USING LEGAL RULES IN AN INDETERMINATE WORLD
Overcoming the Limitations of Jurisprudence

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INDETERMINANCY IN THE MEANING and application of rules characterizes law as such, even if not all aspects of law in all instances. Among issues often indeterminate and therefore open to judicial manipulation are standing, standards of review, and the demands of procedural due process. Proportionately few laws or other legal rules are deeply problematic because they are indeterminate, but those that are tend to be ones of significant social and political consequence, concerning fundamental normative issues affecting many people. In addition, some rules may be unproblematic simply because the political convictions they presuppose are so unchallenged as to be unrecognizable as such. Determinate laws or legal rules are usually those in which formal legal training can provide a unique solution to legal questions, where judges and others can interpret and apply rules unproblematically.

I shall argue that a judge who interprets and applies indeterminate rules does not comply with them in the sense of preserving them intact; sometimes he or she "complies" with rules by manipulating them. Sometimes a judge has no alternative but to alter them because some rules often can be interpreted and applied in no other way. I shall not argue that we need to reject all rule-based explanations of how a normative order constrains or generates social behavior. Rather, I shall emphasize that individuals in legal and other institutional settings often do not employ rules as practical guides to behavior simply by applying them in any straightforward or unproblematic way.

Some approaches in contemporary jurisprudence claim as much: that in important respects, laws and other legal rules cannot be stable, consistent, or unchanging with regard to what particular rules mean and how they should be applied. H.L.A. Hart (1961, 123), for example, claims that "particular fact

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situations do not await us already marked off from each other, and labeled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances." Jurisprudence of this sort acknowledges that meaning and application are context dependent. Context-dependent rules are socially constructed in a strong sense: in any given instance, meaning and application can only be ad hoc. Yet I shall argue that even a contextualizing jurisprudence fails to grasp how people actually use many legal rules in an indeterminate world. I then offer an alternative approach better suited to the task of analyzing supposedly rule-governed behavior particularly in legal contexts.

To construct this approach I draw on a field as European as the social phenomenology of Edmund Husserl (1960) and as American as the founding generation of pragmatists. Both de-emphasize behavior-influencing social structures external to the individual and focus instead on how the fragile interaction of individuals—observable and recurring behavior, voluntary but not necessarily conscious—contributes to the generation of social order (such as institutions, mundane practices, normative customs, and cultural expectations). The sociologist Harold Garfinkel coined the term (and the field) of *ethnomethodology* in the 1960s. It seeks the "methodology" or patterned action of mundane practices and routines of interacting individuals in their everyday behavior. It rejects the conviction of classical Weberian and Durkheimian theory, as well as more contemporary Parsonian theory, that patterned social behavior derives principally from individuals' internalizing preexisting or received norms.

To apply a rule, we often must draw on knowledge or competence or interpretations not contained in the rule itself. In this sense, rules do not specify behaviors, at least adequately for realizing the rule's goal. Such indeterminate rules cannot be norms in the strong sense of guiding determinate behavior. Hence, while rule-guided behavior generates aspects of social order, we cannot explain that generation in normative terms (as Weber, Durkheim, and Parsons contend) but rather in terms of whatever it is that we draw on, in using a rule, that is beyond or outside that rule. As Melvin Pollner (1991, 371) notes,

> rule usage suggests complex, tacit processes in both everyday and scientific domains. More generally, it suggests a "seen but unnoticed" (Garfinkel 1967) substructure of assumptions and practices implicit in the organization of social action. These assumptions and practices, including the manner in which they are disattended, are the central topic of ethnomethodology: they are ethnomethods.

The generation and maintenance of social order are not available in purely psychological categories of internalization (no more than they are available in purely mechanical categories of rule application free of all interpretive judgments). Individuals make sense of the world by generating and maintaining it as "sense-making," that is, as patterned, orderly, and familiar: they are "social phenomena" (Watson 1994, 407). Hence ethnomethodology is not hermeneutics or any other highly interpretive undertaking. In Garfinkel's (1996, 8) words, "Enacted local practices are not texts which symbolize 'meanings' or events."

We "stretch" a rule to fit the particular situation, or reconstruct the relevant events of a situation to fit the rule's criteria, or reinterpret the situation to fit a rule, or ignore features and events of a situation that contradict a rule so as to sustain the rule's applicability (Rhoads 1991, 192-93). Such behavior reflects a rule's "indexicality": the "rational properties of indexical expressions and other practical actions [are] contingent ongoing accomplishments or organized artful practices of everyday life" (Garfinkel 1967, 11). Individuals treat new phenomena as "indexes" or markers for phenomena already recognized. Groups or communities of individuals render the unfamiliar familiar by relating what they newly encounter to what they already know. What they already know provides an index in terms of which they explain new objects or experiences to themselves and others. These accounts themselves constitute the context or setting or condition they purport to be describing, and of course they thereby describe the very context they are in fact constituting. The account constitutes the setting; that is, the individual subjectively reconstructs an objective condition: "accounts and the setting they describe mutually elaborate and modify each other in a back and forth process" (Watson 1994, 413-14). We modify rules unconsciously to render them applicable to contingency and experience. We do so in a naive attitude that rules are guiding our behavior when in fact our behavior is guiding our use of rules. In turn, those rules define that behavior, thus allowing us to maintain a naive attitude toward those rules, believing that we are simply applying them when in fact we are changing them.

