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MISUNDERSTANDING POSITIVISM

Anthony J. Sebok*

If they can get you asking the wrong questions, they don't have to worry about the answers.

— Thomas Pynchon¹

INTRODUCTION: AMERICA'S LOVE-HATE RELATIONSHIP WITH LEGAL POSITIVISM

The past forty years have not been kind to legal positivism. Ever since H.L.A. Hart's famous debate with Lon Fuller over the charge that German legal positivists were partly responsible for the rise of Hitler, positivism has been the target of frequent attacks by American lawyers.² Its critics have tried, at various times, to connect positivism with a diverse and jointly inconsistent group of theories, such as legal formalism,³ legal realism,⁴ and originalism.⁵ Furthermore, since the 1960s, legal positivism has been associated almost entirely with politically conservative forces in this country, especially with an approach to constitutional interpretation known

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1. THOMAS PYNCHON, *GRAVITY'S RAINBOW* 293 (Bantam Books 1974) (1973).

2. Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 595 (1958) (citing Gustav Radbruch, *Die Erneuerung des Rechts*, 2 DIE WANDLUNG 8 (1947); Gustav Radbruch, *Gesetzliches Unrecht und Übergesetzliches Recht*, 1 SÜD-DEUTSCHE JURISTEN-ZEITUNG 105 (1946)).

3. See Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 362 n.19 (1973); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

4. See, e.g., LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 47 (1940); John Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833 (1931); Rufus C. Harris, *Idealism Emergent in Jurisprudence*, 10 TUL. L. REV. 169 (1936); Hermann Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240 (1934); Philip Mechem, *The Jurisprudence of Despair*, 21 IOWA L. REV. 669 (1936); Charles C. Miltner, *Law and Morals*, 10 NOTRE DAME LAW. 1 (1934).

5. See Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001, 1009 (1988); James G. Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter*, 40 U. MIAMI L. REV. 1171, 1172 (1986).

during the 1970s as "judicial restraint."⁶ Given the various contexts in which the term *positivist* has been used, it is clear that in recent years the term has become a pejorative in modern American legal circles.⁷

Legal positivism's critics have also noted that positivism is so pervasive in American legal culture that at various times it has been the dominant jurisprudence of America. Thus, in 1976, Ronald Dworkin called positivism the "ruling theory of law" in America and England.⁸ Looking into our past, Robert Cover characterized positivism as the major jurisprudence of post-Revolutionary America and attributed the failure of Northern judges to subvert the proslavery aims of the Fugitive Slave Acts to the influence of positivism on the antebellum legal mind.⁹

As H.L.A. Hart noted in his debate with Fuller, the assumption that positivism is somehow inherently conservative is a peculiarly American attitude.¹⁰ Furthermore, the immediate identification of positivism with the nation's "dominant" legal theory means that liberals who wish to reform or challenge the status quo begin with the presumption that their analysis must reject legal positivism.¹¹ In

6. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 131-32 (1977). Positivism's conservative reputation in America is especially ironic, given that Jeremy Bentham and H.L.A. Hart, positivism's chief spokespersons in England in the nineteenth and twentieth centuries, were also outspoken liberal reformers of the law. See, e.g., H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963) (responding to the REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, 1957, CMND. 247 ("THE WOLFENDEN REPORT")) and Lord Devlin's criticisms thereof; Hart, *supra* note 2, at 594-96 (stating that Bentham was one of "the most earnest thinkers in England about legal and social problems and [among] the architects of great reforms").

7. See Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 798 (1993) [hereinafter Schauer, *Constitutional Positivism*] (noting that positivism was "until recently" viewed as "simultaneously irrelevant and pernicious"); Frederick Schauer, *Positivism as Pariah*, in *THE AUTONOMY OF LAW: ESSAYS IN LEGAL POSITIVISM* (Robert P. George ed., forthcoming 1995) [hereinafter Schauer, *Positivism as Pariah*]; Robert S. Summers, *Legal Philosophy Today — An Introduction*, in *ESSAYS IN LEGAL PHILOSOPHY* 16 (Robert S. Summers ed., 1968) (claiming that the use of the term positivism "is now radically ambiguous and dominantly pejorative"); see also James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. PA. L. REV. 383 (1987); William H. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 964 (1989) (reviewing ROBERT M. COVER ET AL., *PROCEDURE* (1988)).

8. DWORKIN, *supra* note 6, at vii; see also 1 HAROLD D. LASSWELL & MYRES S. McDOWALL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE & POLICY* 8 (1992) ("The frame of reference commonly described as 'analytical' or 'positivistic' jurisprudence . . . dominates thinking in much of the world today . . .").

9. ROBERT M. COVER, *JUSTICE ACCUSED* 26-29, 121-23 (1975); see also Anthony J. Sebok, *Judging the Fugitive Slave Acts*, 100 YALE L.J. 1835, 1837 (1991).

10. Hart, *supra* note 2, at 594-95.

11. It is ironic that liberals might feel obliged to reject positivism in order to criticize the status quo, since natural law has become increasingly attractive to politically conservative constitutional scholars. See, e.g., HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND* (1994); ROBERT P. GEORGE, *MAKING MEN MORAL* (1993). The nomination of Justice Clar-

this article I will attempt to demonstrate that the association of positivism with conservatism reflects a response in America to a particular version of positivism and that for various historical reasons, only the narrow version of positivism was fully developed on this side of the Atlantic. I do not imagine that my argument, which simply proves that positivism does not have to be conservative, proves the converse, that positivism must support a liberal approach to the Constitution. The relationship between legal positivism and progressive constitutionalism is a separate argument that this article makes possible.¹²

This article sets out a historical account of the evolution of legal positivism in American jurisprudence. Although scholars today treat legal positivism as a major — if not the major — jurisprudence in America, no such theory was discussed by name in legal literature before the late 1920s. Part I argues that although legal positivism did not properly emerge as a major theory of law in America until Fuller's attack in 1940, positivism had been playing a major role in shaping American jurisprudence since the late nineteenth century. The fact that the term "legal positivism" was rarely used before 1940, and probably never used before 1927, does not mean that the theoretical content of legal positivism was absent from legal discourse before that date. The foundational principles of nineteenth-century positivism — what I will call "classical positivism" — were represented in jurisprudential debates in America under a variety of different names. Two other historical schools of jurisprudence provided the "aliases" that concealed classical positivism's influence: formalism and "analytic jurisprudence."

This article will reevaluate the relationship between classical positivism and formalism. For while it has been a popular truism that formalism embraced the separation of law and morality through "mechanical jurisprudence,"¹³ it has also become equally popular to attribute to formalism a commitment to supranatural

ence Thomas gave the issue of conservative natural law theory new immediacy. See, e.g., *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. pt. 1, 6-21 (1991) (statement of Sen. Biden); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POLY. 63 (1989).

12. It should be noted that a number of American scholars are beginning to recognize the liberal potential of legal positivism. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 320-22 (1991) (describing how constitutional positivism could be used to promote greater equality in America); Schauer, *Constitutional Positivism*, *supra* note 7. I try to argue in support of a position similar to Ackerman and Schauer's in ANTHONY SEBOK, *LEGAL POSITIVISM AND THE GROWTH OF MODERN AMERICAN JURISPRUDENCE* (forthcoming Cambridge Univ. Press 1996).

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

principles of law that exist independent of human authority.¹⁴ This latter position is inconsistent with the "sources thesis" of classical positivism and commits formalism to a form of natural law theory similar to Blackstone's.¹⁵ American formalism may have been guilty of many sins, but natural law is not one of them.

Part II argues that the attack on formalism by legal realism reveals to us how classical positivism was defined and distorted in early twentieth-century American legal scholarship. Despite — or perhaps because of — the fact that classical positivism completely agreed with realism that law and morality were analytically separable, the realists focused their attention entirely on formalism's theory of legal reasoning. According to the realists, the formalists believed that every legal conclusion could be logically deduced from a set of authoritative rules. This view of legal reasoning — if it indeed was ever embraced by American formalists — would have been an unwarranted reinterpretation of the sources thesis of classical positivism, which merely said that every valid legal command was the result of a command of the sovereign.

By 1930 — before legal positivism was discussed by name — the rough outlines of American positivism had been set by the debate between realism and formalism. The degree to which this picture of positivism was entrenched in American jurisprudence can be best illustrated by the rejection of the reconstituted form of positivism known as legal process. Part III shows that, in response to the realists' attack, American positivists modified two of the main elements of classical positivism, the command theory of law and the sources thesis, so as to rebut the charges against formalism.¹⁶ To this end, in the 1950s a younger generation of constitutional law scholars — themselves weaned on realism — attempted to reevaluate the force of realism's attack on legal rules. They readily conceded that law could not be a deductive or mechanical system of rules but noted further that realism's solution — skepticism about whether rules can constrain at all — was itself an extreme view. Classical positivism, which had been described by the realists to include the unreal assumption that legal rules could form a deductive system, was ultimately reinterpreted by the legal process school so that its model of

14. See, e.g., M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 110-12 (1986).

15. See, e.g., STEVEN J. BURTON, JUDGING IN GOOD FAITH 3-4 (1992).

16. There was no need to reform the remaining third principle of classical positivism, the separation of law and morals, since the realists and formalists were in complete agreement on this point.

legal reasoning embraced the elements of classical positivism but rejected mechanical jurisprudence.

One goal of Part III is to explain why legal process did not flourish after it appeared as an alternative to realism. On the one hand, the legal process school represented a fundamental rejection of mechanical jurisprudence, while on the other hand, contingent historical reasons led the legal process school to saddle itself with a variety of other liabilities. There were two distinct movements within the legal process school. The first, defined by Hart and Sacks's *The Legal Process*,¹⁷ laid the foundation for the kind of positivism I think is defensible and is not an obvious ally of political conservatism. The second, defined by Herbert Wechsler, Alexander Bickel, and Robert Bork, came later and twisted Hart and Sacks's theory of law into a conservative theory of adjudication. The later legal process scholars' interpretation of Hart and Sacks relied on a controversial form of moral skepticism that assumed that legal norms cannot command judges to enforce moral principles because moral principles did not have any cognizable existence. Nothing in Austinian positivism requires such a crabbed interpretation of legal rules.

American positivism has gone through at least three major transformations. In the first transformation, classical positivism was turned into an absurd form of formalism, in which the realists claimed that Austin's command theory of law necessarily implied a belief in law as a deductive system. In the second transformation, legal process stripped mechanical jurisprudence from positivism. As soon as the second transformation was complete, the third transformation occurred, in which politically conservative legal process theorists argued that the sources thesis and the model of rules necessarily implied a theory of original intent. It is telling that throughout the past century American positivism has been put into the service of conservatism because of the desire of both its enemies and allies to add unnecessary and implausible elements to classical positivism.

It is important that I point out the limited purposes of this article. I cannot, in the context of the argument I make, prove that positivism will not inevitably collapse into a conservative theory of law. Nor can I prove that positivism is not vulnerable to jurisprudential arguments unrelated to the attempt to link positivism with

17. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

formalism, legal process, and originalism. I recognize that strong arguments have been made that modern positivism's attempts to divorce itself from classical positivism's command theory of law has opened up more problems than it has solved.¹⁸ I have certain views on whether that divorce is possible and the form it should take, but this is not the place to raise them.¹⁹ My single goal in this article is to disprove a set of bad arguments against positivism, which, in my opinion, have given it a peculiarly conservative profile and have distracted us from investigating alternative versions.

I. LEGAL POSITIVISM AND LEGAL FORMALISM

The best place to begin any discussion of legal positivism and American jurisprudence is 1940, which is when Lon Fuller accused legal realism of being merely a subspecies of positivism. Fuller thought that legal realism and legal positivism were part of the same jurisprudential family tree. He thought that legal realism was a modern American modification to the legal positivism of Jeremy Bentham and John Austin:

We may say of modern positivistic theories that they diverge [One view that] may be called the "realist" view is represented by numerous American writers These men represent that direction of legal positivism which seeks to anchor itself in some datum of nature, which considers that the law's quest of itself can end successfully only if it terminates in some tangible external reality.²⁰

It is clear that the association of realism with positivism was supposed to weaken realism, which suggests that however obscure positivism may have been, it was perceived as quite unpopular among Fuller's intended audience.²¹ It seemed quite natural to Fuller to attribute the rise of fascism to the European embrace of positivism: "[Legal Positivism] played an important part . . . in bringing Germany and Spain to the disasters which engulfed those countries."²²

18. Fuller was convinced that H.L.A. Hart's repudiation of Austin's command theory in favor of a "social rule" theory was doomed to collapse back into Austin. See Fuller, *supra* note 2, at 640-42. Dworkin argued that it made no difference whether Hart rejected or embraced the command theory: for Dworkin, both the command theory and the social rule theory suffered equally from the "semantic sting." See RONALD DWORKIN, *LAW'S EMPIRE* 31-35, 45-46 (1986). But see H.L.A. HART, *THE CONCEPT OF LAW* 244-48 (2d ed. 1994) (responding to Dworkin's argument in a posthumous postscript).

19. But see *infra* note 213.

20. FULLER, *supra* note 4, at 46-47 (footnotes omitted); see also Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America — Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 475-77 (1986).

21. Fuller represents a tendency among American natural law theorists to conflate legal realism and legal positivism. See FULLER, *supra* note 4.

22. *Id.* at 122; see also INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah L. Schneider trans., Harvard Univ. Press 1991) (1987).

Fuller's comments gave support to others who were mounting a campaign to connect legal realism and fascism. For example, after Fuller linked legal realism and legal positivism, natural lawyers in American Catholic law schools cited his arguments with approval. Francis Lucey, a major figure in the neo-scholastic movement at Georgetown, completed Fuller's equation by adopting the connection between legal positivism and legal realism,²³ and then linked legal realism to totalitarianism: "Realism is being tried out today in Germany and Russia. . . . There is not a single tenet of Realism that these dictatorships do not cherish, adhere to, and try to apply."²⁴

Curiously, in 1940 many other theorists considered legal realism and legal positivism as antithetical and contradictory approaches to law. H.E. Yntema, a prominent realist, observed in 1941 that Fuller's 1940 lecture represented a basic misunderstanding of legal realism:

[T]he classification of American legal realism in the category of positivism along with Austin, Kelsen, etc., is so superficial as to border on the perverse. As the author [Fuller] truly states, the typical interest of a genuine legal positivist is in logic and form, while the interest of the legal realists in these aspects of law is in a degree incidental to their interest in the . . . substance[] of law.²⁵

It may be supposed that only realists emphasized the conflicts between legal realism and legal positivism, since in their own minds they felt a need to distinguish themselves from the earlier English and European theorists of legal positivism. Yet there were many

23. Realism is "only a further development and refinement" of nineteenth-century legal positivism. Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 494, 494-95 (1942).

24. *Id.*; see also Brendan F. Brown, *Natural Law and the Law-Making Function in American Jurisprudence*, 15 NOTRE DAME LAW. 9, 23-24 (1939); Paul L. Gregg, *The Pragmatism of Mr. Justice Holmes* 31 GEO. L.J. 262, 293-95 (1943); Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569 (1945). Natural lawyers were not the only theorists who drew a connection between legal positivism and totalitarianism. F.A. Hayek argued in 1960 that, by dismissing the idea of the "rule of law" as a metaphysical superstition, positivists prepared the way for fascism and communism. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 236-47 (1960).

25. Hessel E. Yntema, *Jurisprudence on Parade*, 39 MICH. L. REV. 1154, 1164 (1941). After the Second World War, the younger realists — apparently unpersuaded by the claims made by Fuller and others — continued to take for granted the incompatibility of legal realism and legal positivism. For example, McDougall and Lasswell's magisterial textbook on "policy science" was very critical of positivism, which was described as "more a 'science' of logical derivation of syntactic forms than an empirical science" like sociological jurisprudence or legal realism. See 1 HAROLD D. LASSWELL & MYRES S. McDOUGALL *Jurisprudence for a Free Society: Studies in Law, Science, and Policy* 9 (1992); see also W. MICHAEL REISMAN & AARON M. SCHREIBER, *JURISPRUDENCE* 269-307 (1987). Along with McDougall & Lasswell's book, Reisman & Schreiber's textbook also noted how important the attack on legal positivism was to the development of realists like Walter Cook and Karl Llewellyn. McDOUGALL & LASSWELL, *supra*, at 272; REISMAN & SCHREIBER, *supra*, at 449-50.

critics of legal realism who did not agree with Fuller's formulation and instead understood legal realism and legal positivism to be two rival and incompatible theories of law. In 1958, Edgar Bodenheimer, a long-time critic of realism, observed: "Analytical positivism and legal realism constitute basic approaches to the science of jurisprudence which are customarily regarded as representing sharply antithetical viewpoints with respect to the nature of law and the method of its application in judicial practice."²⁶ Roscoe Pound distinguished analytical jurisprudence — which is what many early theorists called legal positivism — from realism in his treatise on jurisprudence. Pound drew the following contrast: "As the analytical jurist insisted on the pure fact of law, the new realist seeks the pure fact of fact."²⁷

Even without a precise definition of the theory of legal positivism, one can conclude simply by using the principle of transitivity that either Fuller and the realists meant something different when they referred to "positivism," or one or the other side was simply making a logical error. Positivism cannot be both identical and inconsistent with legal realism. Legal positivism overlaps with *both* legal realism and formalism, although it is identical to neither. The critics of realism identified only those aspects of positivism that were consistent with realism, and used this association with positivism to tar realism, while the realists identified only those aspects of positivism that were consistent with formalism, and used this association with positivism to justify their attack on formalism. Thus, one of the only points of agreement between the realists and their critics was that both sides felt completely secure in using legal positivism as the obvious theoretical evil that, if they could only identify with their opponent, would discredit their opponent's argument.

A. *Classical Positivism*

Classical positivism is the theory of law developed in England by Jeremy Bentham and John Austin that formed the foundation for any subsequent theory that can be characterized as "positivist." Few modern positivists look upon classical positivism uncritically; in fact, much of the most important work of H.L.A. Hart was dedicated to correcting the errors of classical positivism.²⁸ Nonetheless, classical positivism set out the parameters, or minimal content, of

26. Edgar Bodenheimer, *Analytical Positivism, Legal Realism, and the Future of Legal Method*, 44 VA. L. REV. 365, 365 (1958).

27. 1 ROSCOE POUND, JURISPRUDENCE 258 (1959).

28. See HART, *supra* note 18, at 79-99.

any positivist theory of law. We must use classical positivism as a baseline in order to determine just how far afield Fuller or the realists went in their use of the term.

The principles of classical positivism were developed in the eighteenth and nineteenth centuries by Bentham and Austin.²⁹ Bentham and Austin wrote in reaction to Blackstone's theory of the common law, which had become the dominant theory of English law before the nineteenth century. Blackstone's theory of law, which set for itself the task of explaining the source and authority of judge-made law, was held to be inadequate by Bentham and Austin not only because it failed to explain statutory law, but because it failed, in their eyes, even to explain the authority of common law. Classical common law theory, as Blackstone's approach is now known,³⁰ was based on four claims that, although never carefully laid out, were implicit in various arguments that had emerged by 1800.³¹

The first and most famous principle was the idea that the source of common law is custom: that "the only method of proving, that this or that maxim is a rule of the common law is by showing that it hath been always the custom to observe it."³² The second principle was that custom itself was the expression of a nation's shared values, or, as we might say today, of its public conception of justice:³³ "[R]eason is the life of the Law; nay the common Law itself is nothing else but reason. . . ."³⁴ The equation of the common law with reason reflects a very special kind of natural law theory, one in which the source of natural justice was as much the people who were governed under the law as some independent moral truth that could be derived through philosophical reason.³⁵ The third princi-

29. This is not to say that Bentham and Austin were in complete agreement; in fact, Austin disagreed with Bentham's critique of judge-made law. See Wilfrid E. Rumble, *The Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, 66 CORNELL L. REV. 986, 1019 n.180 (1981).

30. See GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 3 n.1 (1986).

31. See SIR MATTHEW HALE, *A HISTORY OF THE COMMON LAW* (Charles M. Gray ed., University of Chicago Press 1971) (3d ed. 1739).

32. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *68. Furthermore, the authority for common law was bound up in its source: "[I]n our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority." *Id.* at *67.

33. See John Rawls, *Kantian Constructivism in Moral Theory: The Dewey Lectures 1980*, 77 J. PHIL. 515, 521 (1980).

34. 1 EDWARD COKE, *INSTITUTES* § 138 (London, 12th ed. 1738).

35. As A.W.B. Simpson explained: "In the common law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, or fair, or just solution." A.W.B. Simpson, *The Common*

ple was that the law was not susceptible to being expressed as a rule or set of rules; that is, in a form which could be set down in any specificity and used to guide future action.³⁶ The fourth principle was that while it remained theoretically possible that a sovereign could create new laws, the logic of classical common law theory suggested that laws promulgated by the sovereign would often be unreasonable, unjust, or jointly incoherent.³⁷ Thus, Blackstone was deeply skeptical of legislation.³⁸

Classical positivism developed in reaction to classical common law theory. If we look at Bentham and Austin's arguments against Blackstone, we see that they focused on the four features described above and proposed a set of principles that would replace them. The following represents a general description of the principles proposed by Bentham and Austin. This list is not likely to be precise or exhaustive, but it should give us a starting point. It is compiled from H.L.A. Hart's discussions of classical positivism as well as other sources.³⁹

The first principle was the separability thesis: that there is no necessary connection between law and morals. Bentham attacked Blackstone's use of natural law to explain the authority of common law. The appeal to natural law was not only an appeal to an unprovable chimera, but it allowed each law-applier to inject his own morality into the law.⁴⁰ Similarly, Austin stressed that jurispru-

Law and Legal Theory, in OXFORD ESSAYS IN LEGAL THEORY 79 (Tony Honoré ed., 2d Ser., 1973); see also POSTEMA, *supra* note 30, at 7 (stating that reason refers not to "some independent standards of justice" but "the expression . . . of . . . the common good"). Postema's excellent discussion of Blackstone's "ambivalen[ce]" toward natural law is also worthy of comment. *Id.* at 34 n.75. It is important to note that although the modern mind might find the equation of reason and law striking, in adopting this particular formulation of natural law, classical common law theory clearly tended toward the scholastic tradition.

36. As Simpson has noted, "it is a feature of the common law system that there is no way of settling the correct text or formulation of the rules, so it is inherently impossible to state so much as a single rule." Simpson, *supra* note 35, at 94.

37. POSTEMA, *supra* note 30, at 15-16 ("Since it was thought legislation is the product of will, and not of rational reflection on an existing order independent of will . . . there is no guarantee that the individual laws will be reasonable or just.").

38. See, e.g., 1 BLACKSTONE, *supra* note 32, at *10-*11; see also POSTEMA, *supra* note 30, at 15 ("Coke and Blackstone regarded parliamentary legislation as the sole, or at least major, cause of all that was confused, incoherent, and unjust in the law of England.").

39. See HART, *supra* note 18; Hart, *supra* note 2; JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 19-33 (rev. ed. 1990). It should be pointed out that these theorists discussed positivism in terms of their reaction, to some extent, to the theories of John Austin. See JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* (London, John Murray 5th ed. 1885) [hereinafter AUSTIN, *LECTURES*]; JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (special ed. 1984) (1832) [hereinafter AUSTIN, *PROVINCE*].

40. Gerald Postema explained:

dence does not involve any ethical evaluation of positive law.⁴¹ Austin's lectures began with the claim that only positive law is temporal law: "[L]aw, simply and strictly so called [is] law set by political superiors to political inferiors."⁴²

The second principle was the "command theory of law": that law was an expression of human will. Bentham criticized classical common law theory for proposing norms so vague that "a law is to be extracted by every man who can fancy that he is able: by each man perhaps a different law."⁴³ According to classical positivism, law consisted of general propositions. Bentham believed that a law must be reducible to a command that one person might give another.⁴⁴ Austin was not as sure as Bentham that a law had to be reducible to a verbal form. He recognized that some intelligible commands could be merely expressive.⁴⁵ What distinguished some authoritative commands as law, Austin believed, was that legal commands are not only accompanied by sanctions but are *general* — in other words, directed toward a class of the public.⁴⁶

The third principle was the "sources thesis": every valid legal norm was promulgated by the legal system's sovereign, and the norm's authority can be traced to that sovereign. According to Bentham, "the authenticity of a law is a question exterior to, and independent of, that of its content," and one therefore had to know

When a man disapproves of a mode of conduct considered independently of any actual System of Jurisprudence he says there is a Law of Nature against it. . . . If he cannot tell why he disapproves of it he begins talking of a Rule of Right, a Fitness of Things, a Moral Sense or some other imaginary standard which howsoever varied in description, is from first to last nothing but his own private opinion in disguise.

