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LEGAL FORMALISM AND INSTRUMENTALISM— A PATHOLOGICAL STUDY

David Lyons†

Holmes and those who followed in his wake believed they were rejecting a rigid and impoverished conception of the law (often called “formalism”) which had, in their view, adversely affected judicial practice. They spawned a collection of doctrines that Professor Summers dubs “pragmatic instrumentalism”¹—fittingly so-called both because they viewed the law as an eminently practical instrument and because they were so strongly influenced by the philosophical pragmatists William James and John Dewey.

This essay has two parts. The first and longer part identifies and examines the basic doctrines of formalism and instrumentalism. The arguments offered by instrumentalists against formalism suggest that both schools generally agree on two fundamental points. First, the law is rooted in authoritative sources, such as legislative and judicial decisions (a “source-based” view of law). Second, legal judgments that are justifiable on the basis of existing law can be displayed as the conclusions of valid deductive syllogisms the major premises of which are tied very tightly to the authoritative texts (a “formalistic model” for legal justifications). The difference between the schools concerns the question of whether law is complete and univocal. Formalists are understood to argue that existing law provides a sufficient basis for deciding all cases that arise. This belief, in combination with the formalistic model for legal justifications, leads the formalists to conclude that the authoritative texts are logically sufficient to decide all cases. In denying this, instrumentalists appear to have the better of the argument. I shall go further, however, to argue that the formalistic model for legal justifications, which is shared by formalists and instrumentalists alike, is subject to serious question.

The second part of this essay examines criticisms by instrumentalists of “formalistic” judicial practice. I argue that these criticisms appear ill-founded and that the doctrines of formalism provide little, if

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¹ Summers, *Pragmatic-Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981). Professor Summers’s Article is assumed here as a guide to these doctrines.

any, basis for the sort of practice to which instrumentalists have objected.

I

FORMALISM AND INSTRUMENTALISM COMPARED

A. *Legal Formalism*

Legal formalism is difficult to define because, so far as I can tell, no one ever developed and defended a systematic body of doctrines that would answer to that name. We have no clear notion of what underlying philosophical ideas might motivate its conception of the law. It is sometimes tempting to suppose that there has never been any such thing as a formalistic theory of law, but only pregnant pronouncements by some legal writers which lack any coherence or theoretical foundation, combined with judicial practices that are thought (soundly or unsoundly) to embody the attitudes of those writers. Although the instrumentalists were distressed by a variety of judicial and juristic errors, their reactions must be our principal guide to formalism.

Part of what is meant by formalism is this: The law provides sufficient basis for deciding any case that arises. There are no "gaps" within the law, and there is but one sound legal decision for each case. The law is complete and univocal. According to Summers, formalists hold that law is "traceable to an authoritative source."² This leads one to inquire, however, about what counts as an authoritative source. One must assume that authoritative sources include legislative and judicial decisions or authoritative records of them. But what else might they comprise?

The question is crucial because some of those who have been called formalists have also been understood to argue that law is determined not just by such mundane human actions and decisions, but also by what is sometimes called "natural law." Natural law has never been laid down as law in any ordinary way, so far as our ordinary legal records show. One jurist who suggests this view is William Blackstone, who, although sometimes called a formalist,³ wrote in his *Commentaries* that "no human laws are of any validity, if contrary to [the law of nature that is dictated by God]; and such of

² *Id.* at 867 n.4, item 6.

³ See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 610 (1958).

them as are valid derive all their force and all their authority, mediately or immediately, from this original.’⁴

Blackstone’s position is usually understood as follows: Nothing counts as law unless it derives from, or at least accords with, God’s dictates. If we assume that Blackstone was a formalist and that formalists believe law is complete, then we must understand him as arguing that human law is not only rectified by divine command but also completed by it. In other words, some of our law comes only from *extraordinary* authoritative sources. This last point is important because it suggests the shape formalism might have to take in order to secure the formalists’ claim that law is complete, without surrendering any of their other fundamental claims. Because formalism is assumed to tie law very closely to authoritative sources, the class of sources must be expanded into the supernatural realm in order to supply sufficient law to close all the gaps left by authoritative, mundane sources.

The idea of a “natural law that is dictated by God” functions in theories like Blackstone’s as a specific conception of a more general concept which an atheist, for example, would interpret differently: that of “moral law.” Blackstone thus suggested the more general view (which exposed him to biting comments from Bentham and others) that nothing counts as law unless it is morally acceptable, and there is as much law as morality requires. Law is not only thought to have moral sources but is regarded as morally infallible as well. The instrumentalists, however, knew better than that.

This reading of Blackstone stresses a kind of authority at the base of law and, hence, might be credited as formalism. Despite the possibility of such an interpretation, I think we should follow Summers, who I take it conceives of a “source-based” conception of law in narrower and more mundane terms, excluding the supernatural. This renders formalism more plausible and more deserving of serious critical attention. Straw men impede the progress of legal theory.

This understanding of formalism is compatible with Blackstone’s remarks on another, more faithful reading. Blackstone can be understood to say not that morally objectionable law does not exist, but rather that there is no automatic moral obligation to obey it. “Natural law” is relevant to determine when ordinary human law “binds in conscience.” This is not an uncommon view among natural lawyers. It was developed most clearly by Aquinas,⁵ who argued that human

⁴ 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 41 (8th ed. 1783).

⁵ 2 T. AQUINAS, BASIC WRITINGS OF SAINT THOMAS AQUINAS 794-95 (A.C. Pegis ed. 1945).

laws are either just or unjust, and that one has an obligation to obey just laws, but not all unjust laws. Human laws are unjust when they fail to serve the common good, when they exceed the lawmaker's authority, when they distribute burdens unfairly, or when they show disrespect for God. One is morally bound to obey such an unjust law only when circumstances demand it, in order to prevent scandal or disturbance.