I shall extend an ethnomethodological perspective from its application so far only to particular instances of some kinds of legal behavior, to law as a conceptual whole, that is, to jurisprudence. I sketch six ways in which an ethnomethodological approach is unique and offers insights otherwise unavailable even to contextualizing jurisprudence.[1] This list is illustrative, not exhaustive.

As a foil, I first provide a sampling of claims from various types of "conventional jurisprudence." The term refers to a variety of competing approaches,

all of which, in ways peculiar to each and in contrast to methods of common law, claim to preclude, escape, or overcome normative or epistemic indeterminacy, such as the following claims:

- The meaning and application of legal rules can be noncontingent. Natural law, for example, maintains that however mutable it may be, positive law, if sound, derives ultimately from eternal principles that are valid because they are reasonable, not because of the procedural correctness of their enactment (Finnis 1993, 351).
- A legal system can specify unambiguously the conditions under which a rule is a member of that system. For example, Hart's (1961, 100) "rule of recognition" provides "authoritative criteria for identifying primary rules of obligation" with respect to text, legislation, custom, and judicial precedent.
- Legal rules may be applied in purely formal ways. The constitutional document itself contains few substantive values and leaves the embracing or rejecting of all other values largely to the political process. Its chief concern is "procedural fairness in the resolution of individual disputes" and ensuring, through procedure, "broad participation in the processes and distributions of government" (Ely 1980, 87).[2]
- The meaning of a legal rule can claim exclusive validity just as it can imply one and only one kind of behavior. For example, lawyers consider all laws to be equally valid and equally binding (legal validity and legal obligation exist absolutely or not at all, certainly not in varying degrees), and legal obligations to neither overlap nor conflict with each other (Finnis 1993, 309, 311).
- Legal rules capture definite, finite, and in principle unambiguously identifiable meanings—namely, the putative self-understanding of the relevant legislators (or of the entire generation) at the time of legislation. Justice Antonin Scalia's (1989, 864) "originalism" claims to provide the legitimate criterion, quite beyond the particular personal values of the authoritative interpreters, by which to determine the proper meaning and application of legal rules.
- (At least some) legal rules can be interpreted properly and adequately in ways that are entirely principled and not ad hoc. Thus Justice Hugo Black interpreted the First Amendment clause prohibiting legislation abridging free speech or press to mean complete and absolute nonintervention by the government. Or Justice William Brennan thus claimed that the same amendment implicitly rejects obscenity on the grounds that it lacks any redeeming social value.[3]
- Legal rules can be animated by a certain moral evolutionism, from which they may draw their (correspondingly evolving) meaning. Thus Chief Justice Earl Warren claimed that the Eighth Amendment derives its meaning "from the evolving standards of decency that mark the progress of a maturing society."[4]
- A procedural approach to systems of legal rules can lead to impartial decisions in cases governed by those rules. We can determine the constitutionality of the distribution of social goods on the basis not of actual results of the distribution but of its procedural correctness (Ely 1980, 136).
- Possible are systems of legal rules that contain only consistent premises; that is, for any rule and resulting conclusion, one cannot find a counterrule justifying a contrary conclusion. Thus the rule of law exists only insofar as the legal system is free of rules that are

incoherent or preclude compliance and insofar as legal authorities apply the rules consistently and according to what John Finnis (1993, 270-71) calls their "tenor."

SIX WAYS IN WHICH ETHNOMETHODOLOGY OFFERS INSIGHTS UNAVAILABLE TO CONVENTIONAL JURISPRUDENCE

Competence, not correctness. Conventional jurisprudence distinguishes between the "correct" and "incorrect" application of rules, whereas ethnomethodology focuses on the "competent" use of rules. To distinguish between "correct" and "incorrect" is to presuppose a standard that holds across cases of correct rule application. But if rule application is ad hoc, as it must be when it is indeterminate, then each case of application must have its own, unique standard of correctness. Ethnomethodology, by emphasizing competence instead of correctness in rule usage, doesn't need a standard that can't be defended anyway—namely, one that holds across different cases of rule application.

"Competence" refers to dexterity in action where rules cannot prescribe behavior. In a credentialing program for elementary school teaching, for example, Richard Hilbert (1981) found that the competence of the competent teacher presupposed knowledge quite beyond the teacher's job description and role prescription. To understand and employ these prescriptions competently entailed knowing that (and how) they were inadequate guides to practice and how to modify and supplement them to render them adequate, even how to abandon their original meanings where competent practice demanded as much. Competent teaching differs from following rules: it involves the ability to "continually modify 'plans,'" to do so within "unknowable and . . . unpredictable situational contingencies," and to "convince relevant others that none of this is being done at random" (Hilbert 1981, 216).

This notion of competence, rather than "correctness," finds support beyond ethnomethodology in Stanley Fish (1993), according to whom a legal professional arguing a case or drafting an opinion presupposes specific understandings of the relevant law, its terms, and its applications. Different professionals may begin from different presuppositions and therefore reach correspondingly different results—indeed, results that are "political" in the realistic sense that a choice had to be made under circumstances of disagreement, where even the criteria of choice were disputed. Such outcomes are normal, unavoidable, and professionally acceptable inasmuch as the parties involved share the overriding goal of determining the legally correct

answer, whereby the "difference between reaching political conclusions and beginning with political intentions is that if you are doing the second, you are not really doing a job of legal work" (Fish 1993, 738).

