Part I

The good faith thesis

Chapter 1

Stubborn indeterminacy

1.1. THE DETERMINACY PROBLEM

The problem of legal indeterminacy has moved to the center of jurisprudential debate in the United States since Oliver Wendell Holmes, Jr., proclaimed:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[1]

Holmes's foil was Christopher Columbus Langdell, the famous father of legal education by Socratic dialogue.[2] The lore is that Langdell supposed the law to be a consistent and complete body of dogmatic rules. For him, the law was objective in that it was rooted in timeless concepts each of which had an essential nature. It was neutral in that it stood apart

1 Oliver Wendell Holmes, *The Common Law*, ed. Mark D. Howe (Boston: Little, Brown & Co., 1963), p. 5.
2 See [Oliver Wendell Holmes], "Book Notice," *American Law Review*, 14 (1880): 233–5 [reviewing Christopher C. Langdell, *A Selection of Cases on the Law of Contracts*, 2d ed. (Boston: Little, Brown & Co., 1879)].

from the contingent empirical context and might be invoked by persons with disparate opportunities to enjoy their legal rights or perform their legal duties. The law was determinate in that it dictated single right results in all possible cases. For convenience, this understanding of the law will be called "determinate-formalism."[3]

Langdell's effort to create a determinate-formalist science of law is a now undisputed object lesson.[4] Holmes's attack inspired successive waves of criticism that in time became the "determinacy critique," which denies that the law produces determinate results and, therefore, also that it is neutral or objective. By emphasizing the multiple causes of the law and judicial decisions, focusing on historical and social forces outside the corpus of official legal rules, Holmes sought to understand the law theoretically without underestimating the complexity and variability of its genesis. He defined the law as "[t]he prophecies of what the courts will do in fact, and nothing more pretentious."[5] Similarly, he treated legal rights and duties as predictions of judicial behavior, seeking to substitute a scientific foundation for "empty words."[6] Many of the legal realists in the 1920s and

3 See Thomas C. Grey, "Langdell's Orthodoxy," *University of Pittsburgh Law Review*, 45 (1983): 1–53. See also Duncan Kennedy, "The Structure of Blackstone's Commentaries," *Buffalo Law Review*, 28 (1979): 209–382.

4 Those who recently have defended versions of legal formalism do not claim that the law must dictate particular results in all cases. See Frederick Schauer, "Formalism," *Yale Law Journal*, 97 (1988): 509–48, at 544–8; Ernest J. Weinrib, "Legal Formalism: On the Immanent Rationality of Law," *Yale Law Journal*, 97 (1988): 949–1016, at 953–7, 1008–12. See also Roberto M. Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1986), pp. 1–14 (criticizing a broad conception of legal formalism).

5 Oliver Wendell Holmes, "The Path of the Law," in *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920): pp. 167–202, at 173.

6 Oliver Wendell Holmes, "Law in Science and Science in Law," in ibid.: pp. 210–43, at 229. See also Holmes, "Natural Law," in ibid.: pp. 310–16, at 313 ("But for legal purposes a right is only the hypostasis of a prophecy – the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it – just as we talk of the force of gravitation accounting for the conduct of bodies in space."); Holmes, "The Path of

1930s continued the Holmesian project by redefining law as the observable regularities in aggregate official behavior.[7] They employed social scientific methods to describe and explain those regularities to enhance the predictability of the law while continuing to debunk determinate-formalism in law. Others, disaffected with positivistic social science and the maldistribution of effective legal power in society, more recently have adapted the project of understanding law theoretically to draw on social theory, literary theory, and history while trying to soften up the law for change, abandoning the goal of prediction.[8] Throughout, the salience of claims that the law is indeterminate mushroomed as the determinacy critique deepened.

In my view, much too much is made of the indeterminacy of legal results. The determinacy critique stems broadly from the riveting clash between Langdell and Holmes, both of whom in their legal theories made determinacy of results a central requirement for law. Contemporary versions of the determinacy critique, in particular, express skepticism due to the failure of the Holmesian project to provide both a determinate theoretical understanding of the law and a determi-

the Law," at 169 ("[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right.").

7 For example, Karl N. Llewellyn, *The Bramble Bush* (New York: Oceana Publications, 1951), pp. 12–13 ("*What these officials do about disputes is, to my mind, the law itself*. . . . And so to my mind the main thing is seeing what officials do, do about disputes, or about anything else; and seeing that there is a certain regularity in their doing – a regularity which makes possible prediction of what they and other officials are about to do tomorrow"); Walter W. Cook, "Scientific Method and the Law," *American Bar Association Journal*, 13 (1927): 303–9, at 308 (rules and principles of law describe past behavior of judges).

