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2008 Edward A. Seegers Lecture

BALANCED REALISM ON JUDGING

Brian Z. Tamanaha*

I. INTRODUCTION

Perspectives on judging in the United States are dominated by a story about the formalists and the realists. According to this conventional story, from the 1870s through the 1920s—the heyday of legal formalism—lawyers and judges saw law as autonomous, comprehensive, logically ordered, and determinate, and believed that judges engaged in pure mechanical deduction from this body of law to produce a single correct answer in each case. In the 1920s and 1930s, building upon the insights of Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo—the story goes—the legal realists thoroughly discredited legal formalism, demonstrating that the law is filled with gaps and contradictions, that the law is indeterminate, that there are exceptions for most every legal rule or principle, and that legal principles and precedents can support opposite results. The realists argued that judges decide according to their personal preferences then construct their legal analysis to justify the desired outcome. This is the standard chronicle, repeated numerous times by legal historians, political scientists who study courts, legal theorists, and many others in the American legal culture. A book on judging by three political scientists lays out this account:

Until the twentieth century, most lawyers and scholars believed that judging was a mechanistic enterprise in which judges applied the law and rendered decisions without recourse to their own ideological or policy preferences In the 1920s, however, a group of jurists and legal philosophers, known collectively as “legal realists,” recognized that judicial discretion was quite broad and that often the law did not mandate a particular result.¹

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¹ VIRGINIA A. HETTINGER, ET AL., *JUDGING ON A COLLEGIAL COURT* 30 (2006) (emphasis added).

Similarly, a legal historian writes that

[f]ormalist judges of the 1895-1937 period assumed that law was objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics. . . . The Legal Realists of the 1920s and 1930s, tutored by Holmes, Pound, and Cardozo, devastated these assumptions. . . . They sought to weaken, if not dissolve, the law-politics dichotomy, by showing that the act of judging was not impersonal or mechanistic, but rather was necessarily infected by the judges' personal values."²

Many more such quotes can be offered, but that is unnecessary. We all know the story.

This ubiquitous formalist-realist narrative is not just a historical story—it continues to structure contemporary debates and research on judging. A 2007 article on judging co-authored by two law professors and a federal judge begins:

How *do* judges judge? . . . According to the formalists, judges apply the governing law to the facts of a case in a logical, mechanical, and deliberative way. For the formalists, the judicial system is a "giant syllogism machine," and the judge acts like a "highly skilled mechanic." Legal realism, on the other hand, represents a sharp contrast For the realists, the judge "decides by feeling, and not by judgment; by 'hunching' and not by ratiocination" and later uses deliberative faculties "not only to justify that intuition to himself, but to make it pass muster."³

Judge Richard Posner's recent summary on judging, *How Judges Think*, is pitched as an assault against the delusions of legal formalism that still beguile the legal fraternity.⁴ Well over a hundred quantitative studies of judging have been conducted by political scientists, with reams more currently underway, many aiming to prove that formalism is wrong and

² WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 187 (1988).

³ Chris Guthrie, et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2 (2007).

⁴ RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

realism is correct.⁵ Legal academics are busily developing “new legal formalism” or “new legal realism.”⁶ The entire legal culture has been indoctrinated in the formalist-realist divide.

The pervasive influence this story exercises on contemporary thought about judging is all the more extraordinary when one realizes that the formalist-realist divide is fundamentally wrong. The story about the legal formalists is largely an invention. Legal realism is substantially misapprehended.⁷ Quantitative studies of judging are marked by a distorting slant owing to incorrect beliefs about the formalists and realists.⁸ Debates about judging are routinely framed in terms of antithetical formalist-realist poles that jurists do not actually hold. We must free ourselves from the formalist-realist stranglehold if we are to recover a sound understanding of judging.

The first part of the argument dispels the story about the formalist age. This is crucial because much of the distortion that follows can be traced back to this misleading story. This Lecture demonstrates that jurists held very realistic views of judging during the so-called formalist age and explains how the story was constructed and when it took hold. It turns out that the full blown account of formalism taken for granted today was actually invented in the 1960s and 1970s owing to contemporary concerns. After dispelling the story about the formalist age, I will address its implications for conventional views about the realists. Today the realists are viewed as skeptics of judging. But that is a mistake: in fact they believed in the law and hoped to advance our understanding of judging. The overarching objective of this Lecture is to lay out what I call “balanced realism.” Most jurists, including the legal realists, have perceived judging in balanced realist terms for more than a century.

The next part of the argument jumps to the present, taking up the contrast between contemporary formalists and realists. It shows that leading legal formalists hold very realistic views of law, and that legal realists accept the core elements of a formalistic view of law. There are differences between these camps in tone and emphasis, but framing the debate about judging in these terms is counter-productive and encourages attacks on false targets.

⁵ Daniel R. Pinello, *Linking Part to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999) (analyzing results of hundreds of separate empirical studies on judging).

⁶ See e.g., David Charny, *New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999); Howard Erlanger, et al., *Is it Time For a New Legal Realism?*, 2005 WIS. L. REV. 335 (2005).

⁷ See Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 732 (2009).

⁸ See Brian Z. Tamanaha, *The Distorting Slant of Quantitative Studies of Judging*, 50 B.C. L. REV. (forthcoming 2009).

II. THE REALISM OF THE “FORMALIST AGE”

By most accounts, the formalist age ran from the 1870s through the 1920s, when the legal realists emerged to break its spell. The problem with this often repeated claim is that many very realistic things about judging were uttered during this period. Consider this remarkably realistic 1881 passage about judging:

It is useless for judges to quote a score of cases from the digest to sustain almost every sentence, when *every one knows* that another score might be collected to support the opposite ruling. The perverse habit of qualifying and distinguishing has been carried so far that all fixed lines are obliterated, and a little ingenuity in stating the facts of a case is enough to bring it under a rule that will warrant the desired conclusion....[T]he most honest judge knows that the authorities with which his opinions are garnished often have had very little to do with the decision of the court—perhaps have only been looked up after that decision was reached upon the general equities of the case....He writes, it may be, a beautiful essay upon the law of the case, but the real grounds of decision lie concealed under the statement of facts with which it is prefaced. It is the power of stating the facts as he himself views them which preserves the superficial consistency and certainty of the law, and hides from careless eyes its utter lack of definiteness and precision.⁹

William G. Hammond made these striking statements, as skeptical as anything the legal realists would say five decades later, upon his installation as the first full time Dean and Professor at St. Louis University School of Law. He was not a legal radical. Hammond, indeed, has been identified by legal historians as an important contributor to legal formalism.¹⁰

Many similarly realistic observations can be found at the time. In 1887, for example, Columbia law professor Munroe Smith realistically described the process by which judges transparently altered the law while claiming to adhere to *stare decisis*:

⁹ W.G. Hammond, *American Law Schools, Past and Future*, 7 S. U. L. REV. 400, 412-13 (1881) (emphasis added).

¹⁰ See William P. LaPiana, *Jurisprudence of History and Truth*, 23 RUTGERS L.J. 519, 539-42, 555, 557 (1992); cf David M. Rabban, *The Historiography of Late Nineteenth-Century American Legal History*, 4 THEORETICAL INQ. L. 541, 567-78 (2003).