Don Zimmerman (1970, 233) found that individuals use conceptions of a "normal" state of affairs to justify suspending a particular rule in a given instance, without thereby viewing themselves as violating the rule's intent. Individuals refer to rules not so much to verify compliance as to "create" it in any given instance. Like Hilbert's (1981) work, Zimmerman's suggests a way to replace the jurisprudential notion of correct rule usage with a concept of the competent use of a given rule or set of rules. Competent use is predicated on participants' grasp of what particular actions are necessary on a given occasion to provide for the regular reproduction of a "normal" state of affairs.

Known/unknown, not legal/illegal. To determine whether law should be invoked, conventional jurisprudence distinguishes between "legal" and "illegal" activities to which the law might be applied. Niklas Luhmann (1989, 140) speaks of "a binary code that contains a positive value (justice) and a negative value (injustice)." This distinction, a binary schematization of justice and injustice, while certainly valid, frames the issue in such a way as to miss an important phenomenon in the actual application of legal rules. Rule application functions unproblematically when both problem and solution are determinate. When, however, problem and solution are indeterminate, rule application itself can be a means to define both.

Aaron Cicourel (1995, 107) observed procedures for coding certain kinds of police records. The procedures that guided the activity of coding presupposed what the police expected the outcome of the coding to be, that is, what they expected the recorded data to mean. Whenever the explicit procedures for coding could not answer questions that developed in the course of coding, the procedures allowed the coder to improvise decisions and thus generate the answers needed to complete the coding. The ethnomethodological perspective distinguishes between solutions to problems by known means and solutions to unknown problems by unknown means.

Such a perspective does not presuppose that rules and behavior are directly and causally linked. One alternative to the notion of causal linkage—an alternative unavailable to conventional jurisprudence—is the idea that rules and behavior are related mutually. Rule-governed behavior cannot be mapped one-to-one to the rules that ostensibly govern it any more than conscious behavior can be mapped one-to-one with the actor's intentions. Rules, then, do not explain the rule user's behavior any more than behavior explains the actor's goals in using particular rules. Individuals "themselves typically

use rules to explain and prescribe behavior with all the success they require" (Hilbert 1981, 215). Because individuals do not need literal role prescriptions to act (or even to use rules), rules by themselves are inadequate to prescribe individuals' future behavior. By interpreting and applying a rule, we make it determinate, at least for that particular instance of interpretation and application. The act, manner, and method of applying a rule first define a problem as relevant to, and requiring, rule application. Likewise, application itself defines the solution as relevant to and achievable by rule application.

Rule-autonomous procedures, not rule-needy procedures. Ethnomethodological studies show how rules are not synonymous with the activity about which they instruct. For example, where a judge or a police officer or some other user of legal rules experiences difficulty in correlating a codified general rule with a specific instance of application, he or she cannot appeal to the legal code for clarification: like rules in general, a legal code is not self-interpreting. David Sudnow (1965) found that petty theft is neither situationally nor necessarily included in the typical burglary (burglars seldom take money or other goods from their victim's person). If we understand burglaries in terms of the penal code and then examine the public defender's records to see how burglaries are reduced in the guilty plea, we find no rule describing the reduction of statutorily defined burglaries to lesser crimes. The rule must be sought elsewhere, in the character of the nonstatutorily defined class of burglaries. Sudnow (1965, 260-61) found that features attributed to offenders and offenses are often unimportant for the way the statute defines the offense. Whether or not the premises were damaged is irrelevant for deciding which statute applies to any given case. While for robbery the presence or absence of a weapon determines the legal severity of the crime, the type of weapon used is immaterial. Also irrelevant is whether the burgled residence or business is located in a high-income or low-income part of town. Similarly, the defendant's race, social class, style of committing offenses, and (for most offenses) criminal history are irrelevant to the codified definition of the offense. But these features are immediately relevant to the public defender's determination of whether the information before him or her constitutes a case of "burglary," and they are crucial for arranging a guilty plea bargain. The public defender scrutinizes the case to determine its membership in a class of similar cases, while the penal code itself does not define the classes of types of offense, providing no adequate reference for deciding correspondences between the instant and the general case.

Often rules "paraphrase a procedure" (Hilbert 1981, 215), if only roughly. From the perspective of conventional jurisprudence, a particular rule is "adequate" if the interested group or individual can follow the procedure

paraphrased by the rule. By presupposing that a procedure can be accomplished only by following rules, jurisprudence is blind to a phenomenon that ethnomethodology can capture: that "correct" procedure is not always, maybe not even often, in need of clarification by rules. Ethnomethodology is more sensitive than conventional jurisprudence to the fact that the role of rules in human behavior often turns on individuals' practical needs. Where an individual doesn't require clarification to accomplish a particular procedure, his or her activity is not really rule governed in the jurisprudential sense of being guided and directed by rules, whether strongly or weakly. Alternatively, the individual discovers a given rule's "true" meaning and "proper" application in the course of employing the rule over a series of actual situations (Zimmerman 1970, 232).

