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Beyond the Formalist-Realist Divide on Judging

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The formalist-realist divide is fundamentally wrong. The story about the legal formalists is largely an invention. Legal realism is substantially misapprehended. Quantitative studies of judging are marked by a distorting slant owing to incorrect beliefs about the formalists and realists. Debates about judging are routinely framed in terms of antithetical formalist-realist poles that jurists do not actually hold. We must free ourselves from the formalist-realist stranglehold if we are to recover a sound understanding of judging.

A book I recently completed—coming out this fall—aims to do this. This article will provide an overview of the argument, along with some of the supportive evidence.

The first part of the argument will dispel the story about the formalist age. This is crucial, and will consume a disproportionate amount of my time, because much of the distortion that follows can be traced back to this misleading story. I will demonstrate that jurists held very realistic views of judging during the so-called formalist age. I will explain how the story was constructed, and why it took hold. It turns out that the full blown account of formalism taken for granted today was actually invented in the 1960s and 1970s owing to contemporary concerns.

After dispelling the story about the formalist age, I will quickly address its implications for conventional views about the realists. Today the realists are viewed as skeptics of judging. But that is a mistake. They are viewed in this erroneous way because they have been hooked, unwillingly, on the opposite pole of the fictional formalists. The main point of the discussion is to lay out what I call balanced realism, which captures what the legal realists thought about judging.

The next part of the argument will jump to the present, to take up the debate between contemporary formalists and realists. I will show that leading legal formalists hold very realistic views of law, and that legal realists share the basic elements of a formalistic view of law. There are real differences between these camps, but the differences are not captured by the terms formalism and realism. So framing the debate in these terms is counter-productive.

I will close the lecture by drawing together the threads of the argument to suggest a way out of the formalist-realist divide.