

**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 transcendental nonsense as, among other things, a legal “question identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, ‘How many angels can stand on the point of a needle?’”), 833 (speaking of “justice”).

4. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1082–1101 (1975) (discussing characteristics of Herculean judge).

5. The late Professor Abram Chayes eloquently implied this definition in one of his most influential works. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976) (“Perhaps the most important consequence of the inevitably exposed position of the judiciary in our contemporary regulatory state is that it will force us to confront more explicitly the qualities of wisdom, viability, responsiveness to human needs—the justice—of judicial decisions.”); David Kennedy, *Abram Chayes*, in THE CANON OF AMERICAN LEGAL THOUGHT 610, 614 (David Kennedy & William W. Fisher III eds., 2006) (quoting Chayes, *supra*, at 1316) (noting the judiciary’s need of “‘responding to . . . the deep and durable demand for justice in our society’” and “‘the importance of substantive results for the legitimacy and accountability of judicial action.’”); see also Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1752 (1976) (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.”).

6. For more on the “Coverian” insight, see Part II below. For present purposes, it should be sufficient to note that adjudication—particularly criminal adjudication—is not moral (or even desirable) simply because the judge ostensibly follows the positive law. The dispersion of institutional responsibility does not change the reality of the result. See also Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271, 1271–75 (1994) (dismissing “‘role-defined’ ethics” for attorneys and law students as “intellectual rubbish”).

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 we should limit it here to treating the role of the judge as crafting rules that serve the greatest social good, whatever that good may be. Implicit in this understanding is the related characteristic of “detachment,” which we can define as the judge’s insulation from or indifference to the tangible effects that she causes with her rulings not only on the public in general, but more importantly, on the specific parties in front of her.⁹

I. THE HOLMESIAN “BAD MAN’S” INFLUENCE ON AMERICAN JUDICIAL THOUGHT

Holmes was many things—a great orator, a Social Darwinist, and (problematically for our purposes) inconsistent.¹⁰ Inconsistency notwithstanding, the resonating point is that jurists nevertheless adopted Holmes’s influential view of the law and its implications for the judge’s role and rule. Holmes bathed the law in “cynical acid” to remove its moral import.¹¹ By doing so, he attempted to amplify the certainty with which jurists could predict the law, with “law” reduced to a prediction of when state sanctions would be inflicted.¹² The result

7. I also do not mean to mislead readers by relying on the term “ethics” too heavily—the point may be served almost as well by labeling it “professional responsibility” or even “the proper role of the judge.”

8. *E.g.*, JOHN RAWLS, A THEORY OF JUSTICE 19–20 (rev. ed. 1999) (noting that “[t]here are many forms of utilitarianism” and discussing “classical utilitarianism”).

9. *Cf.* Roger Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978) (discussing phenomena similar to instrumentalism and detachment in legal education).

10. *See, e.g.*, William Fisher, *Oliver Wendell Holmes*, in KENNEDY & FISHER, *supra* note 5, at 22–25 (explaining several scholars’ explanations of Holmes’s seemingly inconsistent stances in the *The Path of the Law*, *infra* note 11). This article owes much to the editors (particularly David Kennedy) of the recent book, *The Canon of American Legal Thought*, *supra* note 5, for assisting the article’s synthesis (in a reasonable amount of time) of the primary intellectual legal movements of the last one-hundred years. This article also uses the editors’ classifications of scholars and schools of thought.

11. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461–62 (1897).

12. *Id.* at 460–61 (“But if we take the view of *our friend* the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what .

proved infamous; it paved the way for the notion that “judges have failed adequately to recognize their duty of weighing considerations of social advantage.”¹³ Stripped of their duty to consult the vague moral notions of the law, judges were free to rule through issuing utilitarian decisions for social advantage.¹⁴ Holmes even led them by example in the infamous forced sterilization case, among others.¹⁵

Furthermore, the Holmesian-Bad-and-Instrumental Man has had a persistent consequence on lawyers’ ethics.¹⁶ Their ethics, of course, affect judicial ethics because lawyers are judges, and lawyers appear before judges.¹⁷ To a large extent, the result has morally bankrupted

. . . courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law.”) (emphasis added); *see also id.* at 464 (“I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether. . . . [B]y ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.”).

