

AN INTERPRETATION AND (PARTIAL) DEFENSE OF LEGAL FORMALISM

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INTRODUCTION

The origin of this lecture lies in an observation. Specifically, I was struck by a substantial similarity in the views of Grant Gilmore and of Friedrich Hayek. What is striking in this observation is that Gilmore was a kind of legal realist. As a realist his skepticism about law was expressed as an attack upon legal formalism.¹ Hayek, by contrast, is at least generally characterized as a legal formalist.² And what I view as Hayek's very similar skepticism about law was expressed as advocacy of legal formalism.

What is the nature of the skepticism that I, at least, view as common to both of these eminent legal thinkers? At bottom, it is, both distrust of and distaste for centralized, all encompassing legal direction. Gilmore put it this way:

As lawyers we will do well to be on our guard against any suggestion that, through law, our society can be reformed, purified, or saved. The function of law, in a society like our own, is altogether more modest and less apocalyptic. It is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us.³

Repeatedly in his work, Hayek makes what I believe is a substantially similar point: "constructivist rationalism," the belief that, by means of a "scientific" law, society may be purposefully reconstructed, and human activity directed to serve collectively determined goals, is a tragically false, dangerous and destructive myth.⁴ Gilmore identifies formalism with that myth. Hayek offers formalism as

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1. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 41-67 (1977).

2. E.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 228-30 (1992); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 57, 60 (1990).

3. GILMORE, *supra* note 1, at 109.

4. See 1 F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 8-34 (1973) [hereinafter HAYEK, *LAW, LEGISLATION AND LIBERTY*]; 1 F. A. HAYEK, *Traditional Morals Fail to Meet Rational Requirements*, in *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 66-88 (W.W. Bartley, III ed., 1988); FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 234-49 (1960) [hereinafter HAYEK, *CONSTITUTION OF LIBERTY*]. Whether Hayek is properly characterized as a formalist is debatable. His views on law changed from the time of the more clearly formalist *Constitution of Liberty*, HAYEK, *CONSTITUTION OF LIBERTY*, *supra*, to the time of *Law, Legislation and Liberty*, HAYEK, *LAW LEGISLATION AND LIBERTY*, *supra*. The change is attributable to the influence on Hayek of Leoni. See BRUNO LEONI, *FREEDOM AND THE LAW* (3d ed., Liberty Fund, Inc. 1991).

an alternative to and defense against the myth.

Who was right? For me, the question is particularly interesting because I was brought up in the law to believe that formalism is a sin. This is not an experience unique only to me. It is, I venture to guess, an article of faith among most legal academics that formalism is a sin—which is not to say that formalism is absent from contemporary law, or even from contemporary academic commentary. Indeed, judging from that commentary, there is far too much formalism going on. For formalism, as a sin, is the label the commentators often attach to the targets of their critique.⁵ A difficulty with this attaching of that label is that the precise content of the sin supposed to have been committed is often unclear.

What is legal formalism?

As formalism is most often defined by its critics,⁶ and as the critics often have arguably distinct targets in mind, the question is perhaps better framed as “what are legal formalisms?” At least this is so unless there is some underlying foundational belief at the bottom of the variety of formalisms, one that implies or necessitates each.

In surveying the various legal formalisms, I will rely in part upon positions taken or said to have been taken by the “classical formalists”—legal academics writing at the end of the Nineteenth Century and beginning of the Twentieth Century, who were principally associated with the Harvard Law School, and with the then dean of that school, Christopher Columbus Langdell.⁷ However, I am not engaged in an exercise of legal history, and I am not, therefore, seeking to recapture the particulars of the thought of these academics. Rather, I am both outlining contemporary beliefs about what formalism is or was, whether or not these contemporary beliefs accurately portray the long lost era of classical formalism, and constructing an interpretation of the formalist impulse, one only partially related to the specifics of classical formalism.

Similarly, I will refer to formalism’s critics as legal realists, post-realists or

5. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 19-20, 75-76 (1995) [hereinafter POSNER, *OVERCOMING LAW*]; POSNER, *supra* note 2, at 274-75; CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 24-26 (1996).

6. See Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509 (1988) (making this point in context of a defense of formalism). However, there has been a recent renewal of interest in formalism, and there are contemporary defenders of various varieties of formalism. See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Michael Corrado, *The Place of Formalism in Legal Theory*, 70 *N.C. L. REV.* 1545 (1992); Schauer, *supra*; Alan Schwartz, *Incomplete Contracts*, 2 *NEW PALGRIVE DICTIONARY OF ECONOMICS AND LAW* 277 (1997); Ernest J. Weinrib, *Legal Formalism: On The Immanent Rationality of Law*, 97 *YALE L.J.* 949 (1988); James G. Wilson, *The Morality of Formalism*, 33 *UCLAL. REV.* 431 (1985); see also Symposium, *Formalism Revisited*, 66 *U. CHI. L. REV.* 527 (1999) (exploring contemporary relevance of varieties of formalism).

7. For contemporary depictions of the classical formalists, see, e.g., NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 9-64 (1995); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* 13-33 (1995); ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 136-59 (1982).

pragmatic instrumentalists.⁸ I am aware that legal realism was less a coherent school of thought than a set of somewhat diverse impulses, but I am not presently interested in the details of legal realism, the differences between particular legal realists or the differences between legal realism and the post-realist schools that incorporate realist insights. Realism, post-realism, and pragmatic instrumentalism are largely employed here merely as labels for anti-formalist arguments and positions. Nevertheless, it will become apparent that I offer an interpretation of the “realist” impulse, just as I do of the formalist impulse.

My objective is a reconstruction of formalism on grounds of skepticism about legal competence. This will strike many as a peculiar, even perverse thesis. A common theme in anti-formalist thought is precisely that formalism entails an exaggerated, and erroneous, belief in legal competence, it is a belief that the formalist legal method is adequate to the task of properly resolving problems confronted in law.⁹ I do not deny that formalist rhetoric often appears imperious, but I offer an interpretation of formalism that depicts it as devoted to a constrained ambition for law. In the course of my survey of legal formalisms, I will also identify what I take to be the principal objections to the formalism in question, and I will suggest at least partial rebuttals. I proceed initially in three parts, addressing, in turn, formalism as autonomous conceptualism, formalism as rules, and formalism as empty spaces. I then seek to address the merits of formalism and its chiefly consequentialist competitors.

I. FORMALISM AS AUTONOMOUS CONCEPTUALISM

What is “autonomous conceptualism”? By “autonomous” I mean that at least classical formalists believed that answers to legal questions could and should be based upon distinctly legal materials, without reference to sources external to

8. I therefore employ the term “legal realist” in a very broad sense in this essay to include not merely the legal realists of the 1930s, but proto-realists, such as the early Roscoe Pound, and post-realists. Post-realists include all who would agree with the claim that “we are all realists now” in the sense that they are committed to what Professor Summers calls “pragmatic instrumentalism.” See Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981). I exclude from “legal realism” as I employ the phrase, that branch of legal realism devoted to extreme skepticism or nihilism. So “realism” in my usage refers to the pragmatic, social science branch of the phenomenon.

9. This is obviously apparent in Gilmore, but it was also a common theme in legal realist literature and is a theme in Judge Posner’s critique of contemporary legal practice. See, e.g., POSNER, *OVERCOMING LAW*, *supra* note 5; Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205 (1979); David Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949 (1981); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985). On the other hand, some recent “formalist” proposals are predicated on the idea that formalism may be the best that can be done given the incapacities of legal actors. E.g., Eric Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 N.W. U. L. REV. 749 (2000).

law, most obviously without reference to the social sciences.¹⁰ By “conceptualism,” I mean that at least classical formalists believed three things.¹¹ First, legal concepts, such as the concept of consideration in contract or the concept of ownership in property, could be identified through *induction*, though that is a review of the evidence of case law. Second, they believed that more particular rules could then be derived “logically” from the concepts induced from the caselaw. Third, they believed that the result would be a self-contained, internally consistent, systemized and rationalized law, rather like geometry, and, therefore, that correct legal answers could be given to any question by reference to the logic of this system.

This, at least, is the standard account, the account attacked by Holmes¹² and later by legal realists.¹³ What, then, is wrong with autonomous conceptualism? I will not review all of the criticisms, but I will attempt a summary of the main lines of attack. First, the concepts employed by the classical formalists were far too general. The radical version of this criticism was a nominalist belief that concepts do not have real world referents, or that real world referents are insufficiently identical to be captured by any concept.¹⁴ A more moderate version of the criticism is that only narrow concepts drawn at lower levels of abstraction can be serviceable for formalist law.¹⁵ Thus, for example, abstract concepts like “ownership” or “property right” or “liberty” cannot yield particular uncontroversial legal conclusions because various possible conclusions may follow from them. In Hohfeldian terms, abstract concepts such as property must be disaggregated before they become descriptive of the actual variety of possible legal relationships.¹⁶ An implication of this view is that judges are not in fact

10. See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 16-20 (1983). “Formalism” would therefore seem to entail one of the central claims of legal positivism: that law is distinct from morality. At least this would seem to be the case if morality means “everything else.” Frederick Schauer & Virginia Wise, *Legal Positivism As Legal Information*, 82 CORNELL L. REV. 1080 (1997).

11. See Stanley Fish, *The Law Wishes to Have a Formal Existence*, in *THE FATE OF LAW* 159 (Austin Sarat & Thomas Kerns eds., 1991) (offering a somewhat parallel account of formalism, but attributing it to contemporary legal practice); Grey, *supra* note 10.

12. See OLIVER WENDELL HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167 (Peter Smith ed., 1952) (1920). Gilmore nevertheless attacked Holmes as a formalist. See GILMORE, *supra* note 1, at 48-56. In terms of this essay, Holmes is best viewed as a proto-realist in his (moderate) attack on formalism as autonomous conceptualism and as a formalist in his preference both for rules and for empty spaces. See generally DUXBURY, *supra* note 7, at 37-47; Grey, *supra* note 10, at 44.

13. E.g., JEROME FRANK, *LAW AND THE MODERN MIND* (Peter Smith ed., Anchor Books 1970) (1930); Cohen, *supra* note 9; John Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17 (1924); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

14. See AMERICAN LEGAL REALISM 166 (William W. Fisher, III et al. eds., 1993).

15. CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 24-26 (1996).

16. *Id.*; see Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

bound by concepts, as these may be manipulated.¹⁷ If particular rules or rights are not in fact compelled by the high level abstractions relied upon by formalists, judges are not in fact engaged in finding the law and following it. Rather, they are engaged in willing the results they reach in the particular cases they decide.

Second, and perhaps more importantly, formalism's geometrical aspirations are normatively suspect. What is needed instead, said Holmes, the realists, the pragmatists, and most recently Judge Posner, is a concrete focus upon considerations of social advantage and disadvantage.¹⁸ Legal decision should not proceed then from fidelity to the heaven of legal concepts, but rather from consideration of the consequences of alternative decisions. Law, in this anti-formalist depiction, is an instrument of social policy to be used for socially desirable ends. An implication of this normative critique of formalism is denial of law's autonomy: if law is an instrument to be purposively applied, it requires the tools and information supplied by "science" of one sort or another.

These, I think, summarize the main lines of attack, but there is a third line, distinct from and arguably antagonistic to the second, a line most obviously associated with Karl Llewellyn: abstract formalist concepts should be replaced with context dependent sensitivity to social practice.¹⁹ Law should be specific to situation types or categories and should incorporate the norms of real people in the real world. It should be noticed that this reference to social practice as a source of law has much in common with Hayek's Humean theory of spontaneous order and with, at least at some points in Hayek's intellectual journey, his recommendations for law.²⁰ It may also be a point of partial commonality between Hayek and Gilmore. However, there is a tension between the second and this third critique of autonomous conceptualism in *at least* one respect: the preferred source of law in the second is science; the preferred source in the third is practice.

What might be said of formalism given these critiques? I cannot defend formalism in its pristine, classical sense for two reasons. First, it is simply not an accurate depiction of law as it now is, even if, which is doubtful, it once was such a depiction. I would be guilty of malpractice if I described our law in classically formalistic terms and if I taught it in these terms. Second, I think the critique of generalized abstraction partially correct: legal particulars cannot be

17. Cf. John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 253 (1997) (explaining that principles compete with each other and any given principle can be implemented in a variety of ways).

18. See generally *supra* notes 9, 13. For one of Judge Posner's recent statements, see POSNER, *OVERCOMING LAW*, *supra* note 5, at 399.

19. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION, DECIDING APPEALS* 127 (1960); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* chs. 11-12 (1973).

20. See HAYEK, *LAW, LEGISLATION AND LIBERTY*, *supra* note 4, at 35-54, 74-91, 100-01; Symposium, *Decentralized Law for a Complex Economy*, 23 SW U. L. REV. 443 (1994); Symposium, *Public and Private Ordering and the Production of Legitimate and Illegitimate Rules*, 82 CORNELL L. REV. 1123 (1997). Indeed, Hayek in his later work attacks Langdellian versions of autonomous conceptualism. See HAYEK, *LAW, LEGISLATION AND LIBERTY*, *supra* note 4, at 105-06.

uncontroversially derived from abstract concepts, and the law is unlikely ever to achieve a state of internal consistency.

Nevertheless, I wish to offer a partial defense of autonomous conceptualism. My initial point is that a substantial degree of conceptualism is inescapable in law, and a substantial degree of conceptualistic argument is evident in law. Conceptualism is inescapable because one does not, contrary to the view of some realists, approach facts without reference to concepts and expect to do anything intelligible.²¹ Concepts are essential to thought about and evaluation of facts; recognition of this fact should lead to a preference for making one's concepts explicit. Moreover, conceptualism is normatively essential. The nominalist's rejection of conceptual ordering generates radical case specific decision: if no two cases are sufficiently alike to justify a concept or rule encompassing them, there can be no such concept or rule. This is a formula for rule by arbitrary prejudice, not law.

That there is a substantial degree of conceptualistic argument in law is evident not only in any casual reading of appellate opinions, but also in contemporary legal theory. Dworkin, in substituting "equality" for "liberty," "fit" for "deduction" and "moral philosophy" for "existing case law" may be demonstrating a more sophisticated technique than Langdell, but his remains a species of conceptualism.²² Neoclassical economic analysis of law is obviously a formalist enterprise in its technique: through deduction from the rationality and scarcity postulates it generates hypotheses, which hypotheses are then formulated as legal rules. True, the object of this enterprise is consequentialist: it is not, or is not supposed to be, undertaken as an act of fidelity to rationality and scarcity, but as an instrument for identifying social advantage understood as efficiency.²³ On the other hand, to the extent that its hypotheses are unverified or unverifiable, it operates as formalism in precisely the sense that it exhibits a strict fidelity to rationality and scarcity.²⁴ What, of course, distinguishes these examples from classical autonomous conceptualism is that neither adopt purely legal materials as bases for their conceptualism.

