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Articles

Legal Formalism: On the Immanent Rationality of Law

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This Article challenges the assumption that law is essentially political. Professor Weinrib presents a noninstrumental conception of the rationality of juridical relationships. His analysis draws on the notion of form to distinguish political considerations from the justificatory structures latent in legal thinking. Professor Weinrib concludes by defending the conceptualism of his approach and by contrasting formalism to the currently popular modes of legal scholarship.

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I. INTRODUCTION

A. *The Disrepute of Formalism*

This essay elucidates and defends legal formalism. In current academic discussion, the avowed formalist is the missing interlocutor. Formalism is like a heresy driven underground, whose tenets must be surmised from the derogatory comments of its detractors. Everyone knows that legal formalism asserts the distinction of law and politics. The curiosity of this distinction makes formalism seem at best a pathetic escape from the functionalism of law, and at worst a vicious camouflage of the realities of power. One would not guess that formalism, properly understood and stripped of the encrustations of hostile polemics, embodies a profound and inescapable truth about law's inner coherence. My purpose here is to lay bare this truth.

The most explicit criticism of formalism is to be found in the scholarship of the Critical Legal Studies movement.[1] On the fundamental issue of

1. In his introduction to the symposium "Perspectives on Critical Legal Studies," Mark Tushnet

whether law can in any significant sense be differentiated from politics, however, the Critical Legal Studies denunciation of formalism is merely a provocative statement of a commonly held academic belief. Rarely does one find today an espousal of what the anti-formalists labor to undermine. Most of the sophisticated writing in the United States assumes that law is a manifestation of political purposes; dispute centers on the questions of what those purposes should properly be and how they should be woven into the fabric of law.[2]

My defense of formalism is an exploration of the sense in which law can, after all, be differentiated from politics. This differentiation is tied here to a complex of broader issues: How is law intelligible? In what does the coherence of juridical relationships consist? Is a non-instrumental conception of law possible? The distinction between law and politics is thus the precipitate of an endeavor to vindicate the law's autonomy. For current legal scholarship this autonomy is, of course, as much a delusion as the distinction between law and politics.[3] My treatment of legal formalism, therefore, calls contemporary assumptions into question across a wide front.

This attempt to resurrect formalism is not merely a perverse theoretical indulgence. Although legal scholars may deny the distinctiveness or autonomy of law, lawyers engaged in the practice of law have always sensed that their intellectual world is not fully reflected in these academic conclusions. Legal activity invariably takes place within some structure, however lax. No matter how often the impossibility of such structure is announced by academics, murmurs of disbelief are heard in the trenches below. Legal formalism is the effort to make sense of the lawyer's perception of an intelligible order. This is why in the last two centuries formalism has been killed again and again, but has always refused to stay dead.

Formalism postulates that law is intelligible as an internally coherent phenomenon. The implications of the formalist claim extend to every aspect of reflection about law. It affects one's view of the nature of legal justification, the limits of the judicial role and judicial competence, the meaning of legal mistake, the relevance of instrumentalism, the relation of

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identifies the attack on all types of formalism as one of the themes at the heart of the Critical Legal Studies approach. Tushnet, *Introduction*, 52 GEO. WASH. L. REV. 239 (1984). The Critical Legal Studies attack on liberal political theory is related to its attack on formalism, because liberal theory is considered to depend on formalism. Tushnet views formalism as claiming "that some type of analysis provides a solution to problems of legal choice, policy choice, or social analysis by limiting the range of pure choice within which the analyst—judge, policy-maker, social scientist—operates." *Id.* at 239.

2. Even when a distinction between legal and political justification is asserted, the distinction itself is justified in terms of a political vision. Accordingly, the Critical Legal Studies movement's trumpeting of the primacy of the political over the legal secures a position that is no longer contested. *See, e.g.*, R. DWORKIN, A MATTER OF PRINCIPLE (1985). (Part One of which is entitled "The Political Basis of Law"). Dworkin states that his conception of law is "deeply and thoroughly political." *Id.* at 146.

3. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761 (1987).

law and society, the viability of contemporary legal scholarship, and the place of law among the intellectual disciplines. The scope and importance of these issues attest to the inescapably fundamental nature of the formalist claim.

Although its rigorous separation of the juridical and the political sets formalism apart from the main body of contemporary writing, formalism stands most opposed to Critical Legal Studies. Yet this very opposition also, paradoxically, brings the two together, for they do at least place the same issue at the heart of jurisprudence. For the formalist, the law's inner rationality reflects the possibility of its coherence, and this possibility is what Critical Legal Studies scholarship emphatically denies. The assumption common to both opposing views is that the law's moral legitimacy hangs on the outcome of their dispute. Mainstream scholarship, in contrast, allows itself to see the law as a plurality of competing or unintegrated purposes.[4] It implicitly concedes the point made by its radical critics but refuses to be embarrassed by it, claiming that the law's incoherence is manageable or even productive of good.[5] Both formalism and Critical Legal Studies reject this confession and avoidance, and insist on the importance of coherence for law.[6]

Formalism's theme—the internal intelligibility of law—is indispensable to any serious effort of legal philosophy. Juristic activity includes reflection on its own self-understandings and aspirations. This internal standpoint cannot be ignored: Only by reference to it is legal philosophy assured of having made contact with its subject matter. Nothing is more senseless than to attempt to understand law from a vantage point entirely extrinsic to it.[7] Formalism takes the internal standpoint to its extreme and makes it decisive for the understanding of juridical relationships. It thereby offers the most uncompromising construal of the law's inner intelligibility.

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4. For an overview of this characteristic of contemporary scholarship see Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 474-78 (1987).

5. *See, e.g.*, Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 100-08 (1975) (discussing functional advantages of seeing causation as interplay of different goals).

6. This commonality makes Critical Legal Studies dependent on formalism in two ways. First, the radical denial of legal coherence presupposes a grasp of what coherence might be and thus of what the formalist asserts. Without such a grasp, Critical Legal Studies risks misconceiving the target and thus firing to no effect. Second, the Critical Legal Studies practice of the immanent critique of legal doctrine presupposes a conception of the immanent, since one cannot properly criticize law from the inside without understanding the nature of the law's internality. However, although Critical Legal Studies depends on conceptions of the coherent and the immanent, no satisfactory account of these conceptions can be found either within its literature or (at least in contemporary scholarship) outside it. This essay, accordingly, attempts to supply the missing account of the law's immanent coherence.

7. For reliance on the law's internal point of view by philosophers of different persuasions see J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 11-18 (1980); L. FULLER, THE MORALITY OF LAW 33-94 (1964); H.L.A. HART, THE CONCEPT OF LAW 86-88 (1961); J. RAZ, PRACTICAL REASON AND NORMS 170-77 (1975).

B. *What Formalism Is*

My starting point is the formalism described in Roberto Unger's influential critique.[8] Unger regards formalism as fundamental to the legal thought that he opposes and considers to have been conclusively discredited. His description is, nevertheless, a valuable statement of formalism's principal themes and identifies the matter at issue. Indeed, in the litany of recent criticism of formalism, Unger is almost unique in providing an unsuperficial delineation of a position worth opposing. His description combines lack of sympathy with insight.

In Unger's account formalism brings together three features. First, formalism asserts the possibility of "a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life."[9] In this conception law features a mode of rationality that is different in kind from the less determinate rationality of political and ideological contest. Legal doctrine is possible only through "a restrained, relatively apolitical method of analysis."[10] Second, the distinctive rationality of law is immanent to the legal material on which it operates. Formalist doctrine is characterized by the working out of the implications of law from a standpoint internal to law. Unger accordingly defines legal analysis as

> a form of conceptual practice that combines . . . the willingness to work from the institutionally defined materials of a given collective tradition and the claim to speak authoritatively within this tradition, to elaborate it from within in a way that is meant, at least ultimately, to affect the application of state power.[11]

Finally, formalism presupposes that the ensemble of authoritative legal materials "display, though always imperfectly, an intelligible moral order."[12] Formalism relies on some guiding vision about human association that supplies the normative theory sanctifying the tradition as a whole and yet allows some of the received understandings and decisions in it to be rejected as mistaken.

Formalism can accordingly be summed up as proffering the possibility

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8. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 563-76 (1983). Reference to this well-known account guarantees that my defense engages the anti-formalist contentions to which it purports to respond. Moreover, the conception of formalism Unger presents is (as he rightly points out, *see infra* note 14) presupposed in the thinking of orthodox lawyers, so that it implicitly informs whatever assumptions are current concerning law's internal order.

9. Unger, *supra* note 8, at 564.

10. *Id.* at 565.

11. *Id.*

12. *Id.* In Unger's terminology this feature is a characteristic of objectivism rather than formalism. Unger seems to distinguish between formalism and objectivism only because "[t]he modern lawyer may wish to keep his formalism while avoiding objectivist assumptions." *Id.* Since Unger himself considers (correctly in my view) such a distinction to be untenable, we may regard objectivism as an aspect of formalism.

of an "immanent moral rationality."[13] Each term in this phrase corresponds to one of the three features in Unger's description. The first feature, that law has a distinctive rationality, expresses the formalist conception of law negatively through a contrast with political justification. The second, the immanent operation of legal rationality, characterizes law's distinctiveness affirmatively through the claim that the content of law is elaborated from within. The third asserts the moral dimension of this rationality, ascribing normative force to its application.

Unger's description gives a satisfactory preliminary sketch.[14] All that needs to be added is that formalism, at least as I shall present it here, is

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13. *Id.* at 571.

14. The description reflects legal formalism both as it has been understood in the philosophic tradition of natural law and natural right and as it is presupposed in the ideal of coherence to which sophisticated legal systems aspire. According to the natural law tradition, law is a rational ordering that cannot be understood apart from the good which it functions to promote. The classic account is by St. Thomas Aquinas, in T. AQUINAS, *Treatise on Law*, in SUMMA THEOLOGICA I-II, QQ. 90-105, and in THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 3-91 (D. Bigongiari ed. 1953). For recent expositions, see J. FINNIS, *supra* note 7; H. VEATCH, HUMAN RIGHTS: FACTS OR FANCY (1985). In the natural right tradition, law is the realization of the requirements of the rational will, which is initially characterized by a capacity to abstract from particular conceptions of the good. *See* G. HEGEL, THE PHILOSOPHY OF RIGHT (T. Knox trans. 1952); I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (J. Ladd trans. 1965). These traditions postulate a version of formalism that has implications for the law's content. This formalism is therefore distinguishable from the thinner formalism of positivism, which contrasts the formal principle of legal validity with the material content of law and thus makes the notion of law as such indifferent to the law's content. *See* H. KELSEN, GENERAL THEORY OF LAW AND STATE (A. Wedberg trans. 1945); *cf.* Hegel, *Prefatory Lectures on the Philosophy of Law*, 8 CLIO 49 (A. Brudner trans. 1978):

> Positive jurisprudence has for its content authoritative law, all the laws that have validity in a state, and that have validity by virtue of being posited . . . . We are here concerned, first of all, with the form of law as the latter is an object for positive jurisprudence; the content will be given afterwards. The form is this: the law is valid whether the content is rational and intrinsically [*an und fur sich*] just, or whether it is extremely irrational, unjust, completely arbitrary, and given by the authority of external force. The bare fact of being, of having authority, says nothing about worth.

Id. at 62. Since positivism does not construe law as "an immanent moral rationality," its version of formalism is implicitly excluded from Unger's description, and it also falls outside the scope of this essay.

A noteworthy feature of Unger's account of formalism is that he now expressly refuses to equate formalism with "the search for a method of deduction from a gapless system of rules." Unger, *supra* note 8, at 564. He thereby expands the characterization of formalism that appeared in his own earlier work, *see* R. UNGER, KNOWLEDGE AND POLITICS 92 (1975), and in the work of others, *see, e.g.*, Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973); Schauer, *Formalism*, 97 YALE L.J. 509 (1988). Unger's account now includes the invocation of all impersonal formulations of legal content, including principles that do not deductively yield determinate conclusions. The relation between formalism and indeterminacy is discussed *infra* Section VI.

The felicity of Unger's description undermines the only criticism he makes of formalism. Unger's argument is one of probability. Formalism is

> unlikely to prove compatible with a broad range of the received understandings. . . . [Because] [t]he many conflicts of interest and vision that law-making involves, fought out by countless minds and wills working at cross-purposes, would have to be the vehicle of an immanent moral rationality whose message could be articulated by a single cohesive theory.

Unger, *supra* note 8, at 571. But Unger himself immediately points out that the compatibility of formalism and legal doctrine is "tacitly presupposed by the unreflective common sense of orthodox lawyers." *Id.* If the efforts of the legal profession (and of the judges drawn from its midst) are animated by this shared presupposition, the "countless minds and wills" that contribute to the elaboration of law may not in fact be "working at cross-purposes." At least, the tacit adherence to a common presupposition may cut down the odds of the incompatibility Unger postulates.

an integrative notion. The rationality, immanence, and normativity that characterize it are not disjointed attributes contingently combined, but mutually connected aspects of a single complex. For the formalist, law is not merely rational *and* immanent *and* normative; rather, it has each of these qualities only because it also has the other two.[15] Formalism postulates not merely the compresence of the features that Unger perceptively notices, but their mutual dependence and interrelationship in a single approach to legal understanding.

