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Article

Formalism

Frederick Schauer*

Legal decisions and theories are frequently condemned as formalistic, yet little discussion has occurred regarding exactly what the term "formalism" means. In this Article, Professor Schauer examines divergent uses of the term to elucidate its descriptive content. Conceptions of formalism, he argues, involve the notion that rules constrict the choice of the decisionmaker. Our aversion to formalism stems from denial that the language of rules either can or should constrict choice in this way. Yet Professor Schauer argues that this aversion to formalism should be rethought: At times language both can and should restrict decisionmakers. Consequently, the term "formalistic" should not be used as a blanket condemnation of a decisionmaking process; instead the debate regarding decision according to rules should be confronted on its own terms.

With accelerating frequency, legal decisions and theories are condemned as "formalist" or "formalistic." But what *is* formalism, and what is so bad about it? Even a cursory look at the literature reveals scant agreement on what it is for decisions in law, or perspectives on law, to be

* Professor of Law, University of Michigan. I am grateful to audiences at Brooklyn Law School, Cornell Law School, DePaul University College of Law, Duke University School of Law, Indiana University at Bloomington School of Law, New York University School of Law, and the American Political Science Association for helping me to clarify some of my good ideas and jettison some of my bad ones. I am also indebted to Alex Aleinikoff, Bruce Frier, Leo Katz, James Krier, William Miller, and Richard Pildes for commenting on earlier versions of this article with just the right blend of hostility and sympathy.

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formalistic, except that whatever formalism is, it is not good.[1] Few judges or scholars would describe themselves as formalists, for a congratulatory use of the word "formal" seems almost a linguistic error. Indeed, the pejorative connotations of the word "formalism," in concert with the lack of agreement on the word's descriptive content, make it tempting to conclude that "formalist" is the adjective used to describe any judicial decision, style of legal thinking, or legal theory with which the user of the term disagrees.

Yet this temptation should be resisted. There *does* seem to be descriptive content in the notion of formalism, even if there are widely divergent uses of the term. At the heart of the word "formalism," in many of its numerous uses, lies the concept of decisionmaking according to *rule*. Formalism is the way in which rules achieve their "ruleness" precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account. Moreover, it appears that this screening off takes place largely through the force of the language in which rules are written. Thus the tasks performed by rules are tasks for which the primary tool is the specific linguistic formulation of a rule. As a result, insofar as formalism is frequently condemned as excessive reliance on the language of a rule, it is the very idea of decisionmaking by rule that is being condemned, either as a description of how decisionmaking can take place or as a prescription for how decisionmaking should take place.

Once we disentangle and examine the various strands of formalism and recognize the way in which formalism, rules, and language are conceptually intertwined, it turns out that there is something, indeed much, to be said for decision according to rule—and therefore for formalism. I do not argue that formalism is always good or that legal systems ought often or

1. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 124-30 (1961) (formalism as refusal to acknowledge necessity of choice in penumbral area of rules); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 254 (1977) (formalism as refusal to recognize instrumental functions of law); K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 183-88 (1962) (formalism as excessive reliance on canonically written language of rules); R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 1-2 (1986) (formalism as constrained and comparatively apolitical decisionmaking); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 355 (1973) (formalism as view that rule application is mechanical and that mechanical rule application is just); Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (formalism as refusal to acknowledge practical consequences of judicial decisions); Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1506-07 (1985) (formalism as artificial narrowing of range of interpretive choices).

One can avoid the confusion of multiple usage by simply stipulating a meaning for the term "formalism." *See, e.g.*, Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181-82 (1986). This tack, however, evades most of the interesting problems. Having stipulated that "formalism" means deductive logical reasoning, Judge Posner proceeds easily to the conclusion that formalist reasoning has no application to the interpretation of canonical texts. That conclusion, however, follows, if at all, only from the narrowness of the stipulated definition. By not stipulating a meaning in advance of the analysis, I intend to focus on a broader range of issues. In the process, I will explore the way in which deduction, even in Posner's sense, may be related to the interpretation of canonical texts. *See infra* note 48.

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even ever be formalistic. Nevertheless, I do want to urge a rethinking of the contemporary aversion to formalism. For even if what can be said for formalism is not in the end persuasive, the issues should be before us for inspection, rather than blocked by a discourse of epithets.

I. Formalism as the Denial of Choice

A. *Choice Within Norms*

Few decisions are charged with formalism as often as *Lochner v. New York.*[2] But what makes Justice Peckham's majority opinion in *Lochner* formalistic? Surely it is not just that the Court protected an unrestricted privilege of labor contracting against the first stirrings of the welfare state. For the Court to make such a political decision under the rubric of broad constitutional clauses like "liberty" is a far cry from what seems to be meant when decisions are criticized as being formal. To the extent that the charge of formalism suggests narrowness, *Lochner* is hardly a candidate. We criticize *Lochner* not for being narrow, but for being excessively broad.

Although *Lochner* is criticized for the length of its reach, a closer look reveals that it is not the result that is condemned as formalistic but rather the justification for that result. 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. Justice Peckham simply announced that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment"[3] and that "[t]he right to purchase or to sell labor is part of the liberty protected by this amendment."[4] To these pronouncements he added the confident statement that "[o]f course the liberty of contract relating to labor includes both parties to it."[5]

Justice Peckham's language suggests that he is explaining a precise statutory scheme rather than expounding on one word in the Constitution. It is precisely for this reason that his opinion draws criticism. We condemn *Lochner* as formalistic not because it involves a choice, but because

2. 198 U.S. 45 (1905). For condemnations of *Lochner* (and the era of which it is taken to be archetypal) as formalistic, see Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 99 (1984); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1193, 1200-01 (1985); Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1006-07 (1987); *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1292 (1983); Note, *The Constitutionality of Rent Control Restrictions on Property Owners' Dominion Interests*, 100 HARV. L. REV. 1067, 1077 (1987); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 951 (1977); Powers, Book Review, 1985 DUKE L.J. 221, 232; Rotenberg, *Politics, Personality and Judging: The Lessons of Brandeis and Frankfurter on Judicial Restraint* (Book Review), 83 COLUM. L. REV. 1863, 1875 n.60 (1983).

3. 198 U.S. at 53.

4. *Id.*

5. *Id.* at 56.

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it attempts to describe this choice as compulsion.[6] What strikes us clearly as a political or social or moral or economic choice is described in *Lochner* as definitionally incorporated within the ***meaning*** of a broad term. Thus, choice is masked by the language of linguistic inexorability.

When I say that pelicans are birds, the truth of the statement follows inexorably from the meaning of the term "bird." If someone disagrees, or points at a living, breathing, flying pelican and says "That is not a bird," she simply does not know what the word "bird" means.[7] We criticize *Lochner* as formalistic because it treats the word "liberty" (or the words "life, liberty, or property, without due process of law") as being like the word "bird" and the privilege of contracting as being like a pelican, i.e., subsumed in the broader category. According to the reasoning in *Lochner*, if you don't know that contracting for labor without governmental control is an example of liberty, then you just don't know what the word "liberty" means.

Lochner is condemned as formalistic precisely because the analogy between pelicans (as birds) and unrestricted contracting (as liberty) fails. One can understand much about the concept of liberty and about the word "liberty" and yet still deny that they include the privilege of unconstrained labor contracting.[8] Thus, a decisionmaker who knows or should

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6. This was noted by Holmes in his now-famous observation, "General propositions do not decide concrete cases." *Id.* at 76 (Holmes, J., dissenting).

7. Of course when I use the term "inexorable," I do not mean that the world and our language could not have been otherwise; the word "bird" could have referred to frogs instead of pelicans, or to only puffins, robins, and sparrows, but not pelicans, ostriches, and condors. Definitions are contingent and subject to change, and therefore the word "bird" might yet come to be the word that speakers of English use to refer to frogs, or only to small and not to large birds. Yet although there remains a possibility that the word "bird" will come to mean these things, this is only a possible world—it is not *our* world. In our world, the exclusion of frogs and the inclusion of large birds is definitionally part of the meaning of the word "bird." As I argue below, ***see infra*** notes 56-57 and accompanying text, the contingency of definition hardly entails the view that it is within the province of any one actor, legal or otherwise, to change it. Neither you nor I have the power to make it proper to use the word "bird" to refer to a frog, even though the word "bird" could in another world be used to refer to frogs.

8. The extent to which this is true for morally and politically loaded words such as "liberty" is likely to vary with time, place, and culture. Take, for example, the transformation of the "honor codes" at various venerable universities. These codes were phrased in quite general terms at their inception in the 18th and 19th centuries because these schools contained homogeneous student bodies who shared a common conception of the type of conduct definitionally incorporated within the word "honor." If a person thought that purchasing a term paper from a professional term paper service was consistent with being honorable, then that person simply did not know what "honor" meant. As values have changed and as student bodies have become less homogeneous, however, shared definitions of terms such as "honor" have broken down. Some people now ***do*** think that buying a term paper can be honorable, and this breakdown in shared meaning has caused general references to "honor" to be displaced in such codes by more detailed rules. There may now be little shared agreement about what the precept "be honorable" requires, but there is considerable agreement about what the rule "do not purchase a term paper" requires.

Thus, the criticism of *Lochner* and its ilk as "formalistic" in the sense discussed in the text is ambiguous. The critic could mean that the term we ***now*** take to be susceptible to debate was not as debatable at the time of the relevant decision. But this would hardly explain the pejorative, unless we want to condemn an entire era and the conceptual and linguistic apparatus that reflected its understandings. The alternative is that the term "formalism" charges that there was ***at the time*** room for debate about the application of the general term to the particular case, but the relevant decisionmakers either did not recognize that fact (perhaps because they refused to look outside their own socioeco-

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know that such a choice is open, but treats the choice as no more available than the choice to treat a pelican as other than a bird, is charged with formalism for treating as definitionally inexorable that which involves nondefinitional, substantive choices.[9]

Lochner is merely one example in which a false assertion of inexorability is decried as formalistic. Much contemporary criticism of Blackstone, Langdell, and others of their persuasion attacks their jurisprudence on similar grounds.[10] They stand accused of presenting contestable applications of general terms as definitionally incorporated within the meaning of the general term. It is important, however, to understand the relationship between the linguistic and the ontological questions for those of Blackstone's vision. Blackstone's view that certain abstract terms definitionally incorporate a wide range of specific results is tied intimately to his perception of a hard and suprahuman reality behind these general terms. If the word "property," for example, actually describes some underlying and noncontingent reality, then it follows easily that certain specific embodiments are necessarily part of that reality, just as pelicans are part of the underlying reality that is the universe of birds. These instantiations might still follow even if the general term is not a natural kind whose existence and demarcation is beyond the control of human actors. There is nothing natural or noncontingent about the term "basketball," but it is nevertheless an error in this culture at this time to apply that word to a group of people hitting small hard balls with one of a collection of fourteen different sticks. Still, linguistic clarity and rigidity are both facilitated insofar as the words track the natural kinds of the world. To the extent that Blackstone and others believed that categories like liberty, property, and contract were natural kinds rather than human artifacts, they were less likely to perceive the choices we would now not think to deny. When one believes that a general term reflects a deep reality beyond the power of human actors, the view that certain particulars are *necessarily* part of that reality follows with special ease.

Thus, one view of the vice of formalism takes that vice to be one of deception, either of oneself or of others. To disguise a choice in the lan-

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nomic and political class) or intentionally chose to hide it.

9. Formalism may be more broadly viewed as extending to any justification that treats as inexorable a choice that is not. In this broader sense, the claimed inexorability might come from something other than rule formulations. To mask, for example, a political, moral, or social choice in the language of "original intent" when original intent in fact does *not* provide a uniquely correct answer to the issue might be considered formalistic in the same way that masking a political, moral, or social choice in the language of the meaning of a rule is considered formalistic when that language does not provide a uniquely correct answer. Similarly, masking choice in the language of mathematical economic derivation or in the language of a unique solution to some "balance" might be considered formalistic *if* these methods are in fact comparatively indeterminate.

10. *See, e.g.*, Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 610 (1958); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979); Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949, 950 (1981).

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guage of definitional inexorability obscures that choice and thus obstructs questions of how it was made and whether it could have been made differently. Use of the word "formalism" in this sense hinges on the existence of a term (or phrase, sentence, or paragraph[11]) whose contested application generates the choice. Some terms, like "liberty" and "equality," are *pervasively indeterminate*. It is not that such terms have no content whatsoever; it is that *every* application, every concretization, every instantiation requires the addition of supplementary premises to apply the general term to specific cases.[12] Therefore, any application of that term that denies the choice made among various eligible supplementary premises is formalistic in this sense.[13]

More commonly, however, the indeterminacy to be filled by a decisionmaker's choice is not pervasive throughout the range of applications of a term. Instead, the indeterminacy is encountered only at the edges of a term's meaning. As H.L.A. Hart tells us, legal terms possess a core of settled meaning and a penumbra of debatable meaning.[14] For Hart, formalism derives from the denial of choice in the penumbra of meaning, where applying the term in question is optional. Thus, Hart conceives of formalism as the unwillingness to acknowledge in cases of doubtful application, such as the question of whether a bicycle is a vehicle for purposes of the prohibition on vehicles in the park, that choices must be made that go far beyond merely ascertaining the meaning of a word.

