

# Formalism and Realism in Ruins (Mapping the Logics of Collapse)

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*ABSTRACT: After laying out a conventional account of the formalism vs. realism debates, this Article argues that formalism and realism are at once impossible and entrenched. To say they are impossible is to say that they are not as represented—that they cannot deliver their promised goods. To say that they are entrenched is to say that these forms of thought are sedimented as thought and practice throughout law’s empire. We live thus amidst the ruins of formalism and realism. The disputes between these two great determinations of American law continue today, but usually in more localized or circumscribed forms. We see versions of the disputes, for instance, in the stylized disagreements over the desired form of judicial doctrines (rules vs. standards); or the best rendition of key political values like equality (formal vs. substantive); or the proper mode of judicial interpretation (textual vs. purposive). Here too, the arguments that comprise the localized variants of the dispute remain inconclusive. The Article concludes by mapping “the logics of collapse”—specifically, some critical moves that undermine the rhetorical and intellectual force of the formalism vs. realism disputes and their localized variants. The aims here are several. First, the ability to deploy the critical moves helps with analysis. The critical moves help show how the arguments are constructed in the first place and how they are rhetorically and intellectually compromised. Second, and relatedly, the critical moves allow us to avoid being taken in by the formalism vs. realism arguments and their localized variants. Third, the aim is to show how our formalist and realist argumentation has already been surpassed by a legal “logic” that undermines the cogency of that argumentation.*

I. INTRODUCTION .....197

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II.	A CONVENTIONAL ACCOUNT: FORMALISM VS. REALISM.....	199
	A. <i>COMPREHENSIVE FORMALISM</i> .....	201
	B. <i>THE CRITIQUES OF FORMALISM</i> .....	204
	1. Arbitrariness.....	204
	2. Inefficacy.....	205
	3. Dogmatism.....	205
	4. Incoherence.....	206
	C. <i>REALISM</i> .....	207
	D. <i>THE CRITIQUES OF REALISM</i> .....	211
	1. Structural Vacancy.....	211
	2. Infidelity to Law.....	211
	3. Endless Deferral.....	211
	4. Authority Deficits.....	212
	E. <i>THE RELATIONS OF FORMALISM AND REALISM</i> .....	212
III.	THE RUINS—PARADIGMS IMPOSSIBLE AND CRITIQUES INTERRUPTED....	213
	A. <i>FORMALISM (IMPOSSIBLE AND ENTRENCHED)</i> .....	214
	B. <i>THE CONTINUATION OF FORMALISM SUB ROSA</i> .....	215
	C. <i>REALISM (IMPOSSIBLE AND ENTRENCHED)</i> .....	217
	D. <i>REALISM FORMALIZED</i> .....	218
	E. <i>CRITIQUES INTERRUPTED</i> .....	218
	F. <i>STRATEGIES OF RECONSTRUCTION</i> .....	219
	G. <i>SO WHAT?</i> .....	223
IV.	THE CONTEMPORARY SCENE: THE LOCALIZED VARIANTS OF FORMALISM VS. REALISM.....	224
	A. <i>RULES VS. STANDARDS</i> .....	225
	B. <i>VALUE FORMS</i> .....	228
	C. <i>TEXTUALISM VS. PURPOSIVISM</i> .....	230
	D. <i>SUMMARY</i> .....	234
V.	MAPPING THE LOGICS OF COLLAPSE.....	234
	A. <i>RECURSIVITY</i> .....	236
	B. <i>SHALLOWNESS</i> .....	239
	C. <i>INDIVIDUATION</i> .....	240
	D. <i>DISPLACEMENT</i> .....	242
	E. <i>SUMMARY</i> .....	243
VI.	CONCLUSION.....	244

I. INTRODUCTION<sup>1</sup>

Of all the great disputes that have marked American law, formalism vs. realism might well be among the most pervasive and significant. In part, that is because formalism and realism go to the very form, the very identity, of American law.

Today, the theoretical version of the struggle between these two grand visions seems to be dormant. But everywhere, we see residual skirmishes. Everywhere, we notice “localized variants” of the epic struggles: rules vs. standards, textualism vs. purposivism, substantive values vs. formal values (and more).<sup>2</sup> And as we move from one local “substantive” field to another, we encounter, over and over again, the same argumentative forms: The precise semantics may change, but the grammar remains the same. We encounter roughly the same formalism vs. realism dispute on any substantive terrain: freedom of speech,<sup>3</sup> jurisprudence,<sup>4</sup> federalism,<sup>5</sup> legal interpretation,<sup>6</sup> statutory interpretation,<sup>7</sup> the takings clause,<sup>8</sup> whatever.

1. This is a continuation of an effort to develop a jurisprudence of form. For other installments, see Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002) [hereinafter Schlag, *Aesthetics*]; Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929 (1988); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) [hereinafter Schlag, *Rules and Standards*]. See also Pierre Schlag, *The Dedifferentiation Problem*, 41 CONTINENTAL PHIL. REV. 35 (2009) [hereinafter Schlag, *Dedifferentiation*].

2. See *infra* Part IV (elaborating the localized variants of formalism vs. realism).

3. Compare Laurent B. Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 732 (1963) (arguing that courts should not use balancing in all First Amendment cases, but should try to fashion a rule or principle), and Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1425 (1962) (same), with Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 823–25 (1962) (arguing from the text and history of the Constitution that the court should use balancing in First Amendment cases), and Wallace Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479, 481–83 (1964) (same).

4. See *infra* Part II (critiquing formalism and realism).

5. Compare Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1195 (2003) (“[A] dose of formalism is necessary to adequately protect the values of federalism.”), with Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 960 (1997) (“[A] formalistic approach to federalism is misguided.”).

6. Compare ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, at vii (1997) (“Laws mean what they actually say, not what legislators intended them to say.”), with RONALD DWORKIN, *LAW’S EMPIRE* 470 (1985) (concluding that law is an attitude that must be pervasive in ordinary lives “if it is to serve us well even in court”).

7. Compare William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (“Statutes, however, should—like the Constitution and the common law—be interpreted ‘dynamically,’ that is, in light of their present societal, political, and legal context.”), with John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997) (“[T]extualism functions to preserve the integrity of the legislative process by stripping congressional agents of the authority to resolve vague and ambiguous texts of Congress’s own making.”), and John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 708 (1999) (“The current academic consensus against textualism rests upon the shakiest of empirical foundations.”).

Everywhere, the debates are as intense and intricate as they are infirm and inconclusive. And everywhere, it seems, we encounter reasonably well-intentioned people—people like me (and now people like you)—drawn to these disputes like moths to a flame.

Why—why do we do this? At some level, we know that formalism and realism are in disrepair and yet, when someone launches a rules vs. standards dispute, we show up to take sides. The same goes for the interpretive variant of the dispute—textualism vs. purposivism. Same goes for value-form definitions—formal or substantive. We are taken in as if by some wondrous or infernal machine.

How did we get here? This will be Part II—where I describe formalism and realism as two great, formal determinations of American law. I will also present their respective standard critiques. The aim of this section is to map out the positions, the rhetoric, and the stakes in a way that will enable us to recognize in this Article (and elsewhere) the presence of a variety of formalism vs. realism disputes—the localized variants.

In Part III, I then show that formalism and realism are at once impossible and entrenched. To say they are impossible is to say that they are not as represented—that they cannot deliver their promised goods. To say that they are entrenched is to say that these forms of thought are sedimented as thought and practice throughout law's empire. It is also to say that the critiques, whatever their conceptual merit, have been insufficient to displace the formalism vs. realism disputes.

We live thus amidst the ruins of formalism and realism. The disputes continue, but in more localized or circumscribed forms. In Part IV, I discuss versions of the disputes in the stylized disagreements over the desired form of judicial doctrines (rules vs. standards), the best rendition of key political values like equality (formal vs. substantive), and the proper mode of judicial interpretation (textual vs. purposive). Here too the arguments that comprise the localized variants of the dispute remain inconclusive. And as for the many efforts dedicated to resolving the disputes—they not only fail at resolution, but ironically succeed in heightening pluralization (hence further heightening the aura of irresolution).

What are we to think, to do? In Part V, I will map the logics of collapse—specifically, some critical moves that undermine the rhetorical force of the formalism vs. realism disputes and their variants. The aims here are several. First, at a basic level, the ability to activate the critical moves helps with analysis—there is no point buying into pro-formalism or pro-realism arguments if they are compromised. The critical moves help show

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8. For a dispute between takings formalism vs. takings realism, compare Richard A. Epstein, *The Harms and Benefits of Nollan and Dolan*, 15 N. ILL. U. L. REV. 479 (1995), with Mark Fenster, *Takings Formalism and Regulatory Formulas: Exaction and the Consequences of Clarity*, 92 CAL. L. REV. 609 (2004).

*how* the arguments are constructed in the first place and *how* they are intellectually compromised. Second, and relatedly, the critical moves allow us to avoid being taken in by the formalism vs. realism arguments and their localized variants. The idea is to regain a bit of our agency (we law-types) as we deal with compromised arguments that nonetheless continue to shape the way we think. The idea is to show how we can get beyond the automaticity of these legal arguments. Third, the aim is to show how our formalist and realist argumentation has already been surpassed by a legal “logic” that undermines the cogency of that argumentation.

## II. A CONVENTIONAL ACCOUNT: FORMALISM VS. REALISM

In American law, there is a conventional story told about formalism and its collapse. As this story is told over and over again, objections to its historical veracity accumulate.<sup>9</sup> But while the question of veracity clearly matters (very much so), so does the facticity of the conventional story. True or not, the story has had considerable effect on the way we have come to think of our own law. Although there are variations to the story, generally it goes something as follows:

At the end of the nineteenth century, legal thought in American law schools was dominated by a theoretically unarticulated, though institutionally settled, view of law. According to this view—one tacitly instantiated in treatises and law-review articles—law was a coherent, gapless, autonomous, and comprehensive system of conceptual propositions. This view of law—described by Thomas Grey as “comprehensive” formalism—came under withering critique from the legal realists in the 1920s and 1930s.<sup>10</sup>

Once the work of critique was completed, comprehensive formalism was displaced, at least in part, by a working approach to law—call it “realism”—that insisted on its instrumental, practical, contextual, constructed, and adaptive character.<sup>11</sup> This tacit working approach—conceived in embryonic

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9. See, e.g., Brian Z. Tamanaha, *The Realism of the ‘Formalist’ Age 2* (St. John’s Legal Studies Research Paper, Working Paper No. 06-0073, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=985083#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=985083#) (critiquing the standard account of the formalist era).

10. Thomas C. Grey, *The New Formalism 2* (Stanford Law Sch. Pub. Law & Legal Series, Working Paper No. 4, 1999), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=200732](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=200732) [hereinafter Grey, *The New Formalism*]; see also Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 33–39 (1983) [hereinafter Grey, *Langdell’s Orthodoxy*] (discussing the progression of formalism through time).

11. Nomenclature is always a dicey thing. My hope is that my description here will be recognizable to the reader as a contemporary and commonplace working approach in American law and that the label “realism” evokes its character. Realism, as described here, has some relation to the positive theories of law advanced by some of the legal realists. But what is most important to this paper is that realism be recognizable as a working approach to law used by many contemporary jurists and legal thinkers in their processing of the legal materials.

That being said, the realism I describe here tracks very roughly with Robert Summers’s account of “pragmatic instrumentalism”—a helpful theorization of the positive vision of law

form by some of the legal realists—has been in place for most of the twentieth century. It has co-existed side by side with the residues of comprehensive formalism.

As intellectual history, the conventional story likely suffers from certain weaknesses. The story is too simple; the temporal ordering is far too neat and unidirectional; the myths of origins loom too large and the narrative (like much legal thought) is too steeped in a philosophical idealism. But even so, this conventional story has been influential across generations of American legal thinkers. It has been told many times. The story has thus influenced what legal thinkers identify and recognize as formalism and realism as well as their characteristic virtues and vices.

Here, with but one significant exception, I try to stick as closely as possible to the conventional story.<sup>12</sup> Accordingly, I make no strong claims here for the accuracy of what actual historical actors labeled as legal formalists or legal realists “really” believed.<sup>13</sup> I do make two claims. One is to describe an important conventional story about the development of American law—a story still very much in circulation and still of constitutive import for contemporary legal consciousness. I also claim that the modes of thought described here as formalism and realism are recognizable in more or less adulterated/attenuated forms in the consciousness of contemporary jurists and legal thinkers.<sup>14</sup>

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championed by many legal realists and sociological jurisprudes at the beginning of the twentieth century. See generally ROBERT SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982); 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) [hereinafter Summers, *Pragmatic Instrumentalism*].

12. The exception is that I do not portray formalism and realism as symmetrical alternatives. See *infra* Part II.C (introducing realism as something other than a mirror image of formalism).

13. With regard to formalism, the historical veracity of the story is particularly questionable. As David Lyons cautions, “Legal formalism is difficult to define because, so far as I can tell, no one ever developed and defended a systematic body of doctrines that would answer to that name. We have no clear notion of what underlying philosophical ideas might motivate its conception of the law.” David Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949, 950 (1981). Indeed, not only do we confront the problem of the missing referent here (i.e., who or what are we talking about?), but there is the very serious question of whether the ostensible referent was as important or prevalent as the story claims.

14. Consider, for instance, these different stylizations of formalism vs. realism (or their analogues) in different precincts of law’s empire:

*Opinion Writing: The Formal Style and the Grand Style:* The “grand style” and the “formal style” are two styles of judicial opinion writing which Llewellyn describes as corresponding to the antebellum period and the end of the 19th century respectively. In the grand style, precedent is considered in light of the reputation of the judge and principle is treated as a source of sense, order, and policy. In the formal style, by contrast, rules decide the cases, policy is left to the legislature, and principle is used to cull errant precedent. KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 36–38 (1960).