The most mysterious of the three formalist attributes is that of immanence.[16] By suggesting that the rationality of law lies in a moral order immanent to legal material, formalism postulates that juridical content can somehow sustain itself from within. The internalist dimension of formalism is at odds with current assumptions about law in several ways.

The dominant tendency today is to look upon the content of law from the standpoint of some external ideal that the law is to enforce or make authoritative. Implicit in contemporary scholarship is the idea that the law embodies or should embody some goal (e.g., wealth maximization,[17] market deterrence,[18] liberty,[19] utility,[20] solidarity[21]) that can be specified apart from law and can serve as the standard by which law is to be assessed. Thus law is regarded as an instrument for forwarding some independently desirable purpose given to it from the outside.

The external relation that these scholars believe exists between law and the content it comes to have reflects their positivist understanding of law. In the positivist conception, a legal reality is brought into existence by an act of will that transforms into law that which is otherwise not law.[22] The content of law as such is only the product of some law-creating act. Because the power to create law can work for good or for evil, a legal system is not a phenomenon that in itself immanently embodies a moral rationality.[23] Whether any particular law is moral is a matter to be settled by an argument outside rather than inside the law, through reference to the independent desirability of the ideals that the particular law reflects.

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15. Its rationality, for instance, consists in its being immanent to the normative relationships that it orders. Similarly, the law's normativity is a function of its success in embodying in its doctrines and institutions the rationality inherent to them.

16. Although the significance of rationality and normativity is highly controversial, they are at least recognizable as terms of contemporary academic discourse.

17. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

18. *See, e.g.*, G. CALABRESI, THE COSTS OF ACCIDENTS (1970).

19. *See, e.g.*, Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

20. *See, e.g.*, R. EPSTEIN, TAKINGS (1985).

21. *See, e.g.*, R. UNGER, PASSION: AN ESSAY ON PERSONALITY (1984).

22. *See* H. KELSEN, PURE THEORY OF LAW 2-10 (M. Knight trans. 1967).

23. In John Austin's famous formulation: "The existence of law is one thing; its merit or demerit is another." J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 184 (1832). For a modern treatment, see Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

In this conception the legislative process is the distinctive vehicle of legality. Through this process, something that is otherwise without legal significance gets inscribed into the schedule of collectively approved and authoritative aims. Legislation is the mechanism through which the legal system imports from the outside the material that it makes its own. It is not merely that the expressly legislative organs of governance are regarded as paradigmatic, but that public authority generally is conceived as being fundamentally legislative: Positivists consider even adjudication to be a species of legislative activity. All legal norms, even those elaborated by judges, depend on the metamorphosis into law of material that is originally non-legal.

This conception ascribes to law a primarily political nature. It is preoccupied with the notions of coercion, authority, and validity and with the identification of the external purposes that are to be transformed into legal norms. Law is regarded as wafting down from the publicly recognized organs of power, and legal relations are in the first instance relations between the holders of authority and the subjects of authority.[24]

In construing law as an immanent moral rationality, formalism directly challenges these assumptions about law's provenance, nature, and characteristic process. In the formalist conception, law has a content that is not imported from without but elaborated from within. Law is not so much an instrument in the service of foreign ideals as an end in itself constituting, as it were, its own ideal. Rather than being an exclusively positivist transformation of the non-legal into the juridical, law can involve the recognition of that which already has an inchoate juridical significance. The paradigmatic legal function is not the manufacturing of legal norms but the understanding of what is intimated by juridical arrangements and relationships. Legal creativity here is essentially cognitive, and it is most naturally expressed in adjudication conceived more as the discovery than as the making of law.

Legal formalism's postulation of an immanent rationality ties it to the rationalist tradition in Western philosophy, which grappled with the question of how something could be understood in and through itself.[25] To understand something in this way is to understand it unconditionally in the literal sense, i.e., as something whose intelligibility is not conditioned

24. *See, e.g.*, Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 41 (1979).

25. No doubt part of the unpopularity of legal formalism is based on the aversion of academic lawyers in the United States to this tradition. Rationalism has the reputation of being enmeshed in an arid conceptualism and encumbered with profitless metaphysical baggage. It is therefore regarded as incompatible with the pragmatic nature of legal analysis. The very fact that this tradition is now so remote should, however, make contemporary scholars leery of dismissing legal formalism as facilely as they do. Just as they are no longer familiar with what gives formalism its strength, so they perhaps ascribe unreal weaknesses to it. Having lost contact with the vocabulary, the philosophical literature and the conceptual apparatus that nourished legal formalism, can they be confident that their present rejection is based on anything more than an ignorant caricature?

by or dependent upon anything extrinsic. The legal formalist asserts that whatever else can or cannot be understood in this way, law at least can.

In particular, legal formalism endeavors to make the notion of form central to the understanding of juridical relationships. This notion has a distinguished and venerable history that stretches back from the present century to the great thinkers of classical antiquity. Yet contemporary writing on law rarely attends to its significance. My elucidation of formalism will attempt to make good this defect by first outlining what form is and then tracking its implications for legal philosophy. Form is the bedrock on which formalism rests. The general inattention to the significance of form renders the conclusion that formalism has been discredited the merest dogma. I wish to call this dogma into question, to expose it as such by focusing on what it ignores, and to suggest that formalism, properly understood, is indispensable to our understanding of law.

II. The Nature of Form

Legal formalism claims that juridical relationships can be understood as embodying, in Unger's phrase, an "immanent moral rationality." The function of law for the formalist is to express this immanent rationality in the doctrines, institutions, and decisions of the positive law.[26] Juridical relationships so conceived are intelligible by reference to themselves and not solely as the translation into law of an independently desirable political purpose.

Legal form is concerned with the understanding of juridical relationships.[27] Since the point of my entire exposition of formalism is to present an affirmative conception of the juridical, I can indicate the significance of the term at this preliminary only negatively. One example is the relationship that obtains between the victim and the person who intentionally inflicts a blow. While this is a physical event, its juridical significance cannot be grasped solely through the investigation of the mechanics of the impact. Nor can its juridical significance be understood solely by reference to the positive law of a particular jurisdiction. It is true that a sophisticated system of positive law aims at an intelligible connection between the existence and the resolution of controversy and that its holdings are therefore relevant to the understanding of the juridical nature of the relationship. The holdings that govern this incident, however, may be mistaken even from a legal standpoint. The positive law may provide only a defective rendering of the juridical significance of what happened.[28] Similarly,

26. The positive law is immanently rational to the extent that it captures and reflects the contours of rationality that are internal to the relationships that law governs.

27. I shall hereafter use the term "juridical" in its etymological sense to refer to that which is declaratory of *jus* and which thereby represents an essentially legal mode of intelligibility.

28. This essay is about law as a mode of ordering, not as a set of posited norms. Inasmuch as law is a mode of ordering, it has a capacity for coherence. My concern is with the nature of the coherence

a juridical relationship is not defined historically or sociologically in terms of the development of this positive law or of the societal considerations that sustain it. The juridical nature of a relationship refers, in a sense still to be defined, to a paradigmatically legal mode of intelligibility that goes beyond the physical, the positive, the historical, or the sociological.

Our first task, then, is to clarify the formalist conception of understanding. What is it for something to be intelligible? And how do juridical relationships fit into this conception of intelligibility?

A. *Form and Content*

The intelligibility of any matter refers to a relationship between the matter's content and its form. When we seek the intelligibility of something, we want to know *what* the something is. This search for "whatness" presupposes that the something is a *this* and not a *that*, that it has, in other words, a determinate content. This content is determinate because it sets the matter apart from other matters and prevents it from falling back into the chaos of unintelligible indeterminacy that its identification as a something denies. The content has thus both a positive and a negative significance: It makes the matter in question what it is, and it differentiates it from what it is not.

The set of properties that renders a content determinate[29] is, when considered in itself, the matter's form.[30] Form is the ensemble of characteristics that constitute the matter in question as a unity identical to that of other matters of the same kind and distinguishable from matters of a different kind. Form is not separate from content but is the ensemble of characteristics that marks the content as determinate, and therefore marks the content as a content.

The interrelationship between form and content can be illustrated by considering the form of a table. Those characteristics that mark the content of a table as determinate may include elevation, flatness, hardness,

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applicable to juridical relationships. Although I assume that there are legal systems that value coherence, *see infra* note 42, I make no claim about the extent to which the positive law of any jurisdiction (or set of jurisdictions) has achieved coherence.

29. Determinacy is discussed *infra* Section VI-C.

30. For a contemporary treatment of form, see A. BERNDTSON, POWER, FORM, AND MIND 105-24 (1981). Form has recently been discussed from the deconstructive standpoint. *See* H. STATEN, WITTGENSTEIN AND DERRIDA 4-19 (1984). For the classic modern treatment of form as an Aristotelian notion, see J. OWENS, THE DOCTRINE OF BEING IN THE ARISTOTELIAN 'METAPHYSICS' 307-99 (3d ed. 1978). Twentieth-century legal philosophers who have paid attention to the significance of form are G. DEL VECCHIO, THE FORMAL BASES OF LAW 68-80 (J. Lisle trans. 1921); M. OAKESHOTT, ON HUMAN CONDUCT 3-8 (1975) (understanding in terms of ideal character); and R. STAMMLER, THE THEORY OF JUSTICE 167-69 (I. Husik trans. 1925). Emilio Betti has defined form as "an homogeneous structure in which a number of perceptible elements are related to one another and which is suitable for preserving the character of the mind that created it or that is embodied in it." Betti, *Hermeneutics as the General Methodology of the* Geisteswissenschaften, in CONTEMPORARY HERMENEUTICS 54 (J. Bleicher ed. 1980). For a recent treatment of related issues, see S. MEIKLE, ESSENTIALISM IN THE THOUGHT OF KARL MARX 153-74 (1985).

typical function, and so on. By reference to the ensemble of the characteristics of "tableness" that make up the form of a table, we can understand all the embodiments of this form as being the same sort of thing and each table as being a single thing. The ensemble of characteristics that constitute its form makes this thing intelligible as a table, and it has the determinate content of a table inasmuch as it is the embodiment of this intelligible form.

Form and content are correlative and interpenetrating. If any content were formless, it would lack the very determinateness which makes it possible for us to experience it as a something, and it would therefore be, so far as we are concerned, an indeterminate something or other that is nothing in particular. If a form, on the other hand, were without content, it would not be a form *of* anything and therefore not a form at all. Form therefore *is* content and content form, with the distinction between them being notional, not ontological. A thing's form is not a new thing existing separately from that of which it is the form. Rather, form discloses the intelligibility of the thing's content, so that the form is the content qua intelligible and, conversely, the content is the form qua determinate. We understand something when form and content are congruent, that is, when the ensemble of characteristics that we consider to be the form represents what the content really is and, equivalently, when what we consider to be the content adequately expresses the thing's form. Whatever is thought to be in the gap between content and form (for example, a characteristic ascribed to the content that is not a component of its form or a characteristic considered part of the form but not present in the content) is either error or ignorance.[31]

The notion of form has three interrelated aspects. First, to see the form of something is to regard that thing as having a certain character. This character is the ensemble of characteristics that allows us to define something as the sort of thing it is. The specification of the characteristics that go to a thing's form is not an exhaustive recapitulation of all of a thing's individuating attributes; that would be as unilluminating as a detailed map drawn to actual scale that reproduced the topography it was supposed to outline. Rather, the exercise demands a selection of the attributes so decisive of the thing's character that they can truly be said to *characterize* it, and this entails a differentiation between the attributes that are definitive of the thing and those that are merely incidental.[32] Accordingly,

31. *See* G. HEGEL, THE PHILOSOPHY OF RIGHT, *supra* note 14, at 2 ("What we have to do with here is philosophical *science*, and in such science content is essentially bound up with form."); *cf.* G. HEGEL, THE PHILOSOPHY OF MIND (ENCYCLOPEDIA OF THE PHILOSOPHICAL SCIENCES) § 383, at 12 (W. Wallace trans. 1971) ("[F]or form in its most concrete signification is reason as speculative knowing, and content is reason as the substantial essence of actuality, whether ethical or natural. The known identity of these two is the philosophic idea.").

32. The differentiation is illustrated by Aquinas:

[T]he essence or nature includes only what falls within the definition of the species; as human-

in inquiring after form we can ask, "[W]hat elements of a conception are for other constituents of the same conception logically determining, in the sense that they cannot be left out of account, if one is not to lose the entire mental representation which is directly under discussion. . .?"[33] Through reference to the ensemble of characteristics that give a thing its character, we comprehend the thing in question as what it is; in classical terminology, we grasp its nature or essence. And conversely, if its character eludes us, we cannot be said to have understood it at all.

