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INTRODUCTION

PERSPECTIVES ON JUDGING in the United States are dominated by a story about the formalists and the realists. From the 1870s through the 1920s—the heyday of legal formalism—lawyers and judges saw law as autonomous, comprehensive, logically ordered, and determinate and believed that judges engaged in pure mechanical deduction from this body of law to produce single correct outcomes. In the 1920s and 1930s, building upon the insights of Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo, the legal realists discredited legal formalism, demonstrating that the law is filled with gaps and contradictions, that the law is indeterminate, that there are exceptions for almost every legal rule or principle, and that legal principles and precedents can support different results. The realists argued that judges decide according to their personal preferences and then construct the legal analysis to justify the desired outcome.

This is the standard chronicle within legal circles as well as in political science, repeated numerous times by legal historians, political scientists who study courts, legal theorists, and others. A recent article on judging coauthored by two law professors and a federal judge begins:

> How *do* judges judge? According to the formalists, judges apply the governing law to the facts of a case in a logical, mechanical, and deliberative way. For the formalists, the judicial system is a "giant syllogism machine," and the judge acts like a "highly skilled mechanic." Legal realism, on the other hand, represents a sharp contrast. . . . For the realists, the judge "decides by feeling and not by judgment; by 'hunching' and not by ratiocination" and later uses deliberative faculties "not only to justify that intuition to himself, but to make it pass muster."[1]

A book on judging by three political scientists lays out the same account: "Until the twentieth century, most lawyers and scholars believed that judging was a mechanistic enterprise in which judges ap-

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plied the law and rendered decisions without recourse to their own ideological or policy preferences. . . . In the 1920s, however, a group of jurists and legal philosophers, known collectively as 'legal realists,' recognized that judicial discretion was quite broad and that often the law did not mandate a particular result."[2] A legal historian writes, "Formalist judges of the 1895–1937 period assumed that law was objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics. . . . The Legal Realists of the 1920s and 1930s, tutored by Holmes, Pound, and Cardozo, devastated these assumptions. . . . They sought to weaken, if not dissolve, the law-politics dichotomy, by showing that the act of judging was not impersonal or mechanistic, but rather was necessarily infected by the judges' personal values."[3] A legal theorist writes that "we may characterize formalism as the descriptive theory of adjudication according to which (1) the law is rationally determinate, and (2) judging is mechanical. It follows, moreover, from (1), that (3) legal reasoning is autonomous, since the class of legal reasons suffices to justify a unique outcome; no recourse to non-legal reasons is demanded or required."[4] "Realists were certainly antiformalists," he adds.[5] Identifying the inspiration for legal realism, a legal sociologist writes, "Holmes's central ideas on law are based on a rejection of the doctrine of legal formalism that dominated American legal thought. The doctrine of legal formalism holds that the law is an internally consistent and logical body of rules that is independent from the variable forms of its surrounding social institutions."[6]

The formalist-realist antithesis has migrated to shape general historical understandings. A specialist in the turn of the twentieth century reports, "At the beginning of the Progressive Era, the judges of the Supreme Court had long followed the abstract concept of *legal formalism*. They ruled through a deductive process that followed the logic that had shaped preceding rulings. . . . Progressives argued that rather than law being a set of abstract principles and accumulated precedents from which jurists could not deviate, law had to take account of social conditions from which law arose. . . . They urged that attachment to legal formalism be abandoned and replaced with legal realism."[7]

This ubiquitous formalist-realist narrative is not a quaint story of exclusively historical interest: it structures contemporary debates and research on judging. The formalists are "the great villains of contemporary jurisprudence."[8] A "formalist" judge is guilty of foolishness or dishonesty—of slavish adherence to rules contrary to good sense or manipulation under the guise of adherence. Judge Richard Posner's *How Judges Think* is pitched as an effort to debunk the delusions of legal formalism that still beguile the legal fraternity.[9] Well over a hundred quantitative studies of judging have been conducted by po-

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litical scientists,[10] with reams more currently underway, many aiming to prove that formalism is wrong and realism is correct. Legal academics are busily developing "new legal formalism" or "new legal realism."[11] The entire legal culture has been indoctrinated in the formalist-realist divide.

