SCHEDULE 1

Level of Anxiety Chart

(Scrignar, *Post Traumatic Stress Disorder*)

LEVEL	SYMPTOMS OF ANXIETY
Level 5 (panic)	Acute, intense, dysphoric symptoms include feeling of impending loss of physical and mental integrity, depersonalisation, derealisation, and incorrect encephalic statements, eg thoughts of impending doom, going crazy, going out of control, dying, or other thoughts of a cataclysmic nature. Panic attacks occur suddenly, without apparent warning, and are followed by severe anxiety symptoms. Autonomic hyperactivity is a prerequisite for the development of a panic attack.
Level 4 (severe)	Acute, intense symptoms include palpitations, dyspnea, hyperventilation, tightness or pain in the chest, trembling or shaking, sweating, dizziness, vomiting, fainting, tingling sensations in hands and feet, cold, clammy feeling, and hot flashes or flushing. Symptoms usually occur abruptly and unpredictably in the form of an anxiety attack.
Level 3 (moderate)	Chronic, moderate anxiety includes somatic symptoms usually affecting the gastrointestinal, cardiovascular, respiratory, genitourinary, or musculoskeletal systems. When persons are in this level for most of their waking state, they are suffering from a Generalized Anxiety Disorder.
Level 2 (mild)	Subclinical mild symptoms are characterised by statements from persons that they are uptight, edgy, high strung, tense, or nervous.
Level 1 (normal)	Nonsymptomatic.

THE INDETERMINACY PARADOX IN LAW

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Members of the Critical Legal Studies movement ("CLS") have advanced the thesis that legal language is intrinsically indeterminate. This article discusses the apparent contradiction between this contention and the fact that the outcome of many legal disputes can be predicted. Sections II and III provide an analysis of the indeterminacy thesis and place it in its theoretical and historical context. The role of the thesis in the overall CLS strategy, and in particular its use by CLS theorists to attack legal formalism, is explained. The authors argue that the thesis as presented by CLS scholars needs to be reformulated as a thesis about reasoning rather than rules. The place of conventions in legal reasoning plays a critical part in this reformulation. The article concludes by offering some brief remarks about the implications of a reformulated indeterminacy thesis for the claim that the law is predictable in many cases.

I. INTRODUCTION

Paradoxes have always proved useful in philosophy because unlike mere "teasers" they drive us deeper into thought, and as sources for reflection and analysis they have revealed important truths about the world.[1] In this paper we wish to consider a paradox that has been unintentionally generated by the Critical Legal Studies movement as part of its dramatic attack on orthodox

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1. On paradoxes in philosophy see W V Quine "The Ways of Paradox" in W V Quine *The Ways of Paradox and Other Essays* (New York: Random House, 1966) 3. On paradoxes in law, see N Luhman "The Third Question: The Creative Use of Paradoxes in Law and Legal History" (1988) 15 J L & Soc 153.

liberal accounts of law and legal reasoning.[2] The paradox simply stated is this: law according to CLS theorists is indeterminate because it allows any outcome to be justified. Nevertheless, actors within the legal system are able in many instances to make successful predictions about outcomes in given cases. To use the words of one CLS scholar "the idea that judicial decision-making is indeterminate, is rendered vulnerable by our experience of being able to speculate successfully about how at least some cases will come out".[3] This paper is devoted to grappling with that paradox and the insights it offers us into the nature of legal reasoning.

II. CRITICAL LEGAL STUDIES, FORMALISM AND THE INDETERMINACY THESIS

The indeterminacy thesis did not originate with CLS. It can be found in earlier jurisprudence and it surfaces in general philosophy.[4] Within jurisprudential thought, indeterminacy and uncertainty were favourite themes of the American Realists. Karl Llewellyn, for example, observed that the psychological concept of rationalisation suggested that in relation to any case there were always at least two sets of authoritative but contradictory premises available to decide it.[5] Jerome Frank in particular became the standard bearer of scepticism in relation to claims about the certainty and predictability of

2. A movement internal to law, CLS is something of a philosophical hybrid drawing on the theories of different philosophical traditions such as Marxism, the Critical Theory of the Frankfurt School and Post-Structuralism.