Creative (non)compliance, not narrow compliance. When someone invokes the law, conventional types of jurisprudence ask if he or she based the decision to invoke the law on reasons recognized by the law as valid. This framing loses sight of an important aspect of the actual application of rules. Because jurisprudence concerns itself here solely with the question of whether the law invoker complied with the law, it cannot recognize that invoking the law is one way to use the law as a resource, but not the only way. Sometimes not to invoke the law is another way—in some instances, a more useful one—to approach potentially legal issues. Because it doesn't focus narrowly on rule compliance, ethnomethodology sees that compliance is not the sole way to use the law as a problem-solving resource.[5]

In a study of skid-row patrolmen, Egon Bittner (1967, 709) found that officers necessarily exercise discretionary freedom in invoking the law. Conventional jurisprudents will ask whether a particular decision to invoke or not to invoke is in line with the law's intent. While legal doctrine recognizes notions of "prosecutorial discretion," "administrative discretion," and even "abuse of discretion," it confines discretionary freedom within what it takes to be the "spirit" of the law, a spirit that precludes, for example, violations of a defendant's or suspect's civil rights. An ethnomethodological approach employs no such self-limiting concept of law, as letter, spirit, or rule.[6] It does not demand solely decisions that can be based on reasons recognized (even if only in some ultimate or final sense) as valid by the law. From Bittner's (1967, 711) standpoint, for the patrolman to implement the law naively—to arrest someone because he or she committed some minor offense—may contain elements of injustice. Patrolmen often deal with situations in which questions of culpability are profoundly ambiguous. If culpability is not the salient consideration leading to an arrest in cases where it is patently obvious, then, claims Bittner (1967, 711), the patrolman may feel justified in making arrests

lacking formal legal justification. Conversely, he may view arrests for minor offenses as poor workmanship if they were made solely because the offenses met specifications of the legal code. Any jurisprudence oriented to rule compliance will hardly be open to such a standpoint and the phenomenon it analyzes.

Bittner (1967) also found that while the criteria specified by the law are met in the majority of cases of minor arrest, only rarely do patrolmen invoke a particular law simply because an action or situation satisfies its definition. Rather, compliance with the law is often merely the outward appearance of an intervention actually based on altogether different considerations. "Patrolmen do not really enforce the law, even when they do invoke it," but rather deploy it as one resource among others to "solve practical problems in keeping the peace" (Bittner 1967, 710). For example, an officer's decision not to arrest, when the circumstances meet the specifications for arrest, is likely not a decision not to enforce the law but rather a decision to enforce the law in an alternative manner.

Practical methods, not abstract principles. Some types of nonconventional jurisprudence are sensitive to the ways in which rule application is indeterminate.[7] Ethnomethodology certainly shares this sensitivity. But it offers a perspective that can go further and tease out the methods or ways in which indeterminate rules are actually applied by uncovering one or the other calculus for the application of indeterminate rules. Cicourel (1995, 47), for example, has observed how official communication by legal professionals such as police, courts, and probation officers complies with legal rules by heeding not the letter of the law but "tacit knowledge or 'rules' not written or discussed explicitly in written and oral reports"—by following lived rules or tried practices rather than abstract principles. While some types of nonconventional jurisprudence recognize the existence of ad hoc applications, from ethnomethodological studies we learn how to identify actual methods of ad hocness.

Bittner (1967, 700), for example, discovered the indeterminate phenomenon of police in the role of "peace officers," when police operate under some other consideration and largely with no structured and continuous outside constraint, in activities that encompass all occupational routines not directly related to making arrests. Under such circumstances, rule users cannot adhere to high standards of justification. Instead, appliers of indeterminate rules assess their applications against the background of a system of ad hoc decision making, a system encompassing various social institutions such as the courts, correctional facilities, the welfare establishment, and medical services. And Sudnow (1965, 262) found that public defenders and district

attorneys tend to develop sets of unstated recipes for reducing original charges to lesser offenses. The reduced offense often bears no obvious relation to the originally charged offense, yet legal professionals consider the reduction from one to the other "reasonable."

Situations applied to rules, not rules to situations. Jurisprudence emphasizes ways in which rules are applied to situations, while ethnomethodology reveals ways not in which rules are applied to situations, but situations to rules. In the latter case, rules are themselves resources to determine how a context should be approached. For example, police can go about their work investigating or otherwise dealing with a case only after they have "mapped" the relevant events, behavior, and objects onto given legal rules, categories, and definitions (Cicourel 1995, 113). To warrant intervening in a situation, they must first construe it in terms of warrant-granting legal rules.

Ethnomethodology and conventional jurisprudence agree that rules determine behavior. But only ethnomethodology recognizes how rules are dependent on the context of their application and how rules are related internally and not merely externally to the behavior they determine.[8] Only ethnomethodology recognizes that in performing a role, rule users do not passively follow rules and roles but actively manipulate them, even instrumentalize them, toward achieving their goals. Rules then are a "*lived* feature of the settings" in which they function (Maynard and Clayman 1991, 391).

Even as dependent, contextual, and endogenous, rules can accomplish the tasks conventional jurisprudence assigns only to principles, which are independent, acontextual, and exogenous. For example, rule users do not need some principled, underlying moral orientation to life to find in rules a "method of *moral* persuasion and justification" (Wieder 1974, 175).[9] Rules can be both endogenous and part of an individual's way of life:[10] to obey a rule is to participate in a way of life, in its patterns and constraints. If individuals do not share objective, transcendental principles,[11] then perhaps what they share is a way of life, in patterned behavior that can generate, sustain, or change conventional meanings within what Fish (1989, 153) calls "interpretive communities" that provide members with access to public meanings and delimit, to those meanings, members' understandings.