A second point I wish to make in defense of autonomous conceptualism is that the debate between formalists and realists entails, at bottom, a striking difference in perspective over the role of law and the competence of law givers and appliers. Consider in particular the formalist claim that legal particulars are derived from and bound by preexisting concepts and the realist claim that law is an instrument for achieving social purposes.

21. See L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 443-47 (1934).

22. E.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORKIN, *LAW'S EMPIRE* (1986); Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997). See RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 92-120 (1999) (criticizing Dworkin's moral conceptualism).

23. POSNER, *OVERCOMING LAW*, *supra* note 5, at 17-19.

24. A common complaint leveled at economic analysis is that it is insufficiently supported by empirical evidence. I would argue that, even where supported, the support is often ambivalent, subject to challenge or otherwise inconclusive. See *infra* notes 130-37 and accompanying text.

I will approach these claims through an example. I think it fair to say that a limited, bargain view of contract, a view requiring exchange of consideration to achieve legal enforceability, was a formalist notion.²⁵ The effect of the notion, consistently applied, was to deny enforcement to many promises and, in particular, to largely deny legal protection to reliance interests. These consequences followed from a derivation of particular rules from the concept of bargain.²⁶ By contrast, realist and post-realist contract law either rejects or extends the bargain principle so as both to enforce more promises and to provide a measure of protection to reliance interests.²⁷ It does so, in realist fashion, by contending that the purposes of the bargain principle are better served by expanding or ignoring it, or by contending that the harms generated by inducing reliance are worthy of legal protection²⁸.

At one level of analysis this example illustrates the distinction between a rigid deduction of legal result from abstract concept in formalist law and the treatment of law as a purposive instrument for achieving ends (for example, the end of encouraging exchange) in realist and post-realist law. Consider, however, a further level: the formalist's adherence to the bargain principle served the end of freedom *from* legal enforcement of promises, that is, freedom *from* contract. The realist's position serves the end of freedom *to* contract in the sense that it facilitates the practice of effective promise making. The costs of the realist's position, however, are that it requires a substantially greater role for the governmental functionary known as the judge and relies upon a questionable assumption about the competence of that judge, for enforcement of promises beyond the original limits of the bargain principle requires either a difficult empirical inquiry into the seriousness of an often ambiguous promise or the imposition of a tort-like obligation on the basis of the court's perception of proper behavior.²⁹ Gilmore, recognizing this, declared "The Death of Contract."³⁰ My difficulty, not Gilmore's, with the expansion of enforceable promise is that it assumes a greater competence in the judge, or judge and jury, than I think warranted.³¹ To the extent that what is in issue is what was meant or

25. W. DAVID SLAWSON, *BINDING PROMISES, THE LATE 20TH CENTURY REFORMATION OF CONTRACT LAW*, ch. 1 (1996); Melvin Aron Eisenberg, *The Principles of Consideration*, 67 *CORNELL L. REV.* 640 (1982).

26. Eisenberg, *supra* note 25, at 641-56.

27. *E.g.*, Lon Fuller & William Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 *YALE L.J.* 373, 418-20 (1937).

28. Eisenberg, *supra* note 25, at 641-56. *See* Richard Posner, *Gratuitous Promises in Law and Economics*, 65 *J. LEGAL STUD.* 411 (1977).

29. Jay Feinman, *Promisory Estoppel and Judicial Method*, 97 *HARV. L. REV.* 678, 712-16 (1984).

30. GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

31. *Cf. id.* at 52-54 (explaining contradiction between bargain theory of contract and absolute liability potentially as effort to limit litigation); Richard Craswell, *Offer, Acceptance and Efficient Reliance*, 48 *STAN. L. REV.* 481, 544-53 (1996) (recognizing problems of unpredictable results from case by case assessments of efficient reliance, but ultimately rejecting bright line rule alternative).

reasonably understood, the highly stylized, long after the fact and frankly largely bizarre performance art we call the trial is an implausible procedure for determining that question. To the extent that the issue is one of the relative costs and benefits, the notion that these can be quantified and compared “objectively” after the fact strikes me as absurd.³²

My point is this: formalist conceptualism served the end of limiting the scope of law in the sense that it limited occasions on which legal functionaries would assess conduct and therefore occasions on which persons would be called upon to justify their actions before such functionaries. The realist and post-realist ambition, by contrast, is the expansion of these occasions. This should not be surprising; it is inherent in the anti-formalist’s treatment of law as an instrument for achieving social purposes. That treatment postulates a collective purpose or collectively determined end state as an objective, an organic beneficiary of this end-state and someone, presumably the legal functionary, as the formulator and implementor of the objective.³³ The obvious questions, ones I will return to at the end of this essay, are whether there is an adequate means of establishing any such objective and whether any such legal functionary can claim sufficient competence in implementation.

Before leaving the matter of autonomous conceptualism, I want to return to the third objection to it, the notion that social practice, rather than abstract formalist concepts should govern law. I wish to make two points about this claim: First, it is not apparent, or, at least, as apparent as realists in Llewellyn’s camp believed it to be, that formalist concepts are divorced from social practice. Second, direct resort to social practice is itself fraught with difficulties.

I begin by asking where formalist concepts come from. In Langdellian classical formalism they came from existing case law: the formalist induced them from the practices of the courts.³⁴ Where, however, did the practices of the courts come from? Langdellians apparently didn’t ask themselves this question, but let me ask it. One possibility is that it came from some well worked out ideology or moral theory, so the courts were following the precepts of a

32. The chief problem with such an objective comparison is the subjectivity of cost. JAMES BUCHANAN, *COST AND CHOICE: AN INQUIRY IN ECONOMIC THEORY* (1969); F. A. HAYEK, *Economics and Knowledge*, in F. A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 33 (1948). For discussions of the implications of subjectivity, see, e.g., Gary Lawson, *Efficiency and Individualism*, 42 *DUKE L.J.* 53 (1992); Gregory Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *STAN. L. REV.* 311, 337-41, 367-73 (1996). For further discussion of this point, see *infra* note 132 and accompanying text.

33. The contrasts between classical, perhaps formalist law and the post-New Deal administrative state are well depicted in the following: Norman Barry, *The Classical Theory of Law*, 73 *CORNELL L. REV.* 283 (1988); Donald Gjerdingen, *The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought*, 35 *BUFF. L. REV.* 871 (1986); and Jerry Mashaw, “Rights” in the Federal Administrative State, 92 *YALE L.J.* 1129 (1983); cf. BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977) (discussing ordinary observer versus scientific policymaker).

34. Grey, *supra* note 10, at 24-27.

Nineteenth Century Ronald Dworkin. Herbert Spencer is, I suppose, a candidate.³⁵

That is a possibility, but let me postulate a second one: “intuition.” By intuition I mean a set of often tacit commitments, a moral sense, grounded in the “shared morality of a particular society.”³⁶ I think this a possibility for the obvious reason that common law judges of the formalist era were the products of the American society in which they worked. It would be surprising in the extreme if they came up with conclusions, including conclusions consistent with the principles formalists then induced from these conclusions, alien to the conventional understandings and traditions of that society.

This does not mean that formalist adjudications enjoyed or could enjoy universal support from the members of American society, even in the formalist era. It means only that the concepts had some substantial relation to practice. For example, the concept of bargain could be inferred from the actual practice of exchange, and, as a further example, the distinction between act and omission, surely a part of common morality,³⁷ would, in contrast to strictly consequentialist recommendations, be reflected in law. Nor does it mean that formalist concepts or the rules derived from them tracked in detail actual norms or practices. They would not do so for the reason that norms are inevitably and necessarily distorted if incorporated in law. This is because the addition of legal enforcement to non-legal means of norm enforcement will alter the cost/benefit calculation of the actors subject to the norms, because the mere fact of legal enforcement alters the meaning of norms and because considerations of judicial capacity and administrative cost will often dictate alterations of norms.³⁸

35. Professor Grey rejects this possibility. *Id.* at 33-35. Compare HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-37, 174-75 (1981) (rejecting connection between classical formalists and *Lochner*), with MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 (1992) (generally making this connection). See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 25-32 (1995) (treating Spencer as source of judicial formalism).

36. Professor Grey raises but rejects this possibility. Grey, *supra* note 10, at 23-24. Nevertheless, it seems to me both that the classical formalist's effort to systemize the common law would necessarily incorporate social custom given an assumption that common law rests upon custom or convention. E.g., MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW, Ch. 4 (1988); A.W.B. SIMPSON, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 77-79 (A.W.B. Simpson ed. 1973). Cf. Grey, *supra* note 10, at 30 (evolutionary views of classical formalists rested in part on historical school and therefore upon evolving custom). Moreover, formalism more generally understood entails claims to roots in the historical experience of a people or nation. M. H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986). To the extent that the Hayek of RULES AND ORDER, *supra* note 4, can be said to have adopted the common law preferences of Leoni, perhaps his “formalism” entailed an exercise of “finding law” in “existing social-institutional arrangements.” See James Buchanan, *Good Economics, Bad Law*, 60 VA. L. REV. 483, 488-89 (1974).

37. LEO KATZ, *ILL GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD AND KINDRED PUZZLES OF THE LAW* (1996).

38. E.g., Randy E. Barnett, *The Sounds of Silence: Default Rules and Contractual Consent*,

Notice that these points raise a question about the desirability of Llewellyn's program, the program of a more direct and concrete incorporation of norms in law, than is suggested by my intuitionist account of formalist principle. A substantial reason for such incorporation is that promises greater degrees of predictability—surely a formalist value.³⁹ But, if incorporation is inevitably also distortion, the incorporation strategy is problematic. Indeed, it may be that a legal takeover of the norms and understandings of social practice is not what rational persons would prefer. Professor Bernstein has produced at least evidence that they prefer that a rigid, formal and even inequitable law stand outside these understandings as a last resort, leaving adjustment, interpretation and enforcement to non-legal mechanisms of interaction.⁴⁰ This is in part because legal enforcement is more costly than its alternative, in part because legal enforcement undermines the alternatives and in part because even the best judges are not competent discoverers of the complexities and often tacit dimensions of social practice. Alternatively, it is because norms are often local affairs and therefore differ between local communities.⁴¹ Inter-local interactions therefore require resolutions that supplant competing local norms.

Llewellyn's critique of formalism may be understood as the claim that formalism divorces law from life, rendering law an alien, unpredictable, and, by reference to the baseline of social practice, arbitrary force.⁴² Perhaps, but there is another way of looking at this matter. The question is what version of law, the formalist version or the anti-formalist, instrumental version, poses the greatest threat to life outside it? Llewellyn's attempt to protect life from law through incorporation of life's norms into law can be seen as in fact a threat to life if the

78 VA. L. REV. 821, 908 n.231 (1992); Charles Goetz & Robert Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 275-76 (1985); Richard Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055 (1996); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271 (1992); Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 404-06 (1993).

39. Fuller, *supra* note 21, at 431-38 (describing Llewellyn's views).

40. See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999) [hereinafter Bernstein, *Questionable Empirical Basis*]; David Charny, *Non-Legal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 (1990); Edward Rock & Michael Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (1996); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000).

41. Bernstein, *Questionable Empirical Basis*, *supra* note 40; David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999); Richard A. Epstein, *Confusion About Custom: Disentangling Informal Customs from Standard Contractual Provisions*, 66 U. CHI. L. REV. 821 (1999).

42. Charny, *supra* note 41, at 843-44.

distorting effects of legal enforcement are emphasized. Perhaps ironically, autonomous conceptualism, divorced from life but not wholly alien to it if my conjectures about its intuitionist base are entertained, is a better candidate for protecting life from law. At least this may be so if formalist law is limited in ways that leave empty spaces for life. I postpone the question whether this is possible for a moment.

Let me address, briefly, one last criticism of autonomous conceptualism not yet noted. It is that formalism is impractical in a complex, heterogeneous and dynamic society. This claim is typically made with respect to the United States and is therefore typically accompanied by a concession that formalism operates, perhaps successfully, elsewhere.⁴³ I have three responses to these lines of argument.⁴⁴

First, while it is surely the case that change occurs and may require change in law, the issue of change is far more important in an anti-formalist, purposive and instrumentalist conception of law than within a formalist conception. Law, in the former, is an instrument of planning on the assumption that law pervasively directs activity. Law, conceived as having this degree of responsibility for society is easily viewed as necessarily dynamic in a dynamic society. This, however, is not the role of law in the formalist conception, or, at least, in the formalist conception I wish to defend. If society operates, if not quite independently of law, at least independently of particularized direction by law, social change does not imply an urgent need for legal change.

Second, what is often meant by change is not change in fundamental social conditions or in technology, but change in intellectual fashion. Thus, the move from a formalist common law to social engineering in the progressive and New Deal eras was predicated in part on the idea that social conditions had changed, requiring new and different law. Yet it has become apparent that large aspects of this new and different law were substantial mistakes, requiring the dismantling of much of the legislation generated in these eras.⁴⁵

Finally, when anti-formalists invoke the facts of complexity against formalism they assume that the proper response to these phenomena is to manage them. This is not surprising, it reflects a rationalist bias to the effect that greater complexity requires greater measures of control in service of articulated objectives. There is, however, an alternative response to complexity. It is that complexity requires less, not more managerial direction. Passivity in the form of complexity is counterintuitive to the rationalist, but it is obviously supportable

43. *E.g.*, POSNER, *supra* note 22, at 264-65.

