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Defensor Fidei: The Travails of a Post-Realist Formalist

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Lidsky: Defensor Fidei: The Travails of a Post-Realist Formalist
**DEFENSOR FIDEI: THE TRAVAILS OF
 A POST-REALIST FORMALIST**

*Lyrissa Barnett Lidsky**

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Life's single lesson is that there is more accident to life
 than man can admit in a lifetime, and stay sane.

—Thomas Pynchon, V.

Formalism is a matter of faith: faith in the autonomy of law, faith in the ability of reason and language to guide human affairs, and faith in rule by rules. Every faith has its heresy, however, and formalism is no exception.¹ Anti-formalists—including legal realists, pragmatists, and critical legal scholars—have mounted numerous assaults on the tenets of formalism.² Perhaps because formalism *is* a matter of faith,³ these

* Assistant Professor of Law, University of Florida College of Law. I owe many thanks to those who helped me develop my thoughts about this topic. I thank especially Rebecca Newton, who was involved in every facet of this process. I also thank David Anderson, Stuart Cohn, Charles Collier, Tom Cotter, Daniel Farber, Jeff Harrison, Paul LeBel, Joseph Little, Amy Mashburn, Michael Millender and Walter Weyrauch for being kind enough to read drafts of this Article and make helpful suggestions for improvement. The University of Florida College of Law deserves special thanks for the generous research support that made this Article possible and my husband, Howard Lidsky, deserves praise for listening to incessant discussion of it.

1. Heresy is a matter of perspective. See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950 (1988) ("Formalism is like a heresy driven underground, whose tenets must be surmised from the derogatory comments of its detractors.").

2. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 124-30 (1961); KARL LLEWELLYN,

nonbelievers seem incapable of taking formalism seriously or of understanding its appeal. Nor are formalists any more capable of understanding the nonbelievers' lack of faith. Currently, the debate stands at an impasse, neither side able to convert the other to its position.⁴

Espousing a unique strand of "post-realist" formalism,⁵ Professor Robert Summers attempts to break this deadlock in a formidable body of work,⁶ culminating in *The Formal Character of Law IV*.⁷ Summers

JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 183-88 (1962); ROBERT M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 8-11 (1986).

Although the quantity and ferocity of the attacks on formalism led some to proclaim its death, formalists staged a revival of sorts in the 1980s. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 646 (1990); see, e.g., Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Weinrib, *supra* note 1; Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 583 (1993). Judicial formalists include Justice Antonin Scalia and Judge Frank Easterbrook. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989); Frank H. Easterbrook, *Test, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994) (arguing that the proper approach to judicial interpretation "lies in a relatively unimaginative, mechanical process of interpretation").

3. As Judge Posner has pointed out, the attempt to make one's theory an article of faith may represent an attempt to "place [it] outside the boundaries of rational debate." Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1368 (1990) (criticizing Judge Robert Bork's use of religious imagery in defense of originalism and his branding of its opponents as heretics).

4. Ironically, each side in the debate purports to speak for legal practitioners. Compare Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (arguing that "[t]o some extent, we are all realists now") with Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1813 (1990) (implying that since pragmatism "has gradually been absorbed into American common sense," we are all pragmatists now) and Weinrib, *supra* note 1, at 951 (arguing that practitioners are attracted to legal formalism because it represents an "effort to make sense of the lawyer's perception of an intelligible order.")

5. See Robert S. Summers, *The Formal Character of Law IV* (1995) (unpublished manuscript, on file with the *Florida Law Review*) [hereinafter *Formal Character IV*]; Robert S. Summers, *Dunwody Distinguished Lecture in Law at University of Florida College of Law* (Mar. 22, 1996) (transcript on file with the *Florida Law Review*) [hereinafter *Dunwody Lecture*]. Summers issues the provocative yet cryptic disclaimer that he "do[es] not embrace pre-realist formalism." *Formal Character IV*, *supra*, at 2. In this commentary, I am able only to suggest a few relevant differences between pre-realist formalism and post-realist formalism. A full examination of this interesting topic is beyond the scope of this Article.

6. See Robert S. Summers, *The Formal Character of Law*, 51 CAMBRIDGE L.J. 242 (1992) [hereinafter *Formal Character I*]; Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 RATIO JURIS 127 (1993); Robert S. Summers, *Der Formale Charakter des Rechts II*, 80 ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE 66 (1994); Robert S. Summers, *The Formal Character of Law III*, 25 RECHTSSTHEORIE 125 (1994) [hereinafter *Formal Character III*]; see also Robert S. Summers, *The Juristic Study of Law's Formal Character*, 8 RATIO JURIS 237 (1995). Summers' overall goal in *Formal Character IV*, and in its predecessors, is systematically to categorize and label the manifold varieties of legal form. See *Formal Character IV*, *supra*

calls nonbelievers back to the fold with a formalism that, by his own assessment, is "far more wide-ranging in scope"⁸ than that of other post-realist formalists.⁹ Summers crusades "give form in the law its due."¹⁰ Indeed, the task he has set for himself is nothing less than the creation of a "general theory"¹¹ of legal form and the formal character of law.¹² His theory entails both a "typology"¹³ of form and (ultimately) a "calculus"¹⁴ for determining the "appropriately formal rule"¹⁵ in any given situation. By returning form to the center of the jurisprudential debate, Summers seeks not only to capture the terms of that debate but also (in a Hegelian mode) to teach jurisprudence to speak in a new language.¹⁶

The singularity of Summers' focus on form, however, should not obscure the formalist underpinnings of his jurisprudence. For Summers, it is form that makes law internally coherent, autonomous, and capable of providing determinate answers to resolve legal disputes. In effect, the stabilizing influence of form enables the rule of law to fulfill its promise of a "government of laws, and not of men."¹⁷ Although Summers makes a unique contribution to the jurisprudential dialogue, his theory echoes common formalist themes.

note 5, at 2. Although this article is an invited response to Professor Summers' *The Formal Character of the Law IV*, my criticisms apply broadly to Professor Summers' other works on the subject of formalism and also to those formalists who share his views.

7. See *Formal Character IV*, *supra* note 5, at n.1 (discussing the evolution of his thoughts).

8. *Id.* at n.2.

9. Summers criticizes Frederick Schauer and Ernest Weinrib for insufficient attention to "form." *Id.* at nn.2, 4.

10. *Id.* at 2; *Dunwody Lecture*, *supra* note 5, at 2. For a very different analysis of form, see Pierre Schlag, "Le Hors De Texte, C'est Moi: The Politics of Form and the Domestication of Deconstruction," 11 CARDOZO L. REV. 1631 (1990).

11. *Formal Character IV*, *supra* note 5, at 2; *Formal Character III*, *supra* note 6, at 159.

12. See *supra* note 6 for a listing of Summers' previous articles devoted to the "thesis that one of the fundamental characteristics of law is that it is formal." *Formal Character IV*, *supra* note 5, at n.1.

13. *Formal Character IV*, *supra* note 5, at n.2. Although Summers uses this term only once, it is a concise and accurate description of his method.

14. *Dunwody Lecture*, *supra* note 5, at 24.

15. *Id.* at 22.

16. Throughout his lecture, for example, Summers introduces a host of new terms, including: "preceptual form," "configurative" form, "encapsulatory form," the "refinative effect of appropriate form," the "resolutive effect of appropriate form," "general legal values (GLVs)," the "unisonal effect of appropriate form on the content of rules," and the "GLV priorital effect." *Formal Character IV*, *supra* note 5, at 9, 28, 30, 40, 45.

17. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

This Article explores common formalist themes, asking not whether formalism's aspirations are attainable but why formalists still struggle to attain them in the face of sustained attacks by anti-formalists. After briefly sketching the tenets of formalism in Section I, this Article turns to an examination of Summers' "post-realist formalism." Section II.A. outlines the distinctive features of Summers' theory of form. Then, Section II.B. applies Summers' theory to determine whether it provides (or is capable of providing) an objective "calculus" for choosing the "appropriately formal" rule in any given case. Finally, Section III of this Article probes the philosophical and psychological attractions of formalism and suggests that formalism's promise of stability and order may be essential to the effective functioning of the legal system, even if this promise can never be realized.

I. A SYMPATHETIC PORTRAIT OF FORMALISM

The modern debate over formalism has centered largely on the interpretive methods judges use to decide cases.¹⁸ However, formalism is not merely a theory of adjudication or interpretation. Formalism is also a theory about the nature of rules, the nature of legal justification and the nature of law. Indeed, part of formalism's attraction lies in the fact that it is catholic in its aspirations: it is a theory that affects every facet of the legal system, a theory that "extend[s] to every aspect of reflection about law."¹⁹ Formalism attempts to probe the character of law and to speak "profound and inescapable truth about law's inner coherence."²⁰

18. See Eskridge, *supra* note 2, at 646 ("Formalism posits that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute; if unelected judges exercise much discretion in these cases, democratic governance is threatened."); Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 101, 111 (1996); Daniel A. Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 95 (1995) ("The new formalists advocate originalism in constitutional interpretation, textualism in statutory interpretation, and adherence to settled rules in the common law.").

19. Weinrib, *supra* note 1, at 951.

20. *Id.* at 950. Perhaps formalism's attempt to understand law as an organic whole explains why formalists often tend to believe that law is reducible to a relatively small number of fundamental principles. Principles undergird rules, and together they comprise the seamless web of law that is so attractive to formalists. See Singer, *supra* note 4, at 496 ("[C]lassical thinkers like Langdell, Williston, and Beale believed that the entire legal system could be reduced to a very small number of general principles.").

Insofar as formalism has a unifying vision,²¹ it is a vision of law as an autonomous body²² of ascertainable rules.²³ This vision has several distinct components. First, formalists are legal isolationists:²⁴ they see law as a unified whole, as a “closed system”²⁵ untainted by politics, morality, sociology or any “other nonlegal structure of concern.”²⁶ Formalists wish for law to speak with its own vocabulary, to adhere to its own standards, and to employ its own distinctive style of reasoning. In short, they wish law to be law and “not something else.”²⁷

But formalists also assert that law is ascertainable as well as autonomous, and, in doing so, express faith in both the power of language²⁸ to regulate human behavior and in the ability of decision makers to apply rules in a logical and deductive fashion to produce correct answers to legal questions.²⁹ Stated metaphorically, formalists believe that rules make decisions. Rules provide predetermined answers to legal questions, and adjudication is therefore a process by which law

21. I attempt here to summarize some of the most basic features of formalist thought. However, I realize that attempting to summarize the characteristics of a complex movement or school of thought is inevitably fraught with the perils of reductionism and oversimplification.

22. *But see* Michael Corrado, Essay, *The Place of Formalism in Legal Theory*, 70 N.C. L. REV. 1545, 1545 (1992) (defending the proposition that “law is an autonomous area of knowledge” that nonetheless is influenced by “moral, political, and sociological information”).

23. I shall use the term “rules” broadly throughout this commentary to refer to constitutions, statutes, administrative codes and regulations, and common law cases. I attribute the phrase “autonomous body of ascertainable rules” to Richard Fentiman, a former teacher of mine at Cambridge University, who might or might not endorse its use in this context.

24. *See* Weinrib, *supra* note 1, at 951-52. *Cf.* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987) (critiquing the autonomy thesis).

25. Schauer, *supra* note 2, at 523.

26. STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH* 141 (1994):

[L]aw does not wish to be absorbed by, or declared subordinate to, some other—nonlegal—structure of concern. . . . And . . . law wishes in its distinctness to be perspicuous; that is, it desires the components of its autonomous existence be self-declaring and not be in need of piecing out by some supplementary discourse. . . .

Id.

27. *Id.*

28. Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 534 (1992) (“Formalist interpretation, ultimately, relies on a faith in the raw power of the word to communicate. . . .”).

29. *See* Randall P. Bezanson, *The Myths of Formalism*, 69 IOWA L. REV. 957, 968 (1984) (describing legal formalism as reflecting “faith in the rationality of the human animal, the ascertainability of objective criteria, and mechanisms of organizational control”).

is discovered rather than made.³⁰ The formalist judge seeking a correct decision need only resort to rules and facts, letting ordinary language be both guide and constraint to the process of adjudication.³¹ Viewed from this perspective, the language of rules becomes a powerful tool for regulating human affairs because rules speak in a language that all can understand.

Even so, rules are not self-executing. Because rules speak in generalities, the astute decisionmaker must use legal reasoning to identify the relevant rules and apply them to the specific facts of the dispute. According to formalist theory, legal reasoning proceeds from the general (in the form of rules, principles, or the like) to the specific via "a logical, objective, and scientific process of deduction."³² In essence, formalists portray legal reasoning as a subspecies of syllogistic reasoning akin to Euclidean geometry,³³ with its own internal logic and coherence. This hyper-rational, quasi-scientific quality of legal reasoning in turn has important implications for formalist theory. It not only makes legal rules capable of producing determinate answers to legal questions;³⁴ it also makes adjudication a neutral and objective process—mere rule application, not rule creation.

Largely on the basis of the formalist account of legal reasoning,³⁵ its detractors have variously labeled it "mechanical jurisprudence,"³⁶ "legal absolutism,"³⁷ "legal fundamentalism"³⁸ or, more succinctly, a "vice."³⁹ Even Judge Frank Easterbrook, himself an avowed formalist,

30. Weinrib, *supra* note 1, at 956.

31. Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 157 (1981) ("[T]he judge's role is to decide solely on the basis of the meaning of legal rules applied to the facts before him.").

32. Singer, *supra* note 4, at 497; see also Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986) (defining formalism as "the use of deductive logic to derive the outcome of a case from premises accepted as authoritative"). See generally JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES 11-12 (Robert L. Hayman, Jr. & Nancy Levit eds., 1994) (surveying basic features of classical legal thought).

33. See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 16 (1983).

34. See STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 3 (2d ed. 1995); Farber, *supra* note 28, at 539 (describing legal formalism as "the view that the proper decision in a case can be deduced from a pre-existing set of rules").

35. See Corrado, *supra* note 22, at 1556 (arguing that this extreme position "deserves the abuse that it has gotten"). Scholars have hurled a spate of invectives against Justice Peckham's formalistic opinion in *Lochner v. New York*, 198 U.S. 45 (1905). See Schauer, *supra* note 2, at n.2 (listing articles criticizing *Lochner*).

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

37. JEROME FRANK, LAW AND THE MODERN MIND 55 (1949).

38. *Id.* at 48.

39. HART, *supra* note 2, at 126.

concedes that formalism envisions a “relatively unimaginative, mechanical process of interpretation.”⁴⁰ Any attempt to describe legal reasoning as a rigid and scientific process of syllogistic deduction lends itself to caricature.⁴¹ Rather than resort to caricature, however, a sympathetic portrait of formalism might attempt to see it as its adherents do. A sympathetic portrait would concede that post-realist formalists generally have given a more sophisticated account of legal reasoning than their pre-realist predecessors. Most modern formalists do not assert that all cases are easy cases that produce a single correct answer through the mechanical exercise of syllogistic reasoning.⁴² Instead, they acknowledge that legal decisionmakers are sometimes faced with hard cases that are not easily resolved by reference to a transparent and clearly applicable rule,⁴³ but maintain that the application of reason to the ordinary language of rules can resolve most legal questions.

40. Easterbrook, *supra* note 2, at 67. Easterbrook’s view of formalism is distinctly more pessimistic than most of its adherents.

