Limited Ink:
Interpreting and Misinterpreting Gödel's Incompleteness Theorem in legal theory

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Abstract

This thesis explores the significance of Gödel's Theorem for an understanding of law as rules, and of legal adjudication as rule-following. It argues that Gödel's Theorem, read through Wittgenstein's understanding of rules and language as a contextual activity, and through Derrida's account of 'undecidability,' offers an alternative account of the relationship of judging to justice. Instead of providing support for the 'indeterminacy' claim, Gödel's Theorem illuminates the predicament of undecidability that structures any interpretation and every legal decision, and which constitutes the opening to justice. The first argument in this thesis examines Gödel's proof, Wittgenstein's views on rules, and Derrida's undecidability, as manifestations of a common concern with the limits of what can be formalized. The meta-argument examines their misinterpretation and misappropriation within legal theory as a case study of just what they mean about meaning, context, and justice as necessarily co-implicated.

Résumé

Ce mémoire explore l'importance du théorème de Gödel dans la compréhension du droit en tant que règles et de la décision judiciaire en tant qu'application littérale de la règle. Le mémoire soutient que le théorème de Gödel, lu à la lumière de la compréhension wittgensteinienne des règles et du langage comme activité contextuelle, ainsi qu'à la lumière du récit de Derrida sur l'indécidabilité, offre un récit différent de la relation entre l'acte de juger et la justice. Au lieu de fournir un support à la thèse de l'indétermination, le théorème de Gödel éclaire le paradoxe de l'indécidable qui structure toute interprétation et toute décision juridique, et constitue ainsi une ouverture vers la justice. Le premier argument de ce mémoire est que la preuve de Gödel, la position de Wittgenstein sur les règles et l'idée de l'indécidabilité selon Derrida sont toutes des manifestations des limites de la formalisation. Le méta-argument examine comment ces auteurs ont été mal interprétés et appropriés en théorie du droit en tant qu'étude de cas de ce qu'ils veulent justement dire à propos de la nécessaire co-implication de ce que sont le sens, le contexte et la justice.

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Table of Contents

Introduction

This essay is about interpretation in general, and legal interpretation in particular. It forms part of an ongoing attempt to understand what judges do as neither a mechanical exercise in rule-application, nor an unconstrained ideological act, but a process that has a necessary relationship to justice. Against the positivist vision of law as a system of rules capable of housing fixed determinate meaning, it argues that law, like the language in which it consists, is determined by a radical openness to context. This opening to context gives rise to the necessity of interpretation, of having to choose between different contexts, but it also gives rise to the possibility of justice. This essay challenges the attraction of the idea that rules have a-contextual meaning which can be followed without interpretation, and that legal adjudication can avoid recourse to justice, by turning to an unexpected and surprising source: Gödel's Incompleteness Theorem.[1]

No mathematical theorem has generated as much interest outside the domain of mathematics as has Gödel's Theorem, hailed as 'no less than the most important theorem in mathematical logic of all time.'[2] Its distinct fascination lies in its claim to say something about the nature of formal mathematics itself; to have both 'the rigor of

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[1] There were actually two Incompleteness Theorems, as discussed in chapter one; but since the second is dependent on the first more important proof, it has become quite common, and is convenient, to refer to the theorems in the singular.

[2] Roger Penrose, *Shadows of the Mind: A Search for the Missing Science of Consciousness* (Oxford: Oxford University Press, 1994) at 64. See also Jim Holt, 'Time Bandits', *The New Yorker*, February 28, 2005 at 81, John L. Casti & Werner DePauli, *Gödel: A Life of Logic* (Cambridge: Perseus Publishing, 2000) at 12.

mathematics and the reach of philosophy.'[3] Gödel proved that there is a difference between what can be proved to be true within a formal mathematical system, and what is true about that system. The result, that truth is bigger than proof, has often been seen to have a kind of intuitive truth or relevance: as John L. Austin remarked, 'Who would ever have thought otherwise?'[4] Its apparent philosophical reach has meant that it has been discussed far beyond the borders of mathematical logic, in relation to questions of ontology, epistemology, truth and meaning.[5] For Roger Penrose, Gödel's Theorem means that 'human understanding and insight cannot be reduced to any set of rules;'[6] for Palle Yourgrau, it confirms that '(s)yntax cannot supplant semantics.'[7] Yet the apparent philosophical reach of the proof brings with it the danger of it being taken out of its context of mathematical logic.[8] While the debate over the philosophical reach of

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[3] Rebecca Goldstein, *Incompleteness: The Proof and Paradox of Kurt Gödel* (New York: W.W. Norton, 2005) at 135, 26.

[4] cited in Casti & DePauli, *supra* note 2 at 5.

[5] See Palle Yourgrau, *A World Without Time: The Forgotten Legacy of Gödel and Einstein* (New York: Perseus Books, 2005); Roger Penrose, *The Emperor's New Mind: Concerning Computers, Minds, and the Laws of Physics* (Oxford: Oxford University Press, 1989); Douglas R., Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid* (New York: Vintage Books, 1979); Goldstein, *supra* note 3, and Kurt Gödel, *Collected Works* Vol. 1 ed. S. Feferman (Oxford: Oxford University Press, 1986). See Casti & DePauli, *supra* note 2 at 20.

[6] Roger Penrose, *Shadows of the Mind, supra* note 2 at 64-5, 70, 99, 416. This idea has been highly influential in debates over Artificial Intelligence. See Edward Rothstein, 'The Dream of Mind and Machine,' 26 (19) *New York Review of Books* (December 6, 1979) and Douglas Hofstadter, "Foreword" in Ernest Nagel & James R. Newman, *Gödel's Proof,* (New York: New York University Press, 1958, reprinted 2001 with foreword by Douglas Hofstadter) at xvii-xviii.

[7] Yourgrau, *A World Without Time, supra* note 5 at 58.

[8] S.G. Shanker, "Preface" to *Gödel's Theorem in Focus* (1988) at vii; Mark R. Brown, & Andrew C. Greenberg, "On Formally Undecidable Propositions of Law: Legal Indeterminacy and the Implications of Metamathematics" (1992) 43 (6) Hastings Law Journal at 1143. Taking Gödel's Theorem out of its context accounts for the 'postmodern excesses' that Torkel Franzén observes, in *Gödel's Theorem: An Incomplete Guide to its Use and Abuse* (Wellesley, Massuchusetts: A K Peters, 2005) at 1, and see 50-54. See Goldstein, *supra* note 3 at 25. Alan Sokal & Jean Bricmont, *Intellectual Impostures: Postmodern philosophers' abuse of science* (London: Profile, 1998) especially at 167-168. For a similar point made in relation to Wittgenstein, see Brian Bix, "Comments and Caveats for the Application of Wittgenstein to Legal Theory" *Public Law and Legal Theory Research Paper Series* [n.d.] Research Paper, University of Minnesota Law School; Social Science Research Network 2.

Gödel's Theorem is ongoing, this thesis does not so much seek to justify the Theorem's application beyond mathematics - this having already been attempted, not least by Gödel himself[9] – but to analyze, critique and place in perspective the uses that have already been made of it in legal theory. It uses Gödel's Theorem and its interpretation as a prism for examining the relationship of justice to law, and the nature of legal interpretation. And it proceeds by way of three interconnected arguments.

I. Argument

The first argument traces the implications of Gödel's Theorem for the vision of law as a formal system which directs and determines the activity of legal interpretation. It proceeds from Gödel, who demonstrated the limits of formal understandings of mathematics, through Wittgenstein, who insisted on the limitations of a formal understanding of rules and language, to Derrida, who showed us the limitations of formal structures of law. Pursuing this trajectory from mathematics to language to law, with each context opening out into the next one, allows a picture of Gödel's Theorem to emerge which furthers those postmodern and apocryphal approaches to jurisprudence that emphasize the structural and necessary interconnectedness of law and justice.[10]

Chapter One examines Gödel's Theorem in the context of its emergence as a challenge to that which legal positivism shares with mathematical formalism: the idea of a system with purely logical relationships between its parts. Gödel's Theorem shows us that even

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[9] Goldstein, *supra* note 3 at 29. Yourgrau, *A World Without Time*, *supra* note 5 at 99.

[10] See for instance Peter Goodrich, Costas Douzinas & Yifat Hachamovitch, "Introduction: Politics, ethics and the legality of the contingent" in *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (London: Routledge, 1994) at 17; Desmond Manderson, "Apocryphal Jurisprudence" (2001) 26 Australian Journal of Legal Philosophy 27.

the most rigorous formal systems, mathematical systems, are never closed. Their non-closure is the opening to mathematical truth, as distinct from, but embedded within, formal structures of proof. In Chapter Four, Gödel's Theorem is read through Derrida's two texts written in 1989, *Limited Inc.*[11] and 'Force of Law: The Mystical Foundation of Authority.'[12] Derrida explains that all interpretation must go through the ordeal of the undecidable, driven by an a-contextual aspiration towards truth (*Limited Inc.)* and justice ('Force of Law') that announces itself only in its responsiveness to context. Gödel and Derrida together suggest that a purely internal understanding of a system or a structure of rules is never sufficient, because a system is always irreducibly opened to the justice and truth that lie beyond it – that is to context. This opening to context is the opening to justice, making any act of interpretation both contextual and ethical.

II. Meta-argument

The meta-argument examines, somewhat ironically, the context in which Gödel's Theorem was received in legal theory, in order to demonstrate the necessary relationship between interpretation and context that is the subject of the first argument. Since the 1958 publication of Ernest Nagel's and James R. Newman's *Gödel's Proof*[13] brought the Theorem to the attention of a non-mathematical audience, legal writers have appealed to Gödel's Theorem for a variety of purposes,[14] but it was during the zenith of Critical Legal

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[11] Jacques Derrida, "Afterword" to *Limited Inc.* (Evanston II: Northwestern University Press, 1988)

[12] Jacques Derrida, "Force of Law: The Mystical Foundation of Authority" (1990) 11 Cardozo Law Review at 919-1045.

[13] *supra* note 6

[14] It first appeared in legal literature as part of an attempt to elucidate the logical status of the House of Lords' infamously paradoxical Practice Statement on precedent, in Stone-de-Montpensier, "Logic and Law: The Precedence of Precedents" (1967) 51 Minnesota Law Review at 655-65

Studies' obsession with the notion of 'indeterminacy' that the Theorem received its most sustained and contradictory attention.[15] Radical indeterminists cited the Theorem as evidence that legal rules do not determine legal outcomes because a legal system is essentially incomplete.[16] At the same time it was cited by others in support of the opposite view, as demonstrating the robustness of a legal system.[17] The indeterminacy debate is a debate over whether rules can constrain judges or adjudicators, and whether meaning can inhere in a text to a sufficient degree to be able to control the actions and decisions of those adjudicators working with that text. At stake is the perennial question dogging the process of legal adjudication in a liberal democracy: whether there is any meaningful difference between law and politics, between legislators and judges.

Chapter Two demonstrates that instead of providing support for the indeterminacy claim, Gödel's Theorem shows us how it is misconceived. Ironically, indeterminists, like the positivists they oppose, both believe that meaning should exist free of context; for the indeterminists, if such an ideal is not met, the result is that no possibility for rational legal discourse exists. But their despair is ill-founded. Meaning has a necessary relationship to context, but contextually-determined meaning is still meaning. The meaning of a rule

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[15] Duncan Kennedy, "The Turn to Interpretation" (1985) 58 Southern California Law Review at 251, 257; Anthony D'Amato, "Pragmatic Indeterminacy" (1990) 85 (1) Northwestern University Law Review at 148-189; Ken Kress, "A Preface to Epistemological Indeterminacy" (1990) 85 (1) Northwestern University Law Review at 134; John M. Rogers, & Robert E. Molzon, "Some Lessons about the Law from Self-Referential Problems in Mathematics" (1992) 90 (5) Michigan Law Review at 992-1022; Brown & Greenberg, *supra* note 8 at 1439. See also David R. Dow, "Gödel and Langdell – A Reply to Brown and Greenberg's Use of Mathematics in Legal Theory" (1993) 44 (3) Hastings Law Journal at 707; Kevin W. Saunders, "Realism, Ratiocination, and Rules' (1993) 46 (2) Oklahoma Law Review at 220. Pierre Schlag also used Gödel's Theorem metaphorically in "Cannibal Moves: The Metamorphoses of the Legal Distinction" (1988) 40 Stanford Law Review at 949 and "Rules and Standards" (1985) 33 U.C.L.A. Law Review at 379.

[16] Brown and Greenberg, *supra* note 8; D'Amato, *supra* note 15.

[17] Rogers and Molzon minimize Gödel's 'threat' to positivism by clinging to its vision of systemic unity and arguing that Godelian inconsistencies only occur between systems, understood a-contextually and a-temporally: 'The very fact of the difference in jurisdiction or the difference in time reconciles the results.' Rogers & Molzon, *supra* note 15 at 1001.

or a text is neither determined in advance nor indeterminate, but is determined by and only by reference to specific contexts.

Chapter Three examines the skeptical reading of Wittgenstein's rule-following remarks as a particularly clear example of the presumption of a-contextual meaning operative in the indeterminacy debate. When Wittgenstein's work is placed in context, however, it supports neither legal positivism nor indeterminacy. Like Gödel, Wittgenstein illuminates the debate as one of false opposition, based on fetishizing rules rather than understanding language as a practice. In showing us that rules are embedded in, and cannot be understood apart from, the practice in which they manifest themselves, Wittgenstein lays the foundation for a third way of conceiving rule-following, one which avoids the pitfalls of positivism and indeterminacy alike.

Chapter Four explores an alternative to indeterminacy (and positivism), which Derrida terms 'undecidability.' The notion of undecidability allows for a richer understanding of the relationship between interpretation and context, and of the possibility of justice. For Derrida, all acts of interpretation are structured by 'undecidability:' the predicament of having to choose between competing discursive, political, intellectual, social and historical contexts, of having to place limits on 'the entire "real-history-of-the-world."[18] The interpretation of texts - of 'all possible referents'[19] – is a momentary stabilization of this context, of 'relations of force (intra- and extrasemantic, intra- and extradiscursive, intra- and extra-literary or –philosophical, intra- and extracademic, etc.).'[20] Through the

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[18] Derrida, *Limited Inc. supra* note 11 at 136.

[19] *Ibid.* at 148.

[20] *Ibid.* at 145.

notion of 'undecidability,' Derrida shows us that to think about the context of a rule is to begin to think about justice. Because a rule can only be determined by reference to context, and because the choice of context, the necessity of judgment, can never been avoided by a rule, this 'experience and experiment of the undecidable'[21] is endemic to every act of legal judgment. The opening to context is the opening to justice, and neither can be evacuated from what judges do.

This meta-argument seeks to understand Gödel's Theorem in its widest possible - but necessarily incomplete – world-historical-intellectual-philosophical context. One of the most astute commentators on the dynamics at work in this broader context was Gödel himself, who, distinguishing between skepticism as the 'leftward' view and metaphysics (spiritualism, idealism and theology) as the 'rightward' view, observed: 'the development of philosophy since the Renaissance has by and large gone from right to left.'[22] This shift has meant that the late-twentieth-century interpretation of Gödel's Theorem has been shaped by 'the dominance of form over content, syntax over semantics, proof over truth.'[23] This tendency is evident in the 'relativist' understanding of Gödel's Theorem among those postmodernists who view it, along with Einstein's Theories of Relativity and Heisenberg's Uncertainty Principle, as a compelling basis for rejecting the 'myth of objectivity.'[24] This tendency is manifest in the skepticism and nihilism characteristic of (many) legal indeterminacy proponents. It shaped Gödel's contradictory legacy, one he

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[21] *Ibid.* at 116.

[22] Kurt Gödel, 'The Modern Development of the Foundations of Mathematics in Light of Philosophy,' (1961) in Solomon Feferman et al, (eds.) *Kurt Gödel: Collected Works, Vol. III* (New York: Oxford University Press, 1995) at 375-6.

[23] Yourgrau, *A World without Time, supra* note 5 at 54.

[24] Goldstein, *supra* note 3 at 37. See William Barrett, *Irrational Man: A Study in Existential Philosophy* (1962) cited in *ibid.* at 39.

shares not only with Derrida, whose work strongly resonates with his Theorem, but also with his contemporary Wittgenstein. Each thinker has functioned as touchstones for relativism, as a putative source for the idea that meaning is impossible and truth an illusion. Each was marshaled in support of the indeterminacy claim,[25] but in fact, as we shall see, none of them were relativists or skeptics about truth or meaning. Reinscribing our understanding of Gödel, Wittgenstein and Derrida within the wider shared context of their skeptical reception illuminates their common preoccupation, pursued in different contexts (mathematics, language, law), with the limits of formalization and the necessary role of truth.

III. Meta-meta-argument

The meta-meta-argument pursued throughout this essay is that the frequently a-contextual and purposive readings of Gödel, Wittgenstein, and Derrida evidences precisely that with which they were concerned: the radical dependence of meaning upon context, and the relationship of context to justice. Indeed, these motivated misreadings of Gödel, Wittgenstein and Derrida, which have all proceeded by a rigorous disavowal of context, constitute an *in*justice. In this reexamination of Gödel's, Wittgenstein's and Derrida's contributions to legal theory, this essay strives throughout to place their work in its textual, historical, political and intellectual context. While the 'reconstitution of context' 'can never be perfect and irreproachable,'[26] but 'always remains a performative

[25] The nexus between the three thinkers in the indeterminacy debate is most evident in the work of Anthony D'Amato who engaged in misreading of all three thinkers in the one footnote: "Pragmatic Indeterminacy," *supra* note 15 at 152, footnote 16. See text accompanying note 148 below.

[26] Derrida, *Limited Inc. supra* note 11 at 131.

operation,'[27] this does not signal despair for the interpretative enterprise. Meaning is possible but always contextual. Nor does it signal that interpretation is ethically bankrupt. The reconstitution of context is 'a regulative ideal' in the '*ethics* of interpretation,'[28] and deconstruction is 'the effort to take this limitless context into account, to pay the sharpest and broadest attention possible to context, and thus to an incessant movement of recontextualisation.'[29] Interpretation must be evaluated by reference to its openness to that which it excludes, rather than by any presumptive claim to interpretative closure. This is the meta-argumentative link between interpretation and truth, and the opening to context as the possibility of ethics and of justice.

The link between interpretation and context is both performative and constative in this essay. The first argument is that Gödel's Theorem, read through Derrida, tells us about the necessary relationship between interpretation and context, between the impossibility but necessity of an 'outside' to our systemic understandings. The meta-argument demonstrates that the relationship between interpretation and context is borne out by the dynamics of the context in which Gödel was interpreted. Indeterminacy and positivism are a false opposition, because they share the illusory dream of a-contextual meaning. Gödel, Wittgenstein and Derrida were each committed to the destruction of this illusion in different contexts. The meta-meta argument folds the meta-argument back on the first, showing that the illusion of a-contextual meaning which so determined the interpretative legacy of these thinkers was precisely what they should have warned us against.

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[27] *Ibid.* at 132.

[28] *Ibid.* at 131.

[29] *Ibid.* at 136.

Each argument in this essay is recursively embedded in the others, nested into concentric contexts, in a process which by itself 'never comes to a full-stop anywhere.'[30] Yet the necessity of interpretation is the necessity of – however provisionally - framing, stabilizing, deciding that context. Interpretation is a dilemma torn between the ethical opening to context and the practical constraints of time and space. It is this dilemma to which its title, *Limited Ink,* refers. That this dilemma is inherent in the act of interpretation, whether textual or legal, is the argument of this essay, and is manifest throughout it. This essay *is* and *is about* interpretation.

[30] *Ibid.* at 149.

Chapter One

Foundations

This chapter situates Gödel's Theorem in the context of mathematical formalism in order to mount an internal critique of positivism, one directed towards challenging positivism's conception of itself. The connection between the mathematical context of Gödel's Theorem and law lies in each discipline's quest for a secure foundation, a justification for its authority. Mathematical formalists and legal positivists turned to the same abstraction of 'a formal system,' with the same idea that the content of each respective discipline could be made complete, consistent and self-contained, and that the questions of practice could be solved through recourse to such systems. In demonstrating the limitations of mathematical formal systems, which represent the highest level of certainty achievable by logical discourse, Gödel's Theorem shows us the necessity of some element of extra-systemic understanding. In demonstrating the excess of truth over formal(izable) proof, as well as their co-implication, Gödel's Theorem speaks to attempts to understand law and justice as inextricably linked.

I. Gödel's Theorem in context

Mathematics has always drawn its singular claim to authority from its status as the most complete embodiment of axiomatic reasoning. Mathematical propositions like $6 + 5 = 11$ do not seem to have the contingency of scientific propositions; but are often considered

paradigms of necessary truth.[31] In Gödel's words, axioms simply 'force themselves upon us as being true.'[32] Once proved, a mathematical theorem is immune from empirical revision in a way no other discipline can assert.[33] The apparent unassailability of the mathematical claim to truth inspired attempts from Plato to the seventeenth century rationalists to apply the methods of mathematics to all pursuit of knowledge.[34] However, developments in the practice of mathematics during the nineteenth and early twentieth centuries, most notably the discovery of paradoxes in set-theory,[35] challenged mathematical confidence in the intuitively obvious givens of axiomatic systems.[36] The arrival of non-Euclidean geometry helped undermine the Kantian thesis that mathematics is tied to our intuitions about space and time.[37] The mathematical community took a growing interest in rigor, in the formalization of various branches of mathematics, and in the understanding of deduction as independent of content. This was the turn towards

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[31] Stewart Shapiro, *Thinking about Mathematics: The Philosophy of Mathematics* (Oxford: Oxford University Press, 2000) at 21.

[32] Kurt Gödel, "What is Cantor's Continuum Problem?" 1947 with 1963 supplement, in Paul Benacerraf & Hilary Putnam, eds., *Philosophy of Mathematics: Selected Readings* 2nd ed. (Cambridge: Cambridge University Press, 1984).

[33] Goldstein, *supra* note 3 at 17.

[34] These rationalists included René Descartes (1596-1650), Benedictus Spinoza (1632-1677), and Gottfried Wilhelm Liebniz (1646-1716). Goldstein, *supra* note 3 at 27, see also 121. See further Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Cambridge: Harvard University Press, 2005) at 17-19. Shapiro defines rationalism as 'an attempt to extend the perceived methodology of mathematics to all knowledge.' Shapiro, *supra* note 31 at 3. See Franzén, *Gödel's Theorem, supra* note 8 at 17.

[35] Bertrand Russell's The Barber Paradox and Greg Cantor's Theory of the Universal Set are the two most famous examples. See Hofstadter, *Godel, Escher, Bach*, *supra* note 5 at 20; John William Dawson, *Logical Dilemmas: The Life and Work of Kurt Gödel* (Wellesley, Massachusetts: A K Peters, 1997) at 24.