Hart's conception of formalism[15] is closely aligned with that undergirding those who criticize both Blackstone and *Lochner*.[16] Hart's formalist takes the penumbra to be as clear as the core, while the *Lochner* formalist takes the general term to be as determinate as the specific. Both deny the extent of actual indeterminacy, and thus neither admits that the application of the norm involves a choice not determined by the words of the norm alone.

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11. *See infra* note 85.

12. For a discussion of the often-ignored necessity of relying on such supplementary premises in the application of the term "equality," see Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). I disagree, however, with Westen's argument that the necessity of adding those supplementary premises to give the primary term meaning renders the primary term superfluous. Because a term is not self-standing does not mean that it serves no purpose, even if it needs external assistance in order to serve that purpose.

13. On the choices necessitated (but often denied) by general terms, see Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924); Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 175–76 (1985); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 9–25 (1984).

14. Hart, *supra* note 10, at 608–12; *see also* H.L.A. HART, *supra* note 1, at 121–50.

15. H.L.A. HART, *supra* note 1, at 121–50; Hart, *supra* note 10, at 608–12.

16. *See, e.g.*, Gordon, *supra* note 2; Grey, *supra* note 10; Peller, *supra* note 2.

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B. *Choice Among Norms*

Implicit in Hart's conception of formalism is the view that in the core, unlike in the penumbra, legal answers are often tolerably determinate. Even if this is true, and I will examine this claim presently, the possibility remains that a decisionmaker has a choice of whether or not to follow a seemingly applicable norm even in its core of meaning. The question in this case is not whether a bus is a vehicle, or even whether the core of the rule excludes buses from the park, but whether the rule excluding vehicles must be applied in this case. At times a decisionmaker may have a choice whether to apply the clear and specifically applicable norm. In such cases we can imagine a decisionmaker having and making a choice but denying that a choice was in any way part of the process. Thus, a variant on the variety of formalism just discussed sees formalism as involving not denial of the existence of choices within norms, but denial that there are frequently choices about whether to apply even the clear norms.

As an example of this type of formalism, consider the unreported and widely unknown case of *Hunter v. Norman*.[17] Hunter, an incumbent state senator in Vermont seeking re-election, filed his nominating petition in the Windsor County Clerk's office on July 21, 1986 at 5:03 p.m. In doing so he missed by three minutes the petition deadline set by title 17, section 2356, of the Laws of Vermont.[18] The statute provides, in its entirety, that "Primary petitions shall be filed not later than 5:00 p.m. on the third Monday of July preceding the primary election prescribed by section 2351 of this title, and not later than 5:00 p.m. of the forty-second day prior to the day of a special primary election."[19] The Windsor County Clerk, Jane Norman, duly enforced the statute by refusing to accept Hunter's petition, observing that "I have no intention of breaking the law, not for Jesus Christ himself."[20] Hunter's name, consequently, was to be withheld from appearing on the September Democratic primary election ballot.

Hunter, not surprisingly, took his disappointment to the courthouse and filed an action in equity against Norman for extraordinary relief.[21] He asked that the court order her to accept his petition and to ensure that his name would appear on the primary ballot. At the hearing, Hunter alleged that he had called the clerk's office earlier on the date in question and been told that he was required to deliver the petition in person because of

17. No. S197-86-WrC (Vt. July 28, 1986). The following account of the case is drawn from Judge Cheever's brief opinion, the pleadings, news accounts in the *Rutland Herald* of July 22, 23, 24 and 26, 1986, and a conversation with Marilyn Signe Skoglund, Assistant Attorney General in the Office of the Attorney General, State of Vermont.

18. VT. STAT. ANN. tit. 17, § 2356 (1982).

19. *Id.*

20. Rutland Herald, July 23, 1986, at 5, col. 4.

21. The petition is unclear as to whether Hunter was seeking the extraordinary legal remedy of mandamus or a mandatory injunction in equity.

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the necessity of signing forms consenting to his nomination. In fact, these consent forms were not due until a later date. Hunter claimed that had he not been led to appear in person by receiving this erroneous advice, the petition would have been filed earlier in the day. He argued that in light of the erroneous information given to Hunter by the Clerk's office, the clerk (and the state) were estopped from relying on the statutory deadline. In support of this proposition, Hunter offered *Ryshpan v. Cashman*,[22] in which the Vermont Supreme Court, on similar facts, held that because "reliance on erroneous actions on behalf of the State has put . . . its citizens in inescapable conflict with the literal terms of one of the time requirements instituted by that same sovereignty . . . [t]he statutory time schedule must . . . as a matter of equity . . . yield."[23]

Ultimately, Hunter prevailed, and it appears that *Ryshpan v. Cashman* saved the day—or at least saved Hunter's day. *Ryshpan* therefore seems to have operated as an escape route from the rigors of the statute. Suppose, however, that everything in Hunter's case had been the same, including the existence of *Ryshpan*, but that the judge had ruled against Hunter solely on the basis of the statutory language. Had this hardly unrealistic alternative occurred, it would seem but a small step from the brand of formalism discussed above to a formalist characterization of this hypothetical decision. As long as *Ryshpan* exists, the judge has a choice whether to follow the letter of the statute or instead to employ the escape route. To make this choice and merely cite the statute as indicating the absence of choice would therefore deny the reality of the choice that was made. The crux of the matter is that this choice was present as long as *Ryshpan* existed, whether the judge followed that case or not. The charge of formalism in such a case would be but a variation of formalism as the concealment of choice: Instead of a choice within a norm, as with either pervasively indeterminate language or language containing penumbras of uncertainty surrounding a core of settled meaning, here the choice is between two different norms.

This variation on *Ryshpan* reveals the reasons we condemn the masking of choice. When the statute and *Ryshpan* coexist, neither determines which will prevail. Thus, the choice of the escape route represented by *Ryshpan* over the result indicated by the statute, or vice versa, necessarily would be made on the basis of factors external to both. These factors might include the moral, political, or physical attractiveness of the parties; the particular facts of the case; the judge's own views about deadlines; the judge's own views about statutes; the judge's own views about the Vermont Supreme Court; the judge's own views about clerks of courts; and so on. Yet were any of these factors to cause a particular judge to decide that

22. 132 Vt. 628, 326 A.2d 169 (1974).
23. *Id.* at 630-31, 326 A.2d at 171.

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the statute should prevail, mere citation of the statute as inexorably dictating the result would conceal from the litigants and from society the actual determinative factors. Insofar as we expect the reasons for a decision to be open for inspection (and that, after all, is usually the reason judges write opinions),[24] failure to acknowledge that a choice was made can be criticized because knowing how the choice was made helps to make legitimate the products of the system.

C. *Is There Always a Choice?*

Ryshpan v. Cashman is a trifle obscure, but it is hardly unique. Consider the number of *Ryshpan* equivalents that allow decisionmakers to avoid the specific mandates of a particular rule. A decisionmaker may determine that the literal language of a rule does not serve that rule's original intent, as the Supreme Court has interpreted the Civil Rights Act of 1964,[25] the contracts clause of the Constitution,[26] and the Eleventh Amendment.[27] Or a decisionmaker may apply the "mischief rule" or its variants to determine that a literal application of the rule would not serve the rule's *purpose*.[28] Or a decisionmaker may apply a more general rule that denies relief to a claimant entitled to relief under the most locally applicable rule;[29] for example, she might apply the equitable principle of

24. Although it is generally accepted that judges should write opinions explaining their actual reasons for decision, *see, e.g.*, Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987), some scholars have suggested that there may be reasons to avoid a candid explanation of the reasoning process. *See* sources cited *id.* at 731 n.4. Thus an opinion might be equated with a statute, whose message legitimately may depart from a reflection of the process that generated it. While recognizing that reasons going to the symbolic, guiding, and persuasive function of opinions may urge against candid explanation of the decision process, I address here only opinions in which honesty is deemed appropriate.

25. *See, e.g.*, California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 691 (1987); United Steelworkers v. Weber, 443 U.S. 193, 201 (1979).

26. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1251 (1987).

27. *See, e.g.*, Monaco v. Mississippi, 292 U.S. 313, 329-30 (1934); Hans v. Louisiana, 134 U.S. 1, 10-11 (1890).

28. Heydon's Case, 76 Eng. Rep. 637 (Ex. 1584), phrases the rule as deriving from original legislative intent. *See infra* note 68. However, limitation of the purpose of a rule to the intent of the legislature that passed it unnecessarily restricts the meaning of the term "purpose." Purpose gleaned from the words of a rule itself should not be confused with the psychological intentions of the drafters. Consider a rule which specifically excludes from a park children, radios, musical instruments, dogs but not cats, and cars and trucks but not bicycles. One might conclude from reading this rule that its purpose is to prevent noise. Even if the drafters of the rule intended to promote safety rather than prevent noise, their psychological intentions would not negate this reading of purpose from the rule's words themselves, any more than a person, having said "stop," could deny the import of that phrase because she in fact meant "go."

29. *See* Singer, *supra* note 13, at 17-18. The most "locally" applicable rule (or statute) is that which most narrowly pertains to the situation at hand. "Dogs should be leashed" is, in a case involving a dog, more locally applicable than "animals should be restrained." Similarly, "beneficiaries named by the testator are to inherit according to the will" is more locally applicable than "no person should benefit by his own wrong." The idea of *local* applicability distinguishes the rules in each of these pairs, for in each pair both rules might apply to the same situation. Local applicability captures our intuition that a more specifically applicable rule is somehow *more* applicable than a less specifically applicable, but still applicable, rule.

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unclean hands or laches,[30] the legal principle of *in pari delicto*,[31] or the civil law principle of abuse of right.[32] Any reader of this article could easily add to this list.[33]

Yet, what if none of these established routes were available in a particular case—would a judge then be forced to apply the specifically applicable rule? To answer this question, let us examine another variation on *Hunter v. Norman*. Suppose that *Ryshpan v. Cashman* did *not* exist, but that everything else about the facts and the applicable law in *Hunter* remained the same. What choices, if any, would be open to the judge? The judge could, of course, simply hold that the statute applied and rule against Hunter. But must he? Could the judge instead "create" *Ryshpan* by concluding that Hunter should win because he was misled by the clerk's office?

This option of creating *Ryshpan* does not seem inconsistent with the way the American legal system operates. Despite the lack of any specific statute or case authorizing such a result, allowing Hunter to win because he was misled would raise no eyebrows in American legal circles. No one would call for an investigation of the judge's competence, as someone might had the judge ruled for Hunter because Hunter was a Capricorn and Norman a Sagittarius. If the creation of such an escape route would be consistent with American judicial traditions, then the judge can be seen to have had a choice between deciding for Hunter and deciding for Norman even without *Ryshpan*. Thus a judge who ruled against Hunter on the basis of the statute would be denying the extent to which there was still a choice to create *Ryshpan* and thereby rule for Hunter.

Of course, a judge who decided to "create" *Ryshpan* would probably not simply assert that Hunter should win because he relied on erroneous information from a state official. Rather, the judge would justify this conclusion by reference to general principles that lurk in various corners of the legal system. For example, the judge might say that, as a general principle, parties are estopped from relying on laws whose contents they have

30. *See, e.g.*, Brenner v. Smullian, 84 So. 2d 44 (Fla. 1955) (unclean hands); Gorham v. Sayles, 23 R.I. 449, 50 A. 848 (1901) (laches).

31. *See, e.g.*, Rozell v. Vansyckle, 11 Wash. 79, 39 Pac. 270 (1895). Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), made famous in R. DWORKIN, LAW'S EMPIRE 15-20 (1986) [hereinafter LAW'S EMPIRE] and R. DWORKIN, TAKING RIGHTS SERIOUSLY 23 (1977) [hereinafter TAKING RIGHTS SERIOUSLY], presents a similar issue. *Riggs* is significant because the most locally applicable legal rule, the relevant statute of wills, would allow the murdering heir to inherit. Only the imposition of the less locally applicable general principle that no person should profit from his own wrong allowed the court to avoid the result indicated by the most directly applicable legal norm. From the perspective of the result dictated by the most immediately applicable legal rule, *Riggs* is not a hard case, but an easy one. Understanding Dworkin's enterprise requires an understanding of his attempt to explain the ways in which the result "easily" dictated by the most locally applicable rule frequently yields to less locally applicable legal and nonlegal norms. *See* Schauer, *The Jurisprudence of Reasons* (Book Review), 85 MICH. L. REV. 847 (1987).

32. *See generally* Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L.J. 22 (1935) (discussing possibility of incorporating principle forbidding exercise of legal rights for purposes of malevolence).

33. *See* Singer, *supra* note 13, at 17-18.

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misstated to the disadvantage of another; a decision against the clerk would be merely a specific instance of the application of that general principle. Or, the judge might cite other particular principles, such as the principle of reliance in securities law, and analogize this case to those.[34] Under either analysis the judge would attempt to ground the new principle in some already existing principle.