41. Justice Peckham’s opinion in *Lochner*, often cited as an exemplar of this reasoning, is actually an extreme version of the formalist faith in the mechanical deducibility of results from rules. *Lochner*, 198 U.S. at 45. In striking down a statute setting a cap on the number of hours worked by bakers, Justice Peckham framed the case as if a rule (specifically the Due Process Clause of the Fourteenth Amendment) dictated the outcome. *Id.* at 53, 61. According to Peckham’s analysis, freedom of contract is a liberty interest protected by the Due Process Clause; a state statute imposing a maximum-hours restriction violates the freedom of contract; therefore, the maximum-hours restriction is unconstitutional. *Id.* at 53, 59-61, 64. But to frame the issue in this way is to put rules—bodiless, soulless—in the driver’s seat and to relegate the human actor to a position of powerlessness. Justice Peckham was able to deny responsibility for the decision he had made and to deny that the decision was influenced by anything other than the mere fact of the rule.

Perhaps, however, it is unfair to keep bringing up *Lochner* to challenge the formalist account of legal reasoning. Justice Peckham’s error was not that he was a formalist; it was that he was formalistic. See Schauer, *supra* note 2, at 511; see also *Dunwody Lecture*, *supra* note 5, at 1-2 (arguing that anti-formalists have “collaps[ed] the distinction between the formal and the formalistic”). Peckham failed to realize that his analysis of the mandates of the Fourteenth Amendment was a contestable application of deductive reasoning in a difficult case, rather than an inevitable application in an easy case. See Schauer, *supra* note 2, at 511 (“The formalism in *Lochner* inheres in its *denial* of the political, moral, social, and economic choices involved in the decision, and indeed in its denial that there was any choice at all.”).

42. See, e.g., Easterbrook, *supra* note 2, at 68 (“Hard questions have no right answers.”). But if formalism lacks a theory to legitimize decisionmaking in hard cases, is such decisionmaking merely the exercise of brute political force?

43. Formalists have thus relied on the distinction drawn by H.L.A. Hart between easy cases at the core of the rule and hard cases within the rule’s penumbra. HART, *supra* note 2, at 132. Moreover, as Professor Thomas Cotter has pointed out, at least “[s]ome formalist theories can be defended on instrumentalist or pragmatic grounds.” Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2085 n.56 (1996) (citing examples).

A sympathetic portrait of formalism must concede its rhetorical force. Formalists are theorists who "tak[e] rules seriously."⁴⁴ They are theorists for whom words matter.⁴⁵ The formalist commitment to "the rule of rules"⁴⁶ is entwined with the ideals of the rule of law. Only if rules constrain the discretion of those who apply them can the legal system truly be deemed a "government of laws, and not of men."⁴⁷ Only then can citizens be deemed to have preexisting legal rights protected against government interference. Formalism thus legitimates governmental action because officials exercise coercive powers "only when and as authorized by the law,"⁴⁸ it also differentiates the application of law from the exercise of raw political power or brute force.

But formalists make even stronger claims about the virtues of rule by rules. Rules do more than bestow legitimacy on the decisions of the State. The "rule of rules" also provides the order and predictability essential to any rational scheme of governance. Rules, concrete and binding, are the guardians of order. It is the spectre of chaos as much as the promise of order that lends formalism much of its rhetorical, psychological and ideological force.

II. THE SEAMLESS WEB OF LEGAL FORM

A. *Robert Summers and the Role of Form*

Although this brief account of formalism is vaguely suggestive of what Summers means by his assertion that he is not a pre-realist formalist, the connection between Summers' formalism and his attempt to elucidate the formal character of law remains nebulous. After all, Summers' primary preoccupation is form—its "conceptualization," its

44. Schauer, *supra* note 2, at 537; *see also* Morrison v. Olson, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting) ("A government of laws means a government of rules.").

45. Of course, one might argue against this characterization: if formalists are scholars for whom words matter, why then do they choose to write in such an arcane and obscurantist style?

46. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 167 (1991). As Schauer concludes, however, the term "the rule of law" is plagued by ambiguity. *Id.* Schauer distinguishes between jurisdictional rules, which grant a specific agent or institution the power to hear a particular category of dispute, and rules which impose substantive regulative constraint on the decisionmaker. *Id.* at 168-74. Schauer argues that jurisdictional rules are essential to the existence of a legal system, but acknowledges that "[t]here is little that can be said acontextually about the desirable level of substantive regulative constraint on the decision-makers in any legal system. . . ." *Id.* at 173. Louis Kaplow advances a similar argument from a quite different perspective in *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995).

47. *Marbury*, 5 U.S. (1 Cranch) at 163.

48. BURTON, *supra* note 34, at 2.

"pervasiveness," and the indispensable role form plays in advancing both specific policy goals and general legal values.⁴⁹

At first glance, however, Summers' theory of form appears to be almost entirely descriptive. In order to demonstrate that form is both "pervasive[]" and "indispensable," Summers examines representative statutes, rules, and other legal phenomena in order to tease out characteristic formal attributes.⁵⁰ He then attempts to label, categorize, and systematize these various formal attributes and to discover formal features common to all legal systems. In other words, Summers attempts to construct a "typology" of legal form in order that discussions of form can use a common vocabulary. Despite the scope and breadth of this project, however, Summers claims to be merely illuminating "neglected aspects of the familiar"⁵¹ and adopting an approach that "should be congenial even to skeptics."⁵² Summers portrays his method as relatively uncontroversial,⁵³ except to arch-"substantivists" for whom form is "ipso facto bad."⁵⁴

From a pragmatist perspective, it is not immediately apparent why one would want to embark on the course Summers has set for himself. As Jack Balkin has quipped, "[b]eing a legal pragmatist means never having to say you have a theory."⁵⁵ Formalists are the metaphysicians

49. *Formal Character IV*, *supra* note 5, at 1. Form also advances "fundamental political values." *Id.* at 23. For further discussion of these distinctions, see *infra* notes 86-90 and accompanying text.

50. Summers' discussion of New York's burglary statute is an illustrative example of his methodology. Summers finds in this rule various formal attributes: preceptual formality (i.e., the burglary rule takes the form of a rule rather than a maxim or principle); configurative formality (i.e., the attributes of the burglary statute include generality, definiteness, completeness, simplicity); and encapsulatory formality (i.e., the rule is encapsulated in a statute rather than a judicial decision or administrative regulation). *Formal Character IV*, *supra* note 5, at 6-8; *Dunwody Lecture*, *supra* note 5, at 4-6. Summers then argues that "all [] state made rules display preceptual, configurative, and encapsulatory form." *Formal Character IV*, *supra* note 5, at 9; see also *Dunwody Lecture*, *supra* note 5, at 7.

51. *Formal Character IV*, *supra* note 5, at 1; *Dunwody Lecture*, *supra* note 5, at 3.

52. *Dunwody Lecture*, *supra* note 5, at 3; see also *Formal Character I*, *supra* note 6, at 245 ("I will re-order, reconceptualise, and introduce a nomenclature for much that is already very familiar.").

53. Yet the act of description (or, more aptly in this case, redescription) is an act of power and an attempt to change the settled order of things. As Karl Llewellyn once noted, "to classify is to disturb." Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 453 (1930). Describing, categorizing and naming are therefore powerful tools for changing the existing system. See Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523, 528 (1996) ("The claim that one has achieved [an] impartial View from Nowhere is really an exercise of power."); Schlag, *supra* note 10, at 1635 (deconstruction "seeks to subvert the categorial regimes in force within [legal] discourse").

54. *Formal Character IV*, *supra* note 5, at 2; *Formal Character I*, *supra* note 6, at 244.