POSTEMA, *supra* note 30, at 269 (quoting Bentham Manuscripts in the University College, London Library). Thus, as Postema pointed out, according to Bentham, "law can achieve its ends and serve adequately its primary tasks only if its content and authority can be established without any need to rely upon investigation into either moral or traditional historical (or theological) matters." *Id.* at 315.

41. AUSTIN, PROVINCE, *supra* note 39, at 114 n.*; see also ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE* 57 (1989) ("[I]t seemed obvious to [Austin] that the starting point for the science of law must be a clear analytical separation of law and morality.").

42. AUSTIN, PROVINCE, *supra* note 39, at 1.

43. JEREMY BENTHAM, *OF LAWS IN GENERAL* 192 (H.L.A. Hart ed., 1970).

44. Bentham stated:

A law is a discourse — conceived mostly in *general*, and always in *determinate* words — expressive of the *will* of some person or persons, to whom, on the occasion, and in relation to the subject in question, whether by habit or express engagement, the members of the community to which it is addressed are disposed to pay obedience.

8 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 94 n.¶¶ (John Bowring ed., London, Simpkin, Marshall & Co. 1843).

45. "A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded." AUSTIN, PROVINCE, *supra* note 39, at 5.

46. See COTTERRELL, *supra* note 41, at 60.

by whom and in what manner a norm was promulgated in order to determine its status as law.⁴⁷ Furthermore, Bentham argued, valid laws possessed a very specific pedigree: they were promulgated by the legal system's "sovereign." Bentham was convinced that every legal system had a sovereign, including democracies, where the sovereign was the entire citizenry.⁴⁸ According to Bentham, "every law must come from a sovereign," since every law had to be the product of a will that was preferred "to the will of any other."⁴⁹ Austin built upon the sources thesis as set out by Bentham and refined the definition of the sovereign. According to Austin, the sovereign was identifiable by two characteristics: habitual obedience from the bulk of the population and habitual noncompliance with the commands of any other human superior.⁵⁰ The key point for Austin, as for Bentham, was to discover the unique source of legal norms in a given legal system.⁵¹

B. *Did Legal Positivism Exist in 1900?*

A curious feature of American jurisprudence in the early twentieth century is that the expression "legal positivism" did not appear in legal scholarship. As mentioned above, its first notable presence in the general debate occurred through Fuller's lectures in 1940. Nonetheless, Fuller did not pick the expression out of midair. He borrowed it from a discourse that, although obscure, was already in motion.

The occasion of the earliest use of the expression "positivism" in modern American legal theory itself presents a curious problem. When Pound first used the expression in 1912, it functioned as a theoretical homonym. Pound's meaning when he used the word "positivism" was not the same as we would understand it today — even assuming the most expansive or flexible use of the term. In the survey essay *The Scope and Purpose of Sociological Jurisprudence*,⁵² he traced the development of sociological jurisprudence —

47. POSTEMA, *supra* note 30, at 313 (quoting Bentham Manuscripts in the University College, London Library).

48. JEREMY BENTHAM, CONSTITUTIONAL CODE (1827), reprinted in 9 BENTHAM, *supra* note 44, at 10.

49. BENTHAM, *supra* note 43, at 18.

50. AUSTIN, PROVINCE, *supra* note 39, at 220-22.

51. For Austin, who was most concerned with modern constitutional democracies, the source of law lay with that body of people that has ultimate authority to alter the state's constitution — the population at large. *Id.* at 272-76.

52. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1-3), 24 HARV. L. REV. 591 (1911) [hereinafter Pound, pt. 1], 25 HARV. L. REV. 140 (1911) [hereinafter Pound, pt. 2], 25 HARV. L. REV. 489 (1912) [hereinafter Pound, pt. 3].

an early antiformalist theory and Pound's own contribution to legal theory — and listed four stages in its development: the positivist, or mechanical stage, the biological stage, the psychological stage, and the stage of unification.⁵³ Pound used "positivism" in the sense found in traditional sociology, where the term was shorthand for the tradition associated with Auguste Comte. Comte's sociological positivism was based on his conviction that social life could be analyzed and reformed through the careful use of the mathematical techniques of measurement and analysis.⁵⁴ In the late nineteenth century, positivistic sociology had become associated with those deterministic social theories that posited that some set of forces — economic or otherwise — "governed" the histories of societies. Pound's decision to call those legal theories that borrowed from sociological determinism "positivist" is understandable but fraught with potentially confusing consequences. In fact, what Pound referred to as positivism did not really resemble classical legal positivism at all.⁵⁵ "Positivism" as Pound used the term in 1912 did not reflect the separability thesis, the command theory, or the sources thesis.⁵⁶ Pound's reference to positivism is most likely an interesting nonstarter with regard to our question.

After Pound, the next significant discussion of positivism occurred in a debate between Yntema, a realist, and Morris Cohen, an antirealist, over Holmes's legacy. In *Justice Holmes and the Nature of Law*, Morris Cohen argued that Holmes's "idealist" thought was being abused by realist scholars.⁵⁷ He argued that one group of

53. Pound, pt. 3, *supra* note 52, at 491, 495, 503, 509.

54. As one commentator explained, for Comte, "uniform organization of the totality of human knowledge was indispensable to pave the way for a fully-fledged science known as 'sociology,' which alone would make it possible to transform collective life." LESZEK KOLAKOWSKI, *POSITIVIST PHILOSOPHY* 63 (1972).

55. Pound stated:

[Positivist theory] calls for search for a body of rules governing legal development to which law must and will conform, do what we may. Whatever exists in law exists because of the operation of these rules. The operation of these same rules will change it and will change it in accordance with fixed and definite rules in every way comparable to those which determine the events of nature. . . .

"[The theory] treat[s] social forces as though they were mills of the gods which men could at most learn to describe, but which they might not presume to organize and control."

Pound, pt. 3, *supra* note 52, at 492-93 (quoting ALBION WOODBURY SMALL, *GENERAL SOCIOLOGY* 84 (1905)).

56. It must be noted that Comtean positivism is related to legal positivism in at least one important way. The separability thesis finds support — if not roots — in Comte, since nineteenth-century materialist sociology helped support the idea that social forces were motivated by reasons and systems independent of morality.

57. "The danger today is not that [Holmes's ideas] will be ignored, but that their rich content will be impoverished by being harnessed to some ism. . . . Thus contemporary irratio-

extremists had wrongly associated Holmes with "positivism," which Cohen defined as "view[ing] the law exclusively as uniformities of existing behavior, in total disregard of any ideals as to what should be."⁵⁸ Yntema's response to Morris Cohen contained a lengthy and detailed defense of the realists' adoption of Holmes. Yntema wanted to keep the connection between Holmes and realism but discard positivism. He suggested that Morris Cohen confused positivism, which was not part of the realist position, with empiricism, which was an important tool of the realists.⁵⁹ Yntema *agreed with* Cohen's definition of positivism, but he simply denied that he or Holmes were positivists.⁶⁰ He thought Cohen had the right description of positivism but erred in linking it with realism. The linkage, as Yntema would say ten years later, was "so superficial as to border on the perverse."⁶¹

The history of the definition of positivism employed by Cohen is quite interesting. Cohen introduced this particular definition in a 1927 article entitled *Positivism and the Limits of Idealism in the Law*.⁶² In that essay Cohen tried to contrast two competing, yet mutually dependent, approaches to jurisprudence — idealism and positivism. The idealist realizes that "it is . . . impossible to engage in [legal reasoning] without exercising one's views as to what the policy of the law should be."⁶³ The positivist believes that "the jurist can dispense with any consideration as to what the law ought to be."⁶⁴ Positivism "arises from the fiction that the law is a complete and closed system, and that judges and jurists are mere automata to record its will or phonographs to pronounce its provisions."⁶⁵

The adoption of Cohen's definition of positivism by Yntema — despite his other differences with Cohen — is interesting for a number of reasons. First, Cohen's 1927 definition captured most of

nalists frequently support their case by his dictum that 'experience not logic is the life of the law.' " Morris R. Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 352, 356 (1931).

58. *Id.* at 360.

59. "It is just possible that Cohen has thus confused the 'positivism' of continental jurisprudence and empirical legal science, without noticing their totally different backgrounds and objectives." Hessel E. Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 925, 946 n.62 (1931).

60. *Id.*

61. Yntema, *supra* note 25, at 1164.

62. Morris R. Cohen, *Positivism and the Limits of Idealism in the Law*, 27 COLUM. L. REV. 237 (1927).

63. *Id.* at 239.

64. *Id.* at 238.

65. *Id.*

the elements of classical positivism. Its two-pronged test for positivism — the separation of law and morals and the idea of law as a system of authoritative rules — looks a lot like what Fuller attacked in 1940. Second, Yntema responded to Cohen's attempt to associate realism with positivism by denying the association and not by denying the accuracy of Cohen's definition of positivism. Both Yntema and Morris Cohen agreed that positivism endorsed the view that a judge can "attain perfect consistency" and that the law can be a "complete and closed system." This view of positivism was, without a doubt, how antiformalists defined formalism.

Finally, it is interesting to compare the matters upon which Morris Cohen and Yntema agreed and disagreed in their confrontation over Holmes. They fought over whether realism tended to support moral relativism — something that Morris Cohen believed and Yntema strongly denied. Yntema, however, did not reject Cohen's assertion that positivism endorsed the separation of law and morals and the authoritative nature of legal rules. Although there was a lot of disagreement between Yntema and Cohen over the extent to which realism shared in positivism's moral relativism, they agreed that positivism endorsed some form of moral relativism in law because it was committed to the separation of law and morals and to the autonomy of legal reasoning. What Yntema resisted was Morris Cohen's suggestion that realism was a form of either positivism or formalism.⁶⁶

C. *Positivism and Formalism*

That legal positivism was not referred to by name very often during the early twentieth century in American jurisprudence may be explained by the fact that legal positivism played its role under a name not so easily recognized by modern ears. We know the definition of positivism that antirealists and realists agreed upon: "[T]he fiction that the law is a complete and closed system, and that judges and jurists are mere automata to record its will."⁶⁷ Both the natural lawyer and the realist said they disavowed legal positivism. These clues point to the idea that the basic elements of legal positivism — the separability thesis, the command theory of law, and the sources thesis — could be found hidden within the theory that the realists thought they were attacking: formalism.

66. Morris Cohen's equation of realism and positivism would reemerge as the core notion behind Fuller's attack on legal positivism in 1940. In the 1960s both aspects of Morris Cohen's definition of positivism were at the center of the debate between Hart and Dworkin.

67. See Cohen, *supra* note 62, at 238.

1. *Austin and Formalism*

One way of discovering the degree to which legal positivism is related to formalism is to look at the roots of both theories. In the case of modern legal positivism, the roots are easy to find. As we saw above, most basic histories of legal positivism explain that it originated with Bentham and Austin.⁶⁸ The curious and important fact is that these figures — especially Austin — were closely associated with American formalism. The fact that legal positivism and formalism share the same foundation helps confirm the hypothesis that the positivism attacked by theorists like Fuller was similar in content and pedigree to the formalism attacked by the realists.

Bentham and Austin appear as important sources for formalism in the writings of theorists of all persuasions in the early twentieth century.⁶⁹ In his criticisms of formalism, Pound equated mechanical jurisprudence with analytic jurisprudence, which he equated with nineteenth century English jurisprudence.⁷⁰ Jerome Frank discovered in Austin the origins of two basic formalist “myths”: that “every law is a command” from an identifiable human sovereign, and that the law can be made into “an all-sufficient code.”⁷¹ Frank’s criticism of Austin paralleled his critiques of the leading formalists Christopher Columbus Langdell and Joseph Beale. According to Frank, they too believed that law was a closed system, and they too were skeptical of the role of judge-made as opposed to judge-found law. According to Frank, Beale and Langdell believed,

68. See, e.g., FULLER, *supra* note 4, at 26-27; HART, *supra* note 18, at 124-47 (1983); H.L.A. HART, *ESSAYS ON BENTHAM* (1982); KECKOK LEE, *THE POSITIVIST SCIENCE OF LAW* 16-17 (1989); POSTEMA, *supra* note 30, at 302-03.

69. Fuller identified Hobbes and Austin as the sources of twentieth-century positivism. Fuller called Austin and his followers “analytical jurists,” which seemed to be the popular term in the 1940s for nineteenth-century positivism. See FULLER, *supra* note 4, at 29-31. Others who would disagree with Fuller’s conflation of positivism and realism agreed with his adoption of Pound’s terminology and analysis of Austin. Llewellyn claimed that “[f]or the nineteenth century schools I am content to accept one of Pound’s summaries. . . . With regard to the analytical jurists, Pound stresses their interest in a body of established precepts whereby a definite legal result is supposed to be fitted to a definite set of facts” Karl N. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 433 (1930) (footnote omitted); see also Friedrich Kessler, *Natural Law, Justice and Democracy — Some Reflections on Three Types of Thinking About Law and Justice*, 19 TUL. L. REV. 32, 50 (1944) (equating nineteenth-century legal positivism and the “emerging new school of thought within the legal profession: the school of analytical jurisprudence”).

70. See, e.g., Pound, pt. 1, *supra* note 52, at 490-95.

71. Frank observed:

There appears to be more than chance in this combination of the advocacy of an exhaustive code and the espousal of the command theory of law. That every law is a command becomes a more plausible assumption when law takes on the form of a seemingly complete body of enacted statutes.

JEROME FRANK, *LAW AND THE MODERN MIND* 208 (Peter Smith ed., 1970) (1930).

like Austin, that legal systems were posited by an authority and that the individual act of adjudication was a matter of discovering a previously unseen element of a preexisting structure. Thus, Frank's picture of Austin looked much like his picture of Langdell and Beale.⁷²

In the period between the world wars, "analytic jurisprudence" — understood as Austin's thought and its nineteenth-century elaborations — was the main target for realism's attacks. The attack usually consisted of a repudiation of "analytic jurisprudence" and a statement of realist principle:

Legal realism, as it called itself, has tremendously influenced the way of thinking of modern lawyers about the role of law in our society. Its criticism of analytical jurisprudence has made us realize that preoccupation with efforts at making the law consistent and predictable (at a high level of abstraction) may afford an easy escape from a more important task: namely, of constantly testing out the desirability, efficiency and fairness of inherited legal rules and institutions⁷³

Albert Kocourek, who called Austin "one of the Founders of analytic jurisprudence," observed how the realists and other antiformalists defined themselves through their definition of Formalism:

The Austin century witnessed the rise and development of analytic jurisprudence. . . .

. . . [Yet the] development attained by analytic jurisprudence has been the result of a struggle of opposing ideas. . . .

. . . .

. . . [Realism] was created in the course of a few years. This school combatted the idea that legal systems are closed logical structures. . . . In a word, the judge is not a mere automaton, but has a creative role in the application of law.⁷⁴

These attacks on "analytic jurisprudence" also demonstrate that for the antiformalists there was a close relationship between for-

72. Rumble has also noted the connection between American Formalism and English positivism:

Despite important differences between Austin and Langdell, they were, in a sense, spiritually closer to each other than either was to the realists. Both men presumed that principles exist which provide a complete map of the law. They assumed that law has an underlying unity of doctrine that can be measured by the right kind of approach. As such, their position sharply contrasts with the views of the legal realists. Rumble, *supra* note 29, at 1004 n.87.

73. Kessler, *supra* note 69, at 52.

74. Albert Kocourek, *The Century of Analytic Jurisprudence Since John Austin*, in 2 *LAW: A CENTURY OF PROGRESS, 1835-1935*, at 195, 216-17, 221 (1937). Kocourek distinguished between the European "freie Rechtsfindung" ("free adjudication") movement and American realism, although he insists that the latter is the "distinct inheritor" of the former. For purposes of this argument, I have chosen to treat Kocourek's statements about the European and American movements interchangeably. *Id.* at 216-18.

malism and classical positivism. Pound's critique of "analytic jurisprudence" targeted two of the three central elements of classical positivism:

[T]he analytical method . . . has had two serious ill consequences: (1) It led in the nineteenth century to what Jhering called a jurisprudence of conceptions, in which new situations were always to be met by deduction from traditional fixed conceptions, and criticism of the premises of legal reasoning with reference to the ends to be served was neglected. (2) The imperative theory of law — the theory of law as no more than a conscious product of human will — has tended to lead lawmakers, both legislative and judicial, to overlook the need of squaring the rules . . . with the demands of reason and the exigencies of human conduct . . .⁷⁵

Pound noted that the analytical jurists regarded the "science of law as wholly self-sufficient," because they assumed the existence of a complete body of law with no gaps.⁷⁶ The expression "jurisprudence of conceptions" was, for Pound and the realists, code for Langdell and Beale. For Pound and the realists, the central flaws of formalism could be related back to Austin. But if the antiformalists were rejecting Austin, then they must also have been rejecting classical positivism. The elements of classical positivism — the separability thesis, the command theory, and the sources thesis — when combined, constituted formalism itself. Accordingly, the rejection of Austin implies that classical positivism entailed a concept of law as a uniform system, as a self-contained legal science, and as a complete system, free of gaps. Austin, it turns out, was the father of formalism and the original enemy of legal realism.⁷⁷

It is crucial, therefore, to understand how Austin's three principles of classical legal positivism were reinterpreted into formalism. A good place to begin is the relationship drawn by Fuller, Pound, and Bodenheimer between the "imperative" or command theory of law, which is a major element of Austinian positivism, and the idea that Formalism was basically a theory of legal deduction or conceptualism. Pound correctly identified the command theory of law —

75. 1 POUND, *supra* note 27, at 91-92. According to Bodenheimer, in Pound's view: [T]he quintessence of the analytical approach to the law consists in a belief in the autonomous and self-contained character of legal science, joined with a conviction that it is possible to decide legal issues coming before the courts almost completely by the logical processes of deductive reasoning from given principles and established norms of the positive legal system.

Bodenheimer, *supra* note 26, at 365-66.

76. ROSCOE POUND, *LAW AND MORALS* 43-44 (1924).

77. It is curious to note that modern realists, who have been surrounded by discussions of legal positivism since the 1950s, have abandoned Pound's category of analytical jurisprudence and, through the common link of Austin, directly equate legal positivism with that which the realists opposed. See, e.g., 1 MCDUGAL & LASSWELL, *supra* note 25, at 53.

that law is "no more than a conscious product of the human will"⁷⁸ — as essential to Austin, but then assumed that Austin would agree that the command theory entailed the claim that law is a "science in which conceptions are carried out logically even at a sacrifice of the ends of law."⁷⁹ It is easy to see why Pound would reject Austin if he believed that Austin, like Langdell, was a conceptualist. It is not obvious why Pound, and then the realists who followed, conflated Bentham and Austin's command theory with the conceptualist claim that legal conclusions could be logically deduced from *a priori* premises. Yet the equation of the command theory with conceptualism dominated academic criticisms of positivism until Fuller shifted the entire critique of positivism from the command theory — which modern positivists like H.L.A. Hart had themselves attempted to repudiate — to the separability thesis and the sources thesis, both of which are entirely consistent with Pound's antiformalism. The Fullerian critique has become so pervasive that few theorists today recognize the inconsistency between Pound's antiformalist/anticlassical positivist critique and Fuller's antirealist/antipositivist critique. One might explain this inconsistency by suggesting that Fuller had a hidden agenda that skewed his picture of positivism, or one might argue that Pound simply misunderstood the relationship between classical positivism and formalism. I reject both explanations — Fuller was a scrupulously honest theorist, and Pound and most of the realists were very subtle thinkers. To understand why the postwar picture of positivism varied so much with the prewar picture, we must look at how Pound and the realists framed their main opponent, formalism.

II. LEGAL REALISM AND LEGAL FORMALISM

From the outset, it is difficult to discuss realism because it is difficult to define who the realists were and when they wrote.⁸⁰ On

78. 1 POUND, *supra* note 27, at 91. Pound, of course, read "no more" to mean "only."

79. 1 *Id.* at 92.

80. "[Legal realism] constitutes a significant, though not always a dominant part of the intellectual matrix in which almost all modern lawyers, judges, and scholars of law have been formed." EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE* at xv-xvi (1962). "[M]ost legal scholars in the United States, from the late twenties on, have been realists in important respects" JEROME HALL, *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY* 136-37 (1958); see also Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)).

The legacy of legal realism is difficult to estimate or evaluate. The realists' role in the politics of America, or its constitutional development, is an issue debated today for reasons of some contemporary import. One can detect its influence from the use of social science in the early desegregation cases to the rise of the critical legal studies movement. See *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954) (citing social science evidence of the effects of

the one hand, it is possible to find legal scholars such as Oliver Wendell Holmes and John Chipman Gray who were using realist techniques as early as the late 1890s.⁸¹ On the other hand, most scholars defined realism as a movement constituted by a set of authors whose major work occurred during the 1920s and 1930s.⁸² Nonetheless, between the late 1890s and the early 1920s, there appeared significant scholarship that was clearly realist in method.⁸³

segregation on schoolchildren); Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986). Social science in the law emerged as part of the "prerealist" strategy to combat formalism; the "Brandeis Brief" — educating an appellate court about general social facts relevant to the issues of rulemaking — was first used in *Muller v. Oregon*, 208 U.S. 412, 419 n.1 (1908). See John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1979).

81. See, e.g., JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* (Roland Gray ed., Macmillan Co. 1938) (1909); Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899) [hereinafter Holmes, *Science*]; Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) [hereinafter Holmes, *Path*].

82. "Legal realism" is an expression that has been used most often to refer to the work of a group of thinkers, the bulk of whose writings appeared in the 1920s and the 1930s." ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 36 (1982); see also EDWIN W. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 538 (1953) (listing twenty "realist" authors from 1920s and 1930s); Golding, *supra* note 20, at 453 ("[R]ealism was a movement of the 1920s and 30s.").

83. See, e.g., Pound, *supra* note 13; Pound, *supra* note 52; Thomas Reed Powell, *The Logic and Rhetoric of Constitutional Law*, 15 J. PHIL. PSYCHOL. & SCI. METHODS 645 (1918). I agree with Bruce Ackerman that there were three separate phases leading up to and including the appearance of realism. First, Holmesian "proto-realism," based on a historical critique of the idea that "the Common Law had a fundamental structure discernable by the architectonic intelligence." Bruce Ackerman, *Law and the Modern Mind*, 103 DAEDALUS 119, 121 (1974). Horwitz described this period as the "attack on conceptualism." MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 129 (1992). Second, the "prerealist" generation, Brandeis, Frankfurter, and Pound, who were "importantly affected by Progressive politics and Deweyite pragmatism." Ackerman, *supra*, at 121. Horwitz described this period as "progressive" jurisprudence. HORWITZ, *supra*, at 156-57. Third, "[t]he Legal Realists, whose work began in the 1920's and reached its maturity in the 1930's." Ackerman, *supra*, at 121. The realists relied heavily on the antiformalism of the proto- and prerealists. Nonetheless, for the sake of precision, I am going to restrict the term *legal realism* to only those scholars writing during the 1920s and 1930s who self-consciously called themselves realists.

Because realism developed during a period when other disciplines were beginning to ask similar questions of their own orthodoxies, it is hard to know at what point legal scholars began to regard their realist techniques as a form of legal theory, as opposed to treating them as methods borrowed from other disciplines for the benefit of jurisprudence. According to one historian:

The new legal criticism developed out of the same intellectual environment that generated new attitudes throughout American intellectual life. . . . Large numbers of American thinkers in many diverse fields began to adopt a more empirical, experimental, and relativistic attitude toward the problems and guiding assumptions of their disciplines. The impact of science and pragmatism, together with the desire for the improvement of man's social and political life that many intellectuals shared, brought new vitality, ideas, and methods to the expanding social sciences.

Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424, 424 (1969) (discussing developments in philosophy, economics, history, and political science that affected growth of realism); see, e.g., CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE*

It is reasonable, therefore, to take seriously the realists' own self-description. The writings of Llewellyn, Frank, and others suggest that, as a group, they were irregularly bound together by a certain kind of critique. The common thread that held them together was their antiformalism. But their rejection of the status quo was not an entirely nihilistic view. The realists did not attack their contemporaries because they believed that law was a meaningless project. They believed they were working toward a better view of law. As Dean Anthony Kronman pointed out, the "negative side of realism" was the mechanism by which they developed their positive views on the answers to the problems of "intelligibility" and "justification."⁸⁴ If we are to understand legal realism, however, and especially its relationship to legal positivism, we must take seriously its negative project.⁸⁵

UNITED STATES (2d ed. 1935); EDWARD S. CORWIN, *COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT* (1938); WILLIAM B. MUNRO, *THE INVISIBLE GOVERNMENT* (1928); Charles A. Beard, *Historiography and the Constitution, in THE CONSTITUTION RECONSIDERED* 159 (Conyers Read ed., 1938) [hereinafter Beard, *Historiography*]; Charles A. Beard, *The Living Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 29 (1936) [hereinafter Beard, *Living Constitution*].

This article does not treat the relationship between these scholars and their colleagues and the realists, although the influences are significant in both directions. From the perspective of jurisprudence, the development of realism took place *through* its interpretation by legal scholars, even though scholars in other fields were the originators of some of the ideas, or expressed them more forcefully.

84. Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 336 (1988).

85. As Golding pointed out, the realists' negative project was complex and consisted of mutually inconsistent claims:

[Realism's] "negation" [of the prevailing orthodoxy] was held on a number of different grounds. On the basis of purely theoretical considerations it was argued that rules and principles have no existence; only individual judicial decisions exist. It was also argued that, despite what judges say, rules and principles do not determine judicial outcomes and hence are valueless for a science of law. And it was also maintained that since it was impossible to discover what the rules are that were actually being applied, they are valueless. Finally, it was held (by the most moderate realists or by the extreme realists in their moderate moments) that rules and principles do exist and exercise *some* influence on decisions, but that there are more interesting and important things to study about the law All these considerations can be found in the literature of realism, and some realists seem to have entertained all of them at once.

Golding, *supra* note 20, at 452.

It should be noted that this article deals almost exclusively with realism's negative project, which means that its positive project, especially its focus on the role of policy sciences in adjudication, will not be explored. See, e.g., SUMMERS, *supra* note 82, at 60-72 (describing instrumentalist theory of law); Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943) (describing realism as policy science).

A. *The Cohen-Pound List*

In 1935, Felix Cohen summarized the realists' diagnosis of the problems besetting contemporary legal thought.⁸⁶ His essay surveyed a variety of doctrinal fields, including corporate and constitutional law, and concluded that many "leaders of modern legal thought in America are in fundamental agreement in their disrespect" for the "traditional legal thought-ways."⁸⁷ Cohen attributed the crisis in American law to the hegemonic grip of "mechanical jurisprudence."⁸⁸ Cohen also referred mockingly to other established jurisprudential scholars as "classical" jurists⁸⁹ and held out the *Restatement of the Law* by the American Law Institute as "the last long-drawn-out gasp of a dying tradition."⁹⁰

Cohen used the term "mechanical jurisprudence." Other realists used other terms, such as conceptualism or "the formal style." We know that Cohen was adopting the same antiformalist posture of Pound because he selected exactly the same terminology and targets as Pound.⁹¹ If we reduce Cohen's statement to its elements, we see that, in his opinion, mechanical jurisprudence embraced concepts and principles that were unverifiable in that they stated neither sociological facts nor moral ideals. So conceived, legal propositions and arguments were hopelessly independent or autonomous of ethics and the social sciences, and therefore insensitive to moral argument and social facts. This conclusion struck the key theme that ran throughout Cohen's argument, and one that formed the core of the antiformalist position: that, at a minimum, any credible theory of law had to reject the idea that law was *autonomous* from either moral theory or the social sciences.

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

87. *Id.* at 821.

88. Cohen borrowed the term from Pound, *supra* note 13.

89. Interestingly, Horwitz adopted the term "Classical Legal Thought" to describe late-nineteenth-century legal formalism. HORWITZ, *supra* note 83, at 10.

90. Cohen, *supra* note 86, at 833. From the perspective of more than a half-century later, it appears that the reports of the *Restatements'* death have been greatly exaggerated.

91. In mechanical jurisprudence,

Legal concepts (for example, *corporations* or *property rights*) are supernatural entities which do not have a verifiable existence *Rules of law*, which refer to these legal concepts, are not descriptions of empirical social facts (such as the customs of men or the customs of judges) nor yet statements of moral ideals, but are rather theorems in an independent system. It follows that a *legal argument* can never be refuted by a moral principle nor yet by any empirical fact. *Jurisprudence*, then, as an autonomous system of legal concepts, rules, and arguments, must be independent both of ethics and of such positive sciences as economics or psychology.

Cohen, *supra* note 86, at 821.

Cohen did not explicitly state what is wrong with treating law as if it were autonomous and independent of other intellectual tasks. His citation of Pound's essay *Mechanical Jurisprudence* revealed the source of the argument upon which Cohen relied. Pound argued that the old system of jurisprudence was built on a "scheme of deductions from *a priori* conceptions."⁹² Pound did not resist the idea that law was an autonomous system because he rejected the non-moral/nonempirical *content* of the principles upon which such a system would necessarily rely — although this would be argued by later realists. Pound was instead concerned that if legal principles were unverifiable, then they must be true *a priori*, like premises in a syllogism, and that if they were like premises in a syllogism, then legal reasoning had to be like elementary logic — in other words, a matter of proof through deduction. That is why Cohen's first principle, that the old jurisprudence was not verifiable, conforms so perfectly with Pound's various descriptions of mechanical jurisprudence.

According to both Cohen and Pound, because the formalist theory of law begins with the assumption that legal concepts were *a priori* and thus by definition unverifiable, the formalist theory of law entails a theory of legal reasoning, namely that legal reasoning is deductive.⁹³ As a result of looking at Pound, therefore, we can add one more element to Cohen's scheme: the essence of applying a legal rule is that it is applied deductively, in other words, like a rule of logic.⁹⁴

Other antiformalists identified similar problems in what they saw as the prevalent legal theory of their day. For Frank, something called "mechanistic law" governed jurisprudence. Like Cohen, Frank faulted the old system for its "obsessive interest in legal rules" and its naive belief that the science of law could provide

92. According to Pound, the formalists tried to depict law as a science, but this was an illusion:

I have referred to mechanical jurisprudence as scientific because those who administer it believe it such. But in truth it is not science at all. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from *a priori* conceptions. . . . The idea of science as a system of deductions has become obsolete.

Pound, *supra* note 13, at 608.

93. See, e.g., Cohen, *supra* note 86, at 847 (referring to general legal principles as "legal logic or metaphysics").

94. Duncan Kennedy explained:

The decision process is called rule application only if the actor resolutely limits himself to identifying those aspects of the situation which *per se*, trigger his response. . . . The minute he begins to look over his shoulder at the *consequences* of responding to the presence or absence of the *per se* elements [he is no longer acting like a judge].

Kennedy, *supra* note 3, at 359.

"certainty and predictability."⁹⁵ Llewellyn, in an ambitious work of historical analysis, determined that from the Civil War until the 1920s, the American legal community had been in the grips of a style of judicial reasoning he designated "the formal style." The formal style was authoritarian, mechanical, and logical: "[T]he rules of law are to decide the cases. . . . Opinions run in deductive form with an air or expression of single-line inevitability."⁹⁶

It would appear from a review of the literature that "formalism" was not a term found in jurisprudence until after Llewellyn began using the expression — or a shortened version of it. In the last thirty years, however, the term has become a standard way of describing a certain legal perspective. It is currently popular to borrow Llewellyn's analysis of the alternating styles of jurisprudence in America and to describe the period between 1860 and 1920 as the age of formalism.⁹⁷ It must be stressed that we will be talking about a group of thinkers and calling them formalists, even though those thinkers and almost none of their critics used that name. Use of the expression formalism is a convenience — a concession, almost, to modern vernacular.

Dean Langdell, Joseph Beale, and Harvard Law School are commonly identified with formalism and bore the brunt of many of the realists' early attacks.⁹⁸ Langdell was the first dean of Harvard

95. FRANK, *supra* note 71, at 142.

96. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 38 (1960). Although published in 1960, this book represents and summarizes Llewellyn's basic views since the 1920s. *Id.* at 508 (commenting that "the present volume is a direct product" of work done in "the late '20's and early '30's").

97. "Formalism — the notion that social controversies could be resolved by deductions drawn from first principles on which all men agreed or by inductions drawn from the 'evidence' of past decisions — thus became the common denominator of late nineteenth century American jurisprudence." Nelson, *supra* note 3, at 566.

Nelson's use of the category is especially interesting. He argued that the antislavery jurisprudence that opposed decisions such as *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), helped bolster formalism's rise to preeminence after the Civil War. Nelson, *supra* note 3, at 544-66. The number of modern authors who refer to the "age of formalism" is large. See, e.g., HORWITZ, *supra* note 83, at 254; SUMMERS, *supra* note 82, at 138-56; Kennedy, *supra* note 3; David Lyons, *Legal Formalism and Instrumentalism — A Pathological Study*, 66 CORNELL L. REV. 949, 959 (1981). In *The Ages of American Law*, Grant Gilmore refers to this era as "The Age of Faith" and characterizes the period as one of expulsion into "the law's black night." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 41 (1977). In contrast to Llewellyn, Neil Duxbury offers an account that emphasizes the continuity between the Formalist Era and its successors. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (forthcoming 1995). For recent accounts that offer a revised and more positive perspective on formalism, see Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

98. See, e.g., Cohen, *supra* note 86, at 821; William O. Douglas, *A Functional Approach to the Law of Business Associations*, 23 ILL. L. REV. 673 (1929); Karl N. Llewellyn, Book Review, 40 HARV. L. REV. 142 (1926); see also SUMMERS, *supra* note 82, at 26 (identifying Langdell and Beale as central figures of formalism); Golding, *supra* note 20, at 444 (noting

Law School, and although his reign did not last into the twentieth century, his influence was sustained through his writings and proteges.⁹⁹ As Grant Gilmore put it, "if Langdell had not existed, we would have had to invent him. . . . However absurd, however mischievous, however deeply rooted in error it may have been, Langdell's idea [that law is a science] shaped our legal thinking for fifty years."¹⁰⁰ In the following section I will determine whether, and to what extent, Cohen and Pound's three elements can be found in Langdell's and Beale's writings and then examine the substance of the realist critique of formalism.

1. *Langdell*

Langdell believed that law was a science. He declared in 1886 that it

[i]s indispensable to establish at least two things; first that law is a science; secondly that all the available materials of that science are contained in printed books. . . . [T]he library is . . . to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.¹⁰¹

In his preface to his casebook on contracts, Langdell argued that the study of the law could be reduced to the study of a handful of significant cases, with each case representing a principle of law.¹⁰² Langdell's "scientific" method resulted in some doctrinal claims that confounded other scholars. For example, when Langdell wrote his treatise on contracts, the "mailbox rule" had not yet become settled law in American jurisdictions. The rule states that a contract becomes binding when it is signed and mailed by the offeree, not when the document is received by the offeror.¹⁰³ Langdell argued that the very logic of contract law dictated that a written notice stating that a proffered contract had been accepted by the

that the first attack on formalism was led by Holmes against Langdell); Kronman, *supra* note 84, at 335 (equating realism and the attack on "the Langdellian project"); Schlegel, *supra* note 80.

99. Langdell was dean from 1870 until 1895. See ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD 162-205* (1967) ("The Langdell Era"); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

100. GILMORE, *supra* note 97, at 42 (1977).

101. Address by C. Langdell to the Harvard Law School Association, 1886, *quoted in* SUTHERLAND, *supra* note 99, at 175.

102. C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* at vi (Boston, Little, Brown 1871) (noting that the number of fundamental legal doctrines is not very large, but "to have such mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer").

103. See 1 ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* § 78 (1963).

offeree must be received by the offeror before the contract could be formed.¹⁰⁴ Langdell noted that those who supported the mailbox rule "claimed that the purposes of substantial justice, and the interests of the contracting parties as understood by themselves" would be best served by the rule.¹⁰⁵ His response was "the true answer to this argument is that it is irrelevant."¹⁰⁶

There are three aspects of Langdell's treatment of the mailbox rule that merit attention. First, Langdell began his analysis of the mailbox rule with a very specific picture of the meaning of a contract. Langdell's general definition of a contract relied upon a specific conception of consideration. While his argument follows logically, it does not allow for a more textured, less general conception of what counts as a contract or the varying roles that consideration might play in the formation of a contract. Second, Langdell's rejection of reasons from "substantial justice," or the interests of contracting parties, as "understood by themselves" seems counter-intuitive. Assuming that Langdell was right, and the concept of "contract" simply means bilaterally communicated — and received — consent, why would a complex society want to retain "contract" law, as opposed to some permutation of contract law to which we could give a different name?

Third, and finally, we should note something *not* in Langdell's argument. He did not ignore the fact that the courts either did or did not agree with his conclusion that the mailbox rule is bad law. He attempted, in at least two ways, to reconcile his conclusion with those jurisdictions that decided to the contrary. For the vast majority of courts that upheld the parties who urged the rule, but did not

104. When Langdell confronted the mailbox problem, the courts of England and New York had adopted the rule, but those of Massachusetts had rejected it. See C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 18 (Boston, Little, Brown 2d ed. 1880) (citing *McCulloch v. Eagle Ins. Co.*, (18 Mass. (1 Pick.) 278 (1822); *Mactier's Admrs. v. Frith*, 6 Wend. 103 (N.Y. 1830); *Adams v. Lindsell*, 1 B. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818)). Langdell argued that the priority of the offeror's receipt of the offeree's acceptance followed from the doctrine that a promise could not be binding unless it was supported by consideration. The consideration for the offer was the offeree's return promise. But a promise by its nature is not complete until communicated; and Langdell reasoned that an unreceived promise was a promise uncommunicated. Therefore, merely the *intention* to promise, without its receipt, was not consideration.

Langdell noted that of the many cases that ruled in favor of the party urging a version of the mailbox rule, all but three did so with holdings based on other grounds; either they did not mention the rule, or they referred to it only in dicta. The remaining three, he felt, were "neutralized" by the force of the reasoning of their dissenting opinions. See LANGDELL, SUMMARY, *supra*, at 18 (discussing *McCulloch v. Eagle Ins. Co.*, 18 Mass. (1 Pick.) 278 (1822); *Vassar v. Camp*, 11 N.Y. 441 (1854); *Thomson v. James*, 18 D. 1 (Scot. Sess. 1855)).

105. LANGDELL, *supra* note 104, at 20.

106. *Id.* at 20-21.

build the rule in to their holdings, Langdell tried to distinguish: He explained why, in individual cases, the specific facts dictated the outcome without relying on the mailbox rule. For the three cases that flatly contradicted him, Langdell tried to show that they were anomalous.¹⁰⁷

Langdell's writings simply do not support the claim that he was a "legal theologian" in the sense that he believed that the mailbox rule existed independently of what courts actually did.¹⁰⁸ Langdell was acutely aware of the fact that legal principle, unsupported by the actual law found in the judgments of courts, was unlikely to be a correct statement of the law. That some might think otherwise is a bit of a mystery.¹⁰⁹ Langdell treated the decisions of courts as results from a "laboratory" from which all reliable conclusions about the principles of law were drawn.¹¹⁰ Yet, it became commonplace to call Langdell a "legal theologian" who believed that legal principles were eternally inscribed in some "heaven of concepts."¹¹¹ This conclusion, in effect, turns Langdell into some sort of "amoral" natural lawyer. The claim that Langdell endorsed any sort of natural law theory is especially difficult to make sense of, since such a theory apparently would picture law as having an existence independent and prior to legal practice, but its content would not even be

107. See *supra* note 104.

108. See Oliver Wendell Holmes, Book Review, 14 AM. L. REV. 233, 234 (1880). In correspondence, Holmes had this opinion of Langdell's mailbox rule argument:

A more misspent piece of marvellous ingenuity I never read, yet it is most suggestive and instructive. I have referred to Langdell several times in dealing with contracts because to my mind he represents the powers of darkness. He is all for logic and hates any reference to anything outside of it

Letter from Oliver Wendell Holmes, Jr., to Sir Frederick Pollock (Apr. 10, 1881), in 1 HOLMES-POLLOCK LETTERS 16-17 (Mark DeWolfe Howe ed., 1941) [hereinafter Letter to Pollock].

109. See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 535 (1973) (stating that Langdell proposed "a geology without rocks, an astronomy without stars"); Willard Hurst, *Changing Responsibilities of the Law School: 1868-1968*, 1968 WIS. L. REV. 336, 336 (alleging that Langdell thought law was a fixed body of knowledge).

110. The idea that the study of law was an empirical science was a very popular formalist metaphor. Cases were "specimens"; the facts of cases were like "the apple which suggested . . . the law of gravitation." William A. Keener, *The Inductive Method in Legal Education*, 28 AM. L. REV. 709, 713 (1894). Grey's picture of Langdell's science of law was that it was a deductive science, like mathematics. See Grey, *supra* note 99, at 16 ("[Langdell's system] readily suggests a structural analogy with Euclidian geometry."). However, if one compares Langdell's science of law to biology — especially in the inductive Darwinian mode — then one sees that "Langdell's return to original sources . . . and his references to the 'growth' of doctrine, when seen in their late-nineteenth-century context, suggest organicism rather than unitary conceptualism." Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1, 35 (1980).

111. See, e.g., H.L.A. HART, *Jhering's Heaven of Concepts and Modern Analytical Jurisprudence*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 265 (1983).

based on morality but instead on something else — often referred to by the critics of formalism as mere or pure logic.¹¹²

The equation of formalism with natural law — which would have shocked Lon Fuller — had its origins in Holmes's early antiformalist critique of Langdell.¹¹³ In reviewing Langdell's *Summary of the Law of Contracts*¹¹⁴ Holmes first coined the now-famous slogan, "[t]he life of the law has not been logic; it has been experience."¹¹⁵ Although Holmes could not help but be impressed by the treatise, he found Langdell's treatment of precedent cramped and unusable: "[Langdell's] explanations and reconciliations of the cases would have astonished the judges who decided

112. It is difficult to imagine a normative system that is based on pure logic; ostensibly this is supposed to suggest that the formalist norms do not privilege one value system over another — assuming that one accepts a strict contrast between means and ends. Curiously, to the extent that one could imagine such a system based on pure process, it might be related to certain interpretations of John Rawls made by critics of his argument for the "original position." JOHN RAWLS, *A THEORY OF JUSTICE* (1971); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 122-30 (1982).

Nonetheless, the most enduring image of Langdell is precisely that of an amoral natural lawyer. Thus, Richard Posner claimed that Langdell and other nineteenth-century formalists believed that the premises from which judges deduced legal conclusions were "self-evident." Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 182 (1986). Grant Gilmore accused Langdell of believing that "there is one true rule of law which, being discovered, will endure, without change, forever." GILMORE, *supra* note 100, at 43; see also James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 459 (1985) (stating that Gilmore "concluded that formalism's advocates have always assumed that their work was linked to immutable principles").

William Nelson explicitly equated Langdellian formalism and natural law by attempting to demonstrate that the rise of formalism in the late nineteenth century was a backlash caused by the suppression of "higher law" or natural law jurisprudence before the Civil War. Nelson claimed to find "higher law language" in the treatises of formalists such as Thomas Cooley and John Dillon. Nelson, *supra* note 3, at 565; see also Steven M. Quevedo, Comment, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CAL. L. REV. 119, 132-33 (1985) (noting that "[m]any of the cases Nelson uses to describe nineteenth-century antislavery 'formalism' in fact show judges who wholly disregarded existing law in order to bring about justice in accordance with higher law"). Nelson's argument brings us full circle: for him, formalism required the law-applier to use adjudication as a tool to promote justice. As Lynda Paine noted, Nelson's " 'formalism' refers to a position which views law as a means for bringing about a society which conforms to Natural Law." Lynda Sharp Paine, *Instrumentalism v. Formalism: Dissolving the Dichotomy*, 1978 WIS. L. REV. 997, 1013.

113. Holmes's critique of formalism predated the appearance of realism. See MORTON G. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* 11-27 (1976) (maintaining that Holmes, Thorstein Veblen, and John Dewey were the key figures in the "revolt against formalism"); Golding, *supra* note 20, at 452 (averring that the realists' critique of formalism was based on the work of Holmes and John Chipman Gray). Holmes's critique of Langdell was readily adopted by the realists; therefore, for purposes of defining formalism, this section shall treat the aspects of Langdell's work that Holmes identified and rejected as virtually the same as those aspects that realism attributed to formalism. See, e.g., Cohen, *supra* note 86, at 828 (noting Holmes's attempts to reduce legal concepts to empirical conditions).

114. LANGDELL, *supra* note 104.

115. Holmes, *supra* note 108, at 234.

them.”¹¹⁶ It seemed to Holmes that in embracing formalism, Langdell sacrificed accuracy and imagination in order to gain a spurious intellectual tidiness.¹¹⁷ In later essays Holmes expanded his critique of Langdell to cover formalism as a movement. According to Holmes, formalism sought to clothe judicial decisions in the language of formal “logical deduction”¹¹⁸ and to reason from “general axioms.”¹¹⁹ Formalists sought to make law “work[] out like mathematics” and to convince themselves that, if men differed over a question of law, “it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement would inevitably come.”¹²⁰ By emphasizing the role of deduction in formalism, Holmes linked Langdell to the idea that there were *a priori* legal truths, and so connected Langdell — and formalism — to natural law.¹²¹

The attribution of natural law to Langdell was groundless. It was in fact a strategic move designed to help strengthen the nascent antiformalist theories being developed by Holmes and other Progressive legal scholars like Pound. As Horwitz — who cannot be accused of sympathizing with formalism — noted, “the Progressive charge that [formalists] turned to natural law [is] [i]n my judgment . . . largely a fabrication of Progressive thought.”¹²² Horwitz understood, better than any other historian of American jurisprudence, why so many scholars ranging from Pound to Posner would make such a crucial mistake about the nature of formalism. If legal reasoning had to be purely deductive, then one needed legal premises that were not the product of nondeductive processes, such as discretion or legislation. The only premises that could fit this description were *a priori* claims that were either self-evident or true because they reflected some metaphysical reality. Thus, according to Horwitz, the first element of the Cohen-Pound list, that legal principles

116. Letter to Pollock, *supra* note 108, at 17.

117. “Mr. Langdell’s idea in the law, the end of all his striving, is the *logical* integrity of the system. . . . But . . . he is less concerned with his postulates than to show that the conclusions from them hang together.” Holmes, *supra* note 108, at 234.

118. Oliver Wendell Holmes, Jr., *Principle, Malice, and Intent*, 8 HARV. L. REV. 1, 7 (1894).

119. Holmes, *Path*, *supra* note 81, at 465.

120. *Id.*

121. The theory Holmes attributed to Langdell has been described by one contemporary scholar as “determinate-formalism.” BURTON, *supra* note 15, at 4. Burton noted that “Langdell’s effort to create a determinate-formalist science of law is a now undisputed object lesson [in the failure of a legal theory].” *Id.*

122. HORWITZ, *supra* note 83, at 158. Horwitz noted that Cover’s research on the conflict between natural law and formalism in antebellum America undercut the realists’ claim that the formalists “embraced” “higher law.” *Id.* at 158.

are true *a priori*, was not attributed to the formalists as a result of anything they said, but rather because it was a logical consequent of the claim — attributed by anti-formalists to the formalists — that legal reasoning was deductive.¹²³

Many sophisticated historians, such as Horwitz, were content to leave unquestioned the claim that the formalists believed that legal reasoning was deductive and instead focused their critical attention on the claims that follow from the claim that legal reasoning is deductive.¹²⁴ It is not, however, clear that Langdell believed that legal reasoning was deductive, at least not in the way that has been attributed to him. If in fact Langdell was following in the footsteps of Bentham and Austin, one would expect to see in Langdell the influence of the separability thesis, the command theory, or the sources thesis, since these were the central tenets of classical positivism. But one of the most important implications of classical positivism was that law was the product of human will, whether by legislation or judicial discretion. At its very core, classical positivism rejected the idea that legal concepts have an *a priori* existence: Austin and Bentham found Blackstone incredible precisely because classical common law theory ignored the contingent and mutable sources of law. If to be committed to the claim that law is deductive entails commitment to natural law, then it is very hard to understand how Langdell could embrace the central principles of classical positivism while at the same time believing that legal reasoning was deductive.