   On CLS in general, see A Hunt "The Theory of Critical Legal Studies" (1986) 6 Oxford J Legal Stud 1. See also M Kelman *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1989) and A C Hutchinson (ed) *Critical Legal Studies* (Totowa, NJ: Rowman Littlefield, 1989). CLS is not a Marxist movement and in fact many CLS writers spend time attacking some aspect of classical or scientific Marxism. See, for example, R M Unger *Social Theory: Its Situation and Its Task* (Cambridge: Cambridge, 1987); R W Gordon "Critical Legal Histories" (1984) 36 Stan L Rev 57; D Kairys "Introduction" in D Kairys (ed) *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1982).
3. C Dalton "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 Yale L J 997, 1009.
4. The nature of rules and their indeterminate and context- dependent nature received a profound treatment by Ludwig Wittgenstein in *Philosophical Investigations* (trans G E M Anscombe) (Oxford: Basil Blackwell, 1958).
5. K N Llewellyn "Some Realism about Realism - Responding to Dean Pound" (1931) 44 Harv L Rev 1222, 1230-1231, 1238-1239.

law.[6] In English jurisprudence, H L A Hart, working in a tradition which stands in some tension with CLS, observed in 1961 that legal rules were indeterminate and that this was in fact a positive virtue because it allowed the legal system to cope with future social contingencies.[7] Before Hart, Hans Kelsen had commented on the indefiniteness of legal norms.[8]

Although CLS scholars have not given the indeterminacy thesis its start in legal philosophy they remain the most active exemplars of the thesis.[9] While the movement contains differences of opinion on issues such as the role of ideology[10] and the nature of personality,[11] on the question of indeterminacy it seems to speak with one voice. In the words of two members:

> All the Critical scholars unite in denying the rational determinacy of legal reasoning ... CLSers ... refuse to hedge on the indeterminacy of the legal order.[12]

Why should this be so? The immediate reason is that the indeterminacy thesis is an indispensable weapon in the assault on legal formalism.

6. J Frank *Courts on Trial: Myth and Reality in American Justice* (Princeton, NJ: Princeton University Press, 1949). Frank's "fact scepticism", which gained him notoriety as a sceptic, reveals (in our view) a level-headed approach to the way that the facts of a dispute are characterised in a court - an approach which would strike a chord with many advocates. One interesting consequence of Frank's insistence on "fact scepticism" was that it led him to question the assumption, which remains axiomatic even today within much of legal writing, that outcomes within the legal system are predictable. Frank vehemently denied the predictability of the legal system basically because the subjectivities inherent in the fact finding process made the task of successful prediction all but impossible. Frank did not deny that once the facts were known rules could operate to produce determinate outcomes. The problem was, however, in predicting what version of the facts a court would settle on.
7. H L A Hart *The Concept of Law* (Oxford: Clarendon Press, 1961) Ch 7. In a famous exchange with Hart, Lon Fuller argued that indeterminacy went further than Hart's category of penumbral cases. See H L A Hart "Positivism and the Separation of Law and Morals" (1958) 71 Harv L Rev 593 and L L Fuller "Positivism and Fidelity to Law - A Reply to Professor Hart" (1958) 71 Harv L Rev 630, 661-669.
8. H Kelsen *Pure Theory of Law* (trans M Knight) (Berkeley: University of California Press, 1967).
9. Indeterminacy concerns are voiced by persons outside of the CLS movement. See, for example, R N Moles *Definition and Rules in Legal Theory: A Reassessment of H L A Hart and the Positivist Tradition* (Oxford: Basil Blackwell, 1987) Ch 5.
10. Compare Kairys supra n 2 with P Gabels "Book Review: Taking Rights Seriously. By Ronald Dworkin" (1977) 91 Harv L Rev 302, 313 (fn 18).
11. For a criticism of Unger's views on personality see A C Hutchinson and P J Monahan "The 'Rights' Stuff: Roberto Unger and Beyond" (1984) 62 Tex L Rev 1477.
12. A C Hutchinson and P J Monahan "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 Stan L Rev 199, 206, 207.

