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Forms of Formalism

Richard H. Pildes†

Does modern American legal formalism exist, and what might that question mean? Three modes of self-styled legal formalism are presented at this Symposium: (1) formalism as anticonsequential morality in law; (2) formalism as apurposive rule-following; and (3) formalism as a regulatory tool for producing optimally efficient mixes of law and norms in contract enforcement regimes. Even superficially, the problems these "formalisms" aim to solve and their operational structures share little in common.

But beyond their obvious structural differences, these modern "formalisms" diverge even more profoundly in their underlying conceptions of morals, politics, and society. Indeed, the animating conceptions of morality and society of some of these modes are antithetical to those underlying others. Much has been written already about the analytical case for and against some of these formalisms, particularly rule-following, and I want to minimize the rehearsal of those analytical contests. Instead, it is the underlying assumptions I want to explore, with the aim of showing the distinct world views that appear to motivate each mode of modern formalism. Because both the structure of these modern formalisms and their underlying justifications differ so sharply, it is implausible to see them as representing any unified, coherent vision of modern legal formalism.

In "revisiting" formalism, we should also ask whether these modern formalisms constitute in any way a nascent revival of those *bêtes noires* of legal modernism—Langdell, Ames, and Beale—and of the classical legal formalism that they so assiduously constructed. Here I think we will find some surprising results.

I. CLASSICAL FORMALISM

To reprise the structure of classical formalism briefly, an exemplary case will help. I will use Langdell's famous treatment of

the "mailbox rule" in contract law.[1] When Langdell addressed the problem of whether an acceptance was valid when mailed or only when received, the courts were divided. For classical formalists like Langdell, the legal question could not be resolved by practical efficiencies, "the purposes of substantial justice," or a default rule based on "the interests of the contracting parties, as understood by themselves"—all of which he branded "irrelevant."[2] Instead, the answer had to be deduced from the "fundamental principles" of contract law, in this case, the doctrine of consideration.[3] Promises could not bind absent consideration; here, consideration was the return promise. But promises could not be complete until communicated; absent a communicated promise, no consideration. Absent consideration, there was no contract. Hence acceptances *had to be* valid only upon receipt, not when mailed.[4] It was not that contract law should not be justified consequentially, but that all such consequential considerations were to be treated as already embedded in the fundamental principles of the field. Rules for specific cases were then to be the autonomous, worked-out logical entailments of those fundamental principles.[5]

It is important to understand that this scientific system of thought meant more than legal decisionmaking as rule-applying and deductive reasoning. Any system of law will require the use of legal concepts and at least some degree of deductive reasoning from them. Any system of law will likely depend on rules and rule-following, at least to some extent, in some contexts. If formalism comes to mean little more than this, then we will all be Formalists—while also all remaining Realists—but the concept of formalism will have little bite. To the classical formalists, law meant more: it meant a scientific system of rules and institutions that were *complete* in that the system made right answers available in all cases; *formal* in that right answers could be derived from the autonomous, logical working out of the system; *concep-*

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[1] Thomas Grey, in one of the most detailed analyses of classical formalism, explores this example at length. I borrow from Grey's analysis. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U Pitt L Rev 1, 3-4, 12 (1983), citing C.C. Langdell, *A Summary of the Law of Contracts* 20-21 (Little, Brown 1880). For the view that Langdellian thought never exclusively dominated American legal practice, even in the era of Langdell, see Daniel R. Ernst, *The Critical Tradition in the Writings of American Legal History*, 102 Yale L J 1019, 1037-44 (1993), reviewing Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford 1992).

[2] Grey, 45 U Pitt L Rev at 4 (cited in note 1) (containing all quotations).

[3] Id.

[4] Id.

[5] Id at 15 ("Considerations of justice and convenience were relevant, but only insofar as they were embodied in *principles*—abstract yet precise norms that were consistent with the other fundamental principles of the system.").

tually ordered in that ground-level rules could all be derived from a few fundamental principles; and socially *acceptable* in that the legal system generated normative allegiance.[6] Although law as this kind of legal science is rarely seen in current American legal education, anyone who has talked with those trained in certain European and other foreign legal systems will recognize that the view of law as an internally valid, autonomous, and self-justifying science still has much vitality. I want first to work out the underlying world views of the current formalisms on offer here, then consider their relationship to classical legal thought.