44. I rely in what follows largely on Richard Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980).

45. *E.g.*, POSNER, *OVERCOMING LAW*, *supra* note 5 at 220-21. *Cf.* CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION, RE-CONCEIVING THE REGULATORY STATE* ch. 3 (1990) (recounting regulatory failure from pro-regulatory perspective). Critiques of Progressive Era, New Deal and Post-New Deal regulation are of course legion. *See* *THE REGULATED ECONOMY: AN HISTORICAL APPROACH TO POLITICAL ECONOMY* (Claudia Goldin & Gary Libecap eds., 1994); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECONOMICS 3 (1971).

both by reference to theories of spontaneous order and by evidence in experience that attempted management of complexity fails.⁴⁶

II. FORMALISM AS RULES

Another understanding of formalism is that the law consists, or should consist of rules.⁴⁷ The standard argument favoring rules rests upon an appeal to rule of law values: Rules enable those subject to them to predict the legal effect of their behavior and therefore enable coordination; rules preclude discretion and enable a claim that we are governed by law, not men; rules ensure that law is prospective, not retroactive.⁴⁸

Rules should be distinguished from principles, standards, or rules of thumb in that rules direct particular legal conclusions or are more determinate than these alternatives. This implies strict application: the judge or other legal actor committed to rules is not free to make a decision on the basis of what seems best under the circumstances, nor is she free to ignore the rule where following the rule would produce a result she deems absurd, nor is she free to base her decision on the rule's purpose where the rule's directive in the circumstances of the case seems to her inconsistent with that purpose.⁴⁹

Recall that formalism, understood as an autonomy claim, is non- or anti-instrumental, so it may be understood as rejecting the idea that law should be applied so as to achieve its purposes. This may seem odd. Most, if not all legal rules can be assigned plausible, functional purposes, and many can be plausibly said to serve such purposes. It is nevertheless obviously possible to seek to apply such rules in particular cases without reference to such purposes. A strong version of a rule utilitarian perspective and rejection of an act utilitarian perspective suggests as much.⁵⁰

An implication of devotion to rules is that a rule's addressee may with impunity circumvent the rule though strict compliance with it, as by engaging in the evil, or a substantially similar evil, targeted by a rule while nevertheless simultaneously adhering to the rule.⁵¹ Formalism may be understood as a theory of law that tolerates this activity. Thus, the form behavior takes, not the substantive nature of the behavior or the consequences of the behavior, is, for the formalist, controlling.⁵² Indeed, a prominent feature of classical formalism was that its adherents openly advocated adherence to principle and rule even where

46. E.g., HAYEK, *supra* note 32, at 119-208; MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS* 5-42 (1962).

47. E.g., Larry Alexander, "With Me, It's All or Nuthin": *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530 (1999); Schauer, *supra* note 6.

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

49. See FREDERICK SCHAUER, *PLAYING BY THE RULES, A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 96-100 (1991).

50. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

51. The doctrine of independent legal significance in corporate law is an example. See *Hariton v. Arco Electronics, Inc.*, 182 A.2d 22 (Del. Ch. 1962), *aff'd*, 188 A.2d 123 (Del. 1963).

52. See KATZ, *supra* note 37.

they conceded that the result would be unjust, unfair or absurd.⁵³ This harsh notion is traceable to the very nature of the idea that the law consists of rules and compliance with law consists of following rules. If rules are suspended when they generate absurd results, they are no longer rules.⁵⁴

Formalist rule worship may also be understood as entailing a theory of adjudication, specifically, “mechanical adjudication.”⁵⁵ The theory is that rules may be applied to facts mechanically: rules reference sets of facts, so when the relevant set appears, the rule is applied and when it does not the rule is not applied. This conception is of course often attributed to lay persons and to entering law students, and when so attributed is always accompanied by the view that is hopelessly naive. It is, of course, often also attributed by judges to themselves; judges often justify their decisions on the basis that rules compel those decisions.

The formalist adjudicative theory thus depicted entails a deductive procedure. It is deductive in the sense that a rule as a major premise and a set of facts as a minor premise generates a right answer. A formalist legal opinion is one, then, that justifies the result reached by employing a syllogism of this type.

The standard critiques of formalist rule worship may be divided into two basic categories. First, rules have substantial defects.⁵⁶ As they are inevitably over- and under- inclusive, they fail to achieve their purposes where these purposes would be furthered by applying the rule to circumstances that the rule’s language does not reach or would be furthered by not applying the rule in circumstances the rule’s language does reach. Rules can produce absurd results in some circumstances. Absurd, that is, in that some value or norm would be violated by application of the rule, or some desired result would not be reached if the rule were applied. Rules suppress facts by rendering only some facts relevant to the rule, while facts left out by the rule are, by virtue of values, objectives or expectations, important. Anti-formalists will therefore think it desirable that judges refuse to apply rules or to stretch rules to serve their purposes, that they decline to apply rules where application produces absurd results, and that they formulate standards, rather than rules. Standards enable contextualized assessment and judgment, taking into account more facts and circumstances, and permit direct application of purpose and principle without the mediation of a rule.⁵⁷

53. CHRISTOPHER COLUMBUS LANGDELL, *SUMMARY OF THE LAW OF CONTRACTS* 20-21 (1880), *quoted in* Grey, *supra* note 10 at 3, 15.

54. *E.g.*, Alexander; *supra* note 47, at 531, 547, 553-55; SCHAUER, *supra* note 49, at 116.

55. *Cf.* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (objecting to what I have here termed autonomous conceptualism).

56. *See, e.g.*, POSNER, *supra* note 2, at 44-49; SCHAUER, *supra* note 49, at 100-02; SUNSTEIN, *supra* note 5, at 121-35.

57. POSNER, *supra* note 2, at 44-49; *cf.*, SUNSTEIN, *supra* note 5, at 136-47 (balancing “factors” as alternative to rules). On the rules versus standards debate generally, see, for example, Alexander Alienikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943 (1987); John Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance With Legal Standards*, 70

The second basic critique is that adjudication by reference to rule—the mechanical adjudication generally attributed to classical formalism—is highly implausible.⁵⁸ Adjudication as syllogism, with the rule as major premise and facts as minor premise may be that which is expressed in a formalist decision, but this expression covers up the hard and problematic work that goes into generating these premises. Rules cannot themselves be identified through deduction, for there can be multiple and conflicting rules plausibly invocable. A choice of rule is therefore necessary, and the formalist who relies simply on syllogism has failed to justify his choice. There are gaps among and between rules, so the formalist who pretends to apply a prior rule to the gap has failed to justify what is in effect a new rule. Rules, particularly the legislature's rules we call statutes, often employ words with no clear referents, so the formalist who insists, for example, that the words "manufactured goods" apply, by virtue of the meaning of these words, to the fact of an "eviscerated chicken"⁵⁹ has again failed to justify his decision.⁶⁰

These failures of justification are failures of formalist adjudication: the constrained, mechanical, or deductive technique attributed to formalism *cannot* work. We may add to these problems the questionable character of facts and of factual findings.⁶¹ Our means of resolving factual disputes are weak and often distorted both by our processes and by human frailties. The facts we find, even absent dispute, are at best partial under a rule regime; much that is arguably relevant is left out. The anecdotal facts of particular disputes are not the systematic facts necessary to formulating social policy, even if expressed in rules.

VA. L. REV. 965 (1984); Richard Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469 (1987); Jason Scott Johnston, *Uncertainty, Chaos, and The Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341 (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985);.

58. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-15 (1921); POSNER, *supra* note 2, at 42-61; Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 215-19 (1931); Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973); Joseph Singer, *The Player in the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 509 (1988).

59. *Cf.* Interstate Commerce Comm'n v. Krobin, 113 F. Supp. 599 (N.D. Iowa 1953), *aff'd*, 212 F.2d 553 (8th Cir. 1954) (presenting these facts and issue, but not necessarily displaying this reasoning).

60. Michael Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981). Another argument is that words have no core, linguistic meanings. *E.g.*, James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958);. The argument has been demolished by Professor Schauer. SCHAUER, *supra* note 49, at 55-61.

61. JEROME FRANK, *COURTS ON TRIAL* 316-21 (1949).

A. *Formalist Adjudication*

What may be said in response to these critiques? Let me begin in reverse order by addressing the problem of formalist adjudication, understood as the unproblematic application of rules to facts. It will turn out that problems of adjudication are related to the critique of rules, as such, so my discussion of adjudication will lead to discussion of that critique.

A typical and, I think, persuasive response to the critique from the impossibility of unproblematic application is some version of a hard case/easy case dichotomy.⁶² The defense focuses upon the easy case and observes that in fact rules, including legal rules, are unproblematically applied to facts all the time. Without contending that meaning resides in language or that facts are easily identified, most cases are resolved before they ever enter the realm of formal adjudication because in most cases there is agreement about the meaning of the rule, the facts and the application of rule to facts. It is the hard case that is adjudicated, or it is the hard case that attracts an appeal and is the subject of interest. It is, therefore, only the hard case that displays the problems emphasized by the critiques.

On this account, formalist “adjudication” works most of the time. In particular, it works in the hands of layman and lawyers outside of court when engaged in the activity of law compliance or of Holmesian prediction of what judges will do “in fact.” Realist critiques of formalist adjudication thus betray legal realism’s peculiar focus upon, indeed fixation with the judge.

What, however, of the hard case? It seems apparent to me that the critique of formalist adjudication clearly works in *some* hard cases. In particular, it works where there is no plausibly applicable rule available to resolve a case, where two plausibly applicable rules conflict, and where the rule in question has no clear referents.⁶³ Adjudication in these cases is indeed problematic. A “grab bag” of techniques, perhaps best described in terms of “practical reason” must be invoked to resolve the hard case, and the formalist description of adjudication is an inaccurate depiction of the grab bag.⁶⁴ But this assumes that it is formalist adjudication, in the sense of unproblematic application of rule to fact, that is being assessed. What of a formalist recommendation that hard cases be resolved so as to become easy cases in the future?

There is nothing in the critique of formalist adjudication that would preclude such a recommendation. Thus, the formalist confronted with a hard case of the type indicated may resolve it by establishing a rule (not a standard), by seeking to employ words with clear referents in stating the rule, and by minimizing the

62. *E.g.*, H.L.A. HART, *THE CONCEPT OF LAW* 122-32 (1961); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 159, 275 (1997); SCHAUER, *supra* note 49, at 192-59; SUNSTEIN, *supra* note 5, at 128-29; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958); Frederick Schauer, *Easy Cases*, 58 *S. CAL. L. REV.* 399 (1985).

63. In my view, “plausibly applicable” means most locally applicable. *See* SCHAUER, *supra* note 49, at 188-91. Thus, the case contemplated is one of conflicting local rules, not one of arguable “conflict” between a local rule and a more abstract or distant one.

64. POSNER, *supra* note 2, at 73.

set of facts that will be deemed relevant under the rule. The primary criterion for resolving the hard case therefore becomes “formulate that resolution that will best enable formalist adjudication in the future.”⁶⁵ There are, of course, institutional constraints on the ability of the formalist to do these things. A common law judge is no doubt less able to do so than a positivist’s sovereign. But it remains the case that formalist adjudication can be understood as prospective and programmatic as a conscious effort to turn today’s hard case into tomorrow’s easy case.⁶⁶

There is another category of case said to be “hard” that formalists will not regard as hard in the same sense. This is the category of the absurd result or of application of the rule not serving its purpose or of the inapplicability of the terms of the rule permitting the evil targeted by the rule. What is hard about such cases is not a matter of the rule’s apparent meaning. It is perfectly clear that the rule means what it says in the context of the facts presented. It is perfectly clear precisely because it would otherwise make no sense to claim that this meaning produces an absurd result or fails to serve its purpose.⁶⁷ These cases are hard not because of a question of meaning, but because of a normative issue: should the decision maker tolerate absurd results or results inconsistent with purpose?

I think most law professors and many judges would answer “no” to this question. Indeed, one is warranted in saying that contemporary law generally reflects this answer. I also think, however, that there are very good reasons for an affirmative answer. These reasons have largely been supplied by others,⁶⁸ so I will merely summarize some of their points and add a word.

The basic thrust of the defense of formalist adjudication in hard moral cases is that departures from the known meaning of a rule in such a case undermine, or destroy the reasons for rules. These reasons, interestingly, are *consequentialist* reasons; they supply good utilitarian (in a broad sense) grounds for preferring rules over standards or good instrumental reasons for “ruleness.” Notice then, that a defense of what I have been calling formalist adjudication leads to a defense of rules.

B. Rules’ Function

Consider in particular the following, highly simplified summary of Professor Larry Alexander’s consequentialist defense of rules:⁶⁹ (1) people face coordination problems (they need to know how others will act and what to do in the case of disagreement), (2) rules solve this coordination problem by supplying “authoritative settlements” and do so in ways superior to particularized authoritative direction in each case of questioning what to do because (3) the

65. See Scalia, *supra* note 48, at 1183-87.

66. This, indeed, was Justice Holmes’ program. See Grey, *supra* note 10, at 44.

67. SCHAUER, *supra* note 48, at 55-62, 213-15.

68. See *id.* at 158-66; Alexander, *supra* note 47.

69. Alexander, *supra* note 47.

costs of more particularized modes of authoritative settlement are prohibitive.⁷⁰ There are, of course, some necessary caveats. Rules, to serve their function must be determinate in meaning (indeed Professor Alexander defines “rule” by reference to this quality) and must be knowable.⁷¹ They should therefore usually be general and few rather than specific and many (as complexity undermines knowability).⁷² Notice that rules are not in Alexander’s (and for that matter, F. A. Hayek’s similar) depiction a solution to the problem of “bad men,” persons not motivated to do the right thing. Rather, they are solutions to the problem of ignorance knowing what the right thing to do is.⁷³

One alternative to rules, and a form of particularized authoritative settlement, is “standards.” The usual example of a standard, although there are reasons to think it a bad example, is negligence failing to exercise the care a reasonable person would exercise under the circumstances.⁷⁴ Standards may be distinguished from rules on the basis that rules are determinate and standards are not. The difficulty with standards, in Professor Alexander’s analysis, is that they duplicate the problems rules are supposed to solve. That is, as standards are indeterminate, there will be disagreement about their meaning in particular cases; they will fail to inform us of what to do. This is not always so. A reasonable person standard is determinate (and therefore a rule) if everyone or nearly everyone in a community agrees about what a reasonable person should do. But the uncertainty and disagreement that the law is to minimize are usually merely duplicated in standards.

If this is so, it should be clear why application by reference to the underlying “purpose” of a rule or refusal to apply a rule where doing so produces absurd results is “wrong” and strict adherence to rules is “correct” from the formalist perspective: these non- or anti-formalist actions turn rules into standards.⁷⁵ Adjudication by reference to purpose in preference to known plain meaning resurrects controversy over purpose, particularly given the possibility of ascending abstraction in characterizing purpose.⁷⁶ Avoidance of absurd result assumes agreement about absurdity, but there is very often no such agreement.

Perhaps, however, this equating of purpose-oriented interpretation and absurd result avoidance with substituting standards for rules is too extreme. If a standard can be a rule where everyone agrees about its meaning in context, then

70. *Id.* at 531-40.

71. *Id.* at 542-45.

72. *Id.* at 545.

73. *Id.* at 549. Hayek’s positions were derived from a general interest in the problem of ignorance; he, unlike most economists, largely ignored problems of self-interest. See Marina Bianchi, *Hayek’s Spontaneous Order, The “Correct” Versus the “Corrigible” Society*, in F.A. HAYEK, *COORDINATION AND EVOLUTION* 232-51 (Jack Birner & Rudy Van Zijp eds., 1994).