Continuities in belief patterns are ways of life, and in everyday life we establish continuities as we pragmatically[12] seek alliances among groups with divergent viewpoints and as we pragmatically fashion agreements that may be temporary and fragile. Even a population deeply divided by differences over a broad range of issues nonetheless pursues necessarily transient and provisional understandings. Rules are then instruments rather than

prescriptions: as lived rules, they help groups or communities to achieve ends quite independent of the rules, rather than constricting behavior and making it dependent on the rules.

FOUR FEATURES SHARED BY THE VARIOUS DISTINCTIONS BETWEEN ETHNOMETHODOLOGY AND CONVENTIONAL JURISPRUDENCE

The six ways in which an ethnomethodological approach differs from a conventional jurisprudential approach share four features: from an ethnomethodological perspective, the use of legal rules is self-generatingly orderly, pragmatist, locally based, and normatively indifferent.

Rule usage is self-generatingly orderly. We have seen that ethnomethodology shares the insights of some types of jurisprudence into the fundamental ambiguity of law and into the constant need to interpret law in its course. Yet in distinction to even the latter types of nonconventional jurisprudence, ethnomethodological studies reveal that behavior often is not ordered or patterned by individuals following rules or abstract prescriptions. Rules do not organize behavior at all times; sometimes, the order displayed by behavior is itself self-generating. Another name for self-generating order is autopoiesis, a order created by the production and reproduction of its own elements.[13] In ethnomethodological terms, the "organization of everyday interaction is due to participants' own contingently embodied activities and actions as those arise in and as the concrete plenitude of lived experience" (Maynard 1996, 2). Among everyday interactions are the use of a wide variety of rules, and legal rules in particular. Ethnomethodology does not deny the presence and effect of structures—technological, cultural, economic, historical, political, and so forth—on agency or "free will." Rather, it recognizes structure as an "achieved phenomenon of order" (Garfinkel 1996, 6)—structure not only as a conditioner of agency but also as a product of agency. For example, a legal system reproduces itself self-referentially—that is, through the will and consciousness of the participants—and thereby generates its own limits: the will and consciousness of actors are then bounded by the system thus created. Self-generation is also self-limitation—neither arbitrariness nor entropy nor chaos, but predictability, order, and self-containment. By reproducing itself in this autopoetic fashion, the legal system realizes its unity and coherence.[14]

Garfinkel (1988) hypothesizes an autopoietic order embedded in concrete activities, accessible to social science but not through empirical generalization or through the formal specification of variable elements and their analytic relations. Even so, "'raw' experience is anything but chaotic." Rather, the "concrete activities of which it is composed are coeval with an intelligible organization that [individuals] 'already' provide"—an organization therefore available to the social scientist (Maynard and Clayman 1991, 387). Individuals themselves create the context in which they recognize themselves and their environment. According to Lawrence Wieder (1974, 29), we may view any social setting as self-organizing with respect to the intelligible character of its own appearances, as either representations or evidence of social order. A context itself organizes its activities to make its properties—as an organized environment for behavior—detectable, reportable, even analyzable. A setting's "accountability" may be "accomplished" simply through the participants' use of the idea of rule-governed conduct in talking among themselves about their affairs. Indeed, language use itself "renders" human affairs orderly by serving as "embedded instruction" for seeing those affairs as orderly. Wieder (1974) found that by "telling the convict code," that is, by articulating a set of general, indefinite maxims governing behavior in a halfway house, residents made their affairs appear orderly to any outsider who heard their talk and "employed it as embedded instruction" for seeing those affairs. Residents also used the code as a framework of description and injunction in making sense of their own organizational setting. The code produced and sustained the very institutional reality it commented on and regulated.

Rule usage is pragmatist. Indeterminacy is not often a problem in the ordinary functioning of a legal system for the same reason it is not often a problem in the nonlegal aspects of everyday life of individuals, groups, and even whole societies.[15] The constituents of patterns are routinely and repeatedly tested, pragmatically, through experience. Every time an idea or practice enables a person to make sense of a situation or to accomplish a goal, its claim to validity is reinforced. Such pragmatist verification has a confirmatory bias: individuals develop new theories often only to the extent needed to incorporate new experiences under a familiar category. Individuals often will make extensive elaborations before relinquishing their initial understanding and approach in instances where these ill fit new experience or additional information.

Social and legal change sometimes occurs when the patterns (or portions thereof) cease to accomplish practical tasks or to generate psychologically satisfying understandings. Change may be driven by developments in or

alterations of the relative usability of patterns as much as by the introduction of new or modified worldviews. The interpretation of legal texts, notably statutory and constitutional ones, is itself pragmatist to the extent that the possible or probable consequences of any interpretation guide interpretive activity. In 1954, for example, the Supreme Court in *Bolling v. Sharpe*[16] held that racial segregation of public schools in the District of Columbia was unconstitutional. In *Brown v. Board of Education*,[17] decided the same day, the Court reached the same conclusion with respect to the states. The Court based its *Brown* decision on the Fourteenth Amendment's guarantee of equal protection, that is, on a guarantee of equality of citizenship precluding a racially segregated public education that conferred second-class citizenship on the black minority. Because the Fourteenth Amendment applies to the states but not to the federal government—and hence not to the federal entity of the District of Columbia—the Court, desirous to obtain the same result in the national capital as in the rest of the country, found a guaranty of equal protection in the Fifth Amendment, which does apply to federal entities. Yet that amendment has no equal protection clause, and the Court found a guaranty of equal protection in the amendment's due process clause. In a conventional sense, the Court's reasoning was specious: the due process clause cannot imply, as can the equal protection clause, a prohibition of racial segregation. Any conventional jurisprudence would have to accept segregated schools in the District for lack of any constitutional basis for rejecting them—and would thereby undermine the moral authority and political efficacy of *Brown*. From a pragmatist perspective, the Court's reasoning was quite plausible, but the Court must have recognized an "intolerable anomaly, in the political rather than a conventionally 'legal' sense, in allowing the public schools of the nation's capital to remain segregated when the Supreme Court, sitting in that capital, had just outlawed segregation by states" (Posner 1990, 145). As in this example, interpretation is pragmatist when the legislative or legal text is used instrumentally as a resource in fashioning that result. The relevant consequences can include systemic ones, such as debasing the currency of statutory language by straying too far from current usage. Pragmatist behavior is guided by consequences, and consequences may include long-run, systemic, stabilizing, pattern-maintaining consequences.