*Moral Reasoning: Immanent Moral Rationality vs. Instrumentalism.* See generally Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L. J. 949 (1988)

## A. COMPREHENSIVE FORMALISM

Comprehensive formalism presents as a complete vision of law—a contender for what law, broadly understood, is and ought to be. A number of thinkers, including most prominently Ernest Weinrib,<sup>15</sup> David Lyons,<sup>16</sup> Thomas C. Grey,<sup>17</sup> Paul Cox,<sup>18</sup> Duncan Kennedy,<sup>19</sup> and Lawrence B. Solum,<sup>20</sup> have described many aspects of comprehensive formalism. Though these thinkers do not always offer the same description, or target the same object of inquiry, there is nonetheless a fair degree of overlap in the various descriptions. Here it is important to recognize that, like so much else in law, formalism remains, itself, incompletely formalized. Not only is there no single agreed-upon conceptualization of formalism, but the several existing conceptualizations are themselves not fully specified. Indeed, some

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(contrasting a formalist vision of law as an intelligible immanent order with an instrumentalist vision of law as aimed at achieving external ends).

*Globalizations: Classical Legal Thought vs. the Social.* See generally Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David Trubek & Alvaro Santos, eds., Cambridge Univ. Press 2006) (contrasting “classical legal thought” as a mode of thought preoccupied with maintaining spheres of autonomy for public and private actors with “the social” as a mode of thought preoccupied with purposive uses of law as a regulatory mechanism).

*Legal Theory: Grand Theory vs. Pragmatism.* Compare DANIEL FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY (2002) (deriding “grand theory”), with Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (radicalizing Wechsler’s *Neutral Principles* approach to constitutional adjudication).

*Internal Architecture of Law: Systematicity and Consequences.* Compare Jeremy Waldron, “Transcendental Nonsense” and System in the Law, 100 COLUM. L. REV. 16, 47–52 (2000) (arguing that “systematicity”—the conceptual terminology and coherence of law—is necessary and should “accommodate” policy initiatives), with Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 241 (1950) [hereinafter Cohen, *Field Theory*] (advocating a global-consequentialist form of reasoning).

*Legal Virtues: Rule of Law and Instrumentalism.* See generally Tamanaha, *supra* note 9 (delineating rule of law and instrumentalist modes of law and legal thought).

15. Weinrib, *supra* note 14, at 961–62.

16. Lyons, *supra* note 13, at 950–52.

17. Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473 (2003).

18. Paul Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57 (2003).

19. Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought America, 1850–1940*, 3 RES. L. & SOC. 3 (1980). Kennedy does not theorize a construct called “formalism,” but rather, one called “classical legal thought.” *Id.* This is not just a matter of different nomenclature. Kennedy’s construct traverses any ostensible form/substance divide, whereas those who theorize “formalism” (myself included) are focusing very much on something they (we) call form. The difference is important, but there is clearly overlap between the two approaches.

20. Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475 (2004–2005).

conceptualizations of formalism are (and this is not intended as a criticism) downright impressionistic.<sup>21</sup>

Typically, formalism (and here I cull from the theorists mentioned above) represents law in terms of a number of related traits—specifically conceptualism, coherence, gaplessness, autonomy, and comprehensiveness. Below, I describe these traits briefly and indicate in italics the sort of theoretical commitments that they rule out.

*Conceptualism:* Law contains concepts (e.g., “property”) that are sufficiently rich and determinate to allow a “meaning-based” elaboration of the system of law.<sup>22</sup> In other words, one can reflect upon the concepts of law in such a way as to derive legal conclusions from those concepts (without any extrinsic aid).<sup>23</sup>

*This rules out the view of law in instrumental, consequential, or policy terms. Conceptualism renders any examination of social/economic/political effects of law irrelevant to proper legal decision making. Ad hoc policy analysis, efficiency logarithms, and utilitarian calculations are all ruled out. Indeed, any consideration of the effects of the law as a basis for decision making is viewed, at the very least, as suspect, if not totally illegitimate.*

*Coherence/Systematicity:* Law as a system hangs together.<sup>24</sup> In other words, the system of law is (generally and ideally) free from discursive embarrassments such as disjuncture, contradiction, ambiguity, overlapping distinctions, ad hocery, and the like.

*Ruled out here are particularist, pluralistic, and catachrestic accounts of law and views of law as importantly context-dependent.*

*Gaplessness:* The law addresses and provides an answer for each and every legal issue that might arise. There are no “holes” in the law—and thus no occasion for any court to seek or construct some extra-legal source of decision making.<sup>25</sup> Gaplessness, together with coherence, is also conducive

21. See generally *id.*

22. The “meaning-based” term is offered by Duncan Kennedy. Duncan Kennedy, *Legal Formalism*, in 13 THE INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 8634, 8635–36 (2001). Kennedy’s term is helpful because it captures the ethos so well: the attempt to derive meaning from basic concepts alone, in isolation from history, psychology, politics, and culture. See also Grey, *Langdell’s Orthodoxy*, *supra* note 10, at 12 (“[O]ne could derive the rules themselves analytically from the principles.”).

23. Weinrib, *supra* note 14, at 961–62.

24. See Summers, *Pragmatic Instrumentalism*, *supra* note 11, at 890 (“Consistency, analogy, coherence, harmony, and symmetry were their main tests of soundness.”).

25. See Grey, *Langdell’s Orthodoxy*, *supra* note 10, at 12 (“It was crucial to the completeness of the system that it be conceptually ordered, and that its fundamental principles and their constitutive concepts be sufficiently abstract to cover the whole range of possible cases.”); Lyons, *supra* note 13, at 950 (“The law provides sufficient basis for deciding any case that arises. There are no gaps within the law, and there is but one sound legal decision for each case.” (internal quotation marks omitted)).

to the idea that for every legal question, there is a right answer and that law is objective.

*Gaplessness rules out the notion that law can be invented or created. Since law is gapless, there is never any need for a court to invent or create law. Indeed, for a court to create law would be itself a lawless act.*

*Autonomy:* Law develops according to its own internal logic. Law's intellectual credentials stand on their own and are in need of no further support from other disciplines such as economics or sociology.<sup>26</sup> It is possible, of course, to have economic, sociological, or other understandings of law. However, these are neither necessary nor sufficient to actually understand law or to say what it is.

*Autonomy rules out the notion that we must or can resort to extra- or trans-disciplinary knowledge or moral/political principles in order to understand law or to say what it is or should be.*

*Comprehensiveness/Completeness:* Not only is law gapless (no gaps within its interior regions), but law occupies only the field properly subject to law.<sup>27</sup>

*The idea here is that there are given limits to law and juridification should not exceed those limits. Ruled out is the notion that law can be extended to matters that are not already subject to law.*

Formalist theories of law will usually affirm all or a combination of these claims. Obviously, increased relaxation or rejection of each trait will tend to make the theory seem increasingly less deserving of the name "formalist."

In its purest form, comprehensive formalism is advanced as both a descriptive and a normative theory of law. The link between the two is furnished by an insistence on fidelity to law (specifically, the formalist version of law).<sup>28</sup> Comprehensive formalism brooks no compromise. If

26. Grey, *Langdell's Orthodoxy*, *supra* note 10, at 6 ("Classical orthodoxy was a particular kind of legal theory—a set of ideas to be put to work from *inside* by those who operate legal institutions, not a set of ideas about those institutions reflecting an *outside* perspective, whether a sociological, historical or economic explanation of legal phenomena.")

27. *Id.* at 11. Grey stated:

When a new case arose to which no existing rule applied, it could be categorized and the correct rule for it could be inferred by use of the general concepts and principles; the rule could then be applied to the facts to dictate the unique correct decision in the case.

*Id.*

28. There are, of course, all sorts of difficulties facing formalists about what to do when the declared positive law itself fails to conform to the legal formalist ideal. The question is: Should such non-conforming law be followed in the name of fidelity to a formalist process, or should it instead be rejected in the name of inconsistency with formalist form?

comprehensive formalism seems dogmatic or unearthly, so be it. The idea is that law is law and the world must adapt to it, not the other way around.<sup>29</sup>

### B. THE CRITIQUES OF FORMALISM

During most of the twentieth century, comprehensive formalism was roundly dismissed in the American legal academy—indeed, to the point of being simply ignored. Today, one would be hard put to find more than a small group of legal thinkers committed to comprehensive formalism. This is not to say, however, that formalism has been expunged from the juridical scene. Formalism remains and even thrives in various corners of law's empire, even as its full-blown theoretical expression has been decisively rejected.

The intellectual destruction of comprehensive formalism is generally credited to the legal realists of the 1920s and 1930s. The analytical lines of attack were generally infrastructural in character. That is to say, the legal realists generally tried to crack legal formalism at certain weak points rather than theorizing it from some overarching standpoint.<sup>30</sup> Ridicule and sarcasm were the prevalent rhetorical instruments—incredulity and outrage the underlying tone. Comprehensive formalism foundered, not so much the victim of philosophical death blows, but rather from a thousand cuts of jurisprudential embarrassment.<sup>31</sup>

#### 1. Arbitrariness

One of the most enduring realist critiques was a switch in the field of application. While the formalists could be content to “get their law right” in the books and let the world adjust, the realists claimed that law should take into account and respond to the imperatives of social and economic life.<sup>32</sup> The test of sound law was no longer confined to observance of the formalist virtues. Instead, law had to answer for how well or how poorly it regulated social and economic life. For comprehensive formalism, that kind of switch in the field of application was not a cheerful prospect. Not only would law have to surrender its vaunted autonomy, but perhaps worse, law would have to follow the configurations and demands of social and economic life—realms unlikely to be governed by an invariant, overarching, and coherent

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29. Cf. Cox, *supra* note 18, at 92–94 (describing formalism as rejecting responsiveness to “social need”).

30. Thurman Arnold's major opus is perhaps the most obvious exception. THURMAN W. ARNOLD, *SYMBOLS OF GOVERNMENT* (1935).

31. As Morton Horwitz put it, legal realism was “more an intellectual mood than a clear body of tenets.” MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 169 (1992).

32. Cohen, *Field Theory*, *supra* note 14, at 251 (“[W]e can reject the old idea of straight lines of precedent filling absolute legal space.”).

logic. As a consequence, formalism would lead to nonsense and arbitrariness.

## 2. Inefficacy

For comprehensive formalists, the origin of law lies in its conceptual ordering. This means, among other things, that when courts depart from this conceptual order, they are in a profound sense not doing law at all. The realists turned this view on its head. Jerome Frank, for instance, poured scorn on what he called “formal law” and “law in discourse”—arguing that it is what courts do, in fact, that is law.<sup>33</sup> Adverting to Holmes’s “bad man” and the related prediction theory of law, Frank pointed out that the “bad man” doesn’t care about the scholarly elaborations of formalist legal science.<sup>34</sup> He cares only for the consequences that a court will visit upon him. Again, this was not so much a refutation of formalism as a displacement—in this case a displacement of the source of law from concepts to courts.<sup>35</sup> And not courts in general, but named, specific, socially situated courts. With this displacement of the sources of law, comprehensive formalism would be incapable of realizing (making real) its ostensible virtues.

## 3. Dogmatism

While the formalists saw law as a set of “rules, doctrines, and principles”—in short, a set of propositions—the realists sought to reacquaint law with its social character. This meant not merely that those who shape law should consider its social consequences, but something far more radical. For many of the realists, law itself (law’s identity) had a social dimension crucial to its proper elaboration. Llewellyn, for instance, rejected the image of law as a system of propositions and instead sought to treat law as “a doing”—an activity.<sup>36</sup> Felix Cohen, who described legal formalism as a kind of “transcendental nonsense,”<sup>37</sup> conceived of judicial decisions as social events to be understood in terms of social antecedents and consequents.<sup>38</sup> And in the instrumentalism common to many thinkers of that era—Cohen, Pound, Holmes, etc.—law was viewed and wielded as a tool.<sup>39</sup>

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33. See generally Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645 (1932) (explaining that what courts do depends, not so much on “facts,” but on what various actors, such as judges, juries, and witnesses, believe the facts to be).

34. *Id.* at 645.

35. *Id.*

36. Karl N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 668 (1935) (describing law as “a doing”).

37. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935) [hereinafter Cohen, *Functional Approach*].

38. *Id.* at 834.

39. Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 980 (2005) (noting that “the principal insight of Realism was that law was best imagined metaphorically as a tool”).

Once one accepts that law is a doing, an event, a tool, and a medium of social action, formalism becomes a much more daunting, if not impossible, project. The reason is simple: One might, as a formalist, plausibly assert the presence of some sort of conceptual order to law if it is a system of propositions organized according to logic. In this case, one can rely on the assumption that the conceptual meaning of a rule or a doctrine determines its identity (and its proper scope of application). But if the identity of a rule or a doctrine is its social use, then the claim that its conceptual meaning determines its identity becomes a kind of dogmatism—and moreover, an implausible dogmatism. It is implausible because there is absolutely no reason to believe in the coincidence between conceptual meaning and social use—particularly not in a politically and financially stressed setting such as litigation.

#### 4. Incoherence

Another form of critique launched against formalism was the collapse of conceptual oppositions through frame shifting. Here, Robert Hale and his predecessor, Wesley Hohfeld, are key figures.<sup>40</sup> Hale argued that the grant of a property right to a private party effectively disabled other parties from using the protected resource.<sup>41</sup> Accordingly, every grant of a private right was also a disablement of the rights of others. One implication is that a grant of a legal right did not necessarily increase liberty—it merely increased someone's liberty by coercively impairing someone else's.<sup>42</sup> The implication for Hale is that the decision of how to distribute legal entitlements could not be deduced from the elaboration of broad-scale legal concepts such as "liberty" or "rights" or their analogues.<sup>43</sup>

Hale's specific arguments were considerably more sophisticated and subversive than this brief summary intimates.<sup>44</sup> But what is important here is the generalizable form of his critique. If social or economic life is indeed so relentlessly conflictual and law is both an introjection and a progenitor of this conflict, then legal conclusions about how to define entitlements derived from the elaboration of broad-scale legal concepts or legal distinctions are suspect. They are particularly suspect—indeed,

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40. Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). Hohfeld is not generally identified as a realist, but rather as an important precursor.

41. Hale, *supra* note 40, at 471.

42. *See id.* at 489 ("Frequently it may be true that to preserve one value . . . it may be necessary to curtail another . . .").

43. *See id.* (stating that it would be "impossible" to protect all "rights . . . against shrinkage of value").

44. For elaboration, see DUNCAN KENNEDY, *SEXY DRESSING, ETC.* 83–125 (1995) (comparing Hale to Foucault).

incoherent—if one looks at only one side of the equation and only one side of the dispute.

