. While it permits the deconstruction of any argument proffered to justify the current order, it likewise precludes any reasoned argument for change. After all, if there is no such thing as justice or righteousness, then the present arrangement is no worse than any alternative; "worse" presupposes a standard. Mark Tushnet is candid and unusually perceptive in recognizing that this places deconstructionists in the position of perpetual gadflies "decentering, disrupting whatever understandings happened to be settled, criticizing the existing order whatever that order is."¹⁴ There is some evidence that former devotees, particularly feminists, are now beginning to recognize their dilemma and are abandoning deconstruction for just this reason.¹⁵

Into this morass, Anthony D'Amato has thrown a new and, I will show, deceptive curve. Over the course of nine articles,¹⁶ Professor D'Amato offers the same general diagnosis for the indeterminacy of the law in the inherent radical indeterminacy of language.¹⁷ He claims, for instance, that "[t]o 'define' a concept is to specify its meaning; the true Indeterminist attacks the notion that words can have definably specific, bounded meanings."¹⁸ Of rational argument, he of-

13. See, e.g., Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. Legal Educ. 505, 515 (1986).

14. *Id.*

15. See, e.g., Joan Hoff, *The Pernicious Effects of Poststructuralism on Women's History*, Chron. Higher Educ., Oct. 20, 1993, at B1; Karen J. Winkler, *Scholars Mark the Beginning of the Age of 'Post-Theory'*, Chron. Higher Educ., Oct. 13, 1993, at A9. Of course, it is an odd move to reject a theory of language on political grounds rather than on its intellectual merits. The movement away from deconstructionism for this reason suggests that its adherents may have been attracted to it in the first place for reasons other than its intellectual soundness.

16. Anthony D'Amato's nine articles are: *Legal Uncertainty*, 71 Cal. L. Rev. 1 (1983); *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 Va. L. Rev. 561 (1989); *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. Miami L. Rev. 513 (1989); *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 Nw. U. L. Rev. 250 (1989); *Aspects of Deconstruction: The Failure of the Word "Bird"*, 84 Nw. U. L. Rev. 536 (1990); *Aspects of Deconstruction: Thought Control in Xanadu*, 84 Nw. U. L. Rev. 1086 (1990); *Aspects of Deconstruction: Refuting Indeterminacy With One Bold Thought*, 85 Nw. U. L. Rev. 113 (1990); *Pragmatic Indeterminacy*, 85 Nw. U. L. Rev. 148 (1990); *Counterintuitive Consequences of "Plain Meaning"*, 33 Ariz. L. Rev. 529 (1991). Hereinafter I will cite to these articles by their titles alone.

17. See, e.g., *Can Any Legal Theory Constrain Any Judicial Decision*, *supra* note 16, at 514 ("In this Essay, I will present a spectrum of types of legal theories in order to demonstrate, with concrete examples, that the position of the more radical group of writers is correct—that legal theory is inherently incapable of identifying which party should win any given case.").

18. *Pragmatic Indeterminacy*, *supra* note 16, at 162 n.36. See also *id.* at 179 ("Indeterminacy . . . like all other words (or concepts) does not have a determinate core meaning."). Without appearing to appreciate the inconsistency, D'Amato, on the

fers, “[n]ot that it’s meaningful; not that it should work; only that pragmatically it seems to get results.”¹⁹

But D’Amato is distinct from his French deconstructionist colleagues in at least two important respects. First, though he plainly agrees with the followers of Derrida about the nature of language and logic, to the extent of using Derrida’s term “deconstruction” to refer to his own conclusions, D’Amato claims to have arrived at his deconstruction by way of the twentieth-century tradition of Anglo-American analytic philosophy. Nowhere does he adopt, discuss, or even cite Derrida’s work or Derrida’s arguments.²⁰

Second, while he denounces the notion of truth and reason, he never makes the jump into hyperspace along with Derrida to claim that the world is reduced to indeterminate texts. Indeed, D’Amato appears to distinguish sharply between our talk of the world and the world itself. He says:

If justice were only a matter of words (for example, “principles” of justice) then it would not constrain judges [any better than law-words]. But justice is normative, consisting of the judgments that we make all our lives when we consider facts and situations and compare them mentally to other facts and situations that were resolved in the past by other persons whom we consider just.²¹

This permits D’Amato to offer an account of justice in which justice appears to consist, at least largely, in treating like cases alike, blended up with “compassion, fairness, mercy, good judgment, experience of

very same page, shifts from this stronger metaphysical claim about the nature of language to the far weaker, epistemological claim that

I do not mean to imply that the sounds we utter and the words we write have no meaning. I contend only that we can never be sure that the meaning we ascribe to a word will be the same meaning that someone else ascribes to the same word.

Id. at 151 n.14. *See also id.* at 179 n.104 (arguing not that words lack determinate meaning but that there can be no determinate evidence that one person’s “core meaning” for a given word is the same as another person’s “core meaning”). Still later D’Amato switches to yet another inconsistent position and claims that:

Of course, I am not asserting that everyone disagrees about the meaning of every word. There may appear to be a considerable degree of agreement on what a “tree” or a “book” is—although marginal cases can be hotly disputed—and a much lesser degree of agreement on the meaning of “due process of law” or “unreasonable search and seizure.”

Id. at 179 n.105. D’Amato’s arguments are marked by similar inconsistencies. It reminds one of Hilary Putnam’s comment about Derrida and his followers that arguing with them is like trying to box with a fog. Putnam, *supra* note 6, at 109.

Because it is most consistent with his rejection of reason and those aspects of his larger project, particularly his remarks about the Platonic view, with which I am concerned, I will hold D’Amato to his strongest statements about the sense of “indeterminacy.”

19. Putnam, *supra* note 6, at 156.

20. D’Amato attributes the rise of radical indeterminism to Duncan Kennedy. *See Pragmatic Indeterminacy, supra* note 16, at 178.

21. *Id.* at 188 n.142.

many walks of life, sensitivity, humanism, and empathy."²² This in turn leads him to the interesting, naive prescription that in selecting judges, and presumably in training them as well, we ought to pay less attention, or perhaps no attention, to analytic and linguistic skills and devote our attention to nurturing these qualities and selecting judges on the basis of their presence.²³

Others have criticized effectively D'Amato's conclusions about the existence and extent of indeterminacy in the law as a matter of fact. They have dissected and exposed the tangled logic of his arguments for the radical indeterminacy of language in general.²⁴ It is in response to those arguments that D'Amato has made his strongest claim for the support of twentieth-century, Anglo-American analytic philosophy. The form of the appeal seems to suggest that his critics are missing a deeper level of D'Amato's discussion, a level which they would appreciate if only they were reading his work with regard to the same rich background of ideas and concepts that D'Amato had in mind as he wrote. Typical is the following reply to Professor Kenny Hegland:

The proof for a legal Formalist who sincerely wants to understand the possibility that words do not have determinably precise meanings is to read the exciting philosophical and artificial-intelligence literature that has enabled twentieth-century philosophical thought to overcome the conceit of the Platonic view that words have determinate meanings

. . . .

My "long" answer to Professor Hegland is that, before pronouncing my views "insane," he might do well to spend a few years perusing the development of twentieth-century linguistic philosophy.²⁵

It is this appeal to analytic philosophy, rather than the logic or illogic of D'Amato's specific arguments, that concerns me in this Article. For D'Amato is wrong when he appeals to the "supporting

22. *Id.* at 188.

23. *Id.* Indeed, D'Amato seems to see an inverse relationship between gaining verbal skills and developing wisdom and compassion:

For the ability of a judge to state the law in a sophisticated way has, in my opinion, practically nothing to do with what we should really be concerned about—fairness and justice. The more we require our judges to be verbally skilled practitioners of the legal art, the less we can expect them to have found room in their lives for actual empathic experiences, for the wisdom that comes from contemplating the human condition, and for the maturity of judgment that comes from reflecting upon what to do in thousands of daily interactions with other people in diverse contexts.

Id.

24. See generally Kenney Hegland, *Indeterminacy: I Hardly Knew Thee*, 33 *Ariz. L. Rev.* 509 (1991); Kenny Hegland, *Looking for Certainty in all the Wrong Places*, 33 *Ariz. L. Rev.* 577 (1991); Kenney Hegland, *Goodbye to 2525*, 85 *Nw. U. L. Rev.* 128 (1990); Kenny Hegland, *Quibbles*, 67 *Tex. L. Rev.* 1491 (1989); Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 *Nw. U. L. Rev.* 134 (1990); Kress, *supra* note 1.

25. *Pragmatic Indeterminacy*, *supra* note 16, at 151-53 (footnotes omitted).

contributions of Wittgenstein, Goodman, Quine, and Kripke.”²⁶ D’Amato misunderstands the aspects of their work to which he refers, as well as the fundamental ideas that define the tradition. Indeed, I will show that D’Amato’s entire project is based on his misunderstanding of the Platonic view to which he alludes in the passage quoted above and, more critically, the significance of its rejection by analytic philosophy. Beyond that, D’Amato also has somehow missed the fact that the methodology of this tradition, evident in every work that he cites, is committed to and has progressed as far as it has on the power and usefulness of language and logic. No one with whom D’Amato claims spiritual brotherhood has ever been so foolish as to cut out from under himself his own methodological legs.

Part I of this Article considers three philosophers to whom D’Amato attributes the greatest influence, Ludwig Wittgenstein, W. V. O. Quine, and Nelson Goodman. With regard to each philosopher, D’Amato treats as a final conclusion what the philosopher himself presents as no more than an opening gambit, a rhetorical device, or an illustration to highlight a problem that he then goes on to resolve or explain. Each philosopher’s arguments, viewed in context, assume or demonstrate the determinacy of the conduct in question. Part I also discusses the problematic contradiction between D’Amato’s deconstruction of language and reason, and the defining methodology generally of the tradition to which he turns for support. Part II examines three of D’Amato’s own arguments for the indeterminacy of language. Again, my purpose is not to expose the errors of D’Amato’s reasoning, but to show how those errors reveal a misunderstanding of some fundamental insights of analytic philosophy and how those errors are at the foundation of D’Amato’s program.

