

## The Substance of Law

As pessimists on the future of the West have always known, the West is threatened not from external challenges but from internal doubts, self-critique, and even self-condemnation. For the Western theorists who voice this critique, justice would be served if Western culture ceases or "goes under" (Spengler). Of course, the West's death warrant is not accepted by all: the West has its optimists—the conservatives. Conservatives are also the West's doctors, for they try to heal the West's internal self-undermining criticism—in widely varying diagnoses and recommended courses of treatment, from reactionary attempts to turn the clock back to additional pressure toward repentance and progress. Despite the misdeeds Western societies have perpetrated, the foundations of the West are sound and remain the last best hope for the human race.

My aspiration is to become one of these doctors in order to heal the West's failure of nerve. As I see it, my task is to defend the substantive meaning of law (namely, that laws must validate themselves by claims to effect principles of justice), against the various attempts made by positivist legal theorists to purify law of its moral content and to deny it the right and the duty to give an account of itself. The power of value-free legal theory is damaging the West because it has contributed to the West's moral uncertainty about its basic institutions.

Positivism may be defined as the theory that reason cannot discover what is right and good, or cannot adjudicate between conflicting value judgments. The most immediate threat, however, to substantive law in the West isn't positivism, but the belief that justice demands cultural-ethical pluralism, and that accordingly the legal system is obliged to recognize the equality of every individual's and every group's values. Somehow gov-

ernment under pluralistic law could act without preferring the values of one cultural group over another, or one individual's values over another's.

Of course it is true that substantive law in the modern West and especially in America has long recognized the rights of individuals and voluntary associations to very extensive freedoms; but those freedoms and the governmental structures serving them are mandated by a single value system, which developed in the course of Western religious and political history. Each individual may have his own reasons for obeying the laws, but the laws and institutions protecting the pluralism that exists in Western societies are not a pluralism but a monism: some values are included and some are excluded in the legislation of the American legal system. For example, in America one has the freedom to argue for the establishment of a particular church, but any religio-political doctrine that a certain church should be established has been excluded from the American legal system, which establishes no church.

### Pluralism and Bad Thinking

I sense that what pluralism means is that the legal system is to be maintained as mere forms (rules, procedures, routines), and the government will deliberate with no more than implicit reference to the principles from reason and revelation that ground the system and provide it with its moral substance. Pluralism becomes more deeply entrenched as all laws considered to institutionalize public morals and the vestiges of the Christianity that were once part of English common law

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are systematically abrogated. Obviously pluralism is meant to be the chief principle of justice, so it is not intended to be value-neutral but a substantive moral principle. The substantiveness of pluralism is not objectionable from the perspective of the Western legal tradition: that tradition is a heritage of progress; improvements are constantly sought. The objection is that pluralism is a misleading name for a substantive principle: it is a value judgment—something therefore selective, judgment-pronouncing, exclusivistic—that tries to present itself as an acceptance of all values, and may therefore be exempted from giving reasons for its judgments. Justice is a (monistic, not pluralistic) value perspective, and from the perspective of justice it is fair to reject some values (e.g., other concepts of justice) while accepting others.

The substance or moral content of equality and freedom—the two fundamentals of Western law—is obscured by the term pluralism, which wishes to be both just and value-neutral at once. Pluralism, then, is part of what Martin Heidegger calls the approach of the “world night”: legal history is somehow ceasing to explain itself in an ethical worldview; standards once thought to be indicated to reason by God or nature are failing and being dropped, and whatever the new standards are that demand this change are not brought into view.

My investigation into modern legal theory began with the assumption that natural law could solve jurisprudential problems by indicating the content of justice, and hence what laws should be made and how existing laws should be interpreted—provided that judges, politicians, and opinion leaders both know the natural law and how to make it politically effective. But I have come to believe that natural law provides no straightforward way out of the task conservative Western jurisprudence faces—preserving substantive law without offending against cultural pluralism.

First, even though natural-law jurisprudence maintains that one does not need to be a member of any religious community in order to know the natural law, natural law isn't an inclusive-pluralistic standard. At least implicitly, it distinguishes cultural things

accordingly as whether they are just or unjust. Natural law is, moreover, a Christian and secular Western standard; even today, natural law is understood on the model of the Christian separation of unaided reason and revelation. In other words, natural law is to be sufficient for civil legislation, but without a claim to completeness of a sort that would provide for the laws a closed, secular meaning that would implicitly deny Christian and other religious or cultural-ethical interpretations of what the natural law ultimately means. Natural law as the correct standard for legislation, with legislation considered a fundamentally incomplete statement of the just, is a Western peculiarity. Natural law isn't even inclusive of all the branches, Christianity (not all Christian denominations teach that natural law provides the correct standard for civil legislation), or of all secular theories of substantive law.