Second, form is a principle of structure or unity. The thing that has a form is a single entity, characterized by the ensemble of attributes that make it what it is. In comprehending a thing's form, we understand the thing neither as an aggregate of independently intelligible properties nor as a homogeneous unit consisting of an extended single property. Rather, the thing is a single entity comprised of the set of characteristics that defines it, and it has the unity of an articulated whole that is not reducible to—is therefore greater than—the sum of all of its parts. The component characteristics that partake of any form are accordingly understood as mutually related through the oneness of what they inform.

Third, form signifies the genericity of the thing's character. Genericity is that which allows us to regard all the instances of the matter in question as having the same character and as being other than whatever has a different character. Because specifying an ensemble of characteristics involves distinguishing the essential from the inessential qualities, form refers not to the thing's fully individuated particularity, but to the general class under which it falls. The set of properties that makes something a table, for instance, is found in all tables and constitutes the genericity of what it is to be a table. Form is thus the principle that allows a thing to be grouped with others of the same sort.

Thus form exhibits character, unity and genericity as the three essential aspects of intelligibility. Together the characteristics comprise the thing's character, the grasp of which is indispensable to the understanding of what the thing is. The character is not the aggregate of these characteristics wherever any of them is located, but a set that achieves its distinctive

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> ity includes all that falls within the definition of man, for it is by this that man is man, and it is this that humanity signifies, that, namely, whereby man is man. Now individual matter, with all the individuating accidents, does not fall within the definition of the species. For this particular flesh, these bones, this blackness or whiteness, etc., do not fall within the definition of a man. Therefore this flesh, these bones, and the accidental qualities designating this particular matter, are not included in humanity; and yet they are included in the reality which is a man. Hence, the reality which is a man has something in it that humanity does not have. Consequently, humanity and a man are not wholly identical, but humanity is taken to mean the formal part of a man, because the principles whereby a thing is defined function as the formal constituent in relation to individuating matter.

T. AQUINAS, SUMMA THEOLOGICA I., Q. 3, Art. 3, in INTRODUCTION TO ST. THOMAS AQUINAS 29 (A. Pegis ed. 1948).

33. Stammler, *Fundamental Tendencies in Modern Jurisprudence*, (pts. 1 & 2), 21 MICH. L. REV. 862, 883 (1922-1923).

unity by constituting the thing in question as a single thing classifiable with other things of the same sort. Such characteristics are not significant in isolation but only inasmuch as they make up the character of the whole that they constitute: To modify an essential characteristic is to modify the whole, and to modify the whole is to alter the significance of its constitutive characteristics.

B. *The Relevance of Immanent Intelligibility*

The point of referring to something's form is to grasp the thing's nature or intelligible essence, and thus to understand that thing as what it is. One might object that this enterprise is doomed to failure, because in setting out what purports to be a thing's form, we are not exhibiting anything about the thing but only about ourselves. The way in which we divide and classify the world and associate certain objects with certain qualities is a reflection, it might be said, of the circumstances and requirements of our own life rather than of the world on to which our conclusions are projected. Form varies according to vocabulary, linguistic practices, and particular needs and purposes: Such variability belies the permanence and universality that is sought in the notion of form. As Locke put it, "those *Forms,* which there hath been so much noise made about, are only *Chimaera's*; which give us no light into the specifick Natures of Things. . . . [T]hese Boundaries of *Species,* are as Men, and not as Nature makes them. . . ."[34]

This objection alleges that the characteristics going to the form of something do not assume their significance from the internal nature of the thing but from our external requirements as users, observers, and inquirers. The inquirer approaches the object from the outside and subjects it to the demands of his or her enterprise, while the object itself lies shapeless and is available to whatever form the cognizing mind reads into it. For example, the peculiarly shaped wood before us is a table because we can make it serviceable for a function that we ascribe to it or that dominated the mind of its manufacturer. Form thus bespeaks an intelligibility introduced from the outside.

The crucial presupposition of this criticism is that a qualitative disjunction exists between the inquirer's thought and the object of the enquiry. According to this view, the object is the target, but need not be the embodiment, of thought. In specifying the attributes through which it characterizes the object, thought has no access to whatever might illuminate the thing's intelligibility from within and therefore imposes a foreign occupation that serves its own interests.

Whatever the validity of this presupposition with regard to natural or

34. J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING book III, ch. VI, § 30 (P. Nidditch ed. 1975).

artifactual objects, the legal formalist denies that this is the entire truth with respect to law. Legal formalism postulates that the law's content can be understood in and through itself by reference to the mode of thinking that shapes it from inside. For the formalist, law is *constituted* by thought: Its content is made up of the concepts (e.g., cause, remoteness, duty, consideration, offer and acceptance) that inform juridical relationships. Law is identical to the ideas of which it is comprised, and the intelligibility of law lies in grasping the order and connection of these ideas.[35] Because law is, at least in the formalist understanding, essentially conceptual, it does not present itself as alien to the enquirer's efforts to comprehend it. Thus the formalist assumption is that law is, however inchoately, an exhibition of intelligence.[36] For this reason our understanding can, without sacrifice or diminution, assume the perspective that animates the juridical enterprise from within. Accordingly, in the formalist view there is in law an integration of the activity of understanding with the matter to be understood. Since law is assumed to be intelligible from within, the content of law is regarded as being homogeneous with, and therefore accessible to, thought.

By eliminating the disjunction between the understanding and the object one is endeavoring to understand, the formalist assumption, if it can be sustained, opens the path to the elucidation of juridical content in terms of its underlying form. If law is constituted by thought and therefore accessible from within to the operation of our intelligence, the sting is drawn—at least with respect to law—from Locke's observation that the boundaries of form are as men and not as nature makes them. Inasmuch as law's nature is to be immanently intelligible, one can grasp this nature without distortion. Just as one can understand geometry by working through a geometrical perplexity from the inside, so one can understand law by an effort of mind that penetrates to, and participates in, the structure of thought that law embodies.

The elucidation of law through the notion of form is a way of exhibiting the immanent intelligibility of the law's content. One might suppose that formalism's dependence on immanent intelligibility is self-defeating: If law is already immanently intelligible, nothing remains to be accomplished through the elucidation of legal form. This, however, is not so. Although the law is capable of being understood from within, such an understanding is not necessarily fully explicit in the legal materials. Moreover, because sophisticated legal systems admit the possibility that a given juridical determination may be erroneous from an internal perspec-

35. The characteristics of a juridical relationship are not predicates ascribed it by outside observers, but are the concepts (and the corresponding doctrines and institutions) that make up its interior structure.

36. For an explication of the notion of an "exhibition of intelligence," see M. OAKESHOTT, *supra* note 30, at 13-15.

tive, the law's immanent intelligibility may be defectively expressed in any given case. The task for the formalist is to make explicit the intelligibility latent in the legal materials and thereby to indicate that from which legal error is a deviation. Form represents the interplay of character, unity, and genericity. Thus the formalist will attempt to discern the essential characteristics of a legal relationship and to disclose how these characteristics cohere to make this relationship irreducible and hence classifiable with other relationships of the same sort. The function of form is to draw out the law's immanent intelligibility by making salient the nature of unity and coherence both within and among legal relationships.

C. *Some Implications of Immanent Intelligibility*

The following parts of this Article clarify how the formalist elucidation of law proceeds and the assumption of law's immanent intelligibility is substantiated. It is appropriate at this point, however, to signal several general implications of this conception of intelligibility.

Immanent intelligibility is not a subclass but a paradigm of intelligibility. Its virtue is that whatever is immanently intelligible can be understood self-sufficiently without recourse to something external that would pose the problem of intelligibility afresh. If something is not intelligible in and through itself, it must, if it is intelligible at all, be intelligible through something else. But unless that other thing is in its turn intelligible through itself, it will merely point to something else on which its own understanding depends. This regression continues until the understanding alights upon something that is immanently intelligible. Therefore, intelligibility that is immanent to its subject matter is the most satisfactory notion of understanding, and not merely one among many.

Moreover, something that is immanently intelligible must be understood by reference to this quality. If the immanence of a thing's intelligibility is disregarded in favor of an external mode of comprehension, we simply fail to understand the most understandable aspect of the thing in question. Just as the profoundest understanding of the Pythagorean theorem comes from working through its geometric proof rather than by examining the economic conditions of Magna Graecia that may have influenced Pythagoras in his day, so any immanently intelligible matter must be grasped by reference to its immanent intelligibility.

Two consequences of conceiving law in terms of the immanent intelligibility of form merit particular notice. First, the scientific explanation of natural phenomena is not exemplary for matters that are immanently intelligible. The scientist is not an omnisciently pantheistic god who knows nature from inside. Scientific explanation is based on observation combined with the hypothesis that natural phenomena conform to pervasive regularities. Since the content of science is, as Hegel put it, "not known as

moulded from within through the thoughts which lie at the ground of it,"[37] this understanding is categorically different from, and inferior to, an intelligibility that has an internal dimension.[38]

The relationship of immanent intelligibility to scientific explanation bears directly on a very common anti-formalist argument. Through the notion of form the formalist draws attention to the rationality inherent in legal relationships and thereby denies law's radical contingency. The objection points to the contention of philosophers of science that even the supposedly objective enterprise of scientific inquiry is conducted on the shifting sands of historical contingency, and concludes that this contingency applies to law *a fortiori*.[39] From the formalist perspective, however, this argument does not get off the ground. Even if the controversy about scientific objectivity is resolved in the manner most favorable to the objector,[40] formalism rejects the premise that our notion of legal understanding must follow in the ruts of scientific explanation. For the legal formalist, legal phenomena are assumed to differ from natural phenomena because they are immanently understandable. Since on this assumption law is more perspicuous than nature, it is a mistake to burden law with conclusions drawn from the scientist's external—and therefore less secure—mode of cognition.

The second consequence of the connection between law and the immanent intelligibility of form is that legal form is inherently non-instrumental. An instrument can be understood only by reference to the purpose it serves. The instrument's intelligibility lies outside itself in the end toward which the instrument is a means. Therefore, to the extent that juridical relationships can be seen in the light of their underlying forms and thus by reference to themselves, there is no need to grasp them instrumentally. For formalism, legal ordering is not the collective pursuit of a desirable purpose. Instead, it is the specification of the norms and principles immanent to juridically intelligible relationships. Formalism repudiates analysis that conceives of legal justification in terms of some goal that

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37. G. HEGEL, HEGEL'S LOGIC 190 (W. Wallace trans. 1975).

38. The point can be put in Kantian terms. Jurisprudence belongs to the realm of freedom, for which reason's principles are constitutive, whereas the principles for the interpretation of specific natural phenomena are merely regulative. *See, e.g.*, I. KANT, THE CRITIQUE OF JUDGEMENT 8 (J. Meredith trans. 1952). Kant suggests that the latter are thought of by analogy to the former. *Id.* at 20.

39. The canonical texts for this argument in epistemology and philosophy of science are T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970) and R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979). For examples of the argument in legal theory, see Caudill, *Disclosing Tilt: A Partial Defence of Critical Legal Studies and a Comparative Introduction to the Philosophy of the Law-Idea*, 72 IOWA L. REV. 287, 305 (1987); Hutchinson & Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 219-20 (1984); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 34 (1984).

40. For a recent defense of rationalism against the attacks of Kuhn and Feyerabend, see W. NEWTON-SMITH, THE RATIONALITY OF SCIENCE (1981).

is independent of the conceptual structure of the legal arrangement in question.

The formalist separation of law from politics reflects this distinction between immanent and instrumental understandings. Politics is differentiated from law to the extent that politics is the domain of collective instrumentalist purposes. What Unger noted was the more determinate rationality of law is the set of values which can be located within the immanently intelligible enterprise of juridical elaboration, as contrasted with the state's ranging at large among the possible ends to which it might orient its efforts.

The formalist asserts the possibility of a non-instrumental understanding of juridical relations. This assertion, however, contains the following insidious implication: The mere possibility of a non-instrumental understanding renders instrumental understandings of the same legal material superfluous, but not vice versa. This follows from the paradigmatic quality of immanent intelligibility. Instrumental understandings are by their nature imperfect. They first transfer the burden of intelligibility from the subject of the inquiry to the external end this subject serves and then, in turn, require that end to be grasped somehow, presumably by reference to some further external end. Unless this endless shifting of ends can be arrested at a point of non-instrumental stability, the understanding is caught in a game of musical chairs, in which it seems to know everything only because it knows nothing.[41] Perhaps the melancholy truth is that instrumentalism is the most that legal analysis can achieve. But the possibility of a non-instrumental understanding, once established, reveals the inferiority of the instrumentalist alternative. Therefore instrumental and non-instrumental understandings do not have an equal footing. The latter is independent and fundamental; the former comes into play only by default, as a second-best. Instrumentalism cannot remain in the competition once non-instrumentalism enters the field.