At first glance, the CLS attack on formalism seems a classic straw man stratagem since in many parts of the common law world legal formalism is a fashion that is losing supporters, or so it seems.[13] But once the CLS definition of formalism is understood their attack emerges as a genuine exercise. For CLS, formalism is defined extremely broadly. Tushnet, for example, says:

> Formalism, to critical legal theorists, claims that some types of analysis provide a solution to problems of legal choice, policy choice, or social analysis by limiting the range of pure choice within which the analyst - judge, policy-maker, social scientist - operates.[14]

Similarly, Unger describes formalism as "a belief in the possibility of a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life".[15] So formalism, to CLS, is not simply the belief that law is a matter of deduction from some given class of legal rules.[16] CLS is prepared to take on a much larger enemy. 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. Few - if any - can be said to escape the embrace of this type of formalism.

There are several reasons why CLS is willing to deploy this wide concept of formalism. One is that American legal scholarship, unlike its Australian counterpart, has had several decades to absorb the lessons of Legal Realism and is therefore comfortable with a model of legal reasoning which regularly utilises social policies, standards and values in its operation. Accusing this scholarship of deductive formalism is futile, for encapsulated in the cry that "everybody is a Realist now" is a recognition that legal conclusions cannot be explained or justified on deductive grounds alone. On the other hand, the 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

13. See Sir Anthony Mason QC "Future Directions in Australian Law" (1987) 13 Mon L R 149. Sir Robin Cooke, the President of the New Zealand Court of Appeal, noted in 1987 that for an appellate judge "hearing cases day by day it seems more than a decade since the pretence of legal formalism was abandoned....": R Cooke "The New Zealand National Legal Identity" (1987) 3 Canta L R 171.
14. M V Tushnet "Perspectives on Critical Legal Studies - Introduction" (1984) 52 Geo Wash L Rev 239.
15. R M Unger "The Critical Legal Studies Movement" (1983) 96 Harv L Rev 563, 564.
16. This was described by Unger as an anomalous limiting case: ibid 564.

disciplines which masquerade as normatively neutral while actually implementing definite moral visions of community.[17]

In turn, the assault on formalism is part of a larger program which involves a critique and replacement of those political philosophies which currently serve to legitimate the liberal state and are said to depend, in some sense or other, on the existence of formalism.[18] Thus, for example, a central jurisprudential and political issue in a liberal democracy is that of unelected judges imposing upon others their own ideas of how things should be. Part of the traditional liberal response to the coercive use of power by the state against individuals has been to invoke the rule of law. Central to this concept is the idea that persons should be protected by promulgated law administered by a neutral and independent judiciary.[19] CLS theorists argue, rightly in our view, that formalism (in the broad sense) provides a crucial support for the rule of law because it purports to deliver methods which ensure that judicial law creation does not fall into caprice or crude subjectivity. Formalism, in essence, assumes that legal rules have the capacity to direct and limit judicial creativity. If that capacity is in doubt, as it may be where some large set of justifications becomes possible, then so must the legitimacy of judging and the rule of law generally. To put it another way, formalism attempts to preserve a distance between law and purely political or moral discourse whilst the whole CLS endeavour is to show that gap to be an illusion. In this way it is hoped that law can be seen in a different light, new visions of community will become imaginable and the plasticity of social reality acknowledged.[20]

17. For CLS criticisms of Realist-inspired policy approaches, see J Boyle "The Politics of Reason: Critical Legal Theory and Local Social Thought" (1985) 133 U Pa L Rev 685, 691-708. Kelman makes the point that CLS scholars see a major part of their enterprise being an attack on economically inspired policy analyses of law: Kelman supra n 2, 12.
18. The CLS program is lucidly stated by Tushnet supra n 14. See also R W Gordon "Critical Legal Studies" (1986) 10 Legal Studies Forum 335.
19. F A Hayek *The Road to Serfdom* (London: George Routledge & Sons, 1944) 54.
20. No-one can be very confident about the ultimate goals of CLS but this is our interpretation of Roberto Unger's work.