Neither the world nor rules themselves tell us what meanings and applications of a given rule are legitimate; however, this does not imply that a choice among possible meanings or applications is arbitrary or that the choice expresses something "deep within us." We change from one interpretation or application to another for pragmatist, contingent reasons. Our criteria for defining or redefining a rule, or for deciding how to apply a rule, surely involve some notion of consistency; yet consistency alone can hardly explain

our choices fully or adequately. Rather, our criteria for choice involve the pragmatist consideration of adequacy. And we can define the term *adequate* only contingently, in an ad hoc manner, and in different cases we will define it differently.

The pragmatist creation of a new or changed meaning or application is not a discovery about how old meanings or applications fit together. Thus the creation of meaning or the proper application of a rule is not an inferential process, starting with or from premises formulated in earlier interpretations or applications. Such creations are not discoveries of a reality behind appearances. To create a new meaning of a rule (or to change an existing meaning) is like inventing a new tool to replace an old one. It works better but not more truthfully or justly.

Here we see how ethnomethodology differs from conventional jurisprudence's strictly cognitive approach to indeterminacy and the problem of order. It approaches reason as practical and observable worldly conduct, as a pragmatically oriented account of the creation of knowledge. Jurisprudentially, the individual's actions are patterned because individuals share internalized frames of reference and value systems that enable individuals to define situations in similar or even identical ways. Such jurisprudence regards "procedures" as solitary resources that individuals mutually impose on each another. Ethnomethodology, by contrast, regards "procedures" as resources that groups of persons, such as community, employ in concert (Maynard and Clayman 1991, 388).

Rule usage is locally based. Ethnomethodology allows us to see how groups and individuals discover, locally, the scope and applicability of a rule.[18] Ethnomethodology analyzes a context's features as the accomplishment of members' practices for making these features observable (Zimmerman and Pollner 1970, 95). A context's features are unique to the particular setting in which they are assembled and hence cannot be generalized to other settings. Jurisprudence refers to general, and generalizable, norms while ethnomethodology refers to local norms that may be plural, applicable to different cases yet not necessarily consistent with each other (Elster 1992). The validity of local norms is nongeneralizable, hence their application is best left to the participants themselves (Dews 1986). Although they afford a partial, nonprivileged account of particular areas of life (Boyle 1985), they nonetheless can provide for the possibility of nonarbitrary or nonidiosyncratic social critique (Gregg 1994a) as well as nonreductionist social science (Gregg 1999).

According to Garfinkel (1967, vii-viii), people construct definitions and interpretations of legal rules in particular situations; they do not carry them

over from the past. Definitions and interpretations of legal rules are ongoing constructions or "situated accomplishments," what Garfinkel calls "accounts," the "everyday activities as members' methods for making those same activities visibly-rational-and-reportable-for-all-practical-purposes, i.e. 'accountable.'" The meaning, for example, of a legal rule, is made rather than found. Richard Rorty's (1989, 5) similarly pragmatic assertion about truth holds equally well for rules understood ethnomethodologically: that truth is a predicate of propositions—in other words, of human language. It is not a quality of the external world, which does not describe itself as true or false but which humans, in language, may so describe. "Truth," then, is not ahistorical, eternal, unique, absolute, noncontingent, unchanging, or free of context and perspective. It is made rather than found, which is not to say there is no truth but rather to describe a particular conception of truth (one not inconsistent with this sentence, yet one that cannot guarantee its validity).

Whenever a legal rule is applied, it must be applied within a specific social situation—it must be "localized" to be useful—because no social situation is independent of the individuals within it. The very invocation of a rule alters the situation because individuals, rules, and situations ceaselessly inform and mutually elaborate one another. Rules, like individuals and situations, do not even appear except in a mesh of practical circumstances. The individual, rules, and the present definition of the situation—all intertwined—constitute the situation; no one of these elements can be abstracted out and treated as cause or effect. Every legal rule is used and usable only within a web of practical circumstances that "fill in" the incompleteness of a rule, particularizing what Garfinkel (1968, 220) calls the empty but promissory "et cetera aspect" of rules: practices whereby persons make what they are doing *happen* as rule-analyzable conduct. Differences among situations falling under the jurisdiction of rules reduce the fit between rules and their contexts of application: exceptions arise that limit the generality of rules. To the extent a rule is overwhelmed by idiosyncracies, situational constructions of meaning rush in to fill the gap between rules and contexts. Only in extreme cases would this process lead to a complete denial of the existence of rules, where rules would dissolve in the complete uniqueness of the particular situation.