Furthermore, natural law also faces the difficulty that it is too pluralistic for legislative consensus. Nobody, Christian or otherwise, has yet succeeded in stating what the natural law teaches in a way that amounts to a common moral sense for America today.

Of course, these difficulties do not mean that natural law can have no future as the architectonic principle of legal justice, or that there is an alternative jurisprudential standard. But natural law certainly has no future if it seems both unjust (pluralism-denying and freedom-restricting), and unnecessary. Natural law will seem unnecessary if it is thought that legal justice needs no principles of substantive justice. Thus natural law is threatened by the ethical world night that is called pluralism.

How has it come to be that a legal system can be discussed as pluralistic? My guess is that this bad thinking has been made possible by legal positivism. For the legal scientist of the laws, who seeks value-neutral objectivity about the laws, rational inquiry into substantive justice is unnecessary and even impossible. The positivist does not assert that value judgments in legislation are unnecessary; he does not assert that a legal system can be inclusivistic-pluralistic. Nevertheless, the value-neutrality of positivism discourages sustained consideration, at both

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popular and academic levels, of what the substantive justice informing legislation should be. Positivism would then permit Western jurisprudence to fall asleep, liberated from the heavy duty of inquiry into the just, and then arguing for its imposition in laws. In positivism-induced slumber, justice grounds itself in the pillow of cultural-ethical pluralism and dreams value-neutral dreams of inclusiveness. Is this sleep the price we must pay if we choose to develop a science of the laws?

Lest the foregoing remarks seem to approach legal positivism with insufficient gravity, let me consider positivist claims directly, and not through the use pluralist value impositions may make of them.

#### Positivist Claims

Positivist theory may seem to make sense of science, for science maintains that reason has an objective, cross-cultural universality, and that the investigation and interpretation of facts can proceed from any personal perspective or background. One might conclude from the cross-cultural validity of science that the scientist's personal motives in his activity are of little significance. Even though politics may intrude into science, evidently the scientific community can rest its conscience in the assertion that science is neither just nor unjust in itself, but only accordingly as it is used. It is not surprising that there are attempts at positivist study of law: value-neutral methods of investigation can be applied to legal phenomena as much as to other phenomena, so there can be descriptions of Babylonian law, American law or any other sort of law. It is true that laws are values, since they are construed in terms of right and wrong, not objectively; but, as Max Weber observes, values are facts that can be researched. What is surprising is that objective knowledge of the law could be understood as sufficient for those who are to apply it, namely the judiciary. For since laws are understood as values and not mere facts by those who apply them, an objective knowledge of the laws is fundamentally inadequate. Why should the judge apply the laws? The legal positivist's reply is that once the judge has objective knowledge of his society's laws

he can apply them in a value-neutral spirit akin to that of the scientific investigator. The judge becomes a technician who asks what the pertinent law is (fact), and then effects it in the case before him without ever asking whether the law at issue is just or unjust. By supplying judges with descriptions of the laws they are to apply, positivist legal research supplies judges with the objective knowledge they need to do their work.

While positivism fails to explain to the judge why he *should* apply the law, this failure may seem to confirm the laws' demand that the judge put aside his own, personal sense of what is right and wrong, and decide cases in accordance with the dictates of the law: the judge's task is not making laws but interpreting and applying laws; at least *prima facie*, then, laws do not appeal to the judges' own conscientious sense of what is just.

The next stage of the positivist program is to establish the principle of "formalism." According to legal formalism, judges, like all others who enforce the laws, are obliged to adhere to the rigorous enactment of objective legal forms (rules, procedures, routines). Formalism would impose judicial restraint and keep judicial discretion (freedom) to a minimum. The process of judgment is not informed by the substance of the laws (their meaning as to why they are right), but only what the laws direct the judge to do; the substance of the laws is known by the legislative assemblies that make the laws.<sup>1</sup>