8 For example, Clare Dalton, "An Essay in Deconstruction of Contract Doctrine," *Yale Law Journal*, 94 (1985): 997–1114; Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review*, 36 (1984): 57–125; Robert W. Gordon, "Historicism in Legal Scholarship," *Yale Law Journal*, 90 (1981): 1017–56; David M. Trubeck, "Where the Action Is: Critical Legal Studies and Empiricism," *Stanford Law Review*, 36 (1984): 575–622, at 577–9. See also Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988).

nate basis for ensuring a reasonably just legal system. There is, however, a third approach that abandons determinacy of results as a conceptual requirement for law and that has been left largely unattended. I call that approach in general jurisprudence "law as practical reason."[9] A conceptual and normative theory of adjudication within law as practical reason – the "good faith thesis" – will be presented in Chapters 2 and 3 and defended thereafter. Because the thesis breaks out of the dualistic tradition spawned by Langdell and Holmes – logic versus experience – it will be useful first to clarify the central problem of legal indeterminacy and some of the starting assumptions.

1.2. INDETERMINACY CLARIFIED

The yearning for determinacy of results seems ever-present, especially among young law students and frustrated lawyers. A lesson that needs to be relearned in each generation is that the law can appear to be an objective, neutral, and determinate body of rules, but really is situated in a social

9 Steven J. Burton, "Law as Practical Reason," *Southern California Law Review*, 62 (1989): 747–93. The relevant idea of "practical reason" has a long intellectual history, starting with Aristotle and undergoing sometimes important changes as it was developed in the philosophies of St. Thomas Aquinas, Immanuel Kant, and more recently H. L. A. Hart and other important philosophers of the Oxford School. It is not, as is sometimes supposed, just a grab bag of ways of deciding what to do, but a potentially rigorous and constrained intellectual framework for reasoning about action. For a sample of recent treatments of law as practical reason, see John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1982); Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978): Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975); Katharine T. Bartlett, "Feminist Legal Methods," *Harvard Law Review*, 103 (1990): 828–88; Daniel A. Farber & Philip P. Frickey, "Practical Reason and the First Amendment," *UCLA Law Review*, 34 (1987): 1615–56; Anthony T. Kronman, "Alexander Bickel's Philosophy of Prudence," *Yale Law Journal*, 94 (1985): 1567–616; "The Works of Joseph Raz: A Symposium," *Southern California Law Review*, 62 (1988): 731–1235. For an idiosyncratic approach to practical reason, see Richard A. Posner, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990), pp. 71–8.

context, exposed to political bias, and indeterminate to a significant extent. In a brief and abstract version, the determinacy critique goes something like this: The first principle of adjudication in courts of law is that judges are under a duty to uphold the law.[10] They are required to identify the law of their legal system, to interpret that law, and to apply it in disputes that come before them. The law, however, is not so clear, consistent, and complete that it constrains judges to reach a single legally required outcome in many cases. The law then is indeterminate, and the judge has discretion.[11]

To elaborate, legal indeterminacy is not the same as a lack of clarity in a legal rule or other standard for legal decision making. A formal legal rule, for example, may be vague or ambiguous as formulated, or it may conflict in its terms with another legal rule of the same kind. Such a rule, taken in isolation, is indeterminate with respect to the result in a case.

10 American Bar Association, *Model Code of Judicial Conduct*, Canon 3(B)(2) (1990) (a judge "should be faithful to the law and maintain professional competence in it"); § 2.1.

11 "*Discretion* means the power to choose between two or more courses of action each of which is thought of as permissible." Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, tent. ed. (Cambridge, Mass.: Harvard Law School, 1958), p. 162. For other general explanations of discretion, see, for example, Aharon Barak, *Judicial Discretion* (New Haven: Yale University Press, 1989), p. 7; Kenneth C. Davis, *Discretionary Justice* (Baton Rouge, La.: Louisiana State University Press, 1969), pp. 4–5; Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), pp. 31–9, 68–71; D. Galligan, *Discretionary Powers* (Oxford: Clarendon Press, 1990), pp. 1–107; H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 120–32; Neil MacCormick, *Legal Reasoning and Legal Theory*, pp. 246–55; R. Kent Greenawalt, "Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges," *Columbia Law Review*, 75 (1975): 359–99, at 386; Joseph Raz, "Legal Principles and the Limits of Law," in *Ronald Dworkin and Contemporary Jurisprudence*, ed. Marshall Cohen (Totowa, N.J.: Rowman & Allanheld, 1983): pp. 73–87, at 74; §§ 2.2 and following. Not all discretion results from unintended indeterminacy in the law. Sometimes, it is conferred on judges by the law, as when a trial judge's decision to admit evidence is reversible only when discretion is abused. What is said in this book about judicial discretion applies to discretion resulting from both legal indeterminacy and conferred discretionary powers.

