THE UNETHICAL JUDICIAL ETHICS OF INSTRUMENTALISM AND DETACHMENT IN AMERICAN LEGAL THOUGHT

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To a certain undeniable extent, judging "takes place in a field of pain and death."[1] What is truly remarkable, however, is that, at least since Oliver Wendell Holmes and perhaps even today, countless judges and commentators have proceeded as if it does not. American legal thought consistently has encouraged—and can be partially described by—a judicial ethic consisting of instrumentalism and detachment. As we will see, these distinctive features have had their critics, and (fortunately) their rule has weakened.

This article cautions that, in the main, judges should rule equitably and primarily on the facts and circumstances before them, with attention paid less to the systemic and societal effects of decisions and more to the immediate consequences on the parties *sub judice*. The preceding directive, it will be seen, is not only ethically implicated, but is inherent in the proper role of the judge. In Parts I and II, this article briefly interprets the history of the intellectual counter-development over the last one-hundred years, beginning with Holmes and ending with emphases on Duncan Kennedy's implicit and Robert Cover's explicit rebellion against the ethic. The belated decline of instrumentalism and detachment in American judicial thought is a welcome event in which judges of all levels should become (more) aware of the tangible—even violent—consequences of their decisions on the parties before them and respond ethically to that reality. In Part III, this article employs a discussion of two very recent United States Supreme Court cases, a comparison of which illustrates the mistake of judicial detachment and instrumentalism. This article concludes that such categorical—or even presumptive—

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1. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) ("A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.").

reasoning is morally wrong and judicially irresponsible.

PRELIMINARY DEFINITIONS

Before we begin, it should be helpful roughly to define some terms recurring throughout this article, the three most important of which are judicial ethics, instrumentalism, and detachment. "Judicial ethics" could and should mean many things,[2] but the conception I advocate here is roughly equivalent to "doing justice," which in turn warrants its own definition, lest I be accused of deductive or "transcendental-nonsense" error.[3] For our purposes, "doing justice" approximately involves consulting all of the relevant procedural and substantive legal norms (not quite the "Herculean" judge,[4] but someone related to her), *and* the judge's general concern with a fair result in context, notwithstanding laws ostensibly to the contrary.[5] Perhaps, then, an "ethical" judge is one who combines "Dworkinian" legal knowledge with "Coverian" sensitivity to reality.[6] As we will

2. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT (2003), available at http://www.abanet.org/cpr/mcjc/toc.html. The ABA recently adopted a new judicial ethics code, but the state supreme courts have yet to adopt it. *See* MODEL CODE OF JUDICIAL CONDUCT (2007).

3. *See* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810 (1935) (referring to transcende

see, this definition of judicial ethics is strongly preferable to the pervasive one of instrumentalism and detachment (at least to the extent that these competing definitions are mutually exclusive).[7]

By "instrumentalism," I more or less mean utilitarianism, but because that term has multiple meanings,[8]

the practice of the bench and bar,[18] but it has allowed lawyers to argue and judges to craft the law in sweeping ways while removing anxiety and guilt over the consequences.

Again, whether Holmes intended this result is unclear, but it has had lasting effects on American legal thought, influencing judges and scholars on both the left and (mostly) right. The Legal Realists, however, brought an end to one surface set of justifications for instrumentalism and detachment. They convincingly destroyed the protection of deduction from vague concepts immanent in the common law.[19] If judging was not based on deduction—if it in fact was nothing but policy determinations with all of their attendant implications—judges finally were exposed to the raw consequences of their decisions.[20] To be sure, the Realists seemed more concerned with the false justifications than with ethically charging the judge under this new reality.[21] The Realists seemed content with the judge making policy decisions for the public, so long as she knew that she in fact was making policy decisions. Furthermore, the Realists may have aggravated the popular Holmesian view by their far-from-"*temporary* divorce of Is and Ought"[22] and their varying obsession with certainty.[23]

18. In an infamous ethics article, Stephen Pepper summarized the depressing combination of the various prevailing views of the law:

> Our problem now posits: (1) a client seeking access to the law who frequently has only weak internal or external sources of morality; (2) a lawyer whose professional role mandates that he or she not impose moral restraint on the client's access to the law; (3) a lawyer whose understanding of the law deemphasizes its moral content and certainty, and perceives it instead as instrumental and manipulable; and (4) law designed as (*a*) neutral structuring mechanisms to increase individual power (contracts, the corporate form, litigation), (*b*) a floor delineating minimum tolerable behavior rather than moral guidance, and (*c*) morally neutral regulation.

Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 4 AM. B. FOUND. RES. J. 613, 627 (1986).

19. *See generally* LAURA KALMAN, LEGAL REALISM AT YALE 1–10 (1986); Cohen, *supra* note 3; L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934); Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

20. *See supra* note 19.

21. *See, e.g.*, David Kennedy, *Karl Llewellyn*, *in* KENNEDY & FISHER, *supra* note 5, at 138 (suggesting that the realists had an "'anemic' affirmative program").

22. Llewellyn, *supra* note 19, at 1236, 1254.

23. *See, e.g.*, Fuller, *supra* note 19, at 431–38 (discussing the Realists' concept of and preoccupation with "certainty"). The certainty value forces legal instrumentalism in a variety of ways, not the least of which by encouraging bright-line rules.

Legal Process[24] scholars fared no better. Their concept of law—rules adopted through legitimate procedures[25]—was as impoverished as Holmes's concept. Their agnostic, relativist, and complacent take on adjudication seemingly justified the judge's decisions, at least in

stead, however, they did not seem to care that it could be used in the same, or aggravated, instrumentalist fashion (enter Law and Economics). Law and Society revolted, partially, but its addition to legal thought went more to the fact that the instrumental *conclusions* were error, not that *instrumentalism* was error. Professors Duncan Kennedy and Robert Cover (among others), however, soon exposed the inherent tension between detached instrumentalism and the cold reality of the decision.

II. THE NEW (OR REVIVED) ETHICAL CONSCIOUSNESS IN AMERICAN JUDICIAL THOUGHT

To be fair, the ethical consciousness really never went away—it has been in ebb and flow from decade to decade, judge to judge, for a long time. Professor Duncan Kennedy suggested the deep-seated, border-crossing tension "on which no foot of ground is undisputed."[39] Rules and individualism are consistent with instrumentalism and detachment;[40] standards and altruism are consistent with justice in the case.[41] (There are several exceptions, such as the fact that rigid rules often do not solve the judge's dilemma,[42] owing to many considerations, such as the inability of legislatures to foresee and craft a rule disposing of all of the relevant permutations of conduct. Rigid rules also may force judges to push for equity in the margins, contrary to the individualists' push for certainty.[43]) For the most part, the individualist theory is that the self-reliant, rational actor guiding her conduct by rigid rules will promote the best overall result for

39. Kennedy, *supra* note 5, at 1765–66.

40. *See, e.g.*, *id.* at 1771 ("The [individualist] judge should be intensely aware of the subjectivity and arbitrariness of values, and of the instrumental character of the state he represents.").

41. *See, e.g.*, *id.* ("The direct application of moral norms through judicial standards is therefore far preferable to a regime of rules based on moral agnosticism."). *See also id.* at 1752 (noting that in a "regime of standards . . . [e]very case would require a detailed, open-ended factual investigation *and* a direct appeal to values or purposes.").

42. *See, e.g.*, Llewellyn, *supra* note 19, at 1239 (noting that "in any case doubtful enough to make litigation respectable the available authoritative premises . . . are at least two, and that the two are mutually contradictory as applied to the case at hand").

43. As Professor Fuller suggested many years ago, the equity effect may result in unpredictability. *See* Fuller, *supra* note 19, at 437 (noting that undue restraints on judges' decisional options may result in unpredictable legal results); *see also* Kennedy, *supra* note 5, at 1701 ("It is also possible . . . that the reason for the 'corruption' of what was supposed to be a formal regime was that the judges were simply unwilling to bite the bullet, shoot the hostages, break the eggs to make the omelette and leave the passengers on the platform.").

exaggerates his argument (perhaps intentionally),[50] but there is an undeniable truth to his exposed reality. Especially in criminal law, adjudication really does "take[] place in a field of pain and death."[51] Moreover, even judges devoutly committed to the normative theory of utilitarianism (or instrumentalism as we have defined it) are acting irresponsibly in a significant amount of cases: The data to support their specific-injustice, general-justice theory are simply nonexistent.[52]

Neither Kennedy nor Cover (nor their followers) presumably would cast aside instrumental notions.[53] The death knell has been sounded, however, for judges who are willing to further their public good (however vague and unproven)—despite the immediate injustice—and still maintain that they are adjudicating ethically; at best, they rule on shaky ethical grounds. Similarly, judges blindly "applying" the law are not justified ethically (at least when the law happens to be unjust in the circumstances).[54] Indeed, judges who craft

which is about to occur.").