In fact, Langdell's picture of legal reasoning was not completely compatible with classical positivism, but not because he believed that legal reasoning was deductive. Had Langdell believed that, it would be difficult to see how his theory could bear a family resemblance to classical positivism at all. Langdell's theory of legal reasoning was crippled, as Holmes would say, by being "all for logic," but not, as is commonly claimed, *deductive* logic, but rather *inductive* logic.¹²⁵ This slight difference will explain how Langdell could

123. Horwitz stated:

If general propositions could not decide concrete cases, it was unlikely that one would believe that legal implication from highly abstract conceptions could be non-discretionary. If, by contrast, a concept was thought to have a fixed essence or core of meaning, it was correspondingly easier to derive particular sub-rules or doctrines from more general principles. Much of the Progressive charge that the . . . [Formalists] turned to higher law was really an expression of Progressive disbelief in the claimed power and scope of traditional legal reasoning.

Id. at 157.

124. See, e.g., *id.* at 199; Posner, *supra* note 112, at 182; Quevedo, *supra* note 112, at 123.

125. See Letter to Pollock, *supra* note 108, at 17.

have been in important ways both the target that the antiformalists describe and also the first *American* classical positivist.

The difference between the conclusions generated by a deductive and an inductive system may not be dramatic, but the method and assumptions that they require differ significantly. Many of the most influential studies of formalism have assumed that Langdell meant to model legal reasoning after a deductive science like mathematics.¹²⁶ But Langdell made it clear that he thought that his legal method most closely resembled the new science of evolutionary biology. Langdell believed that the law of contracts could be best understood if one were to "select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines."¹²⁷ Although he compared the law library to laboratories of "chemists and physicists," he was at his most eloquent when he argued that the library is "all that the museum of natural history is to the zoologists, all that the biological garden is to the botanists."¹²⁸ For Langdell, the "truth" of a legal doctrine was like the "truth" about the evolution of an organism: what mattered was not just the final result, but the specific causes and unpredictable forces that got the current doctrine to its current state.¹²⁹ By treating doctrine as an

126. One example is Thomas Grey's reconstruction of the role of logic in Langdell's legal science. Grey suggested that the best analogy to Langdell's "conceptually ordered and universally formal legal system" is Euclidean geometry. In geometry, "[w]e believe that . . . axioms are not merely human constructs, but rather obvious and indubitable physical truths about the structure of space, from which nonobvious truths (like the Pythagorean theorem) can be proved by sequences of indubitable deductive steps." Grey, *supra* note 99, at 16-17. Grey looked to Mill's *A System of Logic* to explain how Langdell, who spoke so often of the role of observation in law, could rely on such a nonobservational metaphor like geometry for his model of legal reasoning. In Mill's system, the purpose of observation is to discover principles about the world that are "so well-confirmed by prior experience that no inconsistent observation could rationally overthrow it." *Id.* at 19 (citing JOHN STUART MILL, *A SYSTEM OF LOGIC* 151-52 (London, Longmans, Green & Co. 1889)). As Grey noted, the systems of reason that rely on these sorts of "objectively true observations" are geometry, in which no one would believe an observation that contradicted the principle that parallel lines do not intersect, and classical physics, where no one would accept an observation that objects of different masses fall at different rates.

127. LANGDELL, *supra* note 102, at vii.

128. RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE 87 (Cambridge, John Wilson & Son 1887). Pound, for all his criticisms of Langdell, recognized the biological foundation of Langdell's theory of legal reasoning:

As teachers of science were slow to put the microscope and the scalpel into the hands of students and permit them to study nature, not books, so we have been fearful of putting reports into their hands and permitting them to study the living law. The merit of revolutionizing legal instruction and putting it on a sound basis in this regard belongs solely to Langdell.

ROSCOE POUND, *THE EVOLUTION OF LEGAL EDUCATION* 14 (1903).

129. Sir Frederick Pollock argued that Langdell's method was primarily about recognizing the *dynamic* quality of legal doctrine over time:

organic living thing, Langdell saw himself as making a dramatic break with the Blackstonian treatise tradition that had dominated American law schools throughout the early and middle nineteenth century.¹³⁰

[No one] has been more ready than Mr. Langdell to protest against the treatment of conclusions of law as something to be settled by mere enumeration of decided points. . . . Decisions are made; principles live and grow. This conviction is at the root of all Mr. Langdell's work and makes his criticism not only keen but vital. Others can give us rules; he gives us the method and the power that can test the reason of rules.

HARVARD LAW SCHOOL ASSOCIATION REPORT OF THE NINTH ANNUAL MEETING AT CAMBRIDGE, JUNE 25, 1895, at 17 (Boston, Harvard Law School Assn. 1895).

The difference between approaching law as an evolutionary science and approaching it as a physical science was most evident in Langdell's view of legal education. Before Langdell, law school education typically took the form of lectures that described the law as a fixed body of doctrine in the Blackstonian sense. See, e.g., SAMUEL WILLISTON, *LIFE AND LAW* 198 (1941) ("In the Harvard Law School before 1870, as well as in other law schools, law was taught from treatises and lectures."); see also John H. Wigmore, *Nova Methodus Discendae Docendaeque Jurisprudentiae*, 30 HARV. L. REV. 812, 816 (1917) (stating that before Langdell, the "didactic type was the same — set lecture and memorized treatise, or both"). Often the students were expected to memorize the text, and there was little or no discussion, since it "was assumed that the author of the textbook had examined the subject and had found out the true rules of law relative thereto. Thus the rules were given . . . [and] it was assumed that the rules were right." Franklin G. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 500 (1920). The case method, which Langdell introduced in 1870, demanded that students go beyond what Blackstone had said about the law and discover the law's principles on their own, through an examination of appellate decisions. See Charles W. Eliot, *Langdell and the Law School*, 33 HARV. L. REV. 518, 518 (1920) ("[Langdell] tried to make his students use their own minds logically on given facts, and then to state their reasoning and conclusions correctly in the classroom."); see also Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1, 6 (1951) ("The case method was designed to produce independent and creative thinking."); Young B. Smith, *The Study of Law by Cases: A Student's Point of View*, 3 AM. L. SCH. REV. 253, 254-55 (1913) (noting that the student studied the things to be defined, rather than ready-made definitions); Speziale, *supra* note 110, at 15 ("Essentially active, the mode of instruction did not emphasize absorption of information from a book or teacher. . . ."). It is ironic that Langdell was considered by his critics to be engaged in a transcendental, nonempirical activity, since the premise of the case method was to inculcate in law students the view that each lawyer had to determine the meaning of a legal rule from the materials before him, and not from a treatise or authority:

Professor Langdell was always willing to reconsider a conclusion in light of new suggestions. . . . A student recently informed me of a course in which Professor Langdell changed his opinion in regard to a case three times in the course of one week, each time advancing with positiveness a new doctrine.

2 CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA* 457 (1908) (quoting William Schofield, 46 AM. L. REG. (n.s.) 273, 276-77 (1907)).

130. The traditional approach to law that Langdell rejected was itself quite dependent on the use of deduction to generate legal conclusions from the few legal principles found in the Blackstonian universe. See Edward J. Phelps, *Methods of Legal Education*, 1 YALE L.J. 139, 142 (1892) (noting that in contrast to the Langdellian method, pre-1870 law schools had students memorize a few well-established principles since "[t]he habit of reasoning from principles to conclusions gave [the lawyer], if he was capable of attaining it, the large comprehension and strong logical power which are the characteristics of the sound lawyer"). As Hoeflich noted, "[t]he notion that law must be treated as a deductive science like geometry had several American supporters during the first half of the nineteenth century including Hugh Swinton Legaré, David Hoffman, and Daniel Mayes." Hoeflich, *supra* note 14, at 112.

Langdell rejected the treatise tradition that was championed by lawyers like Phelps, Legaré, and Mayes; that is why "old fashioned" teachers like Phelps despised the case

It was the pre-Langdellian scholars who, under the influence of Blackstone and other Continental theorists, embraced a quasi-natural law model, in which legal conclusions were deduced from *a priori* principles of law. It is ironic that Langdell was associated with a viewpoint that in an important way was the opposite of what he was trying to argue. Langdell certainly believed that law was a science, as did the theorists whom he opposed. But unlike the theorists' belief that law was a deductive science, like geometry or mathematics, Langdell's radical break was based on his rejection of the deductive model of legal reasoning and his embrace of an inductive model based on the emerging biological sciences. Langdell was still working with a model that placed logic at the center of legal reasoning, but he had a very different idea of the nature of the principles that formed the system of law. Instead of believing, like Blackstone and his American followers in the treatise tradition that legal principles were true *a priori* and unchanging, Langdell accepted that legal principles were the product of contingent events and could have been otherwise.¹³¹

It is precisely Langdell's rejection of the deductive-Blackstonian picture of the origin of legal principles that brings us back finally to formalism's positivist roots. The classical positivists rejected Blackstone because his theory of the common law was inconsistent with the separability thesis, the command theory of law, and the sources thesis. The American treatise tradition of Legaré and Mayes was clearly inconsistent with the command theory and the sources thesis: their picture of law, like Blackstone's, was of a system of *a priori* principles — a position that followed logically from their embrace of the deductive theory of legal reasoning. But Bentham and Austin believed that legal principles were not *a priori* and unchanging. The command theory and the sources thesis clearly

method, and why scholars like Wigmore called Langdell's new approach "daring . . . in those days." Wigmore, *supra* note 129, at 817. On this last point I clearly disagree with Hoeflich, who has argued instead that "[Langdell's] notion of law as a rational science, therefore, was anything but unique or innovative. Indeed, to a very large extent, the Langdellian concept of legal science simply echoed Mayes, Legaré . . . and other earlier jurists." Hoeflich, *supra* note 14, at 120. I find Hoeflich's claim implausible given that the contemporaneous descriptions of the reception of Langdell's approach universally describe a great break with the past. The conflict that followed the introduction of the case method clearly reflected a sense within the legal academy that the view of law and law teaching propounded by Langdell was a break with the Blackstonian treatise tradition that dominated American law before 1870.

131. Thus, as Grey noted, Langdell did not believe that a system of contract law *must* include the element of consideration: "[Langdell] believed that the original adoption of the doctrine [of consideration] had not been logically required by pre-existing law — indeed, going the other way might have been 'the more rational course.'" Grey, *supra* note 99, at 27 (quoting LANGDELL, *supra* note 104, at 60-61).

pointed in just the opposite direction: that legal principles were the product of human will and utterly contingent. We should not be surprised that Langdell followed Bentham and Austin on this point. Langdell's formalism was a product of classical positivism's appearance in America in the second half of the nineteenth century.

2. Beale

The other theorist who was clearly associated with Langdell that the realists held up as a paradigm of formalism was Joseph Beale, Langdell's colleague at Harvard and the American architect of the "vested rights" theory in the conflict of laws.¹³² The problem confronted by the American system of conflict of laws is that a case may be connected to more than one state jurisdiction. A suit may involve the rights, duties, and disputes among persons and events in different places. In such a situation, the forum may decide whether to apply its own law or the law of another jurisdiction as the rule of decision in the case.¹³³ The vested rights approach began with the assumption that in each jurisdiction the legal sovereign has exclusive authority to determine the legal rights of persons within its territory and the legal significance of events occurring there.¹³⁴ In a conflicts case, the sovereign can apply its own laws directly or it can create rules about applying other jurisdictions' laws. This decision is an exercise of legislative discretion undertaken by the legislature or the courts in a quasi-lawmaking capacity.¹³⁵

132. In England the vested rights approach was championed by A.V. Dicey. See generally A.V. DICEY & J.H.C. MORRIS, *CONFLICT OF LAWS* (11th ed. 1987). As Amos Shapira noted, "It is not at all surprising that Dicey, usually considered an adherent of Austinian Positivism, was inclined to endorse such territorialist ideas. His version of the vested rights doctrine, however, is said to display both positivist (effectiveness, convenience) and non-positivist (justice in particular cases) notions." AMOS SHAPIRA, *THE INTEREST APPROACH TO CHOICE OF LAW* 9 n.8 (1970) (citing R.H. Graveson, *Philosophical Aspects of the English Conflict of Laws*, 78 *LAW Q. REV.* 337, 344 (1962)).

133. See LEA BRILMAYER, *AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM* 215 (1986).

134. See 1 JOSEPH HENRY BEALE, *A TREATISE ON THE CONFLICTS OF LAWS* 219 (1916).

135. Whenever an event occurs to which the territorial law attaches a legal consequence, the consequence vests as a right that "remains" with the relevant legal actor until it is vindicated by that territory's sovereign or some other sovereign. Thus, if an event occurs in a jurisdiction — Territory X — that invests it with legal significance, the right has vested under Territory X's law. If suit is brought in Territory Y to vindicate that right, it is a matter of empirical fact whether the right in question has vested. Y is obliged to recognize the duly created right: under the vested rights approach, "[w]henever a forum encounters a duly created, foreign based right or *obligatio* it must accord it respect, by giving it proper effect. Otherwise the territorial-sovereign's . . . 'power to create rights entitled to extra-territorial effect' would be unduly denied . . ." SHAPIRA, *supra* note 132, at 9 (footnote omitted) (quoting Nicholas deBelleville Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 *YALE L.J.* 1087, 1097 (1956)). Beale argued that in order for Sovereign X's unfettered discretion to exist, Sovereign Y was neces-

Beale's formalistic claim that every sovereign was the ultimate source of rights in its own jurisdiction was not some strange form of natural law. Realist critics suggested that Beale, like Langdell, had postulated an "essential nature of law" that would determine eternal principles of conflict rules, regardless of what the courts or legislatures did.¹³⁶ This charge by the realists simply is not true. Beale's purpose, in setting up the vested rights theory, was to avoid the natural law orientation of traditional conflict of law theory. From Beale's perspective, the old theory created an independent body of substantive law that sat above the actual decisions of sovereigns as a separate form of "alleged 'international' private law."¹³⁷

The problem with conflict-of-laws theory before the vested rights approach was that, like other natural law theories, it was impossible to know how to identify the objectively true body of rules, since each interpreter arrived at a different set of "natural" rules. Beale believed that conflict-of-law rules ultimately had to be based on the positive authority of sovereigns, and not on an interpreter's insight into the order of things. The vested rights theory had the advantage of solving multistate cases not according to a supranational body of law but according to "the law of the country in whose courts [the case] arises."¹³⁸ Thus, Beale, in a sense, created a "transcendental" principle of the conflict of laws in order to protect the decidedly nontranscendental foundation of legal rights.¹³⁹ Beale's zeal to protect the unfettered capacity of a legal authority to create rights reflected his commitment to classical positivism's command theory of law and the sources thesis.¹⁴⁰ It is *because* a sovereign has, by definition, unlimited legal authority to create rights,¹⁴¹ that the forum sovereign's unlimited power to disturb a vested right

sarily and logically required to recognize the rights created (if at all) by X, and of course, the same was true in reverse — X was obliged to recognize all and any rights created by Y within Y's territory.

136. See Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 459 (1924); see also FRANK, *supra* note 71, at 60 (comparing Beale's approach to Hooker's theology).

137. BEALE, *supra* note 134, at 112.

138. *Id.*

139. See SHAPIRA, *supra* note 132, at 9.

140. Thus, Shapira found it easy to link Beale's vested rights approach to Classical Positivism: "Traditional choice-of-law thinking is deeply rooted in Austinian Positivism and the analytical school of jurisprudence. The Positivistic flavor of the traditional approach is clearly manifested in its celebrated trilogy of principal underlying dogmas: the interrelated concepts of territorial sovereignty, legislative jurisdiction and vested rights." *Id.* at 9.

141. See POSTEMA, *supra* note 30, at 230-37.

must, by logic, be curbed.¹⁴² While Beale's casebook revealed a formalist passion with abstraction and completeness in the law, it plainly undercut the antiformalists' accusation that Beale's formalism endorsed the view that law was based on *a priori* principles.

Nonetheless, like Langdell, Beale was a target of the antiformalists. Realists such as Cook and Yntema adopted and refined the Holmesian approach. Their attack on Beale had three dimensions. First, they criticized him for basing conflict of law rules on "meta-physical" concepts such as "right" or "duty." For example, Cook accused Beale of approaching the conflicts of law with an *a priori* definition of legal terms.¹⁴³ Cook objected to the vested rights theory because he believed that it did not accurately describe the behavior of courts in the American system *and* because he believed that in a conflicts case, other factors should be considered by the court than just the "fact" that the law of another sovereign endowed the parties with certain rights and duties.¹⁴⁴ Second, Cook and Yntema criticized Beale for practicing mechanical jurisprudence.¹⁴⁵ They claimed that Beale's approach required that vested rights be the product of deduction.¹⁴⁶ Third, Cook and Yntema uti-

142. It should not surprise us that Beale chose to include the following principles in his casebook on the conflicts of laws: "Whenever, therefore, there is a political society, there must be some complete body of law, which shall cover every event there happening. . . . Law once established continues until changed by some competent authority." 3 JOSEPH HENRY BEALE, *CASES ON THE CONFLICT OF LAWS* 502 (1902) (reprinting *Swift v. Philadelphia & R.R.R.*, 64 F. 59 (C.C.N.D. Ill. 1894)).

143. Cook, *supra* note 136, at 459.

144. See *id.* at 476 ("Right," "duty" and other names for legal relations are therefore not names of objects or entities which have an existence apart from the behavior of the officials in question . . ."); see also Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 *YALE L.J.* 468, 476-77 (1928) (book review):

One of the primary difficulties with the vested rights theory is the figurative and undifferentiated character of its terminology. . . . The difficulty is . . . that the symbols of the vested rights theory neither correspond to the social and economic facts with which courts deal nor even accurately suggest the things which are done in courts.

145. Cook observed:

It must be admitted that the "outrageous bit of nonsense" that men think in syllogisms, that they solve the problems of life by deductive reasoning, has apparently ruled in [Beale's theory]. . . .

[Realism] points out that the use [of principles and rules] never can be really mechanical; that the danger in continuing to deceive ourselves into believing that we are merely "applying" the old rule or principle to "a new case" by purely deductive reasoning lies in the fact that as the real thought-process is thus obscured, we fail to realize that our choice is really being guided by considerations of social and economic policy or ethics

Cook, *supra* note 136, at 486-87 (footnotes omitted). Yntema warned that the vested rights theory presupposed a dangerous form of mechanical jurisprudence: "[A]ny system of thought so fragmentary as to base the actual statement or reform of law upon purely logical deductions from combinations of abstract symbols without careful analysis of the practical purposes of legal traditions and institutions considered with reference to the concrete case is . . . socially dangerous." Yntema, *supra* note 144, at 477.

146. See Cook, *supra* note 136; Yntema, *supra* note 144.

lized — or amplified — Holmes's critique that the formalists were unscientific.¹⁴⁷

B. *The Realist Rejection of Formalism and Classical Positivism*

The realists had good reasons to criticize formalism. The particular form of positivism that Langdell and Beale tried to promote was quite crude and implausible. It took the worst aspects of Austin's command theory of law and joined it to a confused picture of legal reasoning. All versions of positivism rely, to some extent, on the identification of a rule of recognition and its commands. But as Hart and many others have since argued, Austin's test for sovereignty and his rule of recognition were inadequate.¹⁴⁸ Furthermore, while Austin's version of positivism required a picture of legal reasoning that provided for the constraint of discretion, Langdell and Beale only considered a role for discretion in the *origination* of legal principles.

Austin explicitly embraced the idea that judges sometimes made law; unlike Bentham, he felt that a clear-eyed recognition of the situations in which judges act in a sovereign capacity would enable law-reformers to design changes that would allow the sovereign to implement its will effectively.¹⁴⁹ Langdell seemed incapable of grasping this important point — perhaps because of his attachment to common law — and for this reason formalism's positivist core was hobbled with an inadequate theory of legal reasoning. Nonetheless, the antiformalist critique of Langdell and Beale did not focus on the ways in which they were inadequately positivist, but

147. Cook, *supra* note 136, at 460; *see also* Herman Oliphant, *A Return to Stare Decisis*, 6 AM. L. SCH. REV. 215, 221-22 (1928). Similarly, Yntema declared that Beale's technique "is superficial and, to that extent, unscientific. . . . It suggests almost no correlation with the studies of a generation in sociological or functional jurisprudence and in inductive logic and scientific method" Yntema, *supra* note 144, at 474. By "scientific method" Yntema meant something different from the valid operation of logic or the rule-governed operations of mathematics. His meaning is perhaps best illustrated by the following contrast he draws: "The table of logarithms and the formulae of stresses and strains are invaluable to the engineer, but they cannot tell him whether the bridge is to be built or, if so, where, nor how high and how broad it is to be and how much it will cost." *Id.* at 481. Science, in Yntema's mind, had to do with discovering ends and fitting means to ends.

148. HART, *supra* note 18, at 50-61 and *infra* text accompanying notes 212-13; *see also* JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 27-43 (2d ed. 1980).

149. Austin ridiculed the "childish fiction employed by our judges, that judiciary or common law is not made by them, but a miraculous something, made by nobody, existing from eternity, and merely *declared* from time to time by the judges." 2 AUSTIN, LECTURES, *supra* note 39, at 634. Austin was clear, however, in his preference for legislation over judge-made law: "no judicious or candid man will doubt . . . that a well-made statute is incomparably superior to a rule of judiciary law." *Id.* at 661; *see also* Hart, *supra* note 2, at 610-11 (commenting on the inevitability of discretion in adjudication because of the penumbral meanings of all legal terms).

instead manufactured a set of charges that misstated formalism's positivist core.

The antiformalist position was based on two lines of criticism, each of which was rooted in one of the elements in the Cohen-Pound list. The first realist objection mirrored one of Cohen and Pound's charges. As adopted in the antiformalist critique of Langdell and Beale, the charge was that the top-level concepts employed in their analysis of contracts and the conflicts of law were neither descriptions of social facts nor statements of moral ideas. There were at least two senses in which the realist charge made sense. First, as Holmes and Yntema claimed, the formalists ignored the real and significant differences between various fact situations; that is, in their pursuit of overly abstract top-level categories, Langdell and Beale sacrificed — or purposely avoided — careful inspections of actual factual differences and similarities among the classifications they created.¹⁵⁰ The second sense was set out by Llewellyn: that the formalists refused to bend rules and decisions of case law to the results that were — or could be determined to be — socially desirable. The lack of social fact or moral ideals in this second sense is not really a lack of analysis or technical knowledge on the part of the formalist, but rather a refusal to use legal reasoning in an instrumental fashion.¹⁵¹

This second realist objection mirrored Cohen and Pound's claim that formalism was committed to a deductive model of legal reasoning. It is not clear what this claim really meant. It probably could not mean, as is often claimed, that the "top-level" concepts used by the conceptualist are presented as objective, or true *a priori*.¹⁵² If we understand Langdell to have been committed to discovering legal principles through induction, then the realists must be charging the formalist with using logic incorrectly either in discovering the original "top-level" concepts or deriving the conclusions that follow from those concepts.¹⁵³ But the realist objection cannot mean, on a trivial level, that the formalists "obeyed" the canons of

150. This is the modest realist criticism. It says that the problem with the formalists was not that they were not scientists, but that they were bad scientists.