The rule, however, exists within a system that includes rules of interpretation, hierarchies of legal authority, and other rules about rules. The rules about rules might resolve the initial lack of clarity, as when a statute contains clear definitional provisions or is made "subject to" another statute. This renders the indeterminacy harmless and uninteresting.[12] As Karl Llewellyn famously demonstrated, however,[13] rules of interpretation and hierarchies of legal authority commonly contain problems of vagueness, ambiguity, and conflict with other rules about rules. So the indeterminacy can be stubborn because it resists resolution as one moves through a legal analysis to deeper levels, no matter how many times one backs up and tries different lines of thought or argument. The law then is indeterminate in a real and important sense.

The legal realists did a good job of highlighting the apparent indeterminacy of formal legal rules.[14] Many of them thought, however, that it was not a great problem because discretion could be exercised on the basis of underlying social policies.[15] Legal process theorists thought similarly that apparent indeterminacy could be resolved on the basis of underlying principles and purposes.[16] More recently, law

12 See Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton: Princeton University Press, 1990), pp. 79–98.

13 Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed," *Vanderbilt Law Review*, 3 (1950): 395–406.

14 See generally, Edward A. Purcell, *The Crisis of American Democratic Theory* (Lexington, Ky.: University of Kentucky Press, 1973), pp. 74–94.

15 See generally, Robert S. Summers, *Instrumentalism and American Legal Theory* (Ithaca, N.Y.: Cornell University Press, 1982).

16 See Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), p. 141 (Judge, when free, is to draw his inspiration from consecrated principles); Hart & Sacks, *The Legal Process*, p. 165 (discretionary decisions must be consistent with other established applications of a rule and serve the principles and policies it expresses); Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review*, 71 (1958): 630–72, at 661–9 (judges should interpret laws in light of the laws' purposes); Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review*, 73 (1959): 1–35 (constitutional decision

and economics theorists have advanced economic efficiency or wealth maximization partly as particular social policies that could solve the jurisprudential problem,[17] and Ronald Dworkin has urged that there is one soundest theory of law that produces one right answer in almost all controversies as a matter of principle.[18] Others have called attention to underlying professional conventions that constrain judges.[19] As critical legal studies scholars have taken great pains to show, however, all such resources might have their own indeterminacies.[20] Policies, purposes, economic analysis, prin-

should be based on general and neutral principles).

17 Richard A. Posner, *Economic Analysis of Law*, 3d ed. (Boston: Little, Brown & Co., 1986).

18 Dworkin, *Taking Rights Seriously*, pp. 81–130; Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), pp. 119–80; Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, Belknap Press, 1986), pp. 266–71. See also Rolf E. Sartorius, *Individual Conduct and Social Norms* (Encino, Calif.: Dickinson Pub. Co., 1975), pp. 181–210; Michael S. Moore, "A Natural Law Theory of Interpretation," *Southern California Law Review*, 58 (1985): 277–398.

19 See Steven J. Burton, *An Introduction to Law and Legal Reasoning* (Boston: Little, Brown & Co., 1985), pp. 95–8, 136–43, 204–8; Melvin A. Eisenberg, *The Nature of the Common Law* (Cambridge: Harvard University Press, 1988); Owen M. Fiss, "Objectivity and Interpretation," *Stanford Law Review*, 34 (1982): 739–63; Owen M. Fiss, "Conventionalism," *Southern California Law Review*, 58 (1985): 177–97.

20 The starting point of the most relevant critical literature is Duncan Kennedy, "Legal Formality," *Journal of Legal Studies*, 2 (1973): 351–98. See generally Mark G. Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987); Roberto M. Unger, *Knowledge and Politics* (New York: Free Press, 1975); Unger, *The Critical Legal Studies Movement*; James Boyle, "The Politics of Reason: Critical Legal Theory and Local Social Thought," *University of Pennsylvania Law Review*, 133 (1985): 685–780; Peter Gabel & Duncan Kennedy, "Roll Over Beethoven," *Stanford Law Review*, 36 (1984): 1–55; Allan C. Hutchinson, "Democracy and Determinacy: An Essay on Legal Interpretation," *University of Miami Law Review*, 43 (1989): 541–76; Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harvard Law Review*, 89 (1976): 1685–778; Mark G. Kelman, "Trashing," *Stanford Law Review*, 36 (1984): 293–348; Mark G. Kelman, "Interpretive Construction in the Substantive Criminal Law," *Stanford Law Review*, 33 (1981): 591–673; Gary Peller, "The Metaphysics of American Law," *California Law Review*, 73 (1985): 1151–290; Joseph W. Singer, "The Player and the Cards: Nihilism and Legal Theory," *Yale Law Journal*,

ciples, and professional conventions cannot be counted on to produce determinate results.[21] Consequently, it may seem, judges must resolve indeterminacies on the basis of controversial political values – not the law.