[36] Shapiro, *supra* note 31 at 150.

[37] See John Bolyai, "Non-Euclidean geometries and their significance" in Morris Kline and Addison Wesley eds., *Mathematics: A Cultural Approach* (Perseus Publishing, 1962). Immanuel Kant had argued that Euclidean geometry (and arithmetic) were 'synthetic a priori' (capable of yielding new knowledge, but an inevitable necessity of thought.) Immanuel Kant, *A Critique of Pure Reason* B15-16, cited in Shapiro, *supra* note 31 at 80.

formalism, and the assertion that the essence of mathematics is the manipulation of characters, with no necessary claim to truth.[38]

The most important mathematician of the generation preceding Gödel's, David Hilbert, believed the set theoretical paradoxes had induced a 'foundational crisis'[39] which urgently demanded refutation:

> The situation in which we presently find ourselves with respect to the paradoxes is in the long run intolerable. Just think: in mathematics, this paragon of reliability and truth, the very notions and inferences, as everyone learns, teaches and uses them, lead to absurdities. And where else would reliability and truth be found if even mathematical thinking fails?[40]

His 'meta-mathematical'[41] response, the Hilbert Program, represented the culmination of formalism,[42] and aimed to 'eliminate once and for all the questions regarding the foundations of mathematics.'[43] Hilbert's program thus had two major steps. The first step was to recast all of mathematics within one formal system of reasoning, by finding a

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[38] Shapiro, *supra* note 31 at 140, 150, 158.

[39] *Ibid.* at 158. See Jeremy Avigad & Erich H. Reck, '"Clarifying the nature of the infinite": the development of metamathematics and proof theory' (December 11, 2001) http://www.andrew.cmu.edu/user/avigad/Papers/infinite.pdf 5-7. José Ferreirós, 'The Crisis in the Foundations of Mathematics,' *Princeton Companion to Mathematics* (2004) http://www.pdipas.us.es/j/josef/Crisis.pdf; Paolo Mancosu, *From Brouwer to Hilbert: The Debate on the Foundations of Mathematics in the 1920s* (Oxford: Oxford University Press, 1997)

[40] Published version of a 1925 address, cited in Dawson, *Logical Dilemmas, supra* note 35 at 49. See also David Hilbert, "On the Infinite" in Jean van Heijenoort (ed.), *From Frege to Gödel. A Source Book in Mathematical Logic, 1897-1931* (Cambridge: Harvard University Press, 1967 [1926]) at 375.

[41] Christoffer Gefwert, *Wittgenstein on Mathematics, Minds and Mental Machines* (Aldershot: Ashgate Publishing, 1998) at 259. See also S.G. Shanker, "Wittgenstein's Remarks on the Significance of Godel's Theorem" in S. G. Shanker, ed., *Godel's Theorem in Focus* (London: Routledge, 1988) at 187-8; Stephen Kleene, *Introduction to Metamathematics* (North-Holland, Amsterdam, 1952, 1964) at 61-62.

[42] Hilbert's formalism is called formal deductivism, in Shapiro, *supra* note 31 at 149.

[43] David Hilbert. Die Grundlegung der Mathematik. Mathematische Annalen, 104:485–494, 1931. Translated as "The grounding of elementary number theory" by William Ewald, ed., *From Kant to Hilbert: A Source Book in the Foundations of Mathematics* Vol 2. (Clarendon Press, Oxford, 1996) at 1148–1157, paragraph 39.

language of axioms from which, according to fixed syntactical rules of inference, one could derive all the theorems of a given mathematical domain. The second step was to prove that this formalization of mathematics was consistent, through an 'absolute' or 'global' consistency proof,[44] using only what Hilbert called 'finitary' methods of reasoning.[45] Such a proof would secure the foundations of Hilbert's program, preclude the formation of paradoxes, and confirm the formalist view that 'the business of mathematics was not interpretation, or truth, but logical derivation.'[46]

In 1931, Hilbert's program was radically undermined by a twenty-five year old mathematician named Kurt Gödel. In a paper entitled 'On Formally Undecidable Propositions of *Principia Mathematica* and Related Systems I,'[47] he showed that in sufficiently powerful mathematical systems, consistency could not be proven in the way Hilbert wished, and, more importantly, that such systems were incomplete: there are true statements in mathematics that the system will not produce; true statements that cannot be proven by any process of axiomatic reasoning.

Despite the technical complexity[48] of Gödel's proof,[49] its central strategy was 'simple, beautiful and profound'[50] and is often considered 'sublime,'[51] 'akin to a religious or

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[44] Goldstein, *supra* note 3 at 140-142. See also Gefwert, *supra* note 41 at 289.

[45] Hofstadter, *Gödel, Escher, Bach, supra* note 5 at 24.

[46] Rothstein, *supra* note 6 at 3.

[47] Kurt Gödel, *On Formally Undecidable Propositions of Principia Mathematica and Related Systems* (New York: Basic Books, 1962).

[48] It is 'so shrouded in abstraction that it is impenetrable to an outsider; one can hardly read Gödel's original paper without previous preparation.' Rothstein, *supra* note 6 at 2. This sentiment is echoed in Casti & DePauli, *supra* note 2 at 41.

[49] The definitive account is Nagel & Newman, *supra* note 14 at 68-97. See also Penrose, *The Emperor's New Mind, supra* note 5 at 105-108; Hofstadter, *Gödel, Escher, Bach, supra* note 5; Casti & DePauli, *supra* note 2 at 41-52.

mystical experience.'[52] Gödel achieved his proof by turning the self-reflexivity underlying Hilbert's meta-mathematical program against itself.[53] He took the most extensive attempt to theorize a formal system that had ever been undertaken, Bertrand Russell and Alfred North Whitehead's *Principia Mathematica*,[54] and coded all its statements into arithmetic. In this code – now called Gödel numbering – numbers are made to stand for symbols and sequences of symbols. That way, each statement of number theory, being a sequence of specialized symbols, acquires a Gödel number, and this coding allows such statements to be understood on two different levels: as statements of number theory, and also as *statements about statements* of number theory. This meant that meta-mathematical statements *about* a formalized arithmetical calculus can be represented by arithmetical formulas *within* the calculus.[55] A numerical formula can be made to say something about itself.[56] Music has frequently been found the most apt metaphor for the 'amazing intellectual symphony'[57] of the resulting code.[58]

Gödel was able to use his code to create a true non-provable arithmetic sentence, by employing a self-referential structure akin to that of the Epimenides or Liar's Paradox:

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[50] Penrose, *The Emperor's New Mind, supra* note 5 at 105-106; Hofstadter, *Gödel, Escher, Bach, supra* note 5 at 17.

[51] Shanker, "Wittgenstein's Remarks" *supra* note 41 at 156.

[52] Casti & DePauli, *supra* note 2 at 41. Yourgrau, for example, prefaces his exposition by saying: 'you can admire the music without attending to the words. To appreciate Gödel's theorem is your birthright; let no one, including the mathematical police, deprive you of what you have a right to enjoy.' Yourgrau, *A World Without Time, supra* note 5 at 59.

[53] Casti & DePauli, *supra* note 2 at 41.

[54] Published in three parts in 1910, 1912 and 1913.

[55] Nagel & Newman, *supra* note 14 at 66.

[56] See further Rogers & Molzon, *supra* note 15 at 996.

[57] Nagel & Newman, *supra* note 14 at 3.

[58] Goldstein, *supra* note 3 at 156. See also Yourgrau, *A World Without Time, supra* note 5 at 59.

> One of themselves, even a prophet of their own, said, "The Cretans are always liars." ... This witness is true" (Titus 1: 12-13).[59]

The Liar's Paradox is the problem of a sentence asserting its own falsehood: "This very sentence is false." If this sentence is true, then it is false; and if it false, it is true: a paradox. Gödel used this same self-referentiality to make an arithmetical sentence called G, which, when rendered into arithmetical notation using his numbering code, made the self-referential statement: *G is unprovable in this system.*[60] This meant that G was simultaneously making two distinct statements, asserting an arithmetical claim and also asserting its own unprovability. If G were provable then its negation – G is provable in this system – would be true. But if the negation of a proposition is true, then the proposition itself is false. So if G is provable then it is false; but then, it is also true. Assuming the consistency of the system, if G is provable it is both true and false – a contradiction – which means that G is not provable. So if the system is consistent, G is not provable in it - but that is exactly what G says. Therefore, G is a statement which is both unprovable and true, and this truth can only be seen from outside the confines of the logical system. Inside the system, it remains neither provable nor disprovable. The system is therefore incomplete. This is known as the First Incompleteness Theorem.

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[59] In his paper Gödel offers the Epimenides paradox and Russell's paradox as heuristic grips for coming to terms with his theorem.

[60] 'In essence, he showed that there is a binary formula Q(x,y) such that, given *any* unary formula F(y), if F(y) has code number *n,* then Q(x,n) formalizes the notion "x is not the code number of a proof of the formular F(n)." Thus the formula (¥x)Q(x,n) asserts the unprovability of F(n). But (¥x)Q(x,y) is itself a unary formula, so it has some code number, say q. The formula (¥x)Q(x,q) therefore asserts its own unprovability.' Dawson, *Logical Dilemmas, supra* note 35 at 65. Rogers & Molzon, *supra* note 15 at 996. Gödel's sentence was not a paradox, however, but 'a true statement that could not be proven using the rules of the system – indeed, a true statement whose unprovability resulted precisely from its truth.' Hofstadter, 'Foreword' to *Gödel's Proof, supra* note 6 at xiv.

Gödel then showed that in *every* logically coherent formal system powerful enough to express all relationships among the whole numbers, there exists a statement that cannot be proved using the rules of the system. No formal system powerful enough to carry out number theory can prove its own consistency, unless it abandons intuitive concepts of implication. The system cannot, by its own devices, be shown to be free from inconsistency; it can only be shown to be such by using devices stronger than the system. Such devices can always, of course, be incorporated into the system, but then applying Gödel numbering to this newly enlarged system will result in another Gödel sentence, requiring a still-larger system, *ad infinitum*.[61] This discovery of the *essential* incompleteness of arithmetic is known as the Second Incompleteness Theorem.[62]

Gödel proved that the formal systems of mathematics, which represent the highest level of certainty achievable by rational discourse, cannot prove their own consistency and are essentially incomplete. It is impossible to formalize all of mathematics.[63] While each formal system – of requisite complexity - can be shown to be consistent by using a more inclusive formal system, each one by itself has no legitimacy, as it cannot prove itself

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[61] Gödel himself did not believe he had 'demolished' Hilbert's program, or proved the inconsistency of arithmetic, but had rather showed that the means by which acceptable consistency proofs could be carried out had to be extended. Franzén, *Gödel's Theorem, supra* note 8 at 39. '...since the consistency of a system cannot be proved using means of proof weaker than those of the system itself, it is necessary to go beyond the framework of what is, in Hilbert's sense, finitary mathematics if one wants to prove the consistency of classical mathematics, or even that of classical number theory... [I]n the proofs we make use of insights... that spring not from the combinatorial (spatiotemporal) properties of the sign combinations... but only from their *meaning*.' Kurt Gödel, *Collected Works II* (Oxford: Oxford University Press, 1990 [1958]) at 240-51.

[62] Casti & DePauli, *supra* note 2 at 49. Dawson, *Logical Dilemmas, supra* note 35 at 62.

[63] The radical challenge that Gödel's Theorem offered to the suppositions of formalism are one reason why its reception was one initially of bewilderment, than of devastation. Goldstein, *supra* note 3 at 148, 160. As Gödel later commented to Hao Wang, 'formalists considered formal demonstrability to be an analysis of the concept of mathematical truth and, therefore, were of course not in a position to distinguish the two.' Yourgrau, *A World Without Time*, *supra* note 5 at 114. Decades later, the logician Bertrand Russell seems to have still understood that Gödel had detected an inconsistency in arithmetic, when he asked: 'Are we to think that 2 + 2 is not 4, but 4.001'? Yourgrau, *A World Without Time*, *supra* note 5 at 73.

complete and consistent. Formal systems thus have an asymptotic relationship to the proof of their consistency. And to pursue systems of ever-increasing strength to support the system's consistency is an exercise in bootstrapping: at some point, one has to stop and intuit those traits which the system needs in order to secure its consistency.

Gödel's Theorem tells us about the relationship between formal(izable) proof and truth. It shows us an 'eternally unbridgeable gap'[64] between what is true within a given logical framework and 'what we can actually prove by logical means using that same system.'[65] Truth and formal(izable) proof are not completely separate from each other but are co-implicated, each recursively embedded in the other. This co-implication is clearly evident in the almost-paradoxical nature of the proof itself, which *proves* that there are true statements that cannot be *proven*.[66] Gödel's Theorem was concerned with the relationship between truth and proof - judgment and logic - rather than an absolute claim to either,[67] and it is this relationship which has implications for the positivist understanding of law.

II. Gödel's Theorem in law

In its metaphysical understanding of law as a series of propositions connected logically to each other, somewhere all together on the one plane, positivism is broadly representative of modernist legality. This understanding finds its consummate expression in Ernst

[64] Casti & DePauli, *supra* note 2 at 20.

[65] *Ibid.* at 20.

[66] Goldstein, *supra* note 3 at 165. Nagel & Newman, *supra* note 14 at 10.

[67] John William Dawson, 'The Reception of Gödel's Incompleteness Theorems' in S. G. Shanker, ed., *Gödel's Theorem in Focus* (London: Routledge, 1988) at 91. Yourgrau, *A World Without Time, supra* note 35 at 59-60. 'Unprovable,' in the context of the incompleteness theorem, means unprovable in some particular formal system.' Franzén, *Gödel's Theorem, supra* note 8 at 24.

Weinrib's formalism, in which law has an immanent metaphysical rationality,[68] reified to such an extent that Weinrib can speak of 'law's own aspirations.'[69] It is present also in the words of Lord Mansfield made famous by Lon Fuller, of the common law "working itself pure,"[70] in the metaphysics of natural law theorists, and in the statist and monist understanding of law that legal pluralists seek to challenge.[71] But it is legal positivism's judge-centred and rule-bound paradigm that dominates scholarship about law and legal adjudication. While the positivist vision of law-as-rules is a peculiarly Western conception,[72] which privileges the 'adjudicative function'[73] at the expense of understanding law's other multiple sites of operation,[74] these criticisms are beyond the

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[68] Weinrib's neo-formalist conception of law as form and content is '*distinctly* metaphysical.' Dennis Patterson, "Law's Pragmatism" in Dennis M. Patterson ed., *Wittgenstein and Legal Theory* (Boulder: Westview Press, 1992) at 99. For Weinrib, law has 'juridical significance' of which 'positive law may provide only a *defective* [relative to its metaphysical form] rendering of the juridical [form]...' Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97 Yale Law Journal 949 at 957.

[69] *Ibid.* at 949. See Desmond Manderson, *Songs without Music: Aesthetic Dimensions of Law and Justice* (Berkeley: University of California Press, 2000) at 166.

[70] Omychund v. Barker, 26 Eng. Rep. 15, 33 (1744) (Mansfield, J.). See Lon L. Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1966. [1940]) at 140.

[71] 'Both in its positivist and moralist versions, 'law's empire' is presented as internally coherent and 'pure', the precondition for its task of regulating the world.' This is because all such attempts are founded on the possibility of demarcating 'the properly 'legal' from the terrain of its operation: the social.' Costas Douzinas & Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Oxford: Hart Publishing, 2005) at 47. Berkowitz makes a similar point, 'The return to a theory of objective or intersubjective ethical laws, however, depends on the adoption of the very scientific approach to both natural and positive law that leads to and furthers the subjection of law to calculating rationality.' Roger Berkowitz, *supra* note 34 at xiv.

[72] Peter Fitzpatrick, "The Abstracts and Brief Chronicles of the Time: Supplementing Jurisprudence" in Peter Fitzpatrick, (ed.), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Pluto Press, 1991) at 16.

[73] Allan C. Hutchinson, "A Postmodern's Hart: Taking Rules Sceptically" (1995) 58 The Modern Law Review 788 at 795. Hart described American jurisprudence as 'marked by a concentration, almost to the point of obsession, on the judicial process, that is, with what courts do and should do, how judges reason and should reason in deciding particular cases.' H.L.A. Hart, "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream" (1977) 11 (5) Georgia Law Review at 969.

[74] See the rapidly expanding literature on legal pluralism; in particular, Daniel Jutras, "The Legal Dimensions of Everyday Life" (2001) Can. J. Law & Soc. at 45-65; Roderick A. Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15 Arizona J. Int'l & Comp. L. at 69 and "Here, There ... and Everywhere: Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden" in

scope of this essay. This essay is concerned instead with two ways in which Gödel's Theorem illuminates the *internal* failure of positivism: his syntactic challenge to the structure of law as a system of rules, and his semantic challenge to the idea of legal adjudication as the exegesis of pre-existent meaning.

i. Syntax

The first 'syntactic' inquiry focuses on law as a system of rules. The integrity of positivism's formal system is secured on the inside by a chain of normative validity, a logical hierarchy of norms,[75] and on the outside, the rigid separation between law and everything else: context, content, history, justice.[76] But as Gödel's Theorem demonstrated, the outside to even our most formalizable systems, those of mathematics, cannot be excluded completely from the system. The outside impinges upon the inside, inviting expansion, in a process which always exceeds formalization. Positivism attempts to circumscribe the subversive effects of the 'outside' – justice, morality, and history – by relegating it to the conceptual or historical moment of the *grundnorm,* the 'last reason of validity within a normative system,'[77] the ultimate source of validation for legal rules. But even Kelsen admits that his *grundnorm* is merely the conceptual point where the potentially infinite regression of deriving norms from superior norms comes to

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Mélanges Jacques Vanderlinden (Brussels: Bruylant, 2005), and Emmanuel Melissaris, "The More the Merrier - A New Take on Legal Pluralism" (2004) Social and Legal Studies at 57-79.

[75] Hans Kelsen, "The Pure Theory of Law: Its Method and Fundamental Concepts, Part 1" (1934) 200 Law Quarterly Review at 474; H.L.A. Hart *The Concept of Law,* P.A. Bulloch & J. Raz, eds. (Oxford: Clarendon Press, 1994 [1961]) at 97-107.

[76] Hans Kelsen, *General Theory of Law and State* (New York: Russell, 1961 [1945]); Hans Kelsen, *The Pure Theory of Law*, trans. M. Knight (Berkeley: University of California Press, 1970 2nd ed.). 1st edition 1967, 1st edition in German 1934.

[77] Kelsen, *General Theory of Law and State, supra* note 77 at 111.

'genuine fiction,' 'not only contrary to reality' but 'self-contradictory.'[78] Likewise, Hart's explanation of his rule of recognition is famously circular,[79] and eventually he too defines it merely as the limit of any inquiry concerning authority.[80] This is why, despite essential differences between the theories of Kelsen and Hart,[81] the rule of recognition and the *grundnorm* are analogous concepts: they are each offered as a foundation with no further justification, other than their 'acceptance'[82] or their having been 'presupposed.'[83]

As Lewis Carroll demonstrated in his playful dialogue "What the Tortoise Said to Achilles," [84] even logic cannot legitimate its own authority absolutely. In order for logic to function, *modus ponens*[85] as a rule of inference must first be granted, but then we also need a rule of recognition for *modus ponens*, and a rule of recognition for the rule of recognition. What Gödel showed us is that mathematical quests for absolute authority fare

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[78] *Ibid.* at 256.

[79] It is 'a mere conventional rule accepted by the judges and lawyers of particular legal systems.' H.L.A. Hart 'Postscript' to *The Concept of Law,* rev. ed., P.A. Bulloch and J. Raz, eds. (Oxford: Clarendon Press, 1994) at 267. See Hart, *Concept of Law, supra* note 76 at 101. See further Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory,* 2nd ed. (Sydney: Lawbook Company, 2002) at 93-95; Robert N. Moles, *Definition and Rule in Legal Theory: A Reassessment of H.L.A. Hart and the Positivist Tradition* (Oxford: Basil Blackwell, 1987) at 95; Matthew Kramer, *Legal Theory, Political Theory and Deconstruction: Against Rhadamanthus* (Bloomington: Indiana University Press, 1991) at 115-124; Stanley Fish, "Force" in *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Clarendon Press, 1989) at 511; Fitzpatrick, "The Abstracts and Brief Chronicles of the Time"*: supra* note 72 at 22.

[80] Hart, *Concept of Law*, *supra* note 76 at 104-105.

[81] See further Brian Bix, "Legal Positivism" *Public Law and Legal Theory Research Paper Series* [n.d.] Research Paper No. 03-1. University of Minnesota Law School; Social Science Research Network at 15-16; and Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004).

[82] Hart, *Concept of Law*, *supra* note 76 at 100-110.

[83] Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. B. Litschewski Paulson & S. L. Paulson (Oxford: Clarendon, 1992) at 59.

[84] Lewis Carroll, "What the Tortoise Said to Achilles" (1895) 4 Mind at 278-280.

[85] *Modus ponens* is the single more important rule of first-order logic. It says that if a statement P is assumed, and if the conditional statement "P implies Q" is also assumed (or previously proved), then the statement Q itself is a logical consequence and may therefore be considered proved.

no better. Hilbert had hoped to legitimize all of mathematics by relying on the perspicuous truths of finitary reasoning, effectively pulling mathematics up by its own bootstraps,[86] but Gödel proved that there are truths about mathematics, and indeed about any system, which cannot be captured by such intra-systemic devices. The problem of proof cannot be solved by more reference to more proof.[87] Formalist efforts to ground the foundations of mathematics in a consistency proof parallels legal positivist efforts to ground the formal system of law in an ultimate criterion of validity; in both cases, that which grounds the system will remain forever external to it, yet necessary to its operation. Like mathematical formalists, legal positivists pursue a fictional sense of closure.[88]

ii. Semantics

The second 'semantic' inquiry into the failure of legal positivism focuses on the theory of adjudication necessitated by this vision of law. For Hart 'law is thinkable only in terms of determinate rules,'[89] in which 'the life of the law consists.'[90] Hart makes the 'idea of a rule'[91] the single 'point of resistance'[92] against 'the free use of violence:'[93]

> If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring

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[86] Hofstadter, *Gödel, Escher, Bach, supra* note 5 at 24.

[87] Jorge Luis Borges, "Avatars of the Tortoise," *Labyrinths; Selected Stories and Other Writings* (New York: New Directions, 1964) 202.

[88] Roger Cotterell, "Sociological Perspectives on Legal Closure" in Alan Norrie, ed., *Closure or Critique: New Directions in Legal Theory* (Edinburgh University Press, 1993) at 175.

[89] Fish, "Force," *supra* note 79 at 506.

[90] Hart, *The Concept of Law, supra* note 76 at 132.

[91] *Ibid.* at 78.