Though the primary focus of this Article is Professor D’Amato’s linguistic indeterminism, I should emphasize that its conclusions are not limited to Anthony D’Amato. Twentieth-century analytic philosophy not only does not support D’Amato’s arguments about language, it is also a decisive counterexample to all deconstruction of language and reason. Nor is the thrust of this Article wholly negative. By exploring the specific errors that Professor D’Amato makes in his appeal to the tradition of analytic philosophy, the discussion also reveals the many ways in which that tradition, both its insights and methodology, can contribute to our understanding of the world the law governs, its values, and the nature of the legal institution itself. Indeed, it is the great promise of analytic philosophy that motivates one to correct any misrepresentation that might undermine our commitment to reason and the clarifying power of language used well.

26. *Id.* at 154.

I. D'AMATO AND THE PHILOSOPHERS

A. Wittgenstein

It is a curious fact about Professor D'Amato's work that despite his obeisance to analytic linguistic philosophy, he does not discuss the conclusions and particularly the arguments of these philosophers in any detail. Typical of the way in which he uses these ideas is the eleven-inch footnote that follows his "long" answer to Professor Hegland, which I quoted earlier.²⁷ In this footnote, D'Amato cites no fewer than twenty-eight philosophers, ranging from Jeremy Bentham to Stanley Fish. This concentrated litany contains no discussion of any arguments, only the tersest recollection of what D'Amato believes are their conclusions and no sense of the debates and disagreements among these philosophers themselves.²⁸ Throughout the text there are similar brief references to a few philosophers and their conclusions, but no discussion of their arguments or how those arguments support D'Amato's own deconstruction of language and logic.

Nonetheless, D'Amato is surely correct in this: twentieth-century, Anglo-American analytic philosophy has been preoccupied, though not exclusively, with problems occasioned by our use of language, with the explication of concepts and the nature of meaning, and particularly with how words "hook onto the world," as Wittgenstein put the matter (part of the Platonic problem to which D'Amato alludes).²⁹ D'Amato accurately quotes Wittgenstein, one of the most influential, if not the most influential and seminal member of the tradition, observing that "[p]hilosophy is a battle against the bewitchment of our intelligence by means of language."³⁰ D'Amato understands this observation to support his deconstruction of language and logic.³¹

But the bewitchment of which Wittgenstein speaks is not some inherent feature of language, and certainly not because language is radically indeterminate as D'Amato would have it. Rather, the bewitchments are the philosophical problems that occur because,

27. *Id.* at 152-53 n.16.

28. In one particularly outrageous example of D'Amato's failing to recognize the maturation of the thought of just one philosopher, referring to Wittgenstein's first book, *Tractatus Logico-Philosophicus*, D'Amato quite blandly reports that "Russell's pupil, Ludwig Wittgenstein, proved that all metaphysical statements were intrinsically meaningless." *Pragmatic Indeterminacy*, *supra* note 16, at 152 n.16. D'Amato does not appear to recall that the contradiction inherent in that metaphysical statement led Wittgenstein to revise his thinking substantially in his later work. See Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe trans., 3d ed. 1953); David Pears, *Ludwig Wittgenstein* 95-98 (1986).

29. Useful discussions of analytic philosophy's concern for language can be found in Ian Hacking, *Why Does Language Matter to Philosophy?* (1975) and Richard Rorty, *The Linguistic Turn* (1967).

30. *Pragmatic Indeterminacy*, *supra* note 16, at 153 (quoting Ludwig Wittgenstein, *Philosophical Investigations* § 109 (1953)).

31. D'Amato quotes this observation at the very end of his "long" injunction to Professor Hegland to immerse himself for a few years in linguistic philosophy. See *id.*

Wittgenstein believes, we improperly expect of language that it reveal to us some extreme ideal order that is in fact foreign to the ordinary uses to which language is adapted. This is especially acute when bits of language are examined in isolation from the rich social setting in which language is created and used. Wittgenstein explains the problem as follows:

105. When we believe that we must find that order, must find the ideal, in our actual language, we become dissatisfied with what are ordinarily called "propositions", "words", "signs".

The proposition and the word that logic deals with are supposed to be something pure and clear-cut. And we rack our brains over the nature of the *real* sign.—It is perhaps the *idea* of the sign? or the idea at the present moment?³²

Thus, it is our expectations of language, not language itself, that produces the bewitchment. The solution to the bewitchment is not to give up on language and reason, as D'Amato would seem to have it. Rather the solution to the bewitchment, and the philosophical problems it generates, is careful description of language as we in fact use it to show how the philosophical problems that we suspected were there are not. Wittgenstein explains:

106. Here it is difficult as it were to keep our heads up, — to see that we must stick to the subjects of our every-day thinking, and not go astray and imagine that we have to describe extreme subtleties, which in turn we are after all quite unable to describe with the means at our disposal.³³

Much of the remainder of the *Philosophical Investigations* consists in just such a careful description of the way in which we commonly use language as a sort of therapy for our misguided expectations and what we have made of them. Wittgenstein's own care and the fact that he undertook the positive program are themselves powerful evidence that he did not regard language as inherently indeterminate. This is not the method or occupation of someone who believes that language is incapable of quite sensitive and precise communication or that our language games are fairly stable and determinate phenomena. The influence of Wittgenstein's descriptions, the sense of enlightenment with which they are received by succeeding generations of young philosophers, is itself evidence that Wittgenstein was correct in this assumption. I will return to this point below.

There is more direct evidence as well of Wittgenstein's assumption of the determinacy of language. One of the more perplexing and subtle of Wittgenstein's arguments concerns his rejection of the possibility of private language in favor of locating meaning in socially

32. Wittgenstein, *Philosophical Investigations*, *supra* note 28, § 105.

33. *Id.* § 106.

constructed and maintained language games. Norman Malcolm, one of Wittgenstein's students, summarized the idea as follows:

Wittgenstein's rejection of the intrinsically private, inner object is a consequence of his new conception of meaning. Language requires rules, and following a rule implies a customary way of doing something. It could not be that only once in the history of mankind was a rule followed (Sec. 199). An expression has a meaning only if there is a regular, a uniform, connection between saying the expression and certain circumstances. When we call something *measuring*, for example, a part of the uniformity we require is a constancy in the results of the measurement (Sec. 242). A person can be guided by a *signpost* only if there is a regular way of responding to signposts. The meaning of an expression is its *use*—that is to say, the *language game* in which it occurs—the uniform relation of the expression to certain *circumstances*. Wittgenstein made explicit the connection between this view of the nature of meaning and his attack on "private" mental contents when he said that following a rule is a *practice* and *therefore* one cannot follow a rule "privately" (Sec. 202).³⁴

If language is radically indeterminate, as D'Amato would have it—if I cannot be relatively confident that I understand you, nor relatively confident that you understand me—we are all essentially locked in our own private languages, precisely what Wittgenstein rejected. The emphasis here on regularity, uniformity, rules and constancy could not be further from the indeterminacy for which D'Amato invokes Wittgenstein. These terms are synonymous with determinacy. There is clearly an assumption of regularity, and the task Wittgenstein undertakes is in part to explicate the regularity, to discover the source of the determinate meaning. He does so by locating it in social practices.

D'Amato is not completely unaware of Wittgenstein's arguments concerning private language, but he seems to have been absorbed by just one aspect of Wittgenstein's discussion, particularly as explicated, and with no little controversy, by Saul Kripke.³⁵ At the outset of his argument against private language, Wittgenstein poses the following problem: "This was our paradox: no course of action could be deter-

34. Norman Malcolm, *Wittgenstein, Ludwig Josef Johann*, in 8 *The Encyclopedia of Philosophy* 327, 339 (1967).

35. Kripke's explication of the private language argument is presented in Saul A. Kripke, *Wittgenstein on Rules and Private Language* (1982). The dimension of Kripke's work that particularly was contested concerned his interpretation of Wittgenstein as viewing our practices as mere conventions, rather than as reflecting something about us as humans. Two of the more important articles setting out a naturalist interpretation are Stanley Cavell, *The Argument of the Ordinary: Scenes of Instruction in Wittgenstein and in Kripke*, in *Conditions Handsome and Unhandsome* 64 (1990); Cora Diamond, *Realism and the Realistic Spirit*, in *The Realistic Spirit* 39 (1991). See also James Conant, *Introduction* to Hilary Putnam, *Realism with a Human Face* at XV (1990) (discussing the evolution of philosophical realism). The controversy directly concerns D'Amato's use of Kripke and his interpretation of Wittgenstein. The naturalist turn seeks to ground the consistency of our practices in our common experience. See *infra* text accompanying notes 44-45.

mined by a rule, because every course of action can be made out to accord with the rule."³⁶ Kripke explains the paradox by asking us to imagine that we are confronted with a simple addition problem, but one which we have never performed before, say "68 + 57." We give the answer confidently as "125." But "[n]ow suppose," Kripke asks, "[that] I encounter a bizarre sceptic. This sceptic questions my certainty about my answer Perhaps, he suggests, as I used the term 'plus' in the past, the answer I intended for '68 + 57' should have been '5'!"³⁷ The skeptic claims that I have misinterpreted my own past rule of "plus" in arriving at 125 as the sum of 68 and 57. The real rule that I followed in the past for "plus," denoted by the symbol @ to distinguish it from my mistaken rule, is defined by:

$$\begin{aligned} x @ y &= x + y, \text{ if } x, y < 57 \\ &= 5 \text{ otherwise.} \end{aligned}$$

What gives the skeptic's challenge force is that her hypothesis, Kripke notes, "is not logically impossible."³⁸ D'Amato understands this to mean, correctly, that any rule can be reformulated to take into account any new variation in the future. Therefore, D'Amato concludes, Wittgenstein and Kripke have proven that all rules are radically indeterminate:

But in law, every new case is different from all previous cases at least in so far as time (and probably the identity of the parties) is concerned. Thus, Wittgenstein, Goodman, and Kripke have shown that there can be no (legal) rule that compels a given result (no rule that constrains a judge), because any result can be incorporated in a reformulation of the rule. Another way of stating this position is to say that no amount of legislative history can ever constrain a present case result. A decision either for the plaintiff or for the defendant can be justified, using the Wittgenstein-Goodman-Kripke analysis, on the basis of exactly the same legislative history.³⁹

What D'Amato fails to recognize, however, is that both Wittgenstein and Kripke pose the logical possibility as a paradox just for the sake of resolving it. Indeed, the sense of paradox derives from the fact that while it might logically be possible to reformulate all rules in this way, we do not accept every reformulation as equally valid. Kripke is clear on this. He repeatedly refers to the hypothetical interloper and the problem as "bizarre" and "no doubt false."⁴⁰ But if it is false, then some account has to be given which can demonstrate its

36. Wittgenstein, *supra* note 30, § 201.

37. Kripke, *supra* note 35, at 8-9.

38. *Id.* at 9.