151. This is the strong realist criticism: "The formalist[] . . . appeal to notions of consistency, harmony, and coherence is evident. The instrumentalists stressed existing wants and interests, social facts, available legal machinery, community policy, and the predicted effects of alternatives as the primary considerations in lawmaking, not consistency and the like." SUMMERS, *supra* note 82, at 143.

152. See *supra* text accompanying notes 128-29.

153. Summers referred to this criticism of formalism as "deductivism": "[A] judicial decision could not be well justified unless it were strictly entailed by relevant antecedent premises."

logic or reason, in the sense that the realists flouted those canons. The realists respected and employed simple operations of rational method, as their own self-styled attempts to develop a legal science attest. In truth, the "abuse of logic" claim was not really about the method of reasoning employed by the formalist, but about the number and types of legal concepts the formalist found useful or acceptable.¹⁵⁴

Upon reviewing the realists' antiformalist analysis we can see how it was motivated by a deep rejection of the core elements of classical positivism. The realist critique of the first element of the Cohen-Pound list, the unverifiability of formalist legal theory, led naturally to the realist critique contained in the second and third elements of the Cohen-Pound list: the autonomy of legal principles from either social science or morality and the "abuse of logic." Ironically, both of these two flaws were virtues in the eyes of classi-

154. If all the realist meant when he criticized the formalist's "obsession" with logic was that the formalist used an inadequate set of initial legal concepts, then he was simply objecting that formalists were conceptualists. See *id.* at 155 (noting the confusion between the realist critique of the "abuse of logic" and conceptualism).

Another interpretation of the "abuse of logic" argument comes from Llewellyn. He offered a theory of "rule-skepticism" that held that even if legal reasoning was capable of being rational, legal argument ultimately was still indeterminate because there were so many precedents and rules of statutory construction that no judge could apply them in a deductive, mechanical fashion. Under Llewellyn's rule-skepticism, indeterminacy had at least two sources: the malleability and variety of sources of law, and the variety of common law principles for interpreting precedent. In the face of such a multiplicity of outcomes, Llewellyn argued that to imagine that rational operations *alone* could ever make up the bulk of legal reasoning was simply wrong. Legal reasoning had to take into account, at least, the problem of selecting sources of law and selecting methods for the treatment of precedent. See WILLIAM TWining, KARL LLEWELLYN AND THE REALIST MOVEMENT 203-10 (1973).

A third interpretation of the "abuse of logic" argument comes from Frank. He argued that the formalists were wrong because, to put it simply, judicial reasoning was not really a form of rational activity. Frank took seriously Judge Joseph Hutcheson's argument that judges are ultimately forced to rely on an allogical, nonrational mental leap that Hutcheson called the judicial "hunch." Joseph C. Hutcheson, Jr., *The Judgement Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1928). Frank's early writing pursued a twofold project. First, he tried to explain why Hutcheson was correct. Frank suggested that it was because the sources of indeterminacy went deeper than even Llewellyn suspected: The project of trying to expand the range of relevant premises and rules of adjudication was itself of dubious value, since the facts that one would plug into those rules and principles were themselves difficult to identify and often deeply subjective. See Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645 (1932); Golding, *supra* note 20, at 458-59 (describing fact skepticism). Second, Frank tried to explain why this deep indeterminacy was so frightening to the formalists. For example, he attributed "Realism" to subconscious psychological longings interpreted through the theories of Freud or Piaget. See FRANK, *supra* note 71, at 60. Ackerman described Frank's interest in Freud:

While no single work is typical of the Realist movement, Jerome Frank's *Law and the Modern Mind* has worn comparatively well and is probably the most comprehensive Realist effort to expose the fallacies involved in the Classical effort to state legal rules clearly and to systematize them around fundamental legal principles. Assuming a Freudian point of view, Frank condemned this effort as an immature response to the fact that men have only imperfect knowledge and control over reality.

Ackerman, *supra* note 83, at 121-122 (footnote omitted).

cal positivism. The reason why the realist objected to the autonomy of legal principles from either social science or morality was not because the formalist pretended for a minute that the content of a "top-level" legal concept was devoid of either social or moral content. The formalist, like the classical Positivist, argued instead that the acceptability of the content of a legal concept was irrelevant to its existence.¹⁵⁵ This is simply the separability thesis and the command theory at work. Since the formalist was committed to respecting the authority of a valid legal concept regardless of its content, it should not surprise us that the realist — for whom all laws are open to social and moral evaluation — would oppose this element of the Cohen-Pound list.¹⁵⁶

It is also easy to understand why the realist would think that the formalist was guilty of the "abuse of logic." The command theory and the sources thesis required that valid legal principles — however identified — generate legal conclusions; otherwise legal results could not be traced back to the sovereigns that commanded them. But, the realists' real objection to the role of logic in legal reasoning was not that deductive logic was used to produce results from *a priori* principles, but was rather to the claim that practical reason of any variety — deductive or inductive — could be used to constrain the results that legal reasoning generated. Regardless of whether one adopted Llewellyn's rule skepticism or Frank's more radical fact skepticism, the real target of the realist attack on formalism's use of logic was the idea that legal reasoning could constrain legal results. The real focus of the realist critique of the "abuse of logic" element of the Cohen-Pound list was not that it is wrong to think that legal reasoning is deductive but rather that it is wrong to think that legal reasoning can constrain.

The idea that legal reasoning constrains legal results is central to classical positivism; it is a central assumption upon which the command theory and sources thesis rely in order to explain how sovereigns use the law to constrain human action. Realists opposed

155. Thus, Langdell's statement that justice is "irrelevant" in evaluating the mailbox rule. See LANGDELL, *supra* note 104, at 20-21.

156. The separability thesis and the command theory were reflected in those statements by Beale that Cook singled out for his typical withering criticism. See Cook, *supra* note 136, at 460 n.10 ("A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere." (quoting Beale, *supra* note 142, at 517)). There is no question that Beale saw a connection between his theory of vested rights and the separability thesis: "Law as the lawyer knows it is absolutely distinct from any rule of conduct based on a moral ground no matter how strong," 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 4.11, at 44 (1935).

formalism because it brought to American jurisprudence the "model of rules" that formed the core of classical legal positivism.¹⁵⁷ The realists rejected the idea that a legal system could be based on a small number of such principles because accepting the authority of these principles would bar the rejection of any principle because it was unattractive from the point of view of either social science or morality, and would provide constraints on the range of legal results available within the legal system. The elements of classical positivism that the realists rejected in formalism had to do with the capacity of a legal sovereign to limit the legal results available in a legal system through the objective identification of legal rules and the empowering of those legal rules to constrain legal results. What is concealed in the realists' antiformalist attack on the use of deductive logic in legal reasoning is an important and profound rejection of Austin's insight that law is an autonomous social practice.¹⁵⁸

Legal realism and legal positivism were, in fact, deeply antagonistic theories. The tensions between them were not well documented because they fought under other names. To see the state of legal positivism in the United States before 1958, one must look at the substance of the debate and not at the misnomers. Whether we call the object of our search formalism, conceptualism, analytic jurisprudence, Langdellianism, or Bealism is not important. What is important is to identify and to understand the relationship between

157. The term "model of rules" comes from Dworkin, who characterized — accurately, I believe — the core of legal positivism as a commitment to the idea that

[t]he law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by public power. These special rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with their *pedigree* or the manner in which they were adopted or developed.

Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 17 (1967). Dworkin's description captures the three elements of classical positivism described at the beginning of this article. It is very likely that Dworkin's picture of the model of rules is adequate only for classical positivism, and that Hart corrected many of Austin's errors. See HART, *supra* note 18, at 79-98 (discussing the distinction between primary and secondary rules). Furthermore, to the extent that Dworkin was correct in insisting on a theoretical continuity between Austin and Hart, Raz has argued persuasively that the model of rules is not the best foundation for legal positivism. See Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972).

158. The conflation of formalism's inadequate theory of legal reasoning with its potentially adequate theory of law has been noted:

The distinction between styles of reasoning and theories of law has played an important but not entirely clear role in the formalism/instrumentalism controversy. The legal realists, for example, associated formalism with a strictly logical or deductive or quasi-automatic reasoning style, and with theories of law including natural law and judicial conservatism.

Quevedo, *supra* note 112, at 125 (footnote omitted).

these theories and their contemporary rival, realism, and their ultimate heir, positivism.

III. LEGAL POSITIVISM AND THE LEGAL PROCESS SCHOOL

If realism developed, to some extent, in reaction to a specific version of legal positivism, was the same dynamic repeated when realism itself became the object of attack? Part III first argues that a repeat of this dynamic is precisely what happened: the next stage in American legal theory came during the decline of realism, and it was brought about in part by theorists who were positivists. Second, if formalism was, to some extent, an early form of positivism in American jurisprudence, did it evolve into another form of positivism that one can identify in modern theory? This evolution did occur. The legal process school, which had roots deep in formalism's conflict with realism, was a positivist theory based on the Austinian core found in formalism. Finally, what if anything, can be recovered from formalism that is of any jurisprudential value? The answer to this question is more complex and will not be given adequate treatment in Part III. I will, however, suggest in my conclusion that the forms of positivism that followed formalism are at least *compatible* with a number of different approaches to Constitutional law.

A. *The Reevaluation of Realism*

It seems commonly assumed by those who study American law or jurisprudence that the legal process school did not possess a legal theory of great sophistication. It is rare, for example, to see the writings of the important scholars of the 1950s and early 1960s in collections that contain realists like Karl Llewellyn and Jerome Frank, or fundamental rights scholars like Ronald Dworkin and Laurence Tribe. Writers working within the legal process tradition did, however, operate with a background theory of law that was a version of legal positivism, although this background theory was not, at the time, identified as such.

In fact, looking at Henry Hart's 1951 attack on Justice Holmes's alleged legal positivism, one might think that legal process and positivism were antagonistic theories.¹⁵⁹ Hart attacked Holmes's "error" of separating law and morality; he equated Holmes's positivism with the central tenets of Llewellyn-like realism of the

159. Henry M. Hart, Jr., *Holmes' Positivism — An Addendum*, 64 HARV. L. REV. 929 (1951).

1930s.¹⁶⁰ Hart noted that one cannot wholly sever law and morality, and that the latter plays a complex role in shaping the former. Yet Hart was not a natural lawyer or a moral realist — he agreed with Holmes that only a fool would believe “that law was always right, in the sense of embodying eternal truth.”¹⁶¹

Hart was an excellent example of someone who suffered a specific kind of confusion about legal positivism. He equated legal positivism with legal realism, which is peculiar — legal positivism was the object of realism’s attack in the 1920s and 1930s. The great irony is that the values that Hart championed in the face of Holmes’s separation of law and morality were themselves central to legal positivism.¹⁶² Hart’s attack on positivism portrayed in a concise way how the legal process school developed in reaction to — and out of — the success of legal realism. Just because Hart was confused about the equation of legal realism with legal positivism does not mean that he was not right about something. He and others had begun to detect problems with legal realism, and their early criticisms foreshadowed what would eventually become, however briefly, the new dominant ideology of American law — legal process.

Hart’s essay was written during a period of transition in American jurisprudence in which legal realism was coming under serious attack from a new generation of legal scholars. Realism, which had come into prominence in the late 1920s, had come to dominate academic legal discourse by the end of the 1930s. Instead of settling into a period of comfortable orthodoxy, however, realism in the 1940s confronted a wave of reaction that caused the movement to splinter as some realists began to retract some of their more extreme statements.¹⁶³

There were two waves of reaction to the realists. The first was directed primarily against realism’s first tenet, the temporary divorce of law and morals. For the realist, the practical consequence of this temporary divorce of law and morals was that the scientific understanding of the law would later allow for its reunion with

160. “The first part [of Holmes’s *The Path of the Law*] explains what law really is — something entirely separate from morals . . .” *Id.* at 930.

161. *Id.* at 936.

162. Mark DeWolfe Howe attempted to draw attention to this point in his response to Hart’s essay. See Mark DeWolfe Howe, *Holmes’ Positivism — A Brief Rejoinder*, 64 HARV. L. REV. 937, 939 (1951).

163. See SUMMERS, *supra* note 82, at 277-78.

morals so that law became a "means to an end."¹⁶⁴ The realists, however, did not pay much attention to the method by which ends were selected or justified. Most realists seemed content to borrow from early twentieth-century pragmatism.¹⁶⁵ Given the diversity among the realists' moral beliefs and the fact that even the most relativist of realists approved of the policies of the majority during the New Deal, the divorce between law and morality did not become an issue until fascism began to rise in Europe.¹⁶⁶ Regardless of whether relativism could be fairly attributed to realism, by 1940 critics grew concerned that the realists' stinging critique of the operation of law in a democracy would render meaningless the distinction between the competing political theories of the Allies and the Nazis.¹⁶⁷ The second wave of reaction also used fascism as its foil

164. Herman Oliphant, *The New Legal Education*, 131 NATION 493, 495 (1930) ("[M]any [liberals] are eager to stop talking and begin studying law as a means to present ends.").

165. See, e.g., JOHN DEWEY, *THE QUEST FOR CERTAINTY* 254-86 (1929); JOHN DEWEY, *THEORY OF THE MORAL LIFE* 97-101 (1932). Most of the realists did not study moral philosophy beyond developing a rough appreciation for the relationship between pragmatism and utilitarianism. See SUMMERS, *supra* note 82, at 47 ("[Most realists] appeared, at least in their theoretical moments, to adopt conventionalist and utilitarian notions of value."); see also Walter Wheeler Cook, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 51, 59-63 (Julius Rosenthal Found., Northwestern Univ. ed., 1941) (calling for the "application of scientific methods of inquiry to the field of 'values'"); Herman Oliphant, *Current Discussions of Legal Methodology*, 7 A.B.A. J. 241 (1921) (noting that law's duty is to advance shared values). Nonetheless, some realists were far more explicitly relativistic in their metaethical views. See, e.g., THURMAN W. ARNOLD, *SYMBOLS OF GOVERNMENT* at iv (1935) (noting that law is "symbolic thinking and conduct which condition[s] the behavior of men in groups"); EDWARD STEVENS ROBINSON, *LAW AND THE LAWYERS* 225 (1935) ("[T]here is not now and never has been a deductive science of ethics."); Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303, 306 (1927) (stating that human knowledge has "reached the era of relativity"); Underhill Moore, *The Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609, 612 (1923) ("Ultimates are phantoms drifting upon the stream of day dreams."); Walter Nelles, Book Review, 33 COLUM. L. REV. 763, 767 (1933) ("I deny ethical right and ought without qualification.").

166. As Purcell pointed out:

Although the young [realist] critics were firm believers in democracy, most of them embraced an empirical relativism that raised both practical and theoretical questions about the nature of democratic government.

....
To harm the cause of democratic governments was the last thing the realists hoped to do. . . . [They] were all ardent New Dealers who shared a strong hostility to the method of juristic reasoning that struck down social welfare laws and wrought what they considered great human injustices.

Purcell, *supra* note 83, at 434, 436.

167. See EDGAR BODENHEIMER, *JURISPRUDENCE* 316 (1940) ("There is a certain danger that the skepticism of realistic jurisprudence may, perhaps very much against the wishes of its representatives, prepare the intellectual ground for a tendency towards totalitarianism."); Lucey, *supra* note 23, at 533 ("Democracy versus the Absolute State means Natural Law versus realism."); see also Harris, *supra* note 4, at 179-82 (connecting legal realism with idealism and suggesting idealism leads to fascism). Lon Fuller and Roscoe Pound endorsed and repeated these criticisms of realism. See FULLER, *supra* note 4, at 89-91; ROSCOE POUND, *CONTEMPORARY JURISTIC THEORY* 9 (1940). It should be noted that prominent realists attempted to refute the charge that they were moral relativists. See, e.g., K.N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 603 & n.17 (1940)

but focused on the relationship between realism and its attack on the ability of rules to restrain the state. The coalition that propounded this view included critics of the New Deal who had never forgiven the realists for their support of Roosevelt as well as Catholic law professors who feared that the realists would aid social reformers who would overturn those legal rules that protected private property and "separate" institutions like the church.¹⁶⁸

The younger postwar critics for whom Hart spoke were not necessarily sympathetic to either wave of reaction described above.¹⁶⁹ Hart, like many in his generation, was sympathetic to the metaethical claims of moral relativism.¹⁷⁰ When they were younger, Hart and his generation supported the arguments that helped the executive gather new powers. After all, Hart came of age professionally in the midst of the New Deal, and many of his colleagues were enlisted into a war effort that, in the name of fighting fascism, brought large sectors of the economy under central state control.¹⁷¹ Hart's attack was directed against the realists' picture of adjudication. Hart and his generation recognized that realism's primary lesson, that judges make the law and do not find it, had a kernel of truth in it, but they wanted to refine this truth. They thought that the skepticism of Frank or Arnold went too far. By teaching that *all* aspects of the legal process were shaped by subjective preferences and acts of power, the realists risked overlooking the critical ways in which rules and principles constrain legal actors.

In his essay on Holmes, Hart argued that we must look for moral claims in law "because an examination of those claims leads inexorably to examination of the *mechanisms for orderly change*, and thus to the very heart of the *process* by which justice can be achieved through law."¹⁷² Thus, for Hart, Holmes was correct to

(offering to do "penance" for contributing to the confusion that realism rejected moral truth); see also Max Radin, *In Defense of an Unsystematic Science of Law*, 51 YALE L.J. 1269, 1275 (1942).

168. See, e.g., Raoul E. Desvernine, *The Creed of Americanism*, 17 NOTRE DAME LAW. 216 (1942); Purcell, *supra* note 83, at 440.

169. But see Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561 (1988) (discussing how Cold War political pressures pushed legal scholars away from realism and toward legal process and the antipragmatist political theory that lay behind it).

170. See Hart, *supra* note 159, at 936: "[Holmes] revolted against any suggestion that law was always right, in the sense of embodying eternal truth. In this, almost all of us today will follow him."

171. See, e.g., Henry M. Hart, Jr., *The United States Supreme Court: An Argument on the President's Side*, HARV. ALUMNI BULL. 767 (1936).

172. Hart, *supra* note 159, at 937 (emphasis added). Hart's use of the words "mechanism" and "process" are significant; they reemerge as important elements in his later writings and in those of his colleagues.

point to the subjectivity of moral judgment but wrong to conclude from the simple truth that morality is subjective that legal systems cannot organize and constrain the exercise of subjectivity. Holmes's sin was not his separation of law and morals — despite what Hart says elsewhere in the essay — but his widespread cynicism about the role of *reason* in law. That is why Hart attacked the realist slogan that “[i]t is not what the judges say which is important but what they do,” for its complete exclusion of “reason and argument” from law, as opposed to attacking the effort to separate law and morality.¹⁷³ In the 1930s the realists demonstrated that judges could act disingenuously and argued that in the right circumstances, judicial disingenuity would not be a bad thing. After witnessing the abuse of the rule of law in Germany, the postwar critics of realism began to attack the disingenuous uses of precedent and doctrine. Hart and other postwar critics began to focus on the *reasoning* judges used to justify their decisions.

B. *The Development of Reasoned Elaboration*

In the 1950s legal scholars grew increasingly convinced of the importance of practical reasoning in adjudication, and as a result, “judging” judicial performances became a popular activity in the academy. This new commitment to practical reasoning came to be called “reasoned elaboration.”¹⁷⁴ In this regard, the history of the *Harvard Law Review* Foreword to the annual Supreme Court survey (hereinafter “Foreword”) is a useful lens through which to chart the development of reasoned elaboration as a critical institution.¹⁷⁵ The legal process school's critique of realism should not be seen merely as a reaction to the excesses of realism but in fact should be seen as a principled attempt to resurrect positivism by reshaping formalism's inadequate theory of adjudication. The legal process school's work in this area did not take place only in the shadows of the doctrinal scholarship of the Forewords. The response to the re-

173. *Id.* at 933. Hart was referring in part to FRANK, *supra* note 71, at 121-26 and Joseph W. Bingham, *What Is the Law?*, 11 MICH. L. REV. 1, 16 (1912).

174. Legal reasoning, in its various forms, has always been at the center of debates about law. See, e.g., EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948). By saying that “reasoned elaboration” resulted from a renewed interest in practical reasoning in law, I am suggesting two things. First, that *in comparison* to the preceding period, reasoning regained importance in the eyes of legal scholars. Second, that a group of scholars were self-consciously attempting to develop a theory of practical reasoning for the legal problems of their day; not that the methods they ultimately adopted were novel or had never been used by other legal scholars earlier in American history. See also Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601 (1993).

175. See Peller, *supra* note 169, at 571 (noting connection between Forewords and development of legal process).

alist critique of formalism was set out both in the Forewords and in other, more theoretical texts, such as Henry Hart and Albert Sacks's *The Legal Process*.¹⁷⁶

The theory of reasoned elaboration was built in stages, culminating in Henry Hart's famous 1959 Foreword. The first Foreword was published in 1951 and served as simply what its title promised: a short introduction written by a member of the faculty to the student-authored summary of important Supreme Court decisions of the previous year. The Foreword eventually evolved into an institution in its own right, in which a major scholar not only reviewed the past year but took the opportunity to set out a substantive theory of constitutional law.¹⁷⁷ But even the earliest Forewords were, despite appearances, more than a survey. The theme that dominated the first decade of the Foreword was the question of the Supreme Court's competence at legal reasoning. The very first Foreword set the tone of the debate by stating the accusation that the Vinson Court was "crippled" by the presence of lazy and incompetent justices.¹⁷⁸

Louis Jaffe, the author of the first Foreword, suggested that the weakness of the Court caused the Justices to hear a smaller proportion of appeals than ever before.¹⁷⁹ Jaffe did not say whether he thought the Court had reached the proper result in the cases he reviewed. His stated concern was with what he called the Court's "relative lack of institutional awareness and pride."¹⁸⁰ More than anything else, he wanted to see more open debate and clearer explanations by the Court of its decisionmaking processes. Jaffe argued that the Court, as an institution, had a duty to produce *legal reasons* that the nation could use in its ongoing debate over the meaning of the Constitution.¹⁸¹ As the decade progressed, the

176. HART & SACKS, *supra* note 17.

177. Perhaps one of the earliest examples of this use of the Foreword is Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961), which was the foundation for ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

178. Louis L. Jaffe, *The Supreme Court, 1950 Term — Foreword*, 65 HARV. L. REV. 107, 107 (1951) ("[The Court was] crippled by the presence of three or more lazy, incompetent justices. . . . So . . . it shirk[ed] the elementary business of guidance and direction.").

179. Jaffe endorsed the criticism that "there is a suspiciously large number of denials in cases of apparent first importance." *Id.* at 108-09; see also Fowler V. Harper & Alan S. Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term — An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950).

180. Jaffe, *supra* note 178, at 113.

181. *Id.* at 114. Jaffe blamed legal realism for the decline in the Supreme Court's institutional performance: "If a reason can be assigned [for this decline] . . . it may in some measure be due to an oversteering by the 'realists' and 'liberals' of the political function of the Court." *Id.* at 114. Jaffe noted that the return of political decision making was a little ironic:

Supreme Court's performance, as measured on the scale of its mastery of legal reasoning, became the central axis along which critiques of the Court were mounted. Eventually the rhetoric of blame directed toward realism disappeared, but we cannot ignore the role this rhetoric played in laying the foundation upon which the legal process school developed reasoned elaboration.

In the 1954 Foreword, Albert Sacks praised the Warren Court's segregation cases but focused most of his attention on the Court's use of "summary opinions" to dispose of some of the year's most difficult legal issues.¹⁸² The essay not only analyzed the reasoning in the Court's decisions, it also attempted to demonstrate that in a significant number of cases, the Court provided no reasons *at all* where a decision to overturn or affirm demanded an explanation. In these cases, "[t]he difficulty is not in the result reached, but in the absence of explanation of what was decided."¹⁸³ Sacks was concerned with more than just the fact that a summary decision produced no precedent and provided no guidance for the public. He was also concerned that summary opinions risked undermining the legitimacy of the Court's power.¹⁸⁴ In the next group of Forewords, the Court was criticized for its denial of certiorari in clearly ripe but controversial cases.¹⁸⁵ In the Foreword discussing the 1954 Term, it was noted that the Court evaded not only the predictably politically sensitive race and loyalty-security cases, but even an uncontroversial, albeit difficult conflict-of-laws case.¹⁸⁶ According to that Foreword, the evasion of difficult decisions and the messy results produced by such evasions were as unprincipled as political judging.¹⁸⁷

"There is irony in the possibility that the 'realists' who insisted for so long that the Court's work was not law but politics have made good their claim. . . . The brand of politics [however] will not necessarily satisfy the hopes of the 'realist'" *Id.* at 107.