On the basis of these variations, we can distinguish three possible models of escape route availability. Under one model, the existing escape routes in the system represent an incomplete list of principles to ameliorate the rigidity of rules, and the judge may add to this list where amelioration is indicated but no applicable ameliorative principle exists. In such instances, the judge might discuss justice or fairness or some other general value and explain why this value supports the creation of a principle like that in *Ryshpan v. Cashman*. The implicit ideal of this system is the availability of an ameliorative principle whenever the circumstances demand it. Thus the judge who creates a new ameliorative principle on an appropriate occasion furthers the goals of this system.

Alternatively, we could develop a model of a system in which there is already a more or less complete stock of ameliorative principles. In such a system, a judge would *always* have some escape route available if all the circumstances indicated that the applicable norm was not the best result to be reached in that case. If *Ryshpan* itself did not exist, the judge would be able to pick other extant ameliorative principles that would get Hunter's name on the ballot.

Both the first model, which resembles Dworkin's account of the law,[35] and the second, which borrows from Llewellyn's,[36] acknowledge the pervasiveness of judicial choice in their recognition of the judge's opportunity (or perhaps even obligation) to avoid the arguably unjust consequences of mechanical application of the most directly applicable legal rule. If either of these models is an accurate rendition of some legal system, then a decisionmaker within such a system who simply applies the most directly applicable legal rule without further thought or explanation either denies herself a choice that the system permitted or required, or denies to others an explanation of why she chose not to use the escape routes permitted by the system. This failure to explain the choice to apply the most locally applicable rule is simply a variation on the more egregious forms of formalism as denial of choice.[37]

34. Use of precedent is not as simple as I make it out to be here, but these subtleties of precedential reasoning need not detain us here. For a discussion of precedent, see Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

35. *See* LAW'S EMPIRE, *supra* note 31; TAKING RIGHTS SERIOUSLY, *supra* note 31. *See also* discussion of Dworkin, *supra* note 31.

36. See especially Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

37. Whether a system allows judges to create norms of rule avoidance where none exist, whether

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These two models—one allowing the creation of rule-avoiding norms, and the other presenting a complete list of such norms for use[38]—must be contrasted with a third model. Under this third model, the stock of extant rule-avoiding norms is not temporarily incomplete but completable, as in the first model, nor is it complete, as in the second. Instead, it is both incomplete and closed. A decisionmaker will therefore be confronted with situations in which the immediately applicable rule generates a result the decisionmaker wishes to avoid but for which the system neither contains an escape route nor permits one to be created. Under this model, a judge who followed the rule—rather than the course she otherwise would have taken on the basis of *all* relevant factors—would not have acted formalistically in the sense now under discussion. Where there was no choice, a decisionmaker following the mandates of the most directly applicable norm could not be accused of having a choice but denying its existence.

If we can imagine a model in which a rule-avoiding norm is both nonexistent and precluded in some instances, then we can also imagine a model in which no rule-avoiding norms exist at all. In such a system, a decisionmaker would be expected simply to decide according to the rule when there was a rule dealing specifically with the situation. Because there was no choice to be made, the decisionmaker could not be charged with masking a choice.

This third model presents the conceptual possibility of a different type of formalism than that which has been the focus of this section. In this third model, the charge of "formalism" would possess a different significance than in the other two models, for the decisionmaker accused of being formalistic might not be denying a choice made in the decisionmaking process, but might never have had a choice at all. To investigate the possibility of this type of formalism we must determine whether a system can truly foreclose choices from the decisionmaker. It is to this issue that I now turn.

II. Formalism as the Limitation of Choice

A. *Can Language Constrain?*

Each of my variations on *Hunter v. Norman* presupposed that the judge reached a conclusion that was not influenced by the language of the

judges in fact create such norms, and whether a sufficient stock of rule-avoiding norms exists such that judges need only apply them are all unavoidably empirical questions. *See* Kennedy, *Toward a Critical Phenomenology of Judging*, 36 J. Legal Educ. 518, 547–48, 562 (1986); *see also* Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 Stan. L. Rev. 575 (1984). There is no reason, of course, to presume that the answers to these empirical questions will remain consistent across all decisional domains within a legal system. For example, no logical necessity dictates that the stock of rule avoidance norms applicable to administrative determination of individual social security claims be identical to that applicable to Supreme Court adjudication of constitutional questions.

38. There need not be any conceptual inconsistency between the two models. The second can be conceived of as the end product of the first.

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rule.[39] This rule-independent conclusion presents the possibility that the results required by the most locally applicable statute may diverge from the result the judge considers to be the optimal result for this case in light of a range of factors wider than that specifically mandated by the statute. In cases of such divergence between a judge's unconstrained judgment and the result indicated by the most locally applicable statute, a rigid requirement that the decision follow the statutory language would limit the choices open to the judge.[40]

Insofar as rigid adherence to the most locally applicable statute is required, either by the norms governing a decisional domain or by a judge's understanding of her role, a judge following that requirement would not be formalistic in the sense discussed in the previous section. Nevertheless, legal theorists condemn this type of decisionmaking as formalistic because it requires that a decisionmaker allow her best judgment about what should be done in *this* situation to yield to the dictates of a mere rule. In particular, it is the language of the rule that is perceived as binding the decisionmaker;[41] critics therefore condemn this decisionmaking process as formalistic because it appears to be a commitment to constraint by mere words on a printed page, words chosen and perpetuated without consideration of the exact situation now at hand. Formalism in this sense is not the denial of choice *by* the judge, as above, but the denial of choice *to* the judge. To be formalistic, it is said, is to be enslaved by mere marks on a printed page.[42]

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39. I need not consider here which factors the judge actually used to reach a conclusion, for I am not trying to catalog the considerations comprising an ideal decisionmaker's totally particularized decisionmaking process. Instead, I seek merely to distinguish the concept of a complete array of factors that any particularizing decisionmaker would take into account, regardless of the source of the particularizing norms, from the more limited array of factors available to a decisionmaker inhibited by rules.

40. I assume here a distinction between internal and external constraint. A host of factors defining what I am and how I got that way constrain me from appearing unclothed in a football game at Michigan Stadium. Some of these are internal constraints—the factors that shape my very existence. These internal constraints may be psychological, ideological, or economic, but all shape what I *am* internally up to the moment of decision to appear clothed rather than naked at the football game. Even if I could overcome these internal constraints, however, external ones, such as social disapproval and a formal rule against such behavior, still might deter me from that action. Similarly, all sorts of internal factors influence the decision a judge might reach about the optimal result in this case. But these influences are distinguishable from external constraints, such as rules, that come from outside the judge's personal determination of what should be done.

Rules are only one possible example of external constraints. A decisionmaker also may believe herself to be externally constrained by statutory *purpose*. As I will demonstrate below, however, *see infra* text accompanying notes 77–79, statutory purpose is an external constraint when, and only when, it operates as a *rule* in the sense central to my argument. That is, purpose is an external constraint only when some *formulation* of that purpose, on paper or in the mind, operates in substantially the same way that a canonically formulated rule operates.

41. I explore this issue in depth below. *See infra* Section II-C.

42. For an example of this common use of the term "formalism," see Levinson, *What Do Lawyers Know (and What Do They Do with Their Knowledge)? Comments on Schauer and Moore*, 58 S. CAL. L. REV. 441, 445 (1985) (erroneously concluding that Schauer "is much too sophisticated a theorist to endorse . . . linguistic formalism"). This usage of the term "formalism" parallels that of other disciplines. *See, e.g.*, Michaels, *Against Formalism: The Autonomous Text in Legal and Literary Inter-*

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Formalism as the linguistic limitation of choice can be illustrated in a number of ways. Think of the judge who evicts the destitute widow and her family on Christmas Eve because "the law" permits no other result. Consider the classic, fictional case of *R. v. Ojibway*,[43] in which the judge determines that a pony with a down pillow on its back is a small bird because it literally fits a statutory definition of a small bird as a two-legged animal covered with feathers.[44] And recall Justice White's dissent in *Bowsher v. Synar*,[45] in which he accuses the majority of being "formalistic" for taking its narrow reading of article II to be more important than the practical consequences of striking down attempts to deal with the deficit problem.[46]

These cases exemplify a decisionmaking process that, by distinguishing the literal mandates of the most locally applicable legal norm from some arguably better result reachable by considering a wider range of factors, reinforces the systemic isolation, or closure, of the legal system.[47] Those who condemn such an outlook as formalistic criticize the perception of law as a closed system, within which judgments are mechanically deducible from the language of legal rules.[48] Note that this description of formalism

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pretation, 1 POETICS TODAY 23 (1979).

43. Pomerantz & Breslin, *Judicial Humour—Construction of a Statute*, 8 CRIM. L.Q. 137 (1966).

44. Note, of course, that four-legged animals have two legs—and more. *Id.* at 138.

45. 478 U.S. 714, 106 S. Ct. 3181, 3205 (1986) (White, J., dissenting).

46. The plausibility of Justice White's dissent indicates that the majority opinion may also have been formalistic in the first sense considered in this article, *see supra* Section I, for it suggests that the majority had a choice. Yet by phrasing the opinion largely in terms of the clear mandate of the Constitution, the majority denied the existence of that choice and thus denied its audience the benefit of knowing how that choice was made. *See* Strauss, *supra* note 1.

47. On the relationship between the idea of systemic isolation and the more familiar terminology of legal positivism and its opponents, see *infra* note 81.

48. *See, e.g.*, M. HORWITZ, *supra* note 1, at 250-51. After defining formalism as syllogistic deduction, Judge Posner concludes that formalism is inapplicable to statutory rules (rules with a canonical embodiment) because the decision to take these rules literally is itself a choice. Posner, *supra* note 1. Posner stumbles, however, in taking this preliminary choice to distinguish rule interpretation from common law adjudication. He offers the following as an instance of a common law deduction: "So if an enforceable contract is a promise supported by consideration, and *A*'s promise to *B* was supported by consideration, the promise is a contract." *Id.* at 182. He then contrasts that example with the following requirement: "[O]ne must be at least thirty-five to be eligible [to be President], X is not thirty-five, therefore X is not eligible." *Id.* at 188. The latter case, says Posner, is not deductive, superficial appearances to the contrary, because interpreting the text to produce the premise is not deductive. According to Posner, the text could have been interpreted nonliterally; thus interpretation of the text to require that a President actually be at least thirty-five years old, rather than some less determinate measure of maturity, involves a nondeductive choice.

Posner's conclusion is correct, but only because of Posner's sleight of hand in drawing the preliminary distinction between statutory rule application and common law adjudication. Posner builds into the common law case a hardly noticeable "if." Thus, although the statutory case is not deductive because the generation of the major premise involves an interpretive *choice*, neither is the common law case deductive, because its major premise is also a choice. Note that although both are equally nondeductive, both can be equally deductive once the major premise is generated. We therefore can reformulate the issue this way: If we make the original determination that the language of a rule is to be interpreted literally, then the process of rule application is indeed deductive in any case in which a putative application is definitionally incorporated within the scope of the rule as set forth in its major premise.

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conjoins two different elements: mechanical deducibility and the existence of a closed system. Neither element on its own necessarily implies the other, however. Mechanical deducibility need not entail closure. If we had a legal rule prohibiting all actions specifically condemned by the United Nations, for example, the coverage of the rule would be readily determinable, even if the answers were found outside the legal system (narrowly construed). Conversely, nonmechanical judgments can be made within the boundaries of a single system.[49] Consider the questions of whether there should be a three-point shot in basketball or a designated hitter in baseball. These are not easy questions (nor are they important ones), but their answers are *internal* to the games at issue; they involve a determination of whether the proposed change serves the goals of the game.[50] Although mechanical deducibility is thus analytically severable from systemic isolation, the two are commonly conjoined when critics deride legal decisions or theories as "formalistic," because both limit the domain of choices available to a decisionmaker.[51]

Having posited a model in which the decisionmaker's choice is limited by rules, we now must determine whether this model is descriptively accurate and normatively sound. The descriptive question, which I will take up first, is whether such limitation of choice by the words on a printed page is possible. To put it differently, and to distinguish this version of formalism from that considered in the previous section, the question is whether choice can be constricted by a canonical set of words on a printed page, or whether the choices open to a seemingly constrained decisionmaker are in fact virtually the same as those available to an unconstrained decisionmaker. This descriptive question in turn has both conceptual and psychological aspects. Even if it may be conceptually possible for language to constrain choice, it may still be beyond the psychological ca-

49. For an important defense of this variety of formalism, see Weinrib, *Legal Formalism*, 97 YALE L.J. (forthcoming 1988).