13. *Id.* at 467. In effect, judges did not need to worry too much if they were immersed in unjust laws. *See, e.g., id.* at 460 (“Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened [moral] opinion of the time . . .”).

14. Fisher, *Oliver Wendell Holmes*, in KENNEDY & FISHER, *supra* note 5, at 22–23 (noting Holmes’s legal positivist and “instrumentalist” style of judicial reasoning”). *See also id.* at 23 (“suggesting that . . . judges, when assessing the merits of extant legal rules, should focus exclusively on their impact upon net social welfare and not seek simultaneously to promote ‘fairness.’”).

15. *See, e.g.,* *Buck v. Bell*, 274 U.S. 200 (1927) (Holmes, J.) (upholding forced sterilization law on the basis of its perceived—now debunked—societal good). As another example, compare *Baltimore & Ohio R.R. Co. v. Goodman*, 275 U.S. 66 (1927) (Holmes, J.) (announcing rigid “stop, look, and listen” rule in railroad negligence cases), with *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934) (Cardozo, J.) (rejecting the rule in favor of a standard of reason). Yet another of the many potential examples might be Holmes’s objective theory of contracts, which disregarded the parties’ intent and circumstances for the sake of certainty. *See also* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941) (discussing certainty as policy in contract law).

16. *See* Kennedy, *supra* note 5, at 1773 (“The essence of individualist certainty-through-rules is that because it identifies for the bad man the precise limits of toleration for his badness, it authorizes him to hew as close as he can to those limits. To the altruist this is a kind of collective insanity by which we traduce our values while pretending to define them.”). *See also* WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 15 (1998) (“Once the subject of legal ethics or professional responsibility has been reduced in this manner to a set of mechanical disciplinary rules, it is no longer apparent what it has to do with ethics or responsibility.”). Moreover, because a judge “will always try to connect the justification he provides for an original decision with decisions that other judges or officials have taken in the past,” Dworkin, *supra* note 4, at 1090, instrumentalism can be contagious. It is quite reasonable to assume that judges do imitate or appeal to this style of reasoning, instrumentalism, in issuing decisions, as they do with other principles and policies.

17. Obviously, lawyers and judges are also scholars, who have worked tirelessly to influence the judicial mind.

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 Process²⁴ scholars fared no better. Their concept of law—rules adopted through legitimate procedures²⁵—was as impoverished as Holmes’s concept. Their agnostic, relativist, and complacent take on adjudication seemingly justified the judge’s decisions, at least in her legitimate sphere, so long as she followed the scripted procedure.²⁶ That she may have felt uncomfortable with her work at the end of the day was unimportant—the legislature, regulators, or some other tribunal would fix it in the main.²⁷ In short, Legal Process was too instrumentalist—it effectively ignored ethics and justice. Its method was not completely disastrous, however. It offered some promise by encouraging judges to be “responsive to parties, exercising ‘sound judgment,’ [and] restricting their decision to the matter before them.”²⁸

On the whole, Law and Economics made matters worse. It provided judges with a policy by which to justify all decisions—efficiency. *It no longer even mattered who caused the harm.*²⁹ The judge should concern himself with the most efficient result *for society*.³⁰ That he will have to break a few eggs in the process should not distract him from his prime directive. His ethic is efficiency,

24. See generally HENRY M. HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

25. See, e.g., *id.* at 4 (“The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.”).

26. See G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973) (discussing scholars’ emphases on detachment and neutral principles and their eventual decline). See also Gary Minda, *Jurisprudence at Century’s End*, 43 J. LEGAL. EDUC. 27, 32–33 (1993) (noting the preoccupation with “institutional and democratic norms”).

27. See, e.g., David Kennedy, *supra* note 5, at 605 (“[T]he solution . . . for Hart and Sacks [was] respect for the principle of ‘institutional settlement’ and for each institution’s special decision-making capacities and formal competence.”). See also *id.* at 606 (“Hart and Sacks offered a vision of a stable legal order open to the diversity of decisions that would inevitably flow from judicial reasoning about conflicting policies.”).