74. *E.g.*, POSNER, *supra* note 2, at 44. For the argument that it is a bad example, see *infra* note 128.

75. Alexander, *supra* note 47, at 547.

76. On problems with purpose, see Frank Easterbrook, *Statutes Domains*, 50 U. CHI. L. REV. 533 (1983); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 876-77 (1930).

it ought to be possible for a similar agreement to occur with respect to purpose and absurdity. Perhaps, but the problem is that of the slippery slope.⁷⁷ A legal practice in which purpose and absurdity permit departures from plain meaning in cases of such agreement will lead to one in which such departures are routinely made in cases of substantial and widespread disagreement. This, indeed, happens often in our contemporary practice.⁷⁸

I wish to add to this summary of a defense of rules an observation about the function of law it assumes. I do so because this function may tell us something about formalism apart from its preference for hard rules. The function contemplated is coordination of action in the face of uncertainty. That is a sufficiently broad statement to encompass numerous versions of “coordination,” but I wish to narrow the notion of coordination in a way that renders it close to the assumptions and understandings of the classical formalists. The picture I wish to invoke is one in which persons are acting in service of their own ends and require law only for the purpose of not bumping into each other while doing so, or for the purpose of ensuring efficacy of exchange.⁷⁹ Once a rule is provided, compliance follows and *the law is left behind*. An interesting feature of this picture is that it further explains hostility to standards (and to other *ad hoc* modes of “authoritative settlement”). Specifically, the trouble with standards is that their uncertainties compel persons who otherwise would prefer to get on with their lives and leave the law behind them to engage in argument and participate in a process of public justification. This, of course, is why left-communitarians tend to be critical of rules and favor standards. It is, of course, also why libertarians tend to favor rules.

I should nevertheless make it clear that rules, even general rules, will not themselves implement a libertarian program. Hayek, at least at one point in his intellectual odyssey, thought that such rules would do the trick,⁸⁰ but he was, I think, wrong. The reason is that the substantive content, number and complexity of rules must be taken into account. It is quite possible for rules satisfying formal requisites to nevertheless so constrain the “negative liberty” Hayek advocated as to defeat his political program.⁸¹ Consider, for example, that much of the law of the “administrative state” is comprised of inflexible command and control directives issued by administrative agencies in the form of regulations. These often produce absurd results,⁸² and formalism as mindless rule worship is surely

77. See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

78. My candidate for a prime example of this phenomenon is *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

79. The latter purpose may address problems of “cooperation” as well as problems of “coordination,” but formalism’s non-facilitative implications, *supra* note 10, may often result in non-cooperation.

80. HAYEK, CONSTITUTION OF LIBERTY, *supra* note 4, at 205-19.

81. See SUNSTEIN, *supra* note 5, at 156-61 (comparing mandatory, end-state directive rules versus privately adaptable rules).

82. E.g., CASS SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 271-97 (1997). See *supra* note 45.

a standard characterization of the law generated by bureaucracy.

Does this mean that I have given up on a defense of formalism—that I have conceded that it is the substance, not the form of the law’s authoritative settlement that is important? I do not believe so. To say that substance matters is not to say that form does not. Rules have the tendencies depicted in the picture of persons leaving law behind and standards have the tendencies depicted in the picture of persons forced to engage in public justification. If the leaving law behind picture is attractive, as it is to me, rule preference is *an aspect* of the legal program that serves this picture.

C. Rules and Facts

Before leaving the matter of rules, I want to briefly pick up a theme about facts that I have thus far largely ignored. I suggested above that formalism may also be criticized for its uncritical reliance upon the “facts” found in legal proceedings.

It is not, however, clear that difficulties in establishing facts present a threat to formalism as “mechanical adjudication.” There may well be factual uncertainty, but the formalist syllogism treats the minor premise as an assumption or stipulation. However messy factual determinations might be, the logical exercise proceeds after these determinations are made. It may, therefore, be possible to be both a formalist and a fact skeptic.

It has been said that classical formalists preferred “readily ascertainable facts.”⁸³ They may be said, then, to have been indeed fact skeptics in the sense that they distrusted discretion in fact finding: The fewer the factual assumptions necessary to form minor premises the better. So, for example, objective rules were preferred to vague standards, as standards require or permit assessment of more facts. It might, therefore, be said that formalists ignore or de-emphasize facts in service of conceptual order. The complexities of human behavior and the multiple potential considerations arising from these complexities are threats to rules, so formalists suppress these complexities and considerations by giving primacy to rules.

Moreover, formalists are thought to prefer abstract and general rules over particularized or specialized rules. They prefer, for example, one law of contract, not multiple laws for distinct types of contracts or distinct contractual settings.⁸⁴ This entails suppression of factual difference through an assumption of greater homogeneity than may exist in fact. This suppression of factual difference also facilitates, however, the formalist aspiration to a complete, coherent system from which correct answers may be derived. It enhances the prospects for consistency where consistency is to be obtained at the levels of conceptual principle and rule rather than through particularized factual distinctions.

An insistence upon expanding the scope of factual inquiry goes hand in hand

83. Grey, *supra* note 10, at 11. Cf. Andrew Krull, *The Simplification of Private Law*, 51 J. LEGAL EDUC. 284 (2001) (contending that there is a contemporary tendency to simplify private law by rejecting fact-sensitive equitable inquiries).

84. GILMORE, *supra* note 1, at 82-83.

with standards, balancing tests and factor analysis, for the underlying notion is that judgment is to be made all things considered.⁸⁵ This, however, is precisely what formalism's emphasis upon rules condemns, for the reasons noticed above.⁸⁶ By contrast, formalism's suppression of facts goes hand in hand with formalism's distance from life and facilitates that distance. Notice that this is not a criticism of formalism; formalism's defense of its distance from life is consistent with its hostility to particularized decisions under standards and, therefore, its suppression of facts. Fact suppression limits law's intrusion into life, rendering the facts it suppresses nevertheless available for human judgment within the framework supplied by formalist rules.⁸⁷

This, I think, is an answer to the common claim that the rigidity of rules and the suppression of facts by rules are alien to human judgment, or, at least, to preferred conceptions of human judgment. If the sociologists and institutionalists are correct, human behavior is largely scripted, a matter of rule following even outside law. Nevertheless, a more flattering picture of human choice, or, at least, of wise human choice, entails "all things considered" judgment. So, from the perspective of this picture, judicial (or other governmental) decision by inflexible reference to rules is denigrated, as by claiming that judges are not or should not be mere rule followers.⁸⁸ I, too, prefer the picture of wise judgment, all things considered, but it is not necessary to this ideal that it be the judge or other governmental functionary who exhibits wise judgment. The point of a rule (or, more accurately, of rules with a particular substantive orientation) is that it provides a framework within which such judgment may be exercised by persons other than governmental functionaries. It confers, in effect, the jurisdiction to be wise.⁸⁹

Another criticism of formalist facts is that they are anecdotal—they fail to provide adequate data about systematic human tendencies. This, of course, is a pragmatic instrumentalist complaint: If law is conceived to be an instrument of comprehensive planning to service collectively determined ends, "legislative facts" are needed. It is, of course, also a complaint about common law adjudication generally, not just formalist adjudication (unless formalism is

85. *E.g.*, POSNER, *supra* note 2, at 44-49; SUNSTEIN, *supra* note 5, at 136-47.

86. *See supra* notes 70-81 and accompanying text.

87. *See supra* notes 42-43 and accompanying text, *infra* notes 107-19 and accompanying text.

88. POSNER, *OVERCOMING LAW*, *supra* note 5, at 489-92.

89. *Cf.* SCHAUER, *supra* note 49, at 158-66 (stating that primary function of rule is allocation of decision making authority). Notice, however, that this is potentially so in two senses. A rule can be viewed, as Schauer largely does, as retaining the authority to be wise (or foolish) in the original rule maker. It might also be thought, however, to confer the authority to be wise (or foolish) on persons subject to the rule. This latter sense may seem doubtful if one contemplates a directive rule. Consider, however, a rule requiring consideration for the legal enforceability of a promise. The maker of a promise has, under such a rule, the "discretion" to obtain legal enforceability through a demand for consideration and the discretion to perform, or not, if he fails to make this demand. Consider, also, a prohibition of theft. The prohibition withdraws the discretion of those subject to it to steal, but also confers the discretion (and possibility) of contracting for property transfer.

defined as common law adjudication). The complaint serves, for example, to justify displacement of common law adjudication by regulation through the supposed expertise of administrative agencies.⁹⁰ Whether or not administrative regulation in fact exhibits expertise in either the identification of systematic facts or in their assessment, the important point for present purposes is to recognize that the function of law is quite distinct in the “administrative state” from that proposed above as an explanation of formalist rules and of formalist suppression of fact.⁹¹ The function envisioned for formalist law, recall, was a matter of limited coordination. The function envisioned by the administrative state is comprehensive, top-down planning in service of collectively determined ends. There is obviously a greater need for facts in the latter than the former.

III. FORMALISM AS EMPTY SPACES

A prominent feature of legal realism, and, later, of critical legal studies, is a rejection of the idea of the empty space—an area in which persons are free from law. Actually, there appear to be two distinct but related realist ideas here. First, there is the Hohfeldian idea that liberty (in Hohfeld’s terminology “privilege”) is distinct from legal right.⁹² Thus, the law does not in many instances preclude interference by others with liberty; persons in those instances may harm others with legal impunity. When the law does intervene, when it recognizes a right, it simultaneously imposes a duty, so one person’s right is merely the legal enforcement, or threat of enforcement, of another person’s duty. One upshot of Hohfeldian analysis is the recognition that legal rights are constraints on liberty. Another is that concepts like property refer to bundles of legal relationships, not to real things in the world. Still another is that one cannot suppose, as classical formalists are said to have done, that, because the law recognizes a liberty to do *X*, in the sense that the law permits *X*, that there is a right to do *X*, in the sense that the law will impose a duty not to interfere with one’s doing of *X*.⁹³

An implication of this last point is that classical formalists were wrong in supposing that rights could be logically derived from privileges.⁹⁴ Another is that the Millian concept of liberty as the freedom to pursue one’s own ends so long as one does not harm others is not a viable explanation of the legal system given the extent to which that system privileges the infliction of harm.⁹⁵ This, in turn, implied that no single principle could explain when the law would and would not intervene to prevent harm, a substantial threat to classical formalism’s conceptualistic, deductive system.⁹⁶

90. See SUNSTEIN, *supra* note 45.

91. See Gjerdingen, *supra* note 33; Mashaw, *supra* note 33.

92. Hohfeld, *supra* note 16.

93. See generally Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

94. *Id.* at 997-98.

95. *Id.* at 1022.

96. Some legal economists believe, of course, that the principle of efficiency, here in the

Nevertheless, Hohfeldian privilege or liberty seems clearly to recognize empty spaces in the law: areas of freedom from law, or, in effect, states of nature.⁹⁷ How, then, can I claim that realism rejected the idea of an empty space? The answer lies in a further aspect of Hohfeld's thought, one emphasized, in particular, by the legal realist Robert Hale.

A response to Hohfeld was that the realm of liberty (privilege) was outside law, not a part of it. If the law recognizes no duties within the empty space of privilege, then that space is empty of law.⁹⁸ To this Hohfeld replied that "[a] rule of law that *permits* is just as real as a rule of law that *forbids* . . ."⁹⁹ Thus, a judge who finds for a defendant on the basis that the defendant had no duty of noninterference has made a legal decision. How far might this characterization be pushed? Hale pushed it to rather extreme lengths: Not only is the decision to deny a legal duty a legal decision, it is a delegation of state power to the defendant holder of Hohfeldian privilege.¹⁰⁰ Since liberty is recognized by law, the acts undertaken within it are state acts. Indeed, Hale saw state-based coercion everywhere: A voluntary contractual exchange was, for Hale, "coerced" by the fact that both parties are legally entitled to withhold consent.¹⁰¹ Hale's thought is evident in the oft-repeated contemporary view that any given "private" preference, realm or decision is in fact legally constructed by virtue of a background of state determined entitlements and is therefore "really" a "public" preference, realm or decision.¹⁰²

So realism, and much contemporary thought, rejects the empty space idea, not in the sense that it fails to recognize liberty to harm others in the law, but, rather, in the sense that it denies that this liberty is apart from law. The realist claims are, then, that law permeates liberty, that there is no private realm, and that the private is publicly constructed.

What has all this to do with formalism? If formalism is that which its critics'

guise of pecuniary versus non-pecuniary externality, explains at least the common law.

97. Duncan Kennedy & Frank Michaelman, *Are Contract and Property Efficient?*, 8 HOFSTRA L. REV. 711, 715, 727-28, 754 (1980). While states of nature (or pockets thereof) are extreme examples of empty spaces, it should be noted that I have a broader idea in mind. See *infra* note 111. Thus, in my scheme, there can be an "empty space" generated by legally enforced property entitlements and contract rules even though these entitlements and rules obviously presuppose a state. So a "state of nature" in the pristine sense is not the intended meaning of my invocation of the phrase. A "state of nature" is, rather, a way of understanding Hohfeldian privilege, and such privileges may exist within a background set of entitlements and rules entailing Hohfeldian rights and duties.

98. J. AUSTIN, *THE PROVIDENCE OF JURISPRUDENCE DETERMINED* 290 n.* (1832).

99. Hohfeld, *supra* note 16, at 42 n.59.

100. E.g., Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert Hale, *Force and the State: A Comparison of Political and Economic Compulsion*, 35 COL. L. REV. 149 (1935).

101. Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

102. E.g., HORWITZ, *supra* note 2, at 193-212; CASS SUNSTEIN, *THE PARTIAL CONSTITUTION*, 68-92, 162-94 (1993).

attack,¹⁰³ the realist view is that formalists both fail to recognize that the law permits the infliction of harm and erroneously insist upon the existence of a realm of “liberty” apart from and ungoverned by law. Is this so? There is an obvious affinity between the empty space as liberty notion and my earlier claims that formalism seeks to leave law behind and to protect life *from* law. Moreover, the empty space idea fits, rather neatly, other features of formalism. The point, recall, of both an autonomous, conceptualistic basis for law and of rigid rules as expressions of law is to confine judicial discretion and to enhance stability and predictability. These objectives, if realized, would generate an undirected order within which individuals would pursue their individual projects.¹⁰⁴ Classical formalist commitments to “liberty” would then seem to follow from classical formalist conceptions of law. The realists attacked not merely the formalist commitment, but the very idea of liberty as a realm untouched by law.