II.   "FORMALISM" AS THE UNION OF MORALITY AND LAW

In Leo Katz's puzzling through of legal and moral mindteasers, formalism is a label for resisting a rampant functionalism or consequentialism in contemporary legal scholarship.[7] As evidence that extremism in the service of functionalism is no vice, Katz might point to Coasean joint causation analysis, in which social conflicts over scarce goods are seen to involve equally legitimate, competing desires—there are no preexisting moral rights or duties (breathers "cause" dirty lungs as much as industrial air polluters), and legal rule choices are made as single-dimensioned inquiries into maximizing aggregate social welfare. For Katz, this functionalism is currently voracious, swallowing up the conventional distinctions of ordinary morality and life, such as those between acts and omissions, or between realized costs and opportunity costs.

The basic structure of this legal consequentialism, particularly as perfected in certain law and economics writing, is to compare the total social welfare in competing states of affairs and then to choose legal rules that will generate the end state with the highest total welfare. This structure de-emphasizes the *processes* by which these states of affairs are produced or the *intentions* and *justifications* that produce the end state (unless they affect social welfare in that final end state, which they are typically assumed not to do). To functionalists of this sort, killing and let-

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[6] Ways of defining the tenets of formalism are of course controversial and multiple definitions are on offer. Here I adopt the tenets that Thomas Grey identifies in his study of Langdell, although I drop his criterion of comprehensiveness, which is of little relevance in this context. See id at 7-11.

[7] This extreme functionalism was also characteristic of the first law and economics movement, which sought to deconstruct the moralities reflected in laissez faire legal, economic, and political thought. See Barbara H. Fried, *The Progressive Assault on Laissez Faire* 209 (Harvard 1998) (acknowledging the "analytical extremism" in the work of Robert Hale, a dominant law-and-economics Legal Realist).

ting die, for example, function "just the same"—they produce not just the same end state, but the ultimate end state—and only a kind of mindless conventionalism or academic scholasticism could treat them differently.

Katz resists by seeking to show that the forms by which we bring about states of affairs not only matter, but are central to rationalizing the existing patterns of our moral and legal judgments. It is this emphasis on forms and means that leads Katz to view himself as a "formalist." I confess to thinking of this sense of formalism, at first, as essentially a pun: forms matter, therefore Katz is a formalist. Certainly it is a highly idiosyncratic usage, and I agree with Larry Alexander that the justified distinctions between legitimate and illegitimate forms of acting that Katz identifies are best seen to rest on distinctions of substantive value, not on form for its own sake.[8] But cast in Katz's terms, I suppose I too am a formalist.[9] Accepting Katz's terminology, the interesting questions are what assumptions and justifications drive his anticonsequentialist version of formalism.

Katz does not seek to justify the morality of forms in direct, first-order moral terms; he does not appeal to foundational principles of the right or the good. He approaches justification sideways, as it were, relying on the (presumably justified) morality already embedded in ongoing social practices. He invokes the "ubiquity"[10] of the everyday moral judgments on which he relies, not their justified rightness. For Katz, these social practices reveal an ongoing morality in which distinctions in the ways actions are brought about—through what means, and with what intent—are central to what we praise or condemn. Katz's strategy is, in a sense, to raise the stakes in any individual contest with functionalism: if you want to mock the meaningfulness of the act/omission line *here*, Katz in effect says, you must recognize that you are taking on a morally-laden set of categories central to organizing much of our moral and legal thought. For that distinction is pervasively embedded in our conventional morality, and to dismiss the line as "functionally irrelevant" is to uproot vast ter-

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[8] Larry Alexander, *"With Me, It's All er Nuthin'": Formalism in Law and Morality*, 66 U Chi L Rev 530, 560 (1999).

[9] See, for example, Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 Mich L Rev 1520 (1992), reviewing Martha C. Nussbaum, *Love's Knowledge* (Oxford 1990); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 Mich L Rev 936 (1991); Richard H. Pildes and Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum L Rev 2121 (1990).

