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JURISPRUDENTIAL RESPONSES TO LEGAL REALISM

Richard Posner †

The last time I attended a Federalist Society Symposium was four years ago, almost to the day. On that occasion I talked about two terms in legal debate, restraint and activism, which seemed to me to have become all-purpose terms of condemnation and approbation, respectively—and, really, to have lost all definite meaning. I tried to suggest how they might be used more precisely. I am going to do the same thing today with legal realism and legal formalism, and also relate these terms to economics and to the rule of law and suggest how these four concepts fit together nicely when one is talking about the common law but not so nicely when one is talking about statutory and constitutional interpretation.¹

The terms “formalism” and “realism,” as they are currently used in legal debate, are entirely polemical. They are epithets used for a promiscuous variety of good and bad things, depending on the purposes of the speaker. Formalism can mean anything from casuistry to fidelity to law; realism anything from left-wing ideology to pragmatic, intelligent, and epistemologically mature engagement with the legal system.

These terms can be given precise, nonpejorative, non-polemical meanings as follows. “Formalism” can be used simply to mean the use of logic in legal reasoning. And there is, of course, a place for logic in legal reasoning. If, for example, we have a rule that a contract is not enforceable unless supported by consideration, and a contract is presented which is not supported by consideration, then we can say as a matter of logic that it is unenforceable. “Realism” can be used simply to mean the use of policy analysis in legal reasoning. We get the premises on which to perform the logical operations of formalism from notions of sound public policy. There is nothing illegitimate about this; it has always been an important part of law and it is indispensable for solving many legal problems.

Each of these concepts is susceptible of abuse. The characteristic abuse of formalism, of which Christopher Columbus Langdell is

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¹ For a complete discussion see Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1987).

frequently accused, sometimes with justice, is that of smuggling policy choices into the premises for logical reasoning without analysis or even acknowledgement, so that the law is made to seem to have a more logical structure than it really has. Consider this question of perennial fascination to students of contract law: should a person be allowed to claim, as a matter of contractual entitlement, a reward for returning a lost article, if he did not actually know that a reward had been offered? Langdell said no. And he said it on logical grounds: a contract requires—is defined to require—conscious acceptance; if the person who returned the lost property did not know about the reward he could not have accepted that unilateral offer, and therefore there is no duty to reward this person. Langdell's mistake was to impose a definition on the word "contract" without considering why one might want to make some promises and not others enforceable and what the effect of making this promise enforceable would be. Would it lead to more returns or fewer? Actually this is a difficult question but it is one that Langdell thought he did not even have to consider.

The vice of legal realism—of some versions of realism, anyway—is that it is, in a sense, not realistic enough. It leaves out of the picture some important policy considerations. For example, in one brand of legal realism, it was said that decision according to precedent was either not in fact used by judges in reaching decisions or ought not be used. But the decision to defer to prior decisions is itself an important and valid policy which a sensible and disciplined judge would use in his decisional process even if he thought of himself as thoroughly realistic.

What I have proposed, then, is a system of analysis that has a place for concepts and logical deduction but also a place for using policy analysis to create the premises for decision. And from this description it should be apparent that economic analysis fits very nicely into a concept of law which combines formalism and realism. Economic theory is a logical theory—indeed, a branch of applied logic—and although the premises are supplied by notions about human behavior—how people respond to incentives, for example—and about what is valued in society, once those premises are given, economic theory can be used to deduce all sorts of results. These parallel systems of thought, the legal and the economic, can be combined, and have been combined, for example in the Hand Formula,² which is a logical statement of the meaning of negligence and can be used not only to deduce the outcomes of particular cases but to de-

² See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), for a definition of the Hand Formula.

duce all sorts of interesting doctrines. If you start with the Hand Formula you can ask, if both injurer and victim are negligent should the injurer be liable? By use of economic analysis and the Hand Formula you would come up with a logical answer. This type of analysis, in which economics is used to derive legal results, is I think what common law judges have always done intuitively (perhaps today, more explicitly) and is consistent with what we think of as the rule of law.