39. *Pragmatic Indeterminacy*, *supra* note 16, at 174-75 (footnotes omitted).

40. Kripke, *supra* note 35, at 9 ("Now if the sceptic proposes his hypothesis sincerely, he is crazy; such a bizarre hypothesis as the proposal that I always meant quus is absolutely wild. Wild it indubitably is, no doubt it is false; but if it is false, there must be some fact about my past usage that can be cited to refute it.").

falseness and account for our confidence in our judgment about our past rules. The argument against private language, described above, is that account. Wittgenstein rather more aphoristically answers the paradox, "hence it is not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying it."⁴¹ The solution to the skeptical paradox and the rejection of the possibility of a private language involve moving the source of the security of the rule from something about the mental history or state of the individual to the community to which the speaker belongs. Thus the skeptical paradox is part of a larger argument whose purpose is to explain our practices and account for our ordinary confidence in their regularity, the exact opposite of D'Amato's use of Wittgenstein.

Some philosophers, while accepting that the argument provides security for our rules nonetheless see it as rejecting objectivity for those practices. David Pears, for instance, has written that "if there is anything in a particular area of discourse which seems to require justification, then the only possible justification will lie in the facts about the relevant linguistic practices, because there is nothing outside these facts."⁴² Saul Kripke has similarly remarked that "[w]hat follows from the [private language argument] is *not* that the answer everyone gives to an addition problem is, by definition, the correct one, but rather the platitude that, if everyone agrees upon a certain answer, then no one will feel justified in calling the answer wrong."⁴³

Stanley Cavell finds in Wittgenstein, though, a profound naturalism that grounds agreement on practices in something more than mere convention, something that unites us as human beings. He writes:

The conventions we appeal to may be said to be "fixed", "adopted", "accepted", etc. by us; but this does not now mean that what we have fixed or adopted are (merely) the (conventional) *names* of things. The conventions . . . are fixed not by customs or some particular concord or agreement which might, without disrupting the texture of our lives, be changed where convenience suggests a change They are, rather, fixed by the nature of human life itself, the human fix itself, by those "very general facts of nature" which are "unnoticed only because so obvious", and, I take it, in particular, very general facts of *human* nature. . . . Here the array of "conventions" are not patterns of life which differentiate human beings from one another, but those exigencies of conduct and feeling which all humans share.⁴⁴

Cavell's naturalism and his interpretation of Wittgenstein are not aberrations but represent another mainstream current in contempo-

41. Wittgenstein, *supra* note 28, § 202.

42. Pears, *supra* note 28, at 185.

43. Kripke, *supra* note 35, at 112.

44. Stanley Cavell, *The Claim of Reason* 110-11 (1979).

rary analytic philosophy.⁴⁵ It is difficult to imagine Cavell, or anyone who shared his naturalism, having a great deal of patience with D'Amato's radical skepticism about the reliability of our linguistic practices.

B. Goodman

D'Amato also identifies among his most influential inspirations Nelson Goodman and, in particular, Goodman's path-breaking treatment of induction. The problem of induction traditionally has been understood as the search for a procedure or set of standards that could determine which of our predictions from past events to future events will be successful. For example, can we know for certain that tomorrow, the earth's gravity will continue to hold our feet down just because it has consistently in the past? One important dimension of Goodman's innovation in this area was to recognize that the question itself was a bad question. He observed:

Understandably, then, more critical thinkers have suspected that there might be something awry with the problem we are trying to solve. Come to think of it, what precisely would constitute the justification we seek? If the problem is to explain how we know that certain predictions will turn out to be correct, the sufficient answer is that we don't know any such thing. If the problem is to *find* some way of distinguishing antecedently between true and false predictions, we are asking for prevision rather than for philosophical explanation.⁴⁶

D'Amato infers from this insight that the failure of induction to guarantee valid predictions dooms the practice of induction as fatally unreliable. Because language partakes of induction, language too is therefore doomed as inherently, fatally unreliable. D'Amato writes:

Even though the [Fundamental Formalist Postulate] is designed for deductive application, the actual *content* of the "core meaning" of any word requires an inductive inquiry. We must look at all the previous instances of the speaker's use of the word in question—including, by implied reference, all previous uses of that word by any speaker throughout history. We then add up all these instances, get the average meaning, and "apply" it to the current case. . . . But this raises . . . the problem of the validity of induction itself. As Nelson Goodman demonstrated, no amount of historical evidence (*i.e.*, not even all the evidence from the beginning of the universe to the present moment) compels the result in the next case.⁴⁷

Goodman himself, however, nowhere draws the inference that induction is invalid as a practice from the lack of guaranteed predictabil-

45. See Conant, *supra* note 35, at xxxiv-lvii.

46. Nelson Goodman, *Fact, Fiction and Forecast* 62 (4th ed. 1983).

47. *Pragmatic Indeterminacy*, *supra* note 16, at 173.

ity. Indeed, he embraces the justification of the practice on the following grounds in a way reminiscent of Wittgenstein:

I have said that deductive inferences are justified by their conformity to valid general rules, and that general rules are justified by their conformity to valid inferences. But this circle is a virtuous one. The point is that rules and particular inferences alike are justified by being brought into agreement with each other. A rule is amended if it yields an inference we are unwilling to accept; an inference is rejected if it violates a rule we are unwilling to amend. The process of justification is the delicate one of making mutual adjustments between rules and accepted inferences; and in the agreement achieved lies the only justification needed for either.

All this applies equally well to induction. An inductive inference, too, is justified by conformity to general rules, and a general rule by conformity to accepted inductive inferences. Predictions are justified if they conform to valid canons of induction; and the canons are valid if they accurately codify accepted inductive practice.⁴⁸

Others, inclined toward realism in a way that Goodman is not, go further and justify the practice of induction by its undeniable success in the natural sciences and engineering.⁴⁹

For Goodman, the significance of the lack of a guarantee is simply that it requires us to disregard as misdirected the traditional philosophical question concerning the practice of induction, not to disregard the practice as unreliable. Indeed, the second aspect of Goodman's innovation in the philosophy of induction, again reminiscent of Wittgenstein, is to replace the bad question with the more useful project of describing the practice. The central philosophical problem for Goodman is to describe the practice in a way that discerns which properties of past observations can be projected well to new events and which cannot. Goodman's solution is to ground the projectability of predicates in the history of the community. Using an ingenious thought experiment involving the positing of a unique color, grue, whose hue depends upon the time that the color is viewed, Goodman shows that while any conceivable predicate might be projected, those whose projection is most justified are the ones most entrenched in the community's history, *i.e.*, those that most frequently have been projected in the past.

A realist, at this point, would insist that the predicates most often projected in the past are likely also those that have enjoyed the most success in the past, in other words, those that have most often turned

48. Goodman, *supra* note 46, at 64.

49. See generally Larry Laudan, *Science and Relativism: Some Controversies in the Philosophy of Science* (1990) (presenting the debate over objectivity in the sciences, including the problem of induction, as a Socratic dialogue among amalgams of the different positions on objectivity and relativism).

out to be correct in our experience of the world.⁵⁰ Because Goodman is an idealist for whom there is no external world, except as perhaps itself an idea, he never makes this further move.⁵¹

C. Quine

The third of the troika of analytic philosophers to whom D'Amato attributes the greatest influence is W. V. O. Quine. D'Amato finds support for his deconstruction of language particularly in Quine's conclusion that radical translation—"translation from a remote language on behavioral evidence, unaided by prior dictionaries"⁵²—is always indeterminate. Quine first made the argument for the indeterminacy of translation in an early work, *Word and Object*,⁵³ and then returned to and extended the theme in a later essay, *Ontological Relativity*.⁵⁴

According to Quine, it is possible to compile any number of incompatible manuals for the translation of one language into another, all of which fit all of the observable speech dispositions of native speakers, and there is no way to determine which is the more accurate. Indeed, on Quine's behaviorist premises, there is no sense in asking which is the more accurate. The argument for the indeterminacy of translation takes the form of asking us to imagine a linguist confronting a new, "jungle language."⁵⁵ Each time the linguist points to a rabbit, the native speaker utters "gavagai." The translator therefore concludes that "gavagai" is the native equivalent of the English term "rabbit." But it is altogether possible that "gavagai" could instead be translated into English as "an instance of rabbithood," or "a collection of undetached rabbit parts," or a "particular temporal stage of a rabbit." There is no way by simple ostension to disclose whether one or another represents a more accurate translation of "gavagai." Every time we point to a rabbit we are pointing to an instance of rabbithood as well as to a temporal stage of a rabbit.