50. My point here parallels Dworkin's notion of "fit." As Dworkin illustrates the point, the determination whether the existence of a homosexual relationship between David and Steerforth best fits *David Copperfield* is by no means mechanical, but its resolution takes place largely within the boundaries of the novel. Dworkin, *No Right Answer?*, in LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 58 (P. Hacker & J. Raz eds. 1977). A slightly different version of this article appears under the same title in 53 N.Y.U. L. REV. 1 (1978) and as *Is There Really No Right Answer in Hard Cases?*, in R. DWORKIN, A MATTER OF PRINCIPLE 119 (1985). In a later work, LAW'S EMPIRE, *supra* note 31, Dworkin broadens the systemic boundaries with which he is concerned to encompass those norms commonly understood as legal, political, and moral. The expansion of these boundaries is a separate issue, however; one could agree with Dworkin that it is possible to look for fit *within* a domain while disputing the size of the relevant domain.

51. The mechanical aspects of formalism are stressed in the important discussion in Kennedy, *supra* note 1. The concept of formalism as not necessarily mechanical but involving significant limitations on otherwise eligible results is the focus of Tushnet, *supra* note 1. *See also*, Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 4 n.8 (1984) (distinguishing between "operative" textual norms that guide decisions themselves and "non-operative" textual norms that tell decisionmakers to use decisive norms outside text).

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pacity of those who make decisions to abide by these constraints. But let us turn first to the conceptual question.

Is it possible for written norms to limit the factors that a decisionmaker considers? At first glance, the answer to this question seems to be "no." Language is both artificial and contingent and therefore appears insufficiently rigid to limit the choices of the human actors who have created it. The word "cat," for example, could have been used to refer to canines, and the English language could have followed the language of the Eskimos in having several different words to describe the varieties of snow. Yet this answer confuses the long-term mobility of language with its short-term plasticity, and is a conclusion comparable to taking the ponderous progress of a glacier as indicating that it will move if we put our shoulders against it and push. Of course language is a human creation, and of course the rules of language are contingent, in the sense that they could have been different. It is also beyond controversy that the rules of language reflect a range of political, social, and cultural factors that are hardly *a priori*. But this artificiality and contingency does not deny the short-term, or even intermediate-term, noncontingency of meaning. If I go to a hardware store and request a hammer, the clerk who hands me a screwdriver has made a mistake, even though it is artificial, contingent, and possibly temporary that the word "hammer" represents hammers and not screwdrivers. Similarly, a rule requiring candidates to file nominating petitions at a certain place by a certain time on a certain day is violated by filing in the wrong place or after the specified time. Whatever the real judge *did* say in *Hunter v. Norman*, and whatever some judge might have said in any of my hypothetical variants, none of them would be that Hunter, in filing at 5:03 p.m., had filed at or before 5:00 p.m.

The questions about the possibility of linguistic constraint can be clarified by considering again the rule prohibiting vehicles in the park. But now let us turn from its peripheral applications to the central applications—whether cars and trucks are excluded. Hart assumed that, whatever else the rule did, it excluded cars and trucks. This was the rule's "core" of settled meaning and application.[52] Against this, Fuller offered the example of a statue of a truck erected as a war memorial by a group of patriotic citizens. According to Fuller, the example challenges the idea that a rule will have a settled core of meaning which can be applied without looking at the rule's purpose. Fuller argues that it cannot be determined whether the truck, which is a perfectly functional vehicle, falls into the rule's periphery or core unless one considers the purpose of the rule.[53] Fuller's challenge is ambiguous, however; there are three variant interpre-

52. Hart, *supra* note 10, at 607.
53. Fuller, *Positivism and Fidelity to Law -- A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958).

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tations of his challenge to the theory of linguistic constraint.[54] One interpretation of Fuller's challenge is that legal systems necessarily incorporate rule-avoiding norms such as those discussed earlier.[55] Legal systems must provide some escape route from the occasional absurdity generated by literal application because applying the literal meaning of a rule can at times produce a result which is plainly silly, clearly at odds with the purpose behind the regulation, or clearly inconsistent with any conception of wise policy. Insofar as a legal system offers its decisionmakers no legitimate escape from unreasonable consequences literally indicated by the system's norms, the system is much less a *legal* system, or is at least not a legal system worthy of that name. This argument, however, asserts a normative point about how legal systems should operate, rather than any necessary truth about how the norms themselves operate. Moreover, the argument itself admits the potential binding authority of rules: If rules require an escape route to avoid the consequences of literal application, then it must be that literal application can generate answers different from those which a decisionmaker would otherwise choose. Thus, this interpretation fails to challenge the possibility of linguistic constraint; it merely points out the undesirability of employing it too rigorously in certain domains.

Alternatively, Fuller might be arguing that legal systems necessarily require the interpretation of regulatory language in light of the purpose of the regulation. As with the first interpretation of the challenge, however, this interpretation focuses on whether a rule should bind, and it leaves the claims of linguistic determinacy untouched. We still can imagine a system in which decisionmakers do not interpret clear regulatory language according to its purpose if its purpose diverges from the regulatory language. The outcome in some instances might seem absurd, but it is question-begging to use the existence of the absurd result as an attack on the possibility of a core of literal meaning.

Finally, Fuller might be interpreted as making a point about language itself: He might be arguing that meaning cannot be severed from the speaker's purpose and that meaning must be a function of the specific context in which words are used. Fuller's argument that the idea of literal meaning is incoherent, an argument also made by other critics,[56] reveals a

54. Fuller's example and other illustrations of seemingly absurd results generated by applying a rule without attention to the circumstances of its creation figure prominently in criticism of formalism. *See, e.g.*, Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 386-88 (1985); H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1148-78 (tentative ed. 1958) (unpublished manuscript); *see also* Dworkin's use of *Riggs v. Palmer*, *supra* note 31.

55. This use of the term "necessarily" to describe the essential features of anything properly called a legal system would be consistent with the general tenor of Fuller's jurisprudence. *See* L. FULLER, THE MORALITY OF LAW (1964); R. SUMMERS, LON L. FULLER 27-31, 36-40 (1984).

56. *See, e.g.*, Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 708-13 (1985) [hereinafter *The Politics of Reason*] (arguing that words do not

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mistaken view of the nature of language. Fuller and his followers fail to distinguish the possibility and existence of meaning from the *best* or *fullest* meaning that might be gleaned from a given communicative context. In conversation, I am assisted in determining what a speaker intends for me to understand by a number of contextual cues, including inflection, pitch, modulation, and body language, as well as by the circumstances surrounding the conversation. That such contextual cues assist my understanding, however, does not imply that the words, sentences, and paragraphs used by the speaker have *no* meaning without those cues. The "no vehicles in the park" rule clearly points to the exclusion of the statue from the park even if we believe that the exclusion is unnecessary from the point of view of the statute's purpose.

If I come across an Australian newspaper from 1827, I can read it because I understand, acontextually, the meaning of most of the words and sentences in that newspaper, even though with better historical understanding I might understand *more* of what was written by a colony of transported English convicts. This example does not demonstrate that language is unchanging, nor that language can be perfectly understood without attention to context, but rather that some number of linguistic conventions, or rules of language, are known and shared by all people having competence in the English language. Linguistic competence in a given language involves understanding some number of rules also understood by others who are linguistically competent in the same language. When individuals understand the same rules, they convey meaning by language conforming to those rules.[57] Members of the community of English speakers,

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have essences or core meanings); Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. Pa. L. Rev. 383, 408–19 (1987) (discussing Hobbes' rejection of notion of linguistic essences). In passing, I note my disagreement with those who describe as "post-Wittgensteinian" the view that meaning cannot be separated from the particular context of a particular utterance. *E.g.*, Boyle, *The Politics of Reason*, *supra*, at 708. A footnote in a law review article is hardly the place to debate interpretations of Wittgenstein, including whether Wittgenstein can even plausibly be interpreted to support a pragmatist/particularist theory of meaning. Yet I would briefly note that a fair reading of Wittgenstein reveals that he argued that the meaning of a word is a function of how that word is contingently used in an existing linguistic community, but emphatically not a function of how the word is used on a particular occasion by a particular member of that community.

It is crucial to recognize the seductive quality of phrases like "post-Wittgensteinian," which suggest that if the reader acknowledges Wittgenstein's genius, then she must agree with the point described in those terms. It is better to discuss the point at issue without attempting to lean on the argumentative props of associations with philosophers whose names are currently fashionable in legal circles. In light of the still-raging disputes about the most foundational questions in the philosophy of language, to substitute Wittgenstein's name for an argument is unwarranted even if the use of his name is accurate. When that use is mistaken or at the very least contested, the dangers of facile borrowing from other disciplines are compounded.

This criticism of the presentation of Boyle's argument has no bearing on its underlying validity, however. Although I disagree with much of what he and Fuller argue, those arguments raise central questions about the nature of law which I believe should be confronted directly. Boyle's useful perspectives are ill-served by clothing them in what appears to me to be an idiosyncratic misreading of Wittgenstein.

57. For a particularly insightful and influential articulation of the view that meaning exists inde-

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for example, possess shared understandings that enable them to talk to all other members of the community.

Among the most remarkable features of language is its compositional nature, i.e., the way in which we comprehend sentences we have never heard before. We can do this because rules, unspecified and perhaps unspecifiable, allow us to give meaning to certain marks and certain noises without having to inspect the thought processes of the speaker or the full context in which words appear. Words communicate meaning at least partially independently of the speaker's intention. When the shells wash up on the beach in the shape of C-A-T, I think of small house pets and

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pendent of speaker's purpose or other related aspects of context, see J. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 42–50 (1969). This view also seems to be the import of paragraphs 489–512 of L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans. 3d ed. 1953). A similar interpretation of Wittgenstein, relying on different passages, is G. BAKER & P. HACKER, WITTGENSTEIN: RULES, GRAMMAR AND NECESSITY 329–38 (1985). Indeed, even those who are rightly concerned with the foundational rule-following questions posed by Wittgenstein would not dispute that "communal language constitutes a network of determinate patterns." Wright, *Rule-Following, Objectivity and the Theory of Meaning*, in WITTGENSTEIN: TO FOLLOW A RULE 99, 105 (S. Holtzman & C. Leich eds. 1981).

Interpretations of Wittgenstein apart, acceptance of the possibility of literal meaning has passed into the commonplace of contemporary analytical philosophy of language, even while philosophers hotly dispute the source or explanation of that phenomenon. *See, e.g.*, W. ALSTON, PHILOSOPHY OF LANGUAGE 74–75 (1964); M. BLACK, *Meaning and Intention*, in CAVEATS AND CRITIQUES: PHILOSOPHICAL ESSAYS IN LANGUAGE, LOGIC, AND ART 109 (1975); S. CAVELL, *Aesthetic Problems of Modern Philosophy*, in MUST WE MEAN WHAT WE SAY? 73, 80–82 (1969); S. CAVELL, *Knowing and Acknowledging*, *id.* at 238, 248–49; D. DAVIDSON, INQUIRIES INTO TRUTH AND INTERPRETATION xix, 243–64 (1984); D. HOLDCROFT, WORDS AND DEEDS: PROBLEMS IN THE THEORY OF SPEECH ACTS 122–23 (1978); R. MARTIN, THE MEANING OF LANGUAGE 217 (1987); M. PLATTS, WAYS OF MEANING: AN INTRODUCTION TO A PHILOSOPHY OF LANGUAGE 130–32 (1979); I. SCHEFFLER, BEYOND THE LETTER: A PHILOSOPHICAL INQUIRY INTO AMBIGUITY, VAGUENESS AND METAPHOR IN LANGUAGE 81 (1979).

In one philosopher's words:

> It is a platitude—something only a philosopher would dream of denying—that there are conventions of language, although we do not find it easy to say what those conventions are. If we look for the fundamental difference in verbal behavior between members of two linguistic communities, we can be sure of finding something which is arbitrary but perpetuates itself because of a common interest in coordination. In the case of conventions of language, that common interest derives from our common interest in taking advantage of, and in preserving, our ability to control others' beliefs and actions to some extent by means of sounds and marks. That interest in turn derives from many miscellaneous desires we have; to list them, list the ways you would be worse off in Babel.

D. LEWIS, *Languages and Language*, in 1 PHILOSOPHICAL PAPERS 163, 166 (1983).

Obviously some tension exists between the way that language is discussed in analytic philosophy of language and the way that it is discussed in other circles, including literary theory. Part of the difference between the terms of the debate in these two circles can be explained by the different extent to which the two disciplines focus on "difficult" interpretations. This may also explain the extent to which *some* branches of legal theory, with their focus on difficult interpretations in linguistically hard cases, have been drawn to literary theory. Moreover, insofar as literature exists primarily to illuminate, inspire, and transform, its very existence encourages attempts to pierce literal meaning. The relationship between the enterprise at issue and the view of literal meaning adopted suggests an important question: Might the purposes of the legal enterprise be so different from those of interpreting literature that literal meaning is no longer an obstacle but instead a tool? I have no answer to this question, nor do I intend to offer a few easy citations to suggest a familiarity I do not possess. Nevertheless, the very differences in focus between analytic philosophy of language and literary theory may suggest that it is a bit too easy, for me or for those who draw on literary theory or other perspectives on language, to assume that the applications of these perspectives to law cannot take place without some theoretical slippage.