[92] Fish, "Force," *supra* note 79 at 505.

[93] H.L.A. Hart, *The Concept of Law,* P.A. Bulloch & J. Raz, eds. (Oxford: Clarendon Press, 1994 [1961]) at 167.

> from them certain conduct when occasion arose, nothing that we now recognize as law could exist.[94]

For Hart, avoiding violence *requires* a way of communicating which is general, self-sufficient, requires no elaboration, engenders immediate understanding, and compels the receiver in such a way that leaves no opening for creativity.[95] He understands adjudication as 'the impartial application of *determinate existing rules* of law in the settlement of disputes.'[96] The rules have a pre-existing essence of a-contextual meaning, always already produced and 'there.' The law *consists* in its metaphysical claim to meaning existing in the text of rules: in Hart's words, there must be 'a central element of actual law to be seen in the core of settled meaning which rules have.'[97] Positivism necessitates a theory of language as "given," as static and written, merely awaiting the passive philological work of exegesis to recover its true meaning.[98] Against the idea that each application of the law requires an interpretation of the law,[99] positivism relegates

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[94] Hart, *The Concept of Law, supra* note 76 at 121. Stanley Fish rightly calls this sentence 'a compendium and an explication of the fears and desires that inform the tradition in which Hart writes.' Fish, "Force," *supra* note 79 at 506.

[95] *Ibid.* at 506. Hutchinson, "A Postmodern's Hart", *supra* note 73 at 794.

[96] Hart, "Nightmare and Noble Dream" *supra* note 73 at 971 emphasis mine. The fact that positivism as a purportedly conceptual theory of law must necessitate a theory of legal adjudication has not always been obvious: 'Legal positivism is about the nature of law, by its self-characterisation a descriptive or conceptual theory. By its terms, legal positivism does not have consequences for how particular disputes are decided, how texts are interpreted, or how institutions are organized.' Brian Bix, "Legal Positivism" *supra* note 81 at 6.

[97] Hart, *Concept of Law, supra* note 76 at 251-2.

[98] Peter Goodrich, "Law and Language: A Historical and Critical Introduction" (1984) 11 Journal of Law and Society 173

[99] This is often called the 'hermeneutic' view: Timothy Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000) at 11. In 1992 Dennis Patterson called this view 'the current interpretative orthodoxy,' in "The Poverty of Interpretive Universalism: Towards the Reconstruction of Legal Theory" (1992) 72 *Texas Law Review* 1 at 1; Martin Stone calls it 'the foundational notion of interpretation' in "Focusing the Law: What Legal Interpretation is Not" ed. Andrei Marmor, *Law and Interpretation: Essays in Legal Philosophy* (Oxford: Clarendon Press, 1995) at 43.

interpretation to the domain of 'hard cases' where that meaning is inconsistent or unclear. Invocation and not interpretation is the prevailing judicial task.

The myth of positivism is not primarily an epistemological theory – indeed it amounts to a 'crude semiotics'[100] - but a political vision of rule-bound adjudication as the most appropriate justification for law in a constitutional democracy.[101] Our public sphere is dominated by the notion of the judge as the applier of precedent, the literal interpreter, the apolitical, impartial and objective arbitrator.[102] To take only one example, Canadian Prime Minister Stephen Harper's ideal judge is someone who is 'prepared to apply the law rather than make it' and who applies it in a way which 'uses common sense and discretion without being inventive.'[103] As Costas Douzinas and Adam Gearey write:

> We encounter this attitude in the distrust of administrative discretion and of judicial creativity; in the antipathy towards administrative tribunals, legal pluralism and non-judicial methods of dispute resolution; in the insistence on the declaratory role of statutory interpretation and the 'strictness' of precedent; finally, in the emphasis on the 'literal' rule of interpretation which allegedly allows the exclusion of subjective preferences and ideologies.[104]

It is often remarked that positivism is an understanding of law internal to those who read, write and practice within the legal tradition.[105] Just as the dominant attitude among

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[100] Peter Goodrich 181

[101] Lacey, *supra* note 81 at 6.

[102] Moles, *supra* note 79 at 135.

[103] February 21 2006. See Janice Tibbets, 'Supreme Court pick favours 'restraint'' CanWest News Service, Tuesday February 28, 2006. A recent example in the Australian context can be found in John Gava's response to 'activist' High Court Justice Michael Kirby, accusing him of 'instrumentalist decision-making' which involves 'making choices that go beyond the legal materials,' in John Gava, "Law Reviews: Good for Judges, Bad for Law Schools?" (2002) 26 Melbourne University Law Review 564.

[104] See further Douzinas & Gearey, *supra* note 71 at 7. See also Moles, *supra* note 79 at 135.

[105] Davies, *supra* note 80 at 340; Moles, *supra* note 79 at 35.

working mathematicians (as opposed to philosophers[106]) is realism – the view that 'mathematicians mean what they say, and most of what they say is true'[107] - the idea of the 'science' of legalism has long been attractive to legal practitioners, who have a similarly pragmatic professional interest in the belief of legal determinacy.[108] Legalism is attractive to judges in particular because it provides 'a mantle of legitimacy for the non-elected judiciary in a democractic society'[109] and narrows the scope for controversy over their judicial decisions.[110] But this institutional safeguarding comes at a price. In installing as beyond question this view of the legitimacy of the judicial function, positivism privileges the systemic virtues of predictability and consistency over the concern with justice in particular cases[111] and conceals the fact that it is but 'one – tendentious and motivated – possible account of legal communication.'[112] Positivism is often criticized for being 'devoid of ethical considerations,'[113] for having expunged justice from the central character of law and reduced it to a question of fairness or

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[106] 'Most writers on the subject seem to agree that the typical working mathematician is a Platonist on weekdays and a formalist on Sundays:' Philip J. David, Ruben Hersh, Elena Anne Marchisotto, *The Mathematical Experience: Study Edition* (Boston: Birkhauser, 1995) at 7. See also Goldstein *supra* note 3 at 46, 117. Michael O'Donnell points out that the intertwining of mathematical and scientific language has made the view that mathematics is descriptive more 'sensible.' in "The Sources of Certainty in Computation and Formal Systems" 1999-2000 Sawyer Seminar University of Chicago, *Computer Science as a Human Science: the Cultural Impact of Computerisation* at 12.

[107] Shapiro, *supra* note 31 at 32.

[108] Goodrich, at 181. Ronald Dworkin writes that 'positivists are drawn to their conception of law not for its inherent appeal, but because it allows them to treat legal philosophy as an autonomous, analytical, and self-contained discipline.' Book Review of Jules Coleman's *The Practice of Principle)* (2002) 115 Harvard Law Review 165-6 cited in Lacey, *supra* note 81 at 352.

[109] Anthony Mason, "Future Directions in Australian Law" (1987) 13 Monash University Law Review at 156.

[110] *Ibid.* at 156.

[111] Hutchinson, "A Postmodern's Hart", *supra* note 73 at 796.

[112] Peter Goodrich, at 174.

[113] Douzinas & Gearey, *supra* note 71 at 7.

efficiency,[114] and for rendering legal scholarship 'an apologetics for the professional practice of law.'[115]

iii. Metaphor

The justice defecit in positivism arises by viewing law as a system of rules, and the automatism of rule-following as the measure of lawful action. This reduction of law to the abstract imperatives of an existent formal system is apparent in Rogers' and Molzon's use of Gödel's Theorem as a support for positivism, in which they reduce the teleology of the legal system to a 'right answer,'[116] to 'what the law *is* in any given instance,'[117] and so miss the significance of their own acknowledgement that Gödel's Theorem means that 'the concepts of truth and derivation are not at all equivalent.'[118] The most common criticism of such attempts to 'apply' Gödel's Theorem to law is that they make a 'fallacy of equivocation'[119] in taking the Theorem outside its context of mathematical logic, forgetting that it applies only to formal systems of sufficient complexity to encode arithmetic.[120] Indeed, and if only for this reason, a legal system and a mathematical

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[114] Berkowitz, *supra* note 34 at xiii. 'The divorce of law from justice informs our modern condition. Lawfulness, in other words, has replaced justice as the measure of ethical action.' at xi.

[115] Douzinas & Gearey, *supra* note 71 at 17-18. Alan Norrie, "Closure and Critique: Antinomy in Modern Legal Theory" in Alan Norrie, ed., *Closure or Critique: New Directions in Legal Theory* (Edinburgh University Press, 1993) at 8.

[116] *Ibid.*

[117] Rogers & Molzon, *supra* note 15 at 999.

[118] *Ibid.* at 996.

[119] Kress, "A Preface to Epistemological Indeterminacy", *supra* note 16 at 144-145. 'Gödel's proof consequently finds itself closely entwined with arithmetic. Related systems may be proved to suffer arithmetic's fate, but only after they are either seen to contain arithmetic or somehow correspond with arithmetic such that they can be used to prove arithmetical propositions.' Brown & Greenberg, *supra* note 8 at 1469. See also Franzén, *Gödel's Theorem, supra* note 8 at 77, 22-24; Saunders, *supra* note 16 at 220.

[120] Anthony D'Amato, for instance, makes the rather absurd assumption that '(w)hat is true of mathematical formulae is *a fortiori* true of words.' D'Amato, "Can Any Legal Theory Constrain Any Judicial Decision?" (1989) 43 University of Miami Law Review at 521, footnote 28. 'Gödel... proved that there are some

formal system (of requisite structural complexity) cannot be more than analogues. At most, they have a metaphorical relationship to one another.[121]

But this objection to Gödel's Theorem misses the fact that positivism's understanding of law as a detached and determinate enterprise, as consisting in formal and abstract reasoning, is *already* a metaphor, a 'legal fiction.'[122] Law cannot be understood as existing on a separate metaphysical plane *out there* - in the words of Gertrude Stein, 'There is no *there* there'[123] - because it depends upon a relationship between text and world. It is not an ontological presence subsisting in texts, but an interpretative activity grounded in social practice. To speak of law is to speak of the effects of this legal interpretation in space and through time.[124]

If law is legal interpretation, it is primarily a textual enterprise,[125] but, as Robert Cover reminds us, one which 'takes place on a field of pain and death.'[126] The practice of legal

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mathematical propositions (actually, an infinity of them) that can neither be proved nor disproved within a mathematical system of at least enough complexity as to include ordinary arithmetic. Any existing language qualifies as a system of at least as much complexity as ordinary arithmetic, and hence Gödel's proof applies to legal, textual and linguistic demonstrations.' Anthony D'Amato, "Can Legislatures Constrain Judicial Interpretation of Statutes?" (1989) 75 Virginia Law Review at 597 footnote 96. For critique see Ken Kress, "A Preface to Epistemological Indeterminacy", *supra* note 16 at 143-4.

[121] ... although Franzén is fairly negative what could be gained from drawing analogies from Gödel's Theorem: Torkel Franzén, *Provability and Truth* (Stockholm: *Acta universitatis stockholmiensis*, Stockholm Studies in Philosophy 9, 1987) at 79-80.

[122] Fuller calls this 'the fiction of the unity of law' in Lon L. Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967) at 128.

[123] She was speaking of her home state, Ohio, which is beyond the scope of this thesis.

[124] 'If one is not aware that legal concepts are reified and abstracted, they appear to have some kind of foundational substance, a kind of autonomy or independent being. This loses sight of the notion that the system manufactures its own conditions of legitimacy and then attempts to legislate them as *a priori* universals that have a legitimizing effect through their appeal to reason.' Adam Gearey, *Law and Aesthetics* (Oxford: Hart Publishing, 2001) at 4.

[125] Peter Goodrich, "Law and Language: A Historical and Critical Introduction" (1984) 11 Journal of Law and Society 173.

interpretation has real effects in the material plane: in the allocation of economic and social resources, in the disciplining of bodies. Indeed, law's very possibility is contingent on being able to induce these effects: as Derrida points out, 'there is no such thing as law that doesn't imply *in itself, a priori, in the analytic structure of its concept,* the possibility of being 'enforced,' applied by force.'[127]

As Robert Moles reminds us, 'it is always *people* who impose limitations upon each other, not disembodied laws or rules.'[128] A legal system can only be understood as an 'activity,' the 'product of sustained purposive effort'[129] on the parts of participants in the legal order. And if it is through such legal actors that law achieves the real effects that it does, then how they imagine the law is relevant to its character as law.[130] They wish law to have a formal existence, and this is achieved - albiet partially and rhetorically.[131] Yet it is precisely because this putative formal existence lays claim to real social and material effects, realized through the interpretative activity of legal practice, that it demands to be taken seriously, and to be challenged on its own terms.

Our purpose here is to think seriously through the metaphor of positivism, and this Gödel's Theorem helps us to do. For Gödel's Theorem directly challenges the foundation

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[126] Robert Cover, "Violence and the Word" in *Narrative, Violence, and the Law: The Essays of Robert Cover,* Martha Minow, Michael Ryan, & Austin Sarat, eds. (Ann Arbor: University of Michigan Press, 1993) at 203.

[127] Derrida, "Force of Law" *supra* note 12 at 925.

[128] Moles, *supra* note 79 at 104.

[129] Fuller, *Morality of Law* at 106. Fuller considered argument about definitions of law to be unproductive: see Kenneth I. Wilson, "Three Models for the Study of Law," in Willem J. Witteveen and Wibren van der Burg (eds.), *Rediscovering Fuller – Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) at 69.

[130] Manderson, *Songs without Music, supra* note 69 at 176.

[131] Fish, "The Law Wishes to have a Formal Existence" *in* Alan Norrie, ed., *Closure or Critique: New Directions in Legal Theory* (Edinburgh: Edinburgh University Press, 1993) at 157.

upon which the positivist view of law and legal adjudication rests: rule-fetishism and a-contextual meaning.[132] In undermining the idea of a complete and provably consistent formal system even in the most rigorous discipline of mathematics, and in revealing the ineradicable presence of the unformalizable within its formal structures, Gödel's Theorem impacts on the way we imagine what it means – and does not mean - for something to be a formal system.[133] Because the syntactic vision of positivism, as an internally defined system of rules, necessitates a semantic vision of legal adjudication as the exegesis of pre-existent meaning, Gödel's Theorem, in undermining the first, forces us to reconsider the second. In demonstrating the necessary role of truth in mathematical thinking, its dependence on, yet distinctness from, formal structures of proof, Gödel's Theorem points us toward an understanding of justice not as a corrective to law, but as structurally implicated in the workings of legal adjudication.

[132] Fish calls the external critique of positivism, which finds it 'impoverished,' 'lacking against an external other, whether the demands of politics, morality or justice, the 'humanistic response,' and distinguishes it from the internal critique which he calls 'radical' or 'critical,' and which is directed towards positivism's conception of itself. *Ibid.* at 158. See Douzinas & Gearey, *supra* note 71 at 140-161; Alan Norrie, "Closure and Critique: Antinomy in Modern Legal Theory" in Alan Norrie, ed., *Closure or Critique: New Directions in Legal Theory* (Edinburgh University Press, 1993) at 9.

[133] Stanley Fish, "The Law Wishes to have a Formal Existence," *supra* note 131 at 157.

Chapter Two

Indeterminacy

The primary purpose of this chapter is to show that positivists who believe in the application of determinate existing rules, and indeterminists who find law failing against this measure of its potential, both suffer from the very same thing: rule-fetishism. Fetishism is the process by which objects are imbued with power, and granted agency and importance, without recognizing that this agency and importance has been bestowed on them.[134] To fetishize something is to confuse one's desire with the thing itself. Positivism's fetishism of rules has meant that the desire for justice has come to be imbued within rules, and the idea of rule-following has replaced the idea of doing justice. Indeterminacy arises against rule-fetishism: it names the fear that rules cannot constrain. This chapters shows that the use of Gödel's Theorem on both sides of the debate, in support of indeterminacy as well as in defense of positivism, shows the extent to which the debate is in fact laboring under a false opposition. The rule-fetishism shared by positivists and indeterminists alike rests on a belief in a-contextual meaning, precisely the belief that Gödel shows impossible to sustain.

The meta-argument of this chapter is that the a-contextual reading that both sides of the debate favor in order to appropriate Gödel to their cause *itself* demonstrates the contextual nature of meaning. Positivists and indeterminists proceed by way of a rigorous disavowal

[134] Judith Grbich, "The Problem of the Fetish in Law, History and Postcolonial Theory" (2003) 7 *Law Text Culture* 43

of context. Their rule-fetishism means that context can only ever be understood as a corrective to, rather than constitutive of, the rule, and their belief in a-contextual reading fuelled their free use of Gödel's Theorem completely devoid of *its* context. The irony is that an a-contextual reading is what they ought to have realized Gödel was warning us against, as the remainder of this essay will show.

I. The Nightmare

Like all referents, the indeterminacy claim can only be understood in context: in the discursive space in which it is given voice, and in the institutional and political commitments of its proponents. The Realists were the first to assert that rules were indeterminate, by which they meant that legal rules could not uniquely determine legal outcomes. They were challenging an understanding of legal adjudication known as deductive formalism, 'a scientific, deductive process by which preexisting legal materials subsume particular legal cases under their domain, thus allowing judges to infer the antecedently existing right answer to the case at bar.'[135] The Realist insight that adjudication involved a necessary contact between law and the social field was readily absorbed into the mainstream of Anglo-American jurisprudence,[136] in no small part because of Hart's efforts in *The Concept of Law* to maintain the illusion of a clear and

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[135] Raymond A. Belliotti, *Justifying Law* (1992) 4 cited in John Hasnas, "Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument" (1995) 45 (1) Duke Law Journal 84 at 87, and generally 86-90. Lawrence B. Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma" (1987) 54 (2) University of Chicago Law Review 462 at 496. The realist Felix Cohen described the formalist thinking of his day as 'an autonomous system of legal concepts, rules and arguments... independent both of ethics and of such positive sciences as economics or psychology. In effect, it is a special branch of the science of transcendental nonsense.' "Transcendental Nonsense and the Functional Approach" (1935) 35 Columbia Law Review 809 at 821.

[136] Hence the popular adage 'We are all Realists now.' See further Hasnas, *supra* note 135 at 95.

defensible line between valid adjudication and ideological disputation.[137] By the time the indeterminacy claim resurfaced and came to dominate legal theory in the late eighties and early nineties,[138] it had undergone a fundamental transformation. It now amounted to the claim that legal doctrine can *never* provide a determinate answer with respect to a given fact situation.[139] It had been taken up by critical legal scholars who used it to attack the rule of law itself.

Drahos and Parker explain the shift in the indeterminacy claim in terms of the pragmatics of opposing the hegemony of positivism. Since it was no longer useful to accuse Anglo-American scholarship of deductive formalism, critical legal scholars expanded their target to assert the impossibility of finding *any* basis for rational decision making distinguishable from personal preference.[140] They decried the idea that judges can decide

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[137] Hutchinson, "A Postmodern's Hart" *supra* note 73 at 791.

[138] In 1990 Steven Winter called the indeterminacy claim 'the most pressing issue in legal theory today.' in ''Bill Durham and the Uses of Theory' (1990) 42 Stanford Law Review 639 at 639. Its zenith was closely linked with that of the CLS movement, which lasted 'roughly from the mid 1970s to the late 1980s'. Brian Bix, "Law as an Autonomous Discipline" *Public Law and Legal Theory Research Paper Series* [n.d.] Research Paper No. 02-9, University of Minnesota Law School, Social Science Research Network Electronic Paper Collection. 7. See Manderson, "Apocryphal Jurisprudence" *supra* note 10 at 30, footnote 10.

[139] Peter Drahos & Stephen Parker, "The Indeterminacy Paradox in Law" (1991) 21 University of Western Australia Law Review 305 at 310. Solum phrases it like this: 'In any set of facts about actions or events that could be processed as a legal case – any possible outcome – consisting of a decision, order, and opinion – will be legally correct.' Lawrence B. Solum, "Indeterminacy" in Dennis Patterson (ed.) *A Companion to Philosophy of Law and Legal Theory* (Oxford, Blackwell, 1999) at 491. In Solum's words, 'all cases are hard cases.' at 470; 'the existing body of legal doctrines – statutes, administrative regulations, and court decisions – permits a judge to justify any result she desires in any particular case' at 462.

[140] 'For CLS, one subscribes to formalism merely if one believes that there is a distinct set of procedures which can be employed under the label of "legal reasoning" to justify a legal conclusion. ... (T)he replacements for deductive formalism (such as jurimetrics, cost-benefit policy analysis or economic analysis) retain, for CLS, a formalistic character... They all purport to justify legal rules in terms of higher order principles or disciplines which masquerade as normatively neutral while actually implementing defined moral visions of community.' Drahos & Parker, "The Indeterminacy Paradox in Law" *supra* note 135 at 308-309. See for instance Mark Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (Cambridge, Mass. and London: Harvard University Press. 1988); 'Formalism is only a symptom of a much more profound malaise. The villain of the piece is the Rationalist tradition which has dominated our thinking (and our thinking about thinking) for so long.' Allan Hutchinson, *Dwelling on the Threshold: Critical Essays in Modern Legal Thought* (Toronto: Carswell Co Ltd, 1988) at 27.

cases according to definite criteria as a myth, designed to obscure what is actually occurring: the imposition of the ideological preferences of one privileged and unrepresentative group on the entire community.[141] For them, legal rules had no constraining function at all, and judging was merely politics in disguise.

Brian Langille summarises their radical indeterminacy claim as follows:

> In a democratic political culture dedicated to the virtues of the rule of law, a central jurisprudential issue and political concern is that of unelected judges imposing upon others their own ideas of how things should be. The legitimacy of the judicial process is at stake in this debate. That legitimacy turns upon the power of the 'law' to constrain, direct and limit judges in the exercise of their power 'according to law.' This in turn trades upon the capacity of language (the language of common law precedents, of statutes, of our constitutional document) to constrain, direct, and limit judicial decision-making.... But language is indeterminate, unstable, subject to manipulation and incapable of expressing rules and principles which constrain judges. Thus the law is a failure on its own terms and the virtues of the rule of law are impossible to secure.[142]

This argument clearly involves two separate claims: the first is about what the rule of law requires, and the second is about how the law fails to live up to those requirements.[143] The first is the positivist political claim linking indeterminacy and illegitimacy; the second is the claim that the conditions for meeting this political ideal do not obtain. The now well-recognized irony of the indeterminacy claim is that radical indeterminists out-formalized the positivists. Both positivists and CLS scholars 'believe in the goodness of the god of rules;[144] the difference between them is only that they disagree over whether their ideal

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[141] See Hasnas, *supra* note 135 at 97. See also Solum, "On the Indeterminacy Crisis" *supra* note 135 at 463-70.

[142] Brian Langille, "Revolution Without Foundation: The Grammar of Skepticism and Law" (1983) 33 McGill Law Journal 451 at 455.

[143] *Ibid.* at 457.