Therefore, one would like to class formalist law with the Judaic Torah, the Islamic Charia, or the "natural law" of Western jurisprudence; for Torah, Charia and natural law have unquestionable forms. But this unquestionability comes from their substantive justice as revealed by God, or commanded by the natural conscience as a divine voice; whereas the laws formalist judges apply are not considered sacred. Their "justice" is in the formal correctness of their enactment and application. In the terms of Max Weber's legal formalism theory, formalist law effects the perfection of law in rational-legal domination, whose rationality is a sort of value-free and purpose-free ratio of forms. From the perspective of substantive morality, which is always purpose-ratio-

nal (oriented to ends) or value-rational (oriented to sacred duties and limits), or both, formalist law offers no reasons to obey it. Fearing penalties for infractions against the forms, a low purpose-rationality, may suffice for law-abidingness—provided there is no need for the citizenry to ascend beyond semi-criminality—but it hardly suffices for the judge whose task it is to interpret what law-abidingness shall be. Formalism isn't a question of "the emperor's new clothes": it presents us with an abundance of imperial attire (legal forms) but an invisible emperor (substantive justice principles).

Indeed, if the judge finds himself conscientiously bound to certain substantive principles of justice, he is obliged to set aside—or creatively interpret—mere legal forms whenever they conflict with those principles. It would be seriously wrong for him to override his sense of right and wrong for the sake of mere forms that are silent on justice. If laws expect to be not merely obeyed formally but also considered authoritative on substantive justice, legal formalism does not satisfy the moral meaning of the laws. But since it is true that the laws are spoken in authoritative forms (the wording of rules, procedures), legal formalism has a certain plausibility, and can claim the status of a value-neutral science—even though a judge's decision to learn the facts of the law and apply them objectively (if that is even possible) involves a value judgment that he *should* adjudicate in that way.

Positivist legal theory does not develop only in formalist directions. Indeed, formalism has been more influential in Continental Europe than in the English-speaking countries. Anglo-Saxon legal theory has had, as one might expect, a pragmatic or utilitarian bent. From doubt that legal forms are or should be very determinative for judicial decisions (especially upper-court decisions), American jurisprudence has developed a diverse movement called "legal realism." For this most influential school of American legal theory, the purpose of positivistic study of the law is to develop a science of judicial decision-making that can predict the social consequences of those decisions. With the development of a predictive social science of

judicial outcomes, judicial discretion should be maximized in the service of social progress. To paraphrase Marx: the formalists only interpret and apply the law; according to legal realism, however, the point is to change it.

In recent years a radicalized version of legal realism has arisen in American law schools—Critical Legal Studies. This movement absolutizes the indeterminacy of laws for judicial application by borrowing "deconstructionist" theories about textual meaning derived from Nietzsche and Heidegger: any legal text may be construed in any number of valid ways, and hence legal texts do not have any one meaning. Whereas the more old-fashioned realists were held by merely progressivist visions of piecemeal social engineering, Critical Legal Studies advocate radical socio-political transformation in accordance with the egalitarian values they find themselves committed to as just.

We may call "conservative" those American jurists who oppose an activist or legislative judiciary: according to the Constitution, the judiciary is not the legislative branch of government, but is bound by law to interpret and apply the laws made by representative assemblies. From the perspective of substantive law, it is disturbing to see the Constitutional arrangements defended without reference to the substantive justice principles that informed the Constitution and the legal system it continued—or without reference to other substantive justice principles that might make sense of the Constitutional arrangements. That is, the supporters of substantive law cannot be pleased to see the Constitution defended formalistically.<sup>3</sup> If representative legislation differs from judicial legislation as being more just, the difference cannot be understood formalistically—as a mere difference in legal forms. If the difference between judicial legislation and representative legislation is only a formal difference, what is the point of opposing judicial activism?

#### "Conservative" Formalism

How the formalist understanding of judicial restraint threatens the substantive meaning of the law as just I think can be shown by brief reference to Robert H. Bork's recent *The Tempting of America: The Political Seduction of*