50. I agree with Cover that his "violence" argument peaks in the criminal law and becomes more subtle (sometimes very subtle) in other areas of law. *See id.* at 1607 n.16 ("I have used the criminal law for examples throughout this essay for a simple reason. The violence of the criminal law is relatively direct. If my argument is not persuasive in this

and apply the law in a detached and instrumental fashion are acting doubly dangerously in a legal world that substantially or entirely separates the legal from the moral.[55]

The ethic of doing justice, however, does not require tunnel vision:[56] The law's general effect is fair game for ethical adjudication, but that does not make it "open season" on the human beings in the courtroom.

III. A CONTEMPORARY EXAMPLE OF THE TENSION

In a very real sense, the following example is truly taken at random. It thus serves as a recent reminder that the tension between the abstract "good" and the concrete circumstances is found pervasively from court to court, judge to judge, case to case, and even within cases. The following comparison is particularly important, however, because it both provides promise and illustrates egregious mistake.[57]

At a time when the Supreme Court is busy making callous decisions in criminal law,[58] it issued *Holmes v. South Carolina*.[59] *Holmes* held unconstitutional South Carolina's truly detached rule excluding evidence that a third party committed the crime with which the criminal defendant was charged whenever the state had presented "strong" evidence of the defendant's guilt.[60] In many ways, the defendant in *Holmes* was destined for appellate success, but with the Court sharply divided on most issues, his success was not predetermined by any stretch of the imagination. Therefore, the opinion—nine to nothing—was a remarkable showing of unanimity in favor of defendants' due process rights to present evidence

inefficiency").

55. *See, e.g.*, Pepper, *supra* note 18, at 627 (noting the problematic convergence of an amoral role with an overly positivist interpretation of the law).

56. If it did, race and feminism scholars probably could not have stood on the authors' shoulders to point out the law's systemic impact on race and gender. *Cf.* David Kennedy, *supra* note 47, at 742–43 (noting that Cover's emphasis on "[t]he unspeakable suffering of the marginalized became a metaphorical refutation for anti-foundationalism and a guidepost for ethical action" and "was routinely presented as a baseline justification for law reform efforts emerging from identity politics . . .") .

57. It is also important, of course, because it involves two decisions of the highest court of the land, the Supreme Court, construing the highest law of the land, the Constitution.

58. *See, e.g.*, *infra* note 71 (citing several examples in recent Supreme Court decisions).

59. 126 S. Ct. 1727 (2006).

60. *Id.* at 1734–35.

establishing their innocence in their criminal trials.[61] The Court noted that the illogical rule unfairly applied only to the defense, and the rule simply ignored "the probative value" of the excluded evidence and other "potentially adverse effects."[62]

The *Holmes* opinion, moreover, tracked the modern trend to strike down similar laws and was consistent with the federal judiciary's (slowly) increasing disapproval of states' attempts to hamper defendants' cases, solely for the sake of convictions, plea bargains, or some other perceived public good, such as general deterrence of crime. The opinion is an obvious recognition of the liberty and "violence" at stake in criminal litigation; vague or general evidentiary rules must give way to the paramount concern for justice in the case.

Only two months later, however, the Court devolved back into instrumentalism and detachment. In *Clark v. Arizona*,[63] a five-to-four decision, the Court permitted Arizona not only to restrict the already restrictive *M'Naghten* definition of insanity, but even more importantly, to exclude expert testimony that the defendant J0 -1.16(re)]mu101 vague or gen sole

Justice Kennedy (at times, a law-and-order conservative) noted in his dissent, the majority has sanctioned form over substance—by limiting expert mental health evidence to the affirmative insanity defense, the Court permitted the state to exclude evidence crucial to an essential element of the crime.[66] When that reality is exposed, it is beyond question that the state violated the defendant's due p96 antedy (at dhts.3(e p940.1207 Tw[(Court

necessary,[73] and some amount of instrumentalism may be professionally necessary. Neither, however, should comprise the whole of judicial reasoning. The greater good of the unseen future cannot categorically justify infliction of injustice in the present.[74] The ethical judge must balance these tensions; judging using one without the other adopts, in a sense, a wholly individualist or wholly altruist view without respect for the (more or less) merit of the other view. As Law and Society scholars—and even Holmes himself[75]—have pointed out, most instrumental reasoning is at best naïve in our state of woeful ignorance of the true effects of law on society (and vice versa). In such a world, judges should exercise a presumption of dealing justice in the factually developed cases at hand, to the parties

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