28. *Id.* at 606.

29. See William Fisher, *Ronald H. Coase*, in KENNEDY & FISHER, *supra* note 5, at 357–58; see generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

30. See, e.g., Fisher, *supra* note 5, at 25 (quoting in part Richard Posner, *The Path Away from the Law*, 110 HARV. L. REV. 1039, 1042 (1997)) (“Scholars associated with Law and Economics . . . agreed with [Holmes] that (in Richard Posner’s words) ‘there is a lot of needlessly solemn and obfuscatory moralistic and traditionary blather in judicial decisionmaking and legal thought generally,’ and, most importantly, found compelling his contention that every legal rule must be evaluated in light of its net social advantages.”).

instrumentally;³¹ he should detach himself from the parties and inconsistent law to prepare himself for his new calling.³²

Law and Society provided an implicit rebuttal, but it also had aspects of instrumentalism and detachment from the left. Law was divorced from its effects on society, and legal rulers were too narcissistic to realize it.³³ Legal reasoning instead needed to study law from society's point of view—how, for example, did society use the law?³⁴ And like the Legal Realists, they asked whether law affected society in the ways that legal rules had assumed.³⁵ Although they correctly questioned the strength of the assumed connections between law and society—and in this sense kept their minds on part of the reality advocated in this article—they pushed for an instrumental take on law (and implicitly adjudication) that paid little attention to the cases at hand.³⁶ In their (perhaps correct) opinion, there were fundamental breakdowns, some of which were beyond the judge's ability to correct.³⁷ Furthermore, the strong implication was that, when attempting to fix these *vast* breakdowns, the judge might have to ignore the current case and its circumstances—or use them merely as a springboard—for the greater good.

In sum, Holmes (and to be fair, some of his predecessors) left the judge in a detached state in order to use the law to the greatest “social advantage.”³⁸ The Realists stripped this somewhat dangerous judge of his primary justification—deduction. When they left policy in its

31. See, e.g., RONALD DWORIN, *JUSTICE IN ROBES* 22 (2006) (noting the efficiency ethic). But see Kennedy, *supra* note 5, at 1763–64 (1976) (noting circularity in the efficiency ethic); cf. generally Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. QUARTERLY 470 (1923) (noting the prerequisite of addressing the preexisting coercion and distribution).

32. By painting with a broad brush, my historical sketch risks offending some second- or third-wave scholars whose views vary significantly from the above description. See, e.g., Minda, *supra* note 26, at 36–37 (1993) (discussing law and economics movement). That disclaimer is necessarily true of any reasonably brief attempt to categorize scholarly movements with such diverse adherents.

33. See, e.g., Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986) (discussing and critiquing movement and providing William Simon's rebuttal).

34. See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963) (documenting actual use of contract law).

35. See, e.g., Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (discussing systemic distortion of legal rules by repeat players); Macaulay, *supra* note 34.

36. See generally Friedman, *supra* note 33.

37. See Galanter, *supra* note 35 (discussing “Strategies for Reform” to improve the “have-nots” position and curb “rule drift” in favor of the more wealthy, repeat legal players).

38. Holmes, *supra* note 11, at 467.

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.”).

society.⁴⁴ The judges' application of these rules despite the immediately inequitable result, then, benefits society on the whole. Ultimately, by enforcing these rules, the judicially injured party at hand and others like her no longer will expect help from the state (rather, she should seek help, if from anyone, from the "invisible hand").⁴⁵ Fortunately for the individualist judge, as "an instrument, the judge is not implicated in the legislature's use of force through him."⁴⁶

Of course, since Robert Hale, it has been apparent that legal rules (and even standards) are coercive at least to one of the parties.⁴⁷ Therefore, the judicial decision, and more particularly, its enforcement, will harm a party; it will not merely encourage or protect some vague concept of "free will" or "autonomy."⁴⁸ That does not mean, necessarily, that one party's interest—or the public's interest generally—should not prevail, but it disrobes the judicial decision of any pretense that it will not result in tangible harm to the loser (and to others similarly situated). This reality markedly raised the stakes for adjudication.