If we understand Blackstone (who was not so clear) along the lines suggested by Aquinas, then Blackstone may be interpreted as saying that "natural law" provides a standard for determining when human law merits our obedience. Under this sympathetic interpretation, Blackstone could be credited with an ordinary source-based view of law. Thus, he would qualify as a formalist—provided, of course, that he also espoused certain other doctrines, to which we now turn.

Our sketch of formalism amounts so far to this: First, the law is rooted in authoritative sources, like legislative and judicial decisions; second, it is complete and univocal. But what makes it "formalistic"? That label turns on a third doctrine—namely, that law decides cases in a logically "mechanical" manner. In other words, sound legal decisions can be justified as the conclusions of valid deductive syllogisms. Because law is believed to be complete and univocal, all cases that arise can in principle be decided in this way. This is the *formalistic model* for legal justifications. These three doctrines capture the essence of formalism when it is viewed as a type of legal theory.⁶ They do not, however, explain what may be called the "formalistic method" in judicial *practice*, which will be discussed below.

B. *Instrumentalism*

Ironically, it is more difficult to pin down the doctrines of instrumentalism, because this school of legal thought is determined by the writings of a variety of jurists. They do not always agree and, indeed, are not always self-consistent. Consider, for example, the instrumentalists' attitudes towards what Summers calls "valid law."⁷ One finds three views in unhappy aggregation. Summers claims that instrumentalists share with formalists a source-based conception of law, but that they also embrace the predictive theory. Some instrumentalists, however—the radical fringe on the edge of legal realism—are "rule skeptics." The rule skeptics claim that real law consists only of

⁶ Moreover, they seem to cover all of Summers's twelve points. See Summers, *supra* note 1, at 867 n.4.

⁷ *Id.* at 896.

past judicial decisions, which are understood as limited to their specific holdings, without any further binding implications. No two of these views are compatible.

What is a "source-based" view of law? Presumably, it means that courts are bound by certain authoritative texts or decisions. If the relevant texts or decisions are entirely neglected, judicial decisions or their justifications are that much in error. Authoritative sources establish legal limits or constraints upon judicial decisions. This is not to say they are sufficient to determine a uniquely correct decision in each case or that they must be applied syllogistically. Instead, they must be given their due weight, however that is to be understood.

Rule skepticism clearly does not square with a source-based view of law, for it implies not just that judges are liable to decide cases as they please, but that they are legally free to do so. Furthermore, the idea that laws are "predictions" of what courts will probably decide sits well with neither of these other instrumentalist notions of law. The prediction theory is advanced as a conception of law that goes beyond past decisions. It is meant to perform a task that rule skepticism avoids, but it cannot possibly do that job. A prediction of judicial decisions is not the sort of thing that can bind a court; it cannot serve as a normative standard with which a judge might or might not comply. If a decision accords with a prediction, it may confirm the prediction, but it does not demonstrate that the decision is legally sound. The fact that a decision falsifies a prediction is in no way indicative of judicial error.

Radical rule skepticism can be understood as a way of trying to cope with a puzzling legal phenomenon. If a court acts when existing law seems to provide insufficient guidance, its capacity to help shape the law may not be puzzling. A court's departure from the literal reading of a statute or from a binding precedent, however, may be puzzling if its decision effectively establishes new legal doctrine. It may seem as if one cannot account for the efficacy of such decisions except by holding that *all* law actually is made by courts. Courts themselves cannot be seen as laying down *general* standards, however, for this would only introduce the same problem all over again. Hence, the logical extension of this argument is rule skepticism, which claims that there never is any determinate law aside from specific holdings in past cases.

The question is whether it is more reasonable to conclude that (1) there are legally binding standards from which courts can sometimes effectively depart, even if they do so erroneously, or (2) there are no legally binding standards, which excludes the possibility of judicial error. The following observations may be useful. To acknowl-

edge the possibility of judicial error is to assume neither that law provides a unique answer to every legal question nor that when law provides one, it does so with logical conclusiveness, excluding all argument to the contrary. Judicial error may be the failure to follow the *best* legal arguments or the *strongest* legal reasons, as is usually assumed when judicial decisions are criticized on one legal ground or another. Furthermore, one who believes that courts can err is not committed to the view that such cases have no effect on the law. One might believe that judicial decisions pronouncing new legal doctrines do not always succeed in entrenching those doctrines into the law. Such entrenchment occurs when subsequent courts follow the decision. A novel decision, however, is not always followed—not even by the same court. If a court fails to follow its own previous decision, then, according to the radical realist, it has nothing to explain. The court cannot be regarded as changing either the law or its interpretation of the law, because that would imply that there is law beyond specific holdings. The opposing view maintains that a court might fail to follow its own previous decision either by mistake or because it believes it made an error that it wishes to rectify. This seems to fit our usual ways of thinking when we are not spinning theories about the law, and it is incumbent on legal theories to account for any divergence from these legal phenomena. It may also be admitted, however, that it is incumbent on the opposing theorist to explain how and when judicial mistakes become entrenched within the law.

Despite the excesses of its skepticism, the theory of the radical realists represents a clearer and more consistent overall legal philosophy than its instrumentalist competitors. It can be understood as suggesting that a judicial decision is justified when, but only when, it serves (perhaps to the maximum degree possible) the interests of those who will be affected by the decision. Although many other instrumentalists endorse this normative theory, their views are inconsistent with it, because they believe that past legislative and judicial decisions serve as constraints upon the decisions that can be justified in a particular case. Thus, these nonradical instrumentalists are committed both to the view that courts are bound by past legislative and judicial decisions and that they are not so bound. Their official normative theory does not conform to their understanding that courts are bound by other authoritative decisions. One cannot consistently maintain that those past decisions must have some influence on the decision in the present case—that they provide authoritative standards to be followed—while arguing that the case at hand must be decided solely by consideration of the likely consequences.