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*the Law*, an intelligent but formalist work (New York: Simon & Schuster, 1990). Perhaps the most influential theorist of judicial restraint, Bork attempts to defend the forms or "design" (177) of the "Madisonian system" without the substantive reasons that Madison and the other Founders had when they legislated it. Bork's formalism actually implies that the judge's conscience need not be addressed when conservative jurisprudence defends the judicial restraint intrinsic to the Madisonian system (which recognizes legislative assemblies as having the right to make law). For Bork, the judge can reasonably be expected to set aside his own moral sense in effecting the legislative will of the majority's representatives, including the Framers of the Constitution, except when the representatives' will conflicts with the individual rights specified in the Constitution. In such cases, the judge can reasonably be expected to set aside his own moral sense and effect the will of those who legislated the Bill of Rights and the other pertinent Amendments (139). For Bork, it is enough to assert, "the judge is bound to apply the law as those who made the law wanted him to" (5; 7), even if the judge considers the legislators to have seriously failed the requirements of substantive justice (264); and even though the judiciary is the highest governmental authority for what justice means (200). Admittedly, the original intent of legislators cannot be considered a formalism: legislation is a "political decision." But Bork wishes somehow to confine the judge to a formalist understanding of that intent—an understanding that is (or rather points to) the meaning of the law. Bork insists (in a political decision of his own, surely) that judges be devoted to the original understanding; but somehow that "devotion" (9) is not to be a political choice. The judge is somehow to formalistically obey the "political content" that constitutes the substance of the laws' forms, especially the Constitutional forms (177). Bork asserts that the judge should not heed the social-contract theory taught by John Rawls (211), but he does not attempt to refute it, as by arguing that the social-contract and covenant theories informing the American Founding are superior. The Borkian judge does not need to

agree or disagree with any social-contract theory, but can simply operate in accordance with the Madisonian system as though he agreed with Madison's understanding of social contract. Accordingly, Bork wants judges to believe that citizens' rights "come from" the Bill of Rights (97); that is, those rights must be considered by judges to be forms articulated by the Bill of Rights, not substantive principles preceding the Bill which the Bill simply recognizes. Bork also maintains that according to the Madisonian system "majorities are entitled to rule ... simply because they are majorities" (139), and not because majority rule was considered by the Founders to be more in accord with justice than minority rule. Formalism permits Bork not to explain how it is that judges must heed the positive laws of legislative assemblies as somehow more authoritative than natural law, which Bork himself does not deny (66).

Bork understands judicial restraint as a formalism, but he is not a positivist who believes that legislation must be voluntarist or non-rational. As a value-judging being (i.e., not in his former capacity of formally obedient judge), Bork himself supports the Madisonian system of legislative assemblies and interpretive courts (201). He rejects will as the basis of justice (217, 256), so presumably he has substantive reasons for his support of the Madisonian system. Indeed, he hints at his reasons (6, 9, 201, 355, 363), which are much like Madison's own, but he does not want such reasons to be the basis for a judge's adherence to Madisonian judicial restraint. Perhaps he balks at Madison's reasons for the Madisonian system because he knows that many judges and leading legal theorists do not agree with Madison's understanding of legal justice. But then one must ask whether Bork would support the Madisonian system if he considered it substantively wrong or at least deficient. Is Bork supporting the Madisonian system as a matter of formal correctness, and for no substantive reason at all? Does he expect that judges and theorists who disagree with Madisonian reasons will nonetheless bind themselves to judicial restraint as a matter of formal correctness? Bork concedes as it were that liberal values might be better served by a legis-

lative judiciary than a judiciary of mere interpretation and restraint (6, 77 178). Apparently the legal theorists Bork opposes consider their own sense of what is just a "better" opinion" than that of elected representatives (17). How could these theorists believe they should support the Madisonian system? In view of judicial activism's success, what has Bork to say in "the war for the control of the legal culture" (10) to persuade "left activists" (11) with their "reckless and unprogrammatic radicalism that does not share but attacks traditional values and assumptions" (10)? By refusing to defend the Madisonian system substantively, Bork is left facing left activists across an unbridgeable abyss of value difference. Thus he can say no more than that judicial activism pretending to be obedient to "the principles of the text" (5) is not quite honest: "The person who understands these issues and nevertheless continues to judge constitutional philosophies by sympathy with the results [in judicial activism] must, if he is candid, also admit that he is prepared to sacrifice democracy, in order that his moral views may prevail" (265).

Even though Bork criticizes judicial legislation based on the judge's desire for a good social result (72), he attempts (28-34) to persuade his readers of the rightness of judicial restraint by pointing to the bad social results of judicial activism in *Dred Scott v. Sandford* (1857), a decision by the Taney Court which held that the federal government could not outlaw slavery in any state or territory. Bork considers Taney's decision to be "legislative," in defiance of federal statute enacted by the legislative branch, and argues that the formal method of Taney's decision is the same as that of the liberal-activist decisions of recent years which Bork censures as a violation of the Madisonian system. Presumably, if the Burger Court decided *Roe v. Wade* (1973) correctly when it discovered in the Constitution a right to abortion, then the Taney Court decided *Dred Scott* correctly when it legislatively forbade Congress from restricting slavery. Bork expects his readers to draw back in abhorrence from such a conclusion—but are we drawing back in abhorrence at judicial activism, or at the substance of the Taney decision, which we are

expected to transfer also to *Roe v. Wade* (116)?