III. THE INDETERMINACY THESIS

The indeterminacy thesis, then, is vital to the CLS attack on contemporary reconstituted formalism. Yet a striking feature of the claim is that it comes in many shapes and sizes.[21] Sometimes the claim of indeterminacy is made in relation to legal rules[22] while at other times it appears as a conclusion about legal reasoning.[23] Yet on other occasions it is used to characterise only a particular area of conventional scholarship such as labour law or constitutional law.[24] As Singer (not one of the more modest indeterminacy theorists) admits "[e]veryone is confused about what Critical Legal Scholars mean when we say that law or rights or legal theory is indeterminate".[25]

To make progress we concentrate here on the claim at its most extreme: what Lawrence Solum has described as the strong indeterminacy thesis and dismissed as dogma.[26] This is the view that legal doctrine is *never* able to provide a determinate answer with respect to a given fact situation. There is no denying that some CLS writers seem committed to this apparently wild and vulnerable position.[27] Solum says that the strong indeterminacy thesis can be refuted by an argument based on easy cases. There are, he suggests, cases where doctrine does provide a determinate answer. Walking one's dog does not violate antitrust laws and driving past a supermarket does not cause a legal agreement to arise between the supermarket-owner and the driver. In other words, "it is not difficult to imagine easy cases where a particular action clearly does not violate any legal rule".[28]

21. D Kennedy "Spring Break" (1985) 63 Tex L Rev 1377, 1418-1419 lists six indeterminacy positions which he claims can be found in the literature.
22. Id "Form and Substance in Private Law Adjudication" (1976) 89 Harv L Rev 1685, 1701.
23. D Kairys "Law and Politics" (1984) 52 Geo Wash L Rev 243.
24. "Note: Subjects of Bargaining Under the NLRA and the Limits of Liberal Political Imagination" (1983) 97 Harv L Rev 475; M Tushnet "Critical Legal Studies and Constitutional Law: An Essay in Deconstruction" (1984) 36 Stanford L Rev 623.
25. W J Singer "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 Yale LJ 1, 10.
26. L B Solum "On the Indeterminacy Crisis: Critiquing Critical Dogma" (1987) 54 U Chi L Rev 462.
27. Ibid, 471.
28. Ibid, 472.

If Solum's easy cases argument works then most of CLS writing is based on a false premise.[29] One might have thought that the seductive simplicity of the argument from easy cases would have lured Solum away from any further analysis of the strong indeterminacy thesis but, to his credit, he considers three possible defences for the thesis: *internal scepticism*, *external scepticism* and *epiphenomenalism*. He concludes that none of these defences work. For present purposes we shall concentrate on the defence of internal scepticism since it deepens our understanding of the way in which the concept of indeterminacy operates in law and provides a resolution to the paradox we identified at the beginning of this article.

The defence of strong indeterminacy through *internal scepticism* consists of taking an easy case and showing that it is really a hard case - a case which could have plausibly come out differently. (The defence is *internal* because it consists of arguments that are internal to the practice of law.) The well-known example of this which has been used by CLS and others is the United States constitutional rule that the President must be at least 35 years old.[30] Whilst this appears to be an unambiguous rule, the internal sceptic can argue that it only represents the principle that the President should be a mature person. A court could therefore rule in favour of a mature 34 year old. In effect, there are no easy cases and the strong thesis survives.

Solum has two responses. The first is that some rules, such as the presidential age rule, might be *underdeterminate*, in that they do not dictate one outcome alone, but that does not make them indeterminate. The difference between "underdeterminacy" and indeterminacy is captured by the notions of unbound and rule-guided. Rules like the Presidential age rule do at least place constraints on outcomes. The election of a twenty-three year-old would not, for example, be upheld. In short it does not follow from the fact that an easy case is not determinate that it is indeterminate - it may well be "underdeterminate". Solum's second response is that some easy cases must be determinate because there exist within the legal community standards of

29. Solum divides the indeterminacy thesis into strong and weak variants. We have no quarrel with his analysis and rejection of the weak version. That version holds that all important cases are indeterminate. Unfortunately, as Solum documents, there has been no attempt by CLS writers who advance the weak indeterminacy thesis to define independent criteria for what constitutes an important case. "Important", on close analysis, turns out to mean indeterminate, with the consequence that the weak indeterminacy thesis is the claim that indeterminate cases are indeterminate. This is undoubtedly true but holds little terror: ibid, 488-490.
30. G A Spann "Deconstructing the Legislative Veto" (1984) 68 Minn L Rev 473, 532-533.