[W]hen new law is needed, the courts are obliged to “find” it, and to find it in old cases. This can commonly be done by re-examination and re-interpretation, or, at the worst, by “distinction.” By a combination of these means, it is even possible to abrogate an old rule and to set a new one in its place. When the old rule is sufficiently wormholed with “distinctions,” a very slight re-examination will reduce it to dust, and a re-interpretation of the “distinguishing” cases will produce the rule that is desired.¹¹

Smith took the view, as did Holmes and the later legal realists, that law is the product of contests over social and individual interests,¹² and that the essential purpose of law is to advance “public policy[.]”¹³

A remarkably modern-sounding article was published by Walter Coles in the leading *American Law Review* in 1893, “Politics and the Supreme Court of the United States.” Coles examined a number of important Supreme Court decisions of the past century, systematically matching the political background of the justices with their decisions. “Viewing the history of the Supreme Court at large, and stating conclusions somewhat broadly, it may be said that its adjudications on constitutional questions have in their general tendencies conformed, in a greater or lesser degree, to the maxims and traditions of the political party whose appointees have, for the time being, dominated the court.”¹⁴ He criticized several Supreme Court opinions as vague, “weak, incoherent, and uncandid[.]”¹⁵ best explained not by the stated legal reasoning but by the political views of the judges. “[T]o say that no political prejudices have swayed the court,” noted Coles with consummate realism, “is to maintain that its members have been exempt from the known weaknesses of human nature, and above those influences which operate most powerfully in determining the opinions of other men.”¹⁶ Especially when no clear precedent exists, he asserted, a judge’s “conclusions will be largely controlled by the influences, opinions and prejudices to which he happens to have been subjected.”¹⁷

¹¹ Munroe Smith, *State Statute and Common Law*, 2 POL. SCI. Q. 105, 121 (1887).

¹² *Id.* at 122–23.

¹³ *Id.* at 130.

¹⁴ Walter D. Coles, *Politics and the Supreme Court of the United States*, 27 AM. L. REV. 182, 207 (1893).

¹⁵ *Id.* at 205.

¹⁶ *Id.* at 182.

¹⁷ *Id.* at 190.

1248 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

In the 1904 *Yale Law Journal*, Wilbur Larremore argued that state high court judges were rendering decisions that were “sympathetic with and effectuating an extra-judicial sentiment.”¹⁸ Larremore observed:

In this condition of affairs judges indulge the delusion that they are observing *stare decisis* merely because they cite precedents. The truth is that, much in the same manner that expert witnesses are procurable to give almost any opinions that are desired, *judicial precedents may be found for any proposition that a counsel, or a court, wishes established, or to establish*. We are not living under a system of scientific exposition and development of abstract principles, but, to a large degree, under one of judicial arbitration, *in which the courts do what they think is just in the case at bar and cite the nearest favorable previous decisions as pretexts*[.]¹⁹

It must be emphasized that none of the jurists quoted were radicals; all were known legal figures in their day; and what they said was not unusual. What prompted many of these expressions of realism was concern about the worrisome uncertainty of the law, a common theme among jurists at the time. This uncertainty was the product of two main factors. First, the West Publishing Company had begun to indiscriminately publish decisions, which produced proliferation of inconsistent precedents. Second, an explosion of legislation was taking place over a range of topics, mainly at the state level, but also at the federal level. The combination of these two factors led many jurists to bewail the messy state of the law. Judge John Dillon, one of the nation’s most renowned judges, summed up the situation in the following passage, written in 1886.

Thousands of decisions are reported every year. An almost unlimited number can be found upon almost any subject. What any given case decides, must be deduced from a careful examination of the exact facts, and of the positive legislation, if any, applicable thereto. A general principle will be found adjudged by certain courts. Other courts deny or doubt the soundness of the principle. Exceptions are gradually but certainly introduced. Almost every subject is overrun by a more

¹⁸ Wilbur Larremore, *Judicial Legislation in New York*, 14 YALE L.J. 312, 314 (1904).

¹⁹ *Id.* at 317-18 (emphasis added).

than tropical redundancy of decisions, leaving the most patient investigator entangled in doubt.²⁰

This luxuriant muddle was made worse, Dillon added, because legislation was “irregular and fragmentary,” and often poorly drafted.²¹ Dillon’s observations are especially telling because, like Hammond, he has been identified by modern formalists as a leading contributor to legal formalism.²²

Many more realistic depictions of the law from the period can be offered. Here is a final example, written in 1907 by a leading commentator, James Bryce:

The Common Law is admittedly unsymmetrical. Some people might call it confused, however exact may be the propositions that compose it. There are general principles running through it, but these are often hard to follow, so numerous are the exceptions. There are inconsistencies in the Common Law, where decisions have been given at different times and have not been settled by the highest Court of Appeal or by the Legislature. There are gaps in it. Thus there has been formed a tendency among lawyers to rate principles, or, at any rate, let us say, philosophical and logical views of the law, very low compared with any positive declaration made by a court.²³

III. THE INVENTION OF THE FORMALIST AGE: POUND’S CONTRIBUTION

How did the erroneous story about the “formalist age” get going? The argument can only be sketched here. Three generations contributed to the creation of this story: Roscoe Pound, Jerome Frank and the legal realists, and leftist historians and theorists in the 1970s. All played pivotal roles in establishing and spreading the story. These successive contributors had their own distinctive motivations and concerns, but they all were critical of courts of the day and all were progressives or on the left.

The seminal piece in the construction of this image was laid by Roscoe Pound, notably his 1908 Columbia Law Review article,

²⁰ John F. Dillon, *Codification*, 20 AM. L. REV. 29, 36 (1886) .

²¹ *Id.*

²² See LaPiana, *supra* note 10.

²³ James Bryce, *The Influence of National Character and Historical Environment on the Development of the Common Law*, 19 GREEN BAG 569, 571 (1907).

1250 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

“Mechanical Jurisprudence.” Pound began the article by posing the question: “What is scientific law?”²⁴ His answer: “the marks of a scientific law are, conformity to reason, uniformity, and certainty. Scientific law is a reasoned body of principles for the administration of justice, and its antithesis is a system of enforcing magisterial caprice, however honest, and however much disguised under the name of justice or equity or natural law.”²⁵ The danger of scientific law, Pound warned, is a “petrification,” which “tends to cut off individual initiative in the future, to stifle independent consideration of new problems and of new phases of old problems, and so to impose the ideas of one generation upon another.”²⁶ Contemporary U.S. law, Pound claimed, was mired in this state:

[T]he jurisprudence of conceptions tends to decay. Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists now protest, and protest rightly.²⁷

He argued that historical jurisprudence and analytical jurisprudence, the main legal theories of the day, exacerbated this stultification because they emphasized abstract concepts and logical analysis.²⁸ Pound proposed that legislation should be enacted to meet the needs of the day, to form a more current basis upon which the common law could develop anew.

By framing his criticism in these terms, Pound was able to tread a line that was critical of the state of the law but not in a way that challenged the integrity of judges. On the left flank, many progressive critics at the time excoriated judges for doing the bidding of the elite capitalist class.²⁹ Pound’s criticism was more measured. His argument was that the judges were rendering legal decisions in good faith; unfortunately, rapid changes in surrounding social and economic conditions meant that purely logical decisions based upon preexisting law produced results that were out of sync with modern circumstances.