Therefore, when the judge bases her decision on some general notion of the public good, she rolls the dice with someone's life or property, perhaps unethically. Many scholars, such as Robert Cover, have suggested this point dramatically.⁴⁹ To be sure, Cover

44. See generally Kennedy, *supra* note 5.

45. See, e.g., Kennedy, *supra* note 5, at 1713–15 (discussing individualism and its premium on self-reliance); *id.* at 1752, 1767–68 (discussing individualists' arguments for "nonintervention, for judicial passivity in the face of breach of altruistic duty.").

46. *Id.* at 1772; see also *id.* (noting that "[o]nly when [the judge] chooses to make his own rules, rather than blindly apply those given him, must he take moral responsibility").

47. See generally Hale, *supra* note 31; cf. David Kennedy, *Robert Cover*, in KENNEDY & FISHER, *supra* note 5, at 741 ("The violent impact of judicial interpretation on cultural meanings presented far more pressing ethical and social concerns than what seemed the excessively theoretical worries of those who had theretofore focused on legal interpretation.").

48. See Kennedy, *supra* note 5, at 1716 ("As soon as the state attempts to legislate an ethic more demanding than that of individualism, it runs up against two insuperable problems: the relative inability of the legal system to alter human nature, and the tendency of officials to impose tyranny behind a smokescreen of morality. *The immorality of law is therefore the necessary price for avoiding the greater immoralities that would result from trying to make law moral.*") (emphasis added). Of course, despite its repugnancies, the individualist ethic has some rough consistency with the currently proposed judicial ethics—forcing the judge to focus on the "facts" of the case at hand may have the desired effect of partially suppressing a tendency to instrumentalism and detachment.

49. E.g., Cover, *supra* note 1, at 1601, 1609 ("A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or

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 context, it will be less persuasive in most other contexts.”).

51. *Id.* at 1601. The decision frequently results in death or prolonged imprisonment—save torture, the ethical stakes could not be higher.

52. *See, e.g.,* Holmes, *supra* note 11, at 470 (“What have we better than a blind guess to show that the criminal law in its present form does more good than harm?”). Somewhat frustratingly, we are not far today from where we were when Holmes wrote. *See, e.g.,* ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 64–65 (3d ed. 2000) (noting the lack of empirical evidence regarding the efficacy of modern criminal sentencing); SIMON, *supra* note 16, at 3, 10 (“The important developments in legal theory are not those that encourage skepticism about justice, but those that challenge the idea that justice in the abstract requires deliberate injustice in the here-and-now.”).

53. Instrumentalism is not necessarily a right-wing device. There are many examples of what might be termed left-wing instrumentalism. A famous example is the exclusionary rule in criminal cases. *See, e.g.,* Mapp v. Ohio, 367 U.S. 643 (1961) (excluding evidence of crime because police found it during an unconstitutional search).

54. A game of finger-pointing occurs—a game that did not work for the Nazi judges. The judge points to his circumscribed role in following the legislature’s (and therefore the “people’s”) law. The enforcers in turn point their fingers at the judge. *See, e.g.,* Cover, *supra* note 1, at 1626–27 (If the executors failed unthinkingly to enforce the judge’s orders, “the warden and his men would lose their capacity to shift to the judge primary moral responsibility for the violence which they themselves carry out.”). The judge must take responsibility for her adjudicative act. Her responsibility perhaps may include reasoned resistance to the law. *See, e.g.,* Dworkin, *supra* note 31, at 18 (noting that “[m]ost people . . . accept that in very rare cases judges may have a moral obligation to ignore the law when it is very unjust or perhaps when it is very unwise, and to use their political power to prevent injustice or great

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 suffered from a mental illness that likely affected or precluded his ability to form the requisite *mens rea*—an essential element of the crime of murder. By limiting evidence of defendants’ mental illnesses to the insanity defense—a narrowly defined affirmative defense placing a high burden on the defendant—the Court sanctioned the categorical exclusion of evidence bearing crucially on the defendant’s guilt (which happened to be the crux of Clark’s defense).