It is no accident that my examples have been drawn from common law and that my discussion so far has really been a discussion of the common law. While I think that formalism, realism, economics, and fidelity to the law all cohere nicely when one is talking about common law, when one switches attention to statutes and the Constitution one has a gap to leap, and none of the tools I have mentioned is of decisive assistance in leaping it. The gap is this: with a constitution or a statute, the starting point for analysis has to be a text rather than a concept. Now it may be possible—this is the modern approach to antitrust law—to derive from a text (the text of the Sherman Act,³ for example) a concept such as economic efficiency, and create from that concept a logical system of law, much like the common law of torts or contracts. But there is always that initial step of obtaining a concept from a text. And that is not a step to which formalism or realism or economic theory can provide the key. What we do when we interpret a text is not policy analysis and is not a logical operation; it is not possible, I think, to talk sensibly of deduction from a text. The initial stage, which is interpretation, is a mental process that is distinct from either weighing up pros and cons as in policy analysis or manipulating the rules of logic.

I will give an example that was the subject of an exchange four years ago between Professor Easterbrook, as he then was, and Professor Bator. (I missed Professor Peller's talk last night but he has also participated in print in this debate.) It involves the clearest provision in the Constitution—that you have to be thirty-five years old to be President. The question is, *why* is that clear? Suppose a twenty-one-year old presents himself to the electorate, and a court says, you are not eligible. Do we reason that one must be thirty-five to be President, you are not thirty-five, therefore you are not eligible—i.e., do we reason syllogistically? Do we say that it would just be a bad thing for twenty-one-year olds to be eligible? Or do we, in fact, have to go through a different mental process to decide that this person is ineligible? I think the last suggestion is the correct one. What this text means looks clear to us because we live in a

³ 15 U.S.C. §§ 1-7 (1982).

certain society—fortunately in this respect unchanged in the last two hundred years—that has certain assumptions and ways of doing business. We live in a society, for example, in which birthdays are recorded, in which it is agreed at what point one starts counting people's ages, in which the use of arbitrary deadlines is commonplace—for example, in statutes of limitations—and given this culture in which we live, and have lived for two hundred years, it becomes obvious what the framers had in mind in using this form of words. They did not mean that only mature people could run for President. They meant that you had to be thirty-five years old measured from birth. If we lived in India, where birth is measured from conception, then even though English is an official language of India the provision would mean something different. If we lived in a society that did not record birthdates, or in a society like the ancient Greek in which numbers of years are used in a symbolic rather than exact fashion, or in a society in which it was just unheard of to impose rigid deadlines in serious matters and loose standards were always used to decide important questions, then this "clear" text might well mean something else.

But the provision is not clear by virtue of logic and it is not clear by virtue of a weighing up of pros and cons, although that is indirectly involved. So we have this hump to get over in dealing with texts—the problem of interpretation. We can, in the way I have suggested, identify some clear texts. Unfortunately, most of the ones that we are interested in, or that generate litigation, are unclear, and there is very little agreement on a method of interpretation of unclear texts.

What I described earlier as legal formalism in the common law sphere resembles certain approaches to interpretation, such as textualism and intentionalism, in that they assign a modest role to the judge, that of translator or logical manipulator, rather than that of a policy analyst. But that I think is the only resemblance. I do not think it is possible to be a formalist in interpretation without embarking on the unedifying course of using terms like formalism and realism in an undisciplined fashion. And similarly, while the legal realists may resemble the non-interpretivists in assigning an aggressive role to judges, nevertheless what is involved in dealing with a text and what is involved in dealing with a common law policy question are profoundly different.

My conclusion is that when we talk about the common law, we can, with a little closer attention to terms, discuss legal reasoning in a way that should command broad agreement about principles, though not about details of application. But when we move into the constitutional and statutory sphere, we are in a different arena, deal-

ing with a very different problem, that of interpretation, on which legal analysts have made little progress.