Because of individuals' ever-shifting body of social knowledge and practical interests, they never judge a situation once and for all. Every judgment is only situationally absolute, based on the realization that some later determinations may change the certainty of the here and now (Mehan and Wood 1975, 75). Legal rules have local meanings and local applications; correspondingly, social order is largely the result of ad hoc, local constructions. Yet the absence of some logically closed, self-contained normative order,

grounded in a small number of ultimate values, need not entail the limited impact of rules. Unlike conventional jurisprudence, ethnomethodological studies suggest that the impact of rules is independent of underlying principles or transcendent meanings. Rules and norms do not inhabit some high ground overlooking the terrain of human action; they are constituents of this terrain, local not universal.

Ethnomethodological inquiries show that and how people decide, locally, issues of "neutrality and commitment; the fact/value distinction; the is/ought dichotomy; the issue of relativism and objectivity, universalizability and specificity."[19] This notion of localism comports with Garfinkel's (1967) claim that the world does not lend itself to being generalized in the sense of universal structures of experience. Perhaps humans need to believe that even locally produced rules are repeatable, accountable, and generalizable. If this belief is an illusion, then it may be a necessary one, for we often seem unable to live without turning specific situations into instances of general rules and roles, even though the latter exist only in our systems of accounts. Perhaps for this reason, among others, jurisprudence tends to view rules as functioning in a principled and universalist fashion. For the same reason, ethnomethodology is better able than conventional jurisprudence to identify the pragmatist, localist functioning of legal rules.

Rule usage is normatively indifferent. Nonetheless, ethnomethodology (and empirically oriented legal scholarship more generally) needs to appreciate why conventional jurisprudence places so much emphasis on normativity—indeed, why it privileges normativity in its analysis of rules. It is oriented to normatively foundational concepts such as the rule of law; it views rules as an important, sometimes the most powerful, means toward securing normative social goals such as an administration of governmental power that preserves the institutional balance of power, the individual's realization of legal rights, the fair and equitable functioning of bureaucracies, and the provision of legal equality among legal equals.

Some ethnomethodological studies uncover distinct civil-libertarian dilemmas in the ways some legal rules are routinely used. Striking examples of such civil-libertarian quandaries emerge in Bittner's (1967, 702) work, describing how "police tend to impose more stringent criteria of law enforcement on certain segments of the community than on others." He found that police working a skid-row beat perceived socially marginalized groups or social pariahs, who do not lead "normal" lives, as creating special problems requiring special procedures. For example, the officer, familiar with habitués of his beat, has observed how person X, when in the company of persons Y

and Z, often gets into trouble with the law. Knowing that Y and Z are passing through the area on a particular day, the officer arrests X simply to remove him from the streets while Y and Z are in the area. While the patrolman may urge that "arresting a person on skid-row on some minor charge may save him and others a lot of trouble, but it does not work any real hardship on the arrested person," Bittner (1967, 713) clearly recognizes the normative problems he has uncovered ethnomethodologically. After all, the officer's action has no statutory basis and violates constitutionally guaranteed civil rights. The officer distributes the "burden" of violated rights—even if toward reducing the potential for a disturbance of the peace—unfairly on only one or some of the potential candidates in a manner that is ad hoc and arbitrary.

Cicourel (1995, 123) similarly found that legal "requirements often lead to a kind of window dressing necessary to making the sometimes nasty business of police work compatible with demands for legal safeguards." Window dressing is the presumption of innocence; common sense and long experience "allow" the police to accomplish the task of law enforcement by distinguishing, on an ad hoc basis, between persons assumed innocent and those assumed guilty. The police view legal rules as irrelevant when they are pursuing someone they assume to be guilty or at least suspect. In the short run, due process and civil rights do not further daily law enforcement but actually impede it; in the long run, the accused will receive both due process and civil rights if he or she is in fact innocent.

For methodological reasons, such studies do not address normatively disturbing observations such as the violation of civil rights, precisely questions jurisprudence attempts to confront through distinctly normative conceptions of legal rules. The observer's attitude to observations of normative dilemmas is central to jurisprudence yet beyond the scope of ethnomethodology, which describes but doesn't explain, asks how but not why, and observes social behavior or legal outcomes yet has no opinion on their moral acceptability. Nor will ethnomethodology characterize the individuals observed as "deficient, pathological or irrational (or superior, normal, or rational)—such attributions are themselves endogenous constructions" and "thus a topic of study rather than a resource for an analytic critique" (Pollner 1991, 371). Whereas ethnomethodology, like pragmatism, has no inherent normative or political valence, most types of jurisprudence are normatively committed (and committed in as many different ways as there are types of jurisprudence). While most ethnomethodological research professes indifference toward the nature and status of the knowledge, behavior, or norms examined or uncovered,[20] most types of jurisprudence reject any conception of law devoid of some external (especially moral) justification. If pragmatism is a "future-oriented

instrumentalism that tries to deploy thought as a weapon to enable more effective action" (West 1989, 5), it can be put to ends of any normative stripe. Ethnomethodology lacks pragmatism's instrumental utility yet shares its normative agnosticism, a feature that neither enhances nor detracts from its explanatory potential.