[10] Leo Katz, *Form and Substance in Law and Morality*, 66 U Chi L Rev 566, 571 (1999).

rains of our current practices, built on the pillars of these very distinctions. Katz goes on to argue that the law is similarly laced throughout with distinctions between the forms and means through which the state or private actors bring about various ends—in part because, in Katz's view, the law incorporates or reflects ordinary morality in just this way.

For those who do not believe moral and legal evaluation should or must be anchored in existing practices to this extent, this style of argument will be less persuasive than more foundational ones. But that debate is not important here. Of present interest is the view of morality, law, and legal interpretation that Katz's "formalism" assumes. First, it assumes a *coherence* to our moral practices. We can examine a broad range of practices and recognize in them certain recurring distinctions, such as that between acts and omissions. These practices are knowable and generate determinate answers to questions about which qualitative distinctions are central categories for organizing morality. Second, this morality is presumably thought to be *consensual*, or to reflect widely shared moral judgments. There is no central authority promulgating these practices through positive edict; instead, these moral evaluations emerge from thousands of decentralized interactions and judgments. Third, these practices are not just coherent and consensual, but *intelligibly purposive*.[11] Finally, what is true of morality is true of law, for Katz believes law reflects those formal distinctions that extant social practices already embody. Thus, legal interpretation can be purposive because the law is infused with moral concepts that have a coherence and intelligibility and that also reflect a widely shared consensual morality. We can use the pattern of existing practices to reason in new cases, in some not fully specified way, toward the right moral and legal decision.

Katz does not spell out this process of reasoning. About his implicit method, I will say more later, when we return to classical

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[11] I must equivocate here slightly on "purposive." On one reading, the purpose might be thought to be to respect the various qualitative distinctions, such as those between acts and omissions, based on a view that doing so best promotes human flourishing or some other general end. But on this view there might be nothing further to be said about the reasons for preserving the act/omission distinction in particular contexts. That is, on this view we cannot inquire further into the reasons for the formal, nonconsequential distinctions in particular contexts. On a second reading, we would interpret our settled practices purposively in the sense of asking which contextual features make the act/omission line desirable in particular instances; if those features are not present in our context, we might then have purposive reasons not to uphold the distinction in that instance. As I indicate later, I would apply Katz's approach in the second sense of purposive, but I read Katz himself as applying the first mode of analysis.

formalism. But surely there is nothing inherent in this morally-based, anticonsequential approach that requires the moral categories assertedly embedded in everyday life and law to be applied in a mechanical or rule-deterministic way. Nor do we need to frame the competing views of law and morality as Katz does, in the well-worn categories of deontological versus consequentialist thought. The rights-based resistance of deontology to purely functional approaches fails to capture the large domain of contexts not involving rights at all in which social practices also seem to resist the prescriptions that maximizing moralities produce. The broader opposition is between what many of us call expressive rationalities[12] and consequentialist rationalities. We might want to respect nature's awe by treating it in certain ways that resist using nature to maximize total social welfare, but we need not think nature has rights to justify doing so. We might want to acknowledge the aesthetic virtue of art, and resist using it for welfare maximizing ends, without believing works of art have rights. Expressive rationalities maintain that the right thing to do, morally and legally, in some contexts can be to act individually and collectively in ways that express the attitudes or values differentially appropriate to diverse goods—art, nature, parents, citizens, and the like.[13] Formal rules may thus not be the only alternative to Katz's rejection of law as an attempt to achieve the highest aggregate total welfare.

III. "FORMALISM" AS APURPOSIVE RULE-FOLLOWING

For Larry Alexander, legal formalism is inherent to the very concept of law, and formalism means the enactment of determinate legal rules and their application *as rules*. The justification for this formalism, Alexander makes clear, is itself ultimately a moral one. Although Cass Sunstein's contribution asks that formalists submit to the test of empirical confirmation,[14] I suspect

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[12] For arguments that rational choice, individual and collective, is best understood as involving expressive dimensions, see Pildes and Anderson, 90 Colum L Rev 2121 (cited in note 9); Pildes, 89 Mich L Rev 936 (cited in note 9); Richard H. Pildes, *Expressive Harms*, 92 Mich L Rev 483 (1993); Elizabeth S. Anderson, *Value and Ethics in Economics* 17-44 (Harvard 1993); Richard H. Pildes and Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U Chi L Rev 1 (1995); Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U Chi L Rev 591 (1996); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv L Rev (forthcoming Dec 1999); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U Pa L Rev 2021 (1996). For a critique of expressivist theories of law, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview* (unpublished manuscript on file with U Chi L Rev).