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not of frogs or Oldsmobiles precisely because those marks, themselves, convey meaning independently of what might have been meant by any speaker. Of course there can never be *totally* acontextual meaning.[58] The community of speakers of the English language is itself a context. Yet meaning can be "acontextual" in the sense that that meaning draws on no other context besides those understandings shared among virtually all speakers of English.

Given that the meaning of words may be acontextually derived from our understandings of language, the central question becomes whether enough of these understandings exist to create the possibility of literal language. In other words, we must ask whether words have sufficient acontextual import so that communication can take place among speakers of English in such a way that at least a certain limited range of meaning, if not one and only one meaning, will be shared by all or almost all speakers of English. The answer to this question is clearly "yes." As with the shells that washed up on the beach in the shape of C-A-T, words strung together in sentences point us toward certain meanings on the basis of our shared understandings. At times these sentences may be descriptive, but at other times these comprehensible sentences may be general prescriptions—rules. Because we understand the rules of language, we understand the language of rules. Contextual understanding might be necessary to determine whether a given application does or does not serve the purposes of a rule's framers. Yet the rule itself communicates meaning as well, although that meaning might depart from the purposes behind the rule or from the richer understanding to be harvested from considering a wider range of factors than the rule's words. That we might learn more from considering additional factors or from more fully understanding a speaker's intentions does not mean that we learn nothing by consulting the language of rules themselves.

Of course, certain obvious, accessible, and by and large undisputable features of rules distinguish the meaning we cull from them from our interpretation of other types of communications. For example, when we interpret a rule of law, we understand that it is a law and that it is to be interpreted in light of surrounding language in the same law. In addition, ordinary "lawspeak" (habeas corpus, certiorari, party, appeal) can be viewed as a language for a subcommunity in the community of English speakers, capable of doing within the subcommunity what ordinary language does within the larger community of English speakers. Thus, although all those reading a statute come to that task with certain shared

58. *See* J. SEARLE, *Literal Meaning*, in EXPRESSION AND MEANING 117 (1979) (literal meaning exists albeit only against a set of background assumptions about contexts in which sentence could appropriately be uttered); Moore, *supra* note 54, at 304-07 (arguing that minimal context allows and is required for fixing references to singular terms).

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assumptions, it is probable that almost all lawyers add to these an additional set of assumptions which are shared mainly by lawyers.[59]

Both those within the legal community and those within the larger linguistic community are capable of deriving the literal import of rules, even though the literal lawyer's meaning may occasionally diverge from the literal lay meaning of the same term. A law that limits membership in Parliament to those who take an oath "on the true faith of a Christian" literally excludes Jews by its language.[60] A statute requiring that the master of a vessel shall record in the log book "[e]very birth happening on board, with the sex of the infant, and the names of the parents,"[61] can be understood by virtually any speaker of English as requiring the master to take certain actions.[62] In these and countless other cases, statutes can be wrenched from most of the context of their enactment and application and still be read and understood.

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59. Note that I am talking about language and about two different embellishments on the main theme of literal meaning. First, ordinary people within a given linguistic culture might share, as linguistic conventions, knowledge about how to interpret the language of rules, including conventions relating to the difference between normative and descriptive language and conventions telling them to interpret words in light of surrounding language in the same rule or statute. This suggests only that all competent speakers of the language in which the text is written have access to a certain minimal amount of noncontroversial information about what kind of text it is.

Second, literal meaning is not necessarily ordinary meaning, because linguistic conventions may exist within a technical or professional subcommunity of a larger community. For example, photographers may have a literal sense of the meaning of the term "burning in," physicians may have a literal sense of the meaning of the term "Cushing's Syndrome," and lawyers may have a literal sense of the meaning of the term "assumpsit," even though none of these are terms used at all or in the same way by ordinary English speakers. This second embellishment, however, must be sharply distinguished from other notions of "conventionalism" that build in much more than linguistic meaning. *See, e.g.*, S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING (1985); Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). The conventionalist legal literature talks merely about the conventions of permissible legal argument and does not confront the question of the relationship between the conventions of permissible legal argument and the conventions of literal meaning, whether ordinary or technical. Thus, legal conventionalists such as Fiss avoid questions regarding whether and why certain literal readings of legal rules are or are not permissible arguments within the legal interpretive community. It is these questions, in some sense more foundational, that concern me here, because my aim is to locate the particular permissible arguments in the legal interpretive community, rather than merely to assert the existence of permissible arguments.

60. Salomons v. Miller, 8 Ex. 778, 155 Eng. Rep. 1567 (1853); Miller v. Salomons, 7 Ex. 475, 155 Eng. Rep. 1036 (1852).

61. 46 U.S.C. § 201 (1958), *repealed by* Pub. L. No. 98-89, 97 Stat. 600 (1983).

62. "When you come tomorrow, bring my football boots. Also, if humanly possible, Irish water spaniel. Urgent. Regards. Tuppy."

"What do you make of that, Jeeves?"

"As I interpret the document, sir, Mr. Glossop wishes you, when you come tomorrow, to bring his football boots. Also, if humanly possible, an Irish water spaniel. He hints that the matter is urgent, and sends his regards."

"Yes, that's how I read it, too . . . ."

P.G. Woodehouse, *The Ordeal of Young Tuppy*, *quoted in* S. BLACKBURN, SPREADING THE WORD: GROUNDINGS IN THE PHILOSOPHY OF LANGUAGE 3 (1984).

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B. *Does Language Constrain?*

The conceptual question of whether literal meaning is possible can therefore be answered affirmatively. Rules may point to results that diverge from those that a decisionmaker would have reached apart from the literal meaning of the rule. When there is such divergence, however, the psychological question remains: Is it possible in such cases for decisionmakers to follow the literal meaning of the rule rather than their own judgment regarding how the case should be resolved?

The psychological challenge to formalism involves the claim that decisionmakers will usually take all factors they believe to be relevant into account, or at least that they will usually feel compelled to reach "reasonable" results whether or not the language of the rule points in that direction.[63] When expressed this way, it is obvious that the psychological question is an empirical one. Accordingly, it cannot be answered by mere argument. Yet despite legal scholarship's sorry failure to take the psychological challenge seriously,[64] the possibility that judges usually obey their own rule-independent judgment is, on its face, quite plausible. We can easily imagine a world in which decisionmakers consider everything that they feel relevant and ignore, or at least slight, any inconsistent external instructions in making their decisions. The question is whether that is the world of the law.

Certainly some legal decisionmakers conform to this model. Although one may dispute as excessive the generalizations of the more extreme Realists, it is difficult to deny the existence of decisionmakers who consult the rules only to create *post hoc* rationalizations. Indeed, to the extent that legal systems resemble the model in which a rule-avoiding norm is always available, such behavior is encouraged. Insofar as the view ever prevailed that there were few decisionmakers who rejected, ignored, or bent the plausibly determinate mandates of governing rule, it is important that that view be shown for the optimistic fantasy it is. Yet to accept that some judges arrive at decisions without considering rules does not imply that all or most decisionmakers act in such a way as either an inevitable feature of human nature or even as a contingent feature of judicial behavior.

Just as it is a mistake to assume that because some judges ignore rules most judges do so, it is also a mistake to assume that because rules sometimes constrain, they usually constrain. The truth, an empirical rather than a logical one, plainly lies between the extremes of always and never, or even between the lesser extremes of rarely and usually. Although this is not the place to examine the rudimentary empirical work that has been

63. *See* Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 985, 1004 (1987).

64. Noteworthy exceptions are J. FRANK, LAW AND THE MODERN MIND (1930), and Kennedy, *supra* note 37. However, legal scholarship still must systematically investigate the important issues that Frank, Kennedy, and others have raised in an impressionistic way.

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done on the question, it is sufficient for my purposes to note that this research has, not surprisingly, yielded the result of "sometimes."[65] In some settings, decisionmakers sometimes apply instructions external to their own decisional process even if those instructions diverge in outcome from the results the decisionmakers otherwise would have reached. This conclusion should cause no surprise as long as we recognize that people often do what *others* think best. If privates in the army often follow orders instead of making autonomous choices, and if privates might behave in this way with respect to general orders in addition to particularized commands, we can imagine judges doing the same with respect to rules.[66]

We have seen that, as a descriptive and conceptual matter, rules can generate determinate outcomes; that those outcomes may diverge from what some decisionmakers think ought to be done; and that some decisionmakers will follow such external mandates rather than their own best particularistic judgment. The normative question of formalism now remains: To what extent *should* a system legitimate the avoidance of literal meaning when avoidance seems to be the optimal outcome to the decisionmaker? To put it simply, now that we have established that formalism—in the sense of following the literal mandate of the canonical formulation of a rule—is conceptually and psychologically possible, we must ask whether it is desirable. Before turning to that question, however, I want

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65. *See* D. BLACK, THE BEHAVIOR OF LAW (1976); L. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE (1975); Hogan & Henley, *Nomotics: The Science of Human Rule Systems*, 5 LAW & SOC'Y REV. 135 (1970); Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 LAW & SOC'Y REV. 325 (1987); Scandura, *New Directions for Theory and Research on Rule Learning*, 28 ACTA PSYCHOLOGICA 301 (1968).

66. There is something unrealistic about all of this, because it erroneously assumes that my paradigm "easy" cases are representative of the kinds of decisions that come before decisionmakers. They are not, at least when we take "decisionmaker" in a somewhat narrow sense to refer to formal decisionmakers such as judges sitting in courts of law. In most legal systems, various screening devices ensure that cases at the center of decisional determinacy will not enter the formal adjudicative process. The time and expense of litigation and the widespread inclination to avoid futile battles are such that decisions at the core of settled meaning seldom confront any formal decisionmaking process. *See* Priest, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes*, 14 J. LEGAL STUD. 215 (1985) (develops selection hypothesis to determine which cases are settled and which are litigated); Priest and Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (presents model to predict whether litigation will be resolved by suit or settlement).

This, however, is but a contingent feature of modern legal systems. It is possible to imagine a legal system closer to a sporting event, where umpires call "safe" or "out" on every play, or where officials with red penalty flags in their back pockets patrol the social landscape, ready to throw the flag and call "tort," or "crime," or "breach of etiquette" whenever there is a transgression of the rules. Obvious logistical problems prevent such a system from being a reality, but it is a useful *Gedankenexperiment* for thinking about the innumerable instances in which rules are followed or clearly broken without coming to the attention of the judicial system.

Many legal systems, unlike those with "roving umpires," operate largely in the area of linguistic indeterminacy, generated either by vagueness of the governing norm or by open texture when previously clear norms confront the unexpected. And in some systems, such as that of the United States, the likelihood of success is sufficient to make it worth litigating cases in which linguistic determinacy produces a politically or morally uncomfortable result. But that is exactly our question, because the weight the system gives to literal meaning will determine the extent to which it is worth litigating against literal meaning.

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to answer an important counterargument to the possibility of the type of formalism defined in this section.

C. *Language and Rules*

Until this point my argument may appear to create a false dichotomy. I have counterpoised the vision of decisionmakers who follow the literal language of a rule with that of decisionmakers who follow the dictates of their own externally unguided opinions. But are these the only alternatives? Although *rules* can and do constrain, is it not possible that these rules need not be equated with the literal meaning of the language in which they happen to be articulated? In other words, is portraying the vice of formalism as the vice of literalism actually confusing rules with the literal meanings of their explicit formulations?

The argument that rules can be distinguished from the language in which they are written has a distinguished lineage in Anglo-American legal thought. We see, for example, Ronald Dworkin urging interpreters to search for or to construct the "real" rule lying behind the mere words on a printed page.[67] Somewhat less explicitly, the "mischief rule" of the common law compels the literal language of a rule to yield to the purpose behind a rule when application of the literal language would frustrate the rule's purpose.[68] Indeed, the mischief rule and related principles urging the primacy of purpose over text are features of the thinking of Fuller, of Hart and Sacks, and also of Llewellyn's "Grand Style" of judging.[69] As a matter of fact, Llewellyn distinguished the Grand Style from the Formal Style because he believed that formalism, as the obeisance to the literal language of a rule, could frustrate the rule's purpose and lead to difficulties where the practical consequences of the decision would indicate a different result.

The language in which a rule is written and the purpose behind that rule can diverge precisely because that purpose is plastic in a way that literal language is not. Purpose cannot be reduced to any one canonical formulation, for when purpose is set down canonically, that canonical formulation of purpose may frustrate the purpose itself. It is because purpose is not reduced to a concrete set of words that it retains its sensitivity to novel cases, to bizarre applications, and to the complex unfolding of the human experience. Thus, for the recourse to purpose to "solve" the problem of formalism, the purpose must not be imprisoned in the rigidity of

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67. LAW'S EMPIRE, *supra* note 31, at 16–17.

68. The standard references for this rule are Heydon's Case, 76 Eng. Rep. 637 (Ex. 1584), and Church of the Holy Trinity v. United States, 143 U.S. 457 (1892); see discussion *supra* note 28. *See also* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 45.05, 45.09 (N. Singer rev. ed. 1984).