[144] Manderson, "Apocryphal Jurisprudence" *supra* note 10 at 33.

can be met: while positivists are in 'denial,' CLS scholars are in 'despair.'[145] In their skepticism over whether or not rules can bind, CLS scholars were, like the realists, ''disappointed absolutist(s).'[146] Indeterminacy is positivism, lapsed.[147]

Discussions of Gödel's Theorem in the indeterminacy claim mirror this dynamic by holding law accountable to the positivist paradigm of self-contained systemic completeness and consistency. Anthony D'Amato asserts (and cites Gödel, Wittgenstein and 'deconstruction' as support for his claim[148]) that 'law does not constrain a judge's ruling in any given case.'[149] He declares that the United States Supreme Court has become 'a legislative body which uses a case simply as a serendipitous vehicle for enacting social legislation,'[150] 'institutionally disengaged from doing justice to the litigants based on the facts of a case,'[151] whose members 'can "interpret" what Congress says any way they like.'[152] For him, the language of legal opinions is 'a mode of

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[145] *Ibid.* at 6-7.

[146] 'The rule-sceptic is sometimes a disappointed absolutist; he has found that rules are not all they would be in a formalist's heaven, or in a world where men were like gods and could anticipate all possible combinations of fact, so that open-texture was not a necessary feature of rules. The sceptic's conception of what it is for a rule to exist, may thus be an unattainable ideal, and when he discovers that it is not attained by what are called rules, he expresses his disappointment by the denial that there are, or can be, any rules.' Hart, *Concept of Law, supra* note 76 at 135.

[147] The authors that make this point are: Fish, "The Law Wishes to have a Formal Existence", *supra* note 131 at 169; Ken Kress, "Legal Indeterminacy" (1989) 77 (2) California Law Review 283 at 323 and 329. Hart, "Nightmare and Noble Dream" *supra* note 73 at 979. Christopher Kutz, "Just Disagreement: Indeterminacy and Rationality in the Rule of Law" (1993-1994) 103 Yale Law Journal 997 at 1002. Two examples of CLS scholars doing this are: Joseph W. Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 Yale Law Journal 1 at 15-16. Mark Kelman's 'Interpretive Construction' at 1016-1017. Where? More info needed..Kelman not in biblio

[148] D'Amato, "Pragmatic Indeterminacy" *supra* note 15 at 152 footnote 16.

[149] Anthony D'Amato, 'Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought' (1990) 85 (1) Northwestern University Law Review 113 at 115.

[150] *Ibid.* at 116.

[151] *Ibid* at 117.

[152] *Ibid*

couching the personal legislative preferences of unelected judges in the publicly venerated language of a judicial decree.'[153] Significantly for the argument here, D'Amato presupposes only two options: 'constraining, determinate law, or nonconstraining, indeterminate law which cannot make a difference.'[154] In finding law failing against a formalist model, he commits himself to the view that 'if law does not determinately constrain, it is irrational, arbitrary, and has no significant influence.'[155] Ultimately, such writers only succeeded in exacerbating the 'formalist fear that, without some plausible account of determinate rule following, there will be an official anarchy in which rules will count for nothing or simply be used as *ex post* rationalizations for *ex ante* decisions.'[156]

So too Brown and Greenberg draw on Gödel's Theorem to claim that law is indeterminate because all legal systems are incomplete or inconsistent.[157] Their use of Gödel's Theorem to this end is paradigmatic. Yet these authors also proceed firstly by assuming that the 'law can be ideally structured to support formalism,'[158] and then by equating a formal legal system like a Constitution to a formal mathematical system,[159] where the mathematical notions of axioms, rules of inference, and theorems are made equivalent to the basic norm, rules of legal reasoning, and 'correct' statements of law (eg. the law is x).

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[153] *Ibid* at 118

[154] Kress, 'A Preface to Epistemological Indeterminacy' *supra* note 16 at 136.

[155] *Ibid.*

[156] Hutchinson, 'A Postmodern's Hart' *supra* note 73 at 796.

[157] Brown & Greenberg, *supra* note 8 at 1447.

[158] *Ibid.* at 1443-1445 and Part III A in general. Rogers and Molzon also assert that an analogy between a legal system and an axiomatic system is possible, at least 'at a high level of abstraction.' Rogers & Molzon, *supra* note 15 at 997.

[159] Brown & Greenberg, *supra* note 8 at 1462: 'First, self-evident truths must be established as legal axioms, and second, procedural rules that guide legal reasoning must be developed.' See further Franzén, *Gödel's Theorem, supra* note 8 at 77-79.

To them, Gödel's Theorem thus suggests that there will be an undecidable proposition with any legal system that cannot be decided without appeal to a higher authority – which in turn suggests the indeterminacy of law.[160] This positive framework is why Brown and Greenberg's conclusion, to the effect that human judgment has a fundamental role to play in following legal rules, can only be stated as dogma.[161]

II. The Noble Dream

Positivism was able to resist the indeterminacy claim, and even to survive it, in larger part because of the enduring influence of Hart's negotiated compromise between formalism and indeterminacy. Hart had absorbed the Realist insight and was well aware that the relationship between the system of law and the social field it is designed to regulate cannot be a purely logical one: 'logic,' he admitted, 'is silent on how to classify particulars.'[162] Although he clearly recognizes that absolute certainty is neither achievable nor desirable – 'a margin of uncertainty should be tolerated and indeed welcomed'[163]- his acceptance of the positivist myth of legitimacy means that there *must* be an operational degree of certainty to legitimate the system of law as rules.

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[160] Brown & Greenberg, *supra* note 8 at 1444, 1487.

[161] 'Every case turns on specific judgment and intuition.' *Ibid.* at 1444. In relation to a judge determining his or her own jurisdiction, Brown and Greenberg write: 'Although formal logic might provide guidance, it cannot resolve the case. Instead, insight ultimately must direct the judge's decision.' at 1483. 'Like it or not, the application of legal principles depends on human intuition.' at 1487. See further Solum, "On the Indeterminacy Crisis" *supra* note 135 at 495.

[162] H.L.A. Hart, "Problems of the Philosophy of Law" (1967) reprinted in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) at 67. This echoes Holmes' famous statement, '(t)he life of the law has not been logic.' Oliver W. Holmes *The Common Law* (Cambridge, Mass., The Belknap Press of Harvard University Press, 1963 [1923]) at 1.

[163] Hart, *Concept of Law, supra* note 76 at 251-2. See Hutchinson, "A Postmodern's Hart" *supra* note 73 at 794. As Fish points out, 'from the pragmatic standpoint, the inconsistency of doctrine is what enables law to work.' Fish, "The Law Wishes to have a Formal Existence", *supra* note 131 at 169.

On the one hand, Hart maintains that in considering rules, there are 'paradigm, clear cases' at the core where there are 'no doubts.'[164] A rule framed in appropriately general terms, such as 'vehicles are prevented from entering the park,'[165] will pick out 'standard instances' of its application, and these instances will constitute a set of 'plain' cases in relation to which other, less clear cases can be classified.[166] This 'duality of a core of certainty and a penumbra of doubt'[167] makes communication possible: 'If we are to communicate with each other at all . . . then the words we use . . . must have some standard instance in which no doubts are felt about its application.'[168] Official discretion is confined to these cases of penumbral uncertainty, where the decision-maker can consider 'whether the present case resembles the plain case 'sufficiently' in 'relevant' respects.'[169] In the result there are 'wide areas of conduct which are successfully controlled *ab initio* by rule,'[170] where determinate rules 'guide'[171] officials, who merely draw out of the rule what is latent within it.[172]

But on the other hand, as Hart admits,

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[164] Hart, *Concept of Law, supra* note 76 at 125, 149.

[165] H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review 593 at 607. See also Hart, *Concept of Law, supra* note 76.

[166] 'Someone who understands a legal rule no doubt recognizes some cases as presenting standard instances of the relevant classification' Martin Stone, 'Focusing the Law: What Legal Interpretation is Not' in *supra* note 99 at 39.

[167] Hart, *Concept of Law, supra* note 76 at 119. The metaphor of core and penumbra was not invented by Hart; Benjamin Cardozo wrote of 'the borderland, the penumbra, where controversy begins' in *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) - but Hart was responsible for popularizing it. See Timothy Endicott, *Vagueness in Law,* (Oxford: Oxford University Press, 2000) at 8.

[168] Hart, *Concept of Law, supra* note 76 at 125. See further Fish, "Force", *supra* note 79 at 508.

[169] Hart, *Concept of Law, supra* note 76 at 124. See Fish, "Force", *supra* note 79 at 513.

[170] Hart, *Concept of Law, supra* note 76 at 130.

[171] *Ibid.* at 132.

[172] See Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (London: Macmillan, 1987) at 56

> [I]t is a matter of some difficulty to give any exhaustive account of what makes a 'clear case' clear or makes a general rule obviously and uniquely applicable to a particular case. Rules cannot claim their own instances, and fact situations do not await the judge neatly labeled with the rule applicable to them. Rules cannot provide for their own application, and even in the clearest case a human being must apply them.[173]

Hart's acknowledgment that there is always a judgment to be made as to what the applicable rule is in any case sits rather uneasily with the idea of a determinate rule controlling *ab initio*.[174] He purports to eschew the idea of rules applying themselves, but that is precisely what is entailed by his assertion that determinate legal rules pick out standard instances of their operation.[175] He disavows the ideal of formalism only to usher it back into legal adjudication. While neo-positivists pretend to have done away with formalism, labeling it a strawman[176] or 'a scarecrow,'[177] they advocate 'a form of jurisprudence which is non-subjective, non-moral, non-political and unconnected to justice, which if not mechanical must be quite close to it.'[178] Formalism continues to haunt positivism, the more powerfully by being denied as a presence.

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[173] Hart, "Problems in the Philosophy of Law" *supra* note 158 at 106. See also Hart, *Concept of Law, supra* note 76 at 123. See Hutchinson, "A Postmodern's Hart" *supra* note 73 at 789.

[174] Interestingly, even Dworkin accepts that there are frequent occasions on which a rule 'applies itself.' Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Belknap Press, 1986) at 352.

[175] Moles, *supra* note 79 at 118.

[176] Kutz, *supra* note 143 at 1017.

[177] Andrei Marmor, *Interpretation and Legal Theory* 2nd ed. (Oxford: Hart Publishing, 2005) at 98.

[178] Moles, *supra* note 79 at 176.

III. The Aporia of Time

Hart's success in drawing normative reinforcement for his a-contextual vision of language from the intuitive idea that some cases are harder than others[179] has obscured the real question that is at stake: 'not whether there are plain cases' but 'of what is their plainness a condition and a property?'[180] Hart's notion makes plainness an attribute of the case itself, independent of the interpretation it evokes. This same understanding is at work in post-Hartian attempts to formulate a 'determinate law' which obviates the necessity for interpretation. In 1984, in an early and influential paper on the indeterminacy claim, Joseph Singer asserted:

> It is easy to create completely determinate legal rules and arguments. For example, an absolutely determinate private law system could be based on the rule that no one is liable to anyone else for anything and that everyone is free to do whatever she wants without government interference. Relentless application of this rule would produce a state-of-nature legal system that would be fully determinate: The plaintiff would always lose. The problem is that this or any other determinate system bears no relation to anything anyone would consider to be just or legitimate.[181]

This example of a 'determinate' legal system, based on the rule that 'The plaintiff always loses,' has been cited remarkably often by many otherwise careful writers on the

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[179] 'The plain case, where the general terms seem to need no interpretation and where the recognition of instances seems unproblematic or 'automatic', are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms.' Hart, *Concept of Law, supra* note 76 at 123. Legal positivists 'are committed to the thesis that a distinction exists between (so-called) 'easy cases,' where the law can be simply understood, and applied straightforwardly, and 'hard cases', where the issue is not determined by the existing legal standards.' Marmor, *supra* note 173 at 95, 97-98. An easy case is often defined as one in which 'a vast majority of lawyers would agree is a clear winner, a clear loser, one which should never be filed, one which should be settled or pled.' Kenney Hegland, "Indeterminacy: I hardly knew thee" (1991) 33 (3) Arizona Law Review 509 at 517-18

[180] Fish, "Force" *supra* note 79 at 513.

[181] Singer, *supra* note 143 at 11.

indeterminacy claim, who have tended to follow Singer in impugning the *justice* of such a system, rather than examining the sustainability of such a rule on its own terms.[182] When D'Amato traces through the logical consequences of the relentless application of this rule, demonstrating a descent into 'total anarchy,'[183] he is arguing that 'the Plaintiff always loses' is a rule, but not a *good* rule. He therefore misses the more fundamental and ineradicable problem of the need to *interpret* the rule: 'The Plaintiff always loses.' Who gets put in the position of the plaintiff, and who in the position of the defendant? How does the law frame this particular dispute: as involving the State, private actors, individuals acting on behalf of other individuals, complainants in criminal trials, appellants and counter-appellants? The answers to these questions will depend on the social construction of conflict, and they cannot be decided *in advance* of that social context. Once again, D'Amato comes to the right conclusion, but for the wrong reasons, and in a way that reinforces the inescapability of the interpretative problem.[184]

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[182] Kress, *supra* note 143; Solum, "On the Indeterminacy Crisis," *supra* note 135; Brown & Greenberg, *supra* note 8. 'We cannot accept such a system because it would not protect other important, competing values, such as security, privacy, reputation, freedom of movement' Singer, *supra* note 143 at 11. 'Singer and Kress have 'failed to consider what coherent or even plausible meaning they can possibly give to the term "legal system" when the system in question contains the single rule "the plaintiff always loses."' D'Amato, "Aspects of Deconstruction" *supra* note 149 at 113.

[183] 'To show this, let us for the moment accept their "legal system" and consider its consequences. If the plaintiff always loses, in practice nobody is going to want to be a plaintiff. Thus, if you defraud me out of $1,000 of my money, I would not want to be a plaintiff against you in court, because plaintiffs always lose. So instead I will buy a gun and threaten to shoot you until you return my money. Suppose you go to court to get a restraining order against me; no luck, because you will be a plaintiff and plaintiffs always lose. Suppose instead that you persuade the state to prosecute me for threatening you with a gun. Too bad; the state is the plaintiff and so it loses also. Now suppose that, emboldened by my successful physical assault against you, I decide to embark on a career or robbing banks. I hire accomplices, we shoot our way into banks, we take money' the state cannot prosecute any of us because plaintiffs always lose. Soon everyone goes into the assault and robbery business. The police shoot to kill because they have no incentive to arrest anyone; all court cases against arrested persons are losers because the defendants always win.... Professors Singer and Kress have created total anarchy. True, it is *determinate* in the sense that it is *total* anarchy.' D'Amato, "Aspects of Deconstruction" *supra* note 149 at 114.

[184] Other attempts are similarly problematic. Mark Tushnet offers as an example: 'Litigants named Tushnet always lose.' He says 'this is determinate because we know that, were it part of the law, I would lose any

Attempts to refute the radical indeterminacy claim by asserting the existence of easy cases are similarly fraught.[185] Kress appeals to the pervasiveness of easy cases as evidence that the indeterminacy in law is at most moderate, but his examples - 'Think of the tens, if not hundreds of actions you perform everyday... The overwhelming majority of individuals' actions give rise to determinate legal consequences'[186] - are not actually 'cases.' As D'Amato has objected, it is misleading to call 'every event and every transaction that happens in the world a "case." Rather, a "case" is something where people go to enough trouble to make opposing claims against each other.'[187] To designate something as an 'easy case,' as the positivists do, is to presume that the meeting between law and facts has already taken place. To claim, as indeterminacy theorists do, that all cases are hard cases is not particularly illuminating when we consider that we do not live potentially.[188] This is a simple point, but overlooked sufficiently often in positivist-dominated jurisprudence to merit emphasis:

> There is always a difference which exists between what we know of a phenomenon in advance, even before being confronted with it, and what we are to

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case in which I was a plaintiff or defendant.' Mark Tushnet, "Defending the Indeterminacy Thesis" in Brian Bix, ed., *Analyzing Law: New Essays in Legal Theory* (Oxford: Clarendon Press, 1998) at 226; see also Kress, "Legal Indeterminacy" *supra* note 143 at 296.

[185] For early versions of the argument from easy cases, see Kenney Hegland, "Goodbye to Deconstruction" (1985) 58 Southern California Law Review at 1203 and Frederick Schauer, "Easy Cases' (1985) 58 Southern California Law Review at 399.

[186] Kress, "Legal Indeterminacy" *supra* note 143 at 297. 'It is not difficult to imagine easy cases where a particular action does not violate any legal rule.' Solum, *supra* note 135 at 472. Walking one's dog does not violate anti-trust laws and driving past a supermarket does not cause a legal agreement to arise between the supermarket-owner and the driver.

[187] D'Amato, "Pragmatic Indeterminacy" *supra* note 15 at 169. He writes of Kress: 'If there are so many determinate cases to choose from, why does he not identify at least one?' at 162.

[188] Hegland, "Indeterminacy: I hardly knew thee" *supra* note 175 at 518.

> learn of it *a posteriori,* what we could in no circumstances have foreseen, anticipated or judged *a priori.*[189]

Above all, the assertion of easy cases and determinate rules ignores the most determinative context in which law operates: the context of time. The insight that positivism's a-temporal, a-contextual, spatialized view of law and language fails to recognize is that there are things about the way language and law works that cannot be known in advance, and that this applies to every case and every context. When positivism focuses on the abstract imperatives of the notional system, as the object of synchronic (static) study, it sidelines actual meaning, actual usage and the diachronic (historical) dimension to legal language.[190] Unlike the a-temporal, a-contextual world of pure mathematics, law operates in the here and now.[191]

But while law exists in the present tense, it is written for the future. The defining feature of law is a gap between promulgation and application. Every legal judgment, every act of interpretation, in as much as it is not conclusively referable to some prior text, statute, or case, suffers from the 'momentary aberration'[192] of the *grundnorm*:

> each and every such decision is an exercise of choice whose legality can only be determined by its confirmation *thereafter.* The non-legal lies immanent in the legal and vice versa. In any legal decision the one can be distinguished from the other only retrospectively.[193]

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[189] Goodrich, Douzinas and Hachamovitch, *supra* note 11 at 24.

[190] Peter Goodrich, "Introduction," at 174.

[191] 'Unlike the languages of math and science, where assertions are cast so as to be true or false for all times and all places, many of the sentences we use are implicitly relativized to a time and a place.' Kutz, *supra* note 143 at 1014-1015.

[192] Desmond Manderson, "From Hunger to Love: Myths of the Source, Interpretation, and Constitution of Law in Children's Literature" (2003) 15 Law and Literature 87 at 91.

[193] *Ibid.*

This temporal paradox plagues the judgments of judge and legislator alike: reading a statute, citing precedent, rendering a decision. It is this that led Richard Beardsworth to conclude that 'the aporia of law is the aporia of time.'[194]

The aporia of time is what renders the positivist argument for normative neutrality a failure, because it brings our judgments about the rule of recognition into play.[195] It also infects the solution offered by critical legal studies: that law is politics and that politics is consent.[196] Indeterminists accepted the positivist myth of legitimacy wholeheartedly, refused to consider any other way of legitimating adjudication,[197] and assumed that the deferral back to the legislature would solve the problem of judgment. But their recourse to consent does not work, because it too ignores the situation of law in time. The question of legitimacy cannot be resolved by reference to the past, but must be reinscribed anew in every decision.

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[194] Richard Beardsworth, *Derrida and the Political* (London: Routledge, 1996) at 101. See also Manderson, "From Hunger to Love" *supra* note 192 at 91. It is this kind of reasoning that led Peter Fitzpatrick to suggest that 'much of what appears puzzling, even contradictory in law is resolved through the integral relation between legality and temporality.' Peter Fitzpatrick, "Law in the Antinomy of Time: A Miscellany" in Ost, François and Van Hoecke, Mark (eds.) *Temps et droit : le droit a-t-il pour vocation de durer ? Time and law: is it the nature of law to last?* (Bruylant : Bruxelles, 1998) at 185.

[195] Manderson, "From Hunger to Love" *supra* note 192 at 91.

[196] Singer, *supra* note 143, Charles M. Yablon, 'The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation' (1985) 6 Cardozo Law Review at 917, 918-920, 929-945 and Mark Tushnet, 'Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles' (1989) 96 Harvard Law Review 781. Tushnet argues that a 'community of understanding' in which we develop a 'shared system of meanings' is required to sustain the legitimacy of judicial decisions.' at 826. More recently he describes indeterminacy as an argument about the existence of the requisite consensus in a given instance: Mark Tushnet, "Defending the Indeterminacy Thesis" in Brian Bix, ed., *Analyzing Law: New Essays in Legal Theory* (Oxford: Clarendon Press, 1998) at 223. In both cases, consensus is what determines meaning.

[197] Kress, "Legal Indeterminacy" *supra* note 143 at 289. Kress even suggests that 'far from delegitimating courts, indeterminacy may well enhance courts' legitimacy and citizens' obligations to obey.' at 293. In later reiterations of his indeterminacy thesis, Tushnet acknowledges that there is no necessary link between indeterminacy and democratic legitimacy. Tushnet, "Defending the Indeterminacy Thesis" *supra* note 187. See also Kutz, *supra* note 143 at 1002.

The indeterminacy theorists' despair over the impossibility of determinate meaning is misplaced; it does not signal the failure of the meaning-making enterprise. The meaning of a rule or the outcome of a case can end up determinate, but without being knowable *in advance*. Such a meaning is still meaning; there is still an *answer,* but a qualitatively different answer from specifying a meaning in advance of the context which gives rise to it. The fact that we live in the present tense undermines both the positivist claim that some cases are easy, and the indeterminist claim that all cases are hard. There can still be easy cases and plain meanings, but they do not exist as such before or prior to the context in which they arise.[198]

IV. Beyond Indeterminacy

This chapter's examination of the false oppositions of the indeterminacy debate has reinforced the point that meaning is contextual through and through. Clear cases and determinate rules are not a function of a-contextual meaning, but special cases of interpretation, in which one particular interpretation is uniquely successful or hegemonic.[199] As Robert Moles argues, 'although a statutory provision may appear to be clear as a bell at first sight, this is not simply a result of what 'the words mean,' but is because we are, almost without realizing it, providing the general words of the statute

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[198] Stanley Fish, "Fish v Fiss" in *Doing What Comes Naturally supra* note 79 at 129.

[199] Fish, *ibid.* at 513. Hutchinson makes a similar point: 'Easiness' is not a property or quality that inheres within a case or rule. Rules and their application do not arise or make sense outside of an interpretative context. The easiness or hardness of cases derives from background facts about agreements in judgments, historical contexts and social stability. What goes on in easy cases is the same as in hard cases, only that its context is less contested and more taken for granted. Hutchinson, "A Postmodern's Hart" *supra* note 73 at 809, see also 810. Martin Stone, "Wittgenstein on deconstruction" in Alice Crary and Rupert Read, eds., *The New Wittgenstein* (New York: Routledge, 2000) at 85.

with a context which we regard as suitable.'[200] So to say a legal rule is clear is to say that there is agreement about the context in which the rule should be placed; it does not mean that there is no judgment being made. While these contexts may be circumscribed – by relations of force, legal conventions, rules of evidence – what cannot be mandated is that the rule should not be placed in *any* context.