### Defending the Madisonian System

Bork's argument for judicial restraint with a view to *Dred Scott* and other unjust decisions is not formalist but implicitly substantive. This shows that the Madisonian system cannot be defended formalistically. In sympathy with Bork, I might observe that he does not attempt a substantive defense of the Madisonian system perhaps because he does not believe that such a defense is possible. Drawing on *After Virtue* by Alasdair MacIntyre, Bork speaks of a "cultural war" (10, 112, 138) in American public opinion: "There seems to be no rational way of securing moral agreement in our culture" (256). Nevertheless, by seeking to persuade his readers of the justice of judicial restraint, Bork is attempting to secure enough moral agreement to retain the Madisonian system. Despite himself he argues substantively; he is not simply describing the Madisonian system and judicial attempts to overturn it. If in the midst of this cultural war the citizens can agree "we should vote on these matters, rather than litigate them" (256), the cultural war is not quite so absolute as Bork fears. But if there is a real axiomatic, or war of values, in our legal culture, peace efforts that depend upon the validity of judicial restraint must be ineffective. Axiomachy cannot be resolved by agreeing to disagree and obeying Madisonian forms, when it is the very meaning of justice that is at issue. Bork himself concedes that it was valid for John Marshall, Chief Justice of the Supreme Court from 1801 to 1835, amidst a radical "conflict of visions" (21) about the just form of federalism, to transform the judiciary into a strong centralizing branch of government by legislating the supreme power of judicial review under the Constitution (24) and perhaps even under natural justice (25).<sup>3</sup> Marshall overrode statutes and decreed judicial powers beyond what the legislators of the Constitution specified because he considered Federalism right, and Jeffersonian democracy wrong (21). (Nobody thought at that time to speak of "pluralism" as a way of obscuring the necessity of choosing between government by Federalist and Jeffersonian principles.)

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Bork's call to bind the judge to judicial restraint by the mere observation that judicial restraint involves not remaking the Constitution "from such materials as natural law, conventional morality, prophetic vision, the understanding of an ideal democracy, or what have you" (6) is formalistic, and thus leaves the judge without any substantive reason to obey the Madisonian system which accords legislative power to representative assemblies. In a legal culture of broad and solid consensus, a formalist understanding of the judge's duty can seem enough, but in a situation of real axiomatics, formalism is not enough, and substantive justice principles like those of natural law can enter jurisprudence. Bork supposes that the uncertainties attending "natural law" somehow make it useless as an ethical standard, at least in jurisprudence (66); but uncertainties attend every ethical standard, and there is no reason to suppose natural law is more uncertain than any other standard. Certainly the reality of natural law is not disproved simply because it is difficult to discover and a matter of disagreement. From the perspective of natural-law jurisprudence or indeed from the perspective of substantive law of any sort, Bork's attempt to conserve the American legal system on formalist grounds only makes matters worse. The operative formalist assumption that judicial restraint interprets and applies the laws without an understanding of their substantive meaning as just only hastens the approach of our legal world's night. Naturally a non-formalist judge may find himself in such disagreement with the

legislators' sense of what is just that he cannot in good conscience remain within Madisonian restraint even with a view to the overall justice of the legal system; but formalist judicial restraint does not provide a solution to that crisis, since it does not actually transcend the judge's sense of *should* when it tells the judge: "You *should* set aside your own sense of *should* and agree with the legislators' sense of *should*." But since American legislators—even the Founders—are not God, formalist judicial restraint can only foster additional moral laziness in the judiciary, and hasten the approach of ethical night for the Western legal world.

<sup>1</sup>According to positivism, since rationality is a value-neutral perspective and thus cannot inform a value system like law, legislation must ultimately be a non-rational or voluntarist process. Hence the substance of the laws is the formless "matter" from which the legal forms are willed.

<sup>2</sup>A legal system of forms might seem appealing because uncompromisable forms are a bulwark against arbitrary police power. But such formalism is actually grounded in substantive concerns: the purpose of uncompromisable forms is the prevention of injustice.

<sup>3</sup>Bork remarks, "if the Founders intended judges to apply natural law, they certainly kept quiet about it" (209). But natural law perhaps teaches that legal stability is not to be overturned by easy judicial appeal to the (other) requirements of natural law.