acceptable legal argument. While it is possible to imagine some kind of a legal argument leading to the conclusion that driving past a supermarket creates an agreement between the driver and the owner of the supermarket, it is not an argument which would satisfy the standards of acceptable argument within the legal community. These standards of argument in fact make certain easy cases determinate.[31]

Much of the power of Solum's analysis derives from his failure to clarify an ambiguity in his presentation of the indeterminacy thesis, a failure which he has inherited from similarly loose and ambiguous presentations by CLS theorists. Sometimes the indeterminacy thesis is presented as a claim about the nature of legal reasoning and at other times as a claim about the nature of legal doctrine and, in particular, legal rules. Solum, in developing his analysis of the strong indeterminacy thesis, presents it as a thesis about legal doctrine, and rules in particular. His argument from easy cases is an argument based on the determinacy of certain rules. Similarly, his concept of "underdeterminacy" is targeted at legal rules such as the presidential age rule which, while not determining an outcome, certainly place constraints on possible outcomes. On the other hand, his "standards of legal argument" response is directed towards legal reasoning.

Clearly, Solum's analysis has placed a large dent, if not a gaping hole, into claims about strong rule indeterminacy thesis. However, a strong indeterminacy thesis which claims that legal *reasoning* is indeterminate is not weakened by an argument showing that some rules are determinate. We use legal reasoning in the broad sense to include psychological processes as well as the traditional justificatory techniques of law. Even if one admits to the existence of determinate legal rules within the legal system it does not follow that one is committed to the view that legal reasoning is determinate. There needs to be more than an easy cases argument before an indeterminacy thesis about legal reasoning can be considered to have been refuted. Our point is that rule determinacy does not percolate up to produce determinacy of reasoning. An example in support of our claim is the case where a number of judges agree

31. There is empirical work which corroborates Solum's points. Alan Paterson's study of members of the House of Lords shows that while the Law Lords are instrumental in establishing acceptable standards of argument they themselves are influenced by the standards which they perceive to exist within the legal community: A Paterson *The Law Lords* (London: Macmillan, 1982). The notion also lends support to the notion of underdeterminacy. While the majority of Law Lords surveyed believed that they had a discretion in deciding a case it is clear that they believed that this discretion was bounded in significant ways by the rules, principles and policies of the law.

that a particular legal rule operates to determine a conclusion but their individual reasoning is different.

Surely, it might be said, there are cases in which there is only one path to a conclusion that a legal rule or doctrine operates to determine a particular outcome - that is, some legal problems can only be reasoned in one way. Whether that is true is an empirical matter. This is an important point, since the strong indeterminacy thesis recast as a claim about the nature of legal reasoning is no longer refutable in the way that the indeterminacy thesis concerning rules/doctrine might turn out to be refutable by the argument from easy cases. But what is obscured by this analysis is that the indeterminacy thesis is a higher order theory about the nature of the process which gives rise to rules and doctrine and not an exclusive and universal claim about the rules spawned by that process.

This brings us directly to Solum's second argument against internal scepticism - that there exist in the legal community standards of acceptable legal argument or reasoning that render cases determinate.[32] Such an argument might be described as conventionalism. Writing from a perspective obviously hostile to CLS, Richard Posner has identified various efforts that are currently being made to refurbish the idea that law is an autonomous discipline and should largely be left to lawyers trained in it.[33] Posner's description of these efforts as "conventionalism" is drawn from their common denominator of protecting the independent tradition of law. The problem of indeterminacy is dealt with by conventionalism through ideas like interpretive communities:

> Building on Stanley Fish's idea (before him Wittgenstein's and, earlier still, Peirce's) of 'interpretive communities', the conventionalist seeks to reclaim legal interpretation from indeterminacy by arguing that while no text may possess objective meaning in itself, the community of lawyers, to which constitutional and statutory texts are addressed, can impose determinate meanings on these texts by virtue of the shared outlook of the community's members. Owen Fiss is the best known advocate of this approach.[34]

If we turn to Fiss (who is certainly not a CLS exponent) we see the idea that interpretive communities such as the legal community define, constitute and confer authority upon "disciplining rules".[35] These rules constrain the kind of decision that a judge could make. Examples of disciplinary rules are