These epistemic shortcomings were given normative bite. Not only did formalism yield “transcendental nonsense” in Felix Cohen’s memorable phrase, but it short-circuited the kinds of ethical and political inquiries that realists believed judges should undertake.<sup>45</sup> Courts reached decisions by bypassing what many realists took to be essential—namely, the social and economic consequences.

Most of the critiques of formalism are based on these characterizations. To its critics, formalism seems to be detached from both normative and political values as well as the ostensible realities in the social and economic sphere. Accordingly, formalism is routinely described as mechanical, wooden, rigid, authoritarian, and generally out of touch.

C. REALISM

Before proceeding with the exploration of realism, a caveat is necessary. In discussions of formalism and realism (or their analogues), commentators often present them symmetrically as competitors playing on the same field. The story here is slightly different: Comprehensive formalism and realism, as presented here, play for different stakes, and they aspire to different ends. If we must use the ludic metaphor, it would be more appropriate to say that formalists and realists want to play different games on different fields.

We should not simply assume that formalism and realism are mirror inverse images of each other. They are not. The differences are telling. Formalism and realism hold different views of the world in which they operate and of their own possibilities for law. Having these different pictures, they occupy different roles. Hence:

<b><u>Comprehensive Formalism</u></b>	<b><u>Realism</u></b>
<b><u>is a</u></b>	<b><u>is a</u></b>
Pure	Compromised
Ideal	Worldly
Comprehensive	Partial
First-best	Second-best
Model	Approach
of law	to law

In American law, realism emerged in embryonic form in some of the legal realist writings of the 1920s and 1930s.<sup>46</sup> It has remained, along with the residues of formalism, an enduring tacit understanding of law throughout the twentieth century. One sees elements of realism in the legal

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45. See generally Cohen, *Functional Approach*, *supra* note 37 (introducing the concept of “transcendental nonsense”).

46. Summers, *Pragmatic Instrumentalism*, *supra* note 11, at 864 n.2.

process school (e.g., reasoned elaboration), law and economics (e.g., instrumentalism), critical thought (e.g., contextualism), and, of course, the neo-pragmatism of the 1990s (e.g., practicality).

As with comprehensive formalism, realism is composed of a series of traits that seem to cohere—to hang together. In sharp contrast to formalism, however, one cannot speak of comprehensive realism. On the contrary, realism is necessarily parasitic on a pre-existing architecture (which in the American context happens to be formalist). Typically, realism coheres around the following traits: instrumentalism, practicality, contextualism, constructionism, and adaptability. Below, I describe these traits briefly and indicate in italics the sort of theoretical commitments that they rule out.

*Instrumentalism:* As against the conceptualist entailments of formalism, we have the means/ends logic of what is variously called instrumentalism, consequentialism, functionalism, purposive reasoning, policy analysis, or politics. Law is a means to an end. Ends are objectives to be realized (made real) in the social, economic, or political sphere.<sup>47</sup> Law, in short, is on a mission. Actually, a variety of missions: economic efficiency, utility maximization, progressive legal change, ad hoc policy goals, and more. A law is redeemed or not by virtue of its success in realizing its objective (without producing too much in the way of unintended consequences elsewhere).

*Ruled out here is the possibility of treating law as an end in itself—as an expression of communal aspirations and values through which the community constitutes and comes to know itself. Ruled out as well is the notion that law must follow its own principles of right action (except to the extent that these are justified instrumentally).*

*Practicality:* Law must be tailored to its specific domain, its regulatory objects, and its personnel. What matters is that laws be tailored to the social, economic, and political domains to which they apply. In its more recent and sophisticated versions, practicality involves a repertoire of concepts that help describe the interactions of law and its field of applications— notions such as feedback loops, tipping, indivisibilities, perverse effects, and the like. In its less sophisticated versions, practicality means common sense and sound situational judgments.

*Ruled out here is the possibility of an elegant and systematic account of the coherence of law except at the highest level of abstraction (e.g., efficiency or utilitarian analysis).*

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47. This is the view of law aptly theorized by Robert Summers. See generally *id.* (exploring pragmatic instrumentalism).

*Contextualism:* The appropriateness of any law (or of law at all) is a function of its various contexts.<sup>48</sup> Accordingly, whether some class of people should be regulated and how, if at all, depends upon the relevant contexts. In turn, the meaning of a law depends upon the context in which it is issued, analyzed, and applied. In its sophisticated versions, contextualism entails a post-Hohfeld, post-Hale, post-Coase view that understands that for every entitlement created in one kind of activity or party, there is a corresponding encumbrance imposed on some other kind of activity or party.<sup>49</sup>

*Ruled out here are brute notions that laws have discrete and stable identities apart from their various contexts. Likewise excluded is the view that law is, in some nontrivial sense, objective. Likewise ruled out is the right-answer thesis.*

*Constructionism:* Law is a social and intellectual construction. Law is, in important ways, a creation of evolving social norms and conventional practice. Law is, in important ways, derived from or constituted by forces external to law such as market forces, linguistic patterns, cognitive habits, cultural norms, political contestation . . . and law in turn constitutes them. (The relations can be described in more or less complex ways.)<sup>50</sup> The credentials of law—its normative appeal and intellectual validity—will depend upon redemption from fields other than law: economics, moral philosophy, sociology, etc. In the legal academy, the dependency of law is increasingly recognized by the professionalization of personnel (PhDs required) and inter- or trans-disciplinary study.

*Ruled out here is the notion of a discrete logic (a form of reasoning or interpretation) specific to law. Ruled out also is the notion that law has descriptively or normatively a distinct empire. Law is simply one form of coordination or governance among, and in competition with, others.*

*Adaptability:* Realism presents law as essentially pliable. Realism offers some understanding of the contingency of human and legal arrangements—the sense that “things could be otherwise.” In principle, for realists, every aspect of life is subject to juridification. In part, this is because law is not subject to strong formal determinations—it is pliable.<sup>51</sup> And in part, this is

48. *Id.* at 864 (describing realism as stressing “time, place, circumstance, and particular wants and interests rather than ideology, abstract theory, principle, and an *a priori* normative view of the nature of things” (internal quotation marks omitted)).

49. All three insist upon the conflictual character of entitlement creation. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Hale, *supra* note 40; Hohfeld, *supra* note 40.

50. For a sustained elaboration, see generally Schlag, *Dedifferentiation*, *supra* note 1.

51. See Summers, *Pragmatic Instrumentalism*, *supra* note 11, at 922 (describing some legal realists as advancing the view of law as highly malleable).

because of the instrumentalist orientation—which, in the absence of a confining structure, knows no bounds.<sup>52</sup>

*Ruled out here is the notion that there is a timeless or transcontextual essence to law.*

Upon linking all these traits—instrumentalism, practicality, contextualism, constructionism, and adaptability—several things become apparent.

First, just as with comprehensive formalism, there is a sense in which the various traits of realism hang together. One can see that a commitment to some of these traits could easily lead aesthetically to a commitment to the other traits.

Second, if one views all these traits together, they seem to describe a recognizable and widespread view of law. In other words, realism as presented here is not simply a model for thinking about law, but one that we see in action in various juridical and legal-academic precincts. This is very much unlike comprehensive formalism, which is a pure form that one seldom finds faithfully instanced in anyone's work. There are several reasons for this—but one needs to be noted here in particular. The comprehensive formalist is a “law utopian”—someone who believes that the ideal of law (to wit: the formalist ideal) must be followed come what may. He is an absolutist. A realist, by contrast, is someone who understands that law is always in negotiation with the world. Law is thus nearly always a second-best enterprise operating in a second-best world. The realist vision already incorporates notions of trade-offs and compromises. The result is that realism is much more common than comprehensive formalism in the action-contexts of the law (e.g., lawyering). There is an odd sense in which realism does not need to compromise its vision of the law in action-contexts: Realism already is that compromise. To the extent we see comprehensive formalism in action, by contrast, it is only in interstitial ritualized moments—generally far removed from action-contexts.

Third, and this is very important, realism is not a complete self-sustaining account of law. It is instead, as mentioned before, a protestant tradition. It is parasitic on a pre-existing architecture of law. Realism is thus already rhetorically indebted to formalism. A total triumph over formalism would be disastrous for realism as well.

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52. One should not underestimate the extent to which the appeal of realism among legal scholars can be ascribed to parochial or guild self-interest. There is no doubt that realism authorizes the expansion of scholarly agendas, particularly relative to the austere scholarly economics of formalism. See generally Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803 (2009) (discussing the state of contemporary legal scholarship).

## D. THE CRITIQUES OF REALISM

In contrast to formalism, realism is not highly structured. On the contrary, it claims to be a denial/rejection of the rigidly structured and conceptualized world of formalism. Not surprisingly, the most popular critiques of realism tend to exhibit the same traits as their target—a kind of structural underspecification. The critiques of realism are not for that reason any less passionate or convincing.

## 1. Structural Vacancy

Viewed critically, realism is characterized by a certain jurisprudential permissiveness and a kind of structural vacancy. If compromise between the law and the world, concept and practice is itself part of the “structure” of realism, then there is a great deal of give and play at its very heart. Realism makes no offer it is not willing to negotiate.

## 2. Infidelity to Law

For critics, realism can easily seem strikingly antithetical (at least in its consequentialist and contextualist aspects) to the rule of law.<sup>53</sup> Indeed, one could go through Lon Fuller’s description of the rule-of-law virtues—requirements such as notice, publicity, the prohibition on ex post facto laws—and argue that the realist vision of law arguably violates nearly all of them.<sup>54</sup>

In realism, it is not law that rules. On the contrary, constructionism implies that law is not (always) the authoritative source for the legal decisions rendered. Instead, law is (at least sometimes) derivative of social forces, political contests, market behavior, the plurality of utils, or the economy. There is at the very least a great deal of traffic between law and the social—involving feedback loops, reciprocal causation, and so on. Law, to put it in brute terms, is not entirely in charge here.

## 3. Endless Deferral

In virtue of its structural vacancy, its distrust of unreflective formalism, and its celebration of contextualism and practice, realism effectively delays and defers choice to some future decision or decision maker. Realism has very little to say *a priori* other than to be wary of *a prioris*. The upshot, and

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53. BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END 227–45 (2006) (exploring consequentialism as corrosive of the rule of law).

54. See generally LON L. FULLER, THE MORALITY OF LAW (1969) (discussing how morality counteracts the typical failures associated with making law). There are, of course, available responses. One of them is that the rule-of-law virtues—notice, publicity, etc.—are satisfied because citizens already know that the legal regime is instrumentalist and adaptive. This answer, without more, seems a bit formulaic. A variant would be the idea that realism effectively defers to social and economic norms that are well-known to the citizenry (occasionally better-known than the law itself).

there is irony here, is that this form of thought, which wants to be practical, perpetually avoids making hard decisions.<sup>55</sup> Much of what realism has to teach us about making decisions is a counsel to wait, to postpone, to eschew, to avoid the moment of decision. It seems there is always a future that is more specific, more contextualized, and less formal in which to render a decision. And when a decision is rendered, realism tells us it can be revisited, revised, and reformed.

#### 4. Authority Deficits

Not only does realism preclude law from ruling, as suggested above, but realism does not (and cannot) put itself in the place of law. It is not a complete theory of law. It is neither complete nor a theory. Some thinkers celebrate realism precisely because it abjures completeness and theory status. Indeed, arguably, those are key virtues of realism. At the same time, these virtues, in the context of law, can be viewed as vices. Realism is always busy deferring to other sources of authority: politics, social norms, economic forces, and so on.<sup>56</sup>

##### *E. THE RELATIONS OF FORMALISM AND REALISM*

As previously mentioned, comprehensive formalism and realism do not stand on the same footing or claim the same role for themselves. Comprehensive formalism can present as a stand-alone theory (although the production of outcomes may require “cheating”). Realism, by contrast, depends upon a pre-existing legal architecture (which can only be maintained by realists if they think and act in very non-realist ways).

Comprehensive formalism requires “cheating” in the sense that the formal rules cannot all be deduced or derived from law, but must be based upon some non-judicial understanding of social and economic practices. Where comprehensive formalism fails to incorporate such social understandings, it yields results that are demonstrably silly (which is what many of the legal realists repeatedly tried to show).

Realism meanwhile depends on some pre-existing architecture of legal concepts. It can, of course, justify the creation of such concepts and can possibly even generate such concepts. But it will need to get this architecture by borrowing from elsewhere: Instrumentalism gives us neither ends nor starting points.<sup>57</sup> Practicality says nothing about what to be practical with or

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55. Without a heady shot of existentialist commitment, it is hard to see how the realist could ever make up his mind.

56. Indeed, Thomas Grey rightfully suggests, in a slightly different context, that pragmatism provides a respectable intellectual stance that reprieves the need to “have a theory.” Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1569 (1990). As he puts it, “Pragmatism is freedom from theory-guilt.” *Id.*

57. As Summers painstakingly demonstrates, one cannot do means-ends analysis in a vacuum: One has to have an architecture in place delineating identities and institutional

about. Contextualism cannot select the relevant text. Constructionism is devoid of imperatives and normative values. And as for adaptation . . . the question is adaptation to what? Moreover, realism cannot (absent the importation of some very non-realist modes of thought) process legal concepts in the automatic, unreflective, non-instrumentalist way necessary to sustain the architecture.

Both comprehensive formalism and realism will fault the other for being the kind of jurisprudence it is in fact trying to be. To the realist, a comprehensive model of any kind (formalist or not) is inappropriate. It is already (formalist or not) a misapprehension of how the world works and of the possibilities of law. Meanwhile, to the formalist, something that calls itself a mere “approach” and that admits its compromised character misunderstands the nature of law itself and perforce the role of law in the world.

The different identity-positions of comprehensive formalism and realism help explain their particular weaknesses and vulnerabilities. Virtually no one these days believes in the possibility of a coherent global model of law. This renders comprehensive formalism simply unbelievable except in some much chastened or selective form. Meanwhile, the fact that realism is both partial and merely an approach means that it is not in charge of its own destiny. Realism can never be pure and is always susceptible to colonization by some formalism upon which it ironically depends.