[13] See generally Anderson, *Value and Ethics in Economics* (cited in note 12).

[14] Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U Chi L Rev 636,

formalists of all stripes, including the classical legal formalists, have always defended formalism, surely at the level of ultimate justification, in terms of purported desirable consequences.[15] In Alexander's case, formal law's moral virtues are coordination of behavior, reduction of decision costs, and reduction of error costs (deferring to the greater expertise of rulemakers as against rule appliers).

I want to focus less on the analytical force of Alexander's argument than its moral and sociological underpinnings. But to unpack these, consider two analytical points. Alexander stipulates law's social function to be "authoritative settlement" of moral uncertainty.[16] We might imagine other roles, but even on this limited conception, why does Alexander require this settlement to take the form of determinate rules rather than institutions? That is, a community might share a belief in the need for methods of settling moral conflicts, but it might endorse an institution whose morally-laden legal judgments the community is willing to accept as authoritative. Determinate rules are not the only means of providing institutional settlement.[17] A Supreme Court, interpreting an Equal Protection Clause written in indeterminate, general language can authoritatively settle moral conflicts if its institutional role is socially accepted as legitimate—which is presumably why, in this age of democracy, all new democratic systems are being formed as constitutional democracies, with courts operating under familiarly indeterminate constitutional texts. Constitutions have become perhaps marginally more determinate with respect to rights and equality, but not significantly so; yet emerging political democracies are consistently embracing constitutional courts as means of settling controversial and profound moral questions.

Moreover, if determinate rules are justified when they enshrine the greater expertise of rulemakers, in some contexts the

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641 (1999).

[15] As this is the 50th anniversary of Fuller's dialectic on formalism, it might be worth noting that even his most rigidly formalist judge defended the virtue of "hard decisions"— those that produced seemingly oppressive and unpopular results—on the ground that "judicial dispensation does more harm in the long run than hard decisions." Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 Harv L Rev 616, 636 (1949) (*per* Keen, J). Similarly, even his most populist judge recognized the need for "some adherence to form," some role for rules in law—thus, indicating that critics of formalism as rule-following have rarely argued against a proper role for some rules in law. Id at 638-39 (*per* Handy, J).

[16] Alexander, 66 U Chi L Rev at 533 (cited in note 8).

[17] In other writing, Alexander does accept institutions as potential sources of determinate legal resolutions. See Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv L Rev 1359 (1997) (arguing that the Supreme Court is the authoritative interpreter of the Constitution).

rulemakers themselves, of course, might believe that the more
relevant expertise will lie with future rule appliers. This is an-
other familiar point. Fred Schauer recognizes this in his contin-
gent defense of rule-following, for he notes that rules make sense
in conditions of distrust: when rulemakers fear more the discre-
tion of rule appliers than the bluntness of rules.[18] Indeed,
Schauer asserts, rightly in my view, 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 sys-
tem."[19] But Alexander does not appear to share this view, for he
writes universally, as when he speaks in particular of constitu-
tional law: "[L]aw that is nonformal—that incorporates or refers
to moral principles whose applications are uncertain or conten-
tious—serves no function."[20] To take an obvious counterexample,
the framers of the Fourteenth Amendment, perhaps confident on
core cases of Equal Protection, might have believed future judges
and legislators would have greater authority or expertise about
how to apply the principle of equal protection of the laws. Even
the most hardboiled Realist or policy analyst of law would ac-
knowledge that determinate rules *sometimes* can serve important
legal and social functions. The Fourteenth Amendment itself is
rule-like with respect to at least some issues, even if not all. The
question is why Alexander believes law must *always* take this
form.[21]