D. *Summary*

Form, then, is the ensemble of characteristics that determines the content as a content, as a *this* and not a *that*, and thus differentiates content from the indeterminacy of featureless existence. By exhibiting the essential characteristics of some matter, form allows the matter to be conceived of

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41. Compare the following comments on Spinoza's rationalistic method:

> [A] basic assumption of this method is that thought must find a resting place in a single first principle, which not only serves to explain everything else, but which is perfectly intelligible in its own right. Moreover, since a first principle cannot, by definition be explained in terms of anything prior, it must somehow be self-explicating or self-justifying. Anything less would fail to satisfy the demands of thought, for it would provide us with a principle of explanation that itself stands in need of explanation, and this would obviously lead to an infinite regress and be cause for hopeless skepticism.

H. ALLISON, BENEDICT DE SPINOZA: AN INTRODUCTION 60-61 (rev. ed. 1987).

as something possessing the unity of singleness and to be grouped with other things of the same sort. Form and content are not separate. Rather, they stand in a reciprocal relationship, with form being the intelligibility of determinate content and content being the realization of intelligible form. No extrinsic standpoint is brought to bear upon this relationship between form and content. Form signifies the immanence of intelligibility to that which is being understood. If this approach can be sustained for law, the intelligibility it yields will be one which is internal to juridical relations: These relations will be understood by reference to themselves, and not by reference to something else. An instrumental understanding, in contrast, posits a dependence of the instrument on an end that is beyond it. The extent to which juridical relations can be understood in terms of themselves, therefore, is also the extent to which the political understanding of law—as a means to some ulterior end—is excluded.

III. Moving From Content Toward Form

A. *The Two-Stage Movement*

To understand law as the manifestation of form is to discern an internal dimension of intelligibility in law's content. The shape of this intelligibility emerges in two stages. One must first discern the essential characteristics of juridical relationships in a sophisticated legal system. Because the sophistication of such a system consists in its tendency toward coherence,[42] one can then inquire into the extent to which these initially-identified characteristics can be understood as a unified set. In this way, an appreciation of the nature of coherence for juridical relationships arises out of reflection on the content of law. Because form is the intelligibility of a determinate content, the traces of juridical form should be visible in and through the most significant features of the law's content. In this section I wish to outline this movement from content toward form.

1. *Identifying Essential Characteristics*

In the first stage we distill from the law's content the features that might plausibly be considered the essential characteristics of juridical in-

42. In this essay, I often refer to a "sophisticated legal system," by which I mean a legal system that values coherence and, accordingly, has a tendency toward it. I assume that most readers of this essay will know of such systems from their own study or experience. In my opinion, the "great" legal systems (e.g., the common law, Roman law and its civil law offspring, Talmudic law) are sophisticated in this sense. Reference to a sophisticated legal system is a way of making available insight drawn from the legal doctrines, concepts, and institutions with which we are familiar. Not every phenomenon that satisfies the positivist criteria of a legal system, *see, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 77-96 (1961), is sophisticated in my sense, nor has every (or any) sophisticated legal system achieved the coherence toward which it tends. My concern here is with the nature of coherence, not with the mechanics through which the valuing of coherence is manifested or the tendency toward it is operative.

telligibility.[43] These features will be those that are so central that they must be understood if there is to be any understanding at all of the legal phenomena in question. At this stage these features seem to emerge spontaneously as Archimedean points in legal consciousness; even in the absence of a theoretical account of their ground or interrelation, their centrality is provisionally certified because any intuitively plausible discussion of law either invokes them or presupposes them. At the level of theory, these are the features which must be explained or explained away: Any exposition that ignores them or does them violence runs the risk of being regarded as contrived or artificial or somehow amiss. And at the level of practice, legal discourse will incorporate or presuppose these features and will explicitly or implicitly recognize them as inescapably basic to the continuing elaboration of legal doctrine.

Consider, for example, an action for negligence. One thinks through a problem in negligence not only by reference to the corpus of specific holdings directed toward very specific questions (for example, whether there is liability for nervous shock[44] or whether the landlord is under a duty to protect tenants against criminals[45]), but by seeing these holdings as representing broader legal concepts (for instance, duty, cause, and fault). These concepts, in turn, eddy out into more fundamental and comprehensive notions. Causation, for instance, applies only in a situation of misfeasance and not non-feasance. This presupposes the distinction between the duty to abstain from inflicting harm and the freedom to withhold a benefit, and this distinction, in turn, points to a wide correlativity of plaintiff's right and defendant's duty. These features of legal doctrine figure in a litigational format that grants standing to two parties who appear before a disinterested and impartial adjudicator and that culminates, if the plaintiff is successful, in the transfer of a sum from one party to the other.

These doctrinal, conceptual, and institutional features, and others like them, are fixed points of tort law. When we refer to tort law, such features characterize the object of our attention. These features form the stuff of lawyers' talk. Their relevance is not due merely to the statistical regularity of their appearance or invocation in the ever-expanding corpus of legal materials. Rather, this regularity is itself a consequence of our funneling our thinking through them as we engage in the enterprise of understanding and elaborating the law.

The apparent centrality of these features does not mean that they escape controversy. Court decisions or legal scholarship may call any of

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43. For an outstanding example of this kind of distillation, see H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958).

44. *See, e.g.*, McLoughlin v. O'Brian, [1983] 2 App. Cas. 410 (H.L.) (damages recoverable for nervous shock).

45. *See, e.g.*, Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (landlord has duty to protect tenants against criminals when landlord had notice).

them into question. For instance, a court can disregard the convention of retroactive judgment by restricting its holding to its prospective effect,[46] or the economic analysis of tort law can, through its use of Coase's theorem,[47] ignore the distinction between non-feasance and misfeasance, or the scholarship of Critical Legal Studies can attempt to extirpate root and branch the sense of significance that attaches to all of these features. These developments, however, often attest to the felt significance of these characteristics of law. Doctrinal innovations, such as prospective overruling, are reserved for special occasions and require special justifications. And the eclat of economic analysis or Critical Legal Studies can be explained by the exhilaration they produce precisely because they float free of the moorings generally accepted for legal understanding.

These challenges gain their plausibility from the fact that the initial singling out of the essential features of juridical intelligibility is at an intuitive level.[48] In the absence of an account of the significance of these features, their centrality can be denied by the mere assertion of a different intuition. Taken by itself, the process sketched so far is exposed to the charge that the inarticulate legal experience on which it rests camouflages an ideological or subjective selection for which no valid criteria exist.

2. *The Coherence of the Characteristics*

Identifying elements of the content of a sophisticated legal system as apparently fixed points of intelligibility, however, is only the first step toward understanding law. Confirming that these elements are truly essential depends on the answer to a further question: Do they constitute a coherent ensemble? If these elements are unconnected or pull in different directions, the initial illumination that they offer would, for the formalist, be fraudulent. The formalist assumes that a juridically intelligible relationship cannot consist in an aggregate of conceptually disjunct or inconsistent elements that, like a pile of pebbles, happen to be juxtaposed. If an initially identified feature is to serve as a fixed point of legal understanding, it must participate in the unity that renders a legal relationship intelligible as what it is. It must, in short, signify an underlying form.

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46. *See, e.g.*, Li v. Yellow Cab Co. of Cal., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (adoption of comparative negligence rule made prospective).

47. *See, e.g.*, Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

48. Often, those who wish to defend the centrality of these features can do no more than baldly reiterate that what has been impugned is deeply embedded in our comprehension of the situation at hand. For example, Richard Epstein attempts to stave off the implications of the Coase theorem by (1) pointing to the transitive verbs used by Coase himself, and (2) distinguishing between causal reciprocity and the notion of redress for harm caused. R. EPSTEIN, *supra* note 19, at 164-65. Epstein does not explain (1) why linguistic structure overbears economic insight, or (2) how Coase can be refuted by rehashing the very distinction that Coase's analysis challenges. Epstein's assertion that a normative theory of torts must take into account common sense notions of individual responsibility is a conclusion that is consequent on the dismissal of economic analysis, not a reason for dismissing it. *Id.* at 151, 164.

As we have seen, form is a principle of structure. To the extent that the law governing a relationship is more than a succession of ad hoc resolutions of particular controversies, the law's doctrines and institutions will bear some imprint of form. Through this form the features that characterize the relationship can be understood as making up a unified whole. Because for the formalist a relationship is intelligible only insofar as its features are coherent, their coherence is a way of determining whether the features initially identified truly have the significance that legal experience ascribes to them.

Many components of negligence law, for instance, seem to exemplify a single theme, that the relationship between tortfeasor and victim is bipolar. Factual causation does this by connecting the tortfeasor and the victim through the transitivity of cause and effect. The issues of duty and proximity are similarly bipolar: Through them the riskiness of the defendant's act is viewed from the standpoint of its reasonably foreseeable effects on the plaintiff. The adjudicative framework of tort law institutionally matches the bipolar nature of negligence doctrine. The award of damages is the remedial expression of bipolarity. This convergence suggests that bipolarity is the key to the coherence of negligence law. The formalist attempts to see whether these doctrinal and institutional elements can indeed be understood as the articulations of a coherent justificatory structure of bipolar interaction. If they can, the centrality of the bipolar characteristics that were initially identified as essential is confirmed. At its most inclusive, such a coherent justificatory structure is the form that renders intelligible the relationships to which it applies. Conversely, any feature incapable of integration into a coherent structure cannot be truly constitutive of the intelligibility of a juridical relationship.

For the formalist, a juridical relationship is a conceptual organism, in which each component is meaningful as part of a whole. The functioning of any constituent of this unity can be fully understood only in the light of the functioning of all the others. If, for example, fault and causation are as essential as tort doctrine assumes, each will compliment the other, and the relationship of tortfeasor and victim will be unintelligible without both.[49] A conception of tort liability in which the plaintiff can recover from the defendant for injury in the absence of wrongdoing, or in which the defendant is liable to the plaintiff for a wrong that does not materialize in injury, would be a "conceptual monstrosity" produced by the hacking apart of aspects that for this relationship have—so it is assumed—significance only in combination.[50] These essential doctrinal

49. For a detailed account, see Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987).

50. Michael Oakeshott distinguishes two meanings of conceivability. The first refers to what can, as a merely psychological matter, be pictured or brought together in the mind. The second relates to what can be maintained as a coherent unity. A conceptual monstrosity is something that is conceivable

aspects and the adjudicative framework in which they are elaborated must be similarly integrated. The tort relationship is thus constituted by an ensemble of conceptual and institutional characteristics. If the intelligibility of a tort relationship could withstand the omission or amputation of any aspect of this ensemble, that very fact would show that the initial inclusion of that aspect among the relationship's essential characteristics was mistaken. Conversely, the reciprocal interconnection of all the truly essential aspects of a tort relation would mean that the omission of one of them would undermine the intelligibility of all the others.

B. *Justificatory Coherence*

The unity revealed by the notion of legal form represents, accordingly, an extremely ambitious conception of coherence. A legal form is a single justificatory structure that embraces the conceptual and institutional aspects essential to the understanding of a juridical relationship. Although this structure can be articulated into parts, these parts have no vitality independent of the structure that unifies them. It is, of course, possible to examine one part without explicitly referring to another, as tort casebooks and treatises do when they examine *seriatim* the various ingredients of the negligence action. If these ingredients are truly essential to the intelligibility of negligence law by being aspects of its form, however, all of them implicitly remain present when the spotlight is directed onto one. Because they are cognizable only through the unity that they comprise, the intelligibility of each simultaneously conditions, and is conditioned by, the intelligibility of all the others.

The formalist conception of coherence can be illustrated by consideration of the loss-spreading justification for tort liability. Under this justification, a court regards liability as a mechanism for distributing the accident loss among the largest number of persons. It has long been recognized that the principle of the diminishing marginal utility of money on which this justification rests should lead to social insurance of accident losses and, more generally, to a redistribution of wealth through progressive taxation.[51] Nevertheless, loss-spreading has been defended as consistent with the general ideology tort law on two grounds: First, the judicial enforcement of loss-spreading preserves the decentralized decision-making that is traditional to tort law, and, second, loss-spreading does not aim at a new pattern of wealth, but at re-establishing the distribution that was disturbed by the perpetration of an injury.[52]

For the formalist these defenses are unsatisfactory because of their inco-

in the first but not in the second of Oakeshott's two senses. *See* M. OAKESHOTT, EXPERIENCE AND ITS MODES 35-36 (1933).