55. J.M. Balkin, *The Top Ten Reasons to Be a Legal Pragmatist*, 8 CONST. COMMENTARY

of legal philosophy,⁵⁶ continually questing for a seamless web of principles—whether formal or substantive—that will make law philosophically coherent.⁵⁷ For pragmatists, the attempt to construct not only a theory but a general theory of form is not only inexplicable but also doomed to failure.

Yet if, like Summers, one adopts a formalist perspective, undertaking such a project is not only comprehensible but largely self-explanatory. Although formalism occupies very little of Summers' discussion, it supplies the hidden normative underpinnings of his typology project. Indeed, Summers' attempt to create a typology of legal form must be seen in light of his formalist aims—to preserve law's coherence and autonomy by insulating it from corrupting outside influences, to restore faith in the power of legal decisionmakers to make decisions according to rules, and to stave off the disorder and chaos that he thinks the likes of Richard Posner (his prototype of a pragmatist) and Duncan Kennedy (his prototype of a CLS scholar) have unleashed.

Form plays a pivotal role in Summers' theory by giving law both inner coherence and a sphere of autonomy. Consider a central tenet of Summers' article: form is pervasive in law.⁵⁸ At first glance, this statement seems tautologous. Form is merely a conventional vocabulary, a mode of thought and argumentation, and a set of practices used by participants in the legal system to designate "what [] something is,"⁵⁹ to designate it as "a *this* and not a *that*."⁶⁰ From this perspective, form makes a statute, a judicial decision, or any other legal phenomenon

351, 351 (1991).

56. See FRANK, *supra* note 37, at 58 (comparing the "legal [a]bsolutism" of early formalism to metaphysics); DENNIS PATTERSON, LAW AND TRUTH 23 (1996) ("The plausibility of the formalist enterprise depends upon the success of its metaphysical claims, specifically that law has a conceptual and normative structure independent of the play of external, usually political, interests.").

57. See, e.g., Weinrib, *supra* note 1, at 950 (arguing that formalism "embodies a profound and inescapable truth about law's inner coherence").

58. *Dunwody Lecture*, *supra* note 5, at 1.

59. Weinrib, *supra* note 1, at 958. Although I have borrowed language from Weinrib's definition, Weinrib defines form more broadly:

Form is the ensemble of characteristics that constitute the matter in question as a unity identical to that of other matters of the same kind and distinguishable from matters of a different kind. Form is not separate from content, but is the ensemble of characteristics that marks the content as determinate, and therefore marks the content as content.

Id.

60. *Id.*; see also PATTERSON, *supra* note 56, at 25 (defining form).

recognizable as distinctively legal mainly through force of linguistic habit.

For Summers, however, form serves nobler purposes. Form provides the deep structure of the legal system,⁶¹ and understanding law as formal is essential to understanding its underlying character.⁶² Indeed, the attempt to discover law's "character" assumes that law is philosophically coherent,⁶³ and the attempt to typologize legal form presupposes that it is an organic whole that lends itself to being labeled and categorized, dissected and explained. From Summers' perspective, law is therefore a seamless web of formal principles, united in structural harmony.⁶⁴

But legal form not only gives the law inner coherence, it also preserves law's autonomy.⁶⁵ What makes law distinctively legal (i.e., not political, sociological, moral, etc.) is precisely its formal character.⁶⁶ By establishing that form is pervasive in law, Summers hopes to

61. *Formal Character III*, *supra* note 6, at 156.

62. *Id.* ("In my opinion, if any one thing is what John Austin Called the 'key to the science of jurisprudence,' the formal character of law qualifies for that status as fully as any."); see also Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 MICH. L. REV. 1302, 1307 (1991) (describing law as "shot through with formality").

63. See *Formal Character IV*, *supra* note 5, at 18 (discussing the formal "coherence of

perhaps the emphasis on a seamless web of form rather than substance is one feature which distinguishes Summers' theories from pre-realist formalism.

Law may be able to maintain its autonomy by establishing its internal coherence. See Dupuy, *Shaking the Invisible Hand* 129, in *DISORDER AND ORDER* ("Economics constitute itself as an autonomous discipline unless it not only established the internal coherence of its domain but also proved that such coherence was consistent with the public interest.")

because "[t]he formal features of a rule are commonly . . . manifest on the face of the rule." *Formal Character IV*, *supra* note 5, at 8. Summers' main concern is with the law in books rather than the law in action. Summers bases his analysis on the language of rules rather than on the social situation surrounding the rule, the social context, the identity of the parties, or other socially relevant factors. Consider, for example, his discussion of two possible statutes, one requiring only that drivers must "drive at reasonable speeds," the other specifying that they must not exceed 65 miles per hour. *Id.* at 33. Summers favors the bright-line rule as being more "appropriately formal." *Id.* at 34; *Dunwody Lecture*, *supra* note 5, at 14-15. In fact, Summers suggests that the 65-mile-per-hour rule would *always* be preferable because it is more certain and better serves general legal values such as definiteness. *Formal Character IV*, *supra* note 5, at 34; *Dunwody Lecture*, *supra* note 5, at 19. But his analysis ignores the social, historical, and temporal context surrounding the rule. Perhaps a relatively bright-line rule is better in a highly populated area, because it more concretely specifies the minimum speed at which drivers must conform. But is it really a better compromise between freedom and safety in a rural area such as Montana, where one is far less likely to endanger the safety of others by exceeding 65 miles per hour? (Of course, the author's personal bias in favor of this rule might be explained by the fact that she grew up in the least populated part of West

rebut those who claim that law is merely politics in disguise. Indeed, Summers' overall ambit is to return form to its rightful place at the center of legal discourse, to "give form in the law its due."⁶⁷ His article thus valiantly struggles to isolate form for examination and dissection⁶⁸ and, by doing so, to define and police the boundaries between the formal and the substantive, between law and policy,⁶⁹ between "general legal values," "fundamental political values" and "problem-specific polic[y]" goals.⁷⁰

Form also enables and justifies Summers' faith in rule by rules. Summers adheres to the formalist belief that rules constrain the discretion of legal decisionmakers and provide preordained answers to legal disputes. But for Summers, "appropriate form"⁷¹ is particularly important, indeed "indispensable,"⁷² if the law is to "generate determinate reasons for action"⁷³ and decision by those who are subject to its commands.⁷⁴ The linguistic structure of this argument is telling: rules are clearly in control, and human actors must merely follow their edicts. Note, however, that rules can only generate determinate answers to legal questions (and hence can only constrain the exercise of discretion) if they communicate in language that is relatively clear and unambiguous.⁷⁵ Summers believes that, by and large, rules do speak clearly.⁷⁶

Texas). In addition, in designating the bright-line rule as "more appropriately formal," Summers is assuming that there is a social consensus that 65 miles per hour is an appropriate speed. If there is such a consensus, it has certainly not always existed and does not necessarily exist in other countries (or in Louisiana).

67. *Dunwody Lecture*, *supra* note 5, at 2; *Formal Character IV*, *supra* note 5, at 2.

68. *See, e.g., Formal Character IV*, *supra* note 6, at 17 (distinguishing between the formal and the substantive); *Dunwody Lecture*, *supra* note 5, at 7.

69. *See, e.g., Formal Character IV*, *supra* note 5, at 31 ("[O]ne may isolate and analyze the degree of definiteness of a rule independently of the content in which it is manifest.") *But cf. id.* at 32 ("Changes in the degree of any formal attribute of a rule necessarily manifest themselves in a change or content . . .").

70. *Id.* at 23-24. The beauty of form in Summers theory is that it simultaneously advances general legal values, fundamental political values, and problem-specific policies. *See discussion infra* pp. 19-20.

71. *Dunwody Lecture*, *supra* note 5, at 1; *Formal Character IV*, *supra* note 5, at 1.

72. *Dunwody Lecture*, *supra* note 5, at 1; *Formal Character IV*, *supra* note 5, at 1.