²⁴ Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908).

²⁵ *Id.*

²⁶ *Id.* at 606.

²⁷ *Id.* at 611–12.

²⁸ *Id.* at 607–13.

²⁹ See BRIAN Z. TAMANAHA, BEYOND THE REALIST-FORMALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 27–43, 67–90 (2010).

Pound repeated this characterization many times over the ensuing decades. He insisted in 1913, for example, that “the lawyer *believes* that the principles of law are absolute, eternal, and of universal validity, and that law is found, not made[.]”³⁰ Pound would go on to become the long-serving Dean of Harvard Law School as well as the leading jurisprudence scholar of his generation. This combination of repetition and reputation effectively cemented the image of the time.

The above quotes by Hammond, Dillon, Larremore, and Bryce, however, reveal that Pound’s portrayal must be regarded with skepticism. Owing to the existence of gaps in the law and inconsistent precedents, judging was far from mechanical, according to their accounts. Many nineteenth century jurists openly declared that the old common law saying that law was “found by judges, not made” was a fiction, recognized as such by everyone. A lawyer wrote in 1871, “[t]hough the rules of the judge-made law are enacted for the cases as they occur, the *fiction* is that they have existed from of old and are not enacted but declared.”³¹ Another lawyer wrote in 1883 that “*we all know* this is one of the *resplendent fictions* . . .”³² Columbia law professor Munroe Smith observed in 1887 that “[n]obody really believes in the fiction[] [that the courts do not make law].”³³ Another commentator in 1888: “[b]y a singular fiction the courts, from time immemorial, have pretended that they simply declared the law, and did not make the law; yet *we all know that this pretense is a mere fiction*[.]”³⁴

If most jurists of the day indeed believed in the full blown formalist image, one would expect to find clear and confident statements of the full blown formalist position by its proponents—but none are on hand. When setting out his portrayal, Pound made repeated references to German jurists discussing German legal science.³⁵ German legal science did indeed describe law and judging in terms that resembled the image of legal formalism. Ironically, however, as Max Weber made clear at the time, the rationally organized civil law systems stood in stark contrast to

³⁰ Roscoe Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361,375 (emphasis added); ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 110–11 (1938).

³¹ Edward M. Doe, *Codification*, 5 WESTERN JURIST 289, 289–90 (1871) (emphasis added).

³² John M. Shirley, *The Future of Our Profession*, in REPORT OF THE SIXTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 211 (1883).

³³ Munroe Smith, *State Statute and Common Law*, 2 POL. SCI. Q. 105, 121 (1887) (emphasis added).

³⁴ Editors, *Current Topics*, 29 ALBANY L. J. 481, 481 (1884) (quoting a Mr. Seymour) (emphasis added).

³⁵ See e.g. Pound, *supra* note 24 *Mechanical Jurisprudence*, at 606 n.6, 607 n.9. It should also be noted that the protests of American sociologists Pound avers to in the final sentence is a lament in a three page book review about the invalidation of laws by courts that cite old precedents. C.H. Henderson, *Reviews*, 11 AM. J. SOC. 846, 847 (1906).

1252 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

common law systems, which Weber characterized as almost the opposite of formally rational legal systems.³⁶

It is also telling to compare what Pound wrote in 1908 with the assertions of Edwin Corwin the following year. Corwin was an eminent political scientist and perhaps the leading constitutional law scholar of the day. He remarked in 1909:

It was formerly the wont of legal writers to regard court decisions in much the same way as the mathematician regards the x of an algebraic equation: given the facts of the case and the existing law, the outcome was inevitable. *This unhistorical standpoint has now been largely abandoned.* Not only is it admitted that judges in finding the law act not as automata, as mere adding machines, but creatively, but also that the considerations which determine their decisions, far from resting exclusively upon a narrowly syllogistic basis, often repose very immediately upon concrete and vital notions of what is desirable and useful.³⁷

A year after Pound claimed in “Mechanical Jurisprudence” that judges reasoned in mechanical terms, Corwin called these ideas obsolete.³⁸

Additional reasons to be skeptical of Pound’s account are his pivotal references to legal science and abstract jurisprudential theories. Nineteenth century legal academics were enamored with the idea that law was a science, for that accorded it prestige worthy of a place in university studies. Throughout the so-called formalist age, however, legal practitioners were openly skeptical of this way of viewing law. In 1874, the lawyer-editors of the *Albany Law Journal* identified this gap between theorists and practitioners: “[t]his view [that law is a science] is now taken by all theoretical legists; but it has not come down to the professional level, and for the most part, the jurist and the practitioner do not stop to inquire whether their system is a science . . .”³⁹ Henry White, a member of the bar, wrote in the *Yale Law Journal* in 1892:

If the law were an exact science and furnished a complete system of rules which could be applied

³⁶ MAX WEBER, *ECONOMY AND SOCIETY*, 656–58, 784–808, 852–59, 889–92 (Guenther Roth & Claus Wittich eds., 1978).

³⁷ Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 643 (1909) (emphasis added).

³⁸ *Id.* at 659–72.

³⁹ Editors, *Is the Law a Philosophy, a Science, or an Art?*, 10 ALBANY L. REV. 371, 371 (1874).

without serious difficulty and with certain results in every case, perhaps it would be better not to look beyond the written law in determining controversies. But . . . most cases of any difficulty present questions of law on which no one can confidently predict the decision. Most important battles in the courts, which do not turn on questions of fact, are fought on the frontier of the law, where the ground is unsettled, and where new rules are being formulated and new precedents made.⁴⁰

An academic in 1895 acknowledged the gaping divide between theoretically-inclined academics and practitioners on this issue:

Much debate has been expended on this question[: is law a science?] The assertion that it is, by jurists having high ideals, has provoked no little repugnance among practical lawyers, who see that their whole work is really to produce a mental result in the minds of men—judges and jurors—who are influenced by mixed motives, interest, sympathy, antipathy, prejudice, passion; and that scientific accuracy does not cut much figure to their view, in the process, nor in the result.”⁴¹

Consider, finally, the observations of Jabez Fox, the author of several turn-of-the-century commentaries in the *Harvard Law Review* giving, as it were, the view from practice. “If you ask a lawyer whether he really believes that judicial decisions are mathematical deductions,” Fox wrote in 1901, “he will say that the notion is absurd; that when four judges vote one way and three another, it does not mean that the three or the four have made a mistake in addition or subtraction. It means simply that the different judges have given different weights to divers competing considerations which cannot be balanced on any measured scale.”⁴² Fox added that although judges must follow precedent that cannot be distinguished on some rational ground, “Beyond this the judge has a free hand to decide the case before him according to his view of the general good . . . [and] no human being can tell how the social standard of justice will work on that judge’s mind before the judgment is rendered.”⁴³

⁴⁰ Henry C. White, *Three Views of Practice*, 2 YALE L.J. 1, 6 (1892).

⁴¹ Editors, *Is Law a Science?*, 2 UNIV. L. REV. 257, 257 (1895).