A database of U.S. law journals going back two centuries provides concrete evidence of the rapid ascendance and current attention to formalism and realism.[12] Before1968, no article (*zero*) was published in a law journal with "formalism" or "formalist" in the title.[13] The first article title to include one of these terms was written by Grant Gilmore in 1968.[14] From 1968 through 1979, *nine* articles had one of these terms in the title. From 1980 through 1989, the total was *twenty-seven*; from 1990 through 1999, it was *sixty-eight*; and from 2000 through 2007, *forty-eight*.[15] A search for titles with "realism" or "realist" (subtracting other usages of these common terms) shows a similar trajectory, moving from a relatively low frequency from the 1930s through the 1950s (a low of *seven* and high of *sixteen*), going up a bit in the 1960s and 1970s (numbering in the low *twenties* each decade), then jumping to a much higher level in the 1980s (*sixty-five*), 1990s (*eighty-two*), and 2000 through 2007 (*sixty-four*).[16] Remember that this counts only titles with a reference to the formalists or the realists. Many more articles (in the thousands) and books mention or discuss them.

The pervasive influence this story exercises on contemporary thought about judging is all the more extraordinary when one realizes that the formalist-realist divide is wrong in essential respects. The story about the legal formalists is largely an invention, and legal realism is substantially misapprehended. Quantitative studies of judging are marked by a distorting slant owing to incorrect beliefs about the formalists and realists. Legal theory discussions of legal formalism are irrelevant, misleading, or empty. Debates about judging are routinely framed in terms of antithetical formalist-realist poles that jurists do not actually hold.

The objective of this book is to free us from the formalist-realist stranglehold. It consists of a web of interlocking misinterpretations and confusions bundled in a mutually reinforcing package that is now virtually taken for granted. The consequences of this collection of errors are ongoing and pernicious. Rooting out the formalist-realist story will help us recover a sound understanding of judging.

The Myth about the Legal Formalists: Part I

The key to dislodging this framework is to refute assumed beliefs about legal formalism. This effort will take some doing. Many histori-

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ans and theorists have made confident assertions about what the legal formalists believed. I and others have taught a generation of students about the former dominance of legal formalism. It is stupefying to think that we could have been collectively wrong for so long about something so central and well known.

To demonstrate that the age of "legal formalism" never really existed as such is like proving that ghosts do not exist: one must dispute the credibility of ghost sightings and offer more plausible alternative explanations for the phenomena witnessed. That is the approach taken in part I. Much like chasing ghosts, investigating the formalists proves elusive because they are hard to catch a glimpse of. The formalists never speak for themselves. Every account of the legal formalists and the purportedly widespread belief in "mechanical jurisprudence" has been written by *critics* like Roscoe Pound and Jerome Frank, and by modern historians and theorists relying upon the accounts of critics. "Formalism," legal theorist Tony Sebok observed, ". . . does not really have an identity of its own: As a theory of law, it exists only as a reflection of scholars like Holmes, Pound, Llewellyn, and Frank."[17]

To break down the story, the leading accounts of mechanical jurisprudence and legal formalism—written by Roscoe Pound, Jerome Frank, Grant Gilmore, and others— will be exposed as replete with errors and falsehoods. Although Pound repeatedly *claimed* that turn-of-the century judges and lawyers believed in mechanical deduction, he offered no quotations or citations to that effect by anyone who espoused this purportedly dominant view of judging. When describing this set of beliefs, Pound relied heavily on discussions of German legal science. Frank also relied upon German legal science in his portrayal of judging, and he cited Pound. Most claims about the legal formalists trace back through a string of citations to Pound and Frank.

Abundant ironies will tumble forth as this false story is splayed open. Jurists in the late nineteenth century, it turns out, took substantial pride in the progress they had made in *overcoming* formalism in law. They thought formalism was a primitive legal stage beyond which they had evolved. Chapters 2, 3, 4, and 5 reveal that *many* people in law—including many of the most prominent lawyers, judges, and academics of the day—described judging in consummately realistic terms.