Nor is the difficulty solved by framing analytic questions to the native speaker in the speaker's own language. For once again, the sense that we give to the analytic sentences, composed in the native's language, can differ and yet elicit the same assent from the native

50. D'Amato himself, in one of his multiple personalities, may fall into this group. He declares, for example, just paragraphs before his rejection of induction:

For the Pragmatic Indeterminist, judges do not behave randomly or unpredictably over the long run of cases; far from it. As I will contend later in this essay, lawyers can predict how judges will probably decide a given case or line of cases. If lawyers did not have such an ability, we would have chaos, not law.

Pragmatic Indeterminacy, *supra* note 16, at 171. One can, of course, say the same thing about language.

51. See, e.g., Hilary Putnam, *Renewing Philosophy* 111 (1992).

52. W. V. Quine, *Ontological Relativity and Other Essays* 45 (1969).

53. Willard V. O. Quine, *Word and Object* (1960).

54. See Quine, *supra* note 52, at 26.

55. *Id.* at 30.

speaker. When, for example, we try to ask in the jungle language whether this gavagai "is the same as" that gavagai, we could just as well be asking the native speaker, whether this gavagai "belongs with" that gavagai. In which case, the native's assent to our questions is no grounds for translating "gavagai" as "rabbit" or "rabbit-stage."⁵⁶

Quine pushes the idea even further, taking it into our own languages. "On deeper reflection," he says, "radical translation begins at home. Must we equate our neighbor's English words with the same strings of phonemes in our own mouths?" To which he answers, "Certainly not."⁵⁷ From sentence to sentence within our own language we confront the same circumstance as the linguist in the jungle.

In Quine's theory of the indeterminacy of translation, D'Amato once again sees support for his own deconstruction of language and reason. Summing up Quine, he says, "We can never know for sure what is in the native's mind—or anyone else's—when we talk about and point to things."⁵⁸ Superficially, the indeterminacy of translation does appear to support a deconstruction of language. But on closer inspection, the support evaporates.

In the first place, for Quine, the theory of indeterminacy of translation is imbedded in behaviorist premises. In *Ontological Relativity*, Quine spoke of semantics as being "vitiating by a pernicious mentalism as long as we regard a man's semantics as somehow determinate in his mind beyond what might be implicit in his dispositions to overt behavior."⁵⁹ No doubt Quine would find it somewhat bizarre to be quoted in support of a deconstruction of language that relies so completely, as D'Amato's does, on a mentalistic picture of meaning. Whether we can ever "know for sure what is in the native's mind" is of no consequence to a behaviorist.

Even if we could somehow translate D'Amato's deconstructionism into a behaviorist frame, it would still draw no support from Quine's arguments. Though Quine suggests that the inscrutability of reference revealed by his argument from "gavagai" may well apply between speakers of the same language, he soon thereafter concedes the absurdity of that move:

56. *Id.* at 33.

57. *Id.* at 46.

58. *Aspects of Deconstruction: The Failure of the Word "Bird"*, *supra* note 16, at 538.

59. Quine, *supra* note 52, at 27. The years since *Ontological Relativity* have not tempered Quine's behaviorism. In a recent essay in the *Times Literary Supplement*, Quine wrote:

The purpose of words, people used to say, is to communicate ideas. But if we know what ideas people mean by their words, we know it only by observing how they and others use the words. Oh, we can ask them, but then we just get more words. Words are what we have to go on; ideas are as may be. *Verbum sapienti satis est.*

W. V. Quine, *Words are all we have to go on*, *Times Literary Supplement*, July 3, 1992, at 8.

We seem to be maneuvering ourselves into the absurd position that there is no difference on any terms, interlinguistic or intralinguistic, objective or subjective, between referring to rabbits and referring to rabbit parts or stages; or between referring to formulas and referring to their Gödel numbers. Surely this is absurd, for it would imply that there is no difference between the rabbit and each of its parts or stages, and no difference between a formula and its Gödel number. Reference would seem now to become nonsense not just in radical translation but at home.⁶⁰

The absurdity is resolved by recognizing that each of our terms exists within a framework of terms, a vocabulary, and relative to that framework, each term is determinately meaningful:

This network of terms and predicates and auxiliary devices is, in relativity jargon, our frame of reference, or coordinate system. Relative to it we can and do talk meaningfully and distinctively of rabbits and parts, numbers and formulas. Next, as in recent paragraphs, we contemplate alternative denotations for our familiar terms. We begin to appreciate that a grand and ingenious permutation of these denotations, along with compensatory adjustments in the interpretations of the auxiliary particles, might still accommodate all existing speech dispositions. This was the inscrutability of reference, applied to ourselves; and it made nonsense of reference. Fair enough; reference is nonsense except relative to a coordinate system. In this principle of relativity lies the resolution of our quandary.⁶¹

And because for Quine, as for Wittgenstein, there is no private language, "If it is to make sense to say even of oneself that one is referring to rabbits and formulas and not to rabbit stages and Gödel numbers, then it should make sense equally to say it of someone else."⁶²

We might go even further and notice the consequences for radical translation of exploring for any language its complete coordinate system. If a jungle language had no other word or combination of words but "gavagai" by which the native speakers referred to rabbits, we would be left with the arbitrary choice of translating "gavagai" as "rabbit" or "collection of undetached rabbit parts." Not surprisingly, given his behaviorist premises, even in that situation, Quine sees no problem for reliable interlanguage communication:

An actual field linguist would of course be sensible enough to equate "gavagai" with "rabbit," dismissing such perverse alternatives as "undetached rabbit part" and "rabbit stage" out of hand. This sensible choice and others like it would help in turn to determine his subsequent hypotheses as to what native locutions should

60. Quine, *supra* note 52, at 47-48.

61. *Id.* at 48.

62. *Id.* at 47.

answer to the English apparatus of individuation, and thus everything would come out all right.⁶³

But if the language had a variety of ways of referring to rabbits, then by reference to the entire coordinate system, the linguist might well come to recognize that the jungle language had the same rich variety of ways of discussing individuation. After all, if a newcomer such as an infant can come to recognize this variety in the language games of his own community, surely a sophisticated linguist might come to appreciate that a newly discovered language contains similar nuances. Indeed, the linguist may discover altogether new variations on individuation not present in her own language.⁶⁴

However that might be, it should be clear that Quine's own theory of indeterminate translation gives D'Amato's deconstructionism no boost. The argument from "gavagai" itself critically supposes consistent linguistic behavior and because of the coordinate system which surrounds each term within a language, the language itself is capable of being precisely determinate.

D. *The Method of Analytic Philosophy*

The discussion in the previous section is not offered as a thorough history of twentieth-century analytic philosophy. It does not describe the richness of this tradition, the range of questions with which it has concerned itself, or the many different positions that philosophers have staked out. It addresses only the three philosophers whom D'Amato identifies as his greatest sources of inspiration. Even with regard to these philosophers, the discussion does not give any sense of the range of their interests or explain how Quine departs from Wittgenstein, or Goodman from Quine, or the problems with the conclusions and arguments of each.⁶⁵ But for the purpose of this Article,

63. *Id.* at 34.

64. Hilary Putnam has described such an encounter. Regarding a trip to China, during which he lectured on Quine's views, Putnam comments:

Sophisticated Chinese told me that they did not think the Chinese word *mo* (cat) could be determinately translated into English as "cat/cathood." What they claimed was that "Are you saying that there is a cat or that there is cathood exemplifying itself?" is the wrong question to put to a Chinese speaker. There is no special suffix in Chinese to distinguish "mo" from "mohood" (*mo* is used both in contexts in which we would translate it as "cat" and in the contexts in which we would translate it as "cathood")

Hilary Putnam, *Realism with a Human Face* 273 (1990). On the one hand, Putnam's description bears out Quine's conclusion that translation in such an instance would be arbitrary. This is the purpose for which Putnam offers the anecdote. But the exchange between the "sophisticated Chinese" and Putnam also illustrates that bilingual speakers can come to recognize nuances and differences not present in their own languages and, correlatively, the lack of such nuance in the other language.

65. Another curiosity of D'Amato's account of twentieth-century analytic philosophy is that he gives no sense of the disagreements and continuing debates. He presents the history of philosophy as a steady march toward indeterminacy. While there has been great progress in philosophy in this century, and consensus at least on

no such elaborate account is necessary. Professor D'Amato's errs at a superficial level. In every case, with each of the three philosophers he appeals to as inspiration, he has mistaken an opening gambit or a rhetorical device for the philosopher's final conclusion. We have seen that the philosophers themselves use the skeptical interlopers or rhetorical devices to which D'Amato alludes as points of departure to highlight problems which they then go on to address.

The solutions that each proposes for his problem also belie an imputation of indeterminism. Wittgenstein and Goodman look to careful descriptions of actual linguistic and inferential practice to solve problems of meaning and induction. Quine looks to overt behavior as the most significant factor to fill out a behaviorist theory of meaning. Though it should be obvious, it bears emphasis that talk of practices, of history and repeated projections, of behavior and meaning, all presume determinacy; they presume that there are practices, predicates, and behaviors that carefully can be described and themselves be the subject of reliable inductive projections.

This point raises another dimension of analytic philosophy and with it a critical problem for Professor D'Amato, one of which he seems only superficially aware—the problem of self-contradiction. To this point, the discussion has been concerned primarily with the conclusions of a few influential analytic philosophers, but a bedrock aspect of the self-definition of this tradition has been its unfailing commitment to a methodology that involves careful description, excruciating attention to subtle conceptual differences, and logic.

Both Quine and Goodman have made substantial contributions to symbolic logic and the philosophy of logic.⁶⁶ Wittgenstein famously declared in his first ground-breaking contribution to philosophy, the *Tractatus Logico-Philosophicus*, that “philosophy aims at the logical clarification of thoughts.”⁶⁷ He never backed away from that goal and few today would disagree with it. More recently, Nelson Goodman echoed Wittgenstein when he described philosophy as having the “function of clearing away perplexity and confusion.”⁶⁸

In the analytic philosophy of law, we need only to recall the brilliant contributions of H.L.A. Hart to our understanding of the concept of law. His critique of John Austin's theory of law as the command of an all-powerful sovereign, for instance, relies on his careful observation

what is not fruitful, that progress has not occurred without great and brilliant debates. For useful descriptions of the development of philosophy in this century by two of its great exemplars, see John Passmore, *Recent Philosophers* (1985) and A. J. Ayer, *Philosophy in the Twentieth Century* (1982).