⁴² Jabez Fox, *Law and Logic*, 14 HARV. L. REV. 39–42 (1900).

⁴³ *Id.* at 43.

1254 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

Pound's account of prevailing beliefs in mechanical jurisprudence does not stand up to scrutiny. His observations did not comport with what others were saying at the time. The vision of law and judging he described did not match the concerns expressed by many jurists of the great uncertainty of the law and the freedom judges had to rule whichever way they desired. He relied heavily on German legal science. His depiction was dominated by jurisprudential theories which practitioners did not take seriously. Nonetheless, later generations uncritically accepted Pound's unreliable portrayal of mechanical jurisprudence, using his account as the foundation stone of the story about the formalist age.

IV. THE MODERN INVENTION OF THE FORMALIST AGE: BORN IN THE TURMOIL OF THE 1960S AND 1970S

Although it seems much older, the "formalist age" first burst on the legal scene in the 1970s. No one at the turn of the nineteenth century called themselves formalists, which was a pejorative term. Neither Holmes, nor Pound, nor Frank attached the label "formalists" or "formalism" to a prevailing theory or style of judging. Rather, they spoke in terms of legal science, logical deduction, and mechanistic reasoning. Llewellyn discussed the "formal style" in a 1942 essay,⁴⁴ although no one picked up the reference. Llewellyn again referred to the "Formal Style" in *The Common Law Tradition*.⁴⁵ Still the label remained fallow. Grant Gilmore published an article about the legal realists in 1961 without mentioning "formalism" or "the formalists," instead referring to "conceptualism" and the "predecessors[]" of the realists.⁴⁶ As late as 1968, a book on *American Legal Realism* also failed to use the label.⁴⁷

Almost without warning, the mid-1970s brought a cluster of articles on legal formalism by prominent legal historians and legal theorists.⁴⁸ Gilmore's celebrated *Ages of American Law*, published in 1977, cemented

⁴⁴ Karl Llewellyn, *On the Good, The True, The Beautiful in Law*, 9 U. CHI. L. REV. 224 (1942).

⁴⁵ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 53 (1960).

⁴⁶ Grant Gilmore, *Legal Realism: It's Cause and Cure*, 70 YALE L.J. 1037, 1038 (1961).

⁴⁷ WILFRID E. RUMBLE, *AMERICAN LEGAL REALISM SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* (1968).

⁴⁸ In two superb works on legal realism, published in 1969 and 1973, Edward Purcell used the term "legalistic formalism" to describe reasoning at the time. Purcell had read White's book, and takes up similar themes relating to the influence of pragmatism on American thought. See Edward Purcell, *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969); EDWARD A. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

the modern image of the formalist age; an advance synopsis was published in the 1975 *Yale Law Journal*.⁴⁹ Morton Horwitz published "The Rise of Legal Formalism," also in 1975, in the *American Journal of Legal History*.⁵⁰ Duncan Kennedy published a theoretical analysis entitled "Legal Formality" in the 1973 volume of the *Journal of Legal Studies*.⁵¹ William Nelson extensively elaborated on the rise of legal formalism in connection with anti-slavery cases in a 1974 article in the *Harvard Law Review*.⁵² Legal formalism was a central theme in *Justice Accused*, Robert Cover's book on the judicial treatment of slavery cases.⁵³ All of these scholars worked at elite law schools (Harvard, Yale, and Pennsylvania), and all were politically on the left. Kennedy and Horwitz were founding members of the Critical Legal Studies Movement, which engaged in a radical critique of liberal legalism.

There is unquestionably a connection between this sudden convergence of critical attention on legal formalism and the searing political events of the 1960s and 1970s, when universities and law schools were wracked by civil rights and anti-war protests. Among the left, it was a time of seething skepticism about law.⁵⁴ The student editors of the *Harvard Law Review* wrote in 1970 that "[i]t is true that what passes for logic in some judicial opinions (and in many Harvard classrooms) is a little more than finely spun sophistry. It is also important to note that pure logic does not offer a solution to all [legal] problems."⁵⁵ Little imagination is required to see the parallels between these attitudes and the shortly forthcoming preoccupation of critical theorists with legal formalism. Cover drew the link in his Acknowledgements, writing that his book was inspired by a comparison of "judicial complicity in the crimes of Vietnam" with "judicial acquiescence in the injustices of Negro slavery."⁵⁶ In the closing chapter of *Ages of American Law*, Gilmore argued that the 1970s were ushering in a "New Conceptualism"

⁴⁹ Grant Gilmore, *The Age of Anxiety*, 84 YALE L.J. 1022 (1975).

⁵⁰ Horwitz, "The Rise of Legal Formalism," *supra*.

⁵¹ Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973). Although circulated among historians and theorists at the time, Duncan Kennedy's influential book on this topic was not published until 2006. DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (2006); a piece of this was published at the time in Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: the Case of Classical Legal Thought in America, 1850-1940*, 3 RES. IN LAW AND SOC. 3 (1980).

⁵² William E. Nelson, *The Impact of The Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

⁵³ ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

⁵⁴ BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* ch.6 (2006).

⁵⁵ Editors, *With the Editors*, 83 HARV. L. REV. at xxxi (1970).

⁵⁶ *Id.* at xi.

1256 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

resembling that of the formalist age. "In our own history, both in the late nineteenth century and in our own time," he wrote, "the components of the formalist approach have included the search for theoretical formulas assumed to be of universal validity and the insistence that all particular instances should be analyzed and dealt with in the light of the overall theoretical structure."⁵⁷

A group of leftist scholars deeply disaffected at the law in the 1970s thus reached back to the work of the previous episodes of disaffection (Pound, the legal realists) to resurrect a portrait of what was perceived to be a common enemy. Once given a name, the notion of legal formalism and beliefs about "the formalists" swept the legal culture, rapidly ensconcing the now ubiquitous formalist-realist divide. Coming packaged in an antithesis with the already familiar legal realists made a handy pairing, easy to understand, after which each pole came to define its opposite.

With evident pride of achievement, Gilmore declared in 1979 that the previous two decades of historical research "has produced one proposition, which, so far as I know, had never been heard of before World War II, but which has, with extraordinary speed, become one of the received ideas of the 1970's. That is the proposition that the fifty year period from the Civil War to World War I was one of *legal formalism*."⁵⁸

Concrete evidence supports his boast. Prior to 1968, no article (*zero*) was published in a law journal with "formalism" or "formalist" in the title.⁵⁹ The first article title to include one of these terms was written by Grant Gilmore in 1968.⁶⁰ From 1968 through 1979, *nine* articles had one of these terms in the title; from 1980 through 1989 there were *twenty-seven* such articles; from 1990 through 1999 there were *sixty-eight* such articles; from 2000 through 2007 there were *forty-eight*.⁶¹ As these numbers suggest, the notion of the formalist age, although it built upon and incorporated earlier accounts, is indeed a modern invention.

A few legal historians and legal theorists expressed reservations about hopping on this bandwagon. "Formalism is hard to measure;"

⁵⁷ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 108 (1977).

⁵⁸ Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441 (1979) (emphasis added).