69. K. LLEWELLYN, *supra* note 1, *passim*; *see* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 210–11 (1973).

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words. This unrigidified purpose can be explained, clarified, and enriched as new examples and applications come to our attention. The purpose behind the "No vehicles in the park" regulation is not embarrassed by the statue of the truck exactly because purpose can bend to the circumstances of the moment in a way that language, with its acontextual autonomy of meaning, cannot. In contrast, the term "vehicles," at least at the core, literally refers to vehicles;[70] if it turns out that the prohibition of some vehicles does not serve the purpose of the regulation, then the embarrassment is unavoidable.[71]

If adhering to concretized language causes this embarrassment, then why not adhere to the purpose of the rule rather than the words of the rule? To do so would conform with the models advocated by Fuller,[72] Hart and Sacks,[73] Dworkin,[74] and Llewellyn[75] and would match what can be called, with only negligible exaggeration, the current paradigm of American statutory interpretation.[76] Yet locating the idea and the force of a rule in its purpose rather than in its formulation poses the same problem posed by concretized rules, except at one remove. To illustrate the point, suppose the purpose of the "no vehicles in the park" regulation is the preservation of peace and quiet in the park. Suppose, as well, that this purpose derives from an even deeper purpose of maximizing the pleasure of the residents of the town. Now imagine that a town native who has just

70. Note that the "No vehicles in the park" example may be a flawed illustration of the problem Hart, Fuller, and I explore, because locomotive capacity may now be definitional of a "vehicle." Insofar as this is true, the statue is not a vehicle, and no conflict arises between literal meaning and purpose. This is a defect only in the example, however, rather than in the general formulation of the issue. I will therefore stipulate, for the purposes of this argument, that a statue of a vehicle *is* a vehicle, just as a lion in a cage is still a lion. Consider a rule prohibiting "live animals on the bus" and whether it would prohibit carrying on the bus three live goldfish in a sealed plastic bag.

71. My point about the plasticity of purpose should not be confused with claims, often correct, about the indeterminacy of purpose. *See, e.g.*, Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15-18 (1984); Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 537-38 (1983); Kennedy, *supra* note 1; Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 819-820 (1983). Insofar as purpose becomes both concrete and determinate, as when everyone agrees what the purpose is, the argument that "ruleness" resides in purpose becomes more plausible. But when some conception of purpose is determinate, noncanonical purpose itself can operate formalistically. Conversely, if purpose is comparatively indeterminate, then it looks especially odd to say that the rule exists not in the specific rule-formulation, but in the quite different and nonspecific purpose. Thus, those who argue for the indeterminacy of purpose make claims consistent with mine.

72. L. FULLER, *supra* note 55, at 81-91; Fuller, *supra* note 53; Fuller, *The Speluncean Explorers*, 62 HARV. L. REV. 616, 620-26 (1949) ("opinion" of Foster, J.).

73. H. Hart & A. Sacks, *supra* note 54.

74. LAW'S EMPIRE, *supra* note 31.

75. K. LLEWELLYN, *supra* note 1.

76. *See* Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413 (1987); Note, *Intent, Clear Statements, and the Common Law: Statutory Construction in the Supreme Court*, 95 HARV. L. REV. 892 (1982). Recent manifestations of this paradigm include G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672 (1987). *But see, e.g.*, United States v. Locke, 471 U.S. 84 (1985) (failure to file timely claim deprives petitioner of right, irrespective of statutory purpose).

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won six gold medals in the Olympic Games is returning to this park, the scene of her youth, along with a widely popular President of the United States. Suppose as well that the park with the "no vehicles in the park" regulation is the only suitable place for the motorcade, which must be a motorcade because the President is disabled and cannot walk. Under these circumstances, the purpose behind the "no vehicles in the park" rule would be served by excluding the motorcade, but the purpose behind *that* purpose would be frustrated. Thus the same logic that requires the formulation of a rule to be defeasible in the service of its purpose would also require that purpose to be defeasible in the service of the purpose behind *it*.

As the example reveals, the potential tension between the general goal and its concretized instantiation exists at every level. At one level, the tension is between language and purpose; at the next, it is between that purpose and the deep purpose lying behind it; at the next, between the deep purpose and an even deeper purpose; and so on. When we decide that purpose must not be frustrated by its instantiation, we embark upon a potentially infinite regress in which all forms of concretization are defeasible.

The view that rules should be interpreted to allow their purposes to trump their language in fact collapses the distinction between a rule and a reason, and thus loses the very concept of a rule.[77] Rules are by definition general. They gather numerous known and unknown particulars under headings such as "vehicles," "punishment," "dogs," and "every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any [registered] equity security (other than an exempted security)." After identifying a category of items or events to which the rule applies, in the *protasis*, rules then prescribe what shall be done with these particulars in the *apodosis*.[78] Occasionally, however, not all of the particulars comprising the rule's category of coverage are suitable for the prescribed treatment; the generalizations that are a necessary part of any rule treat all members of the class in a manner that may be appropriate only for *most* members of the class. What, then, is to happen when a case arises in which the generalization does not apply to this particular? When a rule's prescribed treatment is unsuitable, if the decisionmaker

77. Note, however, that this claim is not inconsistent with the view that rules should be interpreted to further their purposes when several interpretations of the rule are possible *and all are supported by the language of the rule*. In such cases, it is not only possible but positively desirable to choose the interpretation that will serve the rule's purpose. *See* H.L.A. HART, *Introduction*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 1, 8 (1983).

78. On this terminology for the structure of rules, which distinguishes the part of the rule specifying its operative facts from the part describing the consequences flowing from the existence of those facts, see W. TWINING & D. MIERS, HOW TO DO THINGS WITH RULES 136-40 (2d ed. 1982). *See also* Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 786-87 (1967) (same distinction with different labels); Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381-83 (1985) (same).

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were to ignore the rule, the rule would not be a real rule providing a reason for decision but would be a mere rule of thumb, defeasible when the purposes behind the rule would not be served. If every application that would not serve the reason behind the rule were jettisoned from the coverage of the rule, then the decision procedure would be identical to one applying reasons directly to individual cases, without the mediation of rules. Under such a model, rules are superfluous except as predictive guides, for they lack any normative power of their own. By contrast, if in cases in which the particular application would not serve the reasons behind the rule, the rule nevertheless provides its own reason for deciding the case according to the rule, the rule itself has a normative force that provides a reason for action or decision.

In summary, it is exactly a rule's rigidity, even in the face of applications that would ill serve its purpose, that renders it a rule.[79] This rigidity derives from the language of the rule's formulation, which prevents the contemplation of every fact and principle relevant to a particular application of the rule. To be formalistic in Llewellyn's sense is to be governed by the rigidity of a rule's formulation; yet, this governance by rigidity is central to the constraint of regulative rules. Formalism in this sense is therefore indistinguishable from "rulism," for what makes a regulative rule a rule, and what distinguishes it from a reason, is precisely the unwillingness to pierce the generalization even in cases in which the generalization appears to the decisionmaker to be inapposite. A rule's acontextual rigidity is what makes it a rule.

D. *The Idea of a Closed System*

We now are in a position to reconsider the charge that formalism embodies the erroneous view that law (or any other decisional domain) is a closed system. We have seen that rules can generate answers or exclude otherwise eligible answers from consideration. We also have seen that there are rules, such as one prohibiting the shooting of pelicans, whose application throughout much of their range requires recourse only to the rule and to uncontroversial judgments of meaning and identification of discrete particulars. There can therefore be systems whose operations require recourse only to the norms of the system and to accepted linguistic and observational skills.

Such a system would be closed, but it would not necessarily be complete. Closedness and completeness are different properties. Closedness refers to the capacity of a system to decide cases within the confines of that

79. This is not to say that rules are always or even ever good things to have. My aim now is to distinguish a form of decisionmaking in which generalizations have independent normative power from a form of decisionmaking in which the full richness of the particular event always is open to consideration. The questions of whether rules should be employed, in which domains, and to what extent, are addressed below. *See infra* Section III.

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system, while completeness refers to the extent to which a system deals with those cases at all. A mathematical system is closed insofar as the rules of mathematics provide an answer to the question "What is the sum of 97 and 53?" But that same system is incomplete insofar as it provides no answer to the question "What should the United States do about the problem of poverty?" The dimension of completeness, although perhaps unimportant for mathematics, is important for law precisely because most modern legal systems claim the ability to deal with a wide range of issues. Insofar as the human experience is especially complex and fluid, the legal system is likely to be frustrated by its incompleteness, its frequent inability to answer the questions it wants to answer. Commonly, we plan for these frustrations by rendering the norms of the law less determinate and thereby using vagueness as the tool by which we plan for the open texture of experience.[80] As a result, legal systems, to avoid the consequences of widespread incompleteness, often employ norms sufficiently indeterminate to accommodate much that is important in the world at large, and in doing so sacrifice the occasional virtues of closedness. Such systems are more open even at the expense of being less predictable and less constraining of their decisionmakers.

Thus, legal systems often reject closedness because they must deal with a large array of problems presented by a complex and fluid world. But this is to say that comparatively closed systems may sometimes be undesirable, not that they are not possible. The importance of drawing this distinction is to stress that the degree of closedness may vary, and that closedness is a tool that might be usable in some domains even if, in untempered form, it is not the *only* tool we would want to use for an entire system of social control.

When applied to individual norms rather than to entire systems, closedness is merely another word for ruleness. By limiting access to the reasons behind the rule, rules truncate the array of considerations available to a decisionmaker.[81] Rules get in the way. They exclude from consideration factors that a decisionmaker unconstrained by those rules would take into

80. *See* Schauer, *Authority and Indeterminacy*, in AUTHORITY REVISITED: NOMOS XXIX 28 (1987).

81. The closed system/open system dispute merely recasts the debate about legal positivism in different terminology. Any version of legal positivism is premised on what Ronald Dworkin, no positivist, has felicitously referred to as "pedigree." TAKING RIGHTS SERIOUSLY, *supra* note 31, at 17. Positivism posits that *legal* norms are identified by reference to some other norm, rule, or standard that distinguishes legal from non-legal norms. Hart's "rule of recognition" serves this purpose, H.L.A. HART, *supra* note 1, as does the "next higher norm" for Kelsen. H. KELSEN, THE PURE THEORY OF LAW 193-278 (M. Knight trans. 1967). The positivist conceives of the set of norms so pedigreed as constituting some sort of a closed system, although that system will not necessarily decide all or even most cases that come before the courts. Kelsen, for example, sees every law-applying act as only partially determined by law. *Id.* at 233-36, 244-45. By contrast, the opponents of positivism, most notably Dworkin, attack the pedigreeability thesis by arguing that in no case is the distinction between pedigreed and nonpedigreed norms dispositive and consequently the characterization of law in terms of pedigreed norms is descriptively inaccurate.

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account. Understanding the way in which rules truncate the range of reasons available to a decisionmaker helps us to appreciate the distinction between formalism and functionalism, or instrumentalism.[82] Functionalism focuses on outcomes and particularly on the outcome the decisionmaker deems optimal. Rules get in the way of this process, and thus functionalism can be perceived as a view of decisionmaking that seeks to minimize the space between what a particular decisionmaker concludes, all things considered, should be done and what some rule says should be done. Rules *block* consideration of the full array of reasons that bear upon a particular decision in two different ways. First, they exclude from consideration reasons that might have been available had the decisionmaker not been constrained by a rule. Second, the rule itself becomes a reason for action, or a reason for decision.

The notion of a rule as a reason for decision requires further exploration. What makes formalism formal is this very feature: the fact that taking rules seriously involves taking their mandates as reasons for decision independent of the reasons for decision lying *behind* the rule.[83] If it were otherwise, the set of reasons considered by a decisionmaker would be congruent with the set of reasons behind the rule, and the rule would add nothing to the calculus. Rules therefore supply reasons for action *qua* rules. When the reason supplied by a rule tracks the reasons behind the rule, then the rule is in a different way superfluous in the particular case. Rules become interesting when they point toward a different result than do the reasons behind the rule—when they indicate, for example, that statues of vehicles ought to be excluded even though the reasons behind the rule indicate that the statues ought not to be excluded. To take these occasionally perverse reasons as always relevant and therefore sometimes dispositive is condemned as "formalistic" because it abstracts the mandates of a rule from the reasons behind it. Yet that is what rules do. Refusal to abstract the rule from its reasons is not to have rules. This refusal reduces rules to rules of thumb, useful but intrinsically unweighty indicators of the results likely to be reached by direct application of reasons.

Thus, the essential equivalency of formalism and "ruleness" is before us. Viewing formalism as merely rule-governed decisionmaking does not make it desirable. Yet recognizing the way in which formalism is merely a way of describing the process of taking rules seriously allows us to escape

82. *See, e.g.*, R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 136-75 (1982); Aleinikoff, *supra* note 63, at 985; Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433 (1978).

83. Insofar as a system permits recourse to the purpose behind a rule's formulation but does not permit departure from *that* purpose when adhering to it will produce unfortunate results or will frustrate the even deeper purpose behind it, that system will still be formal in the sense I am now using that term. It will also be rule-bound, because the less than totally plastic purpose (although more plastic than the rule-formulation) will operate as a rule vis-a-vis the higher order reasons that generated that particular purpose.