66. See, e.g., Willard V. O. Quine, *Set Theory and Its Logic* (1963); Goodman, *supra* note 45.

67. Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* § 4.112 (1962). Wittgenstein continued in the same section: “Without philosophy, thoughts are, as it were, cloudy and indistinct: its task is to make them clear and to give them boundaries.”

68. Nelson Goodman, *The Structure of Appearance* at XVII (2d ed. 1966).

that many laws, including the organic laws, do not fit that model. Rather than command, they empower.⁶⁹ Hart's careful description of that distinction recalls Wesley Hohfeld's earlier delineation of at least four types of legal relationships.⁷⁰ Thomas Perry referred to Hohfeld's conceptual scheme as a "paradigm of philosophy."⁷¹ It is interesting in this context to read what Perry considered to be the standards of excellence in analytic philosophy generally:

To these criteria—exactness of analysis and "solving or illuminating power"—some writers would add that a model piece of philosophizing will contribute valuably to the "theory of critical discussion." Perhaps it will improve our understanding of the nature of some type of critical discourse: science, ethics, literary criticism, whatever. Or perhaps it will actually contribute to the branch of critical thought and talk with which it is concerned by clarifying or reconstructing specific concepts, thus enabling moralists, scientists or literary critics, etc., to think more effectively. An especially admirable work may even do both of these things.⁷²

Quite obviously, this clarifying function of philosophy to which Wittgenstein, Goodman, and Perry allude depends upon the power of language to be not only determinate, but subtly precise. Whatever power this tradition has, and whatever force its conclusions enjoy, are strictly the result of the arguments that its practitioners adduce. What gives Wittgenstein's descriptions the force of revelation to succeeding generations of young philosophers, and what makes Goodman's analysis of induction 'must' reading for every graduate student, is that each is a compelling example of the sensitivity to the nuances of language and the power of reason that mark this tradition. No one even vaguely familiar with its methods can doubt this. Comparing Goodman's irrealism to French deconstruction, Hilary Putnam tellingly remarks:

[Derrida's] attacks on the "logocentrism" of Western culture have been interpreted by some of his more left-wing followers as licensing an all-out rejection of the very idea of rational justification . . . Goodman would be seen as a hopeless reactionary by these people.⁷³

Analytic philosophy is the very embodiment and paragon of logocentrism. It is in fact this aspect of the tradition more than the questions it explores that distinguishes it from the European tradition of philosophy out of which Derrida emerged.

69. See H.L.A. Hart, *The Concept of Law* 124-32 (1961).

70. See Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919).

71. Thomas D. Perry, *A Paradigm of Philosophy: Hohfeld on Legal Rights*, 14 *Am. Phil. Q.* 41, 41 (1977).

72. *Id.*

73. Putnam, *supra* note 51, at 130.

In light of its methodological commitments, had any of these philosophers declared reason to be meaningless and words to be lacking core meanings, as D'Amato does, he or she would clearly be facing a difficult dilemma: he or she would have contradicted his or her own methodology. This is a kind of problem to which analytic philosophy has been acutely sensitive. It caused Wittgenstein to repudiate his conclusions of the *Tractatus* concerning the meaningfulness of meta-physical statements.⁷⁴ It similarly contributed to the demise of Logical Positivism when critics observed that its famous denial of meaningfulness to non-empirical or analytic statements made that declaration itself meaningless.⁷⁵ The concern with self-contradiction forms part of the tradition's sharp rejection of French deconstruction. John Searle, for instance, pointedly remarked:

In order to establish the hierarchical superiority of deconstruction, the deconstructionist is forced to attempt to represent its superiority, its axiological primacy, by argument and persuasion, by appealing to the logocentric values he tries to devalue. But his efforts to do this are doomed to failure because of the internal inconsistency in the concept of deconstructionism itself, because of its very self-referential dependence on the authority of a prior logic. By an aporetic *Aufhebung*, deconstruction deconstructs itself.⁷⁶

D'Amato appears to appreciate the significance of this point, but only at an abstract level. He admits, for instance:

There is at least one fundamental way that my rational is anyone's rational. I believe that any argument must be internally consistent. The reason I believe this is not because I accept a "theory" of coherence, but rather simply because if a person contradicts himself he is *not saying anything that we can figure out*. Rationality, in this application, is simply a matter of choosing between communication and non-communication.⁷⁷

But this is precisely the problem with D'Amato's own essays: because of his commitment to indeterminacy, he nowhere communicates an uncontradicted account of his own reasons for his commitments. He candidly admits:

My critics in effect ask me: "If you don't believe that rational argument constrains judges, why are you resorting to rational argument to convince us?" My answer is: "What would you have me resort to

74. See Wittgenstein, *supra* note 28.

75. See Ayer, *supra* note 65, at 121-30, 138-41.

76. Searle, *supra* note 6, at 78. Searle and others also have criticized Derrida for misrepresenting the history of philosophy. They argue that Derrida's deconstructive methods are little more than open-ended tangles of poor reasoning and that his project is ultimately based on a crude misunderstanding of the significance of the failure of the foundationalist project. See *supra* note 6 and articles cited therein.

In the next part of this Article, I will return to the above point because the same error, ultimately, fatally infects D'Amato's project. See *infra* part III.

77. *Pragmatic Indeterminacy*, *supra* note 16, at 151 n.12.

instead—irrational argument? The only way I have any chance of convincing *you* is to argue in a way that *you* think is rational, even if secretly I believe my 'rational' may differ from your 'rational.'"⁷⁸

Later, he adds the remark quoted earlier:

Bottom line, do I believe in the power of rational argument? Of course I do, for a very good reason: it often seems to work. Not that it's meaningful; not that it should work; only that pragmatically it seems to get results.⁷⁹

Presumably, D'Amato has risen above the false consciousness that binds the rest of us to logocentrism. Thus the positive arguments that he offers for indeterminism don't fool him, and if we too saw the light we too wouldn't be fooled. What then, if not these arguments, is D'Amato's reason for embracing indeterminism?

The only clue we have is D'Amato's long answer to Professor Hegland, quoted earlier, urging his critics "to read the exciting philosophical and artificial intelligence literature that has enabled twentieth-century philosophical thought to overcome the conceit of the Platonic view that words have determinate meanings."⁸⁰ But as we have seen, analytic philosophy bases its own claims to value on the strength of logic and of language precisely used. D'Amato doesn't deny this. Presumably then, its arguments are just as meaningless as D'Amato's own. If that is so, then D'Amato has still not communicated to us his own reasons, or any reasons, for embracing his deconstruction of language and logic.

We are left with only one conclusion: Anthony D'Amato has misunderstood twentieth-century analytic philosophy, not only its conclusions, but its methods as well, and his entire program is contaminated by that mistake. In the next part of this Article, I will look at three of D'Amato's positive arguments for indeterminism. These arguments not only demonstrate that D'Amato has failed to assimilate the methodology of analytic philosophy; more importantly they reveal the error that drives his program even more than his misconstruals of Wittgenstein, Quine, and Goodman—his understanding of the Platonic view to which he refers in the quoted passage above and, in particular, to the significance of its rejection by analytic philosophy.

II. CONTINGENCY AND DETERMINISM

D'Amato's own arguments for the radical indeterminacy of language consist by and large of examples of ordinary miscommunications,⁸¹ improbable hypothetical legal arguments,⁸² and actual legal

78. *Id.* at 150-51.

79. *Id.* at 156.

80. *Pragmatic Indeterminacy*, *supra* note 16, at 151-53.

81. *See, e.g., Aspects of Deconstruction: The Failure of the Word "Bird"*, *supra* note 16, at 539-40.

arguments of dubious soundness that have nonetheless actually won in court.⁸³ Throughout, D'Amato tends to repeat the same methodological errors. He offers marginal cases of miscommunication as if they constituted the norm. He commits the logical fallacy of affirming the consequent—he assumes that if the lack of a core meaning can cause a miscommunication, then each miscommunication is the result of the lack of a core meaning, rather than of one of the many simpler and more intuitively natural causes. And he regularly equivocates between linguistic indeterminacy and legal indeterminacy. Each of the arguments discussed below is built of these logical errors.

The arguments also reveal deeper misunderstandings, though misunderstandings that, apart from the methodological errors, suggest what truly lies at the foundations of D'Amato's project. These misunderstandings concern the relationship between language and behavior, between practices and theories about practices, and, most importantly, the relationship between contingency and determinism.

A. *Language and Behavior*

A recurrent theme in D'Amato's arguments for indeterminacy is that legal language, in any of its embodiments—judicial opinions, statutes and regulations, and legal theory, cannot constrain judges in deciding actual disputes.⁸⁴ Because it cannot constrain judges, he concludes, legal language must lack core meanings. Describing his fictional opponents, the modern Formalists, for instance, he says:

A Formalist regards at least some part, and perhaps all, of law as a logically precise system. Statutes, rules, and precedents are premises, and a legal conclusion is a logical deduction from the applicable premises. The law-words that make up this system form the decisional basis for judges, and so long as the system itself is coherent, these law words constrain the judge. But one thing has to be assumed in order to make Formalism possible—a fundamental postulate concerning the nature of language. . . . [E]very word has a determinate core meaning that is not reasonably disputable.⁸⁵

Actual judicial conduct, he contends, belies that possibility:

82. See, e.g., *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, *supra* note 16, at 253-54; *Aspects of Deconstruction: Thought Control in Xanadu*, *supra* note 16, at 1088.