73. *Formal Character IV*, *supra* note 5, at 29.

74. Summers repeatedly refers to law as *generating* reasons for action. *See id.* at 16, 33, 37.

75. *See, e.g., Formal Character IV*, *supra* note 5, at 61 ("The argument from ordinary meaning is simply not readily available to justify significant departures from the actual language of a statute.") *But see Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (ignoring plain meaning in order to uphold the "spirit" of the law).

76. Well-drafted laws generate determinate reasons for action and decision "in core cases, the vast majority." *Formal Character IV*, *supra* note 5, at 54.

Law speaks directly and forthrightly in “ordinary language,”⁷⁷ and legal reasoning is therefore a relatively straightforward process of learning to speak and understand law’s ordinary language.

Not surprisingly, this view of legal reasoning makes Summers an ardent defender of textualism as the proper method of statutory interpretation.⁷⁸ Summers even describes textualism as a form of being faithful to law.⁷⁹ What is unusual about his defense of textualism, however, is his insistence that textualism is preferable to other methods of statutory interpretation because it is more “appropriately formal,”⁸⁰ which in this context means more constraining, less “malleable.”⁸¹ Of course, this argument is somewhat circular. Textualism is preferable to other methods of statutory interpretation because it is “more formal”; “more formal” methods of interpretation are preferable because they give more determinate answers to legal questions. Yet, in order to accept this argument, however, one has to adhere to its implicit premise that more formal/less malleable rules are more legitimate (*i.e.*, better serve rule-of-law values) than less formal/ more malleable rules.

For Summers, form gives law legitimacy and thereby defends against the disorder and chaos that anti-formalists would leave in their wake.⁸² Form is essential to “organized public decisionmaking”;⁸³ the alternative is anarchy and chaos.⁸⁴ Form segregates law and politics, and imbues law with the power to provide determinate answers. Most significantly, form enables “the very existence of legitimate authority”⁸⁵ to make and apply law. Thus, for Summers, it is form that makes law satisfy its formalist aspirations to coherence, autonomy, certainty, and legitimacy.

But naturally some types of form serve these values better than others. Summers hopes ultimately to “devise a calculus, or at least a

77. *Id.* at 52.

78. For a far more eloquent and extended account of the debate over textualism than I can hope to accomplish in this brief response, see Eskridge, *supra* note 2, at 646.

79. See *Formal Character IV*, *supra* note 5, at 57, 58.

80. *Id.* at 55. It is not clear why a purposive analysis of a rule would be any less “faithful” to the rule than a textual analysis. It might even be more faithful to its spirit than strict textualism. Summers, however, fears that purposive analysis would “invite[] the introduction of substantive considerations into the analysis,” *id.* at 58, and would therefore make the outcome depend on factors external to the rule.

81. *Id.* at 54, 57.

82. See generally *id.* at 23 (“‘Matter without form is chaos; power without form is anarchy.’”) (quoting *Cochran v. State*, 62 Ga. 731, 732 (1879)).

83. *Id.*

84. Modern theories of chaos posit that it, too, has a particular form. See JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* (1987).

85. *Formal Character IV*, *supra* note 5, at 23.

general approach, for law makers to use to determine the appropriate degrees of formal attributes in policy implementive rules proposed for adoption.”⁸⁶ In other words, Summers wishes to set forth a list of objective factors that should be used in determining the “appropriate form” of any given rule. Again, however, this search for the objectively appropriate form must be understood from a formalist perspective. Appropriate form is not merely whatever works. It is not even necessarily the form that best achieves a lawmaker’s policy objectives. Appropriate form should also serve “general legal values.”⁸⁷ By Summers’ definition, “general legal values” include fairness in application, impartial adjudication, fair notice, certainty and predictability, and so forth.⁸⁸ The beauty of form in Summers’ analysis is that it can often maximize general legal values and problem-specific policies simultaneously.⁸⁹ In a conflict, however, the accomplishment of problem-specific policy aims should always take second priority, for “appropriate form” will foster general legal values first. Moreover, these values take precedence over the accomplishment of specific policy objectives, because any rule that does not first serve legal and political values “may not really be law-like, may lack legitimacy, and so may at least be presumptively unwarranted in its entirety.”⁹⁰

B. *The Seamless Web Applied*

In an age when much legislation seems to be a response to newspaper headlines, Summers is to be lauded for his exhortation to better legal craftsmanship. Indeed, his theory of form is a useful reminder that the mechanics of lawmaking are often neglected in the rush to achieve policy goals. Of course, the success of Summers’ endeavor must ultimately be judged by how well his analysis of legal form helps us deal with concrete legal problems. Fortunately, Summers provides just such an example.

Assume that a police department wants to adopt a rule to ensure that its police officers are fit.⁹¹ The department believes that older officers are more likely to be unfit than younger officers, and therefore wishes

86. *Id.* at 63.

87. A rule that simultaneously serves general legal values and accomplishes problem-specific policies exhibits what Summers has labeled the “unisonal effect.” *Id.* at 45; *Dunwody Lecture*, *supra* note 5, at 20.

88. *Formal Character IV*, *supra* note 5, at 41; *Dunwody Lecture*, *supra* note 5, at 17-18. Summers’ “partial inventory” consists of 14 different “general legal values.” *Formal Character IV*, *supra* note 5, at 41-42.

89. *Formal Character IV*, *supra* note 5, at 42-45.

90. *Id.* at 49.

91. See *Formal Character*, *supra* note 5, at 46; *Dunwody Lecture*, *supra* note 5, at 21.

guidance on what sort of policy to adopt concerning officer retirement.⁹² The department has a choice: Should it adopt a rule mandating retirement at age 60, or should it adopt a rule requiring the fitness of each officer over a certain age (e.g., 55) to be evaluated on a yearly basis?⁹³ Does Summers' theory help us *objectively* choose the more "appropriately formal" rule?

Summers believes that it does.⁹⁴ Choosing the appropriately formal rule not only requires consideration of the specific policy objective—ridding the force of unfit officers; it also requires consideration of "general legal values."⁹⁵ Summers concedes that the more flexible fitness evaluation rule (in his lexicon, a "rule of low formality")⁹⁶ would ensure officer fitness more effectively than a bright-line age-60 retirement rule.⁹⁷ However, the fitness evaluation rule is inferior to the age-60 retirement rule in advancing general legal values.⁹⁸ According to Summers, the rule mandating retirement at age 60 better serves general legal values because (1) it is more predictable and "certain in operation,"⁹⁹ (2) it "maximize[s] the freedom from administrative irregularity,"¹⁰⁰ and arbitrariness in application, and (3) those affected by the rule will accord the rule more legitimacy because they will view "particular retirement decisions [as being] made on the basis of clear antecedent law."¹⁰¹ Thus, Summers assumes that any objective observer would rationally choose the age-60 retirement rule over the more flexible fitness evaluation rule.

But it is impossible to give an objectively right answer in the abstract to the question of which rule is more "appropriately formal."¹⁰² Summers seems to suggest (although this probably overstates

92. Many articles deal with whether rules or standards are preferable. See, e.g., Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). Although Summers' discussion seems to replay some of this debate, his primary concern is with whether his theory of form can help us choose rules that are "appropriately formal." *Dunwody Lecture*, *supra* note 5, at 14-15, 22.

93. *Dunwody Lecture*, *supra* note 5, at 21.

94. *Id.* at 21-22.

95. See discussion *supra* notes 87-90 and accompanying text.

96. *Dunwody Lecture*, *supra* note 5, at 21.

97. *Id.*

98. *Id.* at 22-23.

99. *Id.* at 21.

100. *Id.* at 22.