To see what is wrong with the normative theory of radical realism, one must ask what would make it right. Two conditions must be satisfied. First, there must be no basis for supposing that past legislative and judicial decisions are properly regarded as binding. Second, the proper basis for judicial decisions must be simple, direct utilitarianism. Hence, we must ask why others assume that past legislative and judicial decisions properly guide judicial decisions.

One nonutilitarian explanation is that judges have morally committed themselves to being bound by such decisions and to deciding cases in light of whatever law there is. They have accepted this public trust, as everyone understands. This is not necessarily an absolute obligation; one can find examples in which deciding a case according to the law conflicts with a judge's more salient nonjudicial obligations. The judicial obligation of fidelity to law is limited in other ways as well. It is conditional upon being voluntarily undertaken; a judge coerced into serving on the bench under a brutally corrupt regime is, if bound at all, not bound in the way that judges are ordinarily bound by the public trust they willingly assume. Furthermore, there may be limits on the moral scope of such obligations. Just as it makes perfectly good sense to hold that soldiers in wartime are not legally or morally bound by certain orders—such as those clearly and openly intended to have the soldiers commit atrocities—so it makes perfectly good sense to hold that some law may be so morally corrupt as to lie outside the limits of a judge's obligation of fidelity to law.

For such reasons, we might infer that the law must satisfy some moral minimum if judges are to be regarded as bound by past legislative and judicial decisions. The procedures must satisfy minimal conditions of fairness, the outcomes must satisfy minimal constraints of justice, or both. Without such assumptions, the idea that judges are "bound" to follow the law or that judges are expected to render "justifiable" decisions is unintelligible. We merely play misleading and possibly pernicious games with serious and important ideas like obligation and justification unless we suppose that they are linked significantly to factors such as those we have just listed. The alternative is a mindless sort of authority-worship—the notion that mere "legal" authority (in the narrowest sense), which is compatible with the worst sorts of abominations the world has suffered under law, is somehow capable of creating a real "obligation" and is capable of "justifying" what it does to innocent victims. Legal positivists sometimes seem to employ such a desiccated conception of "legal" authority, obligation, right, and justification, though they truly have no need for it. The upshot is confusion about the relations between law

and morals. Just as we need not suppose that law and morals are completely divorced in order to recognize that law is morally fallible, we need not suppose that law automatically possesses any genuine authority in order to analyze its structure, systematize its restrictions, or appreciate that it is something to contend with in practice.

It is reasonable to suppose that the more moderate instrumentalists make such relevant assumptions about the law they see themselves as bound by and that such considerations explain why past legislative and judicial decisions bind courts and limit the scope of their decision-making power. As Summers observes,⁸ nonradical instrumentalists seem to accept a source-based view of law, as do all instrumentalist judges in practice, whatever they may say when writing about the law.

C. *Moderate Instrumentalism and Formalism Compared*

How do these moderate instrumentalists diverge from formalism? Surprisingly, not by very much. They too have a source-based view of law, which distinguishes them from the radical realists. They reject, however, the "formalistic" notion that law is complete and univocal. Unlike the radical realists, the moderate instrumentalists believe that there are laws between the gaps; unlike the formalists, they believe that there are gaps between the laws.

This does not address the third aspect of formalism—the formalistic model for legal justifications. It is tempting to suppose that instrumentalists reject this doctrine as well; after all, they attribute much less significance to the role of formal logic in the law than do the formalists. It is worth asking, however, what is meant by the instrumentalists' complaints about the formalists' excessive use of formal logic. One factor that complicates matters is that these issues are sometimes framed in terms of the logical character of "judicial reasoning." But "judicial reasoning" is ambiguous; it can refer to the logical relations between premises and conclusions, or it can refer to the thought processes of judges. The former is something logicians study, while the latter is a field for psychologists. Although psychologists concerned with the logical character of thought processes require training in logic, logicians need no training in psychology. Claims about the role, or lack thereof, of formal logic in judicial reasoning are correspondingly ambiguous. One who has a formalistic conception of logic, or of legal justifications in particular, assumes that all good arguments are deductive. One who has a formalistic conception of thought processes, or of judicial thinking in particular, assumes that

⁸ *Id.* at 900.

our thoughts run along deductive lines. These ideas are quite independent. One might deny, for example, that judges' thought processes always proceed along straight deductive paths before they arrive at a tentative decision, yet believe that sound judicial decisions can be presented as the conclusions of valid deductive syllogisms with true legal propositions as the major premises and factual assumptions as the minor premises. Thus, an instrumentalist who maintains that formalists have exaggerated the role of logic in adjudication might simply mean that judicial *thoughts* do not run along syllogistic lines.

This point is innocent enough, but it is often misunderstood. It is sometimes suggested, for example, that if judicial thought processes are not syllogistic, then later presenting the corresponding judicial opinion in syllogistic form is hypocritical and involves some form of rationalization (in the pejorative sense). The recognition that judicial thought is not always shaped by syllogistic reasoning may lead to the conclusion that formal logic has no real role in "judicial reasoning." But this would be mistaken. Entertaining hypotheses in a variety of ways is compatible with the justification by rigorous argument of those that survive systematic criticism, and this combination is indispensable as well as routine in all spheres of inquiry and all respectable disciplines. Indeed, it is sometimes a virtue for judicial thought to be relatively unfettered, but the justified decision must take account of all relevant considerations, verify the premises adopted, and include only sound reasoning. If opinions generally did that, we should have no instrumentalist complaints of excess logic.