83. See, e.g., *Counterintuitive Consequences of "Plain Meaning"*, *supra* note 16, at 543-50.

84. In the exchanges between D'Amato and some of his critics, there may be some equivocation at work over different senses of the word "constrain." "Constrain" in some circumstances may mean only that a norm applies to someone, that the person is the subject of the norm. The term may also have the stronger meaning of actually controlling behavior. In the first sense of the term, the law surely constrains judges and all to whom it applies. But the law may nevertheless fail in fact to assure conformance and thus not constrain in the second sense. I take it that D'Amato is using the term in this second sense.

85. *Pragmatic Indeterminacy*, *supra* note 16, at 171-72 (citation omitted).

Yet if scholars are going to catch up to what experienced practitioners know—that you can win cases even though the law is clearly against you, and lose cases even though the law is overwhelmingly on your side—we should boldly confront the possibility of Indeterminacy and its implications for the way we teach and write about law.⁸⁶

I take it that what D'Amato means by language being incapable of constraining a judge is that for any law or theory about the way law should be applicable to a particular dispute, no matter how clear the norm may appear to us, it is still possible that an actual judge in that actual dispute may rule in a way not in keeping with the norm. In this he is surely right, though it is a difficult empirical question to determine how often in fact it actually does occur. Nonetheless, there are many egregious examples.⁸⁷ To the extent that judges depart from plain law, the law is indeterminate. We cannot be sure what any judge will do in any particular case.

But to suggest, as D'Amato does, that this phenomenon necessarily demonstrates that *language* is indeterminate, that words have no core meanings, is either, on the one hand, to both conflate linguistic indeterminacy into legal indeterminacy and then go on to affirm the antecedent or, on the other hand, to suggest a picture of language and behavior that is untenable. The argument implies that if words or utterances had core meanings, then judges, or anyone presented with a norm, would behave unfailingly in accordance with the norm. On this view, people are depicted as perfect automatons who respond mechanically to, perhaps, the vibratory qualities of the utterances, much like voice activated appliances (human clappers!).

Our experience shows, however, and a more accurate account of norm following recognizes, that the normative force, the action-guiding force, of a norm depends upon the subject of the norm having some antecedent interest or desire that supplies the motivation for conformance.⁸⁸ The antecedent interest may be, among other pos-

86. *Id.* at 148-49 (citation omitted).

87. In my own work, I have described how the Supreme Court in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), blatantly ignored plain and, at the time, recent history of the Fourteenth Amendment to gut the Privileges or Immunities Clause. Alan R. Madry, *Private Accountability and the Fourteenth Amendment; State Action, Federalism and Congress*, 59 Mo. L. Rev. 499, 500 (1994); Alan R. Madry, *State Action and the Obligation of the States to Prevent Private Harm: The Rehnquist Transformation and the Betrayal of Fundamental Commitments*, 65 S. Cal. L. Rev. 781, 783-84 (1992).

88. My description here is of norms as hypothetical imperatives. The imperatives are hypothetical in the sense that their force derives from some interest of the subject. Hypothetical imperatives are contrasted with categorical imperatives that purport to supply a motivation for anyone regardless of the actual interests or desires the person may have. Philippa Foot has argued convincingly that the notion of a categorical imperative is incoherent. See Philippa Foot, *Morality as a System of Hypothetical Imperatives*, 81 Phil. Rev. (1952), reprinted in Philippa Foot, *Virtues and Vices* 157 (1978).

sibilities, a desire to please the norm giver, a desire to promote order and harmony that the subject believes would be undermined by failure to conform, or perhaps a fear of any sanctions that are attached to the norm.

Apart from the lack of a motivating desire or interest, it may also be the case that the subject of the norm, including a judge, simply does not understand the plain meaning of the norm. D'Amato tends to treat any departure from the linguistic norm as unremarkable and simply evidence of the lack of core meanings.⁸⁹ But our reaction when someone persistently misuses or misunderstands a particular utterance is that the person is deviant; perhaps the person is new to the community, or simply not very bright or adept at the community's language games. Wittgenstein observed, for instance, that "if a child does not respond to the suggestive gesture, it is separated from the others and treated as a lunatic."⁹⁰ Meaning, after all, may lie, as Wittgenstein suggests, in a community of language users. On that account of language, no single departure from the norm undermines the existence of a determinate core meaning.

I have been assuming, consistent with D'Amato's argument, that the norm being violated is clear. But the departure from the norm, or a dispute over the appropriate conforming conduct, may be because the norm is ambiguous. Under the circumstances of the utterance, we might imagine a number of conflicting behaviors that would be consistent with the utterance. Even in that circumstance, though, it would be extreme and incorrect to jump to the radical conclusion that language has no core meaning. The more accurate view, and the view consistent with our conduct in those instances, is that an utterance may have a number of possible core meanings that need to be identified from the circumstances of the utterance.⁹¹ There is a great difference between an utterance having no core meaning and one having a number of possible meanings depending upon the circumstances. D'Amato himself offers an excellent example of the way in which we

89. See, e.g., *Aspects of Deconstruction: The Failure of the Word "Bird"*, *supra* note 16, at 539 (describing someone who misunderstands the import of another pointing at a bird and who focuses instead on the significance of the way the hand is held as a pictograph).

90. Ludwig Wittgenstein, *The Blue and Brown Books* 93 (1958).

91. D'Amato himself appears to appreciate this fact, although he adds his own peculiar gloss. He writes, for instance, "The meaning of words derives from the contexts in which they are employed, and we can never be certain of the context because we cannot enter into the minds of other persons to see the contexts to which their minds are advertent." *Aspects of Deconstruction: The Failure of the Word "Bird"*, *supra* note 16, at 539-40. Once again, D'Amato involves us, counter-intuitively, each in his own private language. The more natural view is described by James Conant, discussing Stanley Cavell's discussion of Wittgenstein: "The fact of [our mutual] attunement rests on the brute fact of our ability to see what another person sees, feel what he or she feels, follow her lead, catch on to the direction in which he wishes to point. Our capacity to catch on in these ways is a necessary precondition of our being able to participate in civilization." James Conant, *supra* note 35, at lxix-lxx.

would go about trying to identify the sense of an expression when it is ambiguous or unusual. He recalls Franklin D. Roosevelt's reply to his Secretary of State, Cordell Hull, who was distressed at the freedom that Roosevelt allowed his dog, Fala. Cordell remarked to the President, "A dog exists very well out in a yard." Roosevelt replied, "Ah, my dear Hull, that is just the point; Fala is not a dog."

D'Amato carefully explicates the sense of Roosevelt's remark as follows:

Both Hull and FDR presumably shared a *denotation* of a "dog" as a four-legged canine animal. But, if we take him seriously, FDR was really communicating the proposition that, for purposes of playing around in the living room, Fala was more a family member than a dog. Since FDR knew that Secretary Hull was operating under a definition of "dog" that included a dominant *connotation* of an unruly animal not fit for indoor living, the President proceeded to attack *that* dominant connotation. From FDR's point of view, the term "dog" was doing too much work—it was prejudging the issue, blocking Hull's mind from reconceptualizing the situation.⁹²

D'Amato uses the example as part of an argument for indeterminacy that I will examine in subpart C below. He again infers that the variability of language and the possibility for rich nuance doom language to fatal indeterminacy. His own explication is, however, better seen as an example of how even in circumstances where language is used in unusual and potentially ambiguous ways we nonetheless find in it a very precise meaning.

B. *Practices and Theories of Practices and the Nature of Rationality*

In my earlier discussion of Nelson Goodman, I had occasion to distinguish between a practice and our theory of the practice, that is, our attempt to provide an account of what is going on in the practice. The scholarly subject of ethics, for example, is an attempt to provide an account of what lies behind our intuitive practice of judging things to be good or bad, right or wrong. Do those judgments reflect a concern for consequences, and if so, which? Do they reflect instead, or in part, a commitment to particular rules of conduct apart from consequences, and if so, what is the content of those rules? Theorizing may be an important part of the practice, helping us to better understand our commitments and where they may be improved upon. I noted earlier, too, that the lack of a universally acceptable theory does not doom the practice, any more than the lack of an acceptable theory of the physical world dooms the existence of the physical world. Hilary Putnam, for instance, summarizing his disagreement with Richard Rorty over this issue, said:

⁹². *Aspects of Deconstruction: The Failure of the Word "Bird"*, *supra* note 16, at 540-41.

I hope that philosophical reflection may be of some real cultural value; but I do not think it has been the pedestal on which the culture rested, and I don't think our reaction to the failure of a philosophical project—even a project as central as “metaphysics”—should be to abandon ways of talking and thinking which have practical and spiritual weight.⁹³

Nelson Goodman in reconceiving the theory of induction threw out the traditional way of framing the philosophical question, but he did not reject the practice of induction.

We saw that D'Amato failed to recognize this important distinction in his use of Goodman. D'Amato makes a similar error in one of the minority of arguments in which he attempts to refute the practice of reason directly instead of as a by-product of the alleged indeterminacy of language.⁹⁴ The argument also reveals a surprising lack of understanding of the nature of rationality itself. D'Amato asks us to imagine the following occasion:

Suppose we have a lawsuit with the ground rule that the decision will be awarded to the side which presents the most rational argument. . . . I still maintain that a judge can decide the case against [the proponent of rationality]. How? The judge says, “[Proponent], your argument was undoubtedly one of the most supremely rational arguments I ever heard in my life. But there was one problem: it was *formally* rational, whereas your opponent gave a more *substantively* rational argument. To be sure, your opponent stumbled and faltered, miscited some cases, and played loose with some statutes, and if I were grading her performance I would give her a C and you an A. But her position was more substantively rational than yours, and since I am interested in substantive justice and not in grading lawyers' rhetoric, I must award the decision to her.”