From an ethical point of view, the two cases are irreconcilable.⁶⁴ Arizona’s “good reasons” for the per se exclusion of this critical evidence are at best anachronistic and at worst disingenuous.⁶⁵ As

61. The opinion is also noteworthy as the somewhat surprising first opinion of newly appointed Justice Alito.

62. *Holmes*, 126 S. Ct. at 1734–35.

63. 126 S. Ct. 2709 (2006). For details of the *Clark* case that exceed the limited present discussion, see for example Jennifer Gibbons, Note, *Clark v. Arizona: Affirming Arizona’s Narrow Approach to Mental Disease Evidence*, 48 ARIZ. L. REV. 1155 (2006).

64. Although beyond the scope of this article, the cases are also irreconcilable in another way: *Holmes* is consistent with nearly every Supreme Court case handed down on the subject in the last three or four decades; *Clark* is inconsistent with those cases, due process generally, and the state of the mental health fields. See, e.g., *Holmes*, 126 S. Ct. at 1731–32 (discussing long line of cases protecting defendants’ right to present their defense and rejecting general evidentiary exclusions).

65. These reasons include the assertion that expert mental health testimony could confuse jurors (but not judges). *Clark*, 126 S. Ct. at 2717, 2734–35. See discussion *infra* Part

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 process rights to present highly relevant evidence in a trial in which he faced a life sentence. As the Court repeatedly did in the *Apprendi-Ring-Booker* line of cases,⁶⁷ among others, it should have jettisoned this formalistic approach and looked to the substance (here, the rejection of substance) of the state's rule. It should have balanced the state's purported reasons for the exclusion against the defendant's weighty, immediate, and fundamental right to present a defense in his criminal prosecution.⁶⁸

The Court instead rejected the reality before it, namely, that the defendant had received a life sentence unmitigated by the *undisputed* evidence that he suffered from “paranoid schizophrenia with delusions about aliens when he” committed the crime.⁶⁹ To justify its indifference, the Court relied on several abstract justifications. The Court concluded that the blanket exclusion would promote the state's general “good” in light of the “*controversial character* of some categories of mental disease, . . . the *potential* of mental-disease evidence to mislead, and . . . the *danger* of according greater certainty to capacity evidence than experts claim for it.”⁷⁰ Perhaps these

III (discussing other proffered justifications for the exclusion). Even ignoring the ludicrousness of allowing the jurors to hear the same (or virtually the same) testimony with respect to the insanity defense, the Court has held that jurors are capable of understanding “complex” matters in a wide variety of complicated subjects, many of which are arguably more complicated than mental disorders.

66. *Clark*, 126 S. Ct. at 2742–49 (Kennedy, J., dissenting).

67. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *United States v. Booker*, 543 U.S. 220 (2005). These cases of course did not deal with states' attempts to limit relevant evidence, but they analogously rejected states' attempts to label certain elements as “sentencing factors” or “aggravating factors” and thereby circumvent the rights to jury trial and proof beyond a reasonable doubt on essential elements of the crime. Of course, many have noted that these cases did not go far enough in their rejection of formalism. See, e.g., Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1514 n.123 (2006).

68. See *Clark*, 126 S. Ct. at 2718. The balance—in light of defendants' liberty interest at stake—ordinarily will weigh in defendants' favor, with trial courts free to exclude irrelevant or unsound mental health testimony in particular cases. See, e.g., *Holmes*, 126 S. Ct. at 1732 (noting courts' ability to exclude irrelevant or prejudicial evidence).

69. *Clark*, 126 S. Ct. at 2717, 2734.