101. *Id.*

102. *Id.*; see Easterbrook, *supra* note 2, at 63 ("No one could say that rules are always

his actual view) that black-letter rules will almost always be more appropriately formal than more flexible standards. Such rules are not only more certain and easier to apply but also represent a more legitimate exercise of government power.¹⁰³ Yet Summers is able to choose the black-letter rule in his example only because he has prioritized certain general legal values over other general legal values and because he has chosen to address an issue on which there is a relatively high degree of social consensus.

The decision to place certainty and predictability at the top of the hierarchy of "general legal values" is not inevitable or self-evident but is itself a choice amongst competing values.¹⁰⁴ Indeed, as Cass Sunstein has argued, a commitment to case-by-case decisionmaking ("casuistry") "occupies a distinguished and prominent place even in a legal system committed to rule-bound justice and the rule of law."¹⁰⁵ Other important general legal values include fundamental fairness and the right to be free from arbitrary governmental decisionmaking. In the example given by Summers, these general legal values do not really come into conflict. Although the age-60 retirement rule discriminates solely on the basis of age rather than job performance, there is sufficient social consensus on this issue that neither the policy objective nor the mandatory retirement rule meant to implement it are particularly objectionable.

Consider, however, the following scenario. Again assume that policymakers want to rid the police force of unfit officers. A study indicates that officer fitness declines significantly after age 35 (rather than age 60). Therefore, the policymakers are contemplating adoption of a black-letter rule mandating retirement at age 35. If the choice of form can truly be made without reference to the problem-specific policy objective to be achieved, then arguably a mandatory retirement rule would still be the most appropriately formal rule in this situation. Yet one might well be inclined to argue that a rule requiring a yearly fitness examination would be preferable here. One might even argue that a black-letter rule would be so overinclusive in serving the policy of officer fitness that the rule would be an arbitrary exercise of governmen-

preferable to standards, or the reverse.").

103. See generally *Dunwody Lecture*, *supra* note 5, at 20-23.

104. In trying to provide an objectively neutral criteria for choosing optimal rules, Summers has mistakenly made his choice seem inevitable, the product of a straightforward exercise of legal reason.

105. Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 1023 (1995). According to Professor Sunstein, legal systems must sometimes "abandon rules in favor of a form of casuistry" which requires "comparisons between the case at hand and other cases, especially those that are unambiguously within a generally accepted norm." *Id.* at 958.

tal power. Yet faithful adherence to Summers' theory of form would not even allow him to address these arguments directly, for the scale of legal values has already been tipped in favor of certainty and predictability. In fact, Summers seems to be excluding precisely this type of value choice from his equation for selecting the most appropriate form.

This is not to say that Summers is incorrect in preferring the age-60 retirement rule in the example he gives. As a policy matter, the drawbacks of making case-by-case retirement decisions may outweigh the benefits, and there may be a sufficient social consensus that age 60 is a reasonable age to mandate retirement to justify this choice. However, one gets the sense that addressing the issue as a policy matter is precisely what Summers had hoped to avoid. Otherwise, there would be no need to justify the age-60 retirement rule from an objectively neutral perspective based on its degree of formality.

What this analysis suggests is that the desire to resolve the tension between competing values at the abstract level of form can never be fully realized. Instead, the necessity of choosing between (or simultaneously accommodating) various "problem-specific policies" is replicated at the level of "general legal values," and the choice of form (means) is inevitably connected to the ends to be served. Even at the abstract level of form, legal decisionmakers can neither transcend the realm of politics nor escape the necessity of choosing between competing values in order to reach policy goals.

III. WHY FORMALISM PERSISTS: THE TRIUMPH OF HOPE OVER EXPERIENCE

Nonetheless, Summers' theory of form raises provocative questions about the persistence of legal formalism. Recall that at the outset of *The Formal Character of Law IV*, Summers disavowed adherence to pre-realist formalism.¹⁰⁶ By pre-realist formalism, he presumably meant a naive formalism that reduces law to a small set of underlying substantive principles that mechanically dictate answers to legal questions. Even so, Summers' own formalism, with its unique reliance on form, reflects familiar formalist longings to segregate law and politics, to return rules to their rightful place at the pinnacle of the legal hierarchy, and, ultimately, to make the legal system rational, orderly, and internally coherent. Anti-formalist critics might respond that theoretical perfection is a practical impossibility in a system developed and administered by human actors; they might also respond that law, as a human institution, suffers from the same flaws and foibles as those who make and adminis-

106. See *supra* note 5 and accompanying text.

ter it. Yet what formalism promises may be as important as what it delivers. The formalist faith in certainty, predictability, and order fosters the conviction¹⁰⁷ that, despite the complexity of law as a human institution, we can unlock its mysteries, and this faith may be a matter of both psychological and practical necessity. In other words, though formalism may represent the triumph of hope over experience, it may be important to continue to hope.

From a theoretical perspective, part of formalism's attraction lies in the enticing portrait it paints of law. Formalism provides a coherent and elegant theory that philosophically unifies and politically legitimizes law, and formalism empowers human actors by making the legal system not only comprehensible but an outgrowth of human reason. Thus, from a philosophical perspective, "formalism's appeal is a function of the number of problems it solves, or at least appears to solve. . . ."¹⁰⁸

Yet the attractions of formalism may be as much psychological as theoretical.¹⁰⁹ The attempt to discover a unified conceptual structure underlying complex information is a classic human response to uncertainty.¹¹⁰ Indeed, the need to impose order may be an essential adaptive response for understanding and knowing the world around us.¹¹¹ Living systems come to know their world and "make sense"¹¹² of it by imposing order on it. In a very real sense, our world is created by the order we inflict on it.¹¹³ The impulse to order, what Morse

107. Farber, *American Formalism*, *supra* note 18, at 91 ("Formalists believe that certainty, stability and logic are the primary values to be sought by judges. . . ."); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 41 (1990) ("Formalism contains a built-in bias against legal change; this is a clue to the breadth and durability of its appeal.").

108. FISH, *supra* note 26, at 143.

109. Farber, *American Formalism*, *supra* note 18, at 100. As Farber notes, however, "[t]he occupational hazard of formalism . . . is an unbalanced obsession with formalist values at the expense of all else." *Id.* at 105-06.

110. "In the world of the living, order is indeed inseparable from the ways in which living systems makes sense, so that they can be said to have a world. We associate such activity with animals endowed with nervous systems, and consider such actions cognitive acts. Order and knowledge are entangled: this is evident." Francisco J. Varela, *Living Ways of Sense-Making: A Middle Path for Neuroscience*, in *DISORDER AND ORDER* 208 (Paisley Livingston ed., 1984).

111. MORSE PECKHAM, *MAN'S RAGE FOR CHAOS: BIOLOGY, BEHAVIOR, AND THE ARTS* 39 (1965); Varela, *supra* note 110, at 208; see HANS VAIHINGER, *THE PHILOSOPHY OF 'AS IF'* 105-06 (C. K. Ogden trans., 2d ed. 1935). For a provocative article developing similar themes, see Jeffrey L. Harrison & Amy R. Mashburn, *Jean-Luc Godard and Critical Legal Studies*, 87 MICH. L. REV. 1924, 1941 (1989) (arguing that the insights of the Critical Legal Studies movement may never fully take hold due to the "rage for order" (quoting PECKHAM, *supra*)).

112. Varela, *supra* note 110.

113. Richard Rorty describes "[t]he temptation to look for criteria [as] a species of the more general temptation to think of the world, or the human self, as possessing an intrinsic nature, an essence." RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* 6 (1989). However, Rorty

Peckham has termed the “rage for order,”¹¹⁴ leads us to “hypostatize [our] categorial constructs”¹¹⁵—in essence, we assume that the order we impose is immanent in reality itself.¹¹⁶ This impulse may even be so strong that we create order where there is none. Again quoting Peckham, “there is no set of perceptual data so disparate that human perception cannot create order and unity out of it.”¹¹⁷

The tendency to seek order everywhere is reflected in the formalist faith in law’s inner coherence and in the ability of law to be perspicuous and thereby enable rule by rules. This tendency is likewise evident in Summers’ search for the underlying formal character or essence of law and in his assumption that all phenomena in the legal system may be typologized according to their formal attributes. Form takes on significance independent of substance in Summers’ cosmology, for form is the single attribute unifying all legal phenomena. Form does not bring order to law; form is law’s order. Even the aspiration to a “general theory of form” is symptomatic of a desire to introduce order to a legal system fraught with uncertainty.