As a preview of the evidence to come, consider this 1881 passage about judging:

> It is useless for judges to quote a score of cases from the digest to sustain almost every sentence, when *every one knows* that another score might be collected to support the opposite ruling. The perverse habit of qualifying and distinguishing has been car-

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> ried so far that all fixed lines are obliterated, and a little ingenuity in stating the facts of a case is enough to bring it under a rule that will warrant the desired conclusion. . . . *[T]he most honest judge knows that the authorities with which his opinions are garnished often have had very little to do with the decision of the court—perhaps have only been looked up after that decision was reached upon the general equities of the case*. . . . He writes, it may be, a beautiful essay upon the law of the case, but the real grounds of decision lie concealed under the statement of facts with which it is prefaced. It is the power of stating the facts as he himself views them which preserves the superficial consistency and certainty of the law, and hides from careless eyes its utter lack of definiteness and precision.[18]

William G. Hammond made these striking statements, as skeptical as anything the legal realists would say five decades later, upon his installation as the first full-time dean and professor at St. Louis Law School. He was not a legal radical. Hammond, indeed, has been identified by legal historians as an important contributor to legal formalism.[19]

A Reconstruction of Legal Realism: Part II

The standard portrait of the legal realists as a band of pioneering jurists shining a realistic light on judging to illuminate a previously darkened age advances a gross misunderstanding of our legal history. Contemporary historiography paints Holmes as an iconoclast, Pound as a bridge from Holmes to the realists, Cardozo as bravely breaking taboos in his candor about judging, and the realists as rebellious radicals who finally crushed the formalist resistance. Chapters 5 and 6 show that much of this narrative is misleading. Holmes's views were presaged by others, were not unusual among his contemporaries, and were tame in comparison to some; what Cardozo said about judging in the 1920s had been openly stated by leading judges decades earlier; the realists' views of judging closely match what the historical jurists wrote in the 1880s and1890s.

Pound coined "mechanical jurisprudence" in 1908 to criticize judges as trapped in a straightjacket of logical reasoning. Multiple accounts by his contemporaries, however, suggest that judges were not reasoning in any peculiarly mechanical or precedent-bound manner. The dominant theme at the time, contrary to the standard image of the formalist age, was the worrisome uncertainty of the law created by the proliferation of inconsistent precedents and an explosion of legislation.

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In 1930, in the course of attacking contemporary courts, Jerome Frank reprised and embellished Pound's characterization of judges beguiled by mechanical jurisprudence. Then in the 1970s the story was once again dusted off by critics of courts and worked into the full-blown theory of the formalist age. Loud bouts of skepticism about judging erupt periodically owing to unhappiness with law and judging, and the legal realists were one such episode.

A "Balanced Realism" about Judging

The objective of this book is to recover an understanding of judging now obscured by the formalist-realist divide that has prevailed for well over a century—what I call "balanced realism." Balanced realism has two integrally conjoined aspects—a skeptical aspect and a rule-bound aspect. It refers to an awareness of the flaws, limitations, and openness of law, an awareness that judges sometimes make choices, that they can manipulate legal rules and precedents, and that they sometimes are influenced by their political and moral views and their personal biases (the skeptical aspect). Yet it conditions this skeptical awareness with the understanding that legal rules nonetheless work; that judges abide by and apply the law; that there are practice-related, social, and institutional factors that constrain judges; and that judges render generally predictable decisions consistent with the law (the rule-bound aspect). The rule-bound aspect of judging can function reliably notwithstanding the challenges presented by the skepticism-inducing aspect, although this is an achievement that must be earned, is never perfectly achieved, and is never guaranteed.

A concise statement of balanced realism was set forth by Cardozo:

> Those, I think, are the conclusions to which a sense of realism must lead us. No doubt there is a field within which judicial judgment moves untrammeled by fixed principles. Obscurity of statute or of precedent or of customs or morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function. In such cases, all that the parties to the controversy can do is to forecast the declaration of the rule as best they can, and govern themselves accordingly. We must not let these occasional and relatively rare instances blind our eyes to the innumerable instances where there is neither obscurity nor collision nor opportunity for diverse judgment.[20]

Contrary to their image as skeptics, the legal realists viewed judging in similarly balanced terms. They did not assert that judges routinely

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manipulate the law to produce desired outcomes. The misleading skeptical image of the realists is perpetuated by the formalist-realist antithesis, which casts the realists as the opposite of formalism. Karl Llewellyn, realist extraordinaire, devoted a 500-page book to refuting the "Law School Skeptic,"[21] arguing at length that judicial decisions are highly predictable and determined mainly by legal factors.[22] He wrote the book to counteract the corrosive effect of facile skepticism about judging.[23]

Not only did the legal realists see judging in terms of balanced realism, so did their contemporaries, and so did many leading jurists in the late nineteenth century as well as in the twentieth century. Beneath roiling surface debates, jurists have generally viewed judging in terms of balanced realism. A theme that runs through this book is that judges, in particular, have consistently and candidly expressed a balanced realism about judging. Many judges will be heard from in these pages.