Interpretation is inescapable when it is understood not as the exegesis of pre-existing meaning embedded in a rule or text, but a meaning-producing activity of engagement with a rule, text and context. The contextual nature of meaning renders interpretation endemic to adjudication; the fact that every application of the law is an interpretation gives rise to the inescapability of judgment. The necessity of interpretation defines rather than threatens the position of the judge, because the opening to context is the very condition of judgment. Judgment is a choice among competing contexts. It is not an open choice, but one among alternatives that are themselves constrained by context.

The relationship between interpretation and context was precisely what was at stake in Hart's famous debate with Fuller, who took issue with Hart's belief that,

> Communication is possible only because words have a 'standard instance,' or 'a core of meaning' that remains relatively constant, whatever the context in which the word may appear.[201]

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[200] Moles, *supra* note 79 at 156.

[201] Lon L. Fuller, "Positivism and Fidelity of Law - A Reply to Professor Hart," (1958) 71 Harvard Law Review at 662. 'Hart makes too little of purpose; he suffers from the positivist delusion that some gain – unstated and unanalyzed – will be realized if only we treat, insofar as we can, purposive arrangements as though they served no purpose.' Lon L. Fuller, *The Morality of Law* rev. ed. (New Haven, Conn.: Yale University Press, 1969 [1961]) at 190.

Fuller deconstructed Hart's example of an easy case: 'a truck is a vehicle if anything is'[202] by demonstrating that it is not possible to decide whether a statue of a truck will be a vehicle or not based solely on the word 'vehicle.'[203] In applying any statutory provision, a judge must necessarily provide it with some context, and the determination of an appropriate context will presuppose an understanding of its purpose.[204]

> If the rule excluding vehicles from parks seems easy to apply in some cases, I submit it is because we can see clearly enough what the rule 'is aiming at in general' so that we know there is no need to worry about the difference between Fords and Cadillacs.[205]

So for Fuller, understanding a rule is always a matter of determining its purpose, and that it is only in the light of this purposive interpretation that one can judge whether the rule's application to the facts of a given case is to be relatively easy or difficult.[206] Since the

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[202]. Hart, "Positivism and the Separation of Law and Morals" *supra* note 161 at 606-608 and Fuller, "Positivism and Fidelity to Law" *supra* note 197 at 661-665.

[203] 'What would Professor Hart say if some local patriots wanted to mount on a pedestal in the park a truck used in World War II, while other citizens, regarding the proposed memorial as an eyesore, support their stand by the "no vehicle" rule? Does this truck, in perfect working order, fall within the core or the penumbra?' Fuller, "Positivism and Fidelity to Law" *supra* note 197 at 663. In D'Amato's reading of Gödel he suggests that 'Fuller invented a Gödelian undecidable proposition precisely *within* Hart's "core" formula.' He argues that Fuller's example of the truck demonstrates the undecidability of the case (between local patriots and other citizens) *given* an indisputable core-instance "vehicle." D'Amato, "Can Legislatures Constrain Judicial Interpretation of Statutes?" *supra* note 123 at 597. Elsewhere, he writes that Fuller invented 'a Gödelian application of Hart's exemplary statute, one that was undecidable even though by hypothesis it fell within the core.' D'Amato, "Pragmatic Indeterminacy" *supra* note 15 at 172. D'Amato's reading of Gödel is so flawed, however, that it does not serve to illuminate Fuller here.

[204] Moles, *supra* note 79 at 170.

[205] Fuller, "Positivism and Fidelity to Law" *supra* note 197 at 663.

[206] Fish similarly focuses on the role of 'intentions' in interpretation. Stanley Fish, 'Play of Surfaces: Theory and the Law' in Gregory Leyh, ed., *Legal Hermeneutics: History, Theory and Practice* (1992) at 297. For Fish, '(i)nterpretation is the determination of what can be meant by something that is presumed to have been purposely produced.' This does not mean the privileging of the author's intention; but it does mean that 'merely 'playing' with theoretical senses for a text is not a proper interpretative technique.' John R. Morss, "Who's Afraid of the Big Bad Fish? Rethinking What the Law Wishes to Have" (2003) 27 Melbourne University Law Review 199 at 207.

purpose of a rule can only be determined in the light of considerations as to what the rule is there to settle, 'it is in the light of this 'ought' that we must decide what the rule 'is.'[207]

The irreducible role Fuller here grants to an extra-systemic understanding resonates with Gödel's Theorem.[208] Gödel demands recourse to something outside of mathematics formally conceived in order to advance mathematical knowledge – truth. Fuller demands recourse to something outside the words of the legal text in order to advance legal decision-making – the purposes of the legal system. For Fuller, these purposes were not to be equated with the intention in the minds of legislators, but with the rationale for law, its function in the lives of its citizens.[209] For both thinkers, mathematics and law are practices that consist of more than following rules, but require an understanding of the purpose of the practice. They urge us to understand intellectual activity as necessarily and essentially purposive.[210]

This chapter has shown that the extremes of the indeterminacy debate – between positivism and indeterminacy, between rule-bound adjudication and unconstrained political decisions, between rule-application and interpretation - are a false dichotomy. They are both marked by the same rule-fetishism and the investment in a-contextual meaning. Gödel has been misappropriated within this framework. The reading of Gödel's Theorem pursued in the remainder of this essay associates him with a third view, one which is utterly opposed to the fetishism of the positivists and determinists alike. The third view is that interpretation – meaning - is determin*able* but not a-contextual, and that

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[207] Fuller, "Positivism and Fidelity to Law" *supra* note 197 at 666.

[208] Manderson, *Songs without Music supra* note 69 at 194.

[209] Gerald J. Postema, "Implicit Law" (1994) 13 *Law and Philosophy* 361 at 382.

[210] Moles, *supra* note 79, chapter 6.

the process of determining meaning – interpretation – has a necessary relationship to justice.

The meta-level argument in this chapter takes the a-contextual appropriations of Gödel within the indeterminacy debate as illustrative of the purposive and contextual nature of interpretation. The following chapter examines these same meta-level dynamics in relation to the interpretation of Wittgenstein, who has suffered a similar fate to Gödel and for similar reasons. Like Gödel, Wittgenstein points us towards a third way of understanding rules as neither indeterminate nor formal, but embedded in context. The final chapter examines how Derrida translates and enriches Wittgenstein's critique of a-contextual meaning into insights about law, interpretation and justice. Here too we must rescue Derrida from the a-contextual readings of his work which have carelessly placed him on the side of indeterminacy and relativism, in order to properly appreciate what Derrida is saying about these questions. We shall see that both his argument and his treatment echo significantly what Gödel's Theorem has sought to teach us.

Chapter Three

Interpretation and Context: The Case of Wittgenstein

This chapter turns to Gödel's contemporary, the philosopher Ludwig Wittgenstein. Wittgenstein insists on being heard in relation to Gödel's Theorem. Not only did his putative rule-skepticism played a formative and foundational role in the indeterminacy debate, the context which received Gödel's Theorem in legal theory, but Wittgenstein also engaged with the Theorem directly, challenging its claim to philosophical significance. Given that Gödel and Wittgenstein were so firmly at odds with one another in their view of Gödel's Theorem, the possibility of a synergy between the two thinkers has always seemed remote. Yet the primary argument in this chapter is concerned with establishing just such a connection between Gödel's concerns and the implications of Wittgenstein's account of rules and of language. Against both indeterminacy and positivism, Wittgenstein insisted that meaning is contextual and that we cannot understand everything about rule-following by viewing it as a deductive process.

The meta-argument shows that, like Gödel, Wittgenstein has been claimed by both indeterminacy and positivism, but rightly offers support to neither. Instead, in focusing on the action of rule-following as a social practice grounded in context, he too challenges the idea of rule-fetishism upon which the debate rests. The meta-meta-argument examines how the interpretation of Wittgenstein by both indeterminists and positivists is marked – once again - by a-contextual readings. Wittgenstein's reception has been

affected by precisely that which Wittgenstein's thought speaks to, as does Gödel's: the problem of context.

I. The Nightmare and the Failure of Context

Following Saul Kripke's influential publication,[211] his infamous skeptical reading of Wittgenstein's remarks on rule-following[212] functioned, along with 'deconstruction,' as yet another theoretical pillar for the claim of radical indeterminacy.[213] Kripke's skeptical reading focuses on a mathematical example to which Wittgenstein continually referred in the *Philosophical Investigations.*[214] A student is learning to recite the even numbers. Everything goes well as far as 1000, after which the student says, 1004, 1008, 1012.[215] The teacher is at a loss, because all the examples of adding 2 that the teacher has given so far seem unable to determine by themselves that 1002 comes after 1000. While the teacher intended them to be examples of add 2, they could just as well have been examples of 'add 2 as far as 1000, and then add 4.' As Wittgenstein says in §201, upon which Kripke and the skeptics rely so heavily:

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[211] Saul Kripke, *Wittgenstein on Rules and Private Language: An Elementary Exposition* (Cambridge: Harvard University Press, 1982). See Charles M. Yablon, "Law and Metaphysics" (1987) 96 Yale Law Journal 613 (review). Kripke's book remains even today the most cited text on Wittgenstein in legal writing.

[212] Wittgenstein's discussion of rules occurs primarily in sections 139-242 of the *Philosophical Investigations,* trans. G. E. M. Ascombe (Oxford: Basil Blackwell, 1958*)*, though rules are a recurring topic in the *Remarks on the Foundations of Mathematics,* G.E. von Wright and R. Rhees, eds., trans. G. E. M. Anscombe (MIT Press, 1983 rev.[1951])and the *Blue and Brown Books.* See further Patterson, 'Law's Pragmatism' *supra* note 68 at 87.

[213] Scholars who drew on this reading to assert the indeterminacy of language include: D'Amato, 'Aspects of Deconstruction' *supra* note 149, 'Pragmatic Indeterminacy'*supra* note 16, Gary Peller, "The Metaphysics of American Law" (1985) 73 California Law Review at 1151; Ann C. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale Law Journal at 1373; Joseph W. Singer, supra note 143; Tushnet, "A Critique of Interpretivism and Neutral Principles" *supra* note 187 at 781.

[214] §§143, 185-187, 189.

[215] § 185, *Philosophical Investigations,*

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict there.

Wittgenstein demonstrates here that providing the next number in a series is not the same as justifying that action as the necessary following of a particular rule.[216] On Kripke's reading, this means that there remains unbridgeable gap between a rule and its applications. If there is nothing to connect a rule about language use with instances of its applications, then there is nothing to prove that a speaker means the same thing by their current use of a word as they did by a former use, and therefore nothing to prove that the speaker is applying the rule that governs the word's usage correctly.[217] If any way we act can be characterized as following a rule, then anything goes.[218] Kripke concludes that Wittgenstein shows the following:

> There can be no such thing as meaning anything by any word. Each new application we make is a leap in the dark; any present intention could be interpreted so as to accord with anything we may choose to do.[219]

Cogent refutations of this reading appeared almost immediately,[220] and now the consensus on the exegetical question is that Kripke got Wittgenstein completely wrong.[221]

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[216] See further Hutchinson, "A Postmodern's Hart" *supra* note 73 at 809.

[217] Kripke, *supra* note 206 at 70-71.

[218] See further Christian Zapf and Eben Moglen, "Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein" (1996) 84 (3) Georgetown Law Journal at 493.

[219] Kripke, *supra* note 206 at 55.

[220] G.P. Baker and P.M.S. Hacker, *Scepticism, Rules and Language* (Oxford: Blackwell, 1984). See further references in Brian Bix "The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations in Legal Theory" (1990) 3 (2) Canadian Journal of Law and Jurisprudence 107 at 108, footnote 10.

[221] See Robert Fogelin, *Wittgenstein* (New York: Routledge, 1986) at 216; Marie McGinn, *Wittgenstein and the Philosophical Investigations* (New York: Routledge, 1997) at 73-111; Ronald Suter, *Interpreting*

Yet this skeptical reading has had considerable purchase in legal theory.[222] It has offered indeterminacy theorists and critical legal scholars a basis in Wittgenstein for their claim that if rules themselves do not guide, determine or direct what results flows from them, we do not have rule by law but rule by the politics of our judges.[223]

But in fact, Kripke's skeptical reading instead demonstrates exactly what is wrong with formalism and indeterminacy alike: its persistent investment in the notion of a-contextual meaning. Kripke's investment underlay the ease with which he took Wittgenstein's skeptical paradox in §201 not only out of the context of the rest of Wittgenstein's work, but even of the rest of that paragraph. For § 201 immediately continues:

> *It can be seen that there is a misunderstanding here* from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another one standing behind it. What this shows is that there is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call "obeying" the rule and "going against it" in actual cases.[224]

Kripke's mistake was to read all the voices in Wittgenstein's multivocal text as belonging to him, rather than in their nested contexts as his own skeptical interlocutors. He thus failed to understand that Wittgenstein undermines the thinking that gives rise to the paradox in the first place.[225] For Wittgenstein, the skeptical paradox is not a real

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Wittgenstein: A Cloud of Philosophy, A Drop of Grammar (Philadelphia: Temple University Press, 1989) at 204-16; Brian Langille, *supra* note 142 at 451.

[222] The rule-skepticism advanced by Kripke has proven extremely influential and continues to be analyzed in its own right. Drahos & Parker, "Rule-Following, Rule-Scepticism and Indeterminacy in Law" (1992) 5 *supra* note 217 at 109; Pannier, *supra* note 217 at 881; Alice Crary, "Introduction" in *supra* note 217 at 11.

[223] Langille, *supra* note 142 at 465

[224] *emphasis mine.*

[225] Those who follow Kripke's reading in the indeterminacy debate include Tushnet, "A Critique of Interpretivism and Neutral Principles", *supra* note 187 at 822. Tushnet's efforts are discussed in Brian Langille, *supra* note 142 at 169.

problem, but a function of the mistake of viewing rules separately from their applications.[226] Wittgenstein challenges the 'misunderstanding' that when we understand a word, follow a rule, or apply a concept to a new context, we call up a mental image (perhaps a chart or an arrow[227]) or a verbal formula or definition which itself instructs us how to respond.[228] Wittgenstein wanted to show that *all* comprehension could not ultimately be a matter of 'interpretation' *in this sense*, for then we would be stuck in an infinite regress of interpretations. The interpretation would itself have to be understood and that would require yet another interpretation.[229]

Instead, Wittgenstein argues that there is a way of knowing and understanding which is not 'interpretation' – which he explicitly defines as the cerebral exercise of substituting another rule for the first one[230] – but the mastery of a technique.[231] Being master of a technique does not entail being able to follow a rule which we recite to ourselves and then must 'interpret.' We are not able to add because we first learn an abstract and a-contextual rule (or the meaning of 'plus') and then mentally interpret it to apply it to new situations.[232] 'Rather, to say that we know the meaning of 'plus' *is just* to say that we

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[226] Stone, "Wittgenstein on deconstruction", *supra* note 199 at 51. The only role that the infinite regress plays in Wittgenstein's remarks is 'as the absurd consequence of mistaken premises he sought to correct.' Bix "The Application (and Mis-Application) of Wittgenstein's Rule-Following" *supra* note 220 at 115.

[227] *Philosophical Investigations* ss 86

[228] Kutz, *supra* note 143 at 997, 1007-8. Ray Monk, *Ludwig Wittgenstein: The Duty of Genius* (New York: Penguin, 1990) at 345.

[229] 'We cannot lay down a rule for the application of another rule.' cited in Monk, *ibid.* at 308.

[230] §201 *Philosophical Investigations*

[231] § 199. '... To obey a rule, to make a report, to give an order, to play a game of chess, are *customs* (uses, institutions). To understand a sentence means to understand a language. To understand a language means to be master of a technique.' *Philosophical Investigations*

[232] See Gene Anne Smith, 'Wittgenstein and the Sceptical Fallacy' in (ed.) Dennis M. Patterson, *Wittgenstein and Legal Theory* (Boulder: Westview Press, 1992).

know how to add.[233] Understanding the rule and knowing its applications need nothing to connect them: you cannot know how to count to 1002, and understand the rule 'add 2', without knowing that 1000, 1002 is a correct application of the rule. As Wittgenstein says in the following paragraph: 'Obeying a rule is a practice.'[234]

Like those critical legal scholars seduced by the ideal of formalism, it is the skeptic that is actually entranced by the picture that Wittgenstein seeks to challenge. Skeptics answer the question of how meaning works by positing 'self-standing *sources* of significance:'[235] something else standing beyond the rules (usually community agreement[236]) that acts as 'a regress stopper.'[237] But Wittgenstein insisted there is no outside to rules, no external standpoint on language from which we can perceive a gulf between any rule and the behaviour it calls for, or between words and their meanings.[238] For him, to ask the question of how the statement of a rule is connected to its meaning is to have presupposed that the two are separate, and it is this presumption that Wittgenstein urges us to question:

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[233] 'we *define* the series '+2', for example, in terms of the sequence '... 998, 1000, 1002, 1004'. The rule and its application are internally related, for we define the concept 'following the rule' by reference to *this* result.' Baker and Hacker, *Wittgenstein Rules, Grammar and Necessity: An Analytical Commentary on the Philosophical Investigations* (Oxford: Blackwell, 1985) at 148.

[234] § 202 *Philosophical Investigations*

[235] David H. Finkelstein,'Wittgenstein on Rules and Platonism' in (eds.) Alice Crary and Rupert Read, *The New Wittgenstein* (New York: Routledge, 2000) at 53-73, 54.

[236] The community agreement model offered as a solution to the skeptical paradox is usually called the 'interpretative community' view. See Singer, *supra* note 143 at 34-35 and Fish, "Fish v Fiss" *supra* note 198. For articles disputing the attribution of this view to Wittgenstein, see Bix "The Application (and Mis-Application) of Wittgenstein's Rule-Following. Considerations to Legal Theory" *supra* note 220 at 107 footnote 3; Zapf & Moglen, "On the Perils of Misunderstanding Wittgenstein" *supra* note 213 at 498-502; Langille, *supra* note 142. Smith, "Wittgenstein and the Sceptical Fallacy" *supra* note 227 at 155.

[237] Stone, "Wittgenstein on deconstruction" *supra* note 199 at 83-117, 105.

[238] This is often called 'platonism': Finkelstein, "Wittgenstein on Rules and Platonism", *supra* note 230 at 53.

> § 435 If it is asked: 'How do sentences manage to represent?', - the answer might be: 'Don't you know? You certainly see it, when you use them.' For nothing is concealed.[239]

II. The Noble Dream and the Necessity of Interpretation

Since the demise of the skeptical reading, positivist writers have appealed to the second part of Wittgenstein's much-maligned §201 in order to underwrite, rather than undermine, the positivist response to this challenge.[240]

> § 201 .... there is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call "obeying" the rule and "going against it" in actual cases.

They argue that Wittgenstein's comment distinguishes 'understanding' from 'interpretation' in a way that maps onto the positivist bright line between legitimate judicial rule-application (understanding) and the creative (and illegitimate) process of making choices as to the meaning of a rule (interpretation).[241] Their reading evidences positivism's remarkably similar investment in the notion of a-contextual meaning, and is a direct function of their political mandate to restrict the scope and necessity for interpretation in legal practice.[242] Their investment in 'semantic autonomy'[243] means they

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[239] *Philosophical Investigations*

[240] Bix, *supra* notes 8 and 22; Frederick Schauer, "Rules and the Rule-Following Argument" (1990) 3(2) Canadian Journal of Law and Jurisprudence at 187; Scott Landers, "Wittgenstein, Realism and CLS: Undermining Rule Skepticism" (1990) 9 Law and Philosophy at 177.

[241] Stone defends the antithesis 'between rules as requiring interpretation and rules as claiming their own instances.' and the Hartian distinction between hard and easy cases. Stone, 'Focusing the Law: What Legal Interpretation is Not' *supra* note 99 at 41.

[242] Endicott worries that the hermeneutic view 'seems to stretch the notion of interpretation over instances of understanding that are not interpretive at all;' Endicott, *supra* note 163 at 12. Stone complains that '(i)t now seems that any act of understanding or judgment requires the mediation of interpretation,' and appeals for the reinstatement of the 'everyday notion of interpretation – where the sense of a call for interpretation depends upon the possibility of a significant contrast with clear cases in which there is no call for interpretation.' Stone, "Focusing the Law: What Legal Interpretation is Not" *supra* note 99 at 43 and 36.

already assume interpretation to be a supplementary or secondary phenomenon, a '*parasitic* activity in legal practice.'[244]

But while Wittgenstein's definition of 'interpretation' does designate the kind of interpretation that positivism supposes - 'the activity of deciding which of several ways of understanding a rule-given provision is the correct or preferable way of understanding'[245] - Wittgenstein raises the spectre of interpretation as the excavation of pre-existing meaning only to undermine the basis for it. Wittgenstein distinguished between understanding and interpretation only for the purposes of calling into question a particular view of interpretation as 'the substitution of one expression of the rule for another.' He did not make the distinction, as the positivists do, in order to argue that interpretation requires judgment and understanding does not. When Hershovitz argues that Wittgenstein uses interpretation in 'a very odd way,'[246] which neither captures interpretation generally, or legal interpretation in particular, he misses Wittgenstein's critique of the idea of interpretation as a supplement or mediating entity, rather than as an experience which *constitutes* that which is thought to be modified *by* it.

Challenges to the neo-positivist use of Wittgenstein's rule-following remarks have distinguished between the 'pervasively contested' and 'reflective activity' of following

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He takes a particularly cynical tone about 'the sort of interest that comes out in 'heady' remarks to the effect that 'you can't, so to speak, get free of interpretation. At 32. See also Stone, 'Wittgenstein on deconstruction' *supra* note 199 at 83.

[243] Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford, Clarendon Press, 1991) at 56. Cited in Endicott, *supra* note 163 at 18.

[244] Patterson, "Wittgenstein on Understanding and Interpretation (Comments on the Work of Thomas Morawetz)"(2006) 29(2) Philosophical Investigations at 133; see also Stone, "Focusing the Law: What Legal Interpretation is Not" *supra* note 99 at 42.

[245] Patterson, *Ibid.* at 134.