This deep-seated desire for order is expressed not just in general theories of law or theories of legal form; even the language of the law fosters the hope that law is orderly and inherently intelligible. As Oliver Wendell Holmes once wrote, “The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind.”¹¹⁸ Holmes went on to add that “certainty generally is illusion, and repose is not the destiny of man.”¹¹⁹ Still, Holmes’ words capture a distinctive feature of legal language: the language of the law, and particularly the language of judicial decisions, makes results seem inevitable.¹²⁰ Like Summers, judges and other legal decisionmakers commonly describe rules as generating reasons for action.¹²¹ Opinions

cautions that we should never forget “that truth is made rather than found.” *Id.* at 7.

114. *Id.* at 34.

115. *Id.* at 30.

116. Indeed, to say that reality is socially constructed—that it is created by the categories we impose upon it—is to say that people find it useful to impose categories on their experience.

117. RORTY, *supra* note 113, at 30.

118. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465-66 (1897).

119. *Id.* at 466.

120. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (“[J]udges in a real sense ‘make’ law. But they make it *as judges make it*, which is to say *as though* they were ‘finding’ it. . . .”); Posner, *supra* note 3, at 1373 (“The judge is the oracle through which the god (Law) speaks.”).

121. In an early example, the great Justice John Marshall described, “The words of the constitution, then, are express, and incapable of being misunderstood. They admit of no variety of construction, and are acknowledged to apply to that species of contract . . . which has been

speak in the language of compulsion, and convention still requires judges to place themselves above the dispute at hand, to behave as if their hands are metaphorically tied by the dictates of the law itself.

Any deviation from this pattern makes us profoundly uncomfortable. At an almost visceral level, we feel that it is illegitimate for a judge to tell the parties in a dispute that their case is a very close one and that the judge will simply flip a coin to resolve it.¹²² Such judicial candor offends our sensibilities. While we might tolerate a mental coin-flip, a literal one is unacceptable. One might even argue that the judge has behaved unethically by creating an appearance of impropriety and by bringing into question the integrity of the judicial system. Both as citizens and as lawyers, we want to feel that our judges' judgments are based on logic rather than emotion and that the act of judgment is rational.¹²³

This is not to say that the formalist longing for law's inner coherence is naive, foolish, or unsophisticated. At a minimum, viewing law as an ordered system that is somehow separate from the human actors that make and apply it¹²⁴ may reduce the profound anxiety that would otherwise ensue.¹²⁵ More significantly, the tendency to hypostatize legal constructs—to imbue them with the power to provide preordained answers—may be essential to the effective functioning of the legal system. Legal reasoning, with its propensity toward abstraction, potentially obscures the human context in which legal disputes arise.¹²⁶ In so doing, legal reasoning masks both the humanity of the individuals before it and the necessity of making difficult moral and political

entered into by these parties." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 198 (1819).

122. This scenario is not hypothetical. See Peter Franceschina, 'You're Heads, You're Tails': *Lee Judge Flips Coin to Decide Boy's Fate*, FORT MYERS NEWS-PRESS, July 31, 1996, at 1A.

123. See Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 156 (1994) (noting that courts prefer to "avoid the appearance of deciding cases based on judicial whim").

124. See Dupuy, *supra* note 65, at 143. Dupuy describes the human "capacity to step out of themselves, or hang over themselves, in such a way that the violence of the upper level—that of the sacred or the State—bec[omes] good violence" as necessary for maintaining the State's legitimacy. *Id.*

125. Harrison & Mashburn, *supra* note 111, at 1941; see also Peter Gabel, *Reification in Legal Reasoning*, in CRITICAL LEGAL STUDIES 17, 26 (James Boyle ed., 1994) ("[P]eople 'believe in' the legal order because the legal order substitutes an harmonious abstract world for the concrete alientation that characterizes their lived experience.").

126. See JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW—CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (1976) (arguing that judges should pay more attention to the humanity of participants in the legal system); Walter O. Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 CAL. L. REV. 699 (1978) (critiquing Noonan's thesis and detailing the importance of law's masking functions).

choices. Yet as Professor Walter Weyrauch has convincingly shown, the masking functions of law may be crucial to its success in resolving social conflicts and in "keeping the peace."¹²⁷ Professor Weyrauch analogizes the use of "legal masks" to the use of physical masks in tribal societies.¹²⁸ Like physical masks, the legal "masks of objectivity, neutrality, and fairness give the legal process" an existence independent of those who administer it.¹²⁹ By invoking a higher or "independent authority" for law,¹³⁰ legal masks allow participants to maintain their confidence in the system¹³¹ and make the exercise of power more palatable.¹³² The masking functions of law lend "[i]ndividual decisions . . . an institutional or transcendental legitimacy."¹³³ Legal masks therefore allow participants in the legal process to believe that legal decisionmakers are capable of ignoring the status of any individual participant in order to reach fair results. Likewise, participants are able to have faith that the legal decisionmaker is merely playing a role and that the law speaks through the decisionmaker rather than vice versa.

These masking functions are also beneficial to legal decisionmakers themselves. Legal masks enable legislators, lawyers and judges to make the hard choices that are necessary to resolve conflicts. Not only do these masks insulate decisionmakers from criticism¹³⁴ and allow decisionmakers to deny "personal responsibility for the results" of their choices,¹³⁵ legal constructs also provide a "frame" to legal disputes by obscuring certain factors and emphasizing others.¹³⁶ Such constructs winnow relevant from extraneous information and thus enable decisionmakers "to process masses of chaotic and amorphous facts"¹³⁷ into legally useful data. Moreover, legal masks narrow the decisionmaker's scope of inquiry to manageable proportions by

127. Weyrauch, *supra* note 126, at 718.

128. *Id.* at 714-18.

129. *Id.* at 718. This independent existence helps secure law's institutional survival. *See id.* at 701.

130. *Id.* at 718.

131. *Id.*

132. *Id.*

133. *Id.* at 716.

134. *Id.* "Participants and observers of the legal system are less likely to criticize or even question decisions that appear to be based on an objective application of neutral laws." *Id.* at 717.

135. *Id.*

136. "[A] major role of masks in our legal system is to objectify human conflict and exclude much human information that would be relevant if the only purpose of the system were to render 'justice.'" *Id.* at 714.

137. *Id.* at 708. As Professor Weyrauch notes, masking may be "inherent in any form of reasoning." *Id.*

providing a background of common, often unconscious assumptions.¹³⁸ Finally, legal masks are useful precisely because they make it harder for legal decisionmakers to empathize with participants in the legal system, since “empathy . . . interfere[s] with the clarity of legal analysis by raising scruples or emotions.”¹³⁹ What this discussion suggests is that the legal system may owe its existence to the extraordinary persistence of faith that it can achieve its aspirations of neutrality and objectivity, that law can remain above the humans it governs. An important corollary, however, is that anti-formalists may never be able to declare ultimate victory over formalism. Both Critical Legal Scholars and pragmatists reject the formalist portrait of law as rational, orderly, predictable, autonomous, and ascertainable through a relatively straightforward process of legal reasoning.¹⁴⁰ Critical Legal Scholars in particular have attempted to “unmask law” in order “to reveal the disorder that lurks when decisions are made by human beings of either good- or ill-will.”¹⁴¹ Yet to the extent that anti-formalists fail to provide something in place of the disorder they have unveiled, their attack on formalism is probably doomed to fail.¹⁴²

Fortunately, neither Critical Legal Scholars nor pragmatists have displayed any special immunity from the impulse to theory-building. Consider, for example, the theoretical enterprise of the CLS movement. Although CLS scholars have sometimes been accused of nihilism,¹⁴³ this criticism is largely unfounded. CLS scholars do not deconstruct (or “trash”¹⁴⁴) the existing system merely for deconstruction’s sake.¹⁴⁵

138. Indeed, this has been one of the chief themes of the CLS movement.

139. Weyrauch, *supra* note 126, at 708. Of course, this masking is not costless. By preventing empathy, legal masks make legal decisionmakers seem callous.