⁵⁹ An article with "formalism" in the title was published in 1934, but this is not counted because the term was invoked in a casual sense by way of contrast to "informal." Arthur E. Morgan, *Vitality and Formalism in Government*, 13 SOCIAL FORCES 1 (1934).

⁶⁰ Grant Gilmore, *Security Law, Formalism, and Article 9*, 47 NEB. L. REV. 659 (1968).

⁶¹ A partial explanation for the increased quantity might be the growth in the number of journals, but a comparison suggests that this does not explain the entire increase. Articles with "legal positivism" (a leading contemporary theory of law) in the title go up only a bit over this period: four from 1968–1979; ten from 1980–89; twelve from 1990–1999; eleven from 2000–2007.

wrote Lawrence Friedman, “and there is always a nagging doubt whether or not this is a useful way to characterize the work of the judges.”⁶² Legal theorist H.L.A. Hart suggested that the term formalism was a confusing “misnomer,” a term of reproach rather than a useful or clear idea.⁶³ Nonetheless, the label and image stuck.

Among legal historians, legal theorists, and political scientists, with few exceptions,⁶⁴ the story about the formalist age quickly became gospel, and everyone else in the legal culture, taking the word of the experts, joined along. Political scientists incorporated the notion of formalism into the models of judging.⁶⁵ Legal theorists set out to fill in the notion of legal formalism with theoretical content.

A warning sign that the story should be regarded skeptically is that the formalists have been defined entirely by *political critics* of courts and jurists. The suspicion that politics is what drives charges of “formalism” is heightened when one recognizes that the jurists most often condemned as formalists were usually conservatives of some stripe, as is evident in this string of names offered by historian Thomas Grey: “from the formalism of Cooley and Langdell to the formalism of Friedrich A. Hayek and Antonin Scalia.”⁶⁶ Any jurist with politically conservative views who believes in liberty or in fidelity to legal rules is a prime candidate for being branded a formalist. For a loose analogy, it is akin to relying entirely upon the writings of Marxists to learn about Liberalism, or vice versa—although this analogy misleads because these political theories represent a discernable cluster of ideas, while “formalism” appears to be largely a patched-together invention.

Another problem with the standard story about the formalists is that the notions that the common law is autonomous, comprehensive, and logically ordered, and that judging involves mechanical deduction, strike

⁶² Friedman, *A History of American Law*, *supra* 623 n.39.. Raising another set of doubts about the image of the formalist age, Susanna Blumenthal published a superb historical study that argues that throughout the nineteenth century the creative aspects of judging were well understood. Blumenthal, “Law and the Creative Mind,” *supra*.

⁶³ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 610 (1957).

⁶⁴ One exception among legal theorists is Anthony Sebok, who raised doubts in his book *Legal Positivism in American Jurisprudence*, *supra*, Chap. 3. Historian Robert Gordon has also expressed various doubts about the story about the legal formalists, *see* Gordon, “The Elusive Transformation,” *supra*; Gordon, “Book Review,” *supra*. A new generation of historians has begun to challenge various aspects of the story. Bruce Kimball has contested the formalist image of Langdell, as mentioned earlier. Lewis Grossman challenges the portrayal of James Carter in *Langdell Upside-Down: James Coolidge Carter and the Anti-Classical Jurisprudence of Anticodification*, 19 YALE J. L. & HUMAN. 149 (2007).

⁶⁵ *See* Tamanaha, *supra* note 8.

⁶⁶ *See* Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 512 (1996).

1258 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

modern ears as far-fetched. This reaction should have set off alarms among theorists and historians. Jurists a century ago, after all, must have been intimately familiar with all the problems thrown up by human judges working with an imperfect system of law. And indeed they were.

V. BALANCED REALISM

If realistic views of law and judging circulated throughout the formalist age, it stands to reason that the legal realists could not be the pioneering radicals about judging they are often portrayed as today. More to the point, with respect to their views of judging, they were not radicals at all. The legal realists adhered to what I call “balanced realism.” The full argument is laid out elsewhere,⁶⁷ so only a brief sketch will be provided here.

Balanced realism has two conjoined aspects—a skeptical aspect and a rule-bound aspect. It refers to an awareness of the flaws, limitations, and openness of law, and an awareness that judges sometimes make choices, that they can manipulate legal rules and precedents, and that they sometimes are influenced by their political views and personal biases (the skeptical aspect). These skeptical aspects are inherent to law and judging and cannot be eliminated. Law is stated in general terms in advance and does not always have precise or singular meaning in every context of application. Not every situation can be anticipated in advance; legal rules can be over- and under-inclusive in ways that are not always consistent with their purposes; law is not always systematic; and there is a margin of indeterminacy in language and rules; and judges are human decision-makers subject to cognitive biases, passions, prejudices, and occasions of poor judgment.

But this skeptical awareness is conditioned by the understanding that legal rules nonetheless work. In a well-functioning legal system, judges largely abide by and apply the law, there are practice-related, social and institutional factors that constrain judges, and judges render generally predictable decisions consistent with the law (the rule-bound aspect). The rule-bound aspect of judging can function reliably notwithstanding the challenges presented by the skepticism-inducing aspect, although this is an achievement that must be earned, is never perfectly achieved, and is never guaranteed.

A concise statement of balanced realism was set forth by Cardozo:

Those, I think, are the conclusions to which a sense of realism must lead us. No doubt there is a field within

⁶⁷ TAMANAHA, *supra* note 29.

which judicial judgment moves untrammelled by fixed principles. Obscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function. In such cases, all that the parties to the controversy can do is to forecast the declaration of the rule as best they can, and govern themselves accordingly. We must not let these occasional and relatively rare instances blind our eyes to the innumerable instances where there is neither obscurity nor collision nor opportunity for diverse judgment.⁶⁸

Contrary to their image as skeptics, the legal realists viewed judging in similarly balanced terms. They did not assert that judges routinely manipulated the law to produce desired outcomes.⁶⁹ Their most intemperate rhetoric—especially from Jerome Frank—gestured in this direction, but that was not their considered position. Karl Llewellyn, perhaps the best known legal realist (along with Frank), always expressed balanced realism, as reflected in this passage from the *Bramble Bush*:

[W]hile it is possible to build a number of divergent logical ladders up out of the same cases and down again to the same dispute, *there are not so many that can be built defensibly*. And of these few there are some, or there is one, toward which the prior cases pretty definitely press. Already you see the walls closing in around the judge.⁷⁰

A skilled lawyer asked to predict the fate of a case on appeal, Llewellyn conjectured, ought “to average correct prediction of outcome eight times out of ten, and better than that if he knows the appeal counsel on both sides or sees the briefs.”⁷¹ When identifying the sources of this high degree of reckonability, Llewellyn elaborated on several “steadying factors”: judges are indoctrinated into the legal tradition such that they “see things . . . through law spectacles”;⁷² much legal doctrine—including rules, principles, and statutes—is reasonably clear

⁶⁸ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 128–29 (1921).

⁶⁹ See Tamanaha, *supra* note 8.

⁷⁰ KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 70 (1960).

⁷¹ LLEWELLYN, *supra* note 45.

⁷² *Id.* at 19–20.