The Slant within Quantitative Studies of Judging: Part III

Quantitative studies of judging conducted by political scientists are booming, but the orientation of the field has been badly warped by the story about the formalists and the realists. Taking up the banner of legal realism, the expressed aim of the field has been to expose legal formalism as a fraud. Driven by this mission, scholars have labored for decades to prove that judging is political. Part III shows how this orientation has distorted their models of judging, the design of their studies, and the interpretation of their results. Political scientists working in this area have tended to suppress the role law plays in judicial decisions while overstating the role politics plays.

After exposing the slant that infects the field, chapter 7 conveys the many realistic things judges said about judging from the 1920s through the 1960s (when quantitative studies took off). Chapter 8 then summarizes the findings of the most recent quantitative studies of lower federal courts. This juxtaposition serves to underline a key point: the results of the studies tend to confirm the balanced-realism judges have expressed for many decades. Results that judicial politics scholars now tout as proof of the influence of politics on judging are more correctly interpreted—when the small size of the effect is considered—as providing evidence that judicial decisions are substantially determined by the law.

The results are not uniformly reassuring, however. Several recent studies that bear signs of an increasing politicization of judging are

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also discussed. Because political scientists are wont to assert that judging by its nature is politically driven, they have difficulty condemning in legal terms an increase in the politicization of judging. Balanced realism recognizes the inevitability of various political influences on judging, but it also identifies the appropriate role and limits of this influence. A realistic account of what the rule of law requires of judges is offered, along with suggestions to help reorient quantitative studies in a more productive direction.

Moving Past the Divide in Legal Theory: Part IV

Efforts by theorists to make sense of formalism, as chapter 9 explains, are plagued by two factors. One problem is that "formalism" was historically used as a pejorative with no theoretical content. Theorists working with this term today are in effect trying to turn what was insult into a meaningful concept, but the negative connotations cling to the word soiling whatever is produced. Another problem is that theorists are inevitably drawn to the false story about the legal formalists—that judges engage in mechanical deduction from a comprehensive, autonomous, logically ordered body of law. Theories that incorporate elements of this story do not match the common law system and impose demands that are impossible to achieve.

The two most influential contemporary theoretical formulations of legal formalism, by Duncan Kennedy and Frederick Schauer, are critically engaged to demonstrate that the notion lacks theoretical value. Furthermore, modern jurists who are developing "new formalism" accept the basic insights of balanced realism, and nothing in their position is based on anything distinctive to "formalism." When stripped to the basics, formalism comes to nothing more than rule-bound judging. The notion of formalism can be struck from the theoretical discussion without loss, saving much confusion.

The final chapter of the book, chapter 10, begins with a discussion of Judge Richard Posner's new book on judging. He pitches the book as a full-bore assault on legal formalism—still dominant, still pervasive in legal circles. When attacking this target, Posner sounds a great deal like an extreme skeptical realist. Beneath his deliberately provocative stance, however, Posner is a balanced realist, merely repeating what judges have been saying about judging for a hundred years. In his balanced realism about judging, Posner shares a great deal in common with his erstwhile targets, including the arch formalist Justice Antonin Scalia.

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Drawing from the information and accounts provided in the course of previous chapters, especially relying upon the insights of judges, the basic elements of a balanced realist view of judging are briefly articulated. The recognition of balanced realism will not resolve the normative and empirical debates that surround judging, but it will make plain that there is much common ground and that the debate plays out on relatively limited (albeit important) terrain.

Balanced realism is descriptively accurate only as long as a balance exists between the skepticism-inducing aspects of judging and the rule-bound aspects. In recent decades, however, skepticism about judging has increased within the legal culture as well as in the public consciousness, fueled by the politicization of federal judicial appointments and state judicial elections. Excessive skepticism about judging harbors the potential to disrupt the balance. By dislodging the formalist-realist divide and replacing it with balanced realism, this book is an effort to resist this unhappy prospect.