140. See FISH, *supra* note 26, at 209. According to the pragmatist account of law, “law works not by identifying and then hewing to some overarching set of principles, or logical calculus, or authoritative revelation, but by deploying a set of ramshackle and heterogeneous resources in an effort to reach political resolutions of disputes that must be framed . . . in apolitical and abstract terms. . . .” *Id.*

141. Harrison & Mashburn, *supra* note 111, at 1943.

142. Professors Jeffrey Harrison and Amy Mashburn have developed this idea more fully in their excellent article, *supra* note 111.

143. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739-40 (1982). For a response, see Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

144. See Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 321 (1984) (describing “trashing” as “a technique of seeing (and undermining) illegitimate power . . .”).

145. See J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1626 (1990) (arguing that deconstruction is inevitably “logocentric,” *i.e.*, that it inevitably privileges certain ideas as the “most true, real, valuable, or appropriate”).

They are usually “deconstruct[ing] for a reason,”¹⁴⁶ often to support a left-liberal ideology.¹⁴⁷ On the flip side, critics accuse CLS scholars of Utopianism whenever they advance a positive agenda of reform.¹⁴⁸ What this criticism points out, however, is that CLS scholars believe in theory; they just do not believe in the theory currently in operation. CLS scholars may not have faith that the current system is rational and orderly, but they do have faith that a system can arise in its place which promises justice, equality, and democracy.¹⁴⁹

Even pragmatists are not immune from what Stanley Fish has called “antifoundationalist theory-hope.”¹⁵⁰ Antifoundationalist theory-hope is the belief that critical self-consciousness will deliver us from the necessity of theory-building.¹⁵¹ Although pragmatists come in many different stripes,¹⁵² all are committed to a profound skepticism of any philosophical “grand theory” that purports to explain away all our difficulties.¹⁵³ Yet most pragmatists are also simultaneously committed to an agenda of making law better,¹⁵⁴ which for the most part means making it more rational, more orderly and more just. This agenda requires a theory for distinguishing what is more rational, more orderly and more just from what is less rational, less orderly and less just, even if such a theory is only provisional. Again, however, once pragmatism commits to a specific agenda, it becomes “unfaithful to its own first principle (which is to have none). . . .”¹⁵⁵

146. *Id.* at 1627 (arguing that “one deconstructs because one has a particular ax to grind . . .”).

147. Similarly, law and economics scholars initially tended to use economic theory to support a conservative political agenda.

148. See generally Michael A. Foley, *Critical Legal Studies: New Wave Utopian Socialism*, 91 DICK. L. REV. 467 (1986); Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413 (1984).

149. See, e.g., Singer, *supra* note 143, at 8-9.

150. FISH, *supra* note 26, at 172.

151. *Id.* For an excellent discussion of Fish’s flaws, see Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990).

152. Balkin, *supra* note 55, at 351 (A pragmatist “can also be (a) a civic republican, (b) a feminist, (c) a deconstructionist, (d) a case-cruncher, (e) a crit, (f) a law-and-economics type, or (g) anything else.”). For a good discussion of the underlying philosophical concepts that unify legal pragmatists, see Cotter, *supra* note 43, at 2073-98.

153. See RICHARD A. POSNER, *OVERCOMING LAW* 7 (1995); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 798-802 (1989).

154. Professor Cotter explains that “[t]he relevant task [for pragmatists] is to make our system of situated legal decisionmaking better than it is now—in which ‘better’ means, in Rortyan fashion, whatever seems better to the policymaker in light of her contingent, nonexternally grounded norms.” Cotter, *supra* note 43, at 2080 (emphasis omitted).

155. FISH, *supra* note 26, at 209. Stanley Fish phrases this criticism well: “A pragmatist program asks the question ‘what follows from the pragmatist account?’ and then gives an

However, our inescapable impulse to find order should never obscure the fact that order is more often a product of the human mind than an innate property of reality itself. "Order is order, relative to somebody or some being who takes such a stance toward it."¹⁵⁶ But the very desire that prompted us to build a theory in the first place also blinds us to this crucial feature. Our "theoretical model itself quickly becomes frozen,"¹⁵⁷ and we find ourselves becoming "advocate[s] of stability and [] enem[ies] of further change."¹⁵⁸ As Professor Weyrauch warns, once our categories have become self-evidently true, it is probably a signal "that we have reached the outer limits of our capacity to perceive and should try to extend the scope of our perception."¹⁵⁹

In this sense, the pragmatists and CLS scholars who are the targets of Summers' attack provide a useful antidote to the extremes of formalist theory,¹⁶⁰ for they remind us that the tendency to hypostatize order has potentially negative as well as positive consequences. Entrenched categories block the imagination and make us incapable of seeing possible avenues of reform or even the need for it. By doing so, they perpetuate the status quo, whether for good or ill. At a minimum, anti-formalists of all stripes have urged critical self-consciousness by forcing us to question the formalist premises that still underlie our legal system and even our modes of thought. While this critical self-consciousness may not deliver us from the impulse to build new theories, perhaps it is a start down the path toward newer and better (or at least different) theories.¹⁶¹ To paraphrase H.L.A. Hart, neither formalists nor anti-formalists have cornered the market on truth, but both may be useful: "Formalism and rule-s[k]epticism . . . are great exaggerations,

answer, but by giving an answer pragmatism is unfaithful to its own first principle (which is to have none) and turns unwittingly into the foundationalism and essentialism it rejects." *Id.*

156. Varela, *supra* note 110, at 208.

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

158. *Id.*

159. Weyrauch, *supra* note 126, at 710.

160. See GILMORE, *supra* note 157, at 109 (suggesting "that we will do well to be on our guard against all-purpose theoretical solutions to our problems").

161. As Grant Gilmore usefully reminds us, it pays:

to keep our theories open-ended, our assumptions tentative, our reactions flexible. . . . Like the blind men dealing with the elephant, we must erect hypotheses on the basis of inadequate evidence. That does no harm—at all events it is the human condition from which we will not escape—so long as we do not delude ourselves into thinking that we have finally seen our elephant whole.

Id. at 110.

salutary where they correct each other, and the truth lies between them."¹⁶²

IV. CONCLUSION

As Professor Summers' recent efforts demonstrate, formalism is not only alive but also thriving. In the face of sustained attack, formalism retains its power to attract devotees and defenders. Perhaps those mystified by its persistence should reconsider its theoretical and psychological attractions. Formalism is bold in its aspirations. Formalism is not merely a theory of law; it is a grand theory which philosophically unifies the legal universe. Formalism promises law its own domain; it promises rules sovereignty in governing human affairs; it promises to place reason and order at the top of the hierarchy of legal values. But formalism's philosophical attractions may ultimately be secondary to its psychological ones. Formalism inspires faith at least in part because it responds to a basic human longing for certainty, predictability and order. Yet as anti-formalists usefully remind us, faith should be tempered with experience. We must therefore be wary of formalism's capacity to blind us to the vagaries of law as a human institution and to camouflage the role of humans acting under the guise of rules.

162. HART, *supra* note 2, at 144.