32. Solum supra n 26, 475-476.
33. R A Posner "Conventionalism: The Key to Law as an Autonomous Discipline?" (1988) 38 U Toronto LJ 333.
34. Ibid, 339.
35. O M Fiss "Comment: Conventionalism" (1985) 58 S Calif L Rev 177, 184-185.

rules that require attention to precedent or the Fourteenth Amendment or which preclude a judge favouring one side over the other simply on the grounds of race. These seem to be the sort of thing that Solum is referring to by "standards of acceptable argument". More recently, Fiss has acknowledged that he has been making assumptions about the actual workings of the American legal system and its ability to yield a body of disciplining rules which do constrain judges and provide standards for evaluating their work. He now wonders whether this assumption has been a mistake.[36] Nevertheless, he says that the answer is an empirical one about the operation of the American legal system. This corresponds with our earlier claim that a reformulated indeterminacy thesis was something amenable to testing. Whether legal reasoning is indeterminate is not a question that can be answered through armchair analysis alone.

Clearly Fiss' notion of disciplining rules and Solum's reference to standards of argument have some affinity with each other. There is little doubt that in the common law system the doctrines of *stare decisis* and precedent, the concept of *ratio decidendi*, and the rules or principles of interpretation of documents and statutes form operational tools through which the legal community appears able to standardise legal arguments. And standardisation is not mediated through these means alone. There are other significant factors that contribute such as legal training, the influence of peers and legal culture in general.

One factor to bear in mind about these tools of legal reasoning is that they are linguistic devices which suffer from all kinds of ambiguities and indeterminacies themselves. This argument has been used by Stanley Fish, the literary critic who vivified or revived the notion of "interpretive communities" and then applied it to law. He has questioned how the authority of a so-called disciplining rule can be maintained when the rule itself is disputed.[37]

Such an argument is hardly novel. The classical theory of *ratio decidendi*, for example, postulates that there is one correct *ratio* of a case[38] yet as Julius Stone demonstrated some years ago this is an impossible claim to sustain using the methods which are supposedly meant to lead the user to the correct

36. O M Fiss "The Death of the Law?" (1987) 72 Cornell L Rev 1, 11-12.
37. S Fish "Fish v Fiss" (1984) 36 Stan L Rev 1325.
38. A good discussion of the orthodox view is to be found in R Cross *Precedent in English Law* 3rd edn (Oxford: Clarendon Press, 1977) Ch 2.

ratio.[39] A method based on establishing the material facts of the case faces the difficulty that material facts can be stated at varying levels of generality, each level producing the possibility of a different *ratio*. This is by no means Stone's only argument against the possibility of establishing a single *ratio* fo a case, but it suffices here. His general conclusion was that the tools of lega reasoning, like precedent and *ratio decidendi*, far from *limiting* the pathway of reasoning, actually offer the judiciary "leeways of choice".

Even if the presence of leeways of choice within the legal system is conceded, it might nevertheless be argued that there remain cases which could only be reasoned in one way: there are still cases whose *rationes* everybody agrees upon. A natural inference from this might be a claim that legal reasoning *does* in certain cases lead to determinate outcomes. Such an argument, however, misses the point about the indeterminacy thesis as a thesis about the nature of legal reasoning. The fact that members of the legal community are able to arrive at an "inter-subjective agreement" as to the proper outcome of a case does not establish the determinacy of legal reasoning. Rather, it merely illustrates that indeterminacies in the form of alternative pathways of reasoning can be papered over through common agreement. The problem, assuming one sees it as a problem, is that such agreements are temporary affairs. New generations of lawyers equipped with different ideals and moralities, trained in different ways and reacting to different social and political conditions may reason about so-called easy cases or settled cases in very different ways.