Apart from shared acceptance of institutions, we might also
achieve shared agreement on interpretive *methods*. Were such
agreement possible, even laws cast as norms or standards could
serve the principal social function that Alexander believes re-
quires law to take the form of rules. Hart and Sacks of course be-
lieved this, because the twin pillars of their legal thought were
"institutional settlement"—the function Alexander makes pri-
mary for law—and "reasoned elaboration"—a purposive method
of interpretation that is the precise antagonist of Alexander's

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[18] Schauer self-consciously describes his work as one in *"analytic isolation,"* noting
that his concerns are "only secondarily normative" and often unconcerned with "whether
rules are good things to have." Frederick Schauer, *Playing by the Rules* vii-viii (Clarendon
1991). As Schauer also argues, "nothing inherent in the idea of a legal system mandates
that it serves those values" that rules realize. Id at 174.

[19] Id at 173.

[20] Alexander, 66 U Chi L Rev at 550 (cited in note 8).

[21] This is the flip side of Duncan Kennedy's astute insight that formalism as deductive
legal reasoning cannot be wrong as a method, despite some Realist writing that so sug-
gests; rather, formalism can best be understood as a critical label for "a mistaken use of a
method that is sometimes valid, rather than [a critical label for] a method in itself." Dun-
can Kennedy, *A Critique of Adjudication* 106-07 (Harvard 1997).

conception of legal reasoning.[22] Hence, to assert that law's role as authoritative dispute settler requires apurposive rule-following, Alexander must be rejecting the assumptions that make possible "reasoned elaboration."

These points about institutions and methods are preludes to the more interesting question of the implicit understandings that account for Alexander's rejection of nonformalist law. Hart and Sacks believed that legal actors could ascribe coherent purposes to statutes; they also believed there was an intelligible and coherent background legal landscape, so that courts could recognize and resist interpretations that produced "irrational" or "inequitable" results.[23] We might think of this as an assertion about actual facts: statutes genuinely reflect coherent purposes, and there is pattern, rationality, and order in the texture of background law. Or we might think of this as an as-if regulative ideal of judging: the legal system functions better when judges internalize these regulative ideals.

In either case, Alexander must be rejecting these and other accounts of how institutions, purposive interpretation, and law as standards could all realize the specific objectives he assigns to law. One clue to his reasons for doing so is that he sees law as "a solution to the problem of the limits of moral knowledge."[24] This seems less a cognitive fact than a sociological one. That is, in the face of first-order moral disagreement, we cannot reach any shared acceptance of the need to grant legitimate authority to certain dispute-solving institutions. We cannot reach shared acceptance about the benefits of rule appliers, such as judges, interpreting laws purposively, no matter how ambiguous or uncertain the legal texts might be. (Sunstein points out that in public law today, the rule appliers are often administrative agencies; Alexander's arguments about the social function of law would seem to require that they too act as rule formalists.[25]) So too this moral resignation presumably extends to the substance of law and legal principles more generally: statutes do not have, or should not be treated as having, coherent purposes. There is no moral or legal coherence to the background legal landscape, so there is no solid ground—based on embedded understandings of rationality, or equitable treatment, or absurd results—on which

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[22] Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 4, 1374-80 (Foundation 1994) (William N. Eskridge, Jr. and Philip P. Frickey, eds).

[23] On equity and statutes, see id at 1170-71; on irrationality, see id at 1124-25.

[24] Alexander, 66 U Chi L Rev at 549 (cited in note 8).

[25] Sunstein, 66 U Chi L Rev at 660 (cited in note 14).

rule appliers can stand to resist formal rule-like readings that might be thought to produce such outcomes. And even if this is the legal situation we face, we cannot find shared agreement that judges ought to interpret as if they could purposively reason from a coherent legal universe in which such concepts were intelligible.

