### legal code

#### Legal coding shapes the outcome of the plan and link-turns the case --- it shuts down politicization and stops broader societal transformation

Baron 1 (Jane B., Professor of Law – Temple University School of Law, “The Politics of Indeterminacy: The Undersell: An Essay on Duncan Kennedy's a Critique of Adjudication”, March, 22 Cardozo L. Rev. 797, Lexis)

Of course, sometimes legal reasoning produces the "right" result - more precisely, the result that someone who disapproves of all the cases just cited would favor. Brown v. Board of Education [8](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n8" \t "_self) is a gold standard or reference "good" result, although there are others. Think, for instance, of the cases that impose an implied warranty of habitability in landlord-tenant law [9](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n9" \t "_self) or those that impose constructive trusts in cases involving obvious misconduct that nonetheless does not amount to fraud. [10](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n10" \t "_self) Legal reasoning also produces these cases, and the rhetoric of the opinions will be just as necessitarian as in the "bad result" cases. [11](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n11" \t "_self) Well, is "the law" depressing, as in the bad cases, [12](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n12" \t "_self) or exciting, as in the good ones? [13](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n13" \t "_self) The answer, of course, is both and neither. What if it could be demonstrated that judicial talk about certain results being necessary or required is, well, just talk? [14](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n14" \t "_self) What if traditional doctrinal arguments have a predictable structure, oscillating between rule and counterrule, rule and exception, letter and spirit, and so forth? [15](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n15" \t "_self) What if "policy" arguments have a similar susceptibility to support a wide range of results in a given case and are thus as inconclusive as any of the more doctrinal argumentative strategies? [16](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n16" \t "_self) If all this were true, then neither the rules nor the policies would dictate case outcomes; one might say that there is a lot of play in the joints of legal rules, or even that there are only joints. "The law" is capable of producing results of all kinds, "good" ones and "bad" ones and ones about which a thoughtful person doesn't know how to feel, because, at least in [\*800] the abstract, the rules permit all of them and exclude none of them. One might be tempted to say that if all of what I've just described is true, then the law is indeterminate. One might even see this indeterminacy as a good thing. The "sell" of indeterminacy is that things do not have to be as they currently are. No case has to be decided one way rather than another, the judicial rhetoric of necessity notwithstanding. Change, then, is possible - more possible than it might have seemed if we went on blindly believing that, say, poverty cannot be considered a "suspect class" for Equal Protection purposes, [17](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n17" \t "_self) or that, because the law recognizes the concept of consideration, dramatically unequal bargains must be enforced. [18](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n18" \t "_self) Yet all this might be too simple. Perhaps in the abstract it is true that law is indeterminate, but judges do not apply law in the abstract. Rather, they work with law in a particular place (America), at a specific time (fin de siecle), and under certain constraints (such as fidelity to ideals associated with the "rule of law"). There are times when a logically plausible argument will predictably not carry the day even though it is a thoroughly "legal" argument that employs accepted techniques of doctrinal manipulation. If the court recently decided a case that it has determined is exactly like the one now before it, an advocate is unlikely to be able to persuade the court that it should rule differently in the present case. First, it will probably seem too soon for the court to rethink its last decision (even though courts revisit and overrule old decisions all the time, so it is not logically an error to suggest that the court do so here). Further the advocate may be unable to convince the court that today's case is really unlike yesterday's (even though courts often distinguish very similar cases from one another). Conventions of legal argumentation and institutional factors may limit the range of possible results even where, theoretically, any outcome is logically and legally imaginable. [19](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n19" \t "_self) So maybe the law is not indeterminate, or at least not "completely" indeterminate. Or maybe it doesn't matter. According to Kennedy, "the question "does this question of law have a determinate answer?' is ... meaningless if it is a question about the question of law, rather than a question about the interaction between a particular, situated historical actor and this particular question of law situated [\*801] in this particular field." [20](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n20" \t "_self) But that's okay; in terms of change, it doesn't matter whether there is a lot or a little indeterminacy because the possibility or likelihood of change is not in fact a function of the extent of legal determinacy. It is instead a more complex function of how "committed" the liberal (or, alas, the conservative) wing of the judiciary is to doing ideological work with law, the extent of judicial creativity at any given moment, and the attitudes produced by the legal culture then prevailing. [21](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n21" \t "_self) The indeterminacy of rules may mean something (the sell), but not what you hoped (the undersell). Part of what leads Kennedy to the undersell is history. The very same arguments used by the realists to undermine Lochner-era conservative holdings had the potential to be and ultimately were used against New Deal reforms. Nothing prevents those arguments from now being used to undermine decisions cherished by liberals - Miranda v. Arizona, [22](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n22" \t "_self) Roe v. Wade, [23](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n23" \t "_self) and so forth. Even the gold-standard Brown decision is subject to the indeterminacy critique, for as Herbert Wechsler argued, the right of free association could have supported a ruling upholding segregation. [24](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n24" \t "_self) (Herbert Wechsler as a proto-crit? Oh, never mind.) Whatever consequences indeterminacy has for liberals, it holds equally for conservatives. Viral critique from the right effectively cancels out or neutralizes viral