1260 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

and well developed;⁷³ judges follow accepted doctrinal techniques, strive to produce a just result, and strive to come up with the right legal answer;⁷⁴ judges sitting together on an appellate bench interact “to smooth the unevenness of individual temper”;⁷⁵ and judges’ desire and commitment to live up to the obligations of the judicial role, to earn the approval of their legal audience for appropriate judicial behavior, and their desire to avoid reversal by a higher court, prompts judges to engage in a good faith effort to conduct an unbiased search for the correct legal result.⁷⁶

The misleading skeptical image of the realists is perpetuated by the formalist-realist antithesis, which casts the realists as the opposite pole of formalism. Llewellyn devoted a 500 page book, *The Common Law Tradition*, to refuting the “Law School Skeptic,”⁷⁷ arguing at length that judicial decisions are highly predictable and determined mainly by legal factors.⁷⁸ Llewellyn wrote the book precisely to counteract the corrosive consequences of facile skepticism about judging—which is ironic because today he is often painted as a skeptic.⁷⁹

VI. THE REALISM OF CONTEMPORARY FORMALISTS

The false formalist-realist divide continues to structure contemporary debates about judging. What this obscures is that all sides in the debate share substantial common ground. They share balanced realism.

Let us begin with the realism of contemporary formalists. A number of prominent judges and legal theorists, including Justice Antonin Scalia, Judge Frank Easterbrook, Professor John Manning of Columbia, and Professor Lawrence Solum of Illinois, among others, self-identify or are tagged as modern day formalists. The argument here is not that these jurists are espousing empty or irrelevant ideas; rather, the argument is that labeling their position “formalist” adds nothing distinctive,⁸⁰ and is potentially misleading because these modern formalists accept the basic insights identified with realism.

⁷³ *Id.* at 20–21.

⁷⁴ *Id.* at 21–25.

⁷⁵ *Id.* at 26.

⁷⁶ *Id.* at 45–51.

⁷⁷ LLEWELLYN, *supra* note 45.

⁷⁸ *Id.* at 3–7, 19–35.

⁷⁹ *Id.* at 3.

⁸⁰ Although Scalia and Easterbrook have been labeled formalists by others, neither identify themselves as “formalists.”

Scalia is thought to be a contemporary formalist. His basic position is that constitutional provisions and statutes should be interpreted in accordance with the meaning of their terms, informed by original understandings. His adoption of this interpretive approach does not mean that Scalia is unrealistic about law or judging. With respect to the common law, Scalia states unabashedly that judges “make the law,” resolving policy issues in the process.⁸¹ “Indeed, it is probably true that in these fields judicial lawmaking can be more freewheeling than ever,” Scalia writes, “since the doctrine of *stare decisis* has appreciably eroded.”⁸² Scalia describes judges in common law cases not as mechanically applying the law, but as seeking “the most desirable resolution of [the] case.”⁸³ He regrets the use of broad standards and “totality of circumstances” and “balancing” tests on grounds that they grant too much discretion to judges and increase legal uncertainty.⁸⁴ But Scalia recognizes that open provisions have advantages, and he accepts that these “modes of analysis [will be] with us forever.”⁸⁵

Judge Easterbrook, also identified as a formalist, emphasizes that “‘Plain meaning’ as a way to understand language is silly. In interesting cases, meaning is not ‘plain’ *Hard questions have no right answers*. Let us not pretend that texts answer every question. Instead we must admit that there are gaps in statutes, as in the law in general.”⁸⁶ Easterbrook recognizes, moreover, that social meanings and purposes necessarily play into interpretation. “Words take their meaning from contexts, of which there are many—other words, social and linguistic conventions, the problems the authors were addressing. Texts appeal to communities of listeners, and we use them purposively.”⁸⁷

A vocal proponent of a “formalistic” approach to statutory interpretation, John Manning, offers a series of similarly realistic assertions: “modern formalists do not rely much on the-law-is-the-law styles of argument”;⁸⁸ “modern formalists recognize that language is a social enterprise that yields meaning only in context. Hence, they routinely derive statutory meanings from extratextual sources, including

⁸¹ ANTONIN SCALIA, COMMON LAW COURTS IN A CIVIL LAW SYSTEM: THE ROLE OF UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAW, in *A MATTER OF INTERPRETATION* 6, 9, 12 (Amy Gutman, ed., 1997).

⁸² *Id.* at 12.

⁸³ *Id.* at 13.

⁸⁴ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

⁸⁵ *Id.* at 1187.

⁸⁶ Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 67–68 (1994).

⁸⁷ *Id.* at 61.

⁸⁸ John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 685 (1999).

1262 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

unenacted materials such as cases or treatises that define terms of art or prescribe canons of construction.”⁸⁹ “Modern formalists acknowledge that all texts require exposition when applied to specific factual situations, and hence that agencies and courts inevitably enjoy some delegated authority to specify the details of statutory meaning.”⁹⁰ “Formalist judges routinely use purpose to resolve ambiguity.”⁹¹ “If . . . judges must inevitably fill in the blanks of statutory construction,” Manning asserts, “it does little violence to formalism to suggest that they design the resulting norms to fit sensibly within the web of structural relationships that the Constitution prescribes.”⁹²

A sophisticated proponent of a formalistic approach to constitutional interpretation, Lawrence Solum, also stakes out a thoroughly realistic position: “Formalism requires rule-following[] But rule-following need not be mechanical in any literal sense of that word. The application of rules to particular facts may require sensitivity to context and purpose[] Formalists can take the purposes of rules into account in a variety of ways. . . .”⁹³ “[T]here is no reason for formalism to reject a practice of equity that refuses to apply a legal rule when it would lead to absurd consequences.”⁹⁴ “Formalism can and should accept the proposition that more than one outcome in a case can be legally correct. And formalism can and should accept the notion that the law sometimes confers discretionary authority on legal actors, including judges.”⁹⁵ “The application of rules to particular situations necessarily involves practical judgment, and legal formalism does not seek to deny this.”⁹⁶

In the face of this considerable realism, one might ask, what is it about their position that makes contemporary formalists distinctively “formalistic”? Solum encapsulates it as follows: “[t]he core idea of formalism is that the law (constitutions, statutes, regulations, and precedent) provides rules and that these rules can, do, and should provide a public standard for what is lawful (or not).”⁹⁷ Beyond this general position, “formalists” focus on different aspects and do not all agree among themselves (Solum and Scalia, for example, although both

⁸⁹ *Id.* at 688 (footnotes omitted).

⁹⁰ *Id.* at 688–89.

⁹¹ *Id.* at 693.

⁹² *Id.*

⁹³ Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 171–72 (2006).

⁹⁴ *Id.* at 173.

⁹⁵ *Id.* at 174.

⁹⁶ *Id.* at 175.

⁹⁷ *Id.* at 169–70.

espouse versions of originalism, go in markedly different directions in constitutional interpretation).

It seems reasonable to conjecture that most contemporary lawyers, academics, and judges would sign on to the “core idea of formalism” Solum identifies. Indeed, the legal system would be dysfunctional if most lawyers and judges did not believe that legal rules provide guiding and binding public standards. If that is correct, then most contemporary lawyers can be regarded as “formalists” in a core sense (regardless of whether they are repelled by the label).