Another factor that complicates the instrumentalists' attitudes towards formal logic is their emphasis on factual considerations in judicial decisions. Their innocent and innocuous point is that law applies to cases only in relation to factual assumptions that are made. In other words, law's actual implications for cases depend on the facts, while its *de facto* applications depend on presumed facts. The determination of the facts, however, cannot be solely a matter of deductive reasoning. The basis for the latter claim is the familiar point that factual statements about what has happened or is likely to happen in the natural world are always established by evidence that is logically insufficient to entail those statements. This does not reflect badly on logic, but is merely a symptom of two phenomena. First, empirical conclusions logically outstrip the evidence that confirms them. Second, the confirmation of empirical conclusions is therefore necessarily *nondeductive*. This is hardly central to legal theory, and formalists are without reason to deny it. Moreover, it concerns the preliminary arguments needed to establish factual premises used in the justifications of judicial decisions. It should be emphasized that formalists

cannot be understood to deny that factual considerations play a decisive role in legal decisions. No one in his right mind believes that law dictates decisions in particular cases independently of the facts; one cannot even classify a case without making factual assumptions about what goes on in the world. Formalists assume that facts need to be established in order to justify judicial decisions. Their idea that legal justifications are deductive concerns the arguments for judicial conclusions only *after* factual premises have been established.

Even after consideration of these elementary points, something clearly remains of the instrumentalists' concern about formalism's dependence on logic. They seem to argue that formalists make a pretense of deducing decisions from the law when the law does not, in fact, support those deductions. Alternatively, formalists are deluded by their theory into thinking that they can rely solely on law, and they stretch the law in order to do so. But concepts are not so precise and legal norms are not so wide as to cover every case that does arise. According to instrumentalists, there are gaps within the law that formalists do not recognize.

This is not only a complaint about "formalistic" adjudication, but also a reflection of the differences in legal theory previously discussed. It is partly definitive of formalism that it regards law as complete and univocal, and partly definitive of instrumentalism that it regards the law as, at best, incomplete. This brings us back to the differences between formalism and instrumentalism, which first led us into this thicket of logical theory. Now that we have emerged from the undergrowth, what can we say about the third aspect of formalistic theory? Do instrumentalists reject the formalistic model of legal justification, as their complaints about formalism's excess use of logic might lead one to suspect?

The instrumentalists might be interpreted to maintain that deductive, syllogistic argument is fine, as far as it goes. Unfortunately, it won't take us far enough to reach the conclusion that formalists desire—namely, that law is complete and univocal. The law, instrumentalists would say, simply does not extend so far. If we are faithful to the texts provided by the authoritative sources, we find that they are vague and sometimes conflicting, subject to alternative interpretations, and therefore incapable of supporting logically adequate, conclusive arguments for judicial decisions in all cases.

There is some reason to interpret instrumentalist criticism in this way, even though it commits the instrumentalists to questionable philosophical assumptions. One reason is that these assumptions are quite commonly made, especially within "tough-minded" legal theory, such as instrumentalists claim to possess. This interpretation also

makes moderate instrumentalism parallel to legal positivism, just as philosophical pragmatism, which seems to underlie instrumentalism, is parallel to the traditional empiricism that seems to underlie positivism.

The general picture of these two theories we then get may be stated as follows. Moderate instrumentalists and positivists alike embrace a source-based conception of the law as well as a formalistic model for legal justification; partly *because* of this combination, they reject the formalistic notion that law is complete and univocal. Instrumentalists, like positivists, emphasize that because the interpretation of authoritative legal texts and their application to cases are often controversial, reasonable arguments are often possible on both sides of a legal issue. Since there are no hard and fast rules for adjudicating such disputes, positivists conclude that law in such cases is indeterminate—not yet fully formed, needing judicial legislation. Instrumentalists most likely have a similar view of the law. They assume that law is determinate on an issue at a given time only if its identification and application are, roughly speaking, mechanical. Hence, law is gappy and incomplete, and judicial discretion must be exercised and law created in hard cases. Thus, rather than rejecting the formalistic model of legal justification, they merely insist on its limitations.

This sort of view is so widely accepted today that it is important to understand its presuppositions and limitations. The instrumentalists make the decisive assumption that law is not determinate if it is controversial, for law is thought to be gappy and indeterminate only when reasonable legal arguments are possible on both sides of a legal question. That occurs, however, just when the content of law is controversial—when competent lawyers can reasonably disagree about it. It relates to the formalistic model of legal justification in the following way: When law is controversial in the sense that reasonable legal arguments are possible on both sides of a point of law, then the law *cannot* be identified and interpreted mechanically by means of deductive, syllogistic arguments. Considerations must be weighed on both sides of the issue, and there is no rule fixing how that must be done. Hence, deductive logic cannot govern the justificatory arguments that are then made.

This reasoning exposes a more fundamental assumption of formalism, instrumentalism, and positivism: Nondeductive reasoning is incapable of adequately establishing any conclusion. Perhaps the assumption should instead be articulated as follows. If, in principle, it is impossible to prove a proposition by presenting it as the conclusion of a sound deductive argument—that is, where true premises absolutely entail the conclusion—then there is no such fact as the one ostensibly

represented by the proposition. Taken as a general claim, this is either an idle philosophical prejudice or else represents very radical doubt about the possibility of knowledge. For, as we have already observed, the most respectable conclusions of the "hardest" of the sciences always logically outstrip the evidence and other considerations used to establish them. Such conclusions are never decisively proven in a logically water-tight manner. Therefore, when we claim to know what they assert, it is conceivable that we are mistaken. The view under consideration takes this to imply that in such cases there is no natural fact corresponding to the scientific conclusion. It is not that we are liable to be mistaken, but that there is nothing to be mistaken about.

This reading of instrumentalism is supported by the similarity between its underlying philosophical empiricism and the philosophical views that appear to underlie legal positivism. Empiricism can be understood to claim that what we can know about the world must be discovered by the use of our ordinary senses. But both British Empiricism, which is the dominant influence behind legal positivism, and American philosophical pragmatism generally assume a particular version of this theory that regards what goes on in the world as ultimately "reducible" to "hard" observable facts by means of rigorous entailments or deductive logical relations. Applied to physics, for example, this version of empiricism has led some philosophers to maintain that there "are" no sub-atomic particles such as electrons, at least not in the full-blooded sense in which there "are" particle accelerators such as synchrotrons. This is so because only the latter are perceived "directly." Therefore, sub-atomic particles have no more substance than the physical evidence for them, such as configurations on a photographic plate taken from a cloud chamber.