### III. THE RUINS—PARADIGMS IMPOSSIBLE AND CRITIQUES INTERRUPTED

Contemporary legal consciousness confronts an interesting predicament. At some level, we are all aware of the intellectual bankruptcy of comprehensive formalism and of the inadequacies of realism.<sup>58</sup> The critiques above, as well as the many others, are sufficient in this respect. At the same time, the remains of formalism and realism are entrenched. The forms of thought, the habits, the considerations, and the techniques are to be found all throughout law’s empire.

Both formalism and realism are impossible. Indeed, whether announced as a theory (formalism) or an approach (realism), neither is adequate to describe the ways in which lawyers, judges, or legal academics reason, interpret, or elaborate law. Neither seems adequate to describe the identities and character of our precedential and jurisprudential commitments. Moreover, while one might hope that the virtues of the one might compensate for the vices of the other, this prospect remains undemonstrated.

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parameters within which legal actors can do their means–ends calculus. See Summers, *Pragmatic Instrumentalism*, *supra* note 11, at 888.

58. See *supra* text accompanying notes 31–46, 53–58 (critiquing both comprehensive formalism and realism).

Today, one can, of course, claim to hold a formalist or a realist account of extant law, but such claims will require one to take one of the following unattractive stances:

- (1) Dramatically and implausibly reducing the scope of what is generally recognized as positive law. In other words, one redefines the realm of law in highly selective ways (intellectual gerrymandering) such that one's formalist or realist account of this law is effectively made true.<sup>59</sup>
- (2) Dramatically and idiosyncratically redefining what it means to be a formalist or a realist. Usually, this is accomplished by introducing into the one (e.g., formalism) large doses of the other (e.g., realism).<sup>60</sup>
- (3) Presuming that one's proclaimed self-identification as a comprehensive formalist or a realist is fully sufficient to make one's self so. Typically, one commits to either approach and expects others to believe that one's actual intellectual practices will fall *ipse dixit* in line with the self-declaration.

A. FORMALISM (IMPOSSIBLE AND ENTRENCHED)

Comprehensive formalism is now implausible as a widely shared theory of law. And it is implausible not so much because it has succumbed to some killer argument, but because of something much more serious: Comprehensive formalism and its depictions of the identity and role of law are simply no longer credible.<sup>61</sup> It is not that we are all "legal realists now" (we most certainly all are not), but we are all realist enough to understand that our law and culture are strongly flavored with practices and institutions antithetical to comprehensive formalism: instrumentalism, social engineering, bureaucratic administration, and so on. To declare one's self a comprehensive formalist today is thus a bit akin to announcing that one is a monarchist. It is simply not a convincing belief system given our present legal and social conditions. Among the social and intellectual conditions rendering comprehensive formalism obsolete are:

The permeability of law and politics;

59. (Or partially true).

60. Larry Solum, for instance, tempers his brand of formalism with a great deal of realism. Solum, *supra* note 20, at 520–22.

61. Even those sympathetic to formalism may well agree. Paul Cox, for instance, says:

I cannot defend formalism in its pristine, classical sense . . . [I]t 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 . . . .

Cox, *supra* note 18, at 61.

The significant presence of instrumentalist modes of thought in both law and the social sphere;

The bureaucratization of law in both the public and private sectors;

The advent of cost–benefit analysis, balancing, and totality-of-circumstances tests in the positive law;

The widespread use of non-legal experts (social workers, psychologists, economists, etc.) to formulate and administer law;

The infusion of economic, sociological, and empirical knowledges in law through experts and administration;

The almost ecstatic proliferation of discordant yet arguably authoritative legal texts;

(One could go on).

Given these developments, if one wanted to describe law in terms of a comprehensive formalist theory, the best strategy (there are others)<sup>62</sup> would likely be to disregard or repudiate a great deal of what we take to be our own positive law (as well as what we take to be our social circumstances). Formalism, seen in this way, would not be demonstrably wrong, or at least no more “demonstrably wrong” than any other jurisprudence of substance. Its plausibility, however, would depend upon adopting a very narrow view of what counts as law—a view generally not believable.

So, as a working theory of law, comprehensive formalism is impossible. Too much of what we consider to be “law,” and likely would wish to retain as integral to what we call law, would have to be jettisoned or declared errant, spurious, or otherwise pathological.<sup>63</sup> For a judge to be a comprehensive formalist would render him antediluvian. For a lawyer to be a comprehensive formalist would be malpractice.<sup>64</sup> And for a legal academic to be a comprehensive formalist would entail being Ernest Weinrib.<sup>65</sup>

#### B. THE CONTINUATION OF FORMALISM SUB ROSA

And yet, one should not overestimate the defeat of comprehensive formalism. Its maps and pathways and its concerns and anxieties, continue to exercise control over the modern legal imagination.<sup>66</sup> To borrow

62. See *supra* text accompanying note 55 (offering a strategy for constructing a comprehensive formalist theory).

63. I am not being a semantic imperialist here. Formalists (and others) can define or describe “law” however they want. I am simply making a contingent observation that “law,” like other basic terms, plays particular roles within our cultural and intellectual grammars. These grammars will tend to render idiosyncratic definitions irrelevant or utopian or both.

64. Cox, *supra* note 18, at 61.

65. And that position is already taken. Weinrib, *supra*, note 14.

66. See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 815 (1989) (discussing the virtues of the Holmesian slogan about experience and logic for “practitioners

Maitland's felicitous phrase, comprehensive formalism "rules from the grave"—and in sundry ways, too.<sup>67</sup>

First, the architecture of formalism—the grid-like set of distinctions (tort/contracts), the hierarchy in the layers of law (constitution/statutes/common law), the aesthetic ideals (gaplessness, precision, etc.)—all that and more, remains.<sup>68</sup> Perhaps this architecture is in ruins, but it has not disappeared. As many have noted, even today, the law-school curriculum of the first year remains much the same as it was in the late nineteenth century.

Second, one finds the discrete and localized strains of comprehensive formalism throughout the legal landscape. Discrete doctrine-sets, distinct modes of legal interpretation,<sup>69</sup> and legal reasoning bear the imprints of comprehensive formalism. Thomas Grey helpfully describes "neo-formalism" in just this way—as these residual forms and associated arguments that continue to be deployed, even if in ad hoc or interstitial ways.<sup>70</sup>

Third, the meaning, significance, and hold of these neo-formalist arguments owe something to the residual appeal of comprehensive formalism. Like a primordial "legal unconscious," comprehensive formalism provides a depth and a resonance to interstitial neo-formalist arguments and conceptions. If neo-formalist imperatives such as "heed the plain meaning of the text" seem appealing to some people (and awful to others), it is in part because those imperatives resonate in a deep, not fully conscious background of comprehensive legal formalism.

Fourth, comprehensive formalism remains a temptation—particularly for legal academics. In a powerful (and not fully explained) sense, comprehensive formalism remains, for many legal academics, a kind of closet ideal. All this theorizing, modeling, and paradigm-building; all this highly conceptualist work; and all this automatic insistence on elegance, coherence, systematicity, and precision regardless of context<sup>71</sup> suggest the continued hold of the formalist ideal on the American legal-academic imagination.

and scholars who work in a context in which Langdellian formalism retains a primeval and often unrecognized power").

67. FREDERIC MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 1 (Alfred Henry Chatory & William Joseph Whittaker eds., Cambridge Univ. Press 1936) ("The forms of action we have buried, but they still rule us from their graves.").

68. Schlag, *Aesthetics*, *supra* note 1, at 1055–70 (describing the aesthetic of the grid).

69. See, e.g., Antonin Scalia, *The Rule of Law and the Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) (endorsing "the plain meaning of the text" as a favored method of interpretation—one that leads to the formulation of clear commands and clear rules).

70. See Grey, *The New Formalism*, *supra* note 10 (discussing the revival of formalism in the modern era). Grey "portrays the new formalists (Justice Scalia is taken as representative) as characterized by their pursuit of four jurisprudential strands: objectivism, originalism, textualism, and conceptualism." *Id.*

71. Elegance, coherence, and the like are not qualities to sneer at. At the same time, one gets the sense that some legal commentators insist on these qualities without regard to context—that is to say, without regard to the particular aims of inquiry or the objects of inquiry.

Fifth, in a more profound sense, one wonders whether we could have a conception of “law” that is devoid of formalism. To put it positively, it just may be that as a matter of our cultural and intellectual grammars, law and formalism are inextricably intertwined. If so, the eradication of formalism might be tantamount to the elimination of what we, as a cultural and intellectual matter, take “law” to be.

C. *REALISM (IMPOSSIBLE AND ENTRENCHED)*

As a stand-alone project for law, realism is not plausible. There are simply too many aspects of contemporary law that render realism implausible as a complete account. Among these conditions are formal architectural features of law—many of which remain in place (even if sometimes in disrepair):

Stare Decisis;

Controlling Case Doctrine;

Conceptual Analysis;

The Hierarchy of Sources of Law;

Subject-Specific Divisions and Discourses (contracts vs. torts); and

Formal Institutional Identities (corporations, lessors, etc.).

Realism can furnish justifications for these architectural features of law. And realist considerations can give shape and substance to these architectural features. All of this is to say that a realist approach can endorse a localized legal regime that partakes, for instance, of conceptualism or systematicity or other formalist traits. But on pain of self-rejection, what realism cannot do is to become that sort of formalist regime.

Realism depends upon a certain degree of pre-existing architecture.<sup>72</sup> It needs at least some unadorned dogmatism (not very realist) and mechanical or unquestioning repetition (again not very realist) of basic identities and fundamental-reasoning operations. Realism itself is not that architecture. The architecture must be found elsewhere and it must offer sufficient resistance to realist challenges over time. To put it another way, realism is *après-coup*—it is and remains dependent on a pre-existing architecture. And in American law, it is formalism that provides that architecture.

Meanwhile, the challenge that realism poses to formal architectures is well known. If left unchecked over time, instrumentalism, practicality, and contextualism will integrate ends, purposes, and objectives into legal identities (until those identities eventually lose their integrity).<sup>73</sup> Another

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72. Summers, *Pragmatic Instrumentalism*, *supra* note 11, at 918–21 (noting that “pragmatic instrumentalism” depends heavily on “implementive machinery”).

73. Jeremy Waldron makes a similar point about the way in which functionalism corrodes legal concepts:

way of putting it is that some architecture and some relatively fixed and enduring identities are needed, if only to think, and these cannot be furnished by consequentialism, practicality, and contextualism alone.<sup>74</sup>

#### D. REALISM FORMALIZED

And yet even if realism is impossible, it cannot be avoided. Our law is now fraught with explicitly instrumental tests, balancing methodologies, multi-factor tests, and a well-entrenched commitment to policy analysis. There is an ironic (yet quite real) sense in which realism is now the new formalism. The realist tests, doctrines, rules, and policies are now thoroughly formalized into our law. And what could be more unreflective, automatic, and pro forma these days than a balancing test or cost–benefit analysis or a totality-of-circumstances test?<sup>75</sup> These little items have reached almost comprehensive status—such that a per se rule, a categorical decision must now automatically be defended on a kind of global cost–benefit analysis. What once seemed—in the time of the legal realists and the sociological jurists of the 1920s and 1930s—to be a studied extra-legal consideration of social consequences has now become internalized in law. It is an exaggeration, but there is an odd sense in which instrumentalism, functionalism, consequentialism, and policy analysis have become the formalism of our time. When we do policy analysis, it seems as if, for any given substantive subject matter, only certain select policies count. Moreover, the policies that do count tend to be those that have already been internalized within positive law. Indeed, in our legal analyses, we are typically far removed from considering all the consequences of any doctrinal choice. Moreover, often we are not actually *considering* them, and certainly not *all* of them.

#### E. CRITIQUES INTERRUPTED

Ironically, the sense that the legal landscape is littered with the ruins of formalism and realism isn't simply a challenge to these two determinations. It is also a challenge to the critiques. Indeed, the critiques of both formalism

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But if a given [legal] term is defined in this way [functionally], then it will be identified (for each legal system) with the actual criteria that happen to be used at a given time to determine whether or not the concept applies. Change the criteria, and you change the concept. The trouble with this is that you then lose the ability of the concept to mark connections with other concepts—connections that survive such changes in applicability.

Waldron, *supra* note 14, at 50.

74. Summers makes this point convincingly. Summers, *Pragmatic Instrumentalism*, *supra* note 11, at 909–16.

75. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 944–45 (1987) (arguing that the balancing approach has permeated modern constitutional interpretation in spite of its shortcomings).

and realism have been insufficient to remove either one from the legal corpus.

Moreover, for all their initial plausibility, there is an eerie sense in which the critiques of formalism and realism might be compromised as well. Indeed, if one can step back from the dispute for a moment and hold one's commitments in abeyance, one can come to recognize that the ostensible failure of formalism or realism is that each fails to live up to the ideals and functions championed by the other.

Consider formalism first. Notice that the critiques of formalism (arbitrariness, inefficacy, dogmatism, and incoherence) work by removing the grounds (fields of application, sources of law, modalities, and frames) upon which formalism depends for its cogency. In such circumstances, the failure of formalism cannot really surprise: Indeed, if we remove the grounds from *any approach* and demand that it justify itself on inhospitable grounds or in terms of non-conforming ideals, it will, of course, fail. What else could be expected? The same thing seems true of the critiques of realism. These arguments about realism's structural vacancy, infidelity to law, endless deferral, and authority deficits may seem initially compelling. And yet in the next moment, the arguments appear to collapse into mere observations that realism fails to live up to formalist ideals. Of course, it fails: Realism wasn't trying to live up to the identity or ideals of formalism in the first place!

At this point, we have reasons to doubt, not merely the cogency of formalism and realism, but the cogency of their respective critiques as well. Indeed, we can wonder whether the critiques are anything more than the tracing of the implications of either approach followed by a negative evaluation. In turn, we can wonder whether a negative evaluation is any more than the attachment of a negative qualifier to a positive trait. "Structural vacancy" (a critique of realism) sounds bad, but is it any more than a negative term corresponding to the more appealing notion of a "flexible approach"? "Authoritarianism" (a critique of formalism) sounds bad, but is it any more than a negative term applied to a "definitive approach"?

Is this all simply argument by thesaurus? Are the critiques collapsed as well? Does their possible collapse then mean that formalism and realism live to fight another day? Perhaps so.