Of course, once I make this kind of argument, a critic has two surefire comebacks. The critic either says, “I had already thought of the formalist-substantive distinction and by not mentioning it I meant to exclude it by implication,” or “All right, let's change the ground rules—now the best *substantive rational argument* will win the lawsuit, and we assume that I make the best substantive rational argument.”⁹⁵

93. Putnam, *supra* note 64, at 20.

94. In addition to the argument discussed in the text, D'Amato devotes an entire article to what I take to be a similar endeavor. See *Can Any Legal Theory Constrain Any Judicial Decision?*, *supra* note 16. It is unclear in that article and in the argument addressed here whether D'Amato means to make the weaker claim that judges do not always read cases and statutes well or, perhaps, are inclined on occasion to disregard them or whether he means to make the stronger claim that reason is an illusion. Because the discussions appear generally in the context of his larger arguments about the radical indeterminacy of language, and because of his claims elsewhere that rationality is meaningless and shouldn't work, I will hold him to the stronger claim here.

95. *Pragmatic Indeterminacy*, *supra* note 16, at 154-55.

The argument continues with the judge distinguishing between substantive goal-rationality and substantive means-rationality. The actors further stipulate that the standard is the best substantive means-rational argument. The judge then distinguishes between Kaldor-Hicks, substantive means-rationality and Pareto-optimal, substantive means-rationality, and so on. D'Amato concludes:

The point, of course, is that this sort of thing can go on forever. No initial assumption of rationality can possibly constrain the outcomes of particular cases. The deconstructionist's best rejoinder to critics such as Professors Hegland and Kress is simply to *accept all* their starting points (such as "rationality," "the power of persuasion," and "reasonableness"), and argue *within* these categories for the opposite result.⁹⁶

The difficulty with the argument is that none of the kinds of "rationality" between which D'Amato has his hypothetical judge switching is a method of rationality. They are rather, at best, theories of justice—different attempts to account for the standards that lie behind our judgments about the fairness of certain circumstances or decisions. The distinction D'Amato draws between formal and substantive rationality, for instance, is more commonly referred to as a distinction between procedural and substantive justice.⁹⁷ John Rawls describes procedures, such as non-rigged lotteries, as exemplifying "pure procedural justice" because their fairness is not dependant on their outcomes.⁹⁸ Substantive justice, on the other hand, is purely a matter of the character of the outcome rather than the procedure by which it was decided to bring about the outcome. Slavery is unjust regardless of whether it is adopted by a democratic process. At the end of the first paragraph quoted above, D'Amato seems to glimpse the real nature of the distinction he is making by substituting the term "substantive justice" where earlier he had referred to "substantive rationality."

Kaldor-Hicks optimality and Pareto optimality are not even theories of justice, much less types of rationality. The terms refer to different conceptions of economic efficiency, *i.e.*, redistributions of goods that place the goods in the hands of those who value them the most. Kaldor-Hicks optimality does not involve the gainers compensating the losers; Pareto optimality does.⁹⁹

96. *Id.* at 156.

97. *See, e.g.*, John Hart Ely, *Democracy and Distrust* 73-104 (1980). David Lyons criticizes the choice of the term "substance" rather than the more accurate term "outcome." David Lyons, *Substance, Process, and Outcome in Constitutional Theory*, 72 *Cornell L. Rev.* 745, 752-54 (1987).

98. John Rawls, *A Theory of Justice* 85-86 (1971). Robert Nozick refers to this type of pure procedural justice as the "historical principle of justice." Robert Nozick, *Anarchy, State and Utopia* 150-82 (1974).

99. *See* Richard A. Posner, *Economic Analysis of Law* 12-13 (3d ed. 1986).

Philosophers since Aristotle have distinguished between practical reason and theoretical reason.¹⁰⁰ Perhaps this is the distinction that D'Amato alludes to when he refers to "means-rationality" and "goal-rationality," though his is not an accurate characterization of this ancient taxonomy. Practical reason is concerned with the choice of means to attain ends, though it is also concerned with the reconciliation of incompatible ends. Theoretical reason, however, concerns the ways in which we come to understand and verify our understanding of the world. It includes inductive and deductive logic, but more expansively "reasoning," understood richly, as Hilary Putnam has commented, "in the full sense of the word," which "involves not just the logical faculties, in the narrow sense, but our full capacity to imagine and feel, in short, our full sensibility."¹⁰¹

Each of these types of rationality obviously has its domain, and it is not a matter of arbitrary stipulation which type of problem will be addressed by which type of rationality. We use practical reason in deciding on the most efficient route between home and office. It is to theoretical reason that we would turn in trying to understand our ethical practices and arrive at an account of the standards that we use in judging situations to be good or bad, just or unjust.¹⁰²

This gives us some insight into the problem with D'Amato's argument. It doesn't concern choices between types of rationality; it is about, if anything, trying to determine the proper ethical or legal standard for resolving a particular dispute. To do that, we would turn to theoretical reason to help sort out the different possible theories of our commitments. In the context of a particular suit, especially at the trial level, we might not have even that freedom. At that level, there are rules, themselves the product of earlier ethical decisions of a higher level of generality, that apply to the way in which advocates, judges, and juries may proceed.

Of course, any of these actors may violate those rules. But even those violations do not impugn rationality, or even the virtue or applicability of the rules. We are still able to, and do, after all, recognize violations as violations. It may even be the case that our judicial institution, as a matter of practical necessity, tolerates departures from the rules by not consistently correcting them. That too contributes to indeterminacy in the law. We may even say accurately that the artificial reason of the law, by which I mean legal reasoning in practice, is inherently indeterminate for that reason. But again, this is indetermi-

100. On the distinction as Aristotle described it, see generally Jonathan Lear, *Aristotle: The Desire to Understand* 170-74 (1988).

101. Hilary Putnam, *Meaning and the Moral Sciences* 86 (1978).

102. Of course, we could have theoretical accounts of our practical reasoning. Modern game theory is a theory of practical reasoning. Similarly, logic, epistemology, and the philosophy of science could be viewed as theoretical accounts of our practice of theoretical reason. Once again we need to be mindful of the distinction between a practice and our theory of the practice.

nacy only in the law, not language or reason in general. It does not impugn our theories of practical or theoretical reason, much less the practices of either practical or theoretical reasoning. Both are still available to serve those who care about efficiency and knowledge.

C. *Contingency and Determinism*

From the discussion so far, one might conclude that D'Amato's indeterminism is the product simply of a hodgepodge of misunderstandings and bad reasoning. But there is one large idea, and one large mistake, that I believe is at the bottom of the project. The mistake concerns D'Amato's understanding of the significance of analytic philosophy's rejection of the Platonic view. D'Amato refers in a number of places to the importance of this move to his own development of indeterminism. In his long answer to Professor Hegland, he prominently makes the connection: "The proof for a legal Formalist who sincerely wants to understand the possibility that words do not have determinably precise meanings is to read the exciting philosophical and artificial-intelligence literature that has enabled twentieth-century philosophical thought to overcome the conceit of the Platonic view that words have determinate meanings."¹⁰³

The Platonic view to which D'Amato here alludes is characterized by a preoccupation with certainty. John Searle has commented that "[t]he philosophical tradition that goes from Descartes to Husserl, and indeed a large part of the philosophical tradition that goes back to Plato, involves a search for foundations: metaphysically certain foundations of knowledge, foundations of language and meaning, foundations of mathematics, foundations of morality, etc."¹⁰⁴

The search for certain foundations for language and meaning took the form of a belief that the world to which our words referred was inherently divided up in a way that conformed to the references of our words and the structure of our language; there was a one-to-one perfect correspondence between the world and our language. This belief in turn promoted the search for certain knowledge because our knowledge of the world was captured in our language. Thus for Plato, not only were the forms eternal and immutable in a way that the phenomenal world was not, and were therefore a proper subject for true knowledge, the forms and their relations also corresponded to our words and the structure of our grammar, assuring us thereby definite and objective knowledge of this certain world, uncontaminated by our mere conceptions of it.

Among the greatest and indeed defining insights of analytic philosophy is the rejection of both the view of language as corresponding to an inherent division within nature itself and of the possibility of the

103. *Pragmatic Indeterminacy*, *supra* note 16, at 151 (citations omitted).

104. Searle, *supra* note 6, at 77.

kind of certain knowledge, based on transcendental foundations, reflected in Plato's metaphysics. Again, John Searle: "Now, in the twentieth century, mostly under the influence of Wittgenstein and Heidegger, we have come to believe that this general search for these sorts of foundations is misguided. There aren't in the way classical metaphysicians supposed any foundations for ethics or knowledge."¹⁰⁵

On this view, language is a contingent phenomenon in this sense: the categories reflected in our language could be different than the way they now are. We might, for instance, lose the separate categories of "dog" and "cat" and begin to refer to dogs and cats together as "dats." Nothing in the world would prevent it. We might lose a useful distinction, but then what is useful depends upon our needs and interests. For something to be contingent in general is thus for it to be possible that the thing could be other than as it is. D'Amato accurately describes the sense of contingency and its implications for language in his response to one of Frederick Schauer's common sense critiques of linguistic indeterminism. Schauer argued: "When I say that pelicans are birds, the truth of the statement follows inexorably from the meaning of the term 'bird.' If someone disagrees, or points at a living, breathing, flying pelican and says 'That is not a bird,' she simply doesn't know what the word 'bird' means."¹⁰⁶ D'Amato responds:

[The] phrase—"pelicans are birds"—is true only if, as a contingent matter, pelicans are in fact birds. But there is nothing *in nature* that provides an answer. It all depends upon whether taxonomists agree that pelicans share enough of the features of "birds" so as to be called birds.¹⁰⁷

D'Amato's error is in his appreciation of the significance of this insight. For D'Amato it means embracing the worst fears of the Platonic metaphysicians: if language is contingent, then language is also indeterminate and knowledge uncertain. He makes the connection explicitly in a footnote to his reply to Schauer:

[Schauer] correctly summarizes the mature Wittgenstein as holding that "the meaning of a word is a function of how that word is contingently used in an existing linguistic community," but he does not seem to recognize the import of his own summary. Instead, Profes-

105. *Id.* at 78.