This version of empiricism is compatible with a source-based conception of law combined with a formalistic model for legal justifications. The "hard data" are the authoritative texts and their literal implications. The "four corners" of such texts, stretched only to include their most literal implications, represent the limits of real, determinate law. All the rest is mere "theory."

D. *Does Law Go Beyond the Texts?*

If the preceding discussion is accurate, formalism and instrumentalism share two out of three central doctrines, and we can account for the instrumentalists' contention that formalism stretches the law to create implications where no clear implications can honestly be found. Given their mutual assumptions, the instrumentalists seem to have the superior position. If we conceive of law as so thoroughly determined by authoritative texts, as both schools of legal thought appear

to do, it seems implausible to suppose that law is complete and univocal, for the texts are not collectively univocal, and are often unclear.

We need not rest on the above assumptions, however; instead, we need to ask why we should conceive of law in such a way. Perhaps it is inescapable. After all, the texts are taken as authoritative, and the texts admittedly have somewhat uncertain implications. But we can move too quickly here. We cannot derive such significant conclusions about *law* from such innocent facts about *texts* unless we make certain assumptions about what law is. In other words, we can jump from the verbal limits of authoritative texts (such as statutes and records of judicial decisions) to the gappiness of law *only if we assume that law is fundamentally a linguistic entity*, that law is exhausted by the formulations of such texts and their literal implications.

This assumption may be questioned once it is identified. After all, the law is not just a collection of words. Why must we limit ourselves to thinking about the substantive content of the law in terms of its authoritative words and their literal implications? The obvious explanation is that law is a human artifact, fashioned with words like those in the authoritative texts. The words are not the beginning and end of the law—law is a social institution, too—but they represent its normative content. Whatever content the law has, it has because of what we have put into it.

It is important to recognize that this theory represents not just a source-based conception of the law, but one that is bound by the formalistic model for legal justification. Its general appeal rests to some extent on the tacit assumption that nondeductive arguments are somehow suspect, so that we cannot derive law from authoritative texts using anything but literal readings and strict implications. This opinion hardly comports with our most respected intellectual practices outside the law, but doubt about the theory need not rest entirely on such analogies.

The question we must face is whether it is reasonable to maintain that law goes beyond the authoritative texts and their strictly deduced implications. The following argument suggests that this position is tenable.⁹ The point is not to establish an alternative conception of the law, but rather to show that alternative conceptions are feasible and that the doctrines we have found embedded in both formalism and instrumentalism are themselves just theories about the law which are neither self-evident nor self-certifying, but require substantial justification.

⁹ This argument is adapted from R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 131-37 (1978).

One need not unqualifiedly endorse the following argument to recognize its point. It involves what are sometimes called "vague standards" in the law. The due process clause is an example. Calling it a "vague standard" suggests that the due process clause is mainly an empty vessel waiting to be filled with doctrines supplied by covertly legislative activities of courts. This is the view I wish to challenge. In so doing, I shall ignore the complication that decisions based on the clause today must take into account past judicial treatments of it. The point of ignoring such authoritative interpretations is that it provides the central reading around which other factors must be understood to turn. For example, it may be customary to read the due process clause in terms of the "intentions" of the Framers. This would have to be acknowledged in any final decision about how to interpret and apply the clause today. That particular approach, however, is to be considered here *only* as a direct reading of the clause itself. The due process clause is most naturally read to prohibit the government from doing certain things to a person in the absence of fair procedures. Once this is agreed, we can focus on the requirement of fair procedures.

Why should we think the due process clause vague? Perhaps because it does not tell us what is fair. The criteria of fairness are not to be found within the four corners of the text, nor can they be inferred from it. We must go beyond the text to determine what the clause prohibits, if indeed it can be understood to prohibit anything—if it is determinate enough to do that.

One thing is certain. The clause concerns fairness, not something else, such as economic efficiency. That it requires fair procedures is all but explicit—what else could "due process" mean? Only a wild theory could support the claim that the clause requires procedures to be economically efficient. Hence, the clause must have some meaning—at least enough to tell us what it is about, thus excluding some other possibilities.

Let us pursue the analogy with economic efficiency. Imagine a law that requires some activity to be "economically efficient" without defining economic efficiency. How could a court apply it? First, the text would have to be understood as assuming that there is such a thing as economic efficiency; that it makes sense to suppose that certain activities are economically efficient and that some are not; that some judgments about efficiency are true and others are false; and that criteria of efficiency are determinable in principle, at least in specific contexts. A court applying such a requirement must therefore identify appropriate criteria of economic efficiency. It will soon discover that there are alternative conceptions of efficiency; it must weigh the relative merits of those alternative conceptions as well as their relevance to the specific context at hand. It must then proceed on

the assumption that in each context, some conception is most appropriate. But the court might find this assumption indefensible. It might find that there is absolutely no reason to prefer one specific conception of efficiency to another in the particular context. If so, assuming the two equally tenable conceptions are not practically equivalent, the court must make an arbitrary selection.

Suppose, however, that did not happen. Suppose the court concludes that some specific conception of economic efficiency is the most appropriate, at least for the specific context in question. It must then attach that conception to the law, providing the law with more content than it had originally, but not so that it would be legislating freely. That is, if there really are reasons for preferring one conception of economic efficiency to others in a given context, the assumption of the law in question would be true; if the court correctly identifies and applies that conception, it is simply carrying out its legal mandate. It would be faithful to the text, but it would not be limited to the four corners of the text and its literal implications.

To reach a preferred interpretation, the court must consider economic theory. If economic theory provides a correct answer to the court's question, it cannot be arrived at mechanically. Therefore, the court's justificatory argument for its interpretation cannot be mechanical. This leads us to the main point of the argument: A judicial decision need not be limited to the words of the authoritative texts and their literal implications in order to be based firmly on those sources.