Can the empty space idea be defended? One defense, ironically, is that critics of the empty space idea are themselves formalists.¹⁰⁵ To say that private action is “really” public action, or that the private is legally constructed and therefore “political” is to engage in absolutist conceptualism, for it is both true and not true that the private is private and that the private is public. It is true that persons are empowered to act within the private realm by virtue of a “baseline” set of background entitlements recognized in the traditional common law.¹⁰⁶ It is not true that this baseline either directs particular actions within this realm or, indeed, even addresses what particular actions will be undertaken within this realm.¹⁰⁷ More importantly, the fact of a baseline does not imply that it is itself consciously planned or constructed. Nor does recognition of the baseline justify

103. I recognize that formalism cannot simply be that which realists attack. I mean, instead, that which realists (etc.) attack *as formalism*, and I think it apparent that “empty spaces” are conceived by many critics of formalism as part and parcel of formalism. *E.g.*, DUXBURY, *supra* note 7, at 106-11; HORWITZ, *supra* note 2, at 155. *See* GILMORE, *supra* note 1, at 55 (Holmes’ formalism greatly limited liability); SUNSTEIN, *supra* note 102, at 40-67, 112-19 (linking formalism as mechanical legal interpretation with substantive commitment to status quo distributions, and latter to *Lochner*). *But see, e.g.*, HOVENKAMP, *supra* note 35, at 174-75 (denying link between formalism and effort, as in *Lochner*, to constitutionalize common law version of liberty); SUNSTEIN, *supra* note 5, at 118-20 (denying association of Rule of Law with free markets). It is possible to separate formalist method from formalist normative commitment, but, as I suggest immediately below and *infra*, text and notes 167-71, I believe that there are in fact functional linkages between the two.

104. This, at least, was Hayek’s vision. HAYEK, LAW, LEGISLATION AND LIBERTY, *supra* note 4, at 106-10, 118-22.

105. POSNER, OVERCOMING LAW, *supra* note 5, at 281-84. *Cf.* Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361 (1993) (claiming that legal and conceptual breakdowns of public/private distinction have little normative force).

106. SUNSTEIN, *supra* note 102, at 40-92.

107. This is Hayek’s reply to Hale. 2 F.A. HAYEK, LAW LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 37-38 (1976).

a program of conscious reconstruction. This charge, that the critics turn out to be formalists, is a highly attractive rhetorical point. Unfortunately, it is obviously not one upon which I can rely given a project of defending formalism.

So allow me to offer three defenses of the empty space idea distinct from defense through the charge of hypocrisy. The first may be termed a semantic defense. To say, with the realists, that withholding consent to a contract is “coercion” or that there is no “private” realm is to attempt the destruction of perfectly useful terms on the highly doubtful premise that persons who employ such terms are unaware of the legal nature of the institutional structure within which such perfectly useful terms are employed.¹⁰⁸ The formalist who denies that there is an implicit allocation of entitlement in the law’s refusal to assess behavior would of course be mistaken, but no sophisticated formalist would deny this. Hayek certainly did not.¹⁰⁹ The empty space idea is precisely that the law’s refusal to recognize an obligation confers power on persons and frees such persons from justifying their actions in terms of public ends. That the law, even contemporary law, in fact contains such empty spaces requires that the realist bent on denying the private and insisting on the ubiquity of state coercion must invent new, and often more obscure terms to describe these phenomena.

Second, the phenomena do in fact exist in the law; there are empty spaces. Consider two examples: (1) The business judgment rule generally precludes judicial assessment of corporate director decisions absent conflicts of interest and therefore leaves managerial decision making “unregulated,” even though the corporation and the position of power of the board of directors within it are in important *senses* creatures of law.¹¹⁰ (2) The employment at will doctrine precludes judicial assessment of an employer’s decision to discharge an employee (and, for that matter, an employee’s decision to resign) even though the very identification of who is an employer and who is an employee is a function of a set of background entitlements recognized and enforceable by law.¹¹¹

108. Richard Epstein, *The Assault That Failed: The Progressive Critique of Laissez Faire*, 97 MICH. L. REV. 1697, 1700, 1704 (1997).

109. See, e.g., HAYEK, *supra* note 32, at 112-16.

110. See, e.g., Aronson v. Lewis, 473 A.2d 805 (Del. 1984); Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968); Charles Hansen, *The ALI Corporate Governance Project: Of The Duty of Due Care and the Business Judgment Rule, a Commentary*, 41 BUS. LAW. 1237 (1986).

111. See generally Andrew P. Morriss, *Bad Data, Bad Economics and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901 (1996); Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (1996).

Let me clarify the notion of an empty space. There are, in my conception varieties and degrees of empty spaces; some spaces are more empty of law than others. For example, one device by which empty space may be created or expanded is that of constricting the realm of tort and expanding the realm of contract. The realm of contract is not an empty space in the same sense that a state of nature is an empty space; there are rights and duties within the space generated by contract. Nevertheless, the contractual space is “less full” of law than space governed by tort in the obvious senses that the rights and duties generated by contract find their source in the parties’

Third, it is a very good thing that there are empty spaces and it would be a significantly better thing if there were more and wider empty spaces. Leaving aside the many persuasive instrumental and consequentialist reasons for such empty spaces as those created by the business judgment rule and the employment at will rule, let me offer a reason for the goodness of empty spaces more in keeping with what I am characterizing as a formalist stance. I said above that the point of the empty space was freedom from public justification. It may be

agreement to these, not in an externally imposed direction. I am aware that the realm of contract can be characterized as full of directive law. *E.g.*, Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990). I do not share that view. *See* Barnett, *supra* note 38. Within the realm of contract, a further means of expanding empty space is that of expanding the realm of default terms and limiting, or eliminating, the realm of mandatory terms. Within the realm of remedies, the device is that of favoring those that force market transactions, such as specific performance and injunction, and disfavoring those that entail judicial assessments, such as damages.

Now, one theme that runs through these examples is a program of withdrawal from mandatory and directive law, so an empty space is by reference to this theme freedom from and freedom to contract. Another theme, however, is limiting occasions for judicial assessment, and this theme will not only entail a withdrawal from directive law, *it will entail a withdrawal from facilitative law*. It will entail, for example, limitations on freedom to contract, because it implies a reluctance to engage in problematic factual assessments. *See, e.g.*, Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S CAL. INTERDISC. L. REV. 389 (1993); *cf.* GILMORE, *supra* note 30, at 52-54 (contradiction between bargain theory and absolute liability potentially resolved by desire to limit litigation).

An example is the strict bargain principle of contract, a principle that excludes firm offers from enforcement and therefore fails to facilitate exchange. *See supra* notes 25-32 and accompanying text. Another example entails rejecting the notion that courts are capable of identifying the “reasonable expectations” of shareholders in closely held corporations, *e.g.*, Robert B. Thompson, *Corporate Dissolution and Share-Holders’ Reasonable Expectations*, 66 WASH. U. L.Q. 193 (1988). That notion seems to me, highly doubtful if the inquiry is understood as empirical. If, instead, the inquiry is understood as imposing tort-like mandatory terms, it is directive and therefore suspect from the perspective suggested here. But it is at least arguable that withdrawing from reasonable expectations inquiries will deter initial investments. A final example: At one point in the history of corporate law an interested director contract was simply voidable; later, such a contract became enforceable if “fair.” The earlier rule is a formalist rule if formalist rules are, as I advocate, designed to limit judicial assessment. The later rule requires inquiring into the open-ended matter of fairness, and risks the imposition of conception of fairness alien to the understandings of parties to the corporate “contract.” Nevertheless it enables mutually beneficial deals precluded under the earlier rule.

The point is that formalist non-direction and formalist non-assessment will necessarily entail the withdrawal of law from the enterprise of facilitating exchange and therefore relegating that project to aspects of society outside law. In law and economics lingo, the formalist project of expanding empty spaces operates, in effect, as a counterfactual but strong presumption of zero transaction costs and as a more factually supportable assumption of extremely high administrative costs.

true—and certainly would be under a pragmatic instrumentalist regime—that the empty space as a class or category of conduct may be assigned a “public justification,” the justification, for example, of maximizing social wealth. But it remains the case that, once recognized, the empty space is a haven *from* public justification—an area within which one may leave law behind. It seems to me that the goodness of this notion, from the point of view of an individualist tradition, is self evident. It is reflected, in highly imperfect forms, in post-New Deal constitutional law,¹¹² albeit not within so-called economic realms. And it is reflected, again imperfectly, within these realms in the doctrinal examples I have given. I will not seek to defend an individualist tradition here, but I do wish to make clear what I take to be the nature of the goodness of the empty space claimed by that tradition. It is precisely that articulate justification for (formally private) choice is not asked, let alone required.

My final defense of empty spaces rests on the agenda of the critics of those spaces. The agenda, I claim, is precisely a denial of the goodness of the empty space postulated by the individualist tradition. The critics, it must be recognized, come from both ends of the political spectrum, but allow me to concentrate upon what I take to be the legal realist tradition. Realism’s denial of the empty space is premised, I submit, upon a pervasive, indeed organic conception of law in both descriptive and normative senses. The descriptive prong of this conception, we have already encountered: there is no such thing as a private realm because each choice within the realm is traceable to a legal allocation of power. The normative prong goes like this: as the private realm does not exist, it is not an obstacle to a centralized, instrumental and purposive collective assessment, which assessment is itself a good thing.¹¹³ The goodness of such an assessment, from this realist perspective, is precisely that articulate justification of formerly private choice is to be required.¹¹⁴

It might be thought that I exaggerate, but I think I do not. When it is said, as it sometimes is currently said, that we have too much law, when, for example, Professor Gilmore’s notion that “[i]n hell there will be nothing but law”¹¹⁵ is quoted, the speaker is recognizing, in my terminology, the contraction of empty spaces. This phenomenon of contraction is evident, for example, in contemporary threats to the continued viability of my examples of empty spaces, the business judgment rule and the employment at will rule. It is a phenomenon, however, I think pervasive. I suspect that for every example of a common law empty space, particularly where the space is generated by a hard looking legal rule, one may find either progressive retreat from the rule or the parallel development of an alternative body of law that undermines the empty space

112. Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987).

113. See, e.g., SUNSTEIN, *supra* note 45, at 160-92; SUNSTEIN, *supra* note 102, at 40-92.

114. Cf. Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENT. 379 (1993) (noting incoherence of state action doctrine due to dismantling public/private distinction in post-1937 era combined with a contradictory continued commitment to notion of individual rights.)

115. GILMORE, *supra* note 1, at 111.

conferred by its competitor.¹¹⁶ Of course, the reverse phenomenon is present as well. We observe in the law repeated efforts to generate empty spaces, often by means of replacing the indeterminacy generated by standards with the greater certainty generated by rules (such as safe-harbor rules).¹¹⁷ But the very prominence of these efforts, and of the oscillation between standards and rules, illustrates the point of contraction as a pervasive phenomenon.

Contraction does not, of course, always proceed from a self-consciously “scientific” construction. Some contraction may be traced to conservative traditionalism of a self-consciously “moral” variety. Much can be traced to egalitarian commitments: the conferral of “power” by background entitlement tends strongly to render egalitarians hostile to empty spaces.¹¹⁸ All, however, may be traced to an insistence upon articulate justification and a claim to authority in assessment of justification.

If this is so, how does it serve as a defense of empty spaces? It does so in two senses. First, as a descriptive matter, it undermines the realist claim that there are no empty spaces, for it makes no sense to deny the existence of the private while simultaneously substituting for some status quo an insistence upon justification and authoritative assessment. One does not substitute a proffered reality for a non-existent alternative reality. Second, it makes clear that the debate over empty spaces is normative. The anti-formalist has a normative agenda that cannot be defended in merely descriptive terms. So, too, of course, does the formalist, if commitment to empty spaces is accepted as a formalist precept.

IV. THE NORMATIVE DEBATE

What is the nature of this normative debate? The nature of the normative debate may be found in the following general criticism of formalism: by refusing to address consequences, formalism constitutes an abstract theology divorced from social need.¹¹⁹ It seems to me that within this criticism are the roots of the fundamental disagreement. That disagreement entails two interrelated issues: competence and ambition.

116. See, e.g., CAROL M. ROSE, PROPERTY AND PERSUASION, ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP 199-225 (1994); Jason Scott Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341 (1991). An example of the latter phenomenon is the simultaneous presence of an individualistic disparate treatment theory and collectivist disparate impact theory in the law of Title VII. See PAUL N. COX, EMPLOYMENT DISCRIMINATION, ch. 6 (3d ed. 1999).

117. See, e.g., S.E.C. Rule 506, 17 C.F.R. § 230.506 (amended 1989); REV. MODEL BUS. CORP. ACT §§ 8.60-8.63 (1984); UNIF. LIMITED PARTNERSHIP ACT § 303 (1976).

118. See, e.g., SUNSTEIN, *supra* note 102, at 40-92 (status quo neutrality reflected in *Lochner* era non-neutral and unjust); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (unjust power, for example, of corporate management).

119. POSNER, OVERCOMING LAW, *supra* note 5, at 398-99.

A. *Competence*

The notion that formalism is an abstract theology that refuses to address consequences obviously implies that there are better alternatives. It seems to me that formalism can be understood as a denial of this implication, and in particular a denial of the competence of legal actors either to resolve fundamental moral, political or social issues or to adequately predict and control social consequences. Its competitors, by contrast, affirm the capacity of law, of moral reasoning, or of scientific method to do just these things.

Recall that the formalist seeks his guidance from the concepts, rules, principles, etcetera he finds in the past practices of law, practices I earlier claimed nevertheless must inevitably have had some substantial relation to social practice even while not duplicating social practice. This source of legal decision is, by reference to the alternatives offered by anti-formalists, a quite modest one. It does not seek answers through the highfaluting techniques of analytical moral philosophy; it does not place its faith in the supposed expertise of administrative agencies; it does not suppose that social science is capable of achieving with the social what natural science has achieved with the natural. I submit that the claims to truth finding, prediction, control, and moral imperative one finds in these alternatives are far more extravagant than a simple claim to adherence to principles embedded in past practice. The alternatives display both high ambition—the ambition of improving society by reference to some philosophical, political, moral or economic precept—and a deep faith in the capacity of elites to employ rationality in service of this ambition.