51. G. CALABRESI, *supra* note 18, at 39-45.

52. *See* H. STEINER, MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS 76-78 (1987). A specific example of loss-spreading is discussed *infra* note 119 and accompanying text.

herent joinder of the doctrinal and the institutional. They turn on using the adjudicative format of tort law to restrict the reach of the justificatory force of the principle that animates loss-spreading. Because loss-spreading is triggered by the plaintiff's suit against the defendant, it can be mandated only in a sporadic and decentralized way. Since a successful tort action undoes only the effects of an injury caused by another, the distributional impetus of loss-spreading is controlled by the impossibility of holding the defendant liable for the injuries he or she has not caused. Nothing about loss-spreading as a principle, however, is coterminous with the scope or occasion provided by tort law. The idea that money should be exacted from some for the benefit of others in order to spread the burden of a catastrophic loss as lightly and as widely as possible is as pertinent to a non-tortious, as to a tortious, injury. The levies loss-spreading justifies are not confined to tortfeasors. Accordingly, the appropriate institutional setting for loss-spreading is not the bipolarity of litigation, but a general scheme of social insurance or taxation that would spread accidental loss as thinly and broadly as possible. The restrictions arising out of the adjudicative format do not, therefore, correspond to any feature internal to the idea of loss-spreading. Rather, they are imposed on this idea from outside it, so that it is not operationalized to the full extent of its normative reach.

Adjudication and the principle underlying loss-spreading are not part of each other's justificatory structure. The incoherence of their combination demonstrates that they are not aspects of the same legal form. To attempt loss-spreading through tort adjudication is to fail to give full faith and credit to the justificatory dimension of either loss-spreading or adjudication, the former because it is channelled into an institutional framework that does not give effect to its normative force, the latter because it is placed in the service of an ideal that exceeds its competence. Each is compromised by its artificial juxtaposition with the other.

Formalism insists on the integrity of law's justification. It arranges the various doctrinal and institutional considerations into internally coherent justificatory structures, so that the components of any single such structure partake of whatever normative force gives life to the structure in its entirety. Since all the aspects of any justificatory structure comprise a single whole whose parts are interdependent, the structure's normative force is as present in one part as it is in any other. Justification, therefore, cannot properly be truncated. It must be allowed to expand completely into the space that it naturally fills.

C. *Implications and Objections*

Coherence is the criterion of truth for the formalist understanding of a juridical relationship.[53] As the loss-spreading example demonstrated, the coherence of an ensemble of justificatory aspects can confirm or negate the essentiality of a given legal feature. The formalist elucidation of legal phenomena is devoted to making explicit the unity possible in juridical relationships, and the disclosure of this unity is the yardstick of its success. The point is not that the positive law of a given jurisdiction necessarily embodies justificatory coherence, but that such coherence is possible, and that positive law is intelligible to the extent that it is achieved and defective to the extent that it is not.

Coherence is inherently expansive: It resists compartmentalization and seeks to encompass as much as possible. The illumination that formalism yields is proportional to the possible unity that its analysis can disclose. Just as formalism resists treating every tortious incident as a particular that is conceptually unconnected with the understanding of any other tortious incident, so it resists considering tort law, taken in its entirety, to be conceptually unconnected to other branches of law. Formalism thus seeks to confirm the possibility that tort law, for example, is not only coherent on its own, but that the underlying contours of this coherence can be found throughout private law (and perhaps beyond). In this way, private law as a whole might be understood as a massive expression of legal form. Accordingly, the unity of form is operative among—as well as within—juridical relationships. Or rather, to put it more accurately, the most inclusive conception of the unity of a relationship is also the most general conception of the justificatory structure that the relationship exemplifies. Unity and genericity are thus mutually intertwined in the coherence of the features that make up the legal form. The greater the reach of that coherence, the more profound the understanding of the juridical relationship.

The reason coherence functions as the criterion of truth is that legal form is concerned with immanent intelligibility. Such an intelligibility cannot be validated by anything outside itself, for then it would no longer be immanent. Formalism thus denies that juridical coherence can properly

53. Compare Kant's comments on the regulative employment of the ideas of reason:

> If we consider in its whole range the knowledge obtained for us by the understanding, we find that what is peculiarly distinctive of reason in its attitude to this body of knowledge, is that it prescribes and seeks to achieve its *systematization*, that is, to exhibit the connection of its parts in conformity with a single principle. This unity of reason always presupposes an idea, namely, that of the form of a whole of knowledge—a whole which is prior to the determinate knowledge of the parts and which contains the conditions that determine *a priori* for every part its position and relation to the other parts . . . . The hypothetical employment of reason has, therefore, as its aim the systematic unity of the knowledge of understanding, and this unity is the *criterion of the truth* of its rules.

I. KANT, CRITIQUE OF PURE REASON 534-35 (N. Smith trans. 1929) (emphasis in original).

be compromised for the sake of some extrinsic end, however desirable. The sole criterion is an internal one. Form is the principle of the unity immanent to an ensemble of legal features, and judgment about intelligibility can flow only from this unity. Because the intelligibility of form is immanent to its content, no other criterion is available; and if immanent intelligibility is (as claimed in Part II of this essay) the most satisfactory mode of understanding, no other is needed.

Not only can no point outside the form vindicate the truth of formalism, but no point or points, atomistically viewed, located inside the form can do so either. Because form constitutes the unity of a set of legal phenomena, no single element has a significance that is independent of its interplay with the others. Therefore, it is not the presence or absence of this or that desirable feature that is decisive for judgment about a juridical relationship, but the extent to which all of its features cohere.

Thus, to return to our illustration, the adverse judgment that formalism passes on the loss-spreading justification in tort law is not due to an antipathy to loss-spreading considered on its own. Loss-spreading in this context is shunned for the company that it keeps, not for what it is. The objection is to the linkage of loss-spreading and adjudication, and to the consequent failure of this doctrinal and institutional conglomerate to express a coherent justificatory structure. If loss-spreading appeared in conjunction with the other elements of its own form, the demands of formalism would be fully met. The formalist is not, therefore, a libertarian who, by opposing loss-spreading through tort law, stands against the use of state machinery to transfer wealth from those who have it to those whose need for it is more pressing. Nor is the formalist's insistence on the possibility of a coherent tort law an argument that tort law should be preferred to a general social insurance scheme that embodies loss-spreading or any other compensatory principle. What is paramount to the formalist is not the desirability of loss-spreading as a substantive policy, but the coherence with which it is integrated into a justificatory ensemble.

The same considerations that make coherence formalism's criterion of truth also allow formalism to float clear of politics. The formalist's concern is not with whether a given exercise of state power is desirable, either in its own terms or in terms of the larger ends that it serves, but with whether it is intelligible as part of a coherent structure of justification. Formalism abstracts from any substantive goal to the coherent ensemble of features into which that goal might adequately fit. In decrying the tension in our example between loss-spreading and the adjudication of tort claims, the formalist stakes out no position about the merits either of loss-spreading or of adjudication as techniques for dealing with accidents. Although the formalist might have political opinions, he is, *qua* formalist, interested solely in whether the components of any legal relationship express an integrated justificatory structure. Without disputing the legiti-

macy of politics, the formalist insists that the product of politics live up to the conception of justificatory coherence that is immanent to it.

The postulate that juridical relationships bear the stamp of an immanently unifying form allows the internal understanding of law to progress beyond the unsupported assertion of the intuitively central features upon which it initially seizes. Because the notion of form provides an internal standpoint of intelligibility, the features for which juristic experience claims an immediate internal significance may implicitly be articulations of the relevant form. Once the form is itself made explicit, the features originally identified can be scrutinized to determine their adequacy as articulations of this form. The selection of these features can now be seen as the first stage in the search for the form of the legal arrangements in which they figure. Inasmuch as these features are elements in an internal understanding, form is implicit in them. The dynamic of internal intelligibility can be carried through from the initial identification of these features to the explicitness of form, which can in turn serve as a touchstone for the initial identification. The movement is a circle of thought that feeds upon its own unfolding explicitness: from the content of law to the immediate juristic understanding of this content, to the form implicit in this understanding, to the explicit elucidation of the form, to the testing of the content for its adequacy to the now explicit form.

Intelligibility involves the interpenetration of content and its immanent form. One achieves a complete understanding when the form is exhibited and the content is seen as adequate to it. If the elements initially identified have the truly fundamental significance that legal experience claims for them, they will be constituents in the distinctive unity that makes the juridical relationship what it is. The immediate understanding of legal experience is only provisional until form becomes explicit. Then juridical intelligibility emerges from a mutually reinforcing movement between form and content: Form is the organizing idea latent in the content of a sophisticated legal culture, and the ultimate test for legal content is its adequacy to the form it expresses. In this movement the understanding of law is completely internal to what it understands.

Now it might be objected that legal philosophy thus conceived is both circular and apologetic: Inasmuch as its account of law does not strive for any standpoint beyond law, the most that it can do is plough over the same ground in ever deeper furrows, with the implication that the law as given is suffused with positive value. But of these two criticisms, circularity and apology, the first is true but not a vice, and the second is not true.

Circularity is a consequence of the self-contained nature of intelligibility. Because form is the distinct principle of unity that renders intelligible the content that realizes it, no criterion of understanding can exist outside form's encompassing embrace. Provided that the circle is inclusive enough, circularity is here, as elsewhere in philosophical explanation, a strength

and not a weakness.[54] For if the matter at hand were to be non-circularly explained by some point outside it, the matter's intelligibility would hang on something that was not itself intelligible until it was, in its turn, integrated into a wider unity. Criticism on the grounds of circularity implies the superiority of the defective mode of explanation that leaves outside the range of intelligibility the very starting point upon which the whole enterprise depends.[55]

As for the objection that an account in terms of form is inherently apologetic, this misses the radically critical lever that an internal understanding makes available. The sophisticated legal system is taken as the focus of attention because such a system makes an implicit claim to an inner rationality that bears on the formalist's interest in what such a claim might amount to. Holding the legal content to its immanent form allows an assessment, in its own terms, of the legal system's congratulatory self-understanding. The determinations of the legal system can be adjudged confused or mistaken to the extent that they are inadequate expressions of the underlying form. Thus arises a standpoint for criticism that is decisive precisely because it is internal. Whereas criticism from the outside can be sloughed off with the argument that the critic's favored position is simply irrelevant to the law's immanent rationality, criticism from the inside engages law ineluctably on its home ground.[56]

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54. Recall Parmenides' claim at the dawn of philosophy that his thinking had penetrated to the "untrembling heart of well-circled truth." H. DIELS & W. KRANZ, DIE FRAGMENTE DER VORSOKRATIKER, Parmenides, fragment 1, line 29 (5th ed. 1952) (translated by author). Similarly, Hegel writes:

> Philosophy forms a circle. It has a beginning, an immediate factor (for it must somehow make a start), something unproved which is not a result. But the *terminus a quo* of philosophy is simply relative, since it must appear in another terminus as a *terminus ad quem*. Philosophy is a sequence which does not hang in the air; it is not something which begins from nothing at all; on the contrary, it circles back into itself.

G. HEGEL, THE PHILOSOPHY OF RIGHT, *supra* note 14, at 225; *see also* G. HEGEL, HEGEL'S LOGIC, *supra* note 37, at 23. For instances of professed circularity in contemporary philosophy, see H. GADAMER, TRUTH AND METHOD 235-45 (1975) (discussing hermeneutic circle); N. GOODMAN, FACT, FICTION AND FORECAST 64 (4th ed. 1983) (discussing "virtuous circle").

55. For a conspicuous example of an ungrounded starting point, see J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 6 (London 1823) (renouncing the need to prove the principle of utility because "that which is used to prove every thing else, cannot itself be proved: a chain of proofs must have their commencement somewhere").

56. Compare Hegel's comments on refutation:

> [T]he refutation must not come from outside, that is, it must not proceed from assumptions lying outside the system in question and inconsistent with it. The system need only refuse to recognize those assumptions. . . . The genuine refutation must penetrate the opponent's stronghold and meet him on his own ground; no advantage is gained by attacking him somewhere else and defeating him where he is not.

G. HEGEL, SCIENCE OF LOGIC 580-81 (A. Miller trans. 1969).

IV. The Forms Of Justice

A. *The Quest for Comprehensiveness*

Let us now look more closely at the notion of legal form. The previous section traced the movement of thought that works toward the idea of form from reflection on the law's content. There it was pointed out that coherence is the formalist's criterion of truth, and that the more encompassing the coherence the greater the illumination. A juridical relationship's most inclusive unity is, therefore, also the most generalized justificatory structure that the relationship instantiates. These generalized justificatory structures, which are the most adequate conceptions of legal form, are the focus of this section.

In this context, inclusiveness is achieved not by adding another item to an aggregation, but by subsuming the item under a higher level of abstraction. Form is a unity, all the component characteristics of which comprise an ensemble whose intelligibility is greater than that of the sum of its parts. The components of a legal form thus collectively express a single idea. A form is accordingly not a manifold that can incorporate new elements without their being integrated into its organizing unity. If a form is to encompass the widest possible variety of juridical relationships, these relationships cannot be pluralistically tacked on to one another, but must exemplify the unifying idea of the form to which they belong. This requires abstracting to clarify the common structure that various relationships instantiate through their participation in a single form.