The failure of CLS scholars to realise in a consistent way that indeterminacy is a property of legal *reasoning* rather than rules may have led them to overlook a useful argument - namely, that the manifestation of indeterminacy varies from historical period to historical period and from one part of the lega system to another. An illustration of this claim can be seen in the history o negligence. The conclusion of the majority in *Donoghue v Stevenson*[40] tha a manufacturer owed a duty of care to consumers of its product was a conclusion of law which could actually have been reached at least in the second half of the nineteenth century, since the concepts central to modern negligence such as the standard of the reasonable man and the duty of care

39. J Stone *Precedent and Law: Dynamics of Common Law Growth* (Sydney: Butterworths 1985) Ch 7 and *Legal System and Lawyers' Reasoning* (Sydney: Maitland Publications 1964).
40. [1932] AC 562.

were by then available in the legal materials and had been available in embryonic form for some time.[41]

Fleming's explanation for the comparatively late development of negligence is the familiar one.[42] The restricted liability of manufacturers in the nineteenth century was a product of values and social policies which sought, among other things, the development of a strong industry through limited individual responsibility for harmful action. Like more radical scholars, Fleming thinks the answer lies in the ideology of the period. The problem with this answer is that it asserts a possibility without explaining *how* the indeterminacies inherent in concepts such as reasonableness and duty of care, and the availability of those indeterminacies to construct different legal arguments for liability, were largely screened out by the legal profession as part of their internal way of engaging in legal reasoning. Surely a better explanation is that the reasoning conventions of the time, informed by prevailing ideologies such as the limited role for the public sphere to enter into the private, did not allow the rules to be operated in certain ways. One notable deviant was the Master of the Rolls in 1883. In *Heaven v Pender*[43] Lord Justice Brett MR attempted to use inductive logic to extract a general principle of negligence liability from the existing case law. His brethren expressly dissented from this part of the judgment but not, we argue, because they specifically thought through all the consequences that such a principle might entail for industry, nor because they could fault the logic, but because in a more diffuse way it offended against their view of the world and sense of how law should be used.[44] Lord Justice Brett was not reasoning conventionally.

Our argument, then, is that conventions help to fix the application of rules and determine their scope of application. Conventions are seen stipulatively here as types of rules which are used to interpret or fix the meaning of other rules. The idea of using rules to interpret others is a familiar one for lawyers. Yet conventions as a type of rule carry some special features.

First, conventions are not always articulated. When they are, it is usually in the form of restatement rather than explanation. So, for example, a convention might exist that one applies the literal rule of interpretation in preference to the golden rule, or one uses the *ejusdem generis* rule in only a

41. See J G Fleming *The Law of Torts* 7th edn (Sydney: Law Book Co, 1987) 97, 125.
42. Ibid, 94.
43. (1883) 11 QBD 503.
44. Brett MR, later Lord Esher MR, found an ally in A L Smith LJ in *Le Lievre and Dennes v Gould* [1893] 1 QB 491, 504.

limited number of cases. In other words, there can be a convention about when one uses a particular rule to interpret another rule. By way of illustration, the *ejusdem generis* rule is potentially applicable in many instances of statutory interpretation and yet it is not often used. Appellate courts have stressed that the rule is a secondary guide to finding the meaning of a statute.[45] Clearly the limited application of the rule is not a matter of logic, since it could be applied in algorithmic fashion whenever a provision contained a genus followed by general words. It is convention which determines its secondary status. Nevertheless, if the convention regarding its use is well understood by interpreters of legislation, it can be a useful one in obtaining determinate results.

Another characteristic feature of conventions is that they are not readily apparent to outsiders or inexperienced rule users. For example, an outsider might immediately grasp the *ejusdem generis* rule on the basis of some set of examples. Despite having understood it, however, he or she might go on to apply it in ways that appal more experienced users. Legal education (and the early years of practice) can be seen as an induction process whereby the student absorbs certain conventions and, with luck, learns not to appal instructors as frequently as before.[46] This leads us to another feature of conventions: they can exist in such a diffuse form that they are not consciously recognised by the user, but are still correctly applied by the user in the same way that a person can utter grammatically correct sentences even though unable to describe accurately the rules of grammar.