VII. THE FORMALISM OF CONTEMPORARY REALISTS

Now let us see the formalism of contemporary realists. The most prominent realist about judging today is Judge Richard Posner. His *How Judges Think* is a sustained critique of the delusions of formalism. Posner substitutes “legalism” for the term formalism because “it carries less baggage,”⁹⁸ but the meaning remains unchanged.

Legalists decide cases by applying preexisting rules or, in some versions of legalism, by employing allegedly distinctive modes of legal reasoning, such as “legal reasoning by analogy.” They do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and do not look outside conventional legal texts—mainly statutes, constitutional provisions, and precedents (authoritative judicial decisions)—for guidance in deciding new cases. For legalists, the law is an autonomous domain of knowledge and technique.⁹⁹

Throughout his book the deluded legalist serves as the foil for Posner’s pragmatic view of judging.¹⁰⁰ He charges that law professors are the primary purveyors of a naïve legalist/formalist understanding of

⁹⁸ POSNER, *supra* note 4, at 7. For another recent attack against formalism by a judge, see E.W. THOMAS, *THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES* xix (2005) (“It is the lingering judicial commitment to formalism that explains why so much judicial reasoning is still legalistic, strained, or mechanical.”).

⁹⁹ POSNER, *supra* note 4, at 7–8. There is no question that Posner means formalism when he says legalism. At the end of this passage, Posner quotes a summary description of the “legal formalists” by Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473,478 (2003). In the index to his book, the “Formalism” entry says “See Legalism.”

¹⁰⁰ POSNER, *supra* note 4, ch. 1.

1264 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

judging.¹⁰¹ In law schools: “The motivations and constraints operating on judges, and the judicial mentality that results, are ignored, as if judges were computers rather than limited human intellects navigating seas of uncertainty.”¹⁰² Legalism time and again is indicted by Posner for its foolish illusions. “Legalism treats law as an autonomous discipline,”¹⁰³ he repeats. Legalists believe that judging is purely a matter of “performing logical operations.”¹⁰⁴

The ideal legalist decision is the product of a syllogism in which a rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusion. The rule might have to be extracted from a statute or a constitutional provision, but the legalist model comes complete with a set of rules of interpretation (the “canons of construction”), so that interpretation too becomes a rule-bound activity, purging judicial discretion. The legalist slogan is “the rule of law.”¹⁰⁵

The jurist Posner cites for that last delusion is Brian Tamanaha (gulp).¹⁰⁶ Without belaboring the issue, although I have criticized his pragmatic judging,¹⁰⁷ suffice it to say that I have never suggested the set of positions Posner pins on legalists. None of the contemporary formalists identified in the preceding Part adhere to this complex of beliefs about law or judging—nor does any other jurist.

The upshot of these observations is not that Posner has constructed a straw man. It is to demonstrate that the tale about classical legal formalism continues to shape the debate over judging at the highest level. Posner is one of the nation’s most influential judges as well as one of the most respected legal theorists. What Posner says about judging carries heft.

Not only does Posner resurrect classical legal formalists to serve as his modern target, he also assumes a starkly realist stance. To less than

¹⁰¹ *Id.* ch. 8, especially 219–21.

¹⁰² *Id.* at 377.

¹⁰³ *Id.* at 42.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 41.

¹⁰⁶ At the end of the final sentence quoted, Posner cites my *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 227–31(2006), and Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469 (2007).

¹⁰⁷ See TAMANAHA, *supra* note 55, ch. 13.

careful readers, Posner will sound like a modern day Jerome Frank, the most extreme realist.

Because the materials of legalist decision making fail to generate acceptable answers to all the legal questions that American judges are required to decide, judges perforce have occasional—indeed rather frequent—recourse to other sources of judgment, *including their own political opinions or policy judgments, even their idiosyncrasies*. As a result, *law is shot through with politics* and with much else besides that does not fit a legalist model of decision making.¹⁰⁸

Judges are regularly confronted with open areas “in which the orthodox (the legalist) methods of analysis yield unsatisfactory and sometimes no conclusions, thereby allowing or even dictating that emotion, personality, policy intuitions, ideology, politics, background, and experience will determine a judge’s decision.”¹⁰⁹ Posner bluntly declares: “So judging is political.”¹¹⁰

Statements of this sort, scattered throughout the book, are like tossing red meat at the eager skeptics of judging—as Posner well knows. A political scientist reviewing the book enthused, with an air of vindication, that “this book by a highly regarded sitting judge confirms what social scientists . . . have demonstrated. Politics, ideology, and strategic concerns infuse judicial decision-making.”¹¹¹

Skeptics who take Posner’s bait, however, are falling for misdirection from an inveterate provocateur. His position is not as radical as it appears at first blush. Judges have admitted many times over in the past hundred years that law runs out or supports contrary outcomes, and that their personal views can play into legal interpretations.

Take his sampling of realistic statements uttered by judges who sat with Cardozo eighty years ago. In a 1924 speech to the New York City Bar, the Chief Judge of the Court of Appeals, Judge Frank Harris Hiscock, reviewed a string of recent decisions and openly confided: “[a]ll of these cases could have been decided the other way.”¹¹² He told his audience that constitutional questions about rights and liberties that courts are called upon to decide are less questions of law than “of policy

¹⁰⁸ POSNER, *supra* note 5, at 9 (emphasis added).

¹⁰⁹ *Id.* at 11.

¹¹⁰ *Id.* at 369.

¹¹¹ Mark Kessler, *How Judges Think*, LAW AND POLITICS BOOK REVIEW, Aug. 24, 2008, <http://www.bsos.umd.edu/gvpt/lpbr/reviews/2008/08/how-judges-think.html>.

¹¹² Frank Harris Hiscock, *Progressiveness of New York Law*, 9 CORNELL L.Q. 371, 376 (1924).

1266 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

and state craft.”¹¹³ Hence, rulings are a function of the “policy and viewpoint of a court,” which can change when the membership changes.¹¹⁴ Another judge on the court, Irving Lehman, delivered a reflective speech at Cornell Law School in 1924 stating that judges are sometimes confronted with conflicting precedents, or erroneous precedents, or indeed no precedents, and they must sometimes change the law for reasons of public policy.¹¹⁵ As a law student, he realized that “[l]aw was not an exact science founded on immutable principles”; upon becoming a judge, he “realized that in many cases there were no premises from which any deductions could be drawn with logical certainty.”¹¹⁶ He added that “no thoughtful judge can fail to note that in conferences of the court, differences of opinion are based at least to some extent upon differences of viewpoint[]”¹¹⁷; and “it is inevitable that a judge in weighing individual rights as opposed to collective benefit will to some extent be influenced by his personal views.”¹¹⁸ Judge Cuthbert W. Pound, also on the court, elaborated on the sources of uncertainty in law, observing that legal doctrines were “not infrequently reasoned away to a vanishing point. One may wade through a morass of decisions only to sink into a quicksand of uncertainty.”¹¹⁹

These are the candid admissions of a few judges on a single court in the 1920s. Many judges have said the same in the decades before and since.¹²⁰ Judges also uniformly hasten to emphasize, however, that notwithstanding the openness of law and the limitations of judges, their decisions are substantially determined by the law. And Judge Posner is no exception. After bluntly declaring (for maximum effect) that “judging is political,” he soon tacks in the opposite direction:

But judging is not just personal and political. It is also impersonal and nonpolitical in the sense that many, *indeed most*, judicial decisions really are the product of a neutral application of rules not made up for the occasion to facts fairly found. Such decisions exemplify what is

¹¹³ *Id.* at 381.