To the extent modern law is no longer in the business of norming the individual citizen's conscience but distinguishes between itself and morality and assigns to morality all questions of conscience, the law is not a carrier of conscience but—where it makes demands on conscience—sometimes even its enemy. The question of whether, from a normative standpoint, this disjunction of law and morality is desirable (and for what reasons and by what criteria) remains to jurisprudence. But the normative indifference of ethnomethodology makes it better attuned than conventional jurisprudence to grasping modern law in its amorality.[21]

NOTES

1. I cannot here take into account the increasing diversity among ethnomethodologists with respect to choice of both problem and method (see Maynard and Clayman 1991, 386). Nelson (1994, 324-24, n.3) also observes "fragmentation within ethnomethodology, which now threatens to call the possibility of developing a coherent description of ethnomethodology into question. That is, classical ethnomethodology seems at times to be on its way to becoming the only kind of coherently describable ethnomethodology given the increasingly diverse and inconsistent ethnomethodological positions being espoused—or rather, given the increasingly separate articulation of discordant positions once held simultaneously in classical ethnomethodology." Nor can I take into account the far greater variety among jurisprudential approaches. Yet for the purposes of my thesis, these distinctions are immaterial. This foreshortened approach provides for clarity of exposition yet represents a degree of oversimplification. That degree is tolerable insofar as my distinctions within a small range are representative.

2. Elsewhere I critique "principled jurisprudence" (Gregg 1994b) and "legal formalism" (Gregg 1998b).

3. *Roth v. United States*, 354 U.S. 476 (1957). The First Amendment reads in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press..."

4. *Trop v. Dulles*, 356 U.S. 86 (1958). The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. Beyond ethnomethodology, Derrida (1990, 961) observes the practical impossibility of strict compliance in the related area of judicial opinions. He claims that "each [judicial] decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely" and that a decision can be "just and responsible" only if it both conforms to existing law and also justifies it anew or reaffirms its principle.

6. In the final pages of this article I return to ethnomethodology's noncommittal attitude toward normative issues such as civil rights.

7. And that across a broad philosophical range, including authors as diverse as Dworkin (1977, 1982), Frankfurter (1970), Holmes (1968), Kress (1984), Posner (1990), Singer (1984), Smith (1992), Stick (1986), Tushnet (1991), Unger (1984), West (1990), and Williams (1990).

8. See Maynard and Clayman (1991), Halkowski (1990), Hilbert (1981), Maynard (1985), and Watson (1978).

9. My emphasis; author's emphasis deleted.

10. To distinguish between exogenous and endogenous underlying principles is not necessarily to deny the existence or possibility of underlying principles as such.

11. Elsewhere (Gregg 1997) I critique social and political transcendentalisms.

12. Among the presuppositions of pragmatism I count the following: rejection of a correspondence theory of truth; the claim that, even if truth itself is immutable, our estimation of it can only be variable; the notion that we estimate a belief as "true" if it proves to be a successful guide to action; the conviction that knowledge in moral and nonmoral situations is not sharply distinct, nor are the respective knowledge-gathering procedures by which people control their environment; and the view that no inquiry whatsoever provides infallible results. This particular list is directly inspired by Posner (1990, 28), although it is hardly original but rather broadly representative of the pragmatist movement. Elsewhere (Gregg 1997) I show that a pragmatist notion of jurisprudence asserts the absence of ultimate foundations for knowledge and morals and the necessity of drawing on local standards to render law determinate. And I show that it allows for a nonparochial form of localism; for legal critique that is more than idiosyncratic, arbitrary, and subjective; for a viable notion of autonomy of the group and individual vis-à-vis legal institutions; for law without mass delusion; and for a notion of justice as singular, not plural, and more than simply authority.

13. See Luhmann (1989, 137, n.2).

14. Luhmann (1985, 288) nicely captures this circularity: "restrictions are only ever possible as restrictions of freedom, and . . . freedom itself emerges as a result of its restrictions." Again, "legal decisions are valid on the basis of legal rules, although (even because!) rules are valid on the basis of decisions. Regulation and implementation presume each other reciprocally as granting validity" (Luhmann 1985, 285).

15. Contrary to Stick (1986), Singer (1984), and Kress (1989).

16. 347 U.S. 497 (1954).

17. 347 U.S. 483 (1954).

18. For example, Garfinkel's (1996, 18) claim that the "properties of indexical expressions are witnessable only locally and endogenously."

19. Jayyusi (1991, 235). See also Sacks (1990) and Maynard and Clayman (1991, 399).

20. But some ethnomethodological work does see itself as a form of critical sociology (Coulter 1973, 1979; Bandyopadhay 1971). Neither position can claim exclusive validity for itself.

21. Whereas much conventional jurisprudence fails to recognize how complex modern societies have separated out morality from law, an ethnomethodological approach to legal rules demonstrates that reality. Today moral dimensions have legal relevance only if communities choose to use legal rules in corresponding ways. In other work I explore reasons for and possibilities of "renormativizing" law. In Gregg (1998a) I attempt a pragmatist jurisprudence—like the one I derive from an ethnomethodological approach—that allows a normative notion of justice, of justice as more than simply authority. In an unpublished manuscript titled "Courts of Enlightened Localism," I suggest how such a jurisprudence might draw constitutively on its social and political environment to compensate for normative indeterminacy and for the motivational insecurity indeterminacy sometimes generates. And in Gregg (1994a) I show how the validity of nonconventional normative claims, even though necessarily situated

in and oriented on local standards, can exceed any particular community if they are to be more than parochial.

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