[246] Hershovitz, Scott, "Wittgenstein on Rules: The Phantom Menace" (2002) 22 Oxford Journal of Legal Studies at 634

legal rules[247] and the 'automatic and compelling nature of rule-following'[248] in those cases that Wittgenstein was concerned with, such as how to continue the mathematical series "add two"[249] or how to apply the colour word 'red.'[250]

> §240 Disputes do not break out (among mathematicians, say) over the question whether a rule has been obeyed or not. People don't come to blows over it, for example. That is part of the framework on which the working of our language is based (for example, in giving descriptions.)[251]

These rejoinders also miss the point of Wittgenstein's argument that rule-following cannot be a purely mechanical process *even in* the most mechanical situation of mathematics:

> One follows the rule mechanically. Hence one compares it to a mechanism. "Mechanical" – that means: without thinking. But *entirely* without thinking? Without *reflecting*.[252]

Wittgenstein cannot expunge some element of thinking from rule-following. In this moment of thinking the 'decision'[253] endemic to *any* rule-following takes place: the need

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[247] 'The question in legal interpretation is not how to explain agreement, but how to resolve *dis*agreement.' Bix, "Comments and Caveats for the Application of Wittgenstein to Legal Theory" *supra* note 8 at 26, "The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory" *supra* note 220 at 115; Hershovitz, *supra* note 241 at 636.

[248] Simon Blackburn, 'Rule-Following and Moral Realism' at 170 cited in Bix "The Application (and Mis-Application) of Wittgenstein's Rule-Following" *supra* note 220 at 116.

[249] *Philosophical Investigations* ss 185-187

[250] See Marmor, *supra* note 173 at 117-18, and Hershovitz's critique in 'Wittgenstein on Rules: The Phantom Menace' *supra* note 241 at 619-640: 'it is not fruitful, in general, for legal theorists to dwell on his rule-following remarks' 630; Bix, "The Application (and Mis-Application) of Wittgenstein's Rule-Following" *supra* note 220 at 107 and Bix, "Comments and Caveats for the Application of Wittgenstein to Legal Theory" *supra* note 8. Morawetz argues in a similar vein that Wittgenstein's account of understanding cannot be exhaustive because Wittgenstein never distinguished between simple and complex practices – law, as a 'deliberative practice,' Morawetz argues, belongs to the latter. Thomas Morawetz, 'Comments' (2006) 29(2) *Philosophical Investigations* 12.

[251] *Philosophical Investigations*

[252] Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics* G.E. von Wright and R. Rhees, eds., trans. G. E. M. Anscombe (MIT Press, 1983 rev.[1951]) VIII at 61

to decide that no more decisions are necessary about how to go about following the rule. In easy instances, the decision may simply be that no further decisions are necessary, whereas in hard cases, the decision will be a choice among competing contexts. A decision to disregard this or that context as not affecting the meaning of a certain rule is already a decision to reflect on a particular context, and a decision to stop reflecting. There will always be some decision involved.

The dramatic incompatibility between Wittgenstein's vision of language as necessarily embedded in context and the a-contextual vision of the positivists makes all the more extraordinary the fact that Hart *founded* his positivist project in Wittgenstein's linguistic philosophy.[254] He drew on Wittgenstein's idea that the meaning of a rule lies in its use to develop his central idea of the 'internal aspect of rules,' or rule-following as seen from the internal point of view of those following the rules.[255] Hart locates this internal aspect in the contexts where rules operate, and in the use people make of rules. But positivism's myth of authority means that rules must be installed above and apart from the social field. Despite Hart's concern to take language-in-context seriously,[256] Wittgenstein's linguistic philosophy, in which rules do not exist independently of the social field in which they

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[253] The idea of a 'decision' appears elsewhere in Wittgenstein's writing: 'How is it decided what is the *right* step to take at any particular stage? It would almost be more correct to say, not than an intuition was needed at every stage, but that *a new decision* was needed at every stage.' *Philosophical Investigations* 186. For discussion see Simon Glendinning, *On Being with Others: Heidegger, Derrida, Wittgenstein* (Routledge: London, 1998) at 101.

[254] As expressed in *Philosophical Investigations.* See Hart, *Concept of Law, supra* note 76 at 234, 249. For Hart's more general acknowledgment of his indebtedness to Wittgenstein, see H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon, 1983) 2-3, cited in Fitzpatrick, "The Abstracts and Brief Chronicles of the Time" supra note 72 at 3.

[255] See Concept of Law, 87-88; Fitzpatrick, "The Abstracts and Brief Chronicles of the Time" supra note 72 at 6; Hutchinson, "A Postmodern's Hart", *supra* note 73 at 791; Lacey, *supra* note 81 at 5.

[256] Lacey, *supra* note 81 at 140, 144.

operate,[257] capitulates to the positivist view of a rule 'divorced from its use and context.'[258] Merely a trace remains of Wittgenstein in Hart's occasional nods in the direction of social usage.[259] Hart's 'linguistically dubious'[260] philosophy ensured that jurisprudence maintained its 'superb oblivion' to the historical and social features of legal language. Positivism has not responded to the distinctive character of law which Wittgenstein's work would direct us towards: law 'as a specific, sociolingustically defined speech community and usage.'[261] Hart analyzes law as a body of doctrine rather than as a social practice, and understands 'usage' as the language which makes up the doctrines.[262] As a linguistic philosopher, Hart would not seek the essence of law, because it is a 'misconceived quest,'[263] yet as a legal positivist, he embarks on precisely that quest.[264] As Peter Fitzpatrick suggests, if linguistic philosophy is restored to the position

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[257] '...rules, in law or anywhere else, do not stand in an independent relationship to a field of action on which they can simply be imposed; rather, rules have a circular or mutually interdependent relationship to the field of action in that they make sense only in reference to the very regularities they are thought to bring about.' Fish, "Fish v. Fiss," *supra* note 198 at 123.

[258] Fitzpatrick, "The Abstracts and Brief Chronicles of the Time" *supra* note 72 at 23

[259] Hutchinson, "A Postmodern's Hart", *supra* note 73 at 801, 798. Ultimately Hart's theory of language has more connection with that of J.L. Austin, who was a major influence. There is evidence that Hart did not feel he had or could fully come to grips with Wittgenstein's work: see Lacey, *supra* note 81 at 115, although he was profoundly affected by it: see 136, 140. His use of Wittgenstein's work was mediated by the work of Waismann's work on rules and institutions: see P.M.S. Hacker, *Wittgenstein's Place in Twentieth-Century Analytic Philosophy* (Oxford: Blackwell, 1996) at 165, 312. Lacey points out that *The Concept of Law* marks a retreat from Hart's earlier deeper absorption of Wittgenstein's ideas: 146.

[260] Peter Goodrich, "Law and Language: A Historical and Critical Introduction" *supra* note 115 at 173

[261] *Ibid.*

[262] Lacey, *supra* note 81 at 217-218.

[263] Fitzpatrick, "The Abstracts and Brief Chronicles of the Time" *supra* note 72 at 11.

[264] *Ibid.*

of primacy that Hart originally accorded it, '*The Concept of Law* simply "self-destructs."'[265]

III. Wittgenstein and Gödel

Gödel and Wittgenstein share a contradictory legacy not only in legal theory, having been conscripted for both sides of a false opposition, but also more broadly, in the context of the twentieth century's profound shift towards skepticism or relativism. The seeds of the skeptical reading of both Gödel and Wittgenstein were sown by the logical positivists[266] of the Vienna Circle,[267] for whom the only meaningful statements were either true *a priori* (reducible to formal tautologies) or verifiable through empirical experience: 'the verificationist criterion for meaningfulness.'[268] For logical positivists, unanswerable questions, such as those pertaining to morality or the existence of God, do not take the measure of our cognitive inadequacies, but are instead not questions capable of being seriously answered. 'Since the limits of knowability are congruent with the limits of meaning, no meaningful matter can escape our grasp. We are cognitively complete.'[269]

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[265] *Ibid.* at 3. See further 4, 24. 'Deconstruction takes place, it is an event that does not await the deliberation, consciousness, or organization of a subject, or even of modernity. *It deconstructs itself. It can be deconstructed. [Ça se deconstruit.]'* Jacques Derrida, 'Letter to a Japanese Friend' (1983) at 3 http://www.hydra.umn.edu/derrida/content.html.

[266] Logical positivism, also referred to as logical empiricism or radical empiricism, is distinct from legal positivism, but there are some similarities in methodology, and there has been some discussion of a connection via the figure of Hans Kelsen: M.P. Golding, "Kelsen and the Concept of a 'Legal System'" in R.S. Summers (ed.) *More Essays in Legal Philosophy* (Oxford: Oxford University Press, 1971) at 69-100. But this connection is not generally considered substantial: see most recently Avery Wiener Katz, "Positivism and the Separation of Law and Economics" (1995-6) 94 Michigan Law Review at 2234. For H.L.A. Hart's own explicit rejection of logical positivism, see his 'Introduction' in *Essays in Jurisprudence and Philosophy* (New York: Oxford University Press, 1983) at 2-3.

[267] Wittgenstein and Gödel were both from Vienna and both associated with the Vienna Circle, but never actually met. Yourgrau, *A World Without Time, supra* note 5 at 28-29.

[268] A. J. Ayer, *Logical Positivism* (Free Press, 1966); Casti & DePauli, *supra* note 2 at 10.

[269] Goldstein, *supra* note 3 at 84.

They therefore interpreted Gödel's theorem, in its destruction of the formalist project for attaining complete mathematical knowledge, as proof positive of their position that humans cannot exceed the limits of knowability, and that to speak of ontology as separate from epistemology is to speak nonsense.[270] Their influence has meant that Gödel's Theorems have often been hailed as 'positivism's greatest success story: the revolutionary result of applying its principles to mathematics.'[271]

Paradoxically, then, Gödel's Incompleteness Theorems have been interpreted so that they negated precisely those convictions that Gödel wanted to demonstrate.[272] Godel was neither a positivist[273] nor a relativist, but a mathematical Platonist.[274] He believed he had shown that mathematics has a robust reality that transcends any system of logic.[275] The contradictory interpretive fate of his work was shared by his friend Albert Einstein, for whom Relativity was by no means relativism.[276] It was also shared to a remarkable extent

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[270] Yourgrau, *A World Without Time, supra* note 5 at 106.

[271] This is still a common interpretation of Gödel's work. See for example David Edmonds and John Eidinow, *Wittgenstein's Poker,* cited in Goldstein, *supra* note 3 at 74-5.

[272] For as several of Gödel's biographers have shown, his Incompleteness Theorems, far from being conceived in the spirit of positivism, actually emerged as 'an act of supreme intellectual rebellion *against* the positivists.' Goldstein, *supra* note 3 at 44; see further Yourgrau, *A World Without Time supra* note 5 and Dawson, *Logical Dilemmas, supra* note 35. The effect that the popular interpretation of Gödel's Theorem had on the man himself forms the poignant focus of Goldstein's book: see especially 112-113. Shanker, on the other hand, curiously remarks: 'The reaction to his theorem must have more than satisfied Gödel's expectations.' Shanker, "Wittgenstein's Remarks" *supra* note 41 at 225.

[273] Goldstein, *supra* note 3 at 111.

[274] Often used interchangeably with mathematical realism. However, some forms of Platonism amount to a stronger ontological claim for mathematics than realists make: see Alain Badiou, *Manifesto for Philosophy*, trans. Norman Madarasz, (Albany: State University of New York Press, 1999). On the terminological distinction see further Hilary Putnam, *Ethics without Ontology* (London: Harvard University Press, 2004); Franzen, *Provability and Truth, supra* note 125, chapter 1.

[275] Hao Wang, *From Mathematics to Philosophy* (New York: Humanities Press, 1974) at 324; Goldstein, *supra* note 3 at 51, 203.

[276] Goldstein, *supra* note 3 at 36-48. See also Palle Yourgrau, *Gödel Meets Einstein: Time Travel in the Gödel Universe* (Chicago: Open Court, 1999); Yourgrau, *A World Without Time, supra* ; Jim Holt, *supra* note 2 at 81.

by Wittgenstein. For despite being, to his great frustration, the hero of the Vienna Circle,[277] Wittgenstein was also not a positivist, nor a relativist, nor a skeptic.[278] While the Vienna Circle interpreted his verification criterion of meaningfulness as the belief that outside the limits of knowability there is nothing at all,[279] Wittgenstein believed there really *was* 'that whereof we cannot speak.'[280] The knowable – the ethical or the mystical - was both real and inexpressible,[281] and this inexpressibility was the measure of our limits. By delimiting from within, Wittgenstein was taking measure of all that could not be said.[282]

Wittgenstein's and Gödel's philosophical frameworks came into direct contact with each other in Wittgenstein's infamous comments on Gödel's Proof.[283] In a dramatic illustration of the meta-level argument, the interpretation of these comments has been beset by contextual difficulty. Wittgenstein has such a different perspective on

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[277] Palle Yourgrau, *A World Without Time, supra* note 5 at 30. Goldstein, *supra* note 3 at 103-4. They read parts of *Tractatus Logico-Philosophicus* (London: Routledge, 2001 [1921]) as a vindication of their own positivism. Ie. §6.53 exhorting one to 'say nothing except what can be said, that is, propositions of natural science,' §4.11 'the totality of all true propositions is the whole of natural science (or the whole corpus of the natural sciences.)' See Monk, *supra* note 228 at 286-88.

[278] 6.51 Skepticisn is *not* irrefutable, but obviously nonsensical, when it tries to raise doubts where no question can be asked. For doubt can exist only where a question exists, and an answer only where something *can be said.* Wittgenstein, *Tractatus Logico-Philosophicus supra* note 277 at §6.51

[279] See Monk, *supra* note 228 at 287, 309.

[280] Wittgenstein, *Tractatus Logico-Philosophicus*, *supra* note 277 at §7: 'Of what we cannot speak we must remain silent.' 'What separated him from them was this: what must be "passed over in silence" was for Wittgenstein precisely what had value.' Yourgrau, *A World Without Time, supra* note 5 at 29.

[281] Goldstein, *supra* note 3 at 106

[282] Wittgenstein told a potential publisher of the *Tractatus Logico-Philosophicus* that his work consisted of two parts: 'of the one which is here, and of everything I have *not* written down. And precisely this second part is the important one. For the Ethical is delimited from within, as it were, by my book; and I'm convinced that *strictly* speaking it can ONLY be delimited in this way. In brief, I think: All of that which *many* are *babbling* today, I have defined in my book by remaining silent about it.' Letter to Ludwig von Ficker, quoted in Monk, *supra* note 228 at 178.

[283] They appear in Appendix I of his posthumously published *Remarks on the Foundations of Mathematics*, dated in the preface of the volume to the year 1938. *supra* note 212.

mathematics that his critique has proven largely 'impenetrable to the traditional interests of mathematical logic,'[284] and his comments on Gödel's proof 'baffling (to say the least.)'[285] They are frequently taken out of context by mathematicians disinclined to consider Wittgenstein's critique of their discipline[286] and irritated by Wittgenstein's characterization of undecidability proofs as '*logische Kunststücken*' [little logical artifices or conjuring tricks],[287] and his seemingly 'flippant'[288] and dismissive attitude[289] towards Gödel's achievement: 'My task is not to talk about Gödel's proof, for example. But to by-pass it.'[290] All of which has led to the prevailing view of Wittgenstein's remarks as 'uncharacteristically naïve,'[291] 'an embarrassment to the work of a great philosopher.'[292] Gödel, for his part, said that Wittgenstein had advanced 'a completely trivial and uninteresting misinterpretation of my results.'[293]

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[284] Shanker, "Wittgenstein's Remarks" *supra* note 41 at 179.

[285] Ibid. at 226.

[286] Ibid; Goldstein, *supra* note 3 at 119. Monk, *supra* note 228 at 327.

[287] Wittgenstein, *Remarks on the Foundations of Mathematics*, *supra* note 247 at 1, 19.

[288] John W. Dawson Jr, "The Reception of Gödel's Incompleteness Theorems", *supra* note 67 at 89.

[289] Shanker, "Wittgenstein's Remarks", *supra* note 41 at 221, 226, 239. Goldstein, *supra* note 3 at 190.

[290] Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics, supra* note 247, at VII paragraph 19.

[291] David R. Dow, "Gödel and Langdell – A Reply to Brown and Greenberg's Use of Mathematics in Legal Theory" *supra* note 16 at 726, footnote 86.

[292] Dawson, "The Reception of Gödel's Incompleteness Theorems," *supra* note 67 at 89. See further 177. For example, Anderson writes: 'It is hard to avoid the conclusion that Wittgenstein failed to understand clearly the problems with which workers in the foundations have been concerned.' Alan Ross Anderson, 'Mathematics and the "Language Game"' in Paul Benacerraf and Hilary Putnam, eds., *Philosophy of Mathematics* (Oxford, 1964) at 489.

[293] Gödel to Abraham Robinson, 2 July 1973 cited in Gefwert, *supra* note 41 at 280. 'As far as my theorems about undecidable propositions are concerned, it is indeed clear... that Wittgenstein did *not* understand it (or that he pretended not to understand it.) He interprets it as a kind of logical paradox, while in fact it is just the opposite, namely, a mathematical theorem within an absolutely uncontroversial part of mathematics (finitary number theory or combinatorics.)' cited in Karl Menger, *Reminiscences of the Vienna Circle and the Mathematical Colloquia,* ed. Louise Gollard, Brian McGuinness and Abe Sklar (Dordrect: Kluwer, 1994) at 321. For the suggestion that Gödel may have been personally spurred on by exasperation at the

> It is not Gödel's proof which interests me, but the possibility which Gödel makes us aware of through his discussion. Gödel's proof develops a difficulty which must appear in a much more elementary way. (And herein lies, it appears to me, Gödel's greater service to the philosophy of mathematics, and at the same time, the reason why it is not his particular proof which interests us).[294]

Wittgenstein's apparent lapse in judgment has led to many efforts to defend his remarks, by situating them in context of the 'extraordinarily subtle and open-ended'[295] interplay between mathematics and philosophy in his general thought.[296] This attention to context shows that Gödel and Wittgenstein were responding to the same 'consistency problem,' but from within radically different frameworks.[297] Wittgenstein did not share Gödel's platonic faith in the truth-conferring power of mathematics, and rather than attributing any metaphysical essence to rules, stressed that they can only be understood as a practice. Hilbert's program and Gödel's response to it depended on the relationship between a mathematical proposition and its proof being external,[298] but for Wittgenstein, a mathematical proposition is *internally* tied to its proof, because to be a mathematical

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Vienna Circle's idealization of Wittgenstein to find a conclusive refutation of logical positivism, see Goldstein, *supra* note 3 at 115-118, 193.

[294] Michael Nedo and Michele Ranchetti, *Wittgenstein: Sein Leben in Bildern und Texten* Frankfurt am Main (1983) 261; English trans. cited in Gefwert, *supra* note 41 at 275.

[295] Juliet Floyd, "Wittgenstein, Mathematics and Philosophy" in Alice Crary and Ruper Read, eds., *The New Wittgenstein* (London & New York: Routledge, 2000) at 232 - 261

[296] Shanker, "Wittgenstein's Remarks" *supra* note 41 at 155-256, in particular 221, 226, 239; Gefwert, *supra* note 41; Juliet Floyd and Hilary Putnam, "A note on Wittgenstein's "Notorious Paragraph" about the Gödel Theorem" (2000) 97 The Journal of Philosophy at 624-632; Juliet Floyd, 'On Saying What You Really Want to Say: Wittgenstein, Gödel, and the Trisection of the Angle' in Jaako Hintikka (ed.) *From Dedekind to Gödel: Essays on the Development of the Foundations of Mathematics* (Boston: Kluwer, 1995); Juliet Floyd, 'Prose versus Proof: Wittgenstein on Gödel, Tarski and Truth' (2001) 9 *Philosophica Mathematica* at t280-307; *but see* Timothy Bays, 'On Floyd and Putnam on Wittgenstein on Gödel' (2004) *The Journal of Philosophy* (refuting Floyd and Putnam); and Mark Steiner, "Wittgenstein as his Own Worst Enemy: The Case of Gödel's Theorem" (2001) 9 Philosophica Mathematica at 257-279.

[297] Goldstein, *supra* note 3 at 188.

[298] Shanker, "Wittgenstein's Remarks" *supra* note 41 at 206.

proposition is just to be a member of a given system.[299] This is why in mathematics 'we cannot talk of systems in general, but only *within* systems. They are just what we can't talk about.'[300] So neither were concerned about inconsistencies, but for Gödel, this was because mathematics was about objective reality which rendered it consistent,[301] whereas for Wittgenstein, the consistency of mathematics was not something open to doubt, as mathematics was by definition a coherent system. While Gödel showed that the consistency of a formal mathematical system cannot be proved by a meta-mathematical consistency proof, Wittgenstein's point was that there was no genuine need to provide such a proof in the first place.[302]

Like the connection between a word and its meaning, and between a rule and its application, mathematical proofs, for Wittgenstein, were merely 'perspicuous representations' designed to produce 'just that understanding which consists in seeing connections.'[303] The relation between a musical score and a performance, for instance, cannot be grasped causally, nor can the rules that connect the two be exhaustively

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[299] 'The meaning of a mathematical concept is the totality of rules governing the use of that concept in a calculus' Shanker, *supra* note 41 at 228. See further 211, 240. 'Every proposition in mathematics must belong to a calculus of propositions.' Ludwig Wittgenstein, *Philosophical Grammar,* Rush Rhees, ed., trans. Anthony Kenny. (California, University of California Press, 1978 [1969]) at 376.

[300] Wittgenstein, Ludwig, *Philosophical Remarks,* Rush Rhees & Raymond Hargreaves, eds., trans. Maximilian A. E. Aue (Chicago: University of Chicago Press, 1980 [1975]) at 152.

[301] Goldstein, supra note 3 at 188. See also 164.

[302] 'Such a contradiction is of interest only because it has tormented people, and because this shows both how tormenting problems can grow out of language, and what kind of things can torment us.' *Remarks on the Foundations of Mathematics* III §13. '"Only the proof of consistency shows me that I can rely on the calculus." What sort of proposition is it, that only then can you rely on the calculus? But what if you do rely on it without that proof? What sort of mistake have you made?' *Remarks on the Foundations of Mathematics* III §84. 'Do I have to wait for the proof of consistency before I can apply the calculus? Have all previous calculations really, *sub specie aeterni*, been made on credit? And is it conceivable that one day all this will turn out to be illegitimate? Am I ignorant of what I am doing?' Brian McGuinness (ed.) *Ludwig Wittgenstein and the Vienna Circle: Conversations recorded by Friedrich Waismann* trans. Joachim Schulte and Brian McGuinness (Oxford, 1987) 140 (see also 120, 174) cited in Gefwert, *supra* note 41 at 263. See also 255, 268.