In its quest for the most comprehensive unities, formalism gives extreme expression to the tendency to abstraction that marks legal thinking. Although the events that give rise to a juridical relationship are particular—John Doe did such and such to Richard Roe—these events are understood by the lawyer in terms of categories (such as tort law's notions of cause, duty of care, and fault) that abstract from the particularity of the occurrence. Particulars are legally relevant only inasmuch as they can be brought within juridical categories. Accordingly, a datum is legally significant not as a particular added to an aggregate of particulars, but as the instantiation of a category that can coherently combine with other legal categories. Now just as legal thinking sees the particularities within its ken as the embodiments of abstractions, so legal formalism abstracts further from these abstractions in its quest for the most abstract conceptions of juridical relationships. These conceptions will be the barest and most inclusive representations of the unities that can characterize juridical relationships, and the law's content will be intelligible only to the extent that it conforms to one of these most abstract forms.

B. *The Two Forms*

The task of formulating the most inclusive juridical abstractions is not a new one. The first description of these abstractions can be found in Aristotle's discussion of justice.[57] Aristotle observed that juridical relationships are paradigmatically those that obtain between parties regarded as external to each other, each with separate interests of mine and thine.[58] Aristotle's decisive contribution was to notice the conceptual patterns that inhere in juridical relationships. Substantive legal rules are intelligible to the extent that they embody the rationality exhibited by these patterns. In Aristotle's terminology, these patterns are the forms of justice.[59]

The value of Aristotle's account is that he definitively identified the forms that are most consistent with the process I have sketched so far. Aristotle achieved this through reflection on the law of his own day.[60] So inclusive and abstract are the forms he set out, however, that his conclusions apply to any legal ordering of external interaction. Aristotle provides the most formal account possible of the structures that could be latent in external dealings among persons. Since these abstractions are immanent in (and therefore not severable from) the content of law, they could not be discovered except through reflection on particular legal systems. But once elucidated, their very abstractness makes them the ultimate categories for the coherence of juridical relationships generally. Not only are these forms immanent in any sophisticated legal system, but the adequacy of the law's content to these immanent forms is the measure of that system's sophistication.

Aristotle observed that what we would now call private law has a spe-

57. *See* ARISTOTLE, NICOMACHEAN ETHICS 115-23 (M. Ostwald trans. 1962). For a discussion of this text, see Weinrib, *Aristotle's Forms of Justice*, 1 RATIO JURIS (forthcoming 1988).

58. By *external* dealings, *external* interaction, and *external* relations in this paragraph and hereinafter, I do not mean to point merely to a locus of physical impact outside the actor, but to a subject matter that is understood under the aspect of the parties' mutual externality, as when the separateness of their interests is conceived as the defining feature of their relationship. Thus, although in a loving relationship one person impacts externally on the other, it would not be a loving relationship unless each person identified the other's good with his or her own; such a relationship is not intelligible under the aspect of the lovers' mutual externality and is accordingly not external in the sense relevant here. Similarly, although virtuous actions affect others, the intelligibility of virtue lies in the character of the actor, not in the mutual externality of the actor and the party affected. As Aquinas put it:

> The virtues and vices . . . are concerned with the passions, for there we consider in what way a man may be internally influenced by reason of the passions; but we do not consider what is externally done, except as something secondary, inasmuch as external operations originate from internal passions. However, in treating justice and injustice we direct our principal attention to what a man does externally; how he is influenced internally we consider only as a by-product, namely, according as he is helped or hindered in the [external] operation.

1 T. AQUINAS, COMMENTARY ON THE Nicomachean Ethics 384 (C. Litzinger trans. 1964). Thus virtue and justice can be "the same in substance but different in concept." *Id.* at 391 (commenting on ARISTOTLE, *supra* note 57, at 114-15). I neither claim nor imply that the external relationships are in any way superior to love or virtue. My focus throughout is on the intelligibility of external relationships, not on their desirability as compared to other kinds of relationship.

59. *See* ARISTOTLE, *supra* note 57, at 117-20.

60. *See* Lee, *The Legal Background of Two Passages in the* Nicomachean Ethics, 31 CLASSICAL Q. 129 (1937).

cial structure of its own. Justice is effected by an award of damages and the consequent transfer of a certain amount of money from one party to another.[61] An award of damages simultaneously quantifies the wrong suffered by plaintiff and the wrongfulness inflicted by the defendant. It thus expresses the integration of action and injury in the wrong that one litigant has done to the other. This wrong, and the damage award that undoes it, represents a single nexus of activity and passivity where actor and victim are defined in relation to each other.

This special structure is the most abstract mode of coherence for the bipolar relationships of private law. It captures the correlativity within a single transaction, of wrongful doing and suffering—and with it the correlativity in private law of the defendant's duty to avoid inflicting such suffering and the plaintiff's right to immunity from it. All the bilateral aspects of private law, from the adjudicative format of the plaintiff-defendant lawsuit to the doctrines that link doer and sufferer, are encompassed by this structure. The doctrine of factual causation, for instance, is an expression of the relation of one party to another through their doing and suffering of the same harm. In the same vein, no tort liability arises in a situation of nonfeasance, because the failure of one party to extend a benefit to another is categorically different from a harm done and suffered. Moreover, the treatment of the doing and suffering as a single unit underlies the requirement that the plaintiff's injury be within the ambit of the risk that the defendant's act wrongfully creates.[62] Similarly, the contract doctrines defining the formation and consequences of exchange (e.g., consideration, offer and acceptance, and expectation damages) embrace both parties.[63] The bilateral nature of the contractual relationship means that the promised performance is not largess unilaterally proffered and unilaterally revocable, but rather the content of an entitlement. Accordingly, the promisor's breach is the doing of a harm to (and, correlatively, the suffering of a harm by) the promisee.

This two-party structure underlies not only relationships that exemplify the doing and suffering of a single harm, such as those of contract and tort law, but also relationships whose intelligibility presupposes the special significance of doing and suffering. Form signals the *conceptual* coherence of legal doctrine and institutions, and its inclusiveness refers to all the legal relationships that must be understood in its light. Because the inclu-

61. Aristotle is particulary interested in the structure of the relationship for which the award of damages (or the equivalent specific relief) is a rational response to the commission of the wrong. Since what matters is the conceptual structure of the relationship between the actor and the victim, his analysis does not require that a wrong actually have taken place or that damages actually have been awarded. His remarks are therefore as applicable to an injunction that prospectively restrains a wrong as to damages that retrospectively repair a wrong.

62. *See* Weinrib, *supra* note 49, at 429-32, 438-44.

63. A detailed formalist exposition of contract doctrine is contained in Benson, The Executory Contract in Natural Law (1986) (unpublished paper on file with author).

siveness of form is for the formalist a conceptual matter, the implications of the special nature of doing and suffering can render intelligible relationships that might not themselves be regarded as relationships of doing and suffering. Consider, for example, the law of restitution. One can hardly say that the recipient of a mistaken payment, who is under a legal obligation to disgorge the benefit,[64] has done the payor a harm. The activity was on the side of the plaintiff who made the payment; the defendant was merely the passive beneficiary of the plaintiff's error. Nevertheless, the intelligibility of their relationship and of the defendant's obligation to return the unjust enrichment is conceptually dependent on the significance of doing and suffering. Since under this form one must avoid inflicting an unjust harm, there is no legal obligation to confer a gratuitous benefit. Therefore, for benefits to have a legal standing, their conferral must conform to specific conditions concerning the transferor's intent and the mechanics of transfer. In the common law these conditions are laid down in the law of gifts, trusts, and seals. Other unilateral transfers, including payments made under mistake, are invalid. Thus, the relationship consequent on a mistaken payment presupposes the special juridical significance of doing and suffering. In other words, the form instantiated in contract and tort law allows us to think of the payee's retention of a mistaken payment as a harm inflicted on the payor.[65]

The second structure underlying law is one in which parties are related, not as doer and sufferer, but as persons subject to a common benefit or burden. In this relationship, the law's task is to divide the benefit or the burden according to some criterion. The interaction between the parties is defined not in terms of what one person has done to another but in terms of the common nature of the benefit or the burden, and the consequent entitlement or liability under the criterion that distributes it.

These two understandings of interaction Aristotle called corrective justice and distributive justice. They correspond to the two ways of conceiving of the external relations upon which law fastens. For Aristotle, these two kinds of justice were not particular substantive ideals.[66] Rather, they were the most general conceptual patterns to which any substantive ideal of legal ordering would have to conform if it was to have inner coherence. In corrective justice the relationship between the parties is that of the immediacy of doing and suffering in a transaction, whether that transaction

64. Kelly v. Solari, 152 Eng. Rep. 24 (Ex. Ch. 1841).

65. On the relationship between corrective justice and criminal law, see *infra* note 73.

66. These are substantive ideals in today's non-formalistic discourse, where Aristotle's terminology survives divorced from the mode of thought that gives it vitality. *See, e.g.*, R. NOZICK, ANARCHY, STATE, AND UTOPIA 150 (1974) (distributive justice as what justice requires concerning holdings); Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 LAW & PHIL. 5, 6 (1983) (corrective justice as the annulling of wrongful gains and losses); Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 50 (1979) (corrective justice as redress for plaintiff of any violation of his rights); Posner, *The Concept of Corrective Justice*, 10 J. LEGAL STUD. 187, 201 (1981) (corrective justice as wealth maximization).

be a contract, a tort, or the retention of an undue benefit. In distributive justice the relationship between the parties is mediated by a scheme of distribution; particular entitlements are a function not of a direct relationship between the beneficiaries to the distribution but of the criterion according to which the distribution is organized. Distributions embody what Nozick has more recently termed "patterning,"[67] and justifications under distributions can typically be formulated in terms of "to [from] each according to . . . ."[68] Corrective and distributive justice represent the intelligibility of unmediated and mediated interaction respectively.

These two forms of justice are categorically different and this difference can be expressed in terms of the distinct notions of equality that each employs.[69] Corrective justice abstracts from the particular attributes of the parties that are not essential to the intelligibility of doing and suffering. Accordingly, whatever their social status or wealth or character, the parties are considered equal at the outset of the transaction. This notional equality represents the implicit rationality of the transaction. A wrong is conceptualized as one party's disturbance of this equality at the expense of the other. Corrective justice does not, therefore, refer merely to an official act of dispute settlement; rather, the court's intervention is intelligible as specifying what is implicit in the relationship that already exists between the parties.[70] In reflecting this relationship through the interpretation and enforcement of its normative implications, the court is itself part of the justificatory structure applicable to the transaction that it judges. The function of the court is to preserve the initial equality by transferring from one party to the other the fixed quantity that marks the deviation from the transaction's implicit rationality. This sum represents either the plaintiff's loss or the defendant's gain, and in paradigmatic instances of

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67. *See* R. NOZICK, *supra* note 66, at 155-60.

68. *Id.* at 160.

69. The distinction which Aristotle draws in NICOMACHEAN ETHICS, *supra* note 57, at 120, is made perspicuous by Aquinas:

> He [Aristotle] says first that the just thing that exists in transactions agrees somewhat with the just thing directing distributions in this—that the just thing is equal, and the unjust thing, unequal. But they differ in the fact that the equal in commutative justice is not observed according to that proportionality, viz., geometrical, which was observed in distributive justice, but according to arithmetical proportionality which is observed according to equality of quantity, and not according to equality of proportion as in geometry. By arithmetical proportionality six is a mean between eight and four, because it is in excess of the one and exceeds the other by two. But there is not the same proportion on the one side and the other, for six is to four in a ratio of three to two while eight is to six in a ratio of four to three. On the contrary by geometrical proportionality the mean is exceeded and exceeds according to the same proportion but not according to the same quantity. In this way six is a mean between nine and four, since from both sides there is a three to two ratio. But there is not the same quantity, for nine exceeds six by three and six exceeds four by two.

T. AQUINAS, *supra* note 58, at 410; *cf.* ARISTOTLE, *supra* note 57, at 42-44 (discussing medians in emotions and actions).

70. On the difference between corrective justice and dispute resolution, see Weinrib, *Adjudications and Public Values: Fiss' Critique of Corrective Justice*, 39 U. TORONTO L.J. (forthcoming 1989).

restitution, gain and loss will be identical. Because it restores the notional antecedent equality between the parties by making one of them transfer a fixed quantity to the other, corrective justice construes the interaction as immediately pertaining to no more than two parties. In encompassing both the wrong that one party has done to the other and the juridical reflex rectifying the wrong, corrective justice represents the structure of adjudication between plaintiff and defendant in private law.[71]

In contrast, a distribution embodies not the transference of a quantity but the fixing of a proportion. Distributive justice integrates three elements: the benefit or burden that is the subject of the distribution, the recipients among whom the benefit or burden is to be distributed, and the criterion according to which the distribution is to take place. The class of participants and the subject matter of the distribution are notionally separate. The entitlement of each member in the class to his share in the subject matter is determined by the application of the distributive criteria so that, relative to this criterion, the entitlement of each is equal. Because the integration of the three elements takes the form of a proportion, there is no internal restriction on the number of participants: the more there are, the smaller the portions, and the fewer there are, the greater the portions. This can be contrasted with corrective justice, where the determination of the quantity that restores the initial equality requires two parties, no more (because the transfer of a quantity cannot restore equality as between more than two) and no less (because if there were only one there would be no transaction and nothing to correct).