critique from the left, leaving the two sides in equipoise. All of this proves that indeterminacy has only fortuitous and unpredictable political consequences. That is to say, indeterminacy provides no knock-out punch for liberals battling conservatives. Does it follow then that indeterminacy has no consequences whatsoever, or none that the left ought to care about? Well, putting the conflict between liberalism and conservatism aside, what kind of consequences could indeterminacy have? One set of consequences - the consequences with which we have thus far been dealing - has to do with results. To see this, let us return to the simple consideration case with which we began. It seems perfectly plausible that a judge who accepts at least the possibility of indeterminacy, i.e., a judge who consistently finds play in the joints of law, will, if he thinks the situation is unfair, [\*802] search for the exception to what has been offered as the consideration "rule" or for a fact that might distinguish this case from the precedent that seems to require that the agreement be upheld. This is the sell: "See, folks? The judge who is not deluded by phantoms of legal compulsion can produce decisions that at least plausibly advance causes such as equality, distributional fairness, and so forth." [25](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n25" \t "_self) But of course nothing guarantees that the judge will see the drachma-dollar deal as unfair, [26](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n26" \t "_self) even if he thinks of himself as a liberal, because "liberalism" is as indeterminate as a source of concrete principles as any other concept (consideration, the corporation, the very idea of a conspiracy). Or the judge might be what Kennedy calls a difference splitter or bipolar. Most significantly, the judge might be a conservative who thinks the deal is just fine (though he is not compelled by his conservatism to think so, any more than the liberal judge's liberalism compels him to find the deal unfair). A conservative judge who thinks the deal should be upheld may also believe that there is a lot of play in the joints, but may choose not to use it. As long as he does not ignore obvious arguments about possible exceptions to the consideration rule or distinctions between this case and the apparently applicable precedent, the conservative judge can make a convincing argument for enforcing the agreement. [27](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n27" \t "_self) Thus, indeterminacy guarantees nothing in the way of results. For this reason, Kennedy asserts, "there is nothing intrinsically liberal or conservative about the [indeterminacy] critique." [28](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n28" \t "_self) Of course not. Had the prevailing ideas about the concept of consideration or the currently existing precedent-favored nonenforcement of the drachma-dollar deal, the judge who thought the deal should be upheld could work exactly as the liberal judge did to get around the "bad" law, by seeking exceptions or distinctions. This is the undersell again, reminding us - as the historical exegesis has taught us - that today's "good" decisions are as easily undone as yesterday's "bad" ones. A conservative judiciary that is facile with the viral critique will quickly emasculate liberal-leaning legislative initiatives and eviscerate liberal common law. But consider the possibility that indeterminacy might have a different set of consequences, consequences independent of [\*803] results. Those consequences have to do with how we speak about certain problems. [29](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n29" \t "_self) Suppose one were to recount the facts of the drachma-dollar transaction to a person who is not a lawyer. That person might think the outcome very unfortunate; he might alternatively believe that the plaintiff got exactly what she deserved; he might want to know more facts before forming a conclusion about the fairness of the transaction; he may not even be at all interested in the outcome. Importantly, this person is unlikely to say anything about "consideration." Should we care? If the case is discussed and evaluated entirely in terms of the "existence" or "adequacy" of the "consideration" then the whole matter is one on which the nonlawyer may be apt to feel he is neither entitled nor able to form an opinion. To talk about the case in these terms is to talk about it in a way that obscures to anyone unfamiliar with the doctrinal categories what the case is about. Using these legal terms is, relatedly, disempowering, for those who do not know the legal "lingo" cannot participate in a debate about how the case should be resolved. Of course, the obfuscation and disempowerment I have just described might be tolerable if the rules and subrules about consideration in contract law "really" resolved the case. But what we have already seen is that, in most instances, the consideration rules will not resolve the case of their own force (which is not to say that we cannot predict the result or that any result is possible - a holding adverse to the plaintiff in a case decided yesterday in a case deemed "identical" will likely control today's decision). There are arguments on both sides (rule/exception; precedent/distinction), and these arguments encode - but mask - exactly the kind of values that our layperson might bring to bear on the decision. For example, should the law back up bargains made under certain forms of pressure? What forms of pressure are acceptable? Does it matter that the pressure did not come from the defendant, but from circumstances (the war) that might have affected him as well? [30](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n30" \t "_self) Aren't all bargains the result of pressure (who would pay for lunch if one could get it for free?)? [\*804] Most people untrained in the law feel entitled, if not obligated, to have opinions on questions such as these. Debate on these issues is generally encouraged and is seen as healthy. For example, dispute over the proper domain of private "freedom" as opposed to government "regulation" is central to contemporary political debates. Not everyone, however, can crack the legal "code" to see the political questions that a "case" presents. Indeed, cracking the code may be hardest for lawyers themselves, especially those whose technical training has convinced them that there is really something different about "the law." Further, there is always the possibility that the legal encoding may not simply translate, but may alter or distort, political questions; the language in which we speak does, after all, matter. [31](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=af24bfbc5594e64405399b45b81c996d&docnum=42&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAB&_md5=696a95b145d8714f5339e634336c124d&focBudTerms=legal+code+w%2F35+understand%21+or+exclu%21+or+technical%21+or+hierarch%21+or+oppress%21+or+jargon+or+accessib%21&focBudSel=all" \l "n31" \t "_self)