Behind Alexander's formalism, in other words, there seems a brooding omnipresence of moral dissensus and irresolvable conflict. Whether there is a moral reality or not, we cannot reach sufficient agreement on its content. The only means we have to address this conflict is through the enactment of positive law, which exhausts our capacity for finding consensus. And it is not even clear these laws do reflect any kind of consensus, for if they did, we might be able to reason from them purposively. Instead, what we seem to reach is an interest group political compromise, a mere modus vivendi, nothing more.[26] More complex second-order defenses of formalism (and rejoinders) can always be made: even if there is reason and order in law and morality, judges should be lashed to the rule-formalist mast because we distrust their motives; we distrust their cognitive skills; and so on.[27] But Alexander does not seem to rest on these second-order justifications. For him, the problem of law is the limit to moral knowledge; the moral solution is rule formalism. And it seems fair to conclude that the moral universe in which this problem and solution make sense is one of pervasive moral conflict that cannot be overcome, but only temporarily quieted through discrete, disconnected, positive interventions of state acts of lawmaking.

The contrast with Katz's formalism, not just in operational structure, but in underlying ideology, is thus stark. Where Alexander seems to see moral conflict, Katz sees harmony. Where Alexander sees paralyzing conflict in our ability to reach moral agreement (even if Alexander himself might believe a moral reality exists), Katz sees an ongoing social and legal life that is highly structured and ordered. Where Katz envisions moral and legal

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[26] This of course is the basis for Easterbrook's embrace of interpretive formalism. Frank H. Easterbrook, *Statutes' Domains*, 50 U Chi L Rev 533 (1983).

[27] The point is that whenever one identifies specific, instrumental justifications for formalism, it is always possible to argue in any one specific context that those justifications are better realized in that context by departing from rule formalism. This is the familiar dialectic from debates over act versus rule utilitarianism. The universal defense of rule formalism as necessary to law therefore requires some global reason for never entertaining the possibility that departures are justified in particular contexts. In what is still one of the most systematic analyses of rule formalism, Duncan Kennedy generates the kind of systemic reasons that would justify a rule formalist approach to statutory interpretation. While Kennedy ultimately means this piece to be a critique of formality, I have always been left wondering whether formalism doesn't win the contest he narrates. Duncan Kennedy, *Legal Formality*, 2 J Legal Stud 351 (1973).

practices with intelligible purposes, Alexander envisions isolated decisions. Where Katz sees a unity of law and morality, which brings rational structure to law, Alexander sees a sharp separation: law that embeds moral terms is not law at all. And while Katz does not provide an individual or structural mechanism to explain why judges would bring into their legal interpretations the rationality of daily moral practices, he apparently does believe judges and legislators do so, which is why the forms of law track the forms of ordinary moral evaluations. For Alexander, in contrast, even if morality were more consensual, judges could not be trusted to follow that consensus should the interpretive system license them to draw on that consensus in interpreting statutes that produce "harsh," "absurd," "inequitable," or "unfair" results.

IV.   "FORMALISM" AS REALIST POLICYMAKING

Nothing could be farther from the formalisms of Katz and Alexander than this Symposium's third mode of "formalism," embodied in the work of Lisa Bernstein,[28] Richard Epstein,[29] and to a lesser extent, Omri Ben-Shahar.[30] Here the focus shifts to a different problem: how legal rules that govern commercial affairs, particularly contract law, should be designed to integrate with the social norms and conventions that also regulate those practices. The evaluative standard is social welfare maximization. The conclusions of these scholars are at odds with the great commercial law Realists, such as Llewellyn and MacCauley, who urged a more flexible law of contracts, to mirror more closely the immanent practices of ongoing commercial relationships. But after rich empirical observations of the institutional *structures* of commercial relations, in addition to the substantive content of trade practices, Bernstein concludes that behavior of particular trade groups reveals a simultaneous preference for both the regime of formal contract law and that of informal, flexible, accommodating customs of the trade.[31] As collectivities, trade groups prefer these regimes to continue to operate side by side. Transactors prefer to let informal norms govern when relationships are

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[28] This is based more on her prior work, which develops her general arguments and evidence for two-tier systems of law and norms, than her paper for this Symposium. See, for example, Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U Pa L Rev 1765 (1996); Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S Cal Interdiscip L J 59 (1993).

[29] Richard A. Epstein, *Principles for a Free Society* ch 2 (Perseus 1998).

[30] Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U Chi L Rev 781 (1999).