[303] Cited in Monk, *supra* note 228 at 441. See further 508, 537.

described, for given a certain interpretation *any* playing can be made to accord with a score. Eventually we just have to '*see* the rule in the relations between playing and score.'[304] Wittgenstein returned frequently to this example because it is very clear that the meaning of a piece of music cannot be determined by naming anything the music 'stands' for, and his point was that '[u]nderstanding a sentence is much more akin to understanding a theme in music than one may think.'[305] To connect two things we do not always need a third: 'Things must connect directly, without a rope, ie. They must already stand in a connection with one another, like the links of a chain.'[306]

It is in Wittgenstein's insistence on the impossibility of an 'outside' to mathematics and to language that he departs both from Gödel and from law. Wittgenstein advances a theory of meaning internal to those systems, while Gödel's Theorem turns on the importance of the extra-systemic. In both mathematics and in law, there is an ineradicable link to the outside of formal understanding, towards the purposes of the practice. In both mathematics and law, it surely matters what the rules are *for*. Law is thus closer to Gödel's understanding of mathematics than it is to Wittgenstein's. But Wittgenstein did not think that there *was* no outside: Wittgenstein, like Gödel, was a truth-seeker.[307] The difference was that for Wittgenstein, the 'beyond' to our systems is inexpressible, but real, whereas for Gödel, there is expressible truth which is real but has

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[304] Cited in *Ibid.* at 302.

[305] Cited in *Ibid.* at 538.

[306] Cited in *Ibid.* at 308.

[307] Cited in *Ibid,* at 3.

not been formalized.[308] Once Wittgenstein and Gödel are both recognized as non-skeptics, they can be seen to represent positions along the same kind of argument. They do not stand for indeterminacy or relativism, but for a third way which affirms the existence of a 'beyond' to formal understandings of structure and meaning.

This examination of Wittgenstein's interpretative legacy has demonstrated the importance of context to reading: the meta-argument. The skeptical disavowal of context led to their a-contextual reading of Wittgenstein in order to advance the claim of indeterminacy. Positivists seeking ballast for their ever-threatened distinction between valid adjudication and ideological dispute turned to Wittgenstein's distinction between understanding and interpretation, reading it outside the context of Wittgenstein's overall thoughts on rules. The meta-meta-argument has shown that these readings make manifest the inherently purposive and context-driven nature of interpretation, thereby challenging the very assumptions upon which such readings rely.

The primary argument has been that Wittgenstein, like Gödel, presents an alternative to the false opposition of indeterminacy. Interpretation is not unconstrained (*contra* indeterminacy) but neither can 'interpretation,' in the sense of the dynamic construction of meaning re-imagined as each context emerges, be excluded from rule-following (*contra* positivism). Rule-skeptics and positivists alike fetishize the rule and ignore context, when Wittgenstein's challenge is to understand rules *in* context. Taking Wittgenstein's account of context seriously helps to point us towards a different

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[308] 'Just as Gödel demonstrated that our formal systems cannot exhaust all that there is to mathematical reality, so the early Wittgenstein argued that our linguistic systems cannot exhaust all that there is to non-mathematical reality.' Goldstein, *supra* note 3 at 191; see also 119; Casti & DePauli, *supra* note 2 at 11.

understanding of Gödel's Theorem in law, which is neither positivist nor indeterminist, neither relativist nor skeptical. This is the subject of the final chapter.

Chapter Four

Undecidability and the Opening to Justice

This chapter concludes the primary argument in this thesis by examining the striking similarity between Godel's Theorem and the work of Jacques Derrida. Derrida's account of the separation yet co-implication of law and justice echoes Gödel's proof of the relationship of proof to truth, and together they advance an internal challenge to the hermetic system of law in positivism. Derrida's view of the opening to context *as* the opening to justice provides the link between the call to justice and the 'necessity of interpretation'[309] The necessity of having to interpret rules, by engaging in the active construction of meaning and by making an undecidable choice about context, is the condition of justice.

As throughout this thesis, the primary argument is echoed on a second level. The meta-argument in this chapter examines the link between interpretation and justice in relation to the misinterpretation of Derrida himself, who, like Gödel and Wittgenstein, has been marshaled in support of a stance he did not hold. Deconstruction stands in legal theory alongside the skeptical reading of Wittgenstein's rule-following remarks as the two theoretical pillars of the radical indeterminacy claim.[310] In this vein, Derrida is typically taken to believe that all interpretations are possible, and that there can be no justification

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[309] Derrida, *Writing and Difference*, 292

[310] Solum classified the defenders of the indeterminacy thesis into two types: rule-skeptics and deconstructionists: L B Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogmas" *supra note* 135 at 476-484.

for preferring one meaning over another.[311] But nothing could be farther from the truth. The meta-meta-argument is thus that the interpretation of Derrida is itself a manifestation of the injustice perpetrated by partial and a-contextual readings. It is an injustice we are all, to some extent, guilty of.

I. Truth and Context: Misreading Derrida

Derrida wrote his 'Afterword,' to *Limited Inc.*, a much overlooked text,[312] at a time when his reputation was at its most vulnerable. His association with the Heidegger and de Man controversies the previous year had increased pressure on him to articulate the relationship of deconstruction to ethical and political commitments.[313] As a series of responses to questions posed by the editor Gerald Graff about this very relationship, his writing is particularly forceful:

> I do not believe I have ever spoken of "indeterminacy," whether in regard to "meaning" or anything else. Undecidability is something else again.... undecidability is always a *determinate* oscillation between possibilities (for example, of meaning, but also of acts.) These possibilities are themselves highly *determined* in strictly *defined* situations (for example, discursive – syntactical or

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[311] Martha Nussbaum, "Skepticism about Practical reason In Literature and the Law" (1994) 107 Harvard Law Review 714, 723-725; Timothy Endicott, *supra* note 163 *** See Rodolphe Gasché, 'Infrastructures and Systematicity' in (ed.) John Sallis, *Deconstruction and Philosophy* (Chicago: University of Chicago Press, 1987) 3-20, 3, 17.

[312] See Simon Critchley, *The Ethics of Deconstruction: Derrida and Levinas* (Oxford: Blackwell, 1992) at 22-25

[313] The Heidegger affair concerned Heidegger's affiliation with Nazism, and the de Man affair concerned his anti-semitic wartime journalism in Belgium between 1940 and 1942. 'These two events allowed those already ill-disposed towards deconstruction to confirm to their public that its overall tendency was indeed reactionary... However unjust the accusation, Derrida's reputation suffered through association, and the reach of his thinking was severely underestimated.' Beardsworth, *supra* note 194 at 3. Derrida's reaction to this controversy can be found in two articles, "The Sound of the Deep Sea Within a Shell: Paul de Man's War" (1988) 14 Critical Inquiry 590 trans. Peggy Kamuf, and Derrida's response to several critiques of that article, in "Biodegradables: Six Literary Fragments" (1989) 15 Critical Inquiry at 812 trans. Peggy Kamuf, in which he defends not only de Man and deconstruction but also himself from what he regards as unjust treatment and unfair criticism. See further J.M. Balkin, "Transcendental Deconstruction, Transcendent Justice" (1994) 92 Michigan Law Review at 1131.

> rhetorical – but also political, ethical, etc.). They are *pragmatically* determined. The analyses that I have devoted to undecidability concern just these determinations and these definitions, not at all some vague "indeterminacy."[314]

Undecidability is the oscillation between interpretative positions that are themselves products of discursive, political and ethical contexts. This oscillation does not make meaning indeterminate. It means that the process of making a text determinate is governed by the forces of context: social interests, political judgments, ethical commitments.

> I say "undecidability" rather than "indeterminacy" because I am interested more in relations of force, in differences of force, in everything that allows, precisely, determinations in given situations to be stabilized... [315]

The 'relative stability of the dominant interpretation'[316] is 'the momentary result of a whole history of relations of force,'[317] and its meaning is political, and contextual, and contentious, but nonetheless real. Deconstruction is about seeing the political and ethical nature of the battle for meaning. It is therefore very far from any kind of relativism or indeterminism.[318] The often remarked-upon shift in Derrida's work during the nineties to more explicit engagements with justice, religion, politics, and ethics is often viewed as a development in his thought, but Derrida remained adamant that his work had always had

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[314] Derrida, *Limited Inc. supra* note 11 at 148.

[315] *Ibid,* at 148

[316] *Ibid,* at 143

[317] *Ibid. at* 145

[318] There would be no indecision or *double bind* were it not between *determined* (semantic, ethical, political) poles, which are upon occasion terribly necessary and always irreplaceably singular. Which is to say that from the point of view of semantics, but also of ethics and politics, "deconstruction" should never lead either to relativism or to any sort of indeterminism. *Ibid.* at 148.

a political and ethical dimension.[319] (This shift is itself a function of context, as the (latent) ethical and political dimension of Derrida's work came under increasing scrutiny by philosophers seeking an alternative to the skeptical thought of the eighties.[320])

Undecidability, unlike indeterminacy, emphasizes that there is a battle going on. Once you believe in either the unchanging essence of the word, or that words do not mean anything – in other words, in either of the rule-fetishisms known as positivism or indeterminacy - there is nothing to fight for. But Derrida thought there was. The battle of meaning can be won, lost or drawn, but it can always be refought. *Becoming* determinate is political, which is not the same as unconstrained. 'At stake is always a set of determinate and finite possibilities.'[321] Instead of maintaining that 'texts have no decidable meaning,' Derrida stresses instead that '*it is always possible* that it has no decidable meaning.'[322] The argument over meaning is endless, but this is to identify what is at stake rather than to say that nothing is.

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[319] In his address to the fourth Cérisy conference around his work (La démocratie à venir, 2002, published in Voyous, 2003), Derrida emphatically rejected the suggestion that deconstruction did not initially have a political or ethical dimension: "[T]here never was in the 1980s or 1990s, as has sometimes been claimed, a political turn or ethical turn in 'deconstruction,' at least not as I experience it. The thinking of the political has always been a thinking of différance and the thinking of différance always a thinking of the political, of the contour and limits of the political, especially around the enigma or the autoimmune double bind of the democratic." But he also observed elsewhere that works such as *Specters of Marx* and *The Politics of Friendship* did not constitute a political theory: "part of what I'm trying to say in these texts is not part of a theory that would be included in the field known as politology or political theory, and it's not a deconstructive politics either. I don't think that there is such a thing as a deconstructive politics, if by the name 'politics' we mean a programme, an agenda, or even the name of a regime." See <http://french.berkeley.edu/news/news_events_ind.php?id=53>

[320] Critchley, *supra* note 312; Beardsworth, *supra* note 194.

[321] Derrida, *Limited Inc. supra* note 11 at 144.

[322] Jacques Derrida, *Spurs: Nietzsche's Styles* trans. B Harlow (Chicago: University of Chicago Press, 1979) at 133. Emphasis mine.

In *Limited Inc.,* Derrida asks, 'Why so much fear, hate, and denial of deconstruction?'[323] The answer lies in 'the extent to which any questioning of the reliability of language, any suggestion that meaning cannot be taken for granted, violates a powerful taboo in our culture.'[324] The fear of deconstruction is the fear of indeterminacy. Given Derrida's emphatic distinction between undecidability and indeterminacy, the pervasive association of deconstruction with indeterminacy can only be explained by the social and historical context of deconstruction's reception in the United States, where it first gained acceptance not in philosophy departments but in departments of literature and literary theory, where texts are prized for their richness and the multiplicity of interpretations they can support. Likewise, deconstruction found its first adherents in the legal academy among members of the critical legal studies movement who were already committed to the radical indeterminacy critique. Derrida's notion of the 'play of relative indetermination'[325] thus came (and continues) to be (mis)taken for radical indeterminacy.[326]

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[323] Derrida, *Limited Inc. supra* note 11 at 153. 'Why has the press (most often inspired by professors, who themselves did not write directly) multiplied denials, lies, defamations, insinuations against deconstruction, without taking the time to read and to inform itself, without even taking the trouble to find our for itself what "deconstructive" texts actually say, but instead caricaturing them in a stupid and dishonest manner?... *ibid.*.

[324] Barbara Johnson, "The Surprise of Otherness: A Note on the Wartime Writings of Paul de Man" in Peter Collier and Helga Geyer-Ryan, eds., *Literary Theory Today* (Ithaca: Cornell University Press, 1990) at 13-22, 18.

[325] Derrida, *Limited Inc. supra* note 11 at 144.

[326] In a recent book, Roger Berkowitz accuses Derrida (and other 'ethical deconstructionists' such as Drucilla Cornell) of focusing on 'the epistemological indeterminacy of the law' and in so doing continuing to understand law to be 'posited rules in need of certainty.' Berkowitz, *supra* note 34 at xiv. This is indeed the mistake made in epistemological indeterminacy, but it is not one made by Derrida. Indeed, Berkowitz's claims to this effect, made in the Preface to his book, are not revisited or substantiated in the body of the work, and no reference to the work of either Derrida or Cornell is offered to support his point.

Derrida's distinction between 'indeterminacy' and 'undecidability' continues to go unnoticed in jurisprudence. Allan Hutchinson uses the term 'indeterminacy' largely to designate what Derrida calls 'undecidability,' but there is a lot more at stake in the difference between the two terms than he allows for.[327] Similarly, Douzinas and Gearey, in equating the two, do not realise that the opening to context does not 'multipl(y) interpretative difficulties,'[328] but provides the condition for them. Whereas indeterminacy is an a-contextual observation relying on an a-temporal notion of an *a priori* meaning, undecidability embraces the contextual, temporal, contingent predicament of meaning-making. Whereas indeterminacy despairs of ever achieving the ideal of linguistic or semantic meaning, undecidability reflects the fact that the grounding to meaning is *not* linguistic or semantic, but contextual. The opening to context *is* the condition of judgment, and judgment is deciding the limits of that unbounded context. The question of interpretation or of critique is not whether a judgment is being made, but why and how.

Understanding Derrida's notion of the centrality of truth is complicated by the fact that his own work has so often been perceived to negate the value of truth. Deconstruction is often seen as a kind of scholarly nihilism which involves relinquishing any recourse to truth,[329] leading to a pervasive relativism which contaminates even the deconstructionist's own statements.[330] The most common and persistent misreading of Derrida's famous

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[327] Hutchinson, *Postmodern's Hart*, *supra* note 73 at 804, footnote 59.

[328] Douzinas & Gearey, *supra* note 71 at 66.

[329] Some understand Derrida to be 'strictly speaking, not *saying* anything at all.' Stone, "Wittgenstein on deconstruction" *supra* note 199 at 83-117, 88. The most recent and egregious example of misinterpreting Derrida and deconstruction in this way, in the context of the legal indeterminacy debate, is Endicott, *supra* note 163 'deconstruction *says nothing* about meaning:' at 10. See also 15-17.

[330] For example, Anthony D'Amato, a self-proclaimed 'radical deconstructionist', goes as far as to claim that the radical indeterminacy claim cannot be 'defined': 'To "define" a concept is to specify its meaning;

remark, in *Of Grammatology,* that 'There is nothing outside the text,'[331] is to the effect that there is no truth, no reality outside the text itself.[332] But of course Derrida does not deny the existence of reality. Rather he maintains that it can only be known through the medium of interpretation: 'one cannot refer to this "real" except in an interpretive experience.'[333]

In *Limited Inc.,* Derrida precisely shows how 'truth' is not irrelevant but not abstract either. Truth is a rhetorical, contingent, disputed necessity.[334] Truth, for Derrida, is contextual, a question of careful reading, and that is exactly what the reifiers of truth and the misreaders of his own works alike fail to appreciate: they have not familiarized themselves with the context of his work, and that of the texts he was writing about, and have not been attentive enough as readers, to get on the 'right track.'[335] The process of

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the true Indeterminist attacks the notion that words can have definably specific, bounded meanings. In particular, the word 'indeterminate' cannot have a specific, bounded meaning.' D'Amato, "Pragmatic Indeterminacy" *supra* note 15 at 162 footnote 36. Yet D'Amato immediately announces his intention to nevertheless 'sketch what at the present time I think are its main procedures and goals': 179. An opponent of deconstruction like Timothy Endicott does not miss the chance to turn this around on D'Amato, conceding in the process to the same misreading: 'By touting indeterminacy, legal theorists squander the possibility of criticizing anything.' Endicott, *supra* note 163 at 14, see also 10.

[331] Jacques Derrida, "The Dangerous Supplement" in *Of Grammatology*, trans. Gayatri Chakravorty Spivak (Baltimore: John Hopkins University Press, 1976) at 158.

[332] See for instance, Alan Wolfe, "Algorithmic Justice" (1989-1990) 11 Cardozo Law Review at 1418; Morss, *supra* note 202 at 199, 209.

[333] Derrida, *Limited Inc. supra* note 11 at 148. 'Derrida does not deny the existence of objective truth as much as he affirms the interpretative character of our attempts to comprehend truth.' J.M. Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 Yale Law Journal at 761.

[334] Elsewhere, Derrida makes it clear that the transcendent in which he is interested is not simply the classical one, but the 'highly unstable' and 'slightly bizarre' character of what he calls the 'quasi-transcendent,' and speaks of 'the necessity of posing transcendental questions' in order to avoid 'empiricism, positivism and psychologism.' However, this questioning must be renewed 'in taking account of the possibility... of accidentality and contingency, thereby ensuring that this new form of transcendental questioning only *mimics* the phantom of classical transcendental seriousness without renouncing that which, within this phantom, constitutes an essential heritage.' Jacques Derrida, 'Remarks on Deconstruction and Pragmatism' in Chantal Mouffe (ed.) *Deconstruction and Pragmatism* (London: Routledge, 1996) 81-82.

[335] 'For of course there is a "right track" [*une "bonne voie"*], a better way, and let it be said in passing how surprised I have often been, how amused or discouraged, depending on my humor, by the use or abuse of the following argument: Since the deconstructionist (which is to say, isn't it, the skeptic-relativist-nihilist!)

interpretation has an *asymptotic* relationship to 'truth,' – it will never reach truth, but rather engages in a continual process of re-situating the subject of the discussion in more encompassing contexts which have truth as their aspiration.[336]

Discourse cannot proceed without reference to some notion of truth. But this truth is not absolute:

> ... to account for a certain stability... is precisely not to speak of eternity or of absolute solidity; it is to take into account a historicity, a nonnaturalness, of ethics, of politics, of institutionality, etc. I say that there is no stability that is absolute, eternal, intangible, natural, etc. But that is implied in the very concept of stability. A stability is not an immutability; it is by definition always destabilizable.[337]

Since for Derrida, meaning is determined by the context of words, and since each context can be framed in ever larger and more complex contexts (social, historical, political), the process of reinscribing truth through interpretation is never-ending. In other words, there are 'only contexts without any absolute anchorage,'[338] meaning that there is no metacontextual or extra-textual 'outside' which sets a limit to play.[339] '[N]o meaning can

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is supposed not to believe in truth, stability, or the unity of meaning, in intention or "meaning-to-say," how can he demand of us that we read *him* with pertinence, precision, rigor? How can he demand that his own text be interpreted correctly? How can he accuse anyone else of having misunderstood, simplified, deformed it, etc.? In other words, how can he discuss, and discuss the reading of what he writes? The answer is simple enough: this definition of the deconstructionist is *false* (that's right: false, not true) and feeble; it supposes a bad (that's right: bad, not good) and feeble reading of numerous texts, first of all mine, which therefore must finally be read or reread..... ... (W)ithin interpretative contexts (that is, within relations of force that are always differential – for example, socio-political-institutional – but even beyond those determinations) that are relatively stable, sometimes apparently almost unshakeable, it should be possible to invoke rules of competence, criteria of discussion and of consensus, good faith, lucidity, rigor, criticism, and pedagogy.' Derrida, *Limited Inc. supra* note 11 at 146.

[336] '... the value of truth (and all those values associated with it) is never contested or destroyed in my writings, but only reinscribed in more powerful, larger, more stratified contexts.' *Ibid,* at 146.

[337] *Ibid,* at 151.

[338] *Ibid,* at 12.

[339] See Glendinning, *supra* note 253 at 120-121.

be determined out of context, but no context permits saturation.'[340] This means that a final, definitive interpretation is never possible because of the differential nature of interpretation. Every text differs from and defers to another text, in an endless cycle of reference that cannot be halted by some definitive contact with reality 'purely guaranteed by some metacontextuality.'[341] 'Closure is simply not a possibility. There can be no final word on any subject.'[342] Each new context may force us to reconsider what we thought we knew about meaning: that is its undecidability, but not its indeterminacy.

The relationship of context to its excess, following Derrida, is precisely what Gödel's theorem is about: the context can never be framed or enclosed, just as a formal system can never be complete, because within such a system or frame, there are elements – in mathematics, an undecidable statement, in language, the play of *differance* – that frustrate that closure. It is in their rejection of the possibility of systemic closure that Gödel and Derrida part ways with Wittgenstein, for whom the contextualization of language is sufficient to stabilize meaning. Derrida emphasizes that context is 'only relatively stable:'

> In it there is a margin of play, of difference, and opening; in it there is what I have elsewhere called "supplementarity" (*Of Grammatology*) or "parergonality" (*Truth*

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[340] Jacques Derrida, "Living On : Border Lines", trans. James Hulbert, in Harold Bloom et al. *Deconstruction and Criticism* (New York: Seabury Press, 1979) at 81. Derrida also made this point in his 1971 paper 'Signature, Event, Context.' See Critchley, *supra* note 312 at 33; Nicholas Royle, *Jacques Derrida* (New York: Routledge, 2003) at 62-63. This is an insight that has filtered through to critical legal theory, at least: Douzinas and Gearey, *supra* note 71 at 66.

[341] Derrida, *Limited Inc. supra* note 11 at 151. Jacques Derrida, "Différance" in *Margins of Philosophy* (Chicago: University of Chicago Press, 1976 [1968]) 3 at 11.

[342] See Manderson, "Apocryphal Jurisprudence" *supra* note 10 at 34.

> *in Painting*). These concepts come close to blurring or dangerously complicating the limits between inside and outside, in a word, the framing of a context.[343]

Wittgenstein showed us that rules are embedded in context, but Derrida shows us that that process of embedding will never end by itself: the radical opening to context, like the opening of Gödel's formal systems, is a non-stopping problem. A context 'always... remains open, thus fallible and insufficient.'[344]

> The structure thus described supposes both that there are only contexts, that nothing *exists* outside context [*qu'il existe rien hors contexte*], as I have often said, but also that the limit of the frame or the border of the context always entails a clause of *non-closure* [*non-fermeture*]. The outside penetrates and thus determines the inside.[345]

The exigency of interpretation gives rise to the paradox of the frame, as that which 'cuts out but also sews back together.'[346] It is necessary to place boundaries around context to understand what is inside that context, but the frame itself is neither inside nor outside. This is precisely what Gödel thought he had shown. The metaphor or idea of a horizon - the frame or context that we experience as limit but which recedes as we approach it, forever out of reach – links the opening to context and the opening to ethics.[347] The horizon is aspirational, which is why as we approach the limit of contexts we have no

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[343] Derrida, *supra* note 11 at 151.