#### Using standard classification creates mistaken belief that the law is exact and deterministic --- excludes minority perspectives and makes authoritarianism inevitable

Delgado and Stefancic 89 (Richard, professor of law at the University of Wisconsin, and Jean, Technical Services Librarian at the University of San Francisco Law Library, November, Stanford Law Review, 42 Stan. L. Rev. 207, p. 216-217)

Existing classification systems serve their intended purpose admirably: They enable researchers to find helpful cases, articles, and books. Their power is instrumental; once the researcher knows what he or she is looking for, the classification systems enable him or her to find it. Yet, at the same time, the very search for authority, precedent, and hierarchy in cases and statutes can create the false impression that law is exact and deterministic -- a science -- with only one correct answer to a legal question. 62 Moreover, in many instances the researcher will not know what he or she is looking for. The situation may call for innovation. The indexing systems may not have developed a category for the issue being researched, or having invented one, have failed to enter a key item into the database selected by the researcher, thus rendering the system useless. The systems function rather like molecular biology's double helix: They replicate preexisting ideas, thoughts, and approaches. 63 Within the bounds of the three systems, moderate, incremental reform remains quite possible, but the systems make foundational, transformative innovation difficult. 64 Because the three classification systems operate in a coordinated network of information retrieval, we call the situation confronting the lawyer or scholar trying to break free from their constraints the triple helix dilemma.

#### This justifies the worst abuses of the law

Henderson 91 (Lynne, Professor of Law, Indiana University School of Law at Bloomington, Spring, Indiana Law Journal, 66 Ind. L.J. 379, p. Lexis)

The argument for uncritical acceptance of authority can quickly lead to more severe forms of authoritarianism. As soon as uncritical acceptance of and obedience to authority become the norm, the accepted authority has the power to oppress, to punish, to repress and to dominate. For example, the well-known Milgram studies provide a chilling example of authority's power to command obedient persons to inflict pain on others in order to punish them. 71 Arendt sought to preserve the value of obedience to authority by distinguishing authoritarianism from totalitarianism, but even authoritarianism in her formal sense -- obeying because the authority is accepted by tradition and practice -- can quickly become authoritarianism in a substantive, negative sense. While her distinction between totalitarian and authoritarian illustrates a point on a continuum that ranges from benign or humanistic authority to gulags or death camps, unfortunately the distinction has deflected attention from description and analysis of repressive regimes that are not totalitarian, that is, completely dominant over their citizenry. 72 For example, the United States government used Arendt's distinction to legitimate a difference in policies toward brutal right-wing regimes and those on the left, thereby muddying the point that some authoritarian governments are more repressive in more ways than others, whether they are right-wing dictatorships such as the Pinochet regime in Chile, or communist dictatorships such as the Romanian regime of Ceausecu. 73

#### Extinction results

Benoit 80 (Emile, Senior Research Associate and Professor Emeritus – Columbia University, Progress and Survival: An Essay on the Future of Mankind, p. 97-98)

It must be clear, however, that nonresistance to tyranny offers no true safeguard for human survival since rival tyrannies with modern weapons can, and if left to their own dynamics would, destroy not lonely each other, but all of humanity. The survival of freedom thus becomes not only a precious value in itself but a probable precondition for the survival of mankind. It is this, alone, that justifies, even from a survivalist viewpoint, accepting the risks of nuclear war through the maintenance of effective deterrents, in order to buy time, so that tyrannies may wane and the world may be made safe for disarmament – in the sense of the pooling of major armaments under the control of a supranational agency of limiting powers (but a monopoly of crucial force) directed by nonpower-seeking persons with a supranational status and orientation.