70. *Id.* at 2731 (emphasis added)

controversies, potentialities, and dangers will materialize at some unknown point in the future, but in view of the undisputed evidence and the result in the case at hand, that assumption was a huge gamble with someone's life on the line. Even if the majority had adopted detached instrumentalism after careful deliberation, and even if that normative theory is accepted despite its problems, the majority still acted unethically because there is no empirical (or even highly rational) evidence that its result will improve the lot of third parties not before it. Recently, the Court has had no problem deploying this unethical reasoning in the criminal law context.⁷¹

In effect, the rule the Court upheld served no concrete purpose in the case other than to streamline conviction for the prosecution—exactly like the rule the Court unanimously struck down in *Holmes* only two months earlier. An ethical decision would have stopped the state from categorically excluding relevant evidence when a person's life quite literally was at stake. Moreover, ethics aside, this result would have been more consistent with the institutional role of courts vis-à-vis the legislature. The legislature undisputedly makes broad rules of general applicability in a setting conducive to such an ambitious (but inevitably crude) endeavor; the judiciary's undisputed role is case-by-case adjudication according to the facts, law, and justice.⁷² To defer blindly to the legislature's one-size-fits-all rules abdicates perhaps the most important function of the judiciary—to tailor the law to the facts before it in the pursuit of justice.

CONCLUSION

To be sure, some amount of detachment may be psychologically

71. For another line of ethically challenged cases, see for example *Whorton v. Bockting*, 127 S. Ct. 1173 (2007) and the long line of cases refusing to apply "new" constitutional rules retroactively despite their clear violation. The Court justifies its harsh decisions on the general notions of "finality" and "federal comity." See, e.g., *Schriro v. Summerlin*, 542 U.S. 348 (2004) (applying the doctrine to preclude capital defendants' right to jury trial on essential elements of their crimes); *Teague v. Lane*, 489 U.S. 288 (1989) (creating and attempting to justify the doctrine).

For another example, see *Wallace v. Kato*, 127 S. Ct. 1091 (2007), barring section 1983 claims for wrongful arrests unless potential plaintiffs take legal action by an unfairly premature date.

72. Cf., e.g., *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982) (expressing value, in another context, that "legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action").

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 himself⁷⁵—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 before them. At the very least, it could save judges the trouble of having to “anesthetize” themselves and their judgments’ executors;⁷⁶ fair and just decisions would require less numbing while remaining (more) consistent with the judicial role.⁷⁷

73. See Cover, *supra* note 1, at 1613 (“Because legal interpretation is as a practice incomplete without violence—because it depends upon the social practice of violence for its efficacy—it must be related in a strong way to the cues that operate to by-pass or suppress the psycho-social mechanisms that usually inhibit people’s actions causing pain and death.”). The suppression must occur in both the judge and the executors.

74. See, e.g., SIMON, *supra* note 52, at 3 (“The important developments in legal theory are not those that encourage skepticism about justice, but those that challenge the idea that justice in the abstract requires deliberate injustice in the here-and-now.”). Cf. MARY ANN GLENDON, *A NATION UNDER LAWYERS* 241–42 (1994) (noting ethical indifference but stating that “judges and legal strategists today are more vividly aware than ever that their decisions are made on imperfect information and often with but sketchy guidance from precedents and enacted law”).

75. Holmes, *supra* note 11, at 470 (“What have we better than a blind guess to show that the criminal law in its present form does more good than harm?”). See also ASHWORTH, *supra* note 52, at 64–65 (noting the lack of empirical evidence regarding the efficacy of modern criminal sentencing).

76. David Kennedy, *supra* note 47, at 744.

77. That is not to imply that just results are always possible. See Cover, *supra* note 1, at 1621–22 n.48. Nevertheless, the judge can withhold her approval or justification of the law or refrain from acquiescing in the underlying inequities. *Id.* Like Abram Chayes, I do believe that the judiciary is judged by the justice it deals. David Kennedy, *Abram Chayes*, in KENNEDY & FISHER, *supra* note 5, at 614 (quoting Chayes, *supra* note 5, at 1316) (noting the judiciary’s need of “responding to . . . the deep and durable demand for justice in our society” and “the importance of substantive results for the legitimacy and accountability of judicial action”).

Furthermore, the judge who does justice (in the sense roughly articulated in this article) presumably will feel better about herself personally and professionally. See, e.g., SIMON, *supra* note 52, at 2–3 (discussing the depressing state of lawyers who ignore this duty).