106. Frederick Schauer, *Formalism*, 97 Yale L.J. 509, 512 (1988).

107. *Aspects of Deconstruction: The Failure of the Word "Bird"*, *supra* note 16, at 537. There is no indication in Professor Schauer's remarks that he believes that nature rather than our practices provides definitions and that he wouldn't be satisfied that pelicans are birds just because taxonomists do in fact agree that pelicans share enough of the features of birds so as to be called birds. See Schauer, *supra* note 106, at 512. I take Schauer's argument as consistent with the view that meaning is given by socially constituted language games and that anyone who disagrees about the meaning of the word pelican, even after plenty of opportunity for clarification, is simply unfamiliar with our language game.

sor Schauer continues to assume that words have *definite* meanings, ignoring Wittgenstein's teaching that words merely represent recurring utterances with no failsafe, intrinsic "meaning."¹⁰⁸

D'Amato appears to assume that any time anything is contingent, it is also by virtue of its contingency indeterminate. This is surely false. It is a contingent fact that I am sitting where I am; I could be sitting somewhere else. But just because I could be sitting somewhere else does not mean that I am not quite definitely sitting where I am. Similarly with regard to language, just because we could conceive of the world in altogether different categories, and perhaps someday we shall, does not mean that the categories that we now use are indeterminate.

It is this equation of contingency with determinism that ultimately marks D'Amato, although probably unwittingly, not as a twentieth-century philosopher, but as a true heir to the Platonic view. Twentieth-century philosophy not only rejected the view that the definitions of words are given by some antecedent division within nature, it also and more significantly rejected the importance of such a correspondence for the usefulness and certainty of our practices. Discussing the same error in Derrida's deconstructionism, Searle remarked:

The real mistake of the classical metaphysician was not the belief that there were metaphysical foundations, but rather the . . . belief that unless there are foundations something is lost or threatened or undermined or put in question.

Derrida sees that the Husserlian project of a transcendental grounding for science, language, and common sense is a failure. But what he fails to see is that this doesn't threaten science, language, or common sense in the least. As Wittgenstein says, it leaves everything exactly as it is. The only "foundation," for example, that language has or needs is that people are biologically, psychologically, and socially constituted so that they succeed in using it to state truths, to give and obey orders, to express their feelings and attitudes, to thank, apologize, warn, congratulate, etc.¹⁰⁹

Hilary Putnam, discussing Stanley Cavell's interpretation of Wittgenstein on this matter puts the point even more strongly:

[F]or Cavell the pretense that there is a grand metaphysical solution to all of our problems and skeptical or relativistic or nihilistic escape are symptoms of the same disease. The disease itself is the inability to accept the world and to accept other people, or as Cavell says, to acknowledge the world and to acknowledge other people, without the guarantees. Something in us both craves more than we can possibly have and flees from even the certainty that we do have.¹¹⁰

108. *Aspects of Deconstruction: The Failure of the Word "Bird"*, *supra* note 16, at 536 n.2 (citations omitted).

109. Searle, *supra* note 6, at 78.

110. Putnam, *supra* note 51, at 178.

Putnam's remarks suggest that one of the more important consequences of embracing our practices and their success as the only necessary foundation is that it potentially puts philosophy back in touch with life as we in fact live it. Stanley Cavell has written: "In philosophizing, I have to bring my own language and life into imagination."¹¹¹ Elaborating on this point, Hilary Putnam observed that "what is important in philosophy" when treating a philosophical controversy "is to show that (and *how*) both sides *misrepresent* the lives we live with our concepts."¹¹² D'Amato's failure to recognize this basic aspect of the rejection of the Platonic view leads him to a gross distortion not only of Wittgenstein, Quine and Goodman, but also of the lives we all live. It causes him to move marginal cases to the center of our lives, to fail to grasp the significance of his own examples, and to strain against the most obvious intuitions. After all, Fred Schauer is right, a pelican is most assuredly a bird, even if that definition is the product of the way that *we* conceive of the world rather than some inherent division within nature.

D'Amato's repeated confusion in this regard reminds one of Hilary Putnam's criticism of yet another group of philosophers whose philosophy fails to take account of their lives as they live them: they "will abandon the deepest intuitions we have about ourselves-in-the-world, rather than ask (as Husserl and Wittgenstein did) whether the whole picture is not a mistake."¹¹³ The proof of the determinacy of language and the power of reason is not in a philosophy of language; it is in our experience day to day of the effectiveness of language used well and precisely.

III. CONCLUSION

It is hard to avoid the conclusion that D'Amato's analytic indeterminacy is just another example of what Brian Leiter has christened "intellectual voyeurism": the superficial and ill-informed treatment of serious ideas.¹¹⁴ D'Amato misunderstands each of the philosophers from whom he claims support and inspiration; he fails to see the patent contradiction between the indeterminism that he attributes to

111. Cavell, *supra* note 44, at 125.

112. Putnam, *supra* note 64, at 20 (first emphasis added).

113. Hilary Putnam, *The Many Faces of Realism* 15 (1987).

114. Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 Yale J.L. & Human. 79, 80 (1992). Professor Leiter's own definition continues: "[A]pparently done for intellectual 'titillation' or to advertise the . . . 'sophistication' of the writer." *Id.* I am not concerned with Professor D'Amato's motivations. My concern is with the effect of an appeal to the respectability of twentieth-century analytic philosophy by one well placed in the academy on a discipline that is largely not yet mature enough to discern its lack of intellectual merit. That deconstruction could have gotten as far as it has in the legal academy is itself testament to our lack of rigor. John Searle has observed for instance that French deconstruction is "largely ignored by American philosophers." Searle, *supra* note 6, at 74.

these scholars and their methods; and his own methods contain crude errors. But ultimately, the error that most tellingly underlies D'Amato's program is his failure to recognize the real significance of the defining insight of twentieth-century analytic philosophy: its rejection not only of the possibility of transcendent foundations, but the rejection as well of the importance of transcendental foundations to the usefulness and reliability of language and reason.

Does this mean that the law escapes indeterminacy? Can we all feel good about the institution of the law, a position D'Amato disingenuously attributes to his critics?¹¹⁵ *Absolutely not.* One can only jump to that conclusion by again equivocating between language and the law. The law is indeterminate to some degree, perhaps to an unacceptable degree and in matters of the greatest moment. But it is indeterminate because too many legislators, regulatory agencies and judges use language poorly. It is indeterminate because judges and regulatory agencies too often disregard clear law; or are incapable of appreciating the complexity and subtlety of even well written law and opinions; or because the adversary system rewards attorneys for winning for their clients rather than discovering and presenting the truth about the law or their clients' conduct or protecting the community's better interest; or because fact finding is always difficult and juries inexperienced and naive. There are many reasons why the law may be indeterminate, and that fact is one that ought to concern us all, but the law is not indeterminate because language is inherently, fatally indeterminate and reason meaningless.

It is yet another and difficult question just how much law schools and legal scholars can do about this situation. The problem is not one that is unique to the law. It reflects rather problems that run throughout our culture, flaws deep in the collective consciousness. There is no good reason to expect that legislators, lawyers, and judges are somehow above the anti-intellectualism, superficiality, shortsightedness, and, collectively, the deep divisions that characterize American culture generally. They are us and we are them.

If there is one thing that law schools might seek to do, indeed, that all of education might seek to do, it is to provide an opportunity and the means for reflection and self-understanding: understanding of the nature of human happiness and well-being, its relation to culture and community, and how to instill in people virtue. This, if anything, is the promise of analytic philosophy done well and rigorously, the profound lesson of Wittgenstein and Cavell.

That law schools should undertake this burden is doubly important because of the power lawyers wield. We don't do it well yet. Law schools have not come far from the pedagogic methods given us by Langdell. Legal instruction is still centered on case and statutory in-

115. See, e.g., *Pragmatic Indeterminacy*, *supra* note 16, at 148.

terpretation and the application of law to facts—a form of incestuous mediocrity. We learn what our forebears said, but at no point do we assure that those who will have the power to fashion the new inheritance will have learned anything else about *the world* that that inheritance will govern. Current pedagogic practice cannot fail too to reinforce a sort of amorality in the law by giving the impression that the ultimate standard of law is simply having a judge pronounce it to be so.

That *modus operandi* might have suited a legal world that believed in the perfection of legal science. Lawyers could pursue their clients' interests with a clear conscience unperturbed by the moral implications of their work. Conscience and morality were irrelevant to the working out of pure science. But the true legacy of Legal Realism was that there was no science; lawyers made law daily. This insight brought morality back into the daily grind of being a lawyer.

If we are to transform legal education in a way that takes account of the Realist insight, it is going to take more than D'Amato's naive intuitionism about ethics. If there is one thing that is surely indeterminate, it is our collective intuition about the meaning of justice and rightness. Among the more powerful ways in which we might overcome that dissension and promote greater understanding, at least among those who value truth,¹¹⁶ is through thoughtful reflection and discussion on our condition and our methods, all in the medium of language and reason. Logic and reason treat all claims and all arguments alike, holding them up to the same standards of rigor and evidence.¹¹⁷ It does not further the transformation of education, then, or the maturation of the law, to impugn carelessly the power of language and logic. Rather, it poisons the one well that could nourish us all.

116. Of course, reason will have no purchase where people don't care about the truth, or are incapable of reflecting on or testing their beliefs. That does not reflect on the power of language and reason to help in that search. It may be the most important thing that education can do to inspire an interest in learning and provide the means to pursue it. I take it that a concern for self-understanding is one of the greatest of virtues.

117. I regularly receive comments on student evaluations complaining about my political predispositions. But interestingly, for the same class I will receive comments from some students to the effect that I am so liberal that I do not warrant credibility and from other students that I am so right wing that I do not warrant credibility. All of the students who make these comments sadly have missed an important dimension of my classes: my purpose in class is never to discredit a political position, but to force students of all political stripes to learn how to think critically about their own beliefs and the beliefs of others.