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the epithetical mode and to confront the critical question of formalism: What, if anything, is good about the unwillingness to go beneath the rule and apply its purpose, or the purposes behind that purpose, directly to the case before the decisionmaker?

III. Should Choice Be Restricted?

Let me recapitulate. One conception takes the vice of formalism to consist of a decisionmaker's denial, couched in the language of obedience to clear rules, of having made any choice at all. Yet rules, if followed, may not leave a decisionmaker free choice. Rules *can* limit decisional choice, and decisionmakers *can* abide by those limitations. Those limitations come in most cases from the literal language of a rule's formulation, for to take a rule as anything other than the rule's formulation, or at least the meaning of the rule's formulation,[84] is ultimately to deny the idea of a rule.

Thus, formalism merges into ruleness, and both are inextricably intertwined with literalism,[85] i.e., the willingness to make decisions according to the literal meaning of words or phrases or sentences or paragraphs on a printed page, even if the consequences of that decision seem either to frustrate the purpose behind those words or to diverge significantly from what the decisionmaker thinks—the rule aside—should be done. But does dem-

84. In a trivial sense, rules differ from their formulations. *See, e.g.*, G. Baker & P. Hacker, *supra* note 57, at 41–52; M. Black, *The Analysis of Rules*, in Models and Metaphors: Studies in Language and Philosophy 95 (1962); D. Shwayder, The Stratification of Behaviour 241 (1965); G. vonWright, Practical Reason 68 (1983). "Do not walk on the grass," "Walking on the grass is prohibited," and "No walking on the grass" constitute one and not three rules. Referring to these three formulations as formulations of only one rule, however, presupposes that all have the same meaning, that the differences are syntactical and not semantic. Thus, the distinction between a rule and its formulation is like the distinction between a proposition and a sentence. When I discuss a rule and equate it with its formulation, I therefore mean that a rule is that set of semantically equivalent rule formulations.

85. My references to "literalism" are slightly metaphorical. As noted above, *see supra* note 59, literalism includes those aspects of context, such as the appearance of words in a statute rather than in a poem, that are accessible to all or most readers. Moreover, although I often use single words as examples, statutes are not read word by word, but instead by sentences, paragraphs, and larger units of text. This is not to deny, however, that the ability to assign meanings to individual words is what enables us to understand a sentence we have never seen before. *See* D. Davidson, *Truth and Meaning*, in Inquiries into Truth and Interpretation 17 (1984). This assertion, however, superficially in conflict with Frege's assertion that only in the context of a sentence does a word have any meaning, *see* G. Frege, The Foundations of Arithmetic (J.L. Austin trans. 1959), is not without its detractors and complexities. *See, e.g.*, Wallace, *Only in the Context of a Sentence Do Words Have Any Meaning*, in Contemporary Perspectives in the Philosophy of Language 305 (P. French, T. Uehling, Jr., & H. Wettstein eds. 1979).

Still, *pace* Fuller, *supra* note 53, at 662–63, sentences and paragraphs can have literal and even acontextual meaning insofar as an entire sentence or paragraph may supply enough context to make its meaning comparatively clear. As texts become lengthier and richer it is often *more* possible to understand those texts without departing from them and thus *more* possible for them to have acontextual meaning.

Moreover, literal meaning need not always be ordinary meaning. Where some aspect of the minimal and uncontested context makes it plain that a settled specialized or technical meaning of a term or phrase applies, that technical meaning, rather than the ordinary usage of the man on the Clapham omnibus, is controlling.

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onstrating that formalism is ruleness rescue formalism? Restated, what is so good about decision according to rules?

The simple answer to this question, and perhaps also the correct one, is "nothing." Little about decision constrained by the rigidity of rules seems intrinsically valuable. Once we understand that rules get in the way, that they gain their ruleness by cutting off access to factors that might lead to the best resolution in a particular case, we see that rules function as impediments to optimally sensitive decisionmaking. Rules doom decisionmaking to mediocrity by mandating the inaccessibility of excellence.

Nor is there anything essentially *just* about a system of rules. We have scarce reason to believe that rule-based adjudication is more likely to be just than are systems in which rules do not block a decisionmaker, especially a just decisionmaker, from considering every reason that would assist her in reaching the best decision. Insofar as factors screened from consideration by a rule might in a particular case turn out to be those necessary to reach a just result, rules stand in the way of justice in those cases and thus impede optimal justice in the long term. We equate Solomon's wisdom with justice not because Solomon followed the rules in solving the dispute over the baby but because Solomon came up with exactly the right solution for that case. We frequently laud not history's rule followers, but those whose abilities at particularized decisionmaking transcend the inherent limitations of rules.

Still, that rules may be in one sense unjust, or even that they may be inappropriate in much of what we call a legal system, does not mean there is nothing to be said for rules. One of the things that can be said for rules is the value variously expressed as predictability or certainty. But if we pursue the predictability theme, we see that what most arguments for ruleness share is a focus on disabling certain classes of decisionmakers from making certain kinds of decisions.[86] Predictability follows from the decision to treat all instances falling within some accessible category in the same way. It is a function of the way in which rules decide ahead of time how *all* cases within a class will be determined.

Predictability is fostered to the extent that four different requirements are satisfied. The first of the factors contributing to predictability is the capacity on the part of those relying on a rule to identify certain particulars as instances of a given category (for example, that pelicans are birds). When there is a more or less uniform and uncontroversial ability to say

86. *See generally* A. KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW 165-85 (1930); R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 60-66 (1961); Marsh, *Principle and Discretion in the Judicial Process*, 68 LAW Q. REV. 226 (1952). Along with Wasserstrom, *supra*, at 61, I object to the use of the word "certainty" in this context because, unlike the term "predictability," it suggests that no doubt is involved. I can predict that it will snow in Vermont this winter and rely on that prediction in making winter plans, yet still not be *certain* that it will snow. Although one usage of "certain" does recognize variability, I prefer the term "predictability" because its common usage implies such variability.

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that some item is a member of some category, little in the way of potentially variable judgment clouds the prediction of whether the rule will apply to this particular item. This relates to the second factor: that the decisionmakers in the system will perceive those particulars as being members of the same category perceived by the addressees and will be seen as so perceiving by those affected. That is, people perceive pelicans as birds; decisionmakers perceive pelicans as birds; and people know that decisionmakers will perceive pelicans as birds. Third, the rule must speak in terms of an accessible category. Predictability requires that a rule cover a category whose denotation is substantially noncontroversial among the class of addressees of the rule and common to the addressees of the rule and those who apply it. Finally, the rule must treat all members of a category in the same way. Only if the consequences specified in the apodosis of the rule are as accessible and noncontroversial as the coverage specified in the protasis can a rule produce significant predictability of application. Thus, predictability comes from the knowledge that if this is a bird a certain result will follow, and from the confidence that what I now perceive to be a bird will be considered a bird by the ultimate decisionmaker.

This predictability comes only at a price.[87] Situations may arise in which putting this particular into that category seems just too crude—something about this particular makes us desire to treat it specially. *This* vehicle is merely a statue, emits no fumes, makes no noise, and endangers no lives; it ought to be treated differently from those vehicles whose characteristics mesh with the purpose behind the rule. Serving the goal of predictability, however, requires that we ignore this difference, because to acknowledge this difference is also to create the power—the *jurisdiction*—to determine whether this vehicle or that vehicle actually serves the purpose of the "no vehicles in the park" rule. It is the jurisdiction to determine that only some vehicles fit the purpose of the rule that undermines the confidence that *all* vehicles will be prohibited. No longer is it the case that anything that is a ***vehicle***, a moderately accessible category, is excluded. Instead, the category is now that of ***vehicles whose prohibition will serve the purposes of the "no vehicles in the park" rule***, a potentially far more controversial category.

Thus, the key to understanding the relationship of ruleness to predictability is the idea of decisional jurisdiction.[88] The issue is not whether the statue serves the purpose of the "no vehicles in the park" rule. It is whether giving some decisionmaker jurisdiction to determine what the

87. *See, e.g.*, H.L.A. HART, *supra* note 1, at 121-32.

88. On jurisdiction in this sense, see Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 367-68 (1985). *See also* Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 759-65, 771 (1963) (noting that courts define their competencies in the process of making substantive decisions); Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 10 (1955).

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rule's purpose is (as well as jurisdiction to determine whether some item fits that purpose) injects a possibility of variance substantially greater than that involved in giving a decisionmaker jurisdiction solely to determine whether some particular is or is not a vehicle. Note also that the jurisdictional question has a double aspect. When we grant jurisdiction we are first concerned with the range of equally correct decisions that might be made in the exercise of that jurisdiction. If there is no authoritative statement of the purpose behind the "no vehicles in the park" rule, granting jurisdiction to determine that purpose would allow a decisionmaker to decide whether the purpose is to preserve quiet, to prevent air pollution, or to prevent accidents, and each of these determinations would be equally correct. In addition to increasing the range of correct decisions, however, certain grants of jurisdiction increase the likelihood of erroneous determinations. Compare "No vehicles in the park" with "The park is closed to vehicles whose greatest horizontal perimeter dimension, when added to their greatest vertical perimeter dimension, exceeds the lesser of (a) sixty-eight feet, six inches and (b) the greatest horizontal perimeter dimension, added to the greatest vertical perimeter dimension, of the average of the largest passenger automobile manufactured in the United States by the three largest automobile manufacturers in the preceding year." The second adds no inherent variability, but it certainly compounds the possibility of decisionmaker error. Creating the jurisdiction to determine whether the purposes of a rule are served undermines predictability by allowing the determination of any of several possible purposes; in addition, the creation of that jurisdiction engenders the possibility that those who exercise it might just get it wrong.

Grants of decisional jurisdiction not only increase permissible variance and the possibility of "computational" error, they also involve decisionmakers in determinations that a system may prefer to have made by someone else. We may believe that courts are less competent to make certain decisions than other bodies; for example, we may feel that certain kinds of fact-finding are better done by legislatures. There may also be moral or political reasons to restrict the judge's discretion, for decisionmaking implicates profound questions of just who in a given domain may legitimately make certain decisions. It is, for example, a plausible position that the public rather than the University of Michigan philosophy department should make the moral determinations involved in governing the United States, even if the University of Michigan philosophy department would make better choices.

Although decreasing the possibility of variance and error by the decisionmaker contributes to the ability of addressees of rules to predict the consequences of application of those rules, limited variance can serve other values as well. If decisionmakers are denied jurisdiction to determine whether a particular instance actually justifies its inclusion in a larger

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generalization or are denied jurisdiction to determine the best result on the basis of all germane factors, the part of the system inhabited by those decisionmakers becomes more stable. Treating a large group of different particulars in the same way—the inevitable byproduct of the generalization of rules—dampens the range of variance in result by suppressing consideration of a wide range of potentially relevant differences. Thus, stability, not as a necessary condition for predictability but as a value in its own right, is fostered by truncating the decisionmaking authority.

Because rule-bound decisionmaking is inherently stabilizing, it is inherently conservative, in the nonpolitical sense of the word.[89] By limiting the ability of decisionmakers to consider every factor relevant to an event, rules make it more difficult to adapt to a changing future. Rules force the future into the categories of the past. Note the important asymmetry here, the way in which rules operate not to enable but only to disable. A decisionmaker can never exceed the optimal result based on all relevant factors. Thus, a rule-bound decisionmaker, precluded from taking into account certain features of the present case, can never do better but can do worse than a decisionmaker seeking the optimal result for a case through a rule-free decision.

Yet this conservatism, suboptimization, and inflexibility in the face of a changing future need not be universally condemned. Rules stabilize by inflating the importance of the classifications of yesterday. We achieve stability, valuable in its place, by relinquishing some part of our ability to improve on yesterday. Again the issue is jurisdiction, for those who have jurisdiction to improve on yesterday also have jurisdiction to make things worse.[90] To stabilize, to operate in an inherently conservative mode, is to give up some of the possibility of improvement in exchange for guarding against some of the possibility of disaster. Whether, when, and where the game is worth the candle, however, cannot be determined acontextually.[91]

89. *See* Horwitz, *The Rule of Law: An Unqualified Human Good?* (Book Review), 86 YALE L.J. 561 (1977). I use the term "conservatism" to refer to the desire to hold onto the past or present in the face of pressures to change. This usage bears only a contingent connection to the range of political views now labeled "conservative." Left-wing conservatism is not oxymoronic, because one can imagine left-wing systems adopting preservational (conservative) strategies or systems to prevent movement away to the right.

90. This is not a logical truth. Grants of jurisdiction can incorporate substantive requirements. Dworkin, *Non-Neutral Principles*, in READING RAWLS: CRITICAL STUDIES OF A THEORY OF JUSTICE 124 (N. Daniels ed. 1975). Insofar as some grants of jurisdiction aim to increase the ability of decisionmakers to adapt to an unknown future, however, they will be comparatively open-ended. It is this open-endedness, whether couched in substantive (do good) or less substantive (determine the purpose) terms, that creates the possibility of unintended and uncontrollable variance.