182. "The term 'summary opinion' as used here is not meant to include all per curiam opinions Rather, the term includes those per curiam opinions in which the reasons for the decision are either entirely omitted or set forth in a few sentences." Albert M. Sacks, *The Supreme Court, 1953 Term — Foreword*, 68 HARV. L. REV. 99 (1954).

183. *Id.* at 103.

184. "At stake is the value which the Court handled so carefully and so well in the *Segregation Cases*, the acceptability of the Court's decisions to lower courts and to the Bar as a whole." *Id.* at 103.

185. "There will be no praise here for 'judicial statesmanship.' . . . Too often 'judicial statesmanship' is used, not to describe wise judicial opinions, but to praise unstated and even unjustified reasons for decisions or failure to decide." Robert Braucher, *The Supreme Court, 1954 Term — Foreword*, 69 HARV. L. REV. 120, 120 (1955).

186. *Id.* at 127 (discussing *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955)).

187. *Id.* at 127 ("[A]lternative grounds of decision and even sheer dicta have traditional and legitimate roles in guiding lower courts, government agencies, the bar and the people. . . . [S]uch pronouncements may perform real public service.").

The next stage in the development of reasoned elaboration was reflected in Ernest Brown's attack in 1958 on the Supreme Court's practice of reversing lower court opinions through per curiam opinions.¹⁸⁸ He challenged the suggestion that, in many cases, the Court, on the basis of the record, the briefs for and against the petition for certiorari, and nothing more, could have had enough information to determine that the lower court's decision had been "clearly erroneous."¹⁸⁹ So as not to appear as if he were pursuing this argument for political ends, Brown chose as his example a set of cases "remote from the livelier political and social controversies of the day" — the relative status of government and commercial liens¹⁹⁰ — and concluded that the Court's disposition by per curiam reversal conformed to no rational pattern.¹⁹¹ Brown's concern was not only that the lack of reasoned decisionmaking deprived the nation of an important legal resource, or that the Court was avoiding hard cases — to put it bluntly, he was worried that the Court's new-found taste for per curiam reversals was evidence of the Court's inadequate abilities.

Finally, in 1959, Hart attempted to synthesize the earlier criticisms and offered a cure to the Court based on the values of reasoned elaboration. Hart looked back upon the recent criticisms of the Court and concluded that its "failures [were] threatening to undermine the professional respect of first-rate lawyers for the incumbent Justices of the Court."¹⁹² Hart saw a relationship between the rise in summary and vacuous opinions and the rise in individual dissents and fragmented majorities. He argued that if the Court had more time to deliberate and reflect, it would produce more carefully reasoned opinions, *and* if all nine Justices were to reflect

188. The Foreword was dedicated to the examination of this "increasingly frequent practice." Ernest J. Brown, *The Supreme Court, 1957 Term — Foreword: Process of Law*, 72 HARV. L. REV. 77, 77 (1958).

189. *Id.* at 80.

190. *Id.* at 82-87 (discussing *United States v. R.F. Ball Constr. Co.*, 355 U.S. 587 (1958); *United States v. White Bear Brewing Co.*, 350 U.S. 1010 (1956); *United States v. Colotta*, 350 U.S. 808 (1955)).

191. *Id.* at 94 ("It is difficult to resist the conclusion that improper disposition of a case is some indication of less than complete familiarity and understanding.")

192. Henry M. Hart, Jr., *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 101 (1959). Hart was in fact endorsing the verdict of two other legal process scholars, Alexander Bickel and Harry Wellington, who in 1957 had noted the Court's tendency toward "an increasing incidence of the sweeping dogmatic statement." Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957). They argued that for the Court to come up with the correct result without correct reasoning did not further constitutional law because "such a decision does not attempt to gain reasoned acceptance for the result, and thus does not make law in the sense which the term 'law' must have in a democratic society." *Id.* at 5.

fully on each issue, there would be greater unanimity among the nine Justices.¹⁹³ In this case, the right answer would win the assent not only of more of the Court, but of the legal community and the nation as well. Thus, the legitimacy and persuasive power of the Court would be strengthened by better legal reasoning.¹⁹⁴

The fundamental proposition supported by each succeeding set of Forewords was that a judgment accompanied by a reasoned justification — whatever its political outcome — was better than a judgment alone even if the latter reflected the right result. The authors of the Forewords believed this for three reasons. First, as Jaffe suggested, in a realist contest of wills within the judiciary, it is difficult to predict whose politics will win; on the other hand, the demand for a reasoned justification limited the extent to which a single political perspective could capture the Court. Second, as Sacks and Brown suggested, judicial statesmanship — through the use of the denial of certiorari and per curiam affirmances and reversals — denied the nation a crucial resource. The reasoning behind the Court's decisions was critical to the creation of understandable and guiding precedent; and furthermore, only by revealing its reasoning could the Court enable people to grasp the principle underlying a decision to let precedent stand. Third, as Hart suggested, there was likely to be a relationship between the quality of a decision's underlying reasoning and the likelihood of the decision's being right. The best way to ensure that the Court actually engaged in sufficient reasoning about a case was to demand to see the process in writing; further, the best way to ensure that the Court reasoned well about a

193. Hart was assuming, of course, that legal reasoning is a bit like shooting at a target: the more people and more attempts there are, the greater the likelihood of hitting the "right" answer. Hart attributed this result to the phenomenon of the "maturing of collective thought." Hart, *supra* note 192, at 100. According to Hart,

Ideas which will stand the test of time as instruments for the solution of hard problems do not come even to the most gifted of lawyers in twenty-four hours. Indeed, they do not come with dependability to any single individual even in much longer periods of study and reflection. Such ideas have ordinarily to be hammered out by a process of collective deliberation of individuals, gifted or otherwise, who recognize that the wisdom of all, if it is successfully pooled, will usually transcend the wisdom of any.

Id. Hart revealed a classical liberal assumption in this statement. Like Mill or Madison, he was skeptical of idealism and the utility of abstract reasoning; he placed more faith in the operation of the marketplace of ideas, where truth, which exists, is uncovered through the constant friction of conflict and debate. It is interesting that, at the same time Hart made this argument, "pluralism" in political science, which attempted to defend a modernized version of Madison, was becoming dominant within its own field. See, e.g., ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956).

194. Furthermore, Hart suspected that eventually the number of petitions going up to the Court would decline if it took fewer cases: "[I]ts dockets would be freed of large numbers of cases which now come there only because of the uncertainties which are generated by the failures of reasoning of previous opinions." Hart, *supra* note 192, at 125.

case was to demand that it review its reasoning process often and among as many of its members as possible.

Thus, reasoned elaboration was a theory of adjudication in which reason served three functions: it controlled political willfulness, it provided the public with principles around which action could be planned, and it helped increase the likelihood of the right outcome.¹⁹⁵ It is clear that the realists would have denied each of these propositions. The idea that political decisions could be limited by institutional arrangements was, of course, one of the first myths attacked by realism. Similarly, legal realists belittled the value of the public exposition of principles by the courts, arguing that rulemaking was an act of mythmaking. Finally, the realists would have been mystified by the idea that there was a "right" legal answer to which the court could be held accountable and towards which judges could be directed through institutional reform.¹⁹⁶ On the other hand, in rejecting the realist model of legal reasoning, the legal process school was resurrecting and reinterpreting the core features of classical positivism.

The extraordinary interest in adjudication in the Forewords was an attempt by realism's critics to advance beyond formalism's failure to grapple with the problem of legal induction. The legal process school's interest in controlling political willfulness reflected an interest in a theory of constraint that took seriously the separation of law and morality. Its interest in the public exposition of principle reflected an attempt to provide a liberal and attractive interpretation of classical positivism's command theory of law. Furthermore,

195. Hart seemed most concerned with the Court producing the right answers to the substantive legal questions presented in the case; he did not raise the question of why the Court, as opposed to another branch of government, should endeavor to produce the right answer. Wechsler was the first legal process scholar to draw an explicit connection between the methodology of reasoned elaboration and the justification of judicial review. See *infra* text accompanying notes 232-38.

196. There was, in fact, a realist reaction to the reasoned elaboration critique of the Court. Judge Thurman Arnold responded to Hart's Foreword with a strongly worded critique in which he attacked Hart's premise that law-appliers acted differently from lawmakers. Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1311 (1960). Arnold questioned whether Hart's ideal could ever be a reality, and he concluded by rejecting the idea of the "maturing of collective thought":

There is no such process as this, and there has never been; men of positive views are only hardened in those views by such conferences.

.....
The only kind of court that could successfully follow Professor Hart's prescription would be a court composed of men without deep seated convictions about current national problems . . . ; such a court might be found in a Trappist monastery. *Id.* at 1312-13. In the following year's Foreword, Erwin Griswold rejected Judge Arnold's critique: "Arnold's argument wholly fails. . . . To me 'the maturing of collective thought' is a profound reality." Erwin N. Griswold, *The Supreme Court, 1959 Term — Foreword: Of Time and Attitudes — Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 85 (1960).

its attempt to develop strategies for discovering the right result in adjudication reflected an attempt to take seriously the sources thesis and to hold judges accountable to the sources of law in American constitutional law.

C. *The Jurisprudential Foundations of Legal Process*

Advocates of reasoned elaboration in the 1950s had their own jurisprudential text that supported their view of constitutional adjudication. The generation of Harvard scholars that attacked the realist legacy also took part in an ongoing project led by Hart and Sacks that eventually resulted in a collection of materials entitled *The Legal Process*. The manuscript remained unpublished for thirty-six years, but its typewritten pages had been copied in various formats and used frequently at Harvard as well as other law schools.¹⁹⁷ *The Legal Process* does not have a reputation as one of the major texts of American jurisprudence.¹⁹⁸ Yet a brief examination of the materials reveals that the volume contains — amidst the very technical discussions of case law and legislative processes — a substantial one-hundred-page discussion of the philosophy of law. This section will briefly sketch the theory of law set out by Hart and Sacks and then argue that their theory of law is rooted in legal positivism.

1. *Hart and Sacks's Theory of Law*

The section in *The Legal Process* on jurisprudence was entitled "Introductory Text Notes on the Nature and Function of Law." It should come as no surprise that Hart and Sacks began the chapter with a rejection of legal realism. They stated that their theory of law "reject[s] the teaching of a vast body of literature which has accumulated during the last half century seeking to equate the methods of the various social sciences, and in particular of law, with the method of the natural sciences."¹⁹⁹ Hart and Sacks put into this category Felix Cohen, Walter Wheeler Cook, Jerome Frank, and

197. The editors of the 1994 Foundation Press edition are to be credited for facilitating the long-overdue publication of *The Legal Process*. In addition, Professors Eskridge and Frickey have written a very thoughtful critical introduction to the book. See William N. Eskridge, Jr. & Philip P. Frickey, *Introduction to HART & SACKS*, *supra* note 17, at li-cxxxvi.

198. I do not mean to suggest that *The Legal Process* was not highly regarded in the academy. It influenced a wide range of legal scholarship in areas as diverse as procedure, legislation, and statutory interpretation. See *id.* at cxxv-cxxvi (noting the influence of *The Legal Process* in legal scholarship). I do think, however, that it has not been given the same regard by legal philosophers. This trend may be changing. See, e.g., Duxbury, *supra* note 174, at 653-69.

199. HART & SACKS, *supra* note 17, at 107.

Oliver Wendell Holmes. They noted that "in the American legal tradition . . . the notion that law can somehow be drawn from the behavior patterns of the people has been [linked to] the notion that ethics is a body of thought to be distinguished sharply from law,"²⁰⁰ a position that Hart and Sacks rejected. On the other hand, Hart and Sacks did not reject the temporary divorce of law and morality. Immediately after criticizing Holmes for separating law and morality, they explained that they saw the relationship between law and morality as based on the principle of "institutional settlement," which "requires that a decision which is the due result of duly established procedures be accepted whether it is right or wrong — at least for the time being."²⁰¹ Hart and Sacks therefore recognized that there is no necessary connection between law and morality, and therefore embraced at least one central tenet of legal positivism, the separability thesis.

The principle of institutional settlement reflected Hart and Sacks's attempt to find an instrumentalist justification for the separation of law and morality. They argued that since law was an institutional procedure that established the conditions necessary for community life to perform its role in the development of man, the perfection of law as an institution was separate from the identification of the ends that it would be used to pursue.²⁰² For them, the test was not whether the institutional procedure in question tended directly to promote the development of man; it was whether the institutional procedure promoted the *conditions* necessary for the complete development of man. If community life is the condition necessary for the complete development of man, and the total satisfaction of valid human wants is the ultimate purpose of community, then it follows that for Hart and Sacks a "law" is any institutional procedure that promoted the total satisfaction of valid human wants.²⁰³

Hart and Sacks did not mean that the law has to be tested against a specific moral code, as some of the Catholic natural law-

200. *Id.* at 108.

201. *Id.* at 109.

202. "[T]he ultimate test of the goodness or badness of every institutional procedure and of every arrangement which grows out of such a procedure is whether or not it helps to further" the task of "establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of man." *Id.* at 102 (quoting Joseph M. Snee, *Leviathan at the Bar of Justice*, in *GOVERNMENT UNDER LAW* 91, 96 (Arthur E. Sutherland ed., 1956)).

203. *Id.* at 104. That the total satisfaction of valid human wants is an ultimate objective is indicated by the fact that it is referred to as "the great desideratum." *Id.*

yers from the 1940s argued.²⁰⁴ Had they believed that, Hart and Sacks would have found themselves in the natural law camp after having just avoided the realists. Instead, they avoided this unwelcome result by demanding that the definition of a valid human want ultimately refer back to the principle of institutional settlement.²⁰⁵ The principle of institutional settlement tells us to treat some wants as valid or invalid according to the norms imposed upon us by our legal system. But this puts us back to the point where we began: the principle of institutional settlement and Hart and Sacks's definition of law are consistent because, ultimately, a law is an institutional procedure that helps to establish the conditions necessary for community life to achieve its own ends. Hence, their statement that "law is concerned essentially with the pursuit of purposes"²⁰⁶ went right to the heart of legal process as a positivist theory of law.

Law was wholly instrumental for Hart and Sacks, and it was about achieving society's purposes — whether for good or for evil.²⁰⁷ They believed that although it was possible to have many different legal systems promoting many different purposes — some moral, some not — it was impossible to construct a legal system that at its most basic level did not issue purposive commands. This claim is, in essence, the command theory of classical positivism.²⁰⁸

204. This is not to suggest that all natural lawyers share in the neo-scholastics' simple-minded test for law. I bring the neo-scholastics up only because they, along with Lon Fuller, were the sort of natural law theorists writing during the 1940s and early 1950s. Although they differed in the type of test they applied, both the neo-scholastics and Fuller used morality as a test for the existence of a law or legal system.

205. See HART & SACKS, *supra* note 17, at 112 ("To the extent that doubt is possible about the validity or ranking of certain human wants, or of certain wants for certain people, the procedure of institutional settlement often operates to remove the doubt.").

206. *Id.* at 108-09.

207. It is for this reason that I believe that Fuller would find Hart and Sacks' definition of law unacceptable. He would have to make the same argument against them that he made against H.L.A. Hart's form of legal positivism. See Fuller, *supra* note 2, at 661-72 (arguing that the interpretation and creation of law is necessarily driven by moral standards, even if those standards are unacknowledged). But see LON FULLER, *THE MORALITY OF LAW* 223 n.32 (2d ed. 1969) (suggesting that Henry Hart and he might agree on the ends of law). To say that, at a minimum, law performs a coordinating function is consistent with recent theories of legal positivism. See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* 116-21 (1979); RAZ, *supra* note 148, at 101-04.

208. An objection one might raise to the foregoing analysis is that Hart and Sacks said that their theory of law-as-purposive-commands was itself based on a claim of morality. One could rightly point to the following passage:

[I]t is important to see that this distinction . . . is not in a just sense a distinction between law and morals. It is a distinction rather between one aspect of morals in relation to law and another. For the proposition that settled law should be respected, until it is duly changed — that a decision is in some sense "right" simply because it has been duly made — is itself an ethical concept, resting on the recognition that defiance of institutional settlements touches or may touch the very foundations of civil order, and that without civil order, morality and justice in anybody's view of them are impossible.

The only claim that positivism could not concede, and that Hart and Sacks's arguments did not imply, is that the identification of the norm to which one has a moral duty to obey necessarily relies upon the truthfulness of a moral claim. Hart and Sacks's position is compatible, however, with a plurality of mutually exclusive social systems because it says nothing more than that one has a duty to promote those conditions that allow a community to flourish. Unless one operates with an unnaturally narrow definition of what it means to flourish, or is skeptical of the possibility of a variety of social systems being able to promote flourishing, Hart and Sacks's definition of law is consistent with a variety of legal systems, not all of them based on a single, or objective, moral truth.²⁰⁹

Hart and Sacks were clearly concerned with focusing on law as an *authoritative* system. Building on the basic definition of law examined above, they argued that legal systems are "general directive arrangements":

The establishment of a system of institutionalized procedures of settlement necessarily implies general understandings about the kinds of questions which each of the procedures in the system, whether official or private, is going to settle and something about how it is going to settle them. The system has necessarily to include one or more institutions authorized to reach additional general understandings for handling new problems or dealing more effectively with old ones.²¹⁰

This description corresponds with the position developed by H.L.A. Hart about the relationship between primary and secondary rules, which in turn grounded Hart's argument for the existence of a rule of recognition that would provide members of the community with a social rule for legal validity.²¹¹ Although Hart insisted that his

HART & SACKS, *supra* note 17, at 109. If opponents of positivism want to claim this passage as proof that Hart and Sacks believed in a necessary connection between law and morality, then they have reduced that connection to a mere tautology. All Hart and Sacks claimed in this quote is that the duty to obey the law is itself a reason based in morality. This argument is not at all uncontroversial, but even if it were true, it is not clear to what extent it serves the antipositivist. All the positivist needs to argue is that the *existence condition* for a legal system, or the definition of a rule of recognition, need not rely on claims about morality. See M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973).

209. The claim that all humans thrive in communities is not an exclusive basis for a natural law — or any other — argument. This claim could be made by a positivist with utilitarian tendencies like Bentham or a positivist with natural rights tendencies like H.L.A. Hart. I am, however, assuming that when Hart and Sacks refer to "duly established procedures" they are referring to nothing more than conformity with the procedures that the system requires of itself. It should be noted that by using the locution "due result of duly established," Hart and Sacks invoke an important, albeit controversial, phrase from the U.S. Constitution. See, e.g., Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War* (pt. 1), 24 HARV. L. REV. 366, 368-73 (1911).

210. HART & SACKS, *supra* note 17, at 113.

211. H.L.A. Hart argued that a legal system relies upon primary rules to distinguish which normative problems with which it will concern itself. These primary rules, in turn,

"social rule thesis" represented a complete rejection of Austin's command theory, Hart's alternative shared with Austin the basic premise that the ultimate rule of a legal system was, in some sense, obligatory.²¹² The great difference between Austin and Hart was that the former believed the obligation arose from the threat of sanction, while the latter thought it arose from a more complex psychological phenomenon called the "internal point of view."²¹³

Finally, Hart and Sacks's idea that law was a system of general directive arrangements that creates a set of *human* obligations demonstrates their debt to the sources thesis. If one of the purposes of the principle of institutional settlement was to determine who can decide certain questions, and to ground a decisionmaker's authority in practical reasoning distinct from moral reasoning, then, like Bentham, Hart and Sacks were committed to the idea that every legal result had a "pedigree" and ultimately a human source.²¹⁴

generate secondary rules that make up the system of legal obligations we face every day. See HART, *supra* note 18, at 91-99.

212. For Austin, any law is obligatory in the crude sense that one is "obliged" to obey a gunman's instructions. See Hart, *supra* note 2, at 603. In contrast, rules of recognition were obligatory in that, to the extent that they were accepted by the bulk of "officials of the system," these officials "regard [them] as common standards of official behaviour and appraise critically their own and each other's deviations as lapses." HART, *supra* note 18, at 117 (emphasis added).

213. See HART, *supra* note 18, at 89-91. Raz noted that Hart's account of "duty" in *The Concept of Law* was only obscured by the concept of the internal point of view. See RAZ, *supra* note 148, at 148 n.3 (2d ed. 1980). Raz's observation leads me to suspect that Hart erroneously focused on the *motivation* for members of a legal system to regard a rule as a norm, as opposed to the more important question of the definition of a norm. I think this is illustrated by Schauer's suggestion that Austin's phrase "general prescription" better captures what we mean by a rule than the word "command." FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 24 n.11 (1991).

To the extent that the command theory relies upon the rather unreal notion that every law is necessarily backed by a sanction, it is easy to see why Hart and any other positivist would reject it. It is harder to explain, however, how the clearly positivist claim that legal norms are "entrenched generalizations," *id.* at 64, does not entail the further claim that legal norms have the "peremptory force of exclusionary reasons," *id.* at 89 (citing RAZ, *supra* note 207, at 3-33). The view of positivism I have just described — which, admittedly, is not Hart's — seems to include important features of the command theory. I explore this issue in much greater detail in SEBOK, *supra* note 12.

214. One might think that a connection between Hart and Sacks and H.L.A. Hart is unlikely, given the obvious debt to Lon Fuller owed by Hart and Sacks and their many references to Fuller in the chapter under discussion. Fuller, of course, engaged in a fierce debate with H.L.A. Hart of which Hart and Sacks were quite aware. Nonetheless, it is my contention that regardless of what they may have thought, Hart and Sacks mounted an analysis of law substantially similar to H.L.A. Hart's. In the one place where Hart and Sacks discussed H.L.A. Hart — a lengthy footnote — they took issue with Hart's analytic definition of the concept of a "duty." Their amended definition, however, fits into the positivist mode and not at all the mode of a natural lawyer like Fuller:

A duty is a position of a person in relation to an authoritative directive arrangement in which the person is obliged to do something, or not to do it, or do it if at all only in a particular way, subject to some officially imposed disadvantage for failure to comply.

Hart and Sacks's theory of law relied upon many, if not all, of the same elements found in the definition of classical positivism. First, Hart and Sacks's claim that law is instrumental implies an embrace of the separability thesis because the principle of institutional settlement presupposed that the test for law is whether it helps a community achieve its ends, whatever those ends might be. Second, Hart and Sacks's claim that law is purposive reflected the core ideas of the command theory that legal norms are general and obligatory; the fact that they might have preferred H.L.A. Hart's explanation of the obligation to Austin's is not important. Third, Hart and Sacks's claim that one of the primary tasks of a legal system is to identify who can decide various cases entailed their acceptance of the sources thesis, since the principle of institutional settlement required litigants to accept outcomes based on their pedigree and not their conformity with justice.

2. *Hart and Sacks's Theory of Adjudication*

Hart and Sacks drew a connection between their definition of law as institutional settlement and the theory of reasoned elaboration developed in the Forewords. They set out a typology of different types of law possible under their theory and suggested that the Anglo-American system had opted for one particular theory, the theory of reasoned elaboration. What made reasoned elaboration attractive, according to Hart and Sacks, was that it imposed two important duties on the decisionmaker. The first was consistency or uniformity: the "principle of law that like cases should be treated alike."²¹⁵ The second obliged the decisionmaker to understand the *purpose* behind a legal argument before he attempted to apply it: "[E]very statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective, however difficult it may be on occasion to ascertain it or to agree exactly how it should be phrased."²¹⁶ These two values of reasoned elaboration — consistency and purpose — were essential features of a legal system.

In their theory of adjudication, which was based on a typology of distinctions, Hart and Sacks distinguished between types of laws, types of purposes laws could serve, and finally, types of discretion law gives. In constructing this typology, Hart and Sacks carefully

HART & SACKS, *supra* note 17, at 129 n.5 (internal quotation marks omitted).