[31] Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U Chi L Rev 710, 716-19 (1999).

good, but if they turn sour, transactors prefer that courts adjudi-
cate conflicts through the less forgiving rules of classical contract
law.[32]

From a functional perspective, this might well be efficient. In
general, it is a mistake to think that the incorporation of social
norms into law is necessarily a "neutral" act, in the sense that le-
gal enforcement will simply reproduce the regulative effects of so-
cial processes as long as law applies the same substantive norms.
We should think of norms as a system, not as isolated discrete
rules. Like the system of state law itself, the system of social
norms should be conceived as having its own rules of jurisdiction,
appropriate process, prosecutorial discretion, remedial mecha-
nisms, overriding norms, and the like.[33] There are norms about
which actors can invoke norms and under what conditions; norms
about what remedies are proportional to what violations; and
norms about what conditions override norms. Unless law can re-
produce the norm system as a whole, legalization of particular
substantive norms can distort those norms' regulative effects. As
the Realists taught, remedies define what rights mean in prac-
tice. This is the light in which I read Bernstein's findings: trans-
actors recognize that when outsiders, such as judges, are asked to
apply fluid trade practices to assign duties and rights—in situa-
tions where the ongoing relationship has broken down to the
point of litigation—error costs rise.[34] Thus, for purely functional
reasons, as a means of producing the mix of law and norms that
maximizes the welfare of the traders as a collectivity, transactors
in the groups Bernstein studies prefer that adjudicative bodies
apply the bright-line rules of pre-UCC contract law.

So once again, if this methodology be "formalism," I am a
formalist here too. This is a purely policy-oriented analysis, based
on empirical study, contingent on the particular context involved,
of why particular substantive contract rules are preferred among
traders whom we can probably assume are relatively homogenous

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[32] Id at 776-77.

[33] I say more about this perspective on norms, with particular examples, in Richard H.
Pildes, *The Destruction of Social Capital Through Law*, 144 U Pa L Rev 2055 (1996).

[34] In fact, there are two different justifications on which this formalism might be effi-
cient. Transactors might prefer *different* substantive norms to govern when relationships
break down and go to litigation, precisely because the relationship has reached a stage of
collapse. Or transactors might prefer judges to be bound by the formal rules of pre-UCC
contract law because they cannot be trusted to apply the *same* social norms accurately,
given that they are outsiders to this norm system. Bernstein's use of industry dispute
resolution panels, composed of insiders, in her studies suggests it is the first mechanism
at work. Epstein seems to emphasize the second mechanism. Epstein, *Principles* at 58-63
(cited in note 29).

in interest, such as the diamond industry or the National Grain and Feed Association. There are no claims here about the universal requirements law must meet to perform a generalized social function assigned to it. Because the justification for specific legal rules, in conjunction with flexible social norms, is so functional, it remains open to demonstrate empirically or convince analytically that other legal rules—ones less classical, or less formal, or less determinate—would better realize the functions of commercial efficiency in other contexts. To endorse Bernstein, we need not accept as a general matter of policy, let alone as a matter of the intrinsic character of law, that legal rules must be drafted and applied in rule-like fashion; we need only accept that within certain communities, transactors prefer that disputed contracts be judicially settled through formal rules. In their functionalism, Bernstein et al. differ sharply from Katz; in their postulating of shared, identifiable aims among groups of traders, as well as in their contingent empiricism, they also reach a limited "formalism" on the basis of different justifications than those on which Alexander rests.

V. CLASSICAL FORMALISM REVISITED

The three modern modes of formalism presented here bear little resemblance, even of the family sort, to each other. They differ in aspiration and structure; most importantly, they differ in justification and underlying assumptions about morals, society, and politics. From this potpourri, I see no unified, coherent, emergent modern conception of formalism that can be distilled.