Nevertheless, I do not wish to be understood as wholly rejecting criticism of formalist conceptualism. In particular, I do not believe that legal decision in hard cases can be thought of as compelled by past practice, even though that practice will substantially limit the alternatives. Indeed, I do not even believe that “reason” determines the choice between the alternatives thrown up by past practice. The skeptical realists and post-realists are, in my view, correct at least to this extent. The pretense of decision compelled by reference to principle may be a necessary pretense in such cases, but it is, I think, absurd to believe, as our legal culture asserts and purports to believe, that there are correct answers in hard cases, discoverable through reason.¹²⁰ This is particularly obvious when the hard case entails clashes between deeply felt political or moral commitments. There is simply no possibility of a rationally justified right answer in such cases.¹²¹ This means, however, not only that right answers won’t be found in legal principles. It also means they also won’t be found in moral philosophy, economics or any other discipline or body of knowledge outside law.

I also do not wish to be understood as thinking consequences do not matter to what law is or should be; they obviously do matter. My points about the matter of consequences are that both formalists and anti-formalists exaggerate the degree to which formalist law ignores consequences in favor of principles and that ambitious consequentialist programs, like ambitious moral ones, should be

120. *See generally* PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW (1998).

121. *Id.*

greeted with a great deal of skepticism.

That formalist principle may be understood as utilitarian in character is suggested by the proposition that at least some common law doctrines were “efficient.”¹²² It is suggested by a Humean understanding of the “utility” of rules yielded by social practice to the extent these are incorporated in law.¹²³ It is suggested by a rule utilitarian, rather than act utilitarian version of proper consequentialist approach and by recognition that administrative cost, particularly the “cost” of irremediable official ignorance, is very high.¹²⁴ I do not here offer a utilitarian account of the common law, the form of law conceived by classical formalists, as *the* law. Others have done so.¹²⁵ I claim merely that formalist conceptualism and rule worship may have masked an underlying consequentialism, albeit one of limited ambition.

I greet more ambitious consequentialism with skepticism not because it lacks appeal. Economic analysis of law, a sophisticated form of consequentialism, seems to me the most intellectually appealing of extant alternatives. It is particularly attractive because it takes seriously, rather than merely paying lip-service, to the idea that there are two sides to every story: every benefit has a cost. Moreover, elements of that analysis have had the salutary effect of defeating naive consequentialism: the unfortunate belief that, by prohibiting some bad or requiring some good, the bad will be banished and the good will displace the status quo.¹²⁶ Nevertheless, we should also be skeptical of sophisticated consequentialism for the simple reason that we lack, and are likely to continue to lack, information necessary to it. Let me briefly explain this skepticism.

There are two distinct levels at which consequentialist prediction and weighing exercises might occur, although the distinction will be fuzzy in practice. One level may be labeled institutional. It entails assessment of the predicted costs and benefits of alternative institutional arrangements, particularly the alternatives of markets and governmental and non-governmental hierarchies.¹²⁷ The other may be labeled infra-institutional. It entails the adoption and use of the prediction of consequences and the weighing of costs and benefits as a method of decision within a given institution.¹²⁸

122. *E.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 271-81 (5th ed. 1998).

123. DAVID HUME, *ENQUIRY CONCERNING THE PRINCIPLES OF MORALS*, § III, pt. II (3d Selby-Biggs ed. 1975) [1777]; *see* HAYEK, *LAW, LEGISLATION AND LIBERTY*, *supra* note 4, at 113.

124. HAYEK, *LAW, LEGISLATION AND LIBERTY*, *supra* note 4, at 113.

125. *See* RICHARD ALLEN EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

126. *E.g.*, Richard Craswell, *Passing On The Costs of Legal Rules: Efficiency and Distribution In Buyer-Seller Relationships*, 43 *STAN. L. REV.* 361 (1991).

127. *E.g.*, NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985); R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); R.H. Coase, *The Problem of Social Cost*, 3 *J. L. & ECON.* 1 (1960).

128. Thus, for example, judicial decision under “reasonableness” or “under all facts and circumstances” tests, where given a balancing of costs and benefits gloss, entails infra institutional

Consider, first, infra-institutional predicting and weighing. Hard formalist rules, at least those whose content creates or facilitates what I have called empty spaces, tend to allocate decision making authority to “private” or “market” institutions. If rationalist depictions of human behavior are correct, persons within these empty spaces then engage in prediction and weighing exercises. The hard rules that surround and support these empty spaces may often serve, or, at least, be explained as serving the function of compelling persons to consider, in their weighings, the goods and the bads inflicted by their actions on others. However, it remains the case that persons operating within such empty spaces have jurisdiction over prediction and weighing.¹²⁹ By contrast, anti-formalist “soft rules” or “standards” allocate this jurisdiction to governmental functionaries, to the extent that these personages have authority to make “all things considered” judgment. They will ultimately engage or threaten to engage in predicting and weighing. This is true, as well, however, of hard rules that direct particular outcomes and means of achieving those outcomes, for such rules deny or destroy empty spaces. The governmental functionaries who create such directive rules have engaged in an ex ante predicting and weighing in either naive or sophisticated versions. Prediction and weighing occurs, then, within distinct institutions and is therefore engaged in by distinct classes of persons.

Consider, now, prediction and weighing in the choice of institution. The

prediction and weighing. The economic interpretation of negligence is an obvious example. *E.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987). On the other hand, strict liability is not an alternative to prediction and weighing if this method is employed in identifying the party who will be strictly liable, as in analysis of the “least cost avoider.” And negligence need not entail a regime of ongoing prediction and weighing if it is dominated in fact by rules. OLIVER WENDELL HOLMES, *THE COMMON LAW* 98-99 (M. DeWolfe Howe ed., 1963). See Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291 (1992); Stephen G. Gilles, *Rule-Based Negligence and the Regulation of Activity Levels*, 21 J. LEGAL STUD. 319 (1992).

129. A complication, however, is the matter of remedy. In the standard analysis, “property rule” remedies (such as injunctions and, perhaps, specific performance orders) force questions of allocation into market or contracting institutions and, therefore, would be favored in the “formalist” scheme I am depicting. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). (This would also be true of contractions of liability, the expansion of the realm of *damnum absque injuria*, because a dismissal order is the partial analogue, for the complaining party, to an injunction against the responding party). Also in the standard analysis, liability rule remedies (damages) are employed where contracting is obviated by transaction costs, and damages are prices. The difficulties with damages are that they “substitute” governmentally determined objective estimates of cost for a fundamentally subjective experience of cost, rendering them prone to error and unpredictable. Governmental pricing of behavior may be said to leave choice jurisdiction in the hands of “private actors,” as, for example, in the notion that “efficient breach” justifies expectation damages. But it also is governmental pricing, so there can be no assurance that the prices set reflect those that would be subjectively demanded. Perhaps more importantly, I submit that these prices are not predictable ex ante, so the incentive function justifying these prices is in doubt.

allocation of jurisdiction might be decided on the basis of predicting and weighing. One might say, for example, that transaction costs in a particular context preclude appropriate private decision within an empty space and that the distortions of interest group politics are unlikely to be present in this context, so, on balance, jurisdiction should be allocated to a judicial, “political,” “public,” or “administrative” institution. Alternatively, one might predict that transaction costs in a particular context are low and governmental information costs high, so, on balance, jurisdiction to engage in infra-institutional predicting and weighing should be allocated to the empty space.

With these preliminaries out of the way, let me return to the matter of skepticism about competence as a justification for formalism, addressing, first, sophisticated prediction and weighing as a means of doing law and, second, such prediction and weighing as a basis for allocating decision-making jurisdiction.

By “sophisticated prediction and weighing as a means of doing law,” I mean the use of these methods by legal authorities in making particular decisions, and, therefore, assume allocation of choice making jurisdiction to governmental authority. I also again mean, however, the use of these methods in formulating hard rules of a command and control variety: rules, formalist in their hard form, but anti-formalist in their rejection of empty spaces. A rule that directs ends and means is functionally equivalent to an “all things considered” decision by a governmental functionary, for, in both instances, it is a governmental institution that determines particulars. The phenomena differ only in time (ex ante or ex post) of governmental decision.

The reasons for skepticism are many and have been repeatedly offered by others. Let me, however, briefly rehearse some of these reasons: (1) The, ironically, formalist method of prediction employed by sophisticated prediction and weighing, which is rigorous deduction from the rationality and scarcity postulates, misspecifies the complex character of human behavior.¹³⁰ (2) The specification of particular motivations as the ends sought through means-ends rationality too often misspecifies the complexity of human motivation.¹³¹ (3) The objective prices necessarily postulated in weighing exercises either ignore or are poor proxies for the reality of the subjectivity of cost.¹³² (4) The commitments of the analyst therefore necessarily color objective price estimates.¹³³ (5)

130. E.g., HOWARD MARGOLIS, *SELFISHNESS, ALTRUISM AND RATIONALITY* (1982); RICHARD H. THALER, *THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* (1992); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998).

131. E.g., Amartya Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 *PHIL. & PUB. AFF.* 314 (1977).

132. E.g., JAMES M. BUCHANAN, *COST AND CHOICE* (1969); Friedrich A. Von Hayek, *Economics And Knowledge*, in FRIEDRICH A. VON HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 33 (1948). For interesting arguments regarding the implications of subjectivism, see Gregory Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *STAN. L. REV.* 311, 337-41, 367-73 (1996); Gary Lawson, *Efficiency and Individualism*, 42 *DUKE L.J.* 53 (1992).

133. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with*

Empirical evaluation of the hypotheses generated by the exercise most often does not occur.¹³⁴ (6) When empirical testing does occur, the tests employed are insufficiently sensitive; so, while they may produce results consistent with a tendency with which the hypothesis is also consistent, they cannot satisfy a falsifiability criterion.¹³⁵ (7) When empirical testing occurs and generates suggestive results, it is always subject to methodological and interpretive challenge, and, most often, these challenges are sufficiently weighty to preclude reliance. Therefore, there is typically an unsurprising positive correlation between prior political or moral commitment and interpretation of empirical findings.¹³⁶ (8) Finally, the analytical apparatus is so “rich,” or perhaps porous, that it permits competing and inconsistent plausible hypotheses about behavior,¹³⁷ again often correlated with prior commitment, and choice between these

Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563, 597-604 (1982); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

134. The best evidence of this phenomenon are the pleas of advocates for more empirical research. *E.g.*, POSNER, *supra* note 22, at 164, 217.

135. For example, empirical evidence supports the proposition that “incentives matter.” *E.g.*, POSNER, *supra* note 122, at 220-24 (providing evidence indicating that tort liability reduces accidents). The more difficult issue, however, is whether a particular form of incentive matters, and, more specifically, whether attempts at precision in formulating legal incentives matter. This may be doubted. *See* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994).

136. There are, of course, numerous examples; I offer the following as representative: *Compare* William G. Bowen & Derek Bok, *The Shape of the River: Long Term Consequences of Considering Race in College and University Admissions* (1998), *with* Stephen Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. REV. 1583 (1999). *Compare* Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874 (1999) and Terrance Sandalow, *Rejoinder*, 97 MICH. L. REV. 1923 (1999), *with* William G. Bowen & Derek Bok, *Response to Review by Terrance Sandalow*, 97 MICH. L. REV. 1917 (1999). Additionally, *compare* Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987), *with* Elliott J. Weiss & Laurence J. White, *Of Econometrics and Indeterminacy: A Study in Investors' Reactions to “Changes” in Corporate Law*, 75 CAL. L. REV. 551 (1987); *cf.* Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. 698 (1999) (maintaining empirical inquiry often unable to answer questions it addresses at reasonable cost and within useful period of time).

137. POSNER, *supra* note 2, at 363-67. *See* Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99 (1989) (criticizing “misapplications” of theory). For example, consider the matter of insider trading prohibition and the many ingenuous efforts at justifying it in economic terms in face of the standard economic critiques of the prohibition. For an overview of this debate from a critical viewpoint, see STEPHEN M. BAINBRIDGE, *SECURITIES LAW: INSIDER TRADING* 125-73 (1999). For an example of ingenuous effort, see the work of my colleague, Nicholas Georgakopoulos. *Insider Trading as a Transactional Cost: A Market Microstructure Justification and Optimization of Insider Trading Regulation*, 26 CONN. L. REV. 1 (1993).

hypotheses cannot be made within the spirit of “scientific” inquiry absent more powerful empirical mechanisms than we possess or are likely in the future to possess.

What of prediction and weighing as a method of allocating decision-making authority? The issue here is who should decide, in particular, which institution should decide. It may seem that I have already loaded the argument in favor of “private” realms or market institutions by expressing skepticism about the prediction and weighing capacities of governmental actors, but this is not *yet* quite the case. If governmental actors are poor predictors and weighers, so, too, may be private actors. So the question of institutional allocation is distinct from the question of method assuming an allocation. The question of prediction and weighing as a method of determining an appropriate allocation is, likewise, distinct from the question of this method employed as a device for reaching particular decisions.

The issue with respect to allocation is, presumably, that of relative institutional competence: which institution is most likely to make the best decisions? Unfortunately, however, this question assumes an answer to a further underlying question: what is meant by “best”? A prediction and weighing method of answering the allocation question would seem to assume a welfarist criterion as an answer to this underlying question, quite possibly an efficiency criterion. On this assumption, the allocation question becomes: which institution is most likely to generate “efficient” outcomes?¹³⁸

Persons who approach legal issues from the perspective of this allocation question tend to do so by identifying various defects in the institutions in question, usually defects that serve as obstacles to efficiency.¹³⁹ Markets or private contracting institutions are afflicted with “transaction costs.” Political institutions and administrative agencies are affected with the rent-seeking evils of interest group politics. Courts and juries are afflicted with an inability to initiate action, costly processes, and substantial questions of competence. The method of prediction and weighing in assessing the allocation question is therefore one of predicting relative institutional performance and weighing the force of these defects in particular contexts.

The method, when applied to the question of allocation, potentially suffers from the problems recounted above when applied to actual decisions given an allocation. In particular, it would suffer from these problems if it purported to identify with precision the monetary or other values to be assigned the costs and benefits of alternative institutions. This, however, is rare. The more typical exercise in this form of analysis is unquantified description. The analysis therefore tends to rely upon what I term “knowable tendencies” or

138. This again, however, is not the only possible criterion. One might seek to make predictions about which institution is best able to effect egalitarian outcomes. KOMESAR, *supra* note 127, at 34-49.

139. *Id.* at 53-152; Daniel H. Cole, *The Importance of Being Comparative*, 33 IND. L. REV. 921 (2000).

generalizations about human behavior and not upon unknowable particulars.¹⁴⁰ Moreover, analysis of comparative institutional competence is Hayekian in spirit, for it recognizes that institutional capacity is the central question.