215. *Id.* at 147.

216. *Id.* at 148.

avoided confusing *types* of laws — how a norm is promoted — with the different *purposes* law promoted — the content of law. Hart and Sacks distinguished between laws that were rules and laws that were standards. A rule was “a legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events — that is, determinations of *fact*.”²¹⁷ The application of a standard did not require merely the happening or nonhappening of an event; it required a “qualitative” change in circumstances.²¹⁸ An example of a rule would be the prohibition against driving faster than fifty-five miles per hour, and a familiar standard in law would be the due care requirement in torts. Hart and Sacks next noted that the purposes a law served could be distinguished between policies and principles. “A *policy* is simply a statement of objective. *E.g.*, full employment”²¹⁹ In comparison, a “*principle* also describes a result to be achieved. But it differs in that it asserts that the result *ought* to be achieved and includes, either expressly or by reference to well-understood bodies of thought, a statement of *the reasons why* it should be achieved.”²²⁰

Finally, Hart and Sacks distinguished between “continuing discretion” and “noncontinuing discretion.” Continuing discretion occurred when “the power-holder is without obligation to relate in any formally reasoned manner the grounds upon which he acts in one instance with those upon which he acts in another.”²²¹ Non-continuing discretion was the opposite: the powerholder cannot “think of himself as in the same position as a legislator taking part in the enactment of the [norm] in the first place.”²²² He must relate the decision to the norm in a reasoned fashion.

Our legal system could have given judges a lot more continuing discretion, but Hart and Sacks observed that it did not.²²³ Such a legal system would still have law, just not very much of it. The rule

217. *Id.* at 139.

218. *Id.* at 140.

219. *Id.* at 141.

220. *Id.* at 142.

221. *Id.* at 144.

222. *Id.* at 143.

223. *Id.* at 162. Martin Golding, a legal philosopher at Columbia who was sympathetic to legal process, made much the same point in a discussion of American constitutional law: “Our legal system has no privileged status. Not only are systems possible that differ from ours in content, but so also can principled decisions occur within the framework of such systems. . . . Principled judicial decision-making is possible in a tyranny.” Martin P. Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 42-43 (1963). Bentham made the same point in BENTHAM, *supra* note 48, at 10.

or standard that authorized judges in the first place would be law because it would be directive, authoritative, and general. But the reasoning in which judges would then engage after they determined the scope of their discretion would not be legal reasoning — although it could nonetheless be a valid form of reasoning. This is because the judges would have been given continuing discretion; and someone acting under continuing discretion cannot, within the scope of that discretion, claim to be employing legal reasoning since legal principles and policies are used to *control* discretion.²²⁴

If a decisionmaker is free to choose to obey or not the guidance of either a principle or a policy, then the fact that the principle or policy is authoritative, general, and directive is not the decisionmaker's reason for action. Rather, it is simply the content of the principle or policy that is doing the work; the relation of the principle or policy to the decisionmaker is the same as if the words had been delivered as advice from a well-intentioned friend: the listener is absolutely free to adopt or ignore them.²²⁵ The use of principles and policies to constrain discretion authorized by law is called "reasoned elaboration."²²⁶

The desirability of using legal norms to control judgment instead of granting continuing discretion depended on the extent to which a given society wanted to organize its social life around the values of consistency and obedience to purpose. Hart and Sacks never imagined that a legal system could be a pure instance of discretion; the question was about matters of degree. Even where judges are given a vast amount of discretion it must be true that those judges have that authority because of a legal process whose application did not itself allow for continuing discretion. For Hart and Sacks, the realists' interest in discretion was basically right but misplaced: discretion mattered to the legal theorist because wherever discretion is found, attempts to control it also will be found, and that is where reasoned elaboration enters the picture.²²⁷

224. HART & SACKS, *supra* note 17, at 147.

225. This analysis adopts an understanding of discretion that is relatively uncontroversial. It conforms, for example, with Dworkin's use of the term in the chapter entitled "The Model of Rules I" in *Taking Rights Seriously*. See DWORKIN, *supra* note 6, at 31-39.

226. HART & SACKS, *supra* note 17, at 143.

227. Thus, Hart and Sacks pointed out that the key to understanding the process of adjudication was not, as the realists would have it, deciding whether or not all law allows discretion, "for reasoned elaboration and uniformity of application are *always* called for up to the point where discretion begins — in defining, in other words, the permitted scope of discretion. The problem is [therefore] one of the appropriate degree of elaboration." *Id.* at 146 (emphasis added).

The relationship between the tenets of reasoned elaboration derived from the Harvard Forewords and the underlying theory of law developed by Hart and Sacks was that good judging, according to the legal process school, necessarily involved a self-conscious search for the limits of discretion set out in the law. Just like the authors of the Forewords, Hart and Sacks grounded their rejection of "political" decisionmaking on their distinction between continuing and noncontinuing discretion. Hart and Sacks gave this distinction analytic clarity. If judicial decisionmaking was to be constrained by law, then judges should not rely on the sort of reasons used by legislators. Similarly, the rejection of "judicial statesmanship" in the Forewords was based on the two values of reasoned elaboration. To deny certiorari in one case and not in another when the two were, from the perspective of legal principle, alike, was to violate the requirement of treating like cases alike. To generate summary reversals without any explanation was to belie the underlying principle that each law has a purpose, in the form of either a principle or a policy, to which a judge can relate his decision. Thus, Hart's recommendation that the Court take advantage of the "maturing of collective thought" was based on Hart and Sacks's claim that law is a set of general directive arrangements that can "speak from one point in time to another"; that is, that there is a command that laws communicate and that the interpreters of that command can get it right or wrong.²²⁸

D. *Wechsler and the Downfall of Legal Process*

The theory of reasoned elaboration seems both workable and attractive. Yet it is apparent that despite the presence of *The Legal Process* in the Harvard curriculum, its reputation as a theoretical text and even as a teaching material has declined.²²⁹ Not only has Hart and Sacks's theory lost its audience, but it has developed a distinct and unsavory reputation as a theory steeped in "conservatism and procedural fetishism."²³⁰ To observers, Hart and Sacks's theory met "a formidable opponent in the Warren Court."²³¹ Rela-

228. *Id.* at 113.

229. The legal process movement has been "sapped, if not altogether drained [of its vitality]" since the 1960s. Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413, 473 (1987). By the 1980s legal process had "collapse[d]." William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 742 (1991).

230. Norman Dorsen, *In Memoriam: Albert M. Sacks*, 105 HARV. L. REV. 1, 12 (1991) (contesting this reputation).

231. Jan Vetter, *Postwar Legal Scholarship on Judicial Decision Making*, 33 J. LEGAL EDUC. 412, 417 (1983).

tions between Hart and Sacks's supporters and the Supreme Court turned sharply antagonistic when Herbert Wechsler introduced the theory of neutral principles into the history of legal process.

Wechsler's 1959 Holmes Lecture — *Toward Neutral Principles of Constitutional Law*²³² — was published in the same issue as Hart's Foreword. It is the best remembered of all the legal process writings because it used reasoned elaboration to challenge the Supreme Court's reasoning in the most pressing problem in constitutional law at the time; by assuming that challenge, it drew the attention of a wide audience of lawyers and nonlawyers.²³³ Because Wechsler used a version of reasoned elaboration to criticize the Supreme Court's performance in cases involving the all-white primary,²³⁴ the enforcement of racially restrictive covenants,²³⁵ and segregation in public education,²³⁶ his essay became an infamous symbol of the legal process school's hostility to civil rights. In fact, the essay prejudiced an entire generation of liberal scholars to the point where few chose to look past Wechsler's presentation of reasoned elaboration before rejecting the project out of hand.

1. *The Jurisprudence of Neutral Principles*

Wechsler used reasoned elaboration to answer Judge Learned Hand's charge, made a year earlier, that judicial review by the Supreme Court should be exercised only within very narrow limits.²³⁷ Wechsler argued that the Court "cannot escape the duty of deciding whether actions of the other branches of the government are consistent with the Constitution."²³⁸ He questioned the criteria that can justify the Court's exercise of judicial review. Wechsler began by denouncing the idea that a judge should choose a verdict based merely on its results, because that would turn the courts into "naked power organ[s]," not courts of law.²³⁹ The essential element

232. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

233. Some years later, Wechsler commented that he doubted that he would have "provoked substantial disagreement" had he not tested his theory against the Fourteenth Amendment. Herbert Wechsler, *The Nature of Judicial Reasoning*, in LAW AND PHILOSOPHY 290, 294 (Sidney Hook ed., 1964).

234. *Smith v. Allwright*, 321 U.S. 649 (1944).

235. *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

236. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

237. LEARNED HAND, *THE BILL OF RIGHTS* (1958). For an excellent discussion of Hand's theory of judicial review, see GERALD GUNTHER, *LEARNED HAND* 226-72 (1994).

238. Wechsler, *supra* note 232, at 10.

239. *Id.* at 12. Wechsler did not specify who endorsed the view that judges should decide cases according to their political preferences, but since he cited to Fuller in developing it, I assume that Wechsler attributed this view to the various instrumentally oriented realists, such

of legal reasoning was that "it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."²⁴⁰

There are four elements to Wechsler's idea of neutral principles. First, a judge should not decide a certain way because he approves of the results of the verdict. Second, a judge must test his neutrality by ensuring that cases like the one at hand have been decided in a similar fashion, as would be "others that the principles imply."²⁴¹ Third, although a principle or policy *in* a law may be the result of a political process and may reflect political interests, a judge must not decide whether to apply²⁴² that political principle or policy on the basis of reasons unrelated to the political ends of that principle or policy. Fourth, and finally, the reasons a judge may use to apply the principles or policies found in the law must be presented in a form of reasoned explanation unlike the sort of justifications required of politicians.²⁴³

Wechsler's theory of neutral principles was clearly rooted in the theory of reasoned elaboration. The demand that a judge not decide because he approves of the *effects* of his decision was a practical application of Jaffe's caution against political judging or Hart and Sacks's distinction between continuous and noncontinuous discretion. The demand that judges test themselves to see if they have decided a case the same way they have decided other cases, like the criticisms of the Court's seemingly political use of certiorari and per curiam, was another practical application of Hart and Sacks's distinction between continuing and noncontinuing discretion. The recognition that the principles or policies a judge had to apply neutrally are themselves not neutral but the result of politics, simply repeats Hart and Sacks's point that the purpose of adjudication is to discover where law ends and the realm of continuing discretion begins. Finally, the demand that judges publicly explain their reasoning was, as has been pointed out above,²⁴⁴ one of Henry Hart's main points: there are norms embedded in the law for judges to discover, and the dual pressures of public explanation and thorough

as Cook and Oliphant, whom Fuller attacked. See Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946).

240. Wechsler, *supra* note 232, at 15.

241. *Id.*

242. Wechsler in fact used the word "application." *Id.*

243. *Id.* at 16.

244. See *supra* notes 192-94 and accompanying text.

review by multiple parties helps to push judges toward better — more accurate, that is — discoveries.

According to these criteria, the Supreme Court had not succeeded in deciding according to neutral principles in civil rights cases. As if borrowing from the Forewords, Wechsler noted that the Court had disposed of important cases through opaque per curiam opinions.²⁴⁵ The most important test of the Court's performance according to neutral principles, however, came when Wechsler discussed the reasoning contained in the written opinions in a number of major race cases, including *Brown v. Board of Education*.²⁴⁶ With regard to the white primary cases, Wechsler argued that since the decision could not be extended to parties excluded on the basis of religion, there could be no "neutral principles" supporting what he thought was a very attractive result.²⁴⁷ In the case of restrictive covenants, Wechsler noted that the decision in *Shelley v. Kraemer*²⁴⁸ could be logically extended to cases that Wechsler was sure the Court would not affirm, proving that there was no neutral principle to support the attractive result.²⁴⁹ Finally, with regard to the school segregation cases, Wechsler — with a heavy heart — criticized the reasoning of *Brown*. He said the Court was disingenuous. The Court really *meant* to declare that racial segregation was a denial of equality in principle, but the Court's decision appears to be based on the force of empirical fact. Wechsler was concerned that the Court's real argument — that racial segregation is wrong in principle — could not be upheld without infringing bigots' right not to associate. He thought that someone should be able to identify a principle in the Constitution whose neutral application would result in placing minorities' rights over bigots', but no one seemed capable of writing the opinion — including Wechsler himself.²⁵⁰

245. Wechsler reviewed the per curiam disposal of five censorship cases and noted that if the Court could not come to an agreement in these cases of obvious importance, "[i]s it not preferable . . . indeed essential, that if this is so the variations of position be disclosed?" Wechsler, *supra* note 232, at 21. He then made the same critique of the Court's extension of the antisegregation principle in *Brown* to public facilities such as parks and pools by per curiam decision. *Id.* at 22.

246. 347 U.S. 483 (1954).

247. Wechsler, *supra* note 232, at 29.

248. 334 U.S. 1 (1948).

249. Wechsler, *supra* note 232, at 31.

250. *Id.* at 34.

2. Critical Reaction to Neutral Principles

Because of his criticism of the race cases, Wechsler's essay became notorious; furthermore, because he was seen as applying Hart and Sacks's principles, Wechsler was seen as speaking for the legal process school. This perception was unfortunate, because his discussion of reasoned elaboration was incomplete, and his application of it to the race cases was simply wrong.

There were three types of response to Wechsler's article. The first group — the realist critics — rejected the concept of neutral principles in its entirety and not just in its application. The second group — the internal critics — took issue with Wechsler's criticism of the race cases; they thought he had misunderstood the legal process principles upon which the cases were decided. The third group — the conservative critics — took Wechsler's argument and turned it into an argument for judicial restraint and original intent.

The realist critics recapitulated the debate we have already seen in the Forewords. They had four main criticisms. First, the realists argued that Wechsler was incorrect in asserting that judges should not be concerned about the consequences of their decisions.²⁵¹ Second, the realists rejected the demand for generality.²⁵² Third, the realists challenged Wechsler's claim that when two constitutional principles were in conflict, as happened in the school segregation cases, a unifying neutral principle could be found to mediate between them.²⁵³ A court trying to apply Wechsler's theory would therefore always be faced with either choosing one constitutional principle over another for nonlegal reasons or doing nothing, which

251. Thus, Eugene Rostow declared that "Wechsler's lecture . . . represents a repudiation of all we have learned about law since Holmes [and] Pound [with their] path-breaking pleas for a result-oriented, sociological jurisprudence, rather than a mechanical one." Rostow, *supra* note 80, at 28.

252. Addison Mueller and Murray Schwartz argued that the term " 'generality' leads nowhere. A decision holding a statute which forbids all Negroes to drive automobiles unconstitutional because it discriminates against Negroes enunciates a reason which is general." Addison Mueller & Murray L. Schwartz, *The Principle of Neutral Principles*, 7 UCLA L. REV. 571, 577 (1960). For similar reasons, Arthur S. Miller of Emory Law School and Ronald F. Howell, a political scientist at Emory, who saw themselves as building on the realists' work, rejected Wechsler's use of the word "neutrality" in relation to constitutional adjudication. They cited scholarship from various disciplines outside law to demonstrate that "neutrality or objectivity is essentially impossible of attainment." Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 676 (1960).

253. Mueller and Schwartz argued that "the difficulty we find . . . is that there will always be a point at which an extension of the logic of any constitutional principle of decision will run into the similarly extended logic of competing principles." Mueller & Schwartz, *supra* note 252, at 586; see also Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 192-93 (1968).

in effect would always preserve the status quo. Fourth, the realists argued that Wechsler's demand for generality was a sham because what would qualify as "sufficient" generality in Wechsler's model was not determined by legal reasoning but by reference to current public sentiment.²⁵⁴ Neutral principles, which were supposed to constrain the judge or the majority, were in fact defined by the judge or the majority.²⁵⁵

The internal critics were those who were either sympathetic or indifferent to Wechsler's theory of law and objected only to his specific application of it to the race cases. Judge Louis Pollak, in the first of his two articles on Wechsler, endorsed the theory of neutral principles.²⁵⁶ He argued that in the area of civil rights, the Court could have used reasoned elaboration to derive more durable principles to support the Court's results.²⁵⁷ While this is not the proper

254. Thus, Jan Deutsch argued that since "one man's 'relatively fundamental rules of right' may well be another man's 'particular set of ethical or economic options' . . . historical context may well determine the proper classification of a given principle as either a 'fundamental right' or a 'particular opinion.'" Deutsch, *supra* note 253, at 195.

255. In labeling these reactions to Wechsler's essay "realist," I do not mean to diminish the importance of the behavioralist study of public law which was beginning to reach maturity in the late 1950s. To take but one example, it is clear that the work of Glendon Schubert applies a realist point of view in that it emphasizes that value preferences and policy attitudes determined judicial decisions. Schubert's understanding of the Constitution was similar to that of the older realists: From a behavioral standpoint, the Constitution is what a majority of Justices agree it ought to be said to mean, or what the President or Congress may declare by speech or action. In an even broader sense, however, Schubert held that the Constitution is embedded in "the consensually dominant patterns of values that constitute American political ideologies." Glendon Schubert, *The Future of Public Law*, 34 GEO. WASH. L. REV. 593 (1966); see also Glendon Schubert, *The Rhetoric of Constitutional Change*, 16 J. PUB. L. 16, 38 (1967). The new realism, wrote Martin Shapiro, "is basically an attempt to treat the Supreme Court as one government agency among many — as part of the American political process, rather than as a unique body of impervious legal technicians above and beyond the political struggle." MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* 15 (1964).

On the other hand, Peller argued that the techniques of behavioralism and other forms of "value free" social science were inextricably interrelated with the legal process school's project of legitimizing the sort of interest-group liberalism portrayed in Daniel Bell's theory of the "end of ideology." See Peller, *supra* note 169, at 585 (citing DANIEL BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* (1960)).

256. Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 5 (1959).

257. It is interesting to note that some of Wechsler's realist critics attacked Pollak for stating that "if the Court decisions in recent race cases 'are not supportable on the basis of neutral constitutional principles, they deserve to be jettisoned.'" Miller & Howell, *supra* note 252, at 682 (quoting Pollak, *supra* note 256, at 31). In the restrictive covenant case, Pollak argued that the principle should have been that the state cannot "assist[] a private person in seeing to it that others behave in a fashion which the state could not itself have ordained." *Id.* at 23. With regard to the all-white primary, Pollak argued that the Court had the right principle, but should have based its decision on the Fifteenth Amendment, since it "impose[d] on the states a heavier affirmative duty than does the Fourteenth." Pollak, *supra* note 256, at 13. Further, Pollak conceded that the Warren Court's attempt to decide *Brown* on the basis of educational quality was doomed to failure. Pollak literally rewrote the opinion basing the wrong of segregation both on the stigma it currently produced in America and

place to engage in a lengthy review of Pollak's — or others' — arguments, in retrospect it seems that the internal critics had the better argument as a matter of the development of constitutional law.

Martin Golding, a philosopher at Columbia and a "friendly critic" of Wechsler, stated: "I believe that without overstretching Professor Wechsler's language what I have to say can be fairly found in it"²⁵⁸ Golding, like Pollak, thought that the Constitution contained a neutral principle that would prohibit segregated schools. Unlike Pollak, Golding attempted to use the equal protection language in *Cooper v. Aaron*²⁵⁹ to illuminate the meaning of neutral principles.²⁶⁰ Golding's methodological criticism of Wechsler suggested that he would have Wechsler rethink the theory of neutral principles in a manner consistent with Hart and Sacks.²⁶¹ Golding thought that Wechsler was correct to note that the Supreme Court had to base its decision only on values found in the Constitution.²⁶² But Golding was baffled by Wechsler's claim that a constitutional value must be so general that it never conflicts with another constitutional value.²⁶³ Golding's suggestions improved Wechsler in a way that brought him closer to legal process as developed by Hart and Sacks.

on the fact that the Equal Protection Clause of the Fourteenth Amendment was designed to forbid the use of state power to stigmatize Blacks, who were newly freed from slavery when the Amendment was written. *Id.* at 28; see also Louis Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 653 (1961) ("I, like Professor Pollak, believe that the particular cases which bother Professor Wechsler can be justified on 'neutral principles' although the Court perhaps did not do so effectively. But Professor Wechsler's basic thesis seems to me unchallengeable.").

258. Golding, *supra* note 223, at 36.

259. 358 U.S. 1, 19 (1958) ("The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.").

260. Golding, *supra* note 223, at 56 ("[P]rincipled decision requires sameness of treatment in public education — unless some justification can be offered for the different treatment").

261. Golding noted that in general, "principled legal judgment is not so much a matter of content as it is of form. . . . Principled judicial decision-making is possible in a tyranny." *Id.* at 42-43.

262. "A legal system, then, may broadly fix the starting-points of deliberation [Our legal system] has no higher guide than the Constitution itself." *Id.* at 43.

263. Golding stated:

I fail to grasp Professor Wechsler's position if it consists in the statement that one ought to, or even can, supply "neutral principles" for "choosing" between competing values. I can, of course, choose between two competing values by reference to a third value which is more comprehensive or supreme, that is, when there is already an ordering of values. *Id.* at 48. It is interesting to note that Golding's first insight — that the law can set out a series of "ordered" values — was echoed by some members of the Fundamental Rights School. See Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980).

The third group, the conservative critics of Wechsler, saw themselves as the true heirs of the theory of reasoned elaboration. Their interpretations of Wechsler and legal process were so different from Hart and Sacks's original theory, however, that they should be seen as usurpers of the legal process tradition, not heirs. The conservative critics were skeptical about the objective existence of moral concepts and thought that the moral language of the Constitution could have no referent other than the original intent of its authors. Through their intervention, the conservative critics succeeded in making original intent — or interpretivism — the ultimate stage of legal process. The most prominent of this group was Alexander Bickel. Bickel's primary idea — perhaps forged during his time as clerk to Justice Frankfurter in 1954 — was that while it is true that the Justices must obey the demands of reasoned elaboration, it is also true that the Supreme Court is a political institution and that sometimes the demands of principle must be ignored for the moment if the Court is to survive to promote principle in the future. Thus, Bickel implicitly approved of the very same tendency toward "judicial statesmanship" that was criticized by other legal process scholars in the early Forewords.²⁶⁴

In his 1961 Foreword, Bickel celebrated various techniques for the denial of certiorari — dismissal for lack of ripeness, jurisdiction, and so on — as "passive virtues" that allow the Court to avoid giving the "right" answer when, in a sense, the truth would be too costly.²⁶⁵ Bickel's concern was shared by Philip Kurland, another of Frankfurter's former clerks. In 1964, Kurland accused the Court of insisting "that its rulings be carried to their dryly logical extremes."²⁶⁶ His warning was intended to produce the opposite result from that hoped for by Pollak or Henkin, who wanted to see

264. BICKEL, *supra* note 177, at 173 ("It will not do to exalt an individual claim to particular justice over all other problems that adjudication may have to solve and over all other consequences that it entails.").

265. See Bickel, *supra* note 177.

266. Philip B. Kurland, *The Supreme Court, 1963 Term — Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 165 (1964). Ironically, Bickel and Kurland criticized the Court for taking legal reasoning *too* seriously — just the opposite argument made by Hart and others in the Forewords a decade earlier. As Purcell noted:

In *The Least Dangerous Branch*, Bickel had seen the courts as the special voice of reason, uniquely suited to elaborate proper principles; the political process had appeared erratic and given to excess. When principles became "ideological" in the late sixties and Bickel's primary goal shifted from achieving moral reform to ensuring social tranquility, the judgment had to be reversed. The judiciary became erratic, the political system rational.

Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521, 554 (1976).

Wechsler's theory vindicated through its extension to every available incidence of the appropriate principle.

Robert Bork carried Wechsler's project further toward the conservative camp than anyone else. He argued in 1971 that "[w]e have not carried the idea of neutrality far enough."²⁶⁷ Bork argued that for too long the theory of reasoned elaboration concerned only the *application* of principles and had ignored the *derivation* of these principles. Bork agreed with Wechsler that the principles in question are certainly nonneutral in their content, since they were the product of political choices. Bork challenged, however, what he saw as the realist notion that a judge should be able to replace the lawmaker's nonneutral preferences with his own nonneutral preferences: "If [a judge] may not choose lawlessly between cases in applying principle X, he may certainly not choose lawlessly in defining or in choosing X"²⁶⁸ Bork's statement was a non sequitur. The original theory of reasoned elaboration *assumed* that judges can in fact be directed by law to apply standards that require the "working out" of a system of belief in their application, or even — recall that according to Hart and Sacks a judge could be authorized to act like a legislator — to assume varying degrees of continuing discretion.

