

Preface to the First Edition*

“To hunt after truth is properly our business, and we are inexcusable if we carry on the chase impertinently and ill; to fail of seizing it is another thing, for we are born to inquire after truth: it belongs to another power to possess it.”

Montaigne, *Essays*, Ill, 8.

“Certainty is generally illusion, and repose is not the destiny of man.”

O.W. Holmes, *The Path of the Law*,
10 Harvard Law Review 457 (1897)

The viewpoints and practices of much twentieth century legal drafting derive from the experiences of able lawyers working in the thought context of the late nineteenth century. The spirit of that era was one of relative stability and belief in the possibility of firm solutions for even the most difficult problems. The apparent solidity of the Victorian empire and the seeming convergence of science toward a comprehensive explanation of the physical universe¹ surely encouraged the idea that, by due care and diligence, mere tasks of legal drafting could be brought to perfect resolution. The thought that residual uncertainty might remain even after the most Herculean efforts of lawyers must have been generally unacceptable—if not to the true philosophers of the trade, such as Holmes, at least to the commonality of solid practitioners. The elaborated and repetitious style of much contract and testimonial draftsmanship of the turn-of-the-century period—with surviving vestiges even today—can suitably be viewed as evidence of an exhaustive search for semantic certainty, undertaken in expectation of its eventual attainment.

The twentieth century, on the other hand, has specialized in the discovery of uncertainty. From Heisenberg’s announcement of a

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¹“We supposed that nearly everything of importance about physics was known. Yes, there were a few obscure spots, strange anomalies having to do with the phenomena of radiation which physicists expected to be cleared up by 1900.” *DIALOGUES OF ALFRED NORTH WHITEHEAD*, as recorded by Lucien Price (New York: Mentor, 1956).

principle of indeterminacy in the field of quantum physics, through various disillusioning analyses of the “meaning of meaning,” to Bertrand Russell’s observation that: “Mathematics is the subject in which we do not know what we are talking about, nor whether what we are saying is true,” the trend of the century has been toward a general disclaimer of all certainty. Indeed, consistent with Russell’s dictum, just quoted, one of the key contributions of the “Modern Math” has been to bring into the open the fact that even mathematics, that most precise of the various modes of thought, is merely a “hypothetico-deductive” system, with its roots in a set of *undefined* terms and a collection of hypotheses or postulates which are accepted as true without proof. The logic of the system may be rigorous, but the system as a whole never escapes from the indeterminacy and arbitrariness of its foundations.

For present purposes, the relevance of these contemporary mathematical insights is their unavoidable implication that all definitional systems share the limitations of mathematical systems. That is to say, every new defined term in any system of discourse specifies either (i) relationships among “primitive” (meaning “undefined”) terms, or (ii) relationships among terms which have themselves been created from combinations of “primitive” terms. Hence the definitional procedure, where it does not fall into the vice of circularity, eventually takes us back to terms which we must accept as “undefined” and as incapable of definition in any conventional sense.

This inevitable presence of undefined terms obviously applies even in the world of legal draftsmanship and introduces into that world an element of uncertainty which it might like to deny, but cannot. The draftsman may take up his task dedicated to excellence, but he is obliged to forswear the expectancy of absolute certainty in his product. This burden he must, of course, bear while still serving practical ends. “To teach how to live without certainty, and yet without being paralyzed by hesitation, is perhaps the chief thing that philosophy, in our age, can still do for those who study it.”²

In the sense suggested by the sentence last quoted, the present writing is in part a philosophical venture.

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²B. Russell, *Introductory to A HISTORY OF WESTERN PHILOSOPHY* (New York: Simon and Schuster, 1945).