[344] Jacques Derrida, *Specters of Marx: The State of the Debt, The Work of Mourning, and the New International* trans. Peggy Kamuf (London: Routledge, 1994) at xvii

[345] Derrida, *Limited Inc. supra* note 11 at 152-3; cited in Critchley, *supra* note 312 at 31-2, with Critchley's insertions of the original French in square brackets.

[346] Derrida, Jacques, *The Truth in Painting,* trans. Geoffrey Bennington & Ian McLeod (Chicago: University of Chicago Press, 1987) at 304.

[347] Douzinas and Gearey speak of justice as 'a horizon that recedes the more the good boat 'Law' appears to come close to it.' Douzinas & Gearey, *supra* note 71 at 41. Critchley, *supra* note 312 at 31.

recourse but to ethics, in order to tell us where and why we should stop the infinite regress of interpretation.

II. Law and justice

Less than a year after he wrote the 'Afterword,' Derrida made a self-conscious and deliberate intervention into legal theory[348] when he presented a paper called 'Force of Law: The Mystical Foundation of Authority,'[349] now hailed as the 'foundational text of the ethical turn in critical jurisprudence.'[350] The echoes between the 'Afterword' and 'Force of Law' are profound, with the latter explicating, in the context of law and justice, ideas put in more general terms in the former. Derrida explains that a just and responsible decision takes place in the space of radical incommensurability between the law, or rule, and the context, or case, in which it is to be applied:

> ... for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle.[351]

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[348] Derrida had already written at length on law and justice, but he had never been so explicit about the relationship between deconstruction and justice. Derrida's own list of his papers that have discussed the law, given in *Limited Inc. supra* note 11 at 156 footnote 7, include: "The Law of Genre," trans. A. Ronell, *Glyph 7* (Baltimore: John Hopkins Univ. Press, 1980); "Devant la loi," trans. A Ronell, in *Kafka and the Contemporary Critical Performance* (Bloomington: Indiana Press, 1987); "Le facteur de la vérité," in *The Post Card: From Socrates to Freud and Beyond,* trans. Alan Bass (Chicago: University of Chicago Press, 1987); and "Restitutions of the Truth in Painting," in *The Truth in Painting, supra* note 347.

[349] It was presented in October 1989, at a symposium held at the Benjamin J Cardozo School of Law in New York, entitled 'Deconstruction and the Possibility of Justice.' It was subsequently published in (1991) 11 *Cardozo Law Review* and also in Drucilla Cornell, Michel Rosenfeld, David Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992).

[350] Douzinas & Gearey, *supra* note 71 at 9 footnote 10, also 69-70.

[351] Derrida, "Force of Law" *supra* note 12 at 961.

Each decision is not just an interpretation but an invention, 'as if ultimately nothing previously existed of the law, as if the judge himself invented the law in every case.'[352] Judges cannot pretend that they are just following rules and *still be judging*: 'if the rule guarantees it in no uncertain terms, so that the judge is a calculating machine – which happens – we will not say that he is just, free and responsible.'[353]

> Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely.[354]

But justice is also dependent on those rules for its realization: 'it is just that there be law.'[355] There is no just decision if the judge does not refer to law or rule, if she suspends her decision before the undecidable, or leaves aside all rules.[356] Law and justice are separate but co-implicated, dependent upon each other for existence.[357]

Undecidability is the opening to ethics. The 'ordeal of the undecidable'[358] that gives rise to the necessity of making something determinate by reference to context(s), and to the conscious decision as to the relevance of context(s), is the 'necessary condition' of a decision 'in the order of ethical-political responsibility.'[359] This decision must be made in

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[352] *Ibid.*

[353] *Ibid.*

[354] *Ibid.*

[355] *Ibid.* at 947.

[356] *Ibid.* at 961.

[357] *Ibid.* at 947.

[358] Derrida, *Limited Inc*, *supra* note 11; "Force of Law" *supra* note 12 at 963; *Specters of Marx: supra* note 375 at 75.

[359] Derrida, *Limited Inc. supra* note 11 at 116

a space exceeding 'the calculable program that would destroy all responsibility.'[360] The undecidable is the 'space' exceeding the 'calculable program' of law, the moment where responsibility to the other is seen not to impinge upon the interpretative process, but to constitute it.

> The undecidable is not merely the oscillation or the tension between two decisions, it is the experience of that which, though heterogenous, foreign to the order of the calculable and the rule, is still obliged – it is of obligation that we must speak – to give itself up to the impossible decision, while taking account of law and rules.[361]

There can be no moral or political responsibility without this trial and this passage by way of the undecidable. '[362] Judgment is an 'ordeal' rather than a procedure, anxious rather than automatic – but then, as Derrida asks, 'who pretends to be just by economizing on anxiety?'[363]

> Even if a decision seems to take only a second and not to be preceded by any deliberation, it is structured by this *experience and experiment of the undecidable.*[364]

Undecidability means that there is always a decision to be made, and that this decision arises at the point where the legal rule can no longer tell the decision-maker what to do: 'For if decision is calculation, the decision to calculate is not of the order of the calculable, and must not be.'[365] The undecidable is about a choice of context, which is unavoidable. The context determines the decision but is itself framed by other contexts,

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[360] *Ibid.*

[361] Derrida, "Force of Law" *supra* note 12 at 965

[362] *Ibid.*

[363] *Ibid.* at 955

[364] Derrida, *Limited Inc. supra* note 11 at 116. emphasis in original.

[365] Derrida, "Force of Law," *supra* note 12 at 963.

and so on. What grounds this choice cannot be made within it, but must be made outside of it, and that also goes for the meta context. The choice about when to stop this process cannot be made by reference to a rule. The choice about when to stop calculating can never be made by reference to a rule.

The myth of the *grundnorm* is a manifestation of positivism's preference for indeterminacy over undecidability, for fixity instead of oscillation. In positive law, the *grundnorm* is where the threats of violence and interpretation intersect: 'a *coup de force,* of a performative and therefore interpretative violence.'[366] The *grundnorm* functions like a black hole, magnifying and concentrating these threat of violence and of individual interpretative wills, allowing the rule of law (as the rule of rules[367]) to operate in safety. Gödel's Theorem has often been seen as immediately relevant to the paradox of the *grundnorm*: Rogers and Molzon, and Stuart Banner, identify its circuitous self-reference as a moment of 'Gödelian uncertainty.'[368] But in accepting positivism's internal logic, these authors fail to understand that it is not a 'momentary aberration'[369] that can be relegated into the historical past or at the conceptual limit of law.

Derrida agrees that the grundnorm is a moment of undecidability - he writes of the impossibility of separating the legitimate violence from the non-legitimate violence of

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[366] *Ibid.* at 941. Stanley Fish describes the twin threats to law as morality and interpretation, and speaks of the 'violence' of a particular morality' which 'intersects' with the threat posed by interpretation. "The Law Wishes to Have a Formal Existence" supra note 131 at 157-158.

[367] Douzinas & Gearey, *supra* note 71 at 7.

[368] Rogers and Molzon, *supra* note 15 at 1010. Stuart Banner, "Please Don't Read the Title" (1989) 50 Ohio State Law Journal 243 at 255.

[369] Manderson, "From Hunger to Love" *supra* note 192 at 91.

the founding moment[370] - but for him, this undecidability is something which occurs every single time a legal decision takes place. Because of the necessary ordeal of undecidability, each decision is a radical suspension and reinterpretation of the rules whose legitimacy can only be confirmed afterwards.

> There is always a gap between the formulation of a general rule and the decision in a particular case, and that gap has to be bridged by a judgment of the living mind, not the dead hand of the past. [371]

Once the temporal predicament of law is understood, the paradox of the *grundnorm* is no longer concentrated but diffuse, affecting all legal decisions. In the same way a Godelian undecidable proposition exists within any formal system, the undecidability of the *grundnorm* 'remains caught, lodged, at least as a ghost – but an essential ghost – in every decision, in every event of decision.'[372]

III. Undecidability and/in Context

Undecidability shows us that the decision to be made is a choice between competing legal, social and political contexts, and that this choice is endemic to every legal decision. In *Donoghue v Stevenson*,[373] for instance, the House of Lords' choice to examine the manufacturer's responsibility in the context of negligence law rather than contract law was the decisive factor in the ruling. In *R v. Lavallee,* the Supreme Court of Canada

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[370] Derrida, "Force of Law," *supra* note 12 at 927. Derrida writes of the signature on the Declaration of Independence: 'One cannot decide – and that's the interesting thing, the force and the coup of force of such a declarative act – whether independence is stated or produced by this utterance.' Jacques Derrida, 'Declarations of Independence' (1986) *New Political Science* 7 at 9.

[371] Moles, *supra* note 79 at 197, ff197-200.

[372] Derrida, "Force of Law" *supra* note 12 at 965.

[373] *Donoghue (or McAlister) v Stevenson* [1932] AC 562 (H.L.)

decision, in the trial of a woman accused of killing her husband, to admit evidence of her past experiences of his abusive behavior was a choice about the context relevant to deciding whether or not her action was murder.[374] The United States Supreme Court's rejection of a black man's appeal against his death sentence in *McCleskey v. Kemp* was premised upon their exclusion from the 'relevant' context evidence that Georgia's capital sentencing process was administered in a racially discriminatory manner.[375] The Court in *McCleskey* was interested only in how the rules were applied to the appellant in that instance, and not the racial context in which those rules functioned.[376] Their choice of context functions as a continuing obstacle to defendants seeking to challenge their death sentences on the basis of evidence of racial discrimination in sentencing.[377] However, the choice falls to be made again in each case, and has sometimes been made differently. In an earlier appeal involving a black defendant, *Furman v Georgia,*[378] Justice Potter Stewart, in the majority, concluded that the racial logic underlying the death penalty as a whole rendered it impossible to administer justly in individual cases.[379]

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[374] *R v Lavallee,* [1990] 1 S.C.R. 852

[375] *McCleskey v Kemp,* 481 U.S. 279 (1987). The evidence in question is the Baldus study.

[376] Justice Powell, writing for the majority, said that 'apparent disparities in sentencing are an inevitable part of our criminal justice system.' *Ibid.* at 313. For the defendant to be successful in an appeal, he or she would have to provide 'exceptionally clear proof' that the decision-makers in his or her particular case had acted with discriminatory intent. *Ibid.* at 297.

[377] Examples of cases where the McCleskey ruling represented an obstacle include: *Davis v Greer*, 13 F. 3d 1134 (7th Cir, 1994); *State v Taylor*, 929 S.W. 2d 209 (Missouri Sup. Ct, 1996); *Alverson v State*, OK CR 21 (1999). In October 2001, the US Court of Appeals for the Sixth Circuit acknowledged that the disparities on Ohio's death row were "extremely troubling," but wrote that "*McCleskey* remains controlling law on the ability of statistically-based arguments concerning racial disparity to establish an unconstitutional application of the death penalty. Although the racial imbalance in the State of Ohio's capital sentencing system is glaringly extreme, it is no more so than the statistical disparities considered and rejected by the Supreme Court in *McCleskey*". *Coleman v Mitchell*, 2001 FED App. 0367P (6th Cir., 2001).

[378] 408 U.S. 238 (1972)

[379] "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible

One final brief example shows why legal adjudication should be understood not as a battle over indeterminate words but over determinable contexts. The debate over the definition of rape in international law is framed in terms of differing definitions:[380] the wide definition in *Akayesu*[381] of rape as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive,'[382] compared to more 'specific' language of penetration and the emphasis on 'consent' at work in *Furundžija*[383] and subsequent judgments.[384] The *Furundžija* trial chamber predicated its decision on the need for 'specificity' and 'accurate' definitions.[385] Yet framing the question of rape as one of definition obscures the choice being made between two competing contexts in which rape can be understood. An emphasis on nonconsent views rape as a deprivation of sexual freedom, and the proof of it as a question of the 'individual psychic space'[386] of the perpetrator and victim. But an emphasis on coercion views rape as a crime of inequality, and the proof of it as a question of 'the material plane:' 'physical acts,

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as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to death, it is the constitutionally impermissible basis of race.... But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Ibid.* at 309-310.

[380] *Prosecutor v. Furundžija* (Dec 10, 1998), Case No. IT-95-17/1-T (ICTY Trial Chamber) at 185. online: United Nations <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>

[381] *Prosecutor v Akayesu* (Sept 2, 1998), Case No. ICTR 96-4-T, (ICTR, Trial Chamber) at 688. online: United Nations <http://hei.unige.ch/~clapham/hrdoc/docs/ictrakayesu.htm>

[382] *Ibid.* at 688.

[383] See *Prosecutor v. Furundžija*, *supra* note 380 at 185.

[384] *Prosecutor v. Semanza* (May 15, 2003) Case No. ICTR 97-20-T (ICTY Trial Chamber). See further MacKinnon, Catharine A., "Defining Rape Internationally: A Comment on Akayesu" (2006) 44 *Columbia Journal of Transnational Law* 940.

[385] *Prosecutor v. Furundžija*, *supra* note 380 at 177.

[386] Catherine McKinnon, *supra* note 384 at 941.

surrounding context, or exploitation of relative position.'[387] The meaning of rape is not indeterminate, but falls to be determined by making a decision about context. The question becomes: which context will be chosen? Different tribunals will choose differently at different times, but the choice will always be made. The choice of context is the ordeal of undecidability that is the requirement of every legal decision.

Viewing judgment as a responsibility of responsiveness to a circumstance and not as obedience to a rule tells us something about what a judge is doing when deciding a case. Judging does not start with a rule and then fix something onto it, because the rule does not have meaning before the fixture, and that process of affixing meaning is governed by context. Rules arise from and speak to social relations that are always subject to change, and only have any particular meaning as a result of their consideration within a specific political and historical context. This context is never self-evident, but demands an act of delineation which implicates values and power. The question is not what the words mean, but which context will control the meaning of those words.

Indeterminacy is about a rule or text, abstract and *a priori,* but undecidability is about the context, particular and now. It is about the necessity of having to make a choice about context in interpretation. Once context is understood not as a corrective to autonomous meaning but as the only possible source for meaning, the necessity of interpretation becomes clear. Once this necessity of interpretation is seen as requiring a judgment in which justice is implicated, the question of justice is not an addendum to law but embedded in making the decision about law. Taken together, Derrida and Gödel leave us

[387] *Ibid.*

with the necessity of some moment of ethical reflection, some 'outside' to the rules which points to a truth not contained within them. They each reinforce the impossibility of avoiding the ethical moment by falling back on a fetishism of rules.

What Gödel proved in relation to mathematics – the non-closure of even the most formal systems, the necessary impingement of the truth beyond into the restricted domain of proof – also governs the act of interpretation and makes it ethical. Gödel's undecidable statements contaminate each formal mathematical system like the outside of context contaminates the systems of law and language. Deciding these statements – proving or disproving them - necessitates increasingly concentric frames, each of which is incomplete, in a non-stopping continuum. This process, like the irreducible opening of context in legal interpretation, is only terminable by a decision: a stop, an *arrêt*. A decision is the choice to stop interpreting. But any interpretation, legal or otherwise, could be an endless process, and it is impossible to know in advance when a particular interpretation will end – *that* is a choice dependent on our values and our ethics.

Conclusion

This essay has pursued three interconnected arguments, each nested in the next. The first argument uses Gödel's theorem to assert the necessary structural relationship of context to interpretation, and justice to law. The meta-argument is that the way that Gödel's Theorem – along with Wittgenstein's philosophy and Derrida's deconstruction – has been interpreted constitutes a dramatic example of the purposive and contextual nature of interpretation. And the meta-meta argument folds the meta-argument back on the first, by tracing how the interpretation of Gödel, Wittgenstein and Derrida suffered from the injustice they had warned us against: the disavowal of context.

I. Argument

As an internal critique of positivism, this essay establishes why law must have a relationship to justice other than in a purely normative way, or as a corrective to law's otherwise pure functioning. This essay has turned to Gödel's proof of the separation but co-implication of truth and proof in order to assert a parallel relationship between justice and law. Mathematical truth is separate from proof, as justice is separate from law. Law is calculable, like mathematical proofs, but justice is incalculable: it cannot be reduced to legal rules, just as mathematical truth cannot be reduced to mathematical proof. However, in turn, these structures of proof have a necessary relationship to truth, just as law has a necessary relationship to justice. Neither truth nor justice are captured or

exhausted by formal structures but those formal structures are our only means to achieve them.[388]

Justice requires us to think about law because justice cannot remain in the abstract, and has to be made real. Law requires us to think about justice because of its temporal aporia, the gap between promulgation and application that gives rise to the necessity of rendering judgment. Laws have no metaphysical existence and rules have no subsistent meaning, but are constituted by interpretation ending in judgment. Judgment is the ordeal of undecidability, the experience of the aporetic, impossible but necessary.[389] The impossibility of positivism's vision of law-as-rules is the impossibility of judgment without responsibility.

Chapter One situated Gödel's Theorem as a critique of the notion of a mathematical foundation, and identified the syntactic and semantic dimensions of the Theorem's metaphorical challenge to our understanding of formal legal systems. Chapter Two examined the context of Gödel's reception in the indeterminacy debate, and showed that the debate was based on a false dichotomy, since positivists and indeterminists alike fetishize the rule and ignore context. Chapter Three turned to Wittgenstein, whose insights into rules and context help to clarify what is wrong with rule-fetishism and a-contextual meaning. And Chapter Four turned to Derrida, who connects Gödel's mathematics and Wittgenstein's linguistic philosophy to law through the notion of

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[388] ' Justice is immanent to the law but this immanence means that law is unequal to itself – it contains within itself that which opens to a new law, a new politics, a new place or non-place (utopia). Justice lies within the law as a gap, a chasm... Both inside and outside, justice is the horizon against which the law is judged, both for its routine daily failings and for its forgetting of justice.' Douzinas & Gearey, *supra* note 71 at 76.

[389] Derrida, "Force of Law" *supra* note 12 at 947.

undecidability. Any legal decision must go through the ordeal of undecidable, it must take place in a space exceeding the calculable program of law, because of the aporia of time: the legality of any decision can only be confirmed afterwards. This ordeal of the undecidable is a necessary feature of law, but it is also the condition of justice, the radical openness to context and to ethical responsibility. This is why law and justice are co-implicated, and justice cannot be understood separately from the process of following rules.

II. Meta-argument

The meta-argument examined the misinterpretation and misappropriation of Gödel, Wittgenstein and Derrida within legal theory as a case study the necessary co-implication of meaning, context, and justice. What Gödel's Theorem tells us about the relationship between interpretation and context speaks directly to the context of its interpretation in legal theory, the indeterminacy debate. The radical dependence of meaning on context requires a careful examination of the context of this debate: its moral dimensions, its political ideals, its ethical commitments. The indeterminacy claim is the lapsed version of the positivist dream of law as a system of rules, and judicial decision-making as controlled by rules. Judicial decision-making thus necessarily involves the extraction of meaning from the fixed abode of words. It is this belief about meaning as residing in text that fuels the threat of indeterminacy, for law is only indeterminate if it can be 'determinate' in the first place, and the only determinacy that satisfies this positivist idea of law is the belief that judges can be, in the vast majority of instances controlled by words and words alone.

This idea of law and legal interpretation is fundamentally in error because it effects an abstraction of rules from only the contexts in which they can be understood. It is a rule-fetishism shared by the orthodox and the heretic alike. But Wittgenstein understood rule-following is a description rather than a diagnosis; he insisted that it only makes sense as part of a lived activity rather than as a cerebral exercise. Gödel, read via Wittgenstein, and through Derrida, offers an alternative vision of rule-following grounded in the necessity of judgment.

III. Meta-meta argument

The idea of doing justice – both in the legal sense of deciding a dispute and the wider sense of responsibility which calls us in our dealings with people and their texts – parallels the search for truth. And just as some decisions are more just than others, some interpretations are more truthful than others. Justice and truth are linked. Being misinterpreted is a kind of injustice, and it hurts. Gödel, Wittgenstein and Derrida all keenly felt the pain of being misunderstood.[390] This is because interpretation is a normative practice.

This is not a measure of failure, however: something that the indeterminacy advocates, anxious about the loss of recourse to a notion of truth, were unable to grasp. Rather, this separation is both a real and an ideal state of affairs, a description and a normative and ethically committed approach to legal interpretation. Justice should always exceed the law, just as the ethical responsibility to another will always exceed our ability to

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[390] Goldstein, *supra* note 3; Wittgenstein throughout his life grappled with the feeling that 'whatever he said would be liable to be misunderstood.' Monk, *supra* note 228 at 275. Wittgenstein's anxiety over this prospect is the reason that the *Philosophical Investigations* was not published in his lifetime: at 484. See generally Derrida, *Limited Inc. supra* note 11.

discharge it. The fact that interpretation is contextual is both a fact and a responsibility to be discharged; it cannot be ignored by pretending that the rules dictate a certain cause of action regardless of considerations of justice, as so many writers have demonstrated in relation to judge who claims 'the rule made me do it.' We have a responsibility not to misinterpret, and misinterpretation happens because of insufficient attention to context.

And once we draw the boundaries of context thus wider, a synthesis becomes possible. Once each author is understood in the purposes of the inquiry that they were addressing, their concerns can be seen to be parallel or complementary rather than unproductively blocked from each other: they become part of the same higher system. The first argument in this thesis examined Gödel's proof, Wittgenstein's views on rules, and Derrida's undecidability, as manifestations of a common concern with the limits of what can be formalized. The meta-argument examined their misinterpration and misappropriation within legal theory as a case study of just what they mean about meaning, context, and justice as necessarily co-implicated. While neither justice nor truth is available without recourse to context, as Gödel's Theorem and its reception show us, no context is static or complete, just richer and more inclusive than the last one. Another interpretation can always be offered, but nor is this new 'system' closed: it will always be possible to offer another yet-richer interpretation. Truth will always exceed proof, but truth is what spurs proof onwards. As Gödel's Theorem shows us, and legal positivism denies, the *is* and the *ought* are inextricably linked.

The link between interpretation and context is performative as well as constative in this thesis, which manifests the dilemma of being torn between the requirements of justice and the limitations of time, energy and resources. This is a dilemma felt by legal

practitioners, judges, legal actors, academics and all interpreters of text. It is a dilemma because of the demands that justice places on us, and these demands cannot be exorcised or discharged by the use of any rule that we give ourselves or that is given to us. While responding to the call of justice requires the infinite opening of context, it also necessitates the rendering of a decision. A choice of context is unavoidable. As a piece of interpretation, this thesis has to determine the limits of the context which it would investigate. The context has to be closed off, at a place which is inescapably political. And the boundaries that are drawn will exclude much that could have shed light on what is within it. Framing is necessary but limiting, and never complete. Yet the process of interpretation must stop, just as a legal decision must be rendered. We have, after all, limited ink.

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