Stubborn indeterminacy is real, not apparent. Indeterminacy is most problematic when there is no one right answer to be reached using all of the resources the law provides; it is also troubling when members of the legal community, each using all lawyerly skill in good faith, can disagree about an outcome upon full adjudication of a case. These points deserve emphasis because too many sweeping indeterminacy claims are facile. To negate some possible misunderstandings, it is not only that members of the legal community do not readily agree on the right answer in a case, or that some lawyers might be mistaken when they think they know, or that competing arguments can be made without professional embarrassment. Since bad arguments establish nothing, the law is not significantly indeterminate because incompatible results can be advocated. Even arguments that are good enough for a lawyer to be justified in filing a lawsuit, but not good enough for a judge to justify a judgment, show nothing about the law's indeterminacy. Conflicting judicial decisions, too, do not establish indeterminacy if one of them is mistaken and generally would be recognized as such

94 (1984): 1–70.

21 Some critical scholars seem to say that the law does not produce determinate results in any case whatever. For example, Mark V. Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge: Harvard University Press, 1988), pp. 191–2 (legal realists showed that legal materials and reasoning "are so flexible that they allow us to assemble diverse precedents into whatever pattern we choose"); Hutchinson, "Democracy and Determinacy," at 543 (the law is irredeemably indeterminate and thoroughly political); Singer, "The Player and the Cards," at 10–11 (legal doctrine "infinitely manipulable"), 20 (legal doctrine "sufficiently ambiguous or internally contradictory to justify any result we can imagine"); sources cited in Ken Kress, "Legal Indeterminacy," *California Law Review*, 77 (1989): 283–337, at 302 n. 67. If that were so, legal indeterminacy would be both stubborn and pervasive. See also Anthony D'Amato, "Can Any Legal Theory Constrain Any Judicial Decision?," *University of Miami Law Review*, 43 (1989): 513–39.

within the legal community. Human fallibility is not the point. Moreover, legal indeterminacy is compatible with highly predictable judicial behavior.[22] The law might seem settled, for a time, because no one with influence asks the hard questions. Such contingent stabilities can be questioned at any time, and the legal community then may lack the resources needed to resolve a dispute. Indeterminacy occurs in a case most notably when the law has incompatible implications for concrete judicial action and, on thorough analysis by impartial and capable lawyers, no standard or set of standards that generates a determinate result within any practicable frame of reference.

Stubborn legal indeterminacy need not be pervasive.[23] On some matters, legal materials that conflict in the abstract will converge to require one answer to a specific legal question, albeit for different reasons. This would be the case if someone were to sue today for a declaratory judgment that slavery is lawful in the United States, or were to defend against a speeding ticket on the ground that existing traffic laws against speeding are unconstitutional. On other matters, the law may be indeterminate at the level of formal rules, but all the relevant rules of interpretation supported by all the vari-

22 Gordon, "Critical Legal Histories," at 125. See also Kelman, *A Guide to Critical Legal Studies*, pp. 13, 258 (internal contradictions do not render daily outcomes wholly unpredictable); David Kairys, "Legal Reasoning," in *The Politics of Law*, ed. David Kairys (New York: Pantheon Books, 1982): 11–17, at 15 (results in cases are not random or wholly unpredictable); Singer, "The Player and the Cards," at 19–25 (outcomes in our legal system are often predictable despite legal indeterminacy).

23 See Burton, *Law and Legal Reasoning*, pp. 94–8, 125–32 (convergence in concrete judgments can produce easy cases despite controversy over abstract standards); Kress, "Legal Indeterminacy," at 295–337 (legal indeterminacy is at most moderate). See also Altman, *Critical Legal Studies*, pp. 90–8; R. Kent Greenawalt, "How Law Can Be Determinate," *UCLA Law Review*, 38 (1990): 1–86; Kenney Hegland, "Goodbye to Deconstruction," *Southern California Law Review*, 58 (1985): 1203–21; Alvin B. Rubin, "Does Law Matter? A Judge's Response to Critical Legal Studies," *Journal of Legal Education*, 37 (1987): 307–14; Frederick Schauer, "Easy Cases," *Southern California Law Review*, 58 (1985): 399–440.