#### F. STRATEGIES OF RECONSTRUCTION

Efforts at reconstructions from the ruins are offered in a variety of techniques deployed throughout the legal landscape. These techniques are instanced at different levels of generality (everything from grand theory to the interpretation of traffic ordinances). And they too have become stereotyped:

*Hierarchy*: One can subordinate formalism to realism or vice versa. In other words, one can allow one to trump or subsume the other. To give a simple example, some legal thinkers believe that policies and principles should govern the scope of rule application.<sup>76</sup> Other legal thinkers believe that rules limit the effective scope of policies and that when there are rules, it is best to apply them without regard to their supporting reasons.<sup>77</sup>

Needless to say, hierarchy as a solution can be made more complex or nuanced. For instance, the hierarchy could be softened into a mere presumption in favor of formalism or realism.<sup>78</sup> Or a presumption defeasible upon certain conditions. Or . . . (and so on).

*Sectorization*: Another solution is to recognize that one working theory (e.g., formalism) is more appropriate in some specified circumstances or subject-matter areas than the other working theory (e.g., realism).<sup>79</sup> This sectorization strategy can be formulated at a very abstract level (e.g., property/torts) or at a more concrete level (e.g., design/manufacturing defect). As with the hierarchy strategy, all sorts of permutations and nuances are possible: presumptions, presumptions defeasible upon certain conditions, etc.

*Background/Foreground*: If we think about the relations of the two polarities in terms of background/foreground, then it is safe to say that most legal thinkers and judges view the ruins of comprehensive formalism as the background, the ground, the frame, the baselines, and the settled law within which realism must do its work.

But there is nothing necessary about taking formalism as the given background. The background/foreground image can be flipped. One can take realism as the background and view formal doctrinal line-drawing as the foreground activity. This transposition comes close to a view of law Felix Cohen eloquently expressed in terms of “unified field theory” back in the

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76. See, e.g., Eskridge, *supra* note 7, at 1483–84 (offering a “dynamic statutory interpretation” that subordinates rules to policies).

77. See Larry Alexander, “*With Me, It’s All er Nuthin*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 551–52 (1999) (arguing against reading rules in light of their background purposes).

78. FRED SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 29–31 (2009); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1178–79 (1993). Weinberg argues:

The fact that law application sometimes works best as a nuanced, nonrule-bound, discretionary process seems like a necessary evil, an exception to the way that legal reasoning—that is, rule application—is supposed to work . . . Rules are what law is about. Standards, as a result, are what we use in the cases when it seems that rules won’t work.

*Id.*

79. Russell Korobkin notes that this approach describes what most legal scholars do. Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 23–24 (2000).

1950s.<sup>80</sup> And it is also one of the visions of law announced by some Critical Legal Studies (“CLS”) thinkers.<sup>81</sup>

*Eclecticism:* One could decide that the appropriateness of formalist or realist approaches is context-specific.<sup>82</sup> In other words, it depends on the issue in question, the rule applied, the field of application, the kind of personnel affected, the values at stake (and so on). The choice for one or the other is viewed as situational.<sup>83</sup>

*Balancing and Commensuration:* One can also decide whether formalism or realism is more appropriate by balancing the virtues and vices of one approach against the other.<sup>84</sup> This sort of balancing can be done in dollars (or dollar equivalents, utils, or in an ad hoc way).<sup>85</sup>

*Decisionism:* One can simply abjure prior methodological commitments and decide as choices present themselves.<sup>86</sup>

80. Cohen, *Field Theory*, *supra* note 14, at 241.

81. One can, for instance, describe law as a field of conflicting policies or interests and see doctrines as provisional truce lines between the antagonistic background forces. Irreconcilable policy conflicts are viewed as fundamental; meanwhile, doctrinal distinctions are viewed as transient. Duncan Kennedy attributes this vision to Von Jhering and Demogue:

What makes Demogue a founder of conflicting considerations analysis is that he, like Jhering, identified a trade-off that is built into the law-making process. When one thing goes up (security of transaction), something else must go down (static security). This means that it *never* makes sense, when justifying a rule, to say that it is good because it promotes security of transaction. To make sense, one must add: at an acceptable cost to static security. Likewise for Jhering, it *never* makes sense to justify a rule by appeal to its administrability—one must always add: and its acceptable cost in over- or under-inclusiveness. This is the basic difference between the conflicting considerations model and the rival approach to policy analysis that identifies one policy per rule.

Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 113 (2000).

This particular vision, which presents policy as background and line-drawing as foreground has a great deal of appeal if one takes the long-term view. With a timeline of a decade or two, one can easily observe that the policies do not change much over time, while the doctrinal lines shift back and forth. (At least this will seem right in many, even if not all, areas of law.)

82. Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1251–55 (1983) (developing an “eclectic” approach for freedom of speech); Grey, *The New Formalism*, *supra* note 10, at 9.

83. Ironically, it often turns out that the situation, the scene, and the action are themselves susceptible to characterization both in formalist as well as in realist terms. See *infra* text accompanying notes 137–42 (describing a battle of framing between Justices Holmes and Cardozo).

84. See Korobkin, *supra* note 79, at 42–43 (noting that the law and economics literature yields no obvious general preference for rules or standards).

85. For elaboration, see Schlag, *Aesthetics*, *supra* note 1, at 1090–91.

86. Choosing between formalism and realism can also be done spontaneously. This would accord variously with existentialist philosophy, irrationalism, or decisionism. The notion here is that the choice of how to formulate or apply doctrine is irreducible. It is never fully dictated by knowledge, reason, or the like. Duncan Kennedy, *Form and Substance in Private Law Adjudication*,

Now, all of these approaches have some surface plausibility. But the irony is that when viewed together in the order above—from hierarchy through background/foreground all the way to decisionism—it becomes apparent that we have replicated a spectrum running from formalism to realism.

### TECHNIQUES OF RECONSTRUCTION

#### **Formalism**

Hierarchy

Sectorization

Foreground/Background

Eclecticism

Balancing and Commensuration

Decisionism

#### **Realism**

Once one takes note of this spectrum, it becomes but a small step to recognize that the very strategies of reconstruction laid out above replicate the formal tensions rather than resolve them. In other words, the tensions have been repeated at a higher (methodological) level of abstraction—notably, in the array of choices among reconstructive techniques.

The compound irony is that the presentation of all these techniques at once does not demonstrably resolve the formalism vs. realism tensions, but rather, adds to the sense of intractability and complexity. There are now that many more approaches to formalism vs. realism.<sup>87</sup>

The reconstructive techniques are themselves inscribed throughout our law and in the cognitive orientations of jurists and legal thinkers. The techniques of reconstruction are repeatedly settled and unsettled, and repeatedly reaffirmed and rejected throughout our law. No technique ever decisively vanquishes the others. Indeed, every technique remains entrenched in American law as an already-operative form or a dormant form ready to be reactivated.

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89 HARV. L. REV. 1685, 1775 (1976). Decisionism would entail what Carl Schmitt called “a pure decision not based on reason and discussion and not justifying itself, that is, to an absolute decision created out of nothingness.” CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 66 (George Schwab trans., Univ. of Chi Press 2005). Schmitt was a right-wing Catholic theorist—one of the leading legal thinkers of the Weimar period. In 1933, he joined the Nazi party and remained a Nazi until 1945.

87. The form of legal consciousness that corresponds to the embrace of all of these techniques (in their own place and time) might be likened to what Justin Desautels-Stein calls “eclectic pragmatism.” See generally Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 MICH. ST. L. REV. 565.

With the failures of the great reconstructive efforts, jurists and legal commentators operate adrift in an odd admixture of realist and formalist legal materials. It is, of course, conceivable that the combinations of formalism and realism have *providentially congealed* into some rational and coherent arrangement. It may be, for instance, that formalism and realism somehow compensate each other for their shortcomings. Or it may be that the eclectic distribution of formalist and realist moments throughout our law responds to some ostensibly rational extra-legal variable—the transactional context, the facts, the situation sense, the invisible hand, or some such thing.

It may be that there is some rationality to all this. But to date, there has been no demonstration of the point and no secure knowledge acquired on the question. Moreover, one rather doubts that such global knowledge could be achieved. None of this is to suggest that the actual deployment of formalism or realism in legal commentary, judicial opinions, statutes, and regulations is arbitrary. There has been no demonstration of that point either.

#### G. SO WHAT?

To be more precise: So what that our two ruling views of law, formalism and realism, are each at once impossible and entrenched? Why care?

One answer, at least from a juridical perspective, is that the efficacy and redemption of law, the rule of law, and justice (indeed, many of the crucial values associated with law) ostensibly depend upon our knowing what we are doing when we do law. The simultaneous entrenchment and impossibility of our two ruling views casts doubts upon such a claim to knowledge in any strong sense.<sup>88</sup> We do not know whether or when to be formalists or realists or somewhere in between in our choices about how to discern, interpret, elaborate, or fashion law.<sup>89</sup>

One could, of course, simply assert that scholars, judges, legislators, and agency heads always, or often, or generally choose “correctly” between formalism and realism in the relevant context. But such assertions fall somewhat short of convincing. For one thing, scholars, judges, legislators, and agency heads tend to be quite divided (in multiple ways) about the appropriate approach. For another thing, there’s just no basis—short of intuitionist judgment—to redeem such specific claims.

That does not mean that we are done with the formalism vs. realism disputes. On the contrary, they continue on in the form of localized variants.

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88. This is not to say that in some given context we will not have a strong sense whether to favor realism or formalism. But in law, a “sense” is not generally accorded the same status as “knowledge.”

89. In philosophy, of course, the fact that the interpretive community may be divided on some question does not preclude the possibility that one side is simply wrong. But one should not mistake law for philosophy, nor presume that the former is the latter’s colony.

IV. THE CONTEMPORARY SCENE: THE LOCALIZED  
VARIANTS OF FORMALISM VS. REALISM

In keeping with the continued presence of formalism and realism, their intellectual infirmity, and their impossibility as grand visions, the formalism vs. realism disputes continue, albeit on a smaller scale as “localized variants.” These variants can be localized in two senses of the term. First, they can be localized in that they concern a particular substantive subject matter (e.g., antitrust law, the standard of care in negligence, etc.). Second, they can be localized in the sense that they center on one or maybe just a few of the constitutive traits associated with formalism and realism (e.g., contextualism vs. comprehensiveness, autonomy vs. constructionism).

Overall, one can say that contemporary positive law is an admixture in which prescriptions, proscriptions, delegations, formalities, interpretive techniques, and reasoning modes (and much more) by turn mutate and precipitate in all sorts of ways in accordance with the interactive patterns of the formalism vs. realism disputes.<sup>90</sup>

Here, by way of example, are several localized variants of the dispute (which will be mapped out and discussed at length below):

Forms of Directives	<i>Rules vs. Standards</i>
Value Forms	<i>Formal vs. Substantive</i>
Interpretation	<i>Textualist vs. Purposive</i>

These are variants inasmuch as they echo each other (echoes of echoes . . .). In the contemporary moment, these localized variants emerge in the academic literature, draw significant interest, inspire high-pitched intellectual fervor, and then quietly settle down, leaving nothing in their wake until they are picked up and revived some time later.

The commonalities among these disputes are presented here in aesthetic rather than analytical terms.<sup>91</sup> The effort thus demands from the reader a certain aesthetic sensibility for recognizing the commonalities. The point is to appreciate how the localized variants are, as a matter of form, versions of each other.

90. And in using the term “interactive patterns,” I am referring to the assortment of reconstructive strategies for deciding between formalism and realism. See *supra* text accompanying notes 76–87 (discussing strategies for reconstruction).

91. I use the term “aesthetics” throughout this article in the sense elaborated in my previous article, *Aesthetics of American Law*. “In this conception, the aesthetic pertains to the forms, images, tropes, perceptions, and sensibilities that help shape the creation, apprehension, and even identity of human endeavors, including, most topically, law.” Schlag, *Aesthetics*, *supra* note 1, at 1050. This conception of aesthetics tracks with the recent efforts to reacquire numerous social and intellectual enterprises with their aesthetic character. See generally WOLFGANG WELSCH, UNDOING AESTHETICS (Andrew Inkpin trans., Sage Publ’ns Ltd. 1997) (arguing that aesthetics assist in understanding many aspects of cultural and intellectual life).

## A. RULES VS. STANDARDS

Disputes over the relative virtues and vices of the “bright-line rule” and the “flexible standard” are ubiquitous—encountered in many fields, from criminal procedure to the Uniform Commercial Code to constitutional law (to just about every subject matter in the law school curriculum). Rules are said to be certain and predictable, and standards are said to be flexible and adaptive. On the negative side, rules are said to be rigid and mechanical, and standards are said to be fuzzy and indeterminate.

Rules and standards are different forms that a directive can take. A directive has a trigger (also called predicate or hypothesis) and a response. The rule form of a directive about residential noise might be: “Noises above eighty decibels are punishable by a one-hundred-dollar fine.” The standard form might be read as follows: “Excessively loud noises are punishable by an appropriate penalty.”

The pioneering work on rules vs. standards was done by Duncan Kennedy, who described a dialectical form of argument pitting the “bright-line rule” against “the flexible standard.”<sup>92</sup> The arguments, as Kennedy pointed out, come in highly stereotyped form. Hence they can be suggestively mapped out in chart form—as in the following slightly abridged and revised version of Kennedy’s original chart:

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92. Kennedy, *supra* note 86, at 1689–90. Prior to Kennedy’s work, there does not seem to have been much in the way of sustained analysis of rules vs. standards in the American legal literature. There is a passing reference in the Hart and Sacks materials. *Id.* (citing H. Hart & A. Sacks, *The Legal Process* 155–58 (1958) (unpublished manuscript)); *see also* Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 *TUL. L. REV.* 475, 482–83, 485–86 (1933) (stating that rules prescribe definite, detailed legal consequences to a definite set of detailed facts; standards, by contrast, specify a general limit of permissible conduct requiring application in view of the particular facts of the case). The conceptions of rules and standards used in this Article follow Kennedy, Hart, and Sacks’s conceptions.