C. *The Formalism of the Forms*

In this account justice does not in the first instance refer to substantive principles; instead, it points to the different structures according to which external interaction can be construed. Corrective justice discloses the form of a transaction as the immediate interaction of two parties. The proportional equality of distributive justice captures the structure of a distribution by indicating what distinguishes a distribution from a merely haphazard dispersion among persons and goods. The notions of equality employed by the forms of justice are, like the forms themselves, formal and not substantive. Equality is a term of relation appropriate to justice as the ordering of external relationships, and it makes interaction intelligible by operating with reference either to a quantity or to a proportion.[72]

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71. In the tradition upon which I am drawing, the structure of bipolar correction is portrayed in a number of ways. Aristotle portrays it as the restoration of the antecedent equality of two lines. *See* ARISTOTLE, *supra* note 57, at 122-23. Kant explicates the idea as effect and counter-effect or action and reaction. *See* I. KANT, *supra* note 14, at 35-36; I. KANT, *On the Common Saying: 'This May Be True in Theory, But It Does Not Apply in Practice,'* in KANT'S POLITICAL WRITINGS 61, 76 (H. Reiss ed. 1970). Hegel describes it as negation of a negation. G. HEGEL, THE PHILOSOPHY OF RIGHT, *supra* note 14, at 71-74.

72. Aristotle's discussion bears on a matter of recent controversy. Peter Westen argued that the

Corrective and distributive justice are the forms that are immanent to the understanding of transactions and distributions. As patterns of interpersonal ordering they exhibit the nature of rationality *in* their respective types of arrangement and do not refer to some external purpose towards which these arrangements ought to be oriented. Each pattern represents a different mode of coherence for external relationships. Corrective justice treats the transaction between the doer and sufferer as a unity that can find juridical expression in the sum that the defendant must transfer to the successful plaintiff. Distributive justice treats the distribution as a unity that integrates the benefit or burden to be distributed, the persons who might be subject to it, and the criterion according to which the distribution takes place. Since law, as an ordering of external relationships, is directive of transactions and distributions in accordance with their immanent intelligibility, the content of law is required to be an adequate realization of these forms of justice.

A specific legal content is intelligible to the extent of its adequacy to a form of justice. Adjudication of private disputes can be understood as the actualization of corrective justice, and the legislative and administrative direction of the community as the pursuit of distributive justice.[73] This is

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rhetoric of equality should be abandoned because equality is a formal relationship derived from anterior substantive prescriptions and is therefore empty. *See* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). For the ensuing debate, see Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983); Westen, *To Lure the Tarantula from Its Hole: A Response*, 83 COLUM. L. REV. 1186 (1983); Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136 (1982); Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153 (1982); Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983). The entire debate seems to miss the following fundamental point that lies at the core of Aristotle's discussion. Even if equality is formal—indeed because equality is formal—it is situated in the two *different* formal structures of corrective and distributive justice. It therefore operates with respect to two different kinds of juridical relationship and with respect to two different kinds of normative prescription. Since the formalism of equality expresses difference, equality is formal without being empty: The formal equality of each form of justice has at least the negative content of excluding the formal equality appropriate to the other. Indeed (if my argument in this section is correct) this formal difference in the significance of equality marks the most basic division in juridical thought. Westen's work is an elaboration of an argument that Hans Kelsen directed against Aristotle. *See* Westen, *The Empty Idea of Equality*, *supra*, at 543; Westen, *On Confusing Ideas: Reply*, *supra*, at 1157. For Kelsen's argument, see H. KELSEN, *Aristotle's Doctrine of Justice*, in WHAT IS JUSTICE? 110, 128-36 (1957). For a discussion of Kelsen's error, see Weinrib, *supra* note 57.

73. Criminal law has a more complex relationship to these two forms. It is not distributive justice since the norms on which criminal law insists seem to crystallize conspicuous wrongs rather than to embody the proportionate distributions of benefits and burdens. (For a different view, see H. MORRIS, *Persons and Punishment*, in ON GUILT AND INNOCENCE 31 (1976), arguing that the criminal upsets the distribution of benefits and burdens by taking an unfair advantage in a system of mutual constraints. This view has recently been effectively criticized by R. DUFF, TRIALS AND PUNISHMENTS 205-17 (1986).) Rather, criminal law falls under corrective justice, since it presupposes the special significance of doing and suffering. Criminal law diverges from tort law in two respects. First, a criminal wrong requires *mens rea*, whereas a tort can result from the defendant's failure to live up to an objectively reasonable standard. *See* Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983). Second, the state rather than the private victim enforces the criminal norm. These differences between criminal law and tort law relate to corrective justice as follows. The negligent tortfeasor may violate the equality of corrective justice by implicitly mistaking what this equality requires (as where he acts to the best of his subjective capacity but falls short of the objectively reasonable standard, *see* Vaughan v. Menlove, 132 Eng. Rep. 490 (C.P. 1837)), but this mistake does

not to say that the positive law of these domains is substantively just; only that it is internally intelligible in terms of the conceptual structure of categories of external interaction. The very point of the forms of justice, and what gives them their critical bite, is that they are forms: Inasmuch as they set out the implicit patterns of interaction that illuminate juridical relationships from within, they also provide an internal standpoint of criticism that is decisive for law because it cannot be deflected or escaped by a change of standpoint.

Corrective and distributive justice are the most abstract forms that render juridical relationships intelligible. Indeed so abstract are they that Aristotle was able to represent them mathematically as different functions of equality, the one quantitative and the other proportional. Each refers to an inclusive notion of interaction and to a corresponding conception of juridical coherence. Corrective justice is the ordering principle of transactions, whether these be delictual, restitutionary, or contractual:[74] It abstracts from the particular contours of a given transaction to its most general quality as an episode of doing and suffering. Coherence here lies in the singleness of the relationship of doing and suffering. Similarly, distributive justice abstracts from all particular distributions to the shape they share as distributions. Coherence here is a harmony of criterion, benefit (or burden), and beneficiaries (or burden-bearers).

These forms of justice are structurally different and mutually irreducible. Just as restoring the equality of two quantities is a categorically different mathematical operation from continuing a proportion, so the two forms of justice cannot be assimilated to each other. The mathematical terms in which Aristotle explains the different functionings of equality in corrective and distributive justice certify that these two forms are concep-

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not deny the applicability of such equality to his action. Tort is thus only a particular wrong to a particular victim, who can then reestablish his notionally equal position through an action for damages. In contrast, the criminal commits a willful harm, thus implicitly assigning to others the status of mere means to his own satisfaction. *Mens rea* is the expression in positive law of the criminal's setting his face against the very idea of the formal equality of corrective justice. This is not only a particular wrong to a particular victim, but an affront to the general equality of all potential doers and sufferers. Since the state is the representative of this general equality, state prosecution and punishment undoes the general wrong. For criminal law, the failure to conform to the equality of corrective justice takes the form of a wrong against the very notion of that equality. This explanation draws heavily on Hegel's *Philosophy of Right*. *See* G. HEGEL, THE PHILOSOPHY OF RIGHT, *supra* note 14, at 64-74. For an extended explication of Hegel's text, see Nicholson, *Hegel on Crime*, 3 HIST. POL. THOUGHT 103 (1982).

74. Some scholars see distributive justice as the general ordering principle in contract law. *See, e.g.*, Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980). Others see particular doctrines such as expectation damages as informed by distributive rather than corrective justice. *See, e.g.*, Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 56 (1936). This view, however, is mistaken, both on textual and on conceptual grounds. The relationship of promisor and promisee is as unmediated as the relationship of tortfeasor and victim. The immediacy of corrective justice refers not to the proximate physical sequence that is typical of tort law, but to the intelligibility of the plaintiff-defendant relationship as a bipolar one that precludes the continuous proportion of distributive justice. A contract expresses not a mediating criterion, but the terms resulting from the mutual recognition by the parties of each other as immediately interacting persons. For a detailed treatment of this, see Benson, *supra* note 63. *See also* ARISTOTLE, *supra* note 57, at 117.

tually distinct. They constitute the most abstractly comprehensive structures of justification and thus cannot be combined into a single overarching justificatory structure. Each form is its own distinctive and self-contained unity.[75] They both pertain to the ordering of external relations among persons, but they order these relations in different ways.

Because the forms of justice represent mutually irreducible conceptions of coherence for juridical relationships, no single juridical relationship can coherently combine the two forms. If a corrective element is mixed with a distributive one, each necessarily undermines the justificatory force of the other, and the relationship cannot manifest either unifying structure. Such mixing was the root of the problem in our loss-spreading example. The principle that accident losses should be distributed so as to minimize their felt impact has the proportional structure of distributive justice; it mandates the sharing of burdens in accordance with a criterion. Its use in tort law, however, fails to achieve distributive justice, since continuing the proportion by applying the principle to everyone within its reach is inconsistent with its being channelled through the doer and sufferer of a single harm. Conversely, since the issue of how the loss is ultimately spread is not part of the intelligibility of the relationship of doing and suffering as such (indeed the best conduit for loss-spreading might be some third party), the orienting of tort law toward loss-spreading cannot adequately actualize corrective justice. The combination of elements from both forms of justice ensures that neither form is achieved. And since coherence depends on the adequacy of the law's content to some form or other, loss-spreading as a tort doctrine is incoherent.

The forms of justice are justificatory structures. They furnish the morphology to which the justification of a juridical relationship must conform. A relationship can be construed as one of corrective justice if the justification applicable to it is an explication of the equality applicable to doing and suffering. Conversely, a relationship instantiates distributive justice if the argument that supports it has the patterning of a proportion. What matters is that a justification be coherent in terms of one or the other of

75. It is sometimes said that corrective justice is derivative from distributive justice because corrective justice presupposes holdings, and holdings are a matter of distributive justice. *See, e.g.*, Radbruch, *Legal Philosophy*, in THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 74 (K. Wilk trans. 1950). This is wrong on two accounts. First, it is not the case that the setting of holdings must necessarily be conceived as a matter of distributive justice. The Kantian and Hegelian theories of property are explicitly not theories of distributive justice. *See* I. KANT, THE PHILOSOPHY OF LAW 61-99 (W. Hastie trans. 1887); G. HEGEL, THE PHILOSOPHY OF RIGHT, *supra* note 14, at 40-57. Secondly, even if holdings were intelligible solely as distributive justice, the dependence of corrective justice on a previous distribution does not diminish the autonomy of the two forms of justice. These forms are the structures of justification applicable to external interaction. The fact that corrective justice must accept the distribution as given does not mean that the justification of the distribution is an aspect of justification in corrective justice. What matters for corrective justice is that the distribution exists, not that the distribution is justified. Corrective justice's mode of justification can operate against the background of a distribution without incorporating into its justificatory structure the justification of the distribution.

the forms that constitute the broadest and most abstract conceptions of justificatory coherence. A relationship whose justification is not adequate to either of these structures is unintelligible; in creating such a relationship, positive law commits a juridical mistake.

Because the forms of justice are justificatory structures, their concern is with the coherence of the justifications for legal arrangements, not with subject matter of these arrangements as brute facts. Accordingly, the effects that one person might have on another cannot be preclassified as belonging to one or the other form. For the formalist the crucial consideration is not what happened but how one is to understand the justificatory structure that is latent in the legal arrangements that might deal with what happened.[76] My injuring you is in itself neither a transaction that calls for corrective justice nor a distribution that falls under distributive justice. It will be handled correctively if you sue me in tort so that the issue becomes whether the relationship of my doing and your suffering justifies my paying you damages. Alternatively, it will be handled distributively if you have recourse to a fund that, for example, compensates injured persons in proportion to the seriousness of their injuries.

Formalism, accordingly, is not a kind of jurisprudential federalism with different incidents assigned to the jurisdiction of either corrective or distributive authority. Nor does formalism provide a basis for preferring to treat the facts of the world in accordance with one form rather than the other; such preference can come neither from within either form nor from any overarching form. Formalism's concern is entirely with the coherence of legal arrangements and with the way that the doctrinal and institutional components of law manifest that coherence. The forms of justice are the most abstract and inclusive representations of the kinds of unity that can be expressed in juridical relationships. Coherence is, therefore, a matter of the adequacy of the law's content to one or the other of these forms.

V. Politics and Formalism

With these forms in hand, we can now consider the relationship between law and politics. As we saw at the outset of this essay, legal formalism is notorious for distinguishing between the two. The purpose of this section is to sustain and illuminate the distinction by reference to the forms of juridical interaction outlined in Part IV.