Nevertheless, there are reasons to be skeptical of the method of prediction and weighing when applied to the question of allocation of jurisdiction, even when the method relies upon general tendencies and eschews quantification of particulars. One reason is that the historical, perhaps even systematic, tendency has been one of identifying defects in one institution while assuming that its alternatives are free of defects.¹⁴¹ This is a problem that may be overcome in theory; good comparative analysis can be substituted for bad comparative analysis.¹⁴² The tendency to bad analysis is nevertheless a tip-off to a second problem. In the absence of an adequate mechanism for quantifying cost and benefits, a mechanism I have been suggesting is not in the cards, prediction and weighing will reflect prior commitments to a degree that the exercise will merely confirm these priors. If my prediction is incorrect, if there are at least some cases in which unquantified reliance upon general tendencies can yield predictions free of the taint of prior commitment, there is a third problem. We will most often discover both that the defects of alternative institutions are highly correlated and that their values, while unquantified, are probably high. The result is that we are left, or, most often will be left, with no clear answer to the question of relative institutional competence.¹⁴³ In the absence of an objective answer, we will again fall back on our priors, appearing now as presumptions left unrebutted by the exercise.

My final reason for skepticism is that exercises of this sort purport to proceed from outside the institutions examined, as if the analyst, from this outside stance, were in a position to allocate jurisdiction free from the defects she detects in these institutions. This, of course, is pure fiction. There is no single, conscious, impartial, and adequately knowledgeable entity standing outside the subject matter and possessing authority to allocate. The fiction is useful as thought experiment. But it is pernicious if we lose track of the fact that the choosers of institutions are our existing highly imperfect institutions – the institutions subject to the failures neoinstitutionalists identify.

B. Ambition

Although I have mentioned the matter of ambition, I have not yet directly addressed it. I said above that ambition is one of the two interrelated sources of normative disagreement about formalism. I derive this from the claim that formalism fails to respond to “social need.” The implied ambition is that of satisfying or resolving social need. Just what might be meant by “social need”?

140. These, at least, are my impressions. Cf. POSNER, *OVERCOMING LAW*, *supra* note 5, at 426-37 (describing neoinstitutional theory’s rejection of economic formalism).

141. Coase, *supra* note 127.

142. Cole, *supra* note 139.

143. James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440 (1995).

There are distinct conceptions of the function of law and of the “social need” functionally served by law.

Classical formalists conceived of law as the common law.¹⁴⁴ Important features of the common law, as it was addressed by the classical formalists, were that it was decentralized, transactional, corrective, historical, derivative, status neutral, and in an important sense purposeless.¹⁴⁵ By “decentralized,” I mean that the common law is the product of a series of decisions in concrete cases by distinct judges. It has no identifiable, central author, and therefore resists both positivism’s demand for a sovereign source and legal realism’s positivist fixation on the judge as a declarer, rather than a follower, of law.¹⁴⁶ By “transactional,” I mean that its focus and subject matter is upon particular transactions, whether voluntary or involuntary, between individuals. By “corrective,” I mean that it is concerned about the making, or not, of “wrong moves” by individuals within such transactions. Indeed, it assumes and preserves a status quo by addressing wrong moves that have disturbed the status quo. By “historical,” I mean that it addresses past transactions. While it thereby establishes guidance (or rules) for future transactions, it does not in a broad legislative sense purport to prospectively legislate the future in service of a defined collective objective. By “derivative,” I mean that it is derived from social practice or common morality, in the way indicated by my earlier discussion of intuitionism.¹⁴⁷ It is not, then, directive of social practice in the way that a command originating from a source alien to social practice is directive. By “status neutral,” I mean that it is individualistic in the sense that the actions of individuals, not their status or group membership, count. It is therefore “general,” in the sense that it is *formally* neutral. By “purposeless,” I mean that it does not, at least directly, seek to achieve some consciously articulated collective objective or end-state.

If this is correct as a depiction of the common law, classically conceived, it is decidedly non-functional when function is understood as service to consciously articulated social end-states, and it decidedly fails to serve social need when this need is defined in terms of such end-states. But this does not preclude it from being functional in the sense of enabling persons to identify with whom and by what means they may transact with others in service of their individual

144. *E.g.*, Grey, *supra* note 10, at 34-35.

145. I rely, in what follows in the text, upon: Barry, *supra* note 33; Gjerdingen, *supra* note 33, at 876-83; and Mashaw, *supra* note 33, at 1153-59.

146. *See* JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 82, 91 (1916). *But see id.* at 116. I deem that strand of legal realism that emphasizes the judge as a source of law “positivist” in that positivists are supposed to be committed to a sovereign source of law. Realists could, of course, either favor the judge as a sovereign (Llewellyn) or disfavor that source (as in those realists who preferred rule by expert administrative agencies). William W. Bratton, *Berle and Means Reconsidered at the Century’s Turn*, 26 J. CORP. L. 737, 741-50 (2001).

147. *See supra* notes 35-42 and accompanying text. *Cf.* Donald H. Gjerdingen, *The Coase Theorem and the Psychology of Common-Law Thought*, 56 S. CAL. L. REV. 711 (1983) (indicating classical common law thought appeals to normative intuitions of lay persons).

preferences.¹⁴⁸

The obvious objection to equating formalism with this depiction of the classical common law is that classical formalism's alleged "top-down" autonomous conceptualism—its commitment to deriving legal answers from legal principal—appears inconsistent with a decentralized, "bottom-up" common law, a common law built up from resolution of particular actual cases.¹⁴⁹ The "scientific" aspirations of classical formalism – its attempt to select the one correct rule from what Langdell thought was the "useless" jumble of the common law¹⁵⁰—may be viewed as one well within a centralized, directive, and prospectively legislative tradition incompatible with this depiction of the features of classical common law.¹⁵¹ Indeed, Grant Gilmore's conception and critique of formalism may perhaps best be read as hostility to this ambitious, directive depiction. Gilmore's apparent understanding of his anti-formalism was one of favoring fact sensitive, almost ad hoc judgment, or, at least, judgment tied only loosely to principle, and one, following Llewellyn, relying heavily on social practice.¹⁵² Nevertheless, I think a formalist label is warranted. Let me supply four reasons for this view.

First, it is important to again recognize that the classical formalists were engaged in an inductive project of identifying principles that would reconcile, systemize, and render coherent the common law. The source of their principles was common law precedent.¹⁵³ To systemize and rationalize is to centralize in a sense, but, to the extent that the formalist project rested upon the products of a decentralized process, and sought to be true to these products,¹⁵⁴ it remained decentralized in its origin. In short, the classical formalists sought to restate, in coherent form, the traditions of the common law. Now it is true that they are also typically understood as rigidifying the common law, as exaggerating its

148. That is, the law of property, contract and tort may be understood as concerned with enabling exclusion of others (private property), enforcement of promised exchanges (contract) and establishing a knowable line between permissible and impermissible externalization (tort), all on the assumption of a classically liberal (or, if one wishes, "atomized") order. See HAYEK, *LAW, LEGISLATION AND LIBERTY*, *supra* note 4, at 112-15.

149. POSNER, *OVERCOMING LAW*, *supra* note 5, at 172-73. See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 146-61 (1988); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 3-14 (1997); SCHAUER, *supra* note 49, at 174-81.

150. CHRISTOPHER COLUMBUS LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS V-VII* (1871), *quoted in* STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 734-36 (4th ed. 2000). See Grey, *supra* note 10, at 11 n.35, 24-27.

151. Indeed, Hayek at one point so viewed it. HAYEK, *LAW, LEGISLATION AND LIBERTY*, *supra* note 4, at 106.

152. GILMORE, *supra* note 1, at 108-11.

153. Grey, *supra* note 10, at 24-32.

154. This, in the case of the classical formalists was a condition arguably not met. A standard objection to their efforts was their selective treatment of caselaw and failure, therefore, to recognize what was "really" going on. *E.g.*, Walter Wheeler Cook, *Williston on Contracts*, 33 *ILL. L. REV. OF NW. U.* 497 (1939) (reviewing the Williston treatise).

coherence, as falsely supposing its completeness, and as misidentifying the mechanism of decision as deduction from principle rather than “utility,” “situation sense,” or “felt need.”¹⁵⁵ If it is true, however, that utility, situation sense and felt need were the true mechanisms that brought about the precedents from which the classical formalists derived their principles, it is difficult to believe that these principles were independent of the mechanisms. They more plausibly reflected the mechanisms.

Second, the noted features of common law are, rather precisely, the opposites of the features of law advocated by many critics of classical formalism—legal realists, post-realists, and pragmatic instrumentalists. For many of the critics, proper law is centralized, patterned, distributive, forward looking, directive, status conscious, and purposive.¹⁵⁶ It is “centralized” in that realists were obsessed with the judge as an author or maker of law (as opposed to applier or interpreter of law) and, at least in post-realist practice, favored legislative direction and the supposed expertise of administrative agencies, particularly at the federal level. It is “patterned,” “distributive,” and “forward looking” in that it is viewed as an instrument for conforming classes of conduct to articulated collective objectives and therefore for reform of the status quo. It is “directive” in that law is an instrument for reforming social practice on the basis of principles or policies derived independently of that practice. It is “status conscious” in that it focuses upon groups and deems these important. It is therefore not general in that the legal rights and obligations it recognizes are dependent upon status or context. It is “purposive” in that realist and post-realist law is an instrument for achieving collectively articulated “social” ends.

These features of realist aspiration have, of course, at least partially become features of current law—the law of the “administrative state.”¹⁵⁷ This is true not merely in the law as interpreted and enforced by administrative agencies, but also within the common law itself. The law of torts, of contract, of property are now largely conceptualized in these instrumental terms both within academia and

155. See HOLMES, *supra* note 128 (felt necessities of the time); HUME, *supra* note 123 (utility); LLEWELLYN, *supra* note 19, at 268 (situation sense);.

156. I here again rely upon Gjerdingen, Mashaw, and Barry, *supra* note 33.

157. See G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 99 (1978) (realism as intellectual analog to the New Deal). Professor Duxbury argues that the New Deal (and, by implication, post-New Deal administrative state) were not reflections of legal realist jurisprudence on the ground that the legal realists, as academics, failed to develop a theory of administrative law. DUXBURY, *supra* note 7, at 153-58 (nevertheless citing Roscoe Pound and Jerome Frank for the proposition that legal realism and the New Deal were linked). While it is true that the legal realists, as academics, focused on “private law,” and so offered a perspective on the common law opposed to the classical characterization, it is precisely, I submit, the realist perspective that was later reflected in New Deal and post-New Deal regulatory programs. See *id.* at 7, 78 (realism in part a response to *laissez faire*); *id.* at 79-82 (realism as resort to social sciences with object of social control); *id.* at 97-111 (realism as reflecting institutional economics, particularly its egalitarian themes).

within the profession.¹⁵⁸ Similarly, contemporary depictions of the common law, in contrast to the rigid traditionalism of classically formalist depictions, tend to treat rules as mere guideposts to decision by a governmental functionary in instrumental service of socially desirable ends.¹⁵⁹ In short, formalism's antagonist was and remains a set of beliefs at the core of which is the conviction that human societies can and should be consciously planned or constructed. It is in this set of beliefs that another, more ambitious understanding of function and of social need are evident and to which formalism is "blind" or antagonistic.

Third, classical formalism's scientific pretensions were, as Professor Grey has demonstrated, quite unlike the scientism of pragmatic instrumentalism.¹⁶⁰ Science, for classical formalists, entailed the paradigm of a closed logical system. The objective was to render law on the model of geometry. The scientism of formalism's antagonist is closer to more current understandings of science, with its emphasis upon hypothesis and empirical verification, fondness for experimentation, and objective of human control over natural phenomena. Langdell's science of law was a science of conceptual consistency. Realism's science of law was a science of conscious, purposeful social control. There is, then, a distinct lack of ambition in formalist science, at least when compared to its competitor.

Finally, it is not necessary to a contemporary formalism that even classical formalism's ambitions be duplicated. Given my concessions that law as geometry is implausible and that right answers in hard cases cannot be uncontroversially resolved through reason,¹⁶¹ classical formalism's pretensions to science should be abandoned. What might then remain, however, could very much be in the spirit of the classical common law. For example, dominant contemporary views of the common law as a fluid process might give way to more rigid views, views in which *stare decisis* would be taken more seriously, attempts at distinguishing precedent would be looked upon with more skepticism, and arguments from social or economic change would be viewed with suspicion.

It is this comparative lack of ambition I wish to equate with formalism as a more contemporary project and with a contemporary formalist rejection of "social need" more ambitiously defined. It should be apparent that comparative lack of ambition is related to skepticism about methodological capacity. I think skepticism about ambitious method leads to skepticism about, indeed antagonism toward, the idea of a collectively specified social end-state as objective, and law as means to this objective. The reasons may be found in the tradition of Burkean conservatism, summarized in the law of unintended, but unquantifiable consequences and partially justified by our recent historical experience with the grotesque evils, grounded in ambition, that enjoyed too often and for too long the

158. Thomas C. Grey, *Hear The Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1590 (1990); Summers, *supra* note 8.

159. *E.g.*, EISENBERG, *supra* note 149; SCALIA, *supra* note 149, at 3-14; SCHAUER, *supra* note 49, at 174-81.

160. Grey, *supra* note 10 at 16-20.

161. *See supra* notes 20-21, 120-21 and accompanying text.

support of an intelligentsia confident of its capacities.¹⁶²

C. Formalism and Politics

Let me conclude my account of the debate between formalists and anti-formalists by addressing an obvious question: Is formalism a political program? I have been defending formalism as contract dominated, common law permeated, with empty spaces. Is my version of formalism simply, then, a species of libertarian or classically liberal political commitment?

It is surely the case that critics of formalism have depicted it as substantive, as a species of conservative or reactionary ideology.¹⁶³ *Lochner v. New York*,¹⁶⁴ in keeping with this depiction, is, for example, often deemed an example of formalism. It seems also reasonably clear that American legal formalism is historically associated with free market, laissez faire or libertarian positions.¹⁶⁵ On the other hand, *Lochner* is not in fact an example of a formalist mode of adjudication; it is an example of the use of a balancing test, albeit one employed in service of a laissez faire agenda.¹⁶⁶ Perhaps formalist methods, like anti-

162. I am not equating legal realism or pragmatic instrumentalism with National Socialism or Communism. Nor am I suggesting that realism or pragmatism inevitably result in such evils. I am, however, suggesting that excessive ambition in law can be dangerous. Cf. POSNER, *OVERCOMING LAW*, *supra* note 5, at 153-59 (recognizing, on the basis of INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Schneider trans., 1990), that it was not legal positivism, but a rejection of positivism, that explains the behavior of German judges in the Nazi era); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 636-37 (1999) (same).