THE RULES VS. STANDARDS DIALECTIC<sup>93</sup>

<u>PRO RULES</u>	<u>CON RULES</u>	<u>PRO STANDARDS</u>	<u>CON STANDARDS</u>
You see, rules are good because they make law . . .	What nonsense! Rules are bad because they make law . . .	In fact, it's really standards that are good because they make law . . .	What nonsense! Standards are bad because they make law . . .
Determinate	Mechanistic	Flexible	Vague
Simple	Crude	Complex	Muddy
Sharp-edged	Rigid	Elastic	Fuzzy
Definitive	Authoritarian	Contextual	Variable
Elegant	Reductionist	Textured	Messy
Comprehensive	Closed	Open-ended	Inchoate
Autonomous	Insular	Connected	Dependent

This is a relatively simple vices-and-virtues view of the rules vs. standards dispute, but it nonetheless summarizes accurately a great deal of the arguments commonly made for and against rules and standards. If illustration is needed, consider the ways in which the adjectival characterizations above correspond to more fully articulated arguments about the relative virtues and vices of rules and standards.<sup>94</sup>

As one can tell from this chart, there is a certain correspondence between the rules vs. standards dialectic and the formalism vs. realism debate. One could say that, from an aesthetic standpoint, rules are to standards as formalism is to realism. And concomitantly, one could also say—again aesthetically—that *arguments* over rules and standards largely track with *arguments* over formalism and realism.<sup>95</sup> Indeed, consider that the adjectives in the chart could as easily apply to formalism and realism as they do to rules and standards. It is as if rules and standards were a kind of

93. For Kennedy's original chart depicting the pros and cons of rules versus standards see Kennedy, *supra* note 86, at 1710–11. For further recent discussions of rules vs. standards, see generally LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 32–33 (2001); RICHARD EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 21–128 (1995); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15–63 (1987); RICHARD POSNER, THE PROBLEM OF JURISPRUDENCE 42–53 (1990); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kennedy, *supra* note 86, at 1741–76; Korobkin, *supra* note 79; Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL'Y 101, 107–16 (1997); Schlag, *Rules and Standards*, *supra* note 1; Kathleen M. Sullivan, *The Justice of Rules and Standards*, 106 HARV. L. REV. 22, 57–95 (1992).

94. See *supra* notes 91–93 and *infra* note 95 and accompanying text (providing illustrations).

95. This is not to say, of course, that one cannot make formalist arguments for standards or standard-like arguments for formalism. Nor is it to say that one cannot make realist arguments for rules or rule-like arguments for realism.

artifactual version of formalism vs. realism. Or, to put it conversely, it is as if formalism vs. realism was a theoretical abstraction of rules vs. standards.

The ubiquity of rules vs. standards and formalism vs. realism extends much further. Indeed, once one becomes familiar with the rules vs. standards dialectic, one starts to recognize it throughout law’s doctrinal empire. It comes from far out of the past and traverses all borderlands in law’s empire. Here are just a few illustrative examples:

Possession	<i>Certain Control vs. Hot Pursuit</i> <sup>96</sup>
Procedural Due Process	<i>Dignitary vs. Instrumental View</i> <sup>97</sup>
Equal Protection	<i>Tiered Review vs. Sliding Scale</i> <sup>98</sup>
Incorporation	<i>Total Incorporation vs. Fundamental Rights</i> <sup>99</sup>
Contracts/Parol Evidence	<i>Four Corners vs. Intent of the Parties</i> <sup>100</sup>

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96. See *Pierson v. Post*, 3 Cai R. 175 (N.Y. Sup. Ct. 1805). This is the great first-year law-school fox-hunt case wherein the court had to decide whether property in the fox vested upon “certain control” (the rule) or “hot pursuit” (the standard). Notice how in the following account, both the rules vs. standards dialectic and the substantive issues are blended together:

*Pierson* thus presents two great principles, seemingly at odds, for defining possession: (1) notice to the world through a *clear act*, and (2) reward to *useful* labor. The latter principle, of course, suggests a labor theory of property. The owner gets the prize when he “*mixes in his labor*” by hunting. On the other hand, the former principle suggests at least a weak form of the consent theory: the community requires *clear acts* so that it has the opportunity to dispute claims, but may be thought to acquiesce in individual ownership where *the claim is clear* and no objection is made.

Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 77 (1985) (emphasis added); see also Henry Smith, *Possession as the Origin of Property*, 55 STAN. L. REV. 1105, 1119 (2003) (advocating the pro-rule side, noting that, generally speaking, possession must be defined for large heterogeneous audiences—hence, the need for a clear rule). But see, Andrea McDowell, *Legal Fictions in Pierson v. Post*, 105 MICH. L. REV. 735 (2007) (deflating ever so gently the factual and theoretical presumptions about *Pierson v. Post* adopted by Rose, Smith, and others).

97. See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 714–16 (2d ed. 1988) (discussing the differences between a dignitary and instrumentalist approach to the question “what process is due?” and making classic anti-standard arguments against the instrumentalist view).

98. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting) (arguing in favor of a sliding-scale approach to equal protection).

99. Compare *Adamson v. California*, 332 U.S. 46, 71–92 (1947) (Black, J., dissenting) (arguing that the Fourteenth Amendment should be construed as incorporating the entire Bill of Rights to the states), with *Palko v. Connecticut*, 302 U.S. 319, 321, 328 (1937) (rejecting appellant’s argument that the entire Bill of Rights has been extended to the states through the Fourteenth Amendment and instead adopting a fundamental-rights analysis).

100. Compare *W.W.W. Assoc., Inc. v. Giancontieri*, 566 N.E.2d 639, 642 (N.Y. 1990) (employing the four-corners approach to enforcing the terms of a contract), with *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968) (stating that the intention of the parties as expressed in the contract is the source of contractual rights and duties).

If we pay attention to the arguments attending the disputes above, we can see the rules vs. standards disputes enacted in a substantialized form. The disputes are “substantialized” in the sense that the forms (rules vs. standards) are blended with the substantive aspects of the disputes.<sup>101</sup>

It bears noting that the rules vs. standards arguments comprise an arrested dialectic—sets of ongoing, but inconclusive arguments. They do not lead anywhere—they simply go back and forth.<sup>102</sup> It may be that a solution is found—but that is only because, at some point, the argument or the dispute is abandoned. One valorizes arguments on one side and disregards the rest.<sup>103</sup>

Many commentators have sought to link the rules vs. standards disputes to substantive considerations—such as efficiency, cooperative behavior, fairness in the individual case, and the like; but, for reasons to be adduced later, the efforts all seem to founder. Sure: Rules are more efficient (when the rules work as intended). Sure: Standards treat individuals fairly on their own merits (when the standards are well administered). Sure: Rules promote transparency (when the rules are more transparent than their corresponding social norms).<sup>104</sup> Sure . . . (and so on).<sup>105</sup>

#### B. VALUE FORMS

Another localized variant of the formalism vs. realism disputes is found in the elaboration of ostensibly fundamental legal values. Indeed, it is relatively easy to find formalist and realist versions of fundamental legal values such as fairness or liberty. Moreover, the arguments offered in support or derogation of the various conceptions of fundamental legal values bear a certain similarity to the disputes of formalism vs. realism as well as to rules vs. standards.

Consider then the following chart of fundamental legal values:

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101. For examples of five “substantialized” disputes, see *supra* notes 91–95 and accompanying text. In the positive law, the rules vs. standards dispute is most often substantialized in this way. For an extended example, see *infra* notes 137–42 and accompanying text (explaining how in *Pokora v. Wabash Railway Co.*, 292 U.S. 98 (1934), Cardozo employed a pro-standard position while Holmes employed a pro-rule position).

102. Schlag, *Rules and Standards*, *supra* note 1, at 383 (stating that an arrested dialectic “doesn’t go anywhere” because “there is no moment of synthesis”).

103. *Cf.* Kennedy, *supra* note 86, at 1775 (discussing the implications of contradictions and stating that the “meaning of contradiction at the level of abstraction” is that there is no “metasystem” that could provide guidance as to a specific mode as circumstances “required”).

104. For elaboration of this problem (shallowness), see *infra* Part V.B.

105. There are, of course, many occasions where we will feel that the court has clearly reached the “right” result or the “wrong” result, but this sense will be largely a function of the way in which we imagine the relevant situation. There is nothing wrong with imagination. But here, it is no solution at all—because the situation (whatever it may be) can be imagined in myriad ways more or less conducive to rules or standards.

	FORMALISM	REALISM
FAIRNESS	Uniform Treatment <sup>106</sup>	Just Deserts <sup>107</sup>
EQUALITY	Formal Equality <sup>108</sup>	Substantive Equality <sup>109</sup>
NEUTRALITY	Disinterestedness <sup>110</sup>	Even-handedness
FREEDOM	Negative <sup>111</sup>	Positive <sup>112</sup>
EFFICIENCY	Pareto	Kaldor-Hicks
AUTONOMY	Individual Autonomy <sup>113</sup>	Self Realization & Capabilities <sup>114</sup>

106. SCHAUER, *supra* note 93, at 149–53.

107. Sullivan, *supra* note 93, at 66 (suggesting that uniform treatment suppresses relevant similarities and differences while a more standard-like approach treats individuals substantively alike).

108. FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 87 (1978). Hayek argues:

From the fact that people are very different it follows that, if we treat them equally, the result must be inequality in their actual position, and that the only way to place them in an equal position would be to treat them differently . . . [T]he desire of making people more alike in their condition cannot be accepted in a free society as a justification for further and discriminatory coercion.

*Id.* (footnote omitted).

109. Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 58 (2007). Nussbaum argues:

The first and most crucial suggestion is that the judge ought to think about the rights as capabilities, asking: are people *really able* to enjoy this right, or are there *subtle impediments* that stand between them and the full or equal access to the right? Judges should attend *closely to history and social context* . . . .

*Id.* (emphasis added).

110. Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 261–64 (2003).

111. ISAIAH BERLIN, *Two Concepts of Liberty*, in *THE PROPER STUDY OF MANKIND* 191, 203–06 (1997) (arguing for negative liberty by contrasting it with the totalitarian implications and potentials of positive liberty).

112. Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1906–07 (2001). West argues:

Negative rights elevate or empower the citizen relative to an overreaching, paternalistic state. Yet by staying the paternalist’s intervening hand, negative rights both subordinate that citizen to his stronger brother—thereby entrenching private inequalities—and disable the state from securing, on behalf of weaker citizens, the material preconditions to developing the capabilities necessary to a fully human life.

*Id.*; see also STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 9–12 (2005) (contrasting modern liberty with active liberty); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1132–33 (1986) (contrasting a negative conception of freedom with a republican conception).

113. Posner, *supra* note 93, at 117 (“The rule of law is important if we care about autonomy, because standards, more so than rules, encourage self-reinforcing conformity to the imagined goals of the state rather than actions that reflect one’s authentic values and interests.”).

114. Nussbaum, *supra* note 109, at 11. Nussbaum argues:

At the heart of the CA [capabilities approach] is an idea . . . that all human beings are precious, deserving of respect and support, and that the worth of all human

One can see relatively easily that many arguments favoring the opposing conceptions of fairness, equality, and neutrality have a flavor of the formalism vs. realism disputes and the rules vs. standards dialectic. Again, the connection or entailment is not a logical one, but rather aesthetic. And we are dealing with a nested phenomenon here. One could, within a particular prong (say, negative liberty), find both formalist and realist variants.

### C. TEXTUALISM VS. PURPOSIVISM

Here, consider the arguments associated with textualist as opposed to purposive interpretation. As used here, textualist interpretation refers to the notion that the text has a fixed legal meaning and that the text is authoritative.<sup>115</sup> Textualism is thus the joinder of a claim about linguistic meaning (words have fixed, even if sometimes vague, meanings) and a claim about the source of legal authority (the text rules). Purposive interpretation (as I will use the term here) encompasses other plausible contenders—such as intentionalism, philosophical exegesis, dynamic interpretation (and so on).<sup>116</sup> Purposive interpretation includes the other forms of interpretation that hold that a legal text must be read carefully in light of intentions, purposes, context, values, social consensus (and the like). This might be considered a somewhat unusual way to divide the realm of legal interpretation which is often considered pluralistic rather than binary.<sup>117</sup> Nonetheless, the distinction textualist vs. purposive is not arbitrary—jurists and legal commentators generally believe that, in terms of interpretive objects, the text is *primus inter pares*. Correctly or not, they generally understand themselves to be interpreting a text.

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beings is equal. What respect centrally involves, the CA holds, is supporting human beings in the development and exercise of some central human abilities, especially prominent among which is the faculty of selection and choice.

*Id.*

115. See Scalia, *supra* note 69, at 1183–84 (explaining plain-text interpretation).

116. My binary division here deliberately eclipses some important conventional differences among the several standard approaches to constitutional interpretation.

117. For a helpful account of the main kinds of interpretation in constitutional law, see PHIL BOBBITT, *CONSTITUTIONAL FATE* 3–122 (1982) (describing the various modes of constitutional interpretation—historical, textual, doctrinal, prudential, structural, and ethical).

Please note that I am not suggesting that the distinction between “textual” and “purposive” interpretation is coherent. I have simply drawn the distinction from the perspective of textualists—who tend to see all other contenders as impermissibly taking leave of the text for some preferred context (e.g., framer’s intent, political philosophy, etc.). My view on this question is almost the opposite—namely that, in constitutional law, an authentic commitment to textualism leads to just about any other kind of interpretation. Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1688–92 (1996) (showing how the earnest judge who starts interpreting the text of the constitution is led, out of a concern for fidelity, to adopt (by turns) plain meaning, structural interpretation, judicial method, political theory, etc.).

Indeed, it is fair to say that, for the past decade or more, textualism has been a kind of stand-alone mode of interpretation—one whose character is significantly different from the others. In part, that is because the text is characteristically viewed as the relevant object of interpretation, whereas all the other approaches are typically viewed as ways of interpreting the text. If that is right, then a textualist approach might well be more formalist (heed the text and nothing else) than the others, which all seem implicated in the more evaluative enterprises of discerning intentions, purposes, context, values, social consensus (and the like). Concomitantly, one can see that there are some highly stylized pro and con arguments about textualism and purposivism that track the formalism vs. realism dispute and the rules vs. standards dialectic:

THE TEXTUALISM VS. PURPOSIVISM DEBATE

	PRO TEXTUALISM	CON TEXTUALISM	PRO PURPOSIVISM	CON PURPOSIVISM
	You see, textualism is good because . . .	What nonsense! Textualism is bad because . . .	In fact, it's really purposive interpretation that is good because . . .	What nonsense! Purposive interpretation is bad because . . .
Notice	The text is public and fixed and therefore it gives notice to everyone and establishes shared expectations.	Without context, textualism results in capricious decisions that thwart public expectations of reasonableness. <sup>118</sup>	It takes all those considerations into account that a reasonable interpreter would consider. <sup>119</sup>	It looks at resources not generally accessible to the public.