Bickel and Bork nonetheless raised difficult questions for their legal process colleagues. Their writings suggest that the internal critics were wrong to attack Wechsler's conservative interpretation of Hart and Sacks. If anything, Bickel and Bork would have argued that Wechsler did not go far enough with his own argument. Bickel and Bork assumed that Wechsler, had he adopted the terminology of *The Legal Process*, would have endorsed the view that the Constitution provided for noncontinuing discretion. Furthermore, they would have agreed with the internal critics that Wechsler must have believed that the Constitution commanded judges to determine the limits of their own discretion. What Bickel and Bork rejected was the internal critics' claim that Wechsler should have recognized that the Constitution commanded judges to exercise discretion when interpreting the moral language of the Fourteenth Amendment. As we shall see, Bickel and Bork were convinced that noncontinuing discretion was impossible where the law incorporated moral commands.

Since Hart and Sacks rejected the idea that the Constitution commands judges to exercise *continuing* discretion in order to

267. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 7 (1971).

268. *Id.* at 8.

achieve the Constitution's purposes,²⁶⁹ the issue upon which Bickel and Bork and the internal critics differed was how a Wechslerian judge should interpret the rules and standards that limit judicial discretion. In fact, the real question relates to the interpretation of constitutional standards since very few norms in the Constitution are rules; with the exception of the age requirements and a few other provisions, very few constitutional determinations rely upon the occurrence or nonoccurrence of an event. Therefore, a judge must adjudicate according to constitutional *standards*. Note that the application of a standard cannot be an act of continuing discretion, or what H.L.A. Hart would call "rule-making."²⁷⁰ It is an example of elaboration or interpretation of existing law, not the creation of new law. We know from Hart and Sacks, however, that all standards are based in either principle or policy.

Bickel and Bork thought it was clear that Wechsler understood — as the internal critics did not — that discretion cannot be cabined by a standard derived from a principle. A policy, according to Hart and Sacks, is "simply a statement of an objective."²⁷¹ Given that the application of a standard already required the judge to interpret the instant case in the context of "the quality or tendency of happenings in like situations,"²⁷² it would seem that a Wechslerian judge ought to be able to identify an objective if he were to base his decision on policy. In common law, the identification of policy objectives is a constant concern of tort and contract scholars — for example, one group of commentators thinks it is something like economic efficiency.²⁷³ But no answer based on policy-driven goals is helpful at the level of constitutional adjudication. It is doubtful that Hart and Sacks thought that constitutional standards like due process could be based on policy. They probably believed that policy could be a foundation for standards in other parts of the law, like common law or statutory law, whereas constitutional law is

269. Hart and Sacks thought that, although common law judges may have once had such discretion, the Constitution gives complete continuing discretion only to Congress and the President, and only within their prescribed spheres of activity, for example, budget creation or cabinet selection. See HART & SACKS, *supra* note 17, at 152-55.

270. See HART, *supra* note 18, at 135.

271. HART & SACKS, *supra* note 17, at 141.

272. *Id.* at 140.

273. The literature on this question is enormous. See generally GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* (1988); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986). But see, e.g., Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

rooted only in principles.²⁷⁴ But if reasoned elaboration in constitutional law relies upon the derivation of standards from principles, then it follows that Hart and Sacks must have had some idea of what kind of principles could do the job. It was precisely Bickel and Bork's contention that the genius of Wechsler's argument was that it exposed the sad fact that there are no principles that can do the work of underpinning a constitutional standard. According to Hart and Sacks, a principle describes a rationale for the achievement of a goal; it limits the sort of *reasons* a judge can have for action to reasons that are part of a "closely thought out and justified" system.²⁷⁵ Bickel and Bork's challenge was to ask, whose system of thought? The judges'? The original founders'?

Both Bickel and Bork were skeptical about the existence of "systems of reason." For example, Bork argued that in morality as in economics, people's preferences are, at a certain level, impossible to justify or explain through reason.²⁷⁶ Because *systems* of moral reasoning are in principle impossible, all the law can do is embed the majority's choices — representing the *result* of practical moral reasoning by the majority at that moment — about what the Constitution should command judges to do on specific, well-defined occasions. When an occasion comes to pass for which the majority has not provided, and there is nothing in the Constitution to command the judge one way or the other, a judge without continuing discretion should defer to the next level of instructions in the Constitution, which happens to refer to the democratic process by which the majority generates specific responses to concrete problems.²⁷⁷

Bickel was skeptical of the existence in constitutional law of what Hart and Sacks called "standards." In *The Least Dangerous*

274. Hart and Sacks disagreed with Harry Wellington on this point. Wellington based his analysis of constitutional language on the *similarity* between constitutional principles and common law principles. See Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973) [hereinafter Wellington, *Common Law*]; see also Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982) [hereinafter Wellington, *Judicial Review*]. Wellington's most recent views on this subject have been outlined in HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* (1990), and his views have changed somewhat since the 1973 article. For the purposes of this essay, which is primarily on the legal process school and its evolution from the 1950s to the 1970s, I have chosen to focus primarily on Wellington's views as set out in the earlier essays.

275. HART & SACKS, *supra* note 17, at 142.

276. Bork, *supra* note 267, at 10 ("There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another.").

277. *Id.*

Branch, an early study of this problem, he merely alluded to this skepticism,²⁷⁸ while in his last writings Bickel revealed a full-scale value-skepticism quite similar to that of his colleague and friend Bork — and quite similar to that of some of the more extreme realists whom both he and Bork scorned. Bickel, like Bork, did not argue that the Founders could have embedded principles into the Constitution but chose not to; both Bickel and Bork argued that the Founders could not have successfully embedded principles *even if they had tried*. Bickel wrote that he came to realize that, although concepts of justice and injustice were once thought to have some stable content, “[t]he words are used in a different sense now [the late twentieth century] because they are no longer rooted in a single, well-recognized ethical precept.”²⁷⁹ In making this argument, Bickel in fact denied the existence of the distinction between principle and policy set out by Hart and Sacks. The inescapable implication of his writing was that, in the end, all government under law, whether by legislatures or by courts, was rooted in policy.²⁸⁰

The final conservative critic of Wechsler's neutral principles was Harry Wellington. He attempted to distance himself from Bickel and Bork by interpreting legal process through the lens of common law interpretation. Wellington noted that the problem of interpreting rules and standards in terms of principles and policies²⁸¹ was not new — Anglo-American courts had dealt with this problem since the early history of the common law. Wellington admitted that it was rare that constitutional interpretation would be grounded in policy,²⁸² and therefore focused his discussion about constitutional adjudication on the problem of interpreting legal rules by reference to principle. He pointed out that in either common law or constitu-

278. “Which values, among adequately neutral and general ones, qualify as sufficiently important or fundamental or whathaveyou to be vindicated by the Court against other values affirmed by legislative acts?” BICKEL, *supra* note 177, at 55.

279. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 84 (1970).

280. *Id.* at 177.

281. Wellington accepted some of Hart and Sacks's terminology. He adopted their distinction between principle and policy but not between rules and standards; the latter distinction he simply collapsed, and called any legal norms enforceable by a judge a “rule.” Wellington, *Common Law*, *supra* note 274, at 223-25.

282. Wellington noted that the Supreme Court can take policy into account when it is asked to interpret a congressional statute, such as the National Labor Relations Act or a portion of the Constitution to which instrumental goals have been attributed (such as the First Amendment). When the Constitution is being interpreted and the Court disagrees with the legislature on the nature of the constitutional provision's instrumental goals, Wellington counseled the Court to defer to the more *competent* judges of policy — elected officials. *See id.* at 269-70.

tional law, the problem Bickel and Bork raised is the same.²⁸³ If judges can locate coherent, closely reasoned moral systems with which to interpret tort law, why can they not find such systems when faced with problems in constitutional law? The possibility of moral-type reasoning does not change because a judge puts down a Restatement of Torts and picks up the Constitution.

Wellington seemed to concede to Bickel and Bork that a principle embedded in a law cannot remain a useful source of "close reasoning" over time. Because he doubted that the law can express moral principles adequately or fully, Wellington recommended that a judge refer not to a system of moral reasoning as it ideally would have been set out in the law, but rather to the "conventional morality" of one's time.²⁸⁴ According to Wellington, conventional morality is the only sure moral concept at the judge's disposal; the alternative is judicial deference whenever the Constitution's instructions are not clear.²⁸⁵ Wellington's theory, therefore, was a well-intentioned attempt to save the intelligibility of principle in the application of constitutional standards, but did so only at the cost of making the content of those principles rely upon current conventional preferences, which ultimately turn out to be the preferences of the majority.²⁸⁶

Calling Bickel, Bork, and Wellington "conservative" critics of Wechsler suggests a bit of a double entendre.²⁸⁷ The conservative

283. Wellington argued that a judge who wants to apply a principle in a tort case must perform the same interpretive act as a judge applying a principle in a constitutional case. The judge takes the moral point of view of the common law principle he is applying. Wellington, however, steadfastly denied Bickel and Bork's claim that a judge who applied a moral term necessarily was falling into natural law: "[The judge] must take a moral point of view. Yet I doubt that one would want to say that a court is entitled or required to assert *its* moral point of view. Unlike the moral philosopher, the court is required to assert *ours*." *Id.* at 244.

284. "Conventional morality is not necessarily the best morality and makes no claim to be, as does, and perhaps is, the great philosopher's." *Id.* at 280.

285. It seems that for Bork, Bickel, and Wellington, a moral principle embedded in a law could only be interpretable and acted upon if it were framed as a rule — that is, a clear norm whose action could be clearly determined by the occurrence or nonoccurrence or some act. A paradigm example of this would be Justice Hugo Black's reading of the First Amendment's Free Speech Clause, see HUGO L. BLACK, A CONSTITUTIONAL FAITH 17-18 (1968), or the almost universally accepted reading of the Thirteenth Amendment — the prohibition of slavery.

286. Wellington claimed that current conventional morality might be countermajoritarian, but his argument is unpersuasive. See JOHN HART ELY, DEMOCRACY AND DISTRUST 63-69 (1980). One might observe that, in his attempt to defend neutral principles, Wellington had all but conceded Deutsch's criticism. See Deutsch, *supra* note 253.

287. In the beginning of his career, Bickel saw himself as a political liberal, and Wellington, to some extent, still sees himself that way. Ely notes that Bickel, who was "a Robert Kennedy liberal . . . as late as 1968," may have moved toward political conservatism by the end of his life. ELY, *supra* note 286, at 71. Wellington has consistently supported the prochoice position from the perspective of "political morality." See, e.g., WELLINGTON, *supra*

critics claimed to be conservative in their method of interpretation of the Constitution. They disclaimed any relationship between their personal politics and either the norms they claim the Constitution commands or the particular liberal or conservative color of those norms. This double entendre has force only to the extent that the observer cannot help but notice that given the political climate of the 1950s and 1960s, the civil rights gains achieved by the decisions that Wechsler criticized were supported by political liberals and opposed by political conservatives. Furthermore, these gains were not likely to have been produced by the political system left to its own democratic devices.²⁸⁸

E. *Legal Process, Positivism, and Reason*

As a result of the critical reception of Wechsler's article, the legal process school was soon seen only through the lens of the conservative version of neutral principles. A combination of forces guaranteed that Wechsler, Bickel, and Bork's interpretation of legal process soon became what people believed to be legal process. The conservatives obscured Hart and Sacks's actual understanding of the role that principles played in constitutional adjudication and as a result created a very specific version of legal positivism that was, in its own way, as unattractive as legal formalism. As with formalism, which foundered on an inadequate theory of legal reasoning, the conservative interpretation of legal process took Hart and Sacks's positivist theory of adjudication and attributed to it an inadequate theory of legal reasoning that was deeply skeptical of moral principles.

It is clear that Hart and Sacks believed that laws can contain moral principles. The claim that moral principles can be part of the law is perfectly consistent with the separability thesis, the command theory, and the sources thesis. Furthermore, they suggested that laws can incorporate moral principles not only through the exercise of noncontinuing discretion but through the reasoned elaboration of moral terms as well.²⁸⁹ This latter point is one of the most important contributions the legal process school could make to im-

note 274, at 297-311. Bork has been more cryptic as to his political preferences, although he has dedicated a portion of his latest book to rebutting the charge that his judicial record or academic writings reveal that he is a conservative extremist. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 323-36 (1990).

288. This point was profoundly illustrated in RICHARD KLUGER, *SIMPLE JUSTICE* (1975), and well understood by the Supreme Court in the 1950s, see, e.g., BICKEL, *supra* note 177, at 245-47.

289. HART & SACKS, *supra* note 17, at 145-48, 159-61.

proving upon formalism's simplistic application of the sources thesis. But, according to the conservative critics, Hart and Sacks were misled; only *rules* can put into effect the lawmaker's preferences. Since all one has to do to apply a rule is determine a matter of fact, it makes no difference what the source of the rule is — it could be the result of the operation of reason or merely the expression of an ill-considered preference — in either case, it would manifest itself as a fact that can be determined without interpretation.²⁹⁰ That is why Wechsler and his conservative critics assumed that although a law can contain a command that expresses the lawmaker's preference about some state of affairs at some certain time, a law cannot contain a command that expresses the lawmaker's preference that the judge apply the lawmaker's "system of reason."²⁹¹

A *standard*, however, cannot implement the lawmaker's preferences if those preferences are based on principles. Under the Hart and Sacks model, in order to apply a standard, one must do more than observe a fact: one must make a "qualitative appraisal [of facts] in terms of their probable consequences, moral justification, or other aspects of general human experience."²⁹² But according to Bickel and Bork, a person simply cannot make a qualitative appraisal of another's system of reasoning and still faithfully obey his own will. On the other hand, they argued, a person can make a qualitative appraisal of another's preferences based on policy and still faithfully obey his own will.²⁹³ Why should this be? What makes a standard based on principle different from a standard based on policy? A standard based on policy would have to be a statement of an objective that is knowable without necessarily knowing anything about the reasons for it being preferred. Such an objective would have to be knowable without the interpreter needing to understand, agree, or disagree with the thought process that generated the stated preference.

290. This is consistent with a Razian "exclusionary reason." See RAZ, *supra* note 207, at 32-33.

291. See *supra* text accompanying notes 274-78.

292. HART & SACKS, *supra* note 17, at 140.

293. Bickel and Bork did not explicitly say this. It is a conclusion I force upon them because of the obvious yet sometimes overlooked point that the Constitution does not contain many rules. Constitutional litigation focuses, for the most part, on the interpretation of standards such as due process, cruel and unusual, and the like. See *supra* text accompanying note 269.

There are "naked" preferences like this in politics all the time.²⁹⁴ One example is when something is declared the "preference" of the group because more people voted for it than the other choices. When Hart and Sacks spoke of policy, they meant "naked" preferences.²⁹⁵ This feature of policies — that they can be acted upon without the law-applier understanding why the preference was preferred — held the key to Bickel and Bork's assumption that a standard can only be based upon a policy. The achievement of a policy is a matter of empirical fact: if I do not need to understand the reason why the lawmaker preferred the thing she commanded me to do in order to identify it as the thing I must do, then I must be able to tell what it is — and whether or not it has been brought about — simply as a matter of empirical observation.²⁹⁶ It turns out that the reason Bickel and Bork approved of standards that were based on policies is because these were legal norms that did not require qualitative appraisal of another's system of reasoning.²⁹⁷

Bickel and Bork basically felt that legal commands can only communicate matters of fact to their listeners. They certainly would not deny that, through the establishment of factual conditions, legal commands have the power to communicate when someone was entitled to act with continuing discretion — for example, that the Constitution gives the President the power to propose a budget without regard to any restriction. Because, however, they denied that there can be any conceptual space between the application of matters of fact — the province of adjudication — and the application of continuing discretion — the province of politics — they denied that law-appliers can perform reasoned elaboration on principles in the same way they can on simple, empirically verifiable terms. These conservative critics did not accept Hart and Sacks's idea that the law can be based on principles; for them law was ultimately a system of rules.

294. This term is borrowed from Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

295. A policy may be a matter "of unreasoned preference." HART & SACKS, *supra* note 17, at 142.

296. The policy of "bringing inflation down to six percent" is a good example, as would be the policy of "minimizing traffic accidents." See *id.* at 159 (providing similar examples of "full employment" and "the promotion of the practice and procedure of collective bargaining").

297. It therefore turns out that a standard designed to promote a policy is essentially the same as a rule designed to promote a policy — the former may simply be a more complex version of the latter.

Laws, however, often contain moral terms. Bork put more energy than Bickel into developing an answer to this problem. In his argument, since laws must ultimately refer to empirically verifiable terms, the moral terms found in the law — such as “cruel” or “unfair competition” — must refer to empirically verifiable events, which, in the case of normative terms, can only mean the intentions of the authors of those terms.²⁹⁸ Following Bork, most conservative legal process scholars turned to original intent as a necessary tool for interpreting the normative language of the Constitution. Those who joined with Bork eventually came to be known as “interpretivists.”²⁹⁹ As a result of the conservative critics’ rejection of Hart and Sacks’s idea that legal principles can express moral principles, interpretivism has become the modern face of legal positivism. Bickel and Bork’s position is what many think positivism must say.³⁰⁰ Positivism and legal process could have taken a different path; Bickel and Bork were wrong about the relationship between legal principles and moral principle.

One reason why it is easy to dismiss Bickel and Bork is that their desire to base law on empirically verifiable rules seems grounded in their moral skepticism.³⁰¹ Bickel and Bork, however, have another, more serious argument. If one assumed that moral skepticism was wrong, and believed that moral terms had objective

298. “Legislation requires value choice and cannot be principled in the sense under discussion. . . . The bare concept of equality provides no guide for courts.” Bork, *supra* note 267, at 10-11. Elsewhere Bork has stated that:

All that counts is how the words used in the Constitution would have been understood at the time. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.

BORK, *supra* note 287, at 144.

299. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); Henry Paul Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. REV. 117 (1978); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693 (1976); see also RONALD DWORKIN, *A MATTER OF PRINCIPLE* 34-57 (1985) (discussing intention in legal theory); ELY, *supra* note 286, at 1-9 (discussing interpretivism); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1090-92 (1981) (discussing Berger and Bork); Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979) (book review).

300. The degree to which this final version of Bickel and Bork’s position that law is a set of rules resembles Dworkin’s description of positivism as a “semantic theory of law” is uncanny:

[The positivist believes that] we will understand the legal process better if we use “law” only to describe what lies within the core of that concept, if we use it, that is, to cover only propositions of law true according to the central or main rule for using “law” that everyone accepts, like the propositions of the highway code.

DWORKIN, *supra* note 18, at 40 (emphasis added).

301. In fact, there is no reason to believe that all interpretivists are moral skeptics. Neither Berger nor Monaghan displays skeptical tendencies.

content, then the problem facing the judge is that the moral terms are *too* powerful. Assuming a judge could construct a system of reason through which to give content to a moral term, he would then have to apply that system of reason to a legal dispute to which the Constitution had not commanded the term be applied. Hart and Sacks assumed that a system of reason is like a specialized and clearly limited rule, under which only some legal problems are subsumed.

But moral systems of reason are large, global theories of practical action, under which all acts are potentially reevaluated. If by "system of reason" they meant to include a set of moral principles whose norms were not applicable to every putative legal problem faced by the courts, how is this set of principles cabined so that every legal problem that comes before the court is not necessarily subject to the same set of moral principles? According to Bickel and Bork, in the end, Hart and Sacks can reject moral skepticism, but only at the cost of embracing natural law.

A positivist can make two responses to this argument. First, not all "systems of reason" are systems of *moral* reasoning. For example, not all forms of practical reasoning are forms of moral reasoning.³⁰² Second, not all systems of practical reasoning that incorporate moral principles must be insatiable in the way Bickel and Bork implied. They were making the same assumption that the natural lawyers made; they assumed that the principles invoked by a law are global and thus if one aspect of justice is invoked in one part of the law — for example, equal protection — then every other aspect of justice — for example, autonomy or welfare rights — must necessarily be entailed.³⁰³ Bickel and Bork's real argument, once one gets beyond the moral skepticism, shared a common foundation with the natural law school; they just chose one extreme on the spectrum as opposed to its alternative.

Both conservative legal process and natural law, in assuming that legal norms must be either matters of empirical fact or global systems of moral reasoning, made an unwarranted leap that re-

302. See, e.g., JOSEPH RAZ, *PRACTICAL REASONS AND NORMS* 107-23 (2d ed. 1990) (addressing varieties of normative systems).

303. There were a number of contemporary natural law critics of Wechsler who championed such "insatiable" moral terms. See, e.g., Myres S. MacDougal, *Perspectives for an International Law of Human Dignity*, 1959 AM. SOC'Y. INT'L. L. PROC. 107, 130 (1959)); Miller & Howell, *supra* note 252, at 691-92 (arguing that a judge should interpret the Constitution in order to promote either "human dignity" or "welfare") (citing ALEXANDER H. PEKELIS, *The Case for a Jurisprudence of Welfare*, in *LAW AND SOCIAL ACTION* 1 (Milton R. Kovitz ed., 1950); Mueller & Schwartz, *supra* note 252, at 588 (indicating that judges must select the fundamental rights the Constitution is designed to protect).

vealed a certain assumption about practical reasoning. Both approaches assumed that if the legal system authorized a law to interpret some of its institutional rights according to a norm, then the *truthfulness* — or validity according to some outside standard — of the norm becomes a reason to apply the norm to questions of institutional rights for which no authorization had been given by the legal system.³⁰⁴ But that assumption ignores that the reason the norm has any force at all with regard to the interpretation of the institutional rights of the legal system is because it was authorized by that system. Its authorization, being provisional, can never validly assume more authority than was granted initially. The conditional status of legal norms was the lesson of Hart and Sacks's distinction between grants of continuing and noncontinuing authority.³⁰⁵

CONCLUSION

The real story of the development of formalism, realism, the legal process school, and, ultimately, of the current state of modern theories of constitutional interpretation, is the story of the evolution of classical legal positivism from its crudest Austinian model of rules to its more sophisticated recent reinterpretations. What is sad is that, for a variety of reasons, the main core of positivism has been obscured, and its basic merits left unappreciated. This is because whenever positivism has risen to the ascendancy in this country, it has been hobbled by its connection to a flawed theory of adjudication. On the one occasion when it appeared that American positivism might repair this flaw — Hart and Sacks's legal process — the noble attempt was pulled back into disrepair by conservative forces who ultimately remade legal process, and by extension legal positivism, into a tool for their own partisan interests. The fundamental strengths of the modern refinements of classical positivism remain unrefuted, however, and the challenge still remains to reconstruct

304. See, e.g., Louis H. Pollak, *Constitutional Adjudication: Relative or Absolute Neutrality*, 11 J. PUB. L. 48, 61 (1962) (responding to Wechsler and arguing that it would be a good thing if judges had continuing discretion in constitutional cases).

305. Martin Golding makes exactly the same point when he points out that "principled decisionmaking" — i.e., reasoned elaboration — is very similar to moral decisionmaking except for two provisos. First, "a legal system is able to stipulate in a large measure the principles that must be employed in deliberation," and second, "a legal system may stipulate what grounds are and what grounds are not legitimate grounds" for adopting new principles. Golding, *supra* note 223, at 42. Because legal systems can cabin the scope of moral principles, unlike a system of moral decisionmaking, the legal system can stipulate where and until what point moral reasoning will be employed. See *id.* at 43 ("A legal system, then, may broadly fix the starting points of deliberation and the criteria of relevant distinctions.").

American legal positivism into a theory of law with an adequate and persuasive theory of adjudication.³⁰⁶

³⁰⁶. I hope to explore this project in much greater detail in my book, *СЕРОВ*, *supra* note 12.