A. *Politics and the Judicial Role*

The distinction between law and politics manifests itself in scholarship as a controversy about the judicial role. Adherents of the distinction have seen the judge as the guardian and expositor of whatever is non-politically

76. *See* T. Aquinas, Summa Theologica II-II, Q. 61, Art. 3.

legal, the nature of which emerges from a consideration of the limits appropriate to judicial, as opposed to legislative, lawmaking. Private law raises this issue in connection with the propriety of reforming legal doctrine through the courts.[77] In constitutional and administrative law, the dispute concerns the status of the values underlying judicial review of legislative and administrative action.[78]

Pointing to the courts' relative lack of institutional competence and democratic accountability, proponents of a distinct judicial role have demarcated legitimate court activity by reference to two considerations. First, the courts' role is anchored by the preexisting body of rules, standards, policies, and principles from which courts move by a process of "reasoned elaboration."[79] Second, the courts are expected to distance themselves from the realm of "current political controversy," so that they are restricted to the area left unclaimed by the political agenda of the day.[80]

These formulations render the judicial role a contingent matter. While implicitly asserting a crucial difference in principle between the juridical and the political, they would have this difference hinge on whatever happens to receive the attention of courts and legislatures respectively. Whether a particular factor, such as loss-spreading, is legitimately within judicial competence would not depend on its nature as a justification but on whether it (or something from which it can be elaborated) has already ensconced itself in the legal doctrine, or on whether it has, or can be expected to, become a matter of political controversy.[81]

For the formalist these considerations are insufficiently grounded and are thus, at best, shadows of the truth. The formalist seeks to connect this controversy about judicial role and the insight on which it is based—that "[t]o call a court 'political' is merely to deny it the character of a court of law"[82]—to the features of form that characterize and give coherence to the understanding of juridical relationships. These features are conceptual rather than contingent. They refer not to what may have come within the purview of judicial or legislative treatment in a given jurisdiction, but to the elements of structure that mark the intelligibility of external interaction among persons generally.

Formalism is especially relevant to the controversy over the judicial role. Proponents of a limited judicial role do not—or at least need

77. *See, e.g.*, Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229 (1981).

78. For a survey of the problematic nature of these values, see J. ELY, DEMOCRACY AND DISTRUST 43-72 (1980).

79. H. HART & A. SACKS, *supra* note 43, at 162-68.

80. R. KEETON, VENTURING TO DO JUSTICE 92 (1969).

81. Moreover, since an issue can become politically controversial without its being definitively resolved, the second consideration gives those who can influence the political agenda a kind of heckler's veto over the direction of judicial activity.

82. Oakeshott, *The Vocabulary of a Modern European State* (Concluded), 23 POL. STUD. 409, 412 (1975).

not—dispute the desirability of the doctrinal innovations that the judiciary may introduce. Their contention would be unaffected by the concession that the specific new doctrine urged on the court is meritorious. At issue is not what is to be done but who is to do it. The claim is that although certain arguments may justify a specific policy, they are not the sort of justification that is pertinent to the adjudicative process. At issue is not the soundness of certain justifications but their coherence with the justificatory structure appropriate to adjudication.

The formalist understanding of the juridical, as opposed to the political, centers on the immanence of the legal forms to the intelligibility of the interactions that they order. Corrective and distributive justice are not extrinsic impositions on transactions and distributions. They are appropriate to transactions and distributions because they are the justificatory structures that inhere in these two understandings of interaction. An interaction is intelligible as a transaction only inasmuch as it is capable of being ordered by corrective justice; its conformity to this ordering is the perfection of living up to its own intelligible nature as a transaction. The same applies, *mutatis mutandis*, to distributions.

The juridical can be defined as that which is contained within the intelligibility of external interaction. The forms of justice represent the modes of understanding that pertain to interaction from within; the expression of these forms in a specific legal system is the province of the juridical. The forms' immanence to the understanding of the interactions they govern means that officials charged with explicating the juridical—in our legal culture, pre-eminently judges—can treat the ordering of an interaction as an interpretive function in which they draw out the juridical significance of the features that unify the interaction from within. Adjudication involves holding the particular transaction or distribution to its coherence as a transaction or a distribution. The judge is prohibited from orienting the juridical relationship to some external goal of the judge's choosing. The justificatory structures of corrective and distributive justice set the conceptual limits of the judge's jurisdiction, and the judge's role is to apply, in the context of a particular episode of adjudication, the form of justice appropriate to it.

Corrective or distributive justice need not be expressly considered by the judges or mentioned in their judgments. These forms of justice are categories of legal philosophy, not ingredients of positive law. They exhibit the structures of justification latent in a sophisticated legal system, and thus underlie its discourse without being themselves necessarily parts of it. The forms of justice are, as we have seen, the most abstract conceptions of juridical relations. Even if these abstractions are not explicit in positive law, they must be implicit in positive law if its content is coherent, because they represent the ways in which a juridical relationship can be conceived as a unity. The discourse of a sophisticated legal system, i.e.,

one that values coherence, will for particular controversies and sets of controversies tend to actualize one or the other of these implicit abstractions. The common law of negligence, for example, does not explicitly refer to corrective justice. Its categories of wrongdoing and causation, however, can be read as capturing in the context of delictual transactions the abstract equality of doing and suffering that is at the heart of corrective justice.[83] The same can be said for contract law's doctrines of consideration, offer and acceptance, expectation damages, and unconscionability.[84] Accordingly, the judge gives voice to the specifically juridical when he or she elaborates and applies elements of positive law that express or specify aspects of these forms of justice.

The political, in contrast to the juridical, refers to considerations whose intelligibility stands outside the interconnecting aspects of juridical form. Political determinations are extrinsic to juridical form in the sense that, although expressible *through* form, they do not derive justificatory force entirely *from* form. They are expressible through form because otherwise they could not be intelligible as part of a coherent ordering. However, they must be justified by more than their participation in an internally coherent structure of justification. Any particular political determination must have a desirability that is independent of the elucidation or specification of form.

B. *Politics and Distributive Justice*

The home of the political is distributive justice. In corrective justice, all that is present is the immediate relationship of person to person; nothing extrinsic is relevant to this relationship. In distributive justice, by contrast, the relation between persons is mediated by the criterion that assigns things to them in accordance with a proportional equality. The whole complex of persons, things, and criterion is an expression of a particular mediating purpose. Because it mediates, this purpose is not immediate to the relationship of person to person but is brought to bear upon them from outside. The intelligibility of this purpose is thus extrinsic to the relationship of person to person as such.

In the case of distributions, an external orientation is both possible and required. Distributive justice, it is true, is the internal integration of persons and things according to some criterion, so that the formal adequacy of a given distribution is a matter of integrating the elements constituting distributive justice's distinctive unity. But this internal aspect must be supplemented from the outside. Although the elements of distributive justice are internally structured, the fixing of a *particular* distribution involves selection from among many possible different distributions. Distributive

83. *See* Weinrib, *supra* note 49.
84. *See* Benson, *supra* note 63.

justice goes to the inner coherence of a distribution, not to the choice of one distribution over another. Assume, for instance, that one wanted to replace or supplement tort law by introducing a distributive scheme of compensation for personal injuries. A decision must be made as to the class of injuries for which compensation will be paid, the persons who will be burdened by the levies necessary to finance the scheme, the criteria by which recovery will be limited if the need for compensation exceeds the available financing, and so on.[85] For any such particular distribution one can require that its various elements fit with one another, but the notion of internal ordering is not sufficiently powerful to establish the boundaries or the criterion of the scheme. Whatever distribution is chosen must live up to the coherence of distributive justice. Distributive justice, however, understood as the coherent ordering of persons, things, and criterion, cannot single out which of the available distributions is to be preferred.

A particular distribution is the product of political institutions that have the capacity and authority to evaluate the full range of possible distributions, and that are accountable for their choices from among those possibilities. Hence, considerations of institutional competence and electoral responsibility figure prominently in discussions of the legal process.[86] Since no particular distribution can be excluded *ab initio*, competence and accountability must be of a global character. The authorization of some distributions and the rejection of others involve decisions about the interests of all members of the community. Those responsible for these decisions should correspondingly be answerable to all. Judges, who have limited control over their own agendas, who see controversy through the prism of bipolar argument, who must funnel the effects of their judgments through litigants, and who are relatively insulated from accountability to the community, are not appropriately situated to select from among possible distributions.[87]

A political element is therefore present in distributions. A distribution must distribute something and it must distribute it to particular persons according to a criterion that embodies a particular purpose, to be chosen from the many available purposes. Distributive justice implies that a political authority must define and particularize the scope or criterion of any scheme of distribution. This selection cannot be completely insulated from the interplay of power, persuasion, sympathy, and interest that characterizes the political process. The purpose of a specific distribution is not

85. For a discussion of the relevant considerations, see Blum & Kalven, *Ceilings, Costs, and Compulsion in Auto Compensation Legislation*, 1973 UTAH L. REV. 341.

86. *See, e.g.*, H. HART & A. SACKS, *supra* note 43, at 398, 662.

87. I am neither claiming nor denying that the accountability of political institutions is a *conceptual* correlate of distributive justice. This issue would require a careful consideration of the connection between political and legal theory that is beyond the scope of the present essay. It is sufficient for my purposes here that, given the existence of accountable political institutions, we can recognize that such institutions are adequate to the external orientation of distributive justice in a way that courts are not.

elaborated from within distributive justice, but must be authoritatively incorporated into the schedule of collective aims. Until then, this distribution is merely one of any number of possible distributions.

Although distributive justice requires politics, it is not reducible to politics. What is common to all possible distributions is precisely that they are *distributions*, not just haphazard dispersions; they are therefore coherent only insofar as they are expressions of distributive justice. Since distributive justice is the form generic to all distributions, no matter what their particular purposes, its justificatory structure is implicit in them all without exception. Political authority cannot make its extrinsic purposes part of an intelligible order unless its prescriptions conform to distributive justice. Consequently, any distribution must respect the relationship among the conceptual elements out of which distributive justice is constituted.

Distributive justice, as the integration of persons and things in accordance with a criterion, incorporates two related presuppositions. First, distributive justice postulates a distinction between things and persons. If a distribution is to observe the ordering characteristic of its form, it cannot treat persons as things. The difference between a person and a thing is that a thing can be a means to any end for which it is useful, whereas the nature of a person is to be an end and never only a means to an end.[88] The implicitness of this Kantian idea in distributive justice means that the instrumentalism of extrinsic purpose is constrained by the non-instrumental notion of personhood. The immanent intelligibility of distributive ordering presupposes that the recipient of the distributive benefit or burden can be immanently—and thus non-instrumentally—conceived in terms of being one's own end.

Second, distributive justice presupposes that the criterion of distribution applies equally to all who fall under its justificatory force, without underinclusion or overinclusion. Implicit in distributive justice as a justificatory structure is the notion that equality is conceptually necessary to this mode of understanding juridical relations. Equality, as used here, is not a substantive ideal that stands outside distribution, nor does it refer to any particular subject matter (such as welfare or resources[89]) whose equal distribution is independently desirable. Rather, it is applicable to whatever is being distributed because it is immanent to the understanding of a distribution as an internally intelligible arrangement. Accordingly, a distribution decreed by positive law that does not observe equality is defective from the standpoint of its own intelligibility.

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88. This idea has it roots in I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 46 (L. Beck trans. 1959).

89. For an opposing view of equality, see Dworkin, *What is Equality? Part I: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Dworkin, *Part II: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

Because personhood and equality are conceptual components in the form of distributive justice, and because distributive justice, being a form, is a principle of unity, personhood and equality are themselves interdependent. Those who share in the distribution are entitled to demand equality only because they are persons and thus not available for use according to the distributor's pleasure. Similarly, a mark of their personhood is the claim they have to equal standing in the distribution. A distribution that did not embody the equality of persons—a checkerboard scheme, for instance[90]—would fail to manifest an intelligible integration of persons and things with a distributive criterion. Instead of harmonizing the components of distributive justice, it would throw them together. Such a distribution would make inclusion or exclusion a matter of sport; the persons affected would implicitly be not ends in themselves but playthings for the distributing authority.

Personhood and equality are the presuppositions that make distributive justice conceivable. In their absence, distributive justice as a form would disappear. Bereft of the principle that gives them order from within, distributions would be internally indistinguishable from haphazard dispersions. Only the operation of extrinsic purpose on a juridically unintelligible world would remain. Distributions would be whatever political authority makes them. An assertion that the pattern of distribution was unintelligible or random could be decisively met by pointing to its being an expression of political purpose validly enacted into positive law. Distributive justice thus preserves distributions as juridical relationships among the persons who are to share in them rather than as instances of largess bestowed by political authority on whatsoever terms it pleases.

Legislative and administrative action can legitimately be made to respect the conceptual contours of personhood and equality that underlie the ordering of distributions. The positive law may give effect to the fundamental values of personhood and equality in a variety of ways: by incorporating them into the techniques for construing statutes, by elaborating notions of natural justice or fairness for administrative procedures, or by enshrining specifications of personhood and equality into constitutional documents