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118. Anthony D'Amato, *Counterintuitive Consequences of "Plain Meaning,"* 33 ARIZ. L. REV. 529, 538 (1991). He stated that:

A consequence of insisting on plain meaning . . . is that it can induce a state of mind that thrives on arbitrariness. . . . Only in those cases where the literal construction of a statute coincides with its reasonable and just interpretation in the context of a given case, can the plain meaning rule be harmless.

*Id.*

119. See generally William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (explaining the benefits of purposive interpretation).

	PRO TEXTUALISM	CON TEXTUALISM	PRO PURPOSIVISM	CON PURPOSIVISM
Decision Costs	It reduces decision costs by limiting the research that has to be done. <sup>120</sup>	It "seeks to disguise and to minimize the need for . . . choice, once the general rule has been laid down." <sup>121</sup>	It decreases decision costs by relying on knowledges and language already made by others. <sup>122</sup>	It increases decision costs by multiplying the sources that judges must consider to reach a decision.
Constraint	It constrains judges by limiting discretion and subjective judgment. <sup>123</sup>	It allows subjective decision making by allowing the judge to treat as law whatever the text means to him and hide his reasons. <sup>124</sup>	It forces the judge to publicly justify his reasoning and make a convincing argument.	It allows the judge to use any and all rationalizations to reach his favorite result. <sup>125</sup>

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120. Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 351 (2005); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 123–26 (2000).

121. H.L.A. HART, *THE CONCEPT OF LAW* 126 (1961).

122. Edward L. Rubin, *Modern Statutes, Loose Canons and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579, 586 (1992) (“[A] legislature and the administrative agencies within the same jurisdiction are linked by an incredibly dense network of relationships and shared activities. . . . Like family members, they develop a shared and specialized set of linguistic understandings based on this continuous, intense relationship.”).

123. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 5–7, 143–160 (1990).

124. Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 1037 (2005) Craig states:

In taking an “acontextual” textualist reading of such statutes—the reading of an outsider “ordinary person” coming cold to the most recent statutory pronouncements—the strict plain meaning approach ignores the statute’s dialogic dimension, the evolved and evolving meanings accepted by the relevant subculture, allowing Justices using that approach to exploit textual imprecision and historical terms of art to impose their own meaning on the statutory language.

*Id.*

125. See SCALIA, *supra* note 6, at 36 (discussing how judges typically will not follow legislative history when it does not support the outcome they want by saying it is, “as a whole, inconclusive”).

	PRO TEXTUALISM	CON TEXTUALISM	PRO PURPOSIVISM	CON PURPOSIVISM
Source of Law	The text is what was enacted—not principles, not intentions, and not legislative history. <sup>126</sup>	The text does not make sense apart from its generative context. This would be arbitrary. <sup>127</sup>	The text only makes sense in its original, purposive, or values contexts. <sup>128</sup>	It could allow the text to mean anything given the multiple contexts that could be brought to bear. <sup>129</sup>
Legitimacy	“Judges have legitimacy only as long as they stick to facts, not values. . . . ‘Texts and traditions’ furnish ‘facts to study, not convictions to demonstrate about.’” <sup>130</sup>	Textualism cuts out important communal understandings that have given meaning to the law. <sup>131</sup>	The court must speak in terms “sufficiently plausible” to be accepted by the nation. <sup>132</sup>	“Reliance on custom, consensus, or popular opinion is irreducibly value-laden.” <sup>133</sup>

126. William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 647–48 (1990) (tracing to Holmes the formalist argument that the “courts must never lose sight of the text, which is formally all that Congress enacts into law” (internal quotation marks omitted)).

127. Abner S. Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913, 1917 (2006) (arguing that a strict constructionist textualism that disregards context can lead to absurd results).

128. *See id.* (describing the pitfalls of using the plain meaning of words and disregarding context when interpreting statutory language).

129. *See id.* at 1924–25 (presenting the textualist argument that judges could use purposivism to slant statutory language to fit their views).

130. Sullivan, *supra* note 93, at 80 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 1000 (1992)).

131. *See* Craig, *supra* note 124, at 1037 (arguing the textualist approach ignores “the evolved and evolving meanings accepted by the relevant subculture”).

132. *Planned Parenthood*, 505 U.S. at 866.

133. Sullivan, *supra* note 93, at 80.

	PRO TEXTUALISM	CON TEXTUALISM	PRO PURPOSIVISM	CON PURPOSIVISM
Language	"[M]eaning can be 'acontextual' in the sense that meaning draws on no other context besides those understandings shared among virtually all speakers of English." <sup>134</sup>	"Of course there can never be <i>totally</i> acontextual meaning. The community of speakers of the English language is itself a context." <sup>135</sup>	All meaning is situational.	Linguistic meaning can be fixed.

As with formalism vs. realism, rules vs. standards, and the values debate, we encounter here a familiar formal pattern of stereotyped, but inconclusive, arguments.

#### D. SUMMARY

Even though inconclusive, these localized variants continue to occupy the American legal scene. At the theoretical level, there is not much hope that one or the other may triumph. We have already seen why: The ruins of formalism and realism are entrenched. They are inscribed in the positive law as forms of interpretation, reasoning, and elaboration. They are institutionalized in law as the very forms within which law and its ostensibly authoritative artifactual forms (doctrines, principles, policies, and values) are articulated and processed. And they are entrenched not simply as ideas, but as the cognitive and social practices of lawyers, judges, legal commentators, and a variety of officials.

#### V. MAPPING THE LOGICS OF COLLAPSE

When a particular dispute in legal thought "feels dead"—that is to say, predictable, repetitive, and wearisome—it may be a sign that it has become ritualized, and that, contrary to representations, it is no longer in command of its ostensible subject matter. It has become ceremony.

It is certainly conceivable that this is true of the realism vs. formalism debates. Indeed, as one becomes accustomed to recognizing the formalism vs. realism disputes and their localized variants, two insights become increasingly irresistible. One insight is that versions of the dispute and its

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134. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 528 (1988).

135. *Id.*

localized variants are ubiquitous. The disputes seem to emerge everywhere. And not just in law, but in all aspects of life, the humanities, and the social sciences.<sup>136</sup> A second insight, perhaps occasioned by the first, is that there is a kind of floating quality to the disputes and their localized variants. One starts to see that there is a certain drama of form that is repeated everywhere and that it has a certain patterned character that sometimes seems eerily detached (or detachable) from the substantive concerns or the particular context. It can easily seem as if the drama of form is simply superimposed, translated into the substantive concerns. It begins to feel gratuitous. Indeed, it even begins to seem as if one could take just about any tension of culture or law and easily transform it into a formalism vs. realism dispute or one of its localized variants.

It all has the aura of an elaborate game. If we are to see our way through the formalism and realism disputes, then it is important to be able to experience their vacancy, their gratuitous character. In this section, we explore the moves through which the cogency of the formalism vs. realism disputes disintegrates. The claim here is that for all the efforts to resolve these disputes by reference to normative and legal virtues such as efficiency, notice, cooperative harmony, rule of law, fairness, transaction cost reduction, human flourishing, and on and on, the arguments often founder on one or more critical moves:

Recursivity  
Shallowness  
Individuation  
Displacement

Sometimes, one can deploy these moves consciously (in which case the moves seem like tactics). Sometimes the moves just happen (in which case they feel like experiences).

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136. Indeed, the contributions of the formalism vs. realism divide extend far beyond law. As William James, the great American pragmatist, put it:

In manners we find formalists and free-and-easy persons. In government, authoritarians and anarchists. In literature, purists or academics, and realists. In art, classics and romantics. You recognize these contrasts as familiar; well, in philosophy we have a very similar contrast expressed in the pair of terms “rationalist” and “empiricist,” “empiricist” meaning your lover of facts in all their crude variety, “rationalist” meaning your devotee to abstract and eternal principles. No one can live an hour without both facts and principles, so it is a difference rather of emphasis; yet it breeds antipathies of the most pungent character between those who lay the emphasis differently; and we shall find it extraordinarily convenient to express a certain contrast in men’s ways of taking their universe, by talking of the “empiricist” and of the “rationalist” temper. These terms make the contrast simple and massive.

WILLIAM JAMES, PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING 9 (1907); *see also id.* at 12 (explaining the different characteristics of rationalists and empiricists).

These moves are in a sense shortcuts to the collapse of vices and virtues arguments about the localized variants. They show the ways to exit from the grip of arguments about the relative vices and virtues of rules vs. standards, formal vs. substantive values, textualism vs. purposivism.

Three caveats, however . . . First, none of the moves is in any sense a killer argument. Whether a formalism vs. realism dispute seems to fall apart under pressure from one of these moves is contextual. Second, none of this is intended to show that the arguments that comprise the formalism vs. realism disputes or the resulting choices are without consequences. Rather, the claim is that the consequences are not necessarily as advertised. Third, these moves do not necessarily compel the disintegration of formalism vs. realism disputes in any context. One will often retain the sense that a formalism vs. realism dispute matters tremendously in some given context. When that happens (and it does), it will be either because the dispute does matter or because one has been taken in.

Below I have sought to illustrate the moves with a random assortment of illustrations from the various localized variants. But please understand: Each of the moves—recursivity, shallowness, individuation, and displacement—can be deployed throughout all variants of the formalism vs. realism disputes.

#### A. RECURSIVITY

Recursivity implies that before one decides whether to be realist or formalist, to favor a rule or a standard, or to stick with the text or consult purposes, one has already pre-figured the scene, the actors, the action, the goals, and the values in realist or formalist ways. Even as one frames the problem, the issue, or the dilemma—one has always already encountered and enacted the very drama of form one is trying to resolve or explain.

One can see this easily in the justly famous *Baltimore & Ohio Railroad Co. v. Goodman* and *Pokora v. Wabash Railway* “stop, look, and listen” railroad cases decided by Justice Holmes and Justice Cardozo, respectively.<sup>137</sup> At issue substantively was the standard of care required by a driver upon coming to an unguarded railroad crossing. Holmes argued for a stop-and-look rule. Cardozo argued for a due care standard. Both offered some relatively stylized rules vs. standards arguments. But, what is most interesting as one looks at the opinions (and it is borne out in the recital of the factual descriptions) is that Holmes and Cardozo were dealing with very different images of railroad crossings.

For Holmes, railroad crossings generally look alike, present the same dilemmas, and thus invite laying down a rule. Consider what Holmes says to justify his rule. He explains that when a man goes upon a railroad track, he

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137. *Balt. & Ohio R.R. Co. v. Goodman*, 275 U.S. 66 (1927), *limited in* *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934).

knows he will be killed if a train comes. He knows—and now, this is the crucial part—that “he must stop for the train, not the train stop for him.”<sup>138</sup> Here, Holmes is effectively characterizing the operative facts concerning drivers going through unguarded railroad crossings. What are these facts? They are generalized facts—imputed, apparently, to all drivers: the driver *knows* that *he must stop for the train, not the train stop for him*. Now, if those are the operative facts (not just in this case, but in *all* railroad crossing cases), then, of course, the responsibility rests on the driver, and of course, it makes sense to impose a rule like “stop and look.” Indeed, the appropriateness of the rule-form has already been prefigured in Holmes’s characterization of the operative facts, the relevant context—to wit: the knowledge of drivers *generally* upon coming to railroad crossings.<sup>139</sup> Holmes was a bit of a formalist in his depiction of the factual setting.<sup>140</sup>

As for Cardozo’s standard, it is already rhetorically anticipated in his recitation of the facts. For Cardozo, railroad-crossing liabilities have nothing to do with what drivers know generally and everything to do with the apparently variegated physical layout of railroad crossings and the widely varying risks and benefits of the possible precautions that drivers could take. The point is demonstrated in Cardozo’s appropriately lengthy recitation of various railroad-crossing scenarios.<sup>141</sup> Cardozo’s view of railroad crossings is

138. *Balt. & Ohio R.R. Co.*, 275 U.S. at 70.

139. There are other ways of explaining Holmes’s decision. I will mention one, if only because it is an interesting sidelight on the case. It appears that there was no evidence as to whether Goodman, the driver, actually looked or not. In such cases, the burden would seem to rest upon the defendant railroad to show that the driver did not look. That at least was the rule invoked by the lower court. *Balt. & Ohio R.R. Co. v. Goodman*, 10 F.2d 58, 59 (6th Cir. 1926) (citing *Beckham v. Hines*, 279 F. 241, 243 (6th Cir. 1922)), *rev’d*, *Balt. & Ohio R.R. Co.*, 275 U.S. at 70. The appellate court in *Beckham* stated: “In the absence of satisfactory evidence to the contrary on the part of eyewitnesses, the law presumes that decedent looked and listened before crossing the track.” *Beckham*, 279 F. at 243. Holmes’s adoption of the stop-and-look rule—requiring affirmative evidence of looking by the driver—thus arguably seems like a reaching pro-defendant, pro-railroad evidentiary gambit.

140. Another way of characterizing Holmes’s view is that he has an entirely different factual context in mind here—not so much railroad crossings, but rather courts sitting in judgment on these railroad-crossing accidents.

141. This, then, is Cardozo’s decidedly baroque—read: standard-like—view of railroad crossings (and what they might require by way of safety precautions by drivers):

Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and reconnoiter is an uncommon precaution, as everyday experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous. If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him. Often the added safeguard will be dubious though the track happens to be straight, as it seems that this one was, at all events as far as the station, about five blocks to the north. A train traveling at a speed of thirty miles an hour will cover a quarter of a mile in the space of thirty seconds. It may thus emerge out of obscurity as the driver turns his back to regain the waiting car,

standard-like: He focuses on the particular, the specific, and the variegation (which is why his recital of the possible factual transactions is appropriately lengthy). His description effectively prepares the reader to conclude that reasonable precaution by a driver at railroad crossing will require a number of different behaviors depending on the disparate circumstances.