Finally, conventions are internal to some particular community and are in part constitutive of that community.[47] This seems a statement of the obvious and yet the explanatory power of conventions as internal devices for regulating the nature of legal reasoning within a given legal community is often overlooked. Conventions within a legal system tend not to change overnight

45. Lord Diplock in *Quazi v Quazi* [1980] AC 744, 807 refers to "a misunderstanding of that well-known rule of construction that is regrettably common".
46. It is interesting that a well-known introductory student text on legal reasoning invites students to study a series of cases on the development of negligence with the following advice: "By studying the cases to understand the judges' techniques and patterns of reasoning and by trying to predict each following step in the development of the law, you will find that you gradually acquire the skills and techniques yourself": M D Smith and K S Pose *Maher, Waller and Derham's Legal Process: Commentary and Materials* 5th edn (Sydney: Law Book Co, 1988) 168.
47. The idea comes from a notion which Wittgenstein suggested and has since become popular within much philosophical and linguistic writing, namely that "the speaking of language is part of an activity, or form of life". See Wittgenstein supra n 4, 23.

and because of the stabilising role that they play, agents within the system all have a reason to maintain and reproduce them (wittingly or unwittingly).

The indeterminacy thesis, then, needs to be a thesis which embraces the way in which actors within some given system of rules can achieve determinate outcomes utilising those rules. The really interesting question about indeterminacy is how the legal system is able to cure potential indeterminacies, or at least keep them down to a tolerable minimum. Once the indeterminacy thesis is restructured in this way a number of interesting hypotheses suggest themselves. The conventions used to paper over the indeterminacies of legal reasoning might vary not only from legal system to legal system but also from court to court within the same legal system and from one subject area of law to another. The thesis also suggests that, rather than there being one type or model of reasoning, there are probably several kinds of legal reasoning instantiated by sets of conventions particular to discrete legal communities. Finally, a model of rule-following built around this indeterminacy thesis would show that rule-following, particularly in times of dissent over core values, is far more precarious than might be first thought and crucially dependent on the interaction of agents using the rules. Such an account of legal reasoning seems to us to provide a more accurate picture of legal change than that offered by formalism, which because of its emphasis on rules and logic, obscures the communal and highly localised nature of rule following.

IV. CONCLUSION

We began with a paradox: indeterminacy versus apparent predictability. Has the paradox taught us anything? Perhaps the first insight the paradox offers us is that an indeterminacy thesis should be a thesis which is primarily about legal reasoning. We have suggested that legal reasoning can produce determinate outcomes because of the operation of conventions. While conventions remain intact legal reasoning produces determinate, predictable outcomes because the way in which the rules are to be operated are understood by all. When conventions are broken or changed the affected part of the legal system moves into a period of indeterminacy. On our view, indeterminacy is not, as some CLS scholars would have it, a predicate we can always ascribe to law irrespective of time and place. Law does enjoy periods and sites of determinacy and it is for this reason that indeterminacy and predictability can coexist. This coexistence is made possible by the presence of conventions in legal reasoning.

Clearly the role and nature of conventions need further explanation, drawing both on the resources of sociology and psychology as well modern

analytical accounts of the nature of rule-following.[48] Nevertheless, our view is that further work will return a profit. For example, it may help us to understand the links between ideology and routine decision-making within the legal system. Also, legal reasoning may emerge as a highly local and territorial enterprise rather than merely part of the universals so keenly sought by legal philosophers.

The paradox is also instructive in another way. The paradox arises because of our capacity, so it is said, to predict the outcome of cases, or at least some of them. One way of dealing with the paradox is to question the claim of indeterminacy. Equally, one might direct the analysis towards the predictability claim. An important and neglected question is just what level of predictive success do we enjoy. Although the predictability claim is used to attack the CLS position on indeterminacy, rarely is it accompanied by a discussion of what constitutes a successful prediction of a legal outcome, how often legal players make predictions, in what circumstances and their success rates. The claim of predictability may simply amount to the claim that some outcomes are predictable or it may be the stronger and more important claim that legal agents enjoy a high level of predictive success. The former is not inconsistent with the indeterminacy hypothesis since even random events can sometimes be predicted. The latter does cast doubt on the claim of indeterminacy but we need more evidence for its truth than we currently have.

48. S A Kripke *Wittgenstein on Rules and Private Language: An Elementary Exposition* (Oxford: Basil Blackwell, 1982). For an example of how deconstructionist techniques might be used to identify conventions, see S Parker and P Drahos "Critical Contract Law in Australia" (1990) 3 J Cont L 30; S Parker and P Drahos "Closer to a Critical Family Law" (1990) 4 Aust. J Fam L 159.