Moreover, a court could make a mistake in such a case. If, in a given case, a single best criterion of economic efficiency exists, but the court instead adopts another, its reading of the law would be mistaken, for it would have incorrectly applied the economic efficiency requirement. There is, however, nothing problematic in the idea that even the highest court within a jurisdiction can make a legal mistake (or so we must agree if we do not swallow the most extreme rule skepticism of the radical realists).

Let us return to the due process clause example. Just as a court in the preceding hypothetical would have to defend a particular conception of economic efficiency, a court applying the due process clause must defend a particular conception of fairness suitable to the case in order to ensure fidelity to the clear meaning of the text at hand. No such conception, no principle of fairness, is implicit in the clause. But it does not follow that a court that goes beyond the four corners of the text and its literal implications is not doing precisely what the Constitution requires—no more, and no less.

If the due process clause requires that certain procedures be fair, courts cannot adhere to it if there is no such thing as a fair procedure.

It makes no sense to require that procedures be fair unless one believes that such procedures exist—that is a presupposition of the clause. The only plausible reading of the clause, judging from the text, is that this is what the Framers must have assumed. Anyone who takes seriously the task of applying that part of the law must share this assumption.

One could not follow the law literally if its presupposition were false—that is, if there were no such thing as a fair procedure. We are in no position, however, to assume that there is no such thing as a fair procedure. We seem quite capable of distinguishing clearly fair procedures from clearly unfair procedures. It may be difficult to articulate fully the criteria by which we make such judgments, but much has been written on the subject, and one could begin there for help.

Some theorists profess to believe that there is really no such thing as a fair procedure because moral judgments are inherently, inescapably, unavoidably, and irremediably arbitrary. It is not just that people can easily make mistakes in this area, or that people tend to “rationalize” their prejudices in the pejorative sense. Instead, the very distinction between sound and unsound moral judgments is untenable. Such thought represents the most radical kind of moral skepticism.

Some instrumentalists have flirted with this notion, though it hardly comports with their own notions of what judges ought or ought not to do, which they present as defensible. In any event, radical moral skepticism seems an unsuitable attitude for a judge, because it requires both cynicism and hypocrisy. It is questionable what significance a moral skeptic can attach to an undertaking of fidelity to law or to the idea that a judge must justify his judgments. Of course, most if not all of those who regard themselves as “tough-minded” moral skeptics limit this to abstract theoretical pronouncements, which are dissociated from their reasoned use of moral concepts in other contexts and their acceptance of responsibilities.

If we do not approach the due process clause encumbered by the burdens of moral skepticism, how must we understand it? The general approach is clear: One must defend a particular conception of fairness and apply it. One might get it right and then be faithful to the law, not only in aspiration but also in decision. Alternatively, a court might get it wrong because it has committed a significant error of moral theory. Assuming that there is a right answer to the moral question, there is a correct reading of the clause. This reading is faithful to the text even though it is not limited by the four corners of the document and the literal implications of the text. Because such an answer could not be arrived at by deducing it from fixed premises, a court’s justificatory argument for its interpretation of the clause cannot be mechanical.

This method of understanding the due process clause and other "vague standards" may be contrasted with two others. One is to assume that the clause must be understood in terms of certain examples of fair and unfair procedures that the Framers accepted or would have been prepared to accept upon reflection. Another is to interpret it in terms of current popular conceptions of fair procedures. There may, of course, be good reasons for adopting such approaches to understanding legal provisions. One must recognize, however, that if the due process clause literally requires fair procedures, then these approaches are theory-laden in very significant ways. Adopting either approach involves either a departure from the text or a theory of what fair procedures are or how they can be determined.

Take the latter case. The due process clause requires that certain procedures be fair. To apply it by asking what procedures the Framers would have considered "fair" requires the assumption that fair procedures *are* whatever the Framers believed them to be. To apply it by asking what procedures would popularly be credited as fair amounts to the assumption that fair procedures *are* whatever popular opinion suggests they are. Such criteria of fairness are implausible. The due process clause assumes that there is such a thing as fairness; this is not the same as some particular individuals' conception of fairness, which might be mistaken. We therefore cannot use one of these approaches to such a clause without a powerful theory to support it.

The original approach suggested, which involves the application of an appropriate conception of justice, does not avoid theory. It proposes that courts must engage in theoretical deliberations in order to be faithful to the text and carry out its legal mandate. If that is right, then a source-based conception of the law does not commit one to the formalistic model of legal justification; it is, in fact, incompatible with that narrow view of legal reasoning. It follows that the formalistic model, which seems fundamental to both formalism and instrumentalism, is untenable. What the law has to say about a legal matter is not limited to the literal reading of and strict deductions from authoritative texts. Only a radical moral skeptic can avoid this conclusion, but such a skeptic would have no clear understanding of judicial responsibilities.

Finally, consider the issue of completeness—the one that seems most directly to divide this pair of legal theories. We have no clear idea why formalism regards law as complete, but we do have some idea about instrumentalism's opposite conclusion. So far as instrumentalism regards the law as gappy because it interprets legal sources by means of a formalistic model, its conclusion is unwarranted. If law is incomplete, it is not simply because we must go beyond the texts. For the law sometimes mandates, in effect, that we go beyond the text

not only to find the facts, but also to unveil those further considerations that help make up the law on a particular subject.

II

INSTRUMENTALISM AND JUDICIAL PRACTICE

One of the preoccupations of instrumentalists has been judicial practice. According to Summers, "their critique of formalist legal method may be their most important single achievement."¹⁰ I shall conclude with a brief review of this critique and its relations to theoretical doctrines like those we have discussed.