91. I therefore disagree with Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976), insofar as he argues that ruleness is acontextually individualistic and particularization is acontextually altruistic. Even if there is truth in Kennedy's acontextuality, it still is not clear that his analysis of the acontextual tendencies promoted by ruleness is correct. It is quite plausible that the inherently stabilizing tendencies of rule-bound adjudication will dampen individual differences, stifle claims to special treatment as an individual, and encourage decisional modesty rather than decisional arrogance. It could be argued quite sensibly that all these tendencies foster rather than impede altruism.

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In sum, it is clearly true that rules get in the way, but this need not always be considered a bad thing. It may be a liability to get in the way of wise decisionmakers who sensitively consider all of the relevant factors as they accurately pursue the good. However, it may be an asset to restrict misguided, incompetent, wicked, power-hungry, or simply mistaken decisionmakers whose own sense of the good might diverge from that of the system they serve. The problem, of course, is the difficulty in determining which characterization will fit decisionmakers; we must therefore decide the extent to which we are willing to disable good decisionmakers in order simultaneously to disable bad ones.

With these considerations in mind, let us approach formalism in a new light. Consider some of the famous marchers in formalism's parade of horribles, examples such as *R. v. Ojibway*, Fuller's statue of the truck in the park, and the poor Bolognese surgeon who, having opened the vein of a patient in the course of performing an emergency operation outdoors, was prosecuted for violating the law prohibiting "drawing blood in the streets."[92] Each of these examples reminds us that cases may arise in which application of the literal meaning of words produces an absurd result. But now we can recast the question, for we must consider not only whether the result was absurd in these cases but also whether a particular decisionmaker should be empowered to determine absurdity. Even in cases as extreme as these, formalism is only superficially about rigidity and absurdity. More fundamentally, it is about power and its allocation.

Formalism is about power, but is also about its converse—modesty. To be formalistic as a decisionmaker is to say that something is not my concern, no matter how compelling it may seem. When this attitude is applied to the budget crisis or to eviction of the starving, it seems objectionable. But when the same attitude of formalism requires judges to ignore the moral squalor of the Nazis or the Ku Klux Klan in First Amendment cases, or the guilt of the defendant in Fourth Amendment cases, or the wealth of the plaintiff who seeks to recover for medical expenses occasioned by the defendant's negligence, it is no longer clear that refusal to take all factors into account is condemnable.

Modesty, of course, has its darker side. To be modest is at times good, but avoiding authority is also avoiding responsibility. In some circumstances we want our decisionmakers to take charge and accept the consequences of their actions.[93] But it is by no means clear that just because it is good for some people to take charge some of the time, that taking charge, even accompanied by acceptance of responsibility, is a universal

92. The last example, from 1 S. PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO (1672), comes to us through United States v. Kirby, 74 U.S. (7 Wall.) 482, 487 (1868).

93. For a recent articulation of this view, see Michelman, *Foreword: Traces of Self-Government*, 100 HARV L. REV. 4 (1986). A useful contrast is Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747.

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good. "I'm in charge here" has a long but not always distinguished history. Part of what formalism is about is its inculcation of the view that sometimes it is appropriate for decisionmakers to recognize their lack of jurisdiction and to defer even when they are convinced that their own judgment is best. The opposite of modesty is arrogance, not just responsibility. True, modesty itself carries responsibility, because an actor behaving modestly is participating and thus assisting in the legitimacy of the grant of authority to someone else. But this is a responsibility of a different and limited kind. That one accepts partial responsibility for the decisions of others does not entail the obligation to substitute one's judgment for that of others.

The distinctive feature of rules, therefore, lies in their ability to be formal, to exclude from consideration in the particular case factors whose exclusion was determined without reference to the particular case at hand. This formalism of rules is not only conceptually sound and psychologically possible, but it also, as I have tried to show, is on occasion normatively desirable. Insofar as formalism disables some decisionmakers from considering some factors that may appear important to them, it allocates power to some decisionmakers and away from others. Formalism therefore achieves its value when it is thought desirable to narrow the decisional opportunities and the decisional range of a certain class of decisionmakers.

I stress that all of this is compatible with agnosticism about how rule-bound decisionmaking applies to legal systems in general, to particular legal systems, or to particular parts of legal systems. It is far from a necessary truth that legal systems must be exclusively or even largely operated as rule-governed institutions. Judgments about when to employ formalism are contextual and not inexorable, political and not logical, psychological and economic rather than conceptual. It would blunt my point about the simultaneously plausible and contingent nature of decision according to rule to offer in this acontextual setting my recommendations about what if any parts of the American or any other legal system should operate in such a fashion. My goal is only to rescue formalism from conceptual banishment. But having been readmitted to the community of respectable ideas, formalism, or decisionmaking according to rule in any strong sense, still has the burden of showing that it is appropriately used in a particular decisional domain.

IV. The Degrees of Restriction

I have thus far presented formalism and maximally contextual particularism as mutually exclusive opposites, incapable of coexisting within the same decisional domain. It may therefore appear that the advantages of formalism can be attained only within a system willing to accept some proportion of preposterous results and only within a system willing to

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have its decisionmakers ignore the novelty of the situations that come before them. Accommodation between these two forms of decisionmaking might be possible, however.

Let us contrast two cases, both arising out of the "No vehicles in the park" rule. The first involves the statue of the truck erected by the veterans' organization. The second involves an electric golf cart, as quiet as a bicycle, incapable of proceeding at greater than ten miles an hour, and emitting no noxious fumes. Can these cases be distinguished? In both cases, exclusion of the object under consideration would not seem to serve any of the purposes behind the rule, regardless of whether the purpose was the suppression of noise, the reduction of noxious odors, the limitation of high speeds, or the restriction of forms of conveyance likely to be dangerous to pedestrians. Yet despite their similarity, there appears to be a difference between the cases. The statue seems to lie *more* outside the purpose behind the rule than the golf cart. If we assume that something like twenty miles per hour is dangerous, a totally immobile vehicle is further away from the danger point than one that can go ten miles per hour. Similarly, a vehicle with a totally inoperative engine makes less noise and emits no more noxious fumes than even an electric motor.

If the difference between the cases is a matter of degree, is there some way of empowering a decisionmaker to draw the distinction without at the same time discarding all of the formalist-inspired virtues from the decisionmaking process? That is, can we empower the decisionmaker to override the rule when its application would be totally preposterous, but not when its application, still outside the purpose of the rule, would fall short of the preposterous?

The question is the same one that arises in discussions regarding higher court scrutiny of lower court decisions, and lower court scrutiny of administrative decisions and state laws. Can a decisionmaker distinguish those state interests that are "compelling" from those that are "important" from those that are merely "rational"? Can a decisionmaker distinguish "proof beyond a reasonable doubt" from "clear and convincing evidence" from "a preponderance of the evidence"? Can decisionmakers distinguish "de novo" review from review only for "abuse of discretion"? The question raised by all of these standards and others is the same: Can we admit the possibility of overriding some judgment while at the same time not opening the door to unconstrained substitution of judgment?

It is debatable whether some form of deferential but genuine review is possible. It might be argued that deferential but not toothless review is an illusion. Once the reviewing decisionmaker has the authority to look at the decision below with at least the possibility of overturning it, deference becomes largely illusory. This hypothesis equates the review process with Pandora's box: Once the record below is opened, the review is in reality de novo, and the language of abuse of discretion—or compelling interest

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or whatever—is used merely as a tag line when the decisionmaker wishes to reach a conclusion different from that reached below.

An alternative hypothesis posits some ground between no review and unfettered intrusiveness. There might be cases in which the presumption in favor of the result below would cause the decision to stand. Under this hypothesis, we can have rebuttable presumptions—cases in which the presumption might be overcome in particularly exigent circumstances but nevertheless controls in many or even most cases.

If this latter hypothesis is correct, it is correct as a contingent empirical matter and not as a necessary truth. My instincts are that it is *sometimes* correct—that at some times in some domains presumptions can matter without being irrebuttable. This conclusion is based on my also instinctive view that presumptions create attitudes, and that attitudes can matter. I believe, for example, that I am more likely to admire an item of clothing if I discover it myself than if my mother tells me she saw it in a shop and it would look very nice on me. But I might be wrong. Even if I am right about clothing and mothers, those attitudes might not carry over to real decisions by real decisionmakers, and even if it does, it might be empirically false more often than it is empirically true.

Moreover, even if attitudes can be changed, it may be that linguistic instructions are not particularly effective in accomplishing those changes. The observation that linguistic instructions to adopt a certain attitude are in fact potent is not universally proved by the observation that such instructions are sometimes potent, any more than the observation that such instructions are sometimes impotent proves that they are never potent. Given all of this, let me satisfy myself here with the unproved empirical conclusion that linguistic instructions are sometimes potent.

If such instructions sometimes create presumptions, and if those presumptions sometimes work, then what does this say about the possibility of what we might call a *presumptive formalism*? In order to construct such a model, we would want to equate the literal mandate of the most locally applicable written rule with the judgment of the court below. The court below can be taken to have determined, for example, that in one case operable and operating automobiles are excluded from the park, in another case golf carts are excluded from the park, and in a third case immobile statues of trucks are excluded from the park. We can then equate the reviewing court with a determination of the correct result from the perspective of the reasons behind the rule rather than the literal language of the rule itself. We might conclude that in the first case even a de novo application of the reasons would generate the same result as generated by the formalistic reading, and therefore the formal mandate would prevail uncontroversially. In the second, a de novo application of reasons would generate a different result than that generated by the rule, but the result generated by the rule remains "in the ballpark" and therefore is

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upheld despite its divergence from the result that would be reached by direct application of the reasons. In the third, however, a de novo application of the reasons indicates that the result generated by the rule is so far out of bounds, so absurd, so preposterous that it is analogous to an abuse of discretion and would therefore be reversed—the rule would not be applied in this case.

Under such a theory of presumptive formalism there would be a presumption in favor of the result generated by the literal and largely acontextual interpretation of the most locally applicable rule. Yet that result would be presumptive only, subject to defeasibility when less locally applicable norms, including the purpose behind the particular norm, and including norms both within and without the decisional domain at issue, offered especially exigent reasons for avoiding the result generated by the presumptively applicable norm.

Such a system would bring the advantages of predictability, stability, and constraint of decisionmakers commonly associated with decision according to rule, but would temper the occasional unpleasant consequences of such a system with an escape route that allowed some results to be avoided when their consequences would be especially outrageous. Such a system would not be without cost. First of all, the escape route would necessarily decrease the amount of predictability, stability, and decisionmaker restraint. In short, it would diminish the amount of ruleness by placing more final authority in the decisionmaker than in the rule. Second, the presumptive force attached to the formalist reading of the applicable norms would still result in some odd or suboptimal results. In this sense, such a system would fail to honor all of the goals either of unrestrained particularism or unrestrained formalism. Finally, such a system would risk collapse into one in which the presumptions were for all practical purposes either absolute or nonexistent.

Even on the assumption that such a system might be desirable in some decisional domains, this does not mean that all or part of what we commonly call the legal system might be one of those domains. It might be that formalism, even only presumptively, is a good idea, but that the goals of the legal system, in light of the decisions we ask it to make, are such that it ought not to be designed along such a model. More likely, formalism ought to be seen as a tool to be used in some parts of the legal system and not in others. Determining which parts, if any, would be susceptible to such treatment is not my agenda here, for what I have attempted to offer is only an argument that formal systems are not necessarily to be condemned. That is not to say they are universally or even largely to be applauded, nor that they are to be pervasive or even frequent within that segment of society we call the legal system. To answer this last question we must ask what the legal system, in whole or in part, is supposed to do,

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for only when we answer that question can we determine what kinds of tools it needs to accomplish that task.

V. CONCLUSION

I have concluded this analysis by venturing no more than a prolegomenon to a theory of presumptive formalism, which, to avoid the pejorative (or at least to select a slightly less pejorative pejorative) might be called a theory of ***presumptive positivism***. As I have said, to urge the potential advantages of such a view in some domains is to say little if anything about whether the domain of decisions of judges or the domain of decisions of the political state backed by force is amenable to presumptively positivistic decisionmaking. But even if we put aside the question of concrete applications, the presumptiveness that is central to this model may illuminate one final usage of the word "formalistic" in its pejorative guise. It may be that, in practice, to condemn an outlook as formalistic is to condemn neither the rule-based orientation of a decisional structure nor even the inevitable over- and under-inclusiveness of any rule-based system. It may be to condemn such a system only when it is taken to be absolute rather than presumptive, when it contains no escape routes no matter how extreme the circumstances. Such a usage of "formalism" is of course much narrower than is commonly seen these days. But with that narrower usage we see that formalism is no longer something to be roundly condemned, but rather, like the relation of fanaticism to enthusiasm, or bullheadedness to integrity, merely the extreme and therefore unfortunate manifestation of a fundamentally desirable characteristic. If we recognize that, we may ultimately cease to use the epithetical deployment of "formalistic" as a substitute for argument and turn instead to the central questions involved in determining what, if anything, lies at the heart of the idea of law.

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