¹¹⁴ *Id.* at 374.

¹¹⁵ Irving Lehman, *The Influence of the Universities on Judicial Decisions*, 10 CORNELL L.Q. 1 (1924).

¹¹⁶ *Id.* at 2–3.

¹¹⁷ *Id.* at 6.

¹¹⁸ *Id.* at 12.

¹¹⁹ Bulletin, Cuthbert W. Pound, *Defective Law – Its Cause and Remedy*, New York State Bar Association, September 1929, 279, 281.

¹²⁰ See Brian Z. Tamanaha, *The Realism of Judges Past and Present*, 57 CLEV. ST. L. REV. 77 (2009).

commonly called “legal formalism,” though the word I prefer is “legalism.”¹²¹

Although easily overlooked beneath his blaring skeptical assertions, Posner has consistently said this for many years: “the social interest in certainty of legal obligation requires the judge to stick pretty close to statutory text and judicial precedent in most cases and thus to behave, much of the time anyway, as a formalist.”¹²² Posner often repeats that a substantial proportion of time judges duly adhere to precedent because that is what their role demands.¹²³ “The business of judges is enforcing the law,”¹²⁴ Posner says, and that is what judges do.

Posner’s statements about politics and ideology relate to judging in the “open area[,]”¹²⁵ to the subset of cases with “legal uncertainty.”¹²⁶ But “most cases are routine,”¹²⁷ he tells us, and “the routine cases are those that can be decided by legalist techniques.”¹²⁸ Posner recognizes that the vast bulk of disputes never make it into court because the expected legal outcome is clear; a substantial majority of judicial decisions are not appealed “because the case really is ‘controlled’ by precedent or clear statutory language.”¹²⁹ One must wonder why Judge Posner thought it necessary to pitch the book as an assault against prevailing legalist delusions when, by his own account, the legalist position (the realistic one, not Posner’s resurrected classical formalist) is not a delusion at all for the mass of routine cases.

Stripping away the rhetorical excesses, the differences between Posner and his opponents play out on relatively narrow—albeit important—terrain. Legalists want judges to follow legal texts, precedents, and methods as far as they will go.¹³⁰ Posner similarly insists that pragmatic judges usually do, and should, follow texts and precedents when clear.¹³¹ Both sides agree that this covers the bulk of cases.

Posner puts a different gloss on what comes to the same position. Legalists say judges are *obligated* to follow the law; Posner says judges should do what advances the social good, but he adds that society

¹²¹ *Id.* at 370 (emphasis added).

¹²² RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 209 (1999).

¹²³ POSNER, *supra* note 4, at 45, 61, 71, 125, 145.

¹²⁴ *Id.* at 213.

¹²⁵ *Id.* at 15.

¹²⁶ *Id.* at 11, 82.

¹²⁷ *Id.* at 46.

¹²⁸ *Id.* at 76, 373.

¹²⁹ POSNER, *supra* note 4, at 44–45.

¹³⁰ See TAMANAH, *supra* note 29, ch. 13.

¹³¹ POSNER, *supra* note 4, at 253.

1268 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

benefits from the consistent interpretation of the legal rules and adherence to precedent. Legalists say judges have a *duty* to set forth a reasoned, legally supported basis for their decision; with rascally delight, Posner says those are the “rules of the judicial game,”¹³² although he admits that judges readily follow these rules and obtain satisfaction in doing so.

When the law offers *no clear answer* or runs out—that is when matters get tricky, for legalists and pragmatists alike. As Posner recognizes, “[l]egalists acknowledge that their methods cannot close the deal every time.”¹³³ And “legalists” do not hold a uniform position on what a judge should do when no legal answer can be ranked stronger than others. As for *his* preferred method, Posner admits that pragmatism does not tell judges how to figure out what are the “best” ends for the community.¹³⁴ He also concedes that judges can only guess at the likely consequences of their decisions.¹³⁵ His final advice to a pragmatic judge offers scant guidance: “there isn’t too much more to say to the would-be pragmatic judge than make the most reasonable decision you can, all things considered.”¹³⁶ Individual pragmatic judges will have different views of desirable social ends, and they will often lack reliable empirical information to make informed judgments about what decision will best advance those ends. The complexity and uncertainty involved in predicting the future consequences of decisions are immense. Opponents of pragmatic judging emphasize these flaws when objecting that Posner’s preferred approach invites judges to engage in uncontrolled political decision making, contrary to their judicial role, a task for which they are ill-equipped.¹³⁷

The core point of this discussion is that the disagreement between Posner and his opponents mostly relates to the relatively small subset of legally uncertain cases (the precise proportion unknown). This small subset can never be eliminated because the law is unavoidably open and uncertain at the margins. This involves the skeptical aspect of balanced realism. There is no consensus answer for how judges should deal with these situations because solid arguments—some normative, some empirical—support competing approaches. For the bulk of cases, however, there is substantial agreement about what judges *are doing*, as well as agreement about what they *should be* doing (albeit with

¹³² *Id.*

¹³³ *Id.* at 47 (identifying Tamanaha).

¹³⁴ POSNER, *supra* note 4, at 240, 253.

¹³⁵ *Id.* at 334.

¹³⁶ RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 64 (2003).

¹³⁷ RONALD DWORKIN, JUSTICE IN ROBES 84–104 (2006).

competing reasons proffered for why they should be doing it). This is the rule-based aspect that balanced realism recognizes.

If taken at the broadest level of generality, a loose contrast can be drawn between contemporary jurists identified as formalists and those identified as realists: formalists tend to emphasize the reasons why and ways in which legal rules, texts, and precedents can and should control; realists tend to emphasize the limitations of legal rules. There are differences of attitude and emphasis. But little more can be said beyond that (and keep in mind that formalists disagree among themselves across a range of issues, as do realists). The differences that separate formalists and realists are neither sharp enough nor deep enough to maintain the formalist-realist antithesis. Neither side adopts the complex of exaggerated beliefs typically associated with each pole.

VIII. A WAY OUT

If the preceding presentation has been at all persuasive, then the first steps have already been taken to move beyond the formalist-realist divide. By making it plain that the image of the formalist age deserves skepticism, we are freed from one prong of the divide. The realization that the realists were not radical skeptics, but held to a balanced realism about judging, frees us from the other prong. The recognition that most jurists, today and for more than a century, adhere to a balanced realism about judging, provides a common baseline for debates about judging. This “balanced realism” can with equal felicity be called “balanced formalism.” Recognition of this common baseline will not in itself resolve current debates. It does hold the promise, however, to reduce misunderstandings and wasted effort, and to focus the debates on matters of real disagreement. There have never been formalists who believed that judging was an exercise in mechanical deductions; nor is it plausible to believe that judges’ decisions are driven by their ideological preferences. The sooner we set aside this false opposition the better off we will be.