Summers mentions several charges of judicial malpractice that instrumentalists lay at the door of formalists. They abuse logic, overgeneralize case law, artificially distinguish cases, introduce legal fictions instead of facing up to the need for judicial legislation, and fail to decide cases in light of community policy.¹¹ These charges have varying connections with general theory—connections that the instrumentalists appear to have exaggerated. Several, but not all, seem related to differences of doctrine. If we are correct that formalists believe the law provides a complete decision procedure, while instrumentalists deny it, then this disagreement underlies some of the charges of judicial malpractice. For instrumentalists believe there is sometimes insufficient legal basis for decisions when judges they regard as formalists purport to find such bases in the law. Thus, it is natural to expect the instrumentalists' criticism that formalistic judges overgeneralize case law and otherwise overextend the law by introducing fictions and ignoring community policy.

The latter point reminds us that instrumentalists embrace a particular normative theory, which they do not always balance successfully against their acknowledgement of existing law. If instrumentalists believe that decisions unsupported by existing law should be made in light of community policy, then they have two bases for disagreement with judges who decide cases differently. First, others may believe that the law provides sufficient basis for deciding cases that instrumentalists believe require judicial legislation. Second, they may believe that grounds other than community policy legitimate decisions that the law does not adequately determine. Instrumentalists, with a naive utilitarian outlook, seem to assume that no other normative theory is rationally tenable—all other views reflect either a disguised

¹⁰ Summers, *supra* note 1, at 909.

¹¹ *Id.* at 910-13.

consideration of the consequences of decisions on the interests of those affected, or some superstitious form of valuation. Such an attitude, however, leads inexorably to the extreme realism of the radical fringe of instrumentalism, because it leaves no room for the notion that past legislative and judicial decisions demand some measure of respect even if their guidance is not optimistic. To insist on maximum promotion of satisfactions and on deference to past authoritative decisions only when that deference could reasonably be expected to have such optimistic consequences is to deny that courts are bound in the slightest degree by statutes or precedent. One cannot have it both ways; one must either go with the radical realists or drop such naive utilitarianism. But if naive utilitarianism is surrendered, the charge of failure to decide cases in light of community policy is limited to cases in which the law provides insufficient basis for decision. "Community policy" thus becomes shorthand for "whatever standards are properly applied in such a case." Hence, the issue between formalists and instrumentalists reduces once again to that of completeness or incompleteness in the law. The question thus becomes whether and when the law provides no basis for decision, and what standards then properly apply.

Instrumentalistic criticism of "formalist legal method" sometimes does reflect theoretical disagreement, but not always very clearly. For example, consider, in light of Summers's imaginary example,¹² the criticism that formalistic judges "abuse logic." The majority of a court holds that a child cannot collect damages from negligent individuals as compensation for injuries received during its period in utero. The court's argument is elegant: (1) this child had no rights that could have been violated, because (2) the capacity to possess legal rights presupposes the capacity to have legal duties, and (3) an unborn child cannot have legal duties. The instrumentalist judge argues in dissent that (4) an unborn child can have legal rights without legal duties, because (5) "we as judges can alter these concepts as we desire to serve useful goals";¹³ since there was a negligently caused injury, room can and must be made within the law for compensation through civil liability.

Before we examine the specific charge that logic is "abused" by the majority's decision, we should note that if we take these arguments at face value, they *agree* that the law speaks clearly about this particular case. The majority supports its decision with an argument that the dissenter does not dispute. Instead, *the dissenter advocates chang-*

¹² *Id.* at 910-11.

¹³ *Id.* at 910.

ing the law. There is no need to "alter" the relevant legal concepts unless they lead to a decision that the dissenter believes should not be reached. Therefore, at least on the surface, the disagreement concerns whether to change the law by judicial legislation. Before addressing this issue, let us analyze these opinions more closely.

The majority claims that capacity for legal rights presupposes capacity for legal duties, which it characterizes as a kind of "symmetry." This is supposed to represent a "formalistic" attitude, because formalists are supposed to prize such aesthetic values and read the law as embodying them.¹⁴ That sounds silly; perhaps we can make it seem a bit more plausible.

First, formalists are supposed to regard the law as complete. If, as we have argued, this means going beyond the authoritative texts and their literal implications, it must involve elaboration of the law on the basis of some theory of how to understand it. Constraints that any such theory would have to respect include precisely those that Summers mentions, namely "coherence, harmony, and consistency with existing law."¹⁵ However law is read beyond the four corners of the texts, as an elementary matter of theory-construction it must respect those texts and develop systematically. In other words, these values are not vices but virtues once it is agreed that law extends beyond the four corners of the texts. Unfortunately, this way of working out the implications of the law does not adapt itself to the formalistic model for legal justifications. Formal logic alone will not generate such theory-based extensions of the texts. Therefore, logic must be abused if it is made to serve the illusion that the texts can be so stretched.

Second, the alleged symmetry exemplified in the majority's second claim is a familiar extension of a real symmetry embedded in normative systems. It is often asserted that rights and duties (or obligations) are "correlative," and there are cases in which this appears undeniable.¹⁶ If Alex owes Basil five dollars, then (1) Basil has a right to payment of five dollars from or on behalf of Alex and (2) Alex has a duty (is under an obligation) to pay Basil five dollars. The corresponding right and duty are two sides of a single normative relation; they stand or fall together. Thus, it is plausible to claim that some pairs of rights and duties are logical or conceptual correlatives, and it would not be misleading to refer to this as a kind of "symmetry" in the law.

¹⁴ *Id.*

¹⁵ *Id.* at 867 n.4, item 5.

¹⁶ This idea is discussed in Lyons, *The Correlativity of Rights and Duties*, 4 *Nous* 45 (1970).

But not all alleged relations between rights and duties are like that. It may be contended, for example, that Alex himself cannot have rights without duties, in the sense that one has no valid claim against others unless one respects others' claims on one. Alex cannot legitimately claim any rights unless he lives up to his obligations and responsibilities. This could be characterized as a kind of "symmetry," but it is significantly different from the one discussed above. This sort of claim represents a substantive proposition of fairness, not a mere logical or conceptual correlation. This proposition is distorted, however, in the opinion of the majority on the court. Those who are incapable of assuming obligations or responsibilities cannot be regarded as irresponsible and, thus, to have forfeited any claim to have their rights respected. Hence, mental incompetents and new-born infants, for example, presumably possess rights that we are bound to respect, despite their inability to reciprocate. The law apparently respects this moral proposition, because both mental incompetents and new-born infants presumably possess, for example, the right not to be deprived of life without due process of law, although they lack the capacity for legal duties. If that is correct, then the majority's decision is based on a false principle—an imaginary symmetry—and its conclusion cannot be sustained.