What do we learn about classical legal formalism when we revisit it from the vantage point of these contemporary, self-styled "formalisms"? We can array the fidelity of these modern modes to classical formalism on a spectrum. The most removed is the Bernstein/Epstein two-tiered efficient contract regime of inflexible legal rules combined with more fluid commercial norms. For this approach is motivated, justified, and understood in precisely the modernist, hyper-policy analytic vein that constitutes the direct rejection of Langdellian formalism. The hard-edged rules of formal contract are not justified as some autonomous, closed domain, nor are they logically deduced from fundamental principles. Legal rules are functionally assessed in terms of how they interact with social norms; the baseline for assessment remains efficiency, in the sense of having the law mirror the immanent practices of the relevant trade group. Llewellyn simply defined these immanent practices too narrowly, because he did not look at the institutional dispute settlement processes of his mer-

chant communities. This empirical, functional, consequential analysis is about as Realist as legal scholarship gets. Whatever its recommendations about the content of particular rules, in this method there is no whiff of classical formalism.

Superficially, Alexander's rule formalism might seem to be most closely connected to classical formalism. Yet even here, the tie is at best highly attenuated. Rule-following in the sense of textual literalism was indeed an aspect of classical formalism—as it is likely to be of any body of American legal thought—but it was a marginal concern.[35] Formalism was a project of rationalizing the central principles and methods of the common law, for purposes of both common law adjudication and, in the *Lochner* era, for constitutional doctrines that drew on common law concepts. Obsessions with rule-based versus purposive interpretation become particularly acute in the age of statutes.

In Alexander's rule formalism, there is nothing about the substantive principles of bodies of law, nothing of the conceptual structuring, nothing of the modes of reasoning, that were characteristic of legal formalism. Alexander's concerns for authoritative settlement are centered on the reading of textual language and the discretion of judges. To be sure, as Hart and Sacks recognized, there is much at stake in our age over whether the central products of our modern legal system—statutes—are read literally or purposively. But even should the method of treating law as rules prevail, we would remain a long way from the world of classical formalism.

Ironically, the mode of modern formalism that might be closest in structure to classical formalism is the one I initially considered "formalist" only as a pun. Katz does not provide much of a self-conscious method for how we are to apply the nonconsequentialist categories of law and morals to new contexts. In my view, we can avoid transforming all conflicts of values into single-dimensioned problems of welfare maximization: we can recognize the place of expressive rationality and qualitative distinctions among values and still reason purposefully about how best to in-

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[35] Contrary to Dworkin's integrative approach to dealing with the case of the murderous heir, *Riggs v Palmer*, 115 NY 506, 22 NE 188 (1889). Ronald Dworkin, *Taking Rights Seriously* 23 (Harvard 1977). Ames in his most formalist writings believed it "impossible to justify" the result in that case. In *Riggs*, the New York courts overrode the literal language of the state's statute of wills to deny inheritance rights where the devisee murdered the testator to gain the goods. James Barr Ames, *Can a Murderer Acquire Title by his Crime and Keep It?*, in James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* 310, 312 (Harvard 1913).

terpret or understand various expressive commitments, such as treating people as ends, not means, as we apply them to new contexts. But Katz appears to see such a profound harmony in moral thought, and such unity between law and morality, as to border on suggesting that the categories of everyday morality are aspects of our basic cognitive functioning. It is as if our capacity to understand the world, including the domains of law and morality, depends on maintaining these conceptual categories. And the implicit ways in which Katz *applies* the distinctions of everyday morality to law begin to have the feel of, well, mechanical jurisprudence. The fundamental principles of our moral and legal life include the distinctions between, for example, acts and omissions. Whatever the considerations of justice or efficiency, they are already fully embedded in the various conventional distinctions Katz identifies. In new contexts, we do not ask what the specific reasons are for generally treating acts differently from omissions and then try to determine whether those reasons are persuasive in *this* context. For Katz, as soon as we can characterize the disputed context as one involving an act or omission, its proper legal treatment seems to follow. Indeed, when he presents difficult legal problems, as in the securities case of *Basic Inc v Levinson*,[36] the policy considerations arguably distinct to that field play little role. It is as if we are back in the closed universe of classical formalism, with the fixed principles of everyday morality providing the foundational principles from which specific case resolutions can be deduced, without further reference to functional or purposive considerations. I don't believe Katz himself would take this as a critique. In the end, Katz accomplishes the almost unique feat of generating from deontological morality a style of thought closest in spirit to the classical legal formalism long thought dead in American legal thought.

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[36] 485 US 224 (1988).