Notice what Holmes and Cardozo have done. Their pro-rule and pro-standards positions, respectively, have already been prefigured at the level of the evidentiary and operative facts. One might say that Holmes has a rule-like vision of railroad crossing accidents while Cardozo has a standard-like vision.<sup>142</sup>

All this is an extended illustration of recursivity in the context of rules vs. standards. The appropriateness of rules and standards at railroad crossings has already been prefigured in the description of the facts (the

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and may then descend upon him suddenly when his car is on the track. Instead of helping himself by getting out, he might do better to press forward with all his faculties alert. So a train at a neighboring station, apparently at rest and harmless, may be transformed in a few seconds into an instrument of destruction. At times the course of safety may be different. One can figure to oneself a roadbed so level and unbroken that getting out will be a gain. Even then the balance of advantage depends on many circumstances and can be easily disturbed. Where was Pokora to leave his truck after getting out to reconnoiter? If he was to leave it on the switch, there was the possibility that the box cars would be shunted down upon him before he could regain his seat. The defendant did not show whether there was a locomotive at the forward end, or whether the cars were so few that a locomotive could be seen. If he was to leave his vehicle near the curb, there was even stronger reason to believe that the space to be covered in going back and forth would make his observations worthless. One must remember that while the traveler turns his eyes in one direction, a train or a loose engine may be approaching from the other.

Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury.

*Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 104–06 (1934) (citations omitted).

142. They are not imagining the same crossings. Holmes is thinking about what the driver knows. Cardozo is thinking about the variety of precautions that might be reasonable given the wide array of different railroad crossing situations. And each of them is already thinking about the operative facts, the context in a way which will lead, respectively, to a rule or a standard.

It is, of course, conceivable that the historical actuality was quite the reverse. Perhaps Holmes was fixated on a rule and Cardozo on a standard and each read the facts, the context to achieve their desired outcomes. Or perhaps each was thinking about the whole thing dialectically.

railroad crossing, the knowledge of the driver) and the transactional challenge (the harmful train/automobile encounter).<sup>143</sup>

The same sort of recursivity occurs with formalism vs. realism and its other localized variants. The point is that any attempt to resolve the formalism vs. realism dispute by references to the factual setting fails inasmuch as we are caught in recursive circularity. Formalism turns out to be appropriate in suitably characterized formalist circumstances. Realism turns out to be appropriate in suitably characterized realist circumstances. This, of course, is neither resolution nor explanation.

Recursivity gives the lie to a certain naïve conception of the relation of law and facts. In the naïve legal consciousness, one “applies the law to the facts” as if the apperception of the facts were independent of the law one is ostensibly applying. Recursivity is the observation that the same or similar forms that give shape to the law also give shape to the facts. To the extent that both law and facts are constructed or apprehended through the same form (e.g., ruleness or standardness), they will have a predictable tendency to fit each other.

### B. SHALLOWSNESS

Shallowness could be considered a kind of recursivity—except that instead of pertaining to the law–situation relation, it pertains to the law–purpose relation. This experience of shallowness can happen with some frequency in the formalism vs. realism disputes.

An example: We say that formalism is good because it serves “rule-of-law” virtues. At first impression the statement seems plausibly correct. But then in the next moment, one realizes that this plausibility depends upon the prior construction or apprehension of “rule-of-law virtues” within a formalist aesthetic. In other words, one has already characterized the “rule-of-law virtues” in the image of formalism. Once this realization is had, the sense of shallowness follows forthwith: Formalism is good because it serves those legal virtues that are served by formalism. Uhhmm . . .

Or, take a realist view instead. Realism is good because it allows us to take context into account. At first we agree. But then we realize that taking context into account is precisely what we mean by realism. The experience of shallowness follows immediately: Contextualism is good because it takes context into account. Right . . .

This experience of shallowness is often presaged by the sense that a given argument is little more than words being moved around the page

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143. This is not to say that one couldn't get from Holmes's account of the facts to a standard or from Cardozo's description of the facts to a rule. Logically, there is nothing that would prevent such a result. But it's also beside the point here, which is simply that the appeal of formalism/rules/textualism and realism/standards/contextualism is already anticipated and prefigured (hence recursivity) in the description of the facts (the railroad crossing) and the transactional dilemma (the train/car encounter).

(without regard to their ostensible referents). One fails to notice immediately the emptiness because the arguments arrive at the court (or in the law-review office) with a seemingly more interesting explanatory or normative structure—maybe a structure like the quote below. Indeed, read the following passage, agree with its claims (you should), take note of its modest heuristic value, and then experience the vacancy (i.e., rules are good when rules are good). The quote:

Our approach here suggests that it is impossible to resolve this dispute in the abstract. When predictability is especially important, and where numerous decisions have to be made, the case for rule-bound judgment is greatly strengthened. And when judges have the information and the capacity to produce decent rules, they have good reason to attempt to do exactly that. But if judges lack that information and that capacity, they might reasonably limit their decisions to particular facts for fear that broad decisions will have unfortunate systematic effects and prove too crude to handle situations not yet subject to briefing and argument.<sup>144</sup>

And this contributes what to our knowledge, precisely? Rules are good when judges have enough information to make good rules? And when judges lack such good information, they should use standards?

### C. INDIVIDUATION

Like other academic commentary, this Article makes use of relatively simple examples to make its points (e.g., the “stop, look, and listen” rule). Other classic examples from the broader literature include “Do not go over 55 MPH,” “Follow the plain meaning of the text,” “No vehicles in the Park,” (and so on).

The great virtue of such simple hypothetical examples is that they readily illustrate the more theoretical points. But there is also a great vice. That vice is that such simple hypotheticals institute an often unnoticed and rather controversial assumption—call it atomism—that more complex phenomena are simply more complicated and elaborate versions of the simple ones. That is not obviously true—not of language, cognition, life, or, as we shall see, law.<sup>145</sup>

This brings us to individuation. The simple examples used in this article and in others prefigure the formalism vs. realism disputes and their localized

144. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 948 (2003).

145. For a sophisticated elaboration of this point, see generally STEVEN WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001) (discussing the idea that reason is a product of dynamic social values that contribute to law in concrete and predictable ways). In the context of language and cognition, see generally GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH* (1999).

variants by identifying discrete and simple hypotheticals. Simplicity is nice and all, and it certainly helps to make the points succinctly. But in the context of law, it is not obvious that this sort of simplicity is a helpful starting point. Consider, by way of example, the famous Hart–Fuller hypothetical of an ordinance that prohibits vehicles in the park.<sup>146</sup> Now, between Hart and Fuller, the jurisprudential dispute focused in part on whether the term “vehicle” had a core of settled meaning, standard instances (Hart’s view), or whether the ordinance had to be read as a whole in light of its purposes (Fuller’s view).<sup>147</sup>

Framed this way, the dispute is jurisprudential in character. It is also about the proper unit of interpretation. Are we talking about the meaning of “vehicle” or of “No vehicles in the Park”? This is a matter of individuation. But even this version of the dispute greatly simplifies the problem because, offhand, our problem is to figure out what is the meaning of a directive that proscribes (((((((((vehicles) in a park) in an ordinance) that is being interpreted) presumably by a court) in a post WWII) Anglo-American jurisprudential system) as imagined by a legal-scholar writing circa 1958) for an American law review).<sup>148</sup>

Taking this initially broad view of the Hart–Fuller interchange, the question is: What is the proper object of our legal attention? Just what is it that we are or should be interpreting here?<sup>149</sup> The answer—and here, it is not meant to be helpful—is that the text might be cut off from its contexts at any of the breakpoints marked by the parentheses above.<sup>150</sup> And the point is that not only are these different texts, but being different texts, they have different meanings and relate to their different contexts differently.

This, then, is the individuation problem. It is what belies the virtues of so-called textualism. Indeed, the virtues commonly associated with textualism—fixity, restraint, publicity—all founder when one realizes that the simplicity of the injunction, “follow the plain meaning of the text,” dissolves upon further inquiry. “Text?” “Which text?” “What are you talking about?”<sup>151</sup>

146. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662 (1958).

147. Hart, *supra* note 146, at 593; Fuller, *supra* note 146, at 662.

148. Schlag, *supra* note 117, at 1688–92 (describing the institutional, practical, and jurisprudential orientations of the judicial interpreter as she reads the constitutional text); Sunstein & Vermeule, *supra* note 144, at 886 (emphasizing the importance of institutional context in deciding upon an interpretive methodology).

149. Notice that the object of attention has just been reduced to a text (a somewhat narrower category).

150. . . . and, of course, many more. Those parenthetical divisions are only *my* categories. One could think of many other ways of slicing and dicing things up.

151. For an elaborate demonstration of the point, see Schlag, *supra* note 117, at 1683–86.

The same is true of purposivism. The formulation of a plausible purpose for a law depends crucially upon the individuation that creates the law to be interpreted. For instance, the attribution of a purpose to the First Amendment's protection of freedom of speech varies depending whether freedom of speech is to be interpreted in light of the other First Amendment freedoms, the entire Bill of Rights, or the political theories or precepts informing the Constitution (and more). Purpose is a function, *inter alia*, of individuation—in the same way that context is a function of text (and vice versa). It follows then that since, *in its interesting respects* (an important hedge) law's individuations are not fully formalized, the ostensible virtues of purposivism (situatedness, context-bound meaning, and reasonableness), founder on the vertiginous proliferation of possible contexts. “Context?” “Which context?” “What are you talking about?”

The analysis above not only suggests that we need to pay attention to the individuations we presuppose (collectively and individually), but it also leads in a different, more disturbing direction—namely, whether individuation is at all possible, or whether it is the equivalent of trying to draw lines in a river.<sup>152</sup> Thus, for instance, the primordial question to be asked about textualism is not whether it is a good idea, but whether it is possible or even intelligible.<sup>153</sup>

#### D. DISPLACEMENT

Discussions of formalism vs. realism disputes and localized variants typically take place within highly abstract settings (law-review articles) and with highly abstracted law-directives (hypotheticals such as “do not go faster than safe” or “do not go above 55 MPH”). The abstraction typically results in a kind of tunnel-vision perspective in which a localized subject is isolated from the rest of the legal domain and the effects of the choice (e.g., formal value vs. substantive value, rule vs. standard) beyond the isolated local subject are overlooked. But we know, at least since Coase's path-breaking article (and likely before), that the choice of a law-directive will have systemic reverberations beyond the local situation isolated for analysis.<sup>154</sup>

We might expect that the choice in favor of a substantive rule in a given area will give rise to an attenuating standard at the evidentiary level.

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152. For elaboration, see Schlag, *Dedifferentiation*, *supra* note 1, at 47.

153. Finding an appealing and yet faithful definition of textualism is no easy task. Consider the definition below and note the way the last phrase effectively cannibalizes the meaning of the first part of the sentence: “[T]extualism does not admit of a simple definition, but in practice is associated with the basic proposition that judges must seek and abide by the public meaning of the enacted text, understood in context (as all texts must be).” John Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

154. This reflexive feedback-loop effect is a crucial part of Coase's attack on Pigouian externalities analysis. Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1661 (1989); *see id.* (discussing Coase's article, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)).

Similarly, one might expect, for instance, the adoption of a substantive standard to yield a rule-like delimitation of its operative scope.

We can formulate some rules of thumb here. Hence, rules in an isolated local area can be expected to yield compensatory standards in the vicinity (the displacement effect). Standards in an isolated local area will likely yield compensatory rules in the vicinity (the displacement effect). One would expect the displacement effect and the resulting compensation to occur along some very traditional lines:

Burden of Persuasion  
 Delimitation of Operative Scope  
 Evidentiary Requirements  
 Implementing Procedural Mechanism

The key point here with the displacement effect is that when it happens—and one expects it to happen some of the time—it vitiates the ascription of the traditional virtues and vices to the localized variant pairs. Why? Because the ostensible achievement of the classic virtues and vices attached are effectively attenuated or even negated by the displacement effect—the presence of compensatory directives.

This compensation can occur because a chosen approach (e.g., a standard) produces the information leading to external attempts to compensate for excess.<sup>155</sup> Or the compensation occurs because the decision makers, *ab initio*, recognize the need for temporization. Either way, the point remains that much of the classic vices and virtues assigned to the formalist and realist strands in the disputes depend upon a certain tunnel vision (one that is very much characteristic of the micro-perspective of common-law thinking).

The upshot is that whether a directive, an interpretive approach, or a value exhibits its characteristic virtues or vices depends not simply upon an examination of that directive, interpretive approach, or value, but upon the relevant juridical entourage in which it is nested.<sup>156</sup>

#### E. SUMMARY

Recursivity, shallowness, individuation, and displacement—these are some of the main critical moves upon which the formalism vs. realism disputes and their localized variants hinge. The deployment of these moves

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155. See Jason S. Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341, 361–62 (1991) (arguing that rules and standards tend over time to produce information showing their inadequacy thus leading to their replacement by their opposite).

156. Sunstein and Vermeule in this respect are quite right to focus attention on the institutional context. Sunstein & Vermeule, *supra* note 144, at 866. Solum, in turn, is quite right in pointing out that institutional context requires a focus on the virtues of judges and judging. Solum, *supra* note 20, at 522–23.

can effectively yield a breakdown in these disputes. Whether the moves will seem rhetorically convincing in a given context, however, is a different question.

## VI. CONCLUSION

For the moment, it feels like the formalism vs. realism disputes are here to stay. Some version or another of the disputes have been with us in more or less attenuated forms for centuries—perhaps millennia. In American law, we happen to be in a particular phase—one in which the disputes show all the earmarks of being at once actively pursued, intensely overwrought, and yet inconclusive.

The logics of collapse described here—recursivity, shallowness, individuation, and displacement—help us move beyond this odd state of affairs. They help show that the stylized disputes are not necessarily as important as we think they are. Their attendant arguments are not nearly as pressing or meaningful as they might first have seemed.

To put it in other words: It may well be that we cannot get beyond the formalism vs. realism disputes in our positive law at this time. But this need not dictate our orientation towards those disputes. What is appealing about the critical moves is that they allow us to recognize that these disputes are in ruins. We can then turn our attention (even if not our law) to other matters.

What is perhaps more important is recognizing that in the midst of these disputes, it is the rhetorical work exposed by the critical moves—recursivity, shallowness, individuation, displacement, and, ultimately, collapse—that matters. It is there that the crucial framing is accomplished.