If the argument thus far is right, and the majority's "symmetry" proposition is mistaken, is the majority guilty of "an abuse of logic"? That charge seems misleading or confused. Given the court's assumptions, its conclusion follows by the strictest logic. The dissenter is in no position to claim it is an abuse of logic, because he accepts both the majority's assumptions and its reasoning and only wishes to circumvent the proceeding by changing the law. If the decision is wrong, it is wrong either because its premises are false, as suggested above, or, as the dissenter urges, the decision is so objectionable that a responsible court should take the law into its own hands and change it. Logic itself, however, is neutral with respect to all these issues. Of course, it might be imagined that the very quest for "symmetry" involves an abuse of logic. But that would be mistaken—logic argues only for such symmetries as logic guarantees. Because the sort of symmetry predicated by the majority involves a substantive point of fairness, which it overextends, logic is silent on the matter.

Moreover, formalism as we understand it cannot be blamed for the specific decision of the court in this case. Formalistic judges assume that the law is determinate in all cases, and if they are mistaken, they will read the law as determinate when in fact it is not. Formalists, therefore, may stretch the legal facts, but this leads in no particular direction. If one is going to discover illusory "symmetries"

in the law, there is no telling what one might claim to find. The quest for symmetry is too vague a basis for fixing formalistic judges in any particular direction.

One might contend that the clash between formalist and instrumentalist judges is more social than theoretical. Formalism is often characterized as politically and economically "conservative." It has been associated with judicial decisions that secure the interests of the economically powerful against those who suffer at their hands. The trouble with this interpretation of formalism is that it has no causal connection with the type of theory we have described. Some aspects of our law tend to favor the powerful against those who would encroach on their established rights, but other aspects tend to favor those whose rights are violated by the rich and powerful. If formalism systematically favors one side over the other, that is not because it favors symmetries or imagines the law to be more complete than it actually is. Rather, it is because the individuals who compose that group are biased and possibly dishonest, though perhaps as dishonest with themselves as with the community at large. This is not to deny that legal battles reflect economic struggles, or that legal theory can be politically motivated. What the critics of formalism fail to demonstrate, however, is that formalism is especially related to one side of these battles, or that instrumentalism is especially related to the other side.

The instrumentalists' criticism of the imaginary decision discussed above is worth probing further, for such criticism appears faithful to the instrumentalist tradition and reveals some difficulties for its practitioners. The instrumentalist dissenter claims that "we as judges can alter these concepts as we desire to serve useful goals." If we take the dissenter at his word, his criticism has the following implications: The majority's premise that capacity for rights assumes capacity for duties is a true proposition of law; the court has the capacity to make it false by changing the law; and such modification is perfectly proper. Thus, on a literal level, the dissenter must be understood as arguing either that changing the law in order to serve useful goals is *authorized by law* or that the court *should act unlawfully*. Assuming that instrumentalists do not typically call on courts to act unlawfully, we should probably understand them as supposing that the law empowers courts to act as courts of equity. This is an interesting proposition, but it may not be what is really meant; its literal meaning readily can be doubted.

Recall our discussion of the formalistic model of legal justification, which, together with the source-based view of law, led to the idea that law consists of whatever can be read from authorized texts or is literally implied by them. I argued earlier that this cannot be assumed

to exhaust "the law," because an adequate account of what the law requires and allows may take us beyond the four corners of its texts. Hence, we can understand the idea of *changing a legal concept* (e.g., to effect equity), which the dissenter prefers, in two ways: as a matter of adjusting our understanding of the law by going beyond a doctrinaire or literal reading of it (which may be inadequate), or as a matter of changing law by neglecting some binding considerations or introducing others without adequate legal basis. If the latter is what the instrumentalist dissenter has in mind, he is calling on the court to act unlawfully. If he has the former notion in mind, however, then he desires not so much a change in the law as a change in our understanding of it.

I doubt that the latter is the appropriate interpretation of the dissenter's opinion; it would be more characteristic of an instrumentalist to maintain that the law on the subject is really indeterminate. In that case, we cannot read the dissenting opinion literally. The dissenter does not believe that the court should "alter these concepts as we desire to serve useful goals," but instead he believes that the law needs to be shaped because it is not yet capable of deciding the case at hand. Because he believes the court is engaged in a legislative activity (which is not just a matter of correcting an inadequate understanding of existing law), the dissenter urges the court to serve useful goals. If that is what the dissenter means to say, then his criticism of the majority opinion is poorly framed, at best.

In sum, if we take the instrumentalist at his word, he is urging the court to ignore existing law and illegally change it. If we take him in some other way suggested by his general position, then we find his comments at best hyperbolic and unilluminating. As I believe that Summers accurately captures the spirit and character of instrumentalist criticisms of formalistic legal practice, I must demur from his appraisal of those criticisms. Very little legal method can be traced to formalistic legal theory. Instrumentalist criticisms of judicial practices seem themselves to suffer from overgeneralization and logical confusion. Furthermore, instrumentalists appear to embrace a naively utilitarian normative theory, and their recommendations concerning judicial legislation are, accordingly, unreliable.

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If my original suspicions were sound, formalism is a nontheory, developed by instrumentalists who see themselves as battling theory-laden judicial practice that ignores human values. Instrumentalism is itself half-formed out of radical empiricism, developed on the verge of

skepticism toward theory as well as substantive values, including those with which it wishes to be identified. Ambivalence about theory, values, and the law itself runs right through instrumentalism. This makes that body of legal doctrine an accurate reflection of a significant stream of American thought.