163. HOROWITZ, *supra* note 2; cf. SUNSTEIN, *supra* note 102, at 46-92 (critique of status quo neutrality); *but see* SUNSTEIN, *supra* note 5, at 118-20 (rejecting link between rule of law and free markets).

164. 198 U.S. 45 (1905).

165. DUXBURY, *supra* note 7, at 25-32; HOROWITZ, *supra* note 2, at 33-39, 142, 193, 200.

166. POSNER, *OVERCOMING LAW*, *supra* note 5, at 284; cf. HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937*, at 172-75 (1991) (generally rejecting formalism as explanation of substantive due process). Perhaps the best argument for deeming *Lochner* a formalist decision is the claim that the constitutional concept of "liberty" does not compel freedom of contract, so the justices in *Lochner* were "dishonest" in not justifying their claim that this freedom was constitutionally protected. *See* SUNSTEIN, *supra* note 102, at 45-67; Schauer, *supra* note 6, at 514.

There are a number of difficulties with this contention. First, it does not explain why the non-economic "freedoms" recognized by post-New Deal constitutional law as derivable from "liberty" or other constitutional generalizations are not subject to the same claim. Granting that much ink has been spilled in attempted justification, no uncontroversial, ironclad argument supports these freedoms. Second, whether any given freedom is necessarily entailed by "liberty" depends upon whether the community believes it is so entailed. In a heterogenous community, consensus is unlikely. This implies that (1) *Lochner* did not unjustifiably derive contractual freedom from constitutional liberty given the beliefs of a community; it merely failed to recognize heterogeneity of belief and (2) this justification and failure support and infect currently recognized constitutional

formalist methods, may be employed to serve multiple political masters.

It seems to me, in fact, both that the various interpretations I have given formalism can operate independently of each other and that at least the law as rules and law as conceptualism interpretations of formalism can be independent of substantive political commitment. It is quite possible to formulate rigid rules on quite instrumentalist grounds and it is quite possible to deem rigid rules the most pragmatic means of achieving “social objectives.” It seems to me, moreover, that much “left-wing” or “progressive” legal analysis warrants a formalism as conceptualism label. Substituting egalitarian conceptions of equality for libertarian conceptions of liberty is not an escape from conceptualism.¹⁶⁷ A good portion of consequentialist analysis is employed as “right-wing” or “conservative” rebuttal of “left wing” or “progressive” conceptualism.¹⁶⁸ The association of formalism with the right and anti-formalism with the left may therefore rest on historical contingency. So formalism and anti-formalism may simply be tools or weapons of convenience, with no necessary connection to any substantive political commitment.

Nevertheless, there is a case for thinking those critics of formalism who associate it with conservative or libertarian political commitments are largely correct. It is a case of affinity, and, perhaps, a case for the proposition that formalist form may be a necessary, though not sufficient, condition for implementing these commitments.

freedom. Therefore, (3), either the claim of dishonesty must fail or it must be applied to all controversial constitutional adjudication.

The claim that *Lochner* was “dishonest” is not, in my view, aided by the claim that it relied upon a “legally constructed” baseline as (falsely) neutral. This is my view for two reasons. First, it does not follow from the contention that the court relied upon a common law baseline (or that it sought to elevate the common law to constitutional status) that this baseline was consciously planned. It therefore does not follow that conscious planning of a new baseline, even given that some baseline is required, is justified. The common law and conscious, purposive planning entail distinct processes with distinct assumptions about human capacity. Second, if the alternative to a common law baseline is “deliberative democracy,” it should be apparent by now that “deliberative democracy,” as practiced, is perverse, or, at least, that it would not be unreasonable for a contemporary community to believe that it is perverse, given what we know from the “public choice” literature and given what we know of the electorate’s ignorance. Compare Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987) (moderate criticism of public choice theory) with Michael DeBow & Dwight Lee, *Understanding and Misunderstanding Public Choice: A Response to Farber & Frickey*, 66 TEX. L. REV. 993 (1988) (defense of public choice theory). See, e.g., Samuel DeCanio, *Beyond Marxist State Theory: State Autonomy in Democratic Societies*, 14 CRITICAL REV. 215 (2002); Reihan Salam, *The Confounding State: Public Ignorance and the Politics of Identity*, 14 CRITICAL REV. 299 (2002).

Of course these musings suggest that *Lochner* was a formalist decision in precisely the sense that it relied upon a common law baseline and, if my earlier contentions are correct, that this baseline is a fundamental assumption of formalism.

167. POSNER, *OVERCOMING LAW*, *supra* note 5, at 271-86.

168. E.g., POSNER, *supra* note 122, at 361-75, 514-18.

If we begin with skepticism about conscious, purposive governmental direction, it should be apparent that the various features of formalism I have postulated “fit” that skepticism at least in the sense that they are partial strategies for implementing it. The autonomy of law, in the form of traditionalist conceptualism, protects law from the ambitions of science (as science is *now* understood), and, therefore, society from law as constructivist social science. This autonomy serves also to protect law and society from the threat posed by anti-formalist, pseudo-scientific ideologies, ideologies illustrated by the decidedly anti-formalist examples of National Socialism and fascism in the last century.¹⁶⁹ This protection assumes that the concepts employed are “liberal,” in the old, non-socialist, sense of the term, so the protection afforded may be historically contingent, but conceptualism, once this contingency is met, is a vehicle for avoiding a managed society.

Rigid rules provide determinate guidance, enabling coordination. If employed for purposes of coordinating individual behavior assumed to have been undertaken pursuant to diverse private ends, such rules enable empty spaces. This “if” is another contingency, for rigid rules may be employed to frustrate or preclude such a pursuit and to direct behavior in service of collectively formulated public ends. The Code of Federal Regulations is, after all, full of rigid-looking rules. Again, however, if this contingency is met, a rigid rule preference is a means by which the empty space becomes viable.

Perhaps, however, I have mischaracterized the political sides in this story. Consider the possibility that the debate is between authoritarians and anti-authoritarians. Given this way of looking at matters, my contention that skepticism about law justifies formalism will seem particularly ironic. On more standard accounts, formalism is grounded upon and expresses authoritarian certainty. This, recall, was Gilmore’s perception: Formalism’s conceptualistic abstractions, grounded in the dead hand of the past, ignore the particularized realities, the situation-specific needs and expectations of real people.¹⁷⁰ Classical formalists like Langdell ignored the operative facts of real cases in favor of their preferred principles, so formalism resembles the centralized directives of a distant commissar. One might respond that it is the administrative state, the culmination of legal realist thought, that better fits this commissar charge, but this rejoinder won’t work against Gilmore; he had, or said he had, no sympathy for the administrative state and claimed that formalists and legal realists had in common both scientism and a lamentable belief in implementable truth.¹⁷¹

This brings me to the original question posed in this essay. I, largely following Hayek, have depicted formalism, or at least a version of formalism, as a strategy for minimizing law for anti-authoritarian reasons. Gilmore attacks formalism on the basis that it is an authoritarian conception of law.¹⁷² How might

169. See *supra* note 162; see also Guido Calabresi, *Two Functions of Formalism*, 67 U. CHI. L. REV. 479 (2000).

170. GILMORE, *supra* note 1, at 41-56.

171. *Id.* at 100-01.

172. *Id.*

this conflict be explained? One clear possibility is that one of us is wrong in our understanding of formalism, or, perhaps more plausibly, that we have distinct interpretations of an amorphous concept. Another possibility is that this conflict reflects a deeper and more fundamental conflict between conceptions of what it means to be anti-authoritarian.

I think this second possibility is, in fact, a probability. There is a deep, fundamental conflict in perception. But I do not here attempt to diagnose its origins. Instead, I will attempt to point out some of its manifestations. One such manifestation is the distinction between an *ex ante* and *ex post* conception of law.¹⁷³ Formalism, as I have depicted it, is very much within the *ex ante* conception. Its anti-authoritarian strategy is that of providing a set of knowable rules in service of empty spaces human interaction.¹⁷⁴ “Freedom” falls out of the ability to know what to do to achieve one’s ends through compliance with these knowable rules. Rules are therefore *ex ante* guides to behavior. Gilmore’s dispute-centered version of law is, by contrast, one within the *ex post* conception. As I read him, he was concerned about what to do after the fact, and he answered with a version of all things considered, contextualized judgment. I take it that he wished to tie this judgment, through fact sensitivity, or “situation sense” to some version of cultural expectation. If so, it would not be rules or even common law precedents, but the capture of contextualized expectations that would generate, almost as an afterthought, any *ex ante* predictability.

Consider, in particular, Gilmore’s anti-formalist rhetoric—the claim that formalism’s abstractions impose themselves on real world, situation specific needs and expectations. This view makes perfect sense to anyone who places himself in the position of the judge, for example, in the imaginings of the legal academic. It makes sense because anyone with decent instincts will want a resolution of a dispute that seems to him just, all things considered. Hard formalist rule worship will therefore seem indecent. But this is the view of authority, of the person who has or wishes to have responsibility for decision. The point of “indecent” formalism is that it allocates jurisdiction for decision elsewhere.

Gilmore might respond by citing rule skepticism. If it is true that rules cannot themselves constrain, if all things considered judgment is inevitable and

173. See Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329 (1993) (discussing the justice paradox as tension between doing justice in particular case and regulation of future).

174. Can this assertion be reconciled with my transactional/historical depiction of classical common law, *supra* text and notes 144-48. It can, on the following grounds: For the law to be historical and transactional does not mean that it must be concerned with justice between the parties to a particular past transactional event on an all things considered basis. In the formalist version of historical and transactional justice, it means instead that law is concerned with identifying wrong moves as these are defined by knowable rules. Similarly, an *ex ante* perspective, one that seeks to establish guidance for the future, need not entail an effort to plan means of achieving a collectively determined end-state. In the formalist depiction, *ex ante* means simply the establishing of knowable rules for engaging in future transactions between individuals.

merely pushed underground by a norm of justification by reference to rule, formalist hopes are obviously at risk. And if the real constraint is attitudinal—the formalist judge’s good faith effort to be a formalist and Gilmore’s judge’s good faith effort to be a wise interpreter of cultural expectation—the formalist cannot viably claim he has a better means of constraining ambition.

Perhaps this is correct, but I do not believe that it is to a degree that would obviate the claim that formalism’s constraints on ambitious law are superior to Gilmore’s reliance on official wisdom. If I am correct in believing extreme rule skepticism unjustified, formalism’s constraints provide a basis for disciplining decision and a benchmark for critique. An appeal to open-ended wisdom does not.

CONCLUSION: IS FORMALISM LIKELY?

I have thus far argued that formalism is both viable and, at least to me and perhaps a few others, attractive. I will close by addressing the question whether it is likely—whether, that is, there is a reasonable prospect that it will triumph.¹⁷⁵ My answer is no. I do not mean by this answer either that formalism is wholly absent from American law or that it will disappear from American law. It is both present and enjoying in some contexts a resurgence. Nevertheless, I think the prospects for its triumph unlikely for two sets of reasons.

First, underlying formalism are a set of values, or, perhaps, personality traits, that are largely absent in contemporary America, particularly within the intelligentsia. Formalism requires restraint in the form of a tolerance of apparent injustice, apparent absurdity, even apparent evil. I say “apparent” because injustice, absurdity and evil are more often than not controversial characterizations rather than reflections of consensus, because the benefits of correcting these bads, even where there is consensus that they are bads, are always accompanied by costs to legitimate interests and values, because these costs are often ignored and often thoughtlessly denigrated, and because the terms

175. A fair question is what would such a triumph entail? It should be apparent at this point that formalism as I interpret it is not merely a conception of the common law or one of the proper role of the judge or of adjudication. Rather, it is a comprehensive program for law. It would therefore entail, if implemented, either that the restrained sense of ambition and competence I advocate be internalized both by judges and by legislators or that it be internalized by judges and (arrogantly!) employed by them to constrain legislators. If it is too late to return to *Lochner*, narrow interpretive strategies might be adopted.

It should be noticed that, while textualism is sometimes deemed a formalist strategy, it is not in fact clear whether it would enable or prevent a judiciary bent on constraining legislative excess. Compare SCALIA, *supra* note 149, at 29 (rejecting strict construction as anti-democratic and denying that textualism is anti-democratic), with Price Marshall, *No Political Truth: The Federalist and Justice Scalia on the Separation of Powers*, 12 U. ARK. LITTLE ROCK L. REV. 245, 253-54 (1989) (Scalia seeks to restrain legislature); David Schultz, *Judicial Review and Legislative Deference: The Political Process of Antonio Scalia*, 16 NOVA L. REV. 1249, 1265-71 (1992) (Scalia distrusts legislative process).

“absurdity” and “evil” are often employed without a sense of proportion and in service of utopian visions.

These “oftens” to one side, it remains the case that formalism demands tolerance of bad things, and under circumstances in which there is apparent power to correct them. This is not a tolerance much evident in contemporary value systems. The formalist’s failure to correct apparent injustice has been denigrated as an escape from responsibility, evidence of adolescence, and as rendering the formalist himself the author of the evil he tolerates.¹⁷⁶ I think these characterizations unjustified, but they must be conceded to be popular.

Lest I be misunderstood, let me make it clear that I do not deny that great evils have been furthered by the law; although I think more great evils are associated with anti-formalism than with formalism. My points, rather, are that the distinction between great evils and unfortunate bads is not one much admired in contemporary America, that the resulting intolerance of unfortunate bads threatens formalism’s empty spaces, and that this intolerance appears currently rampant.

Second, formalism isn’t much fun, particularly from an intellectual point of view. I do not think formalism “easy” or unchallenging. Nor do I think the formalist in fact a mere automaton, applying without difficulty rule to fact. Both formalist rhetoric and anti-formalist rhetoric exaggerate formalism when they depict it as unproblematic rule following. Nevertheless, formalism is not unbridled moral philosophy, applied price theory or the ingenuous remaking of American society through the working out of a set of allegedly “preferred” values. It cannot, therefore, be attractive to persons with large intellectual ambitions. Law schools and the legal profession have for many years now attracted precisely such persons. The result is no doubt a vast improvement in the academic quality of the schools, and, perhaps, the intellectual power of the profession. I cannot help thinking that society would have been better off if this talent had applied itself within more socially productive fields, but this is not my point. My point is that formalism is not a likely candidate for fulfilling these ambitions.

In short, formalism, like other “isms,” requires for its triumph compatibility with the self interest of the elites in a position to implement it. That condition is not satisfied.

176. FRANK, *supra* note 14. Cf. Alexander, *supra* note 47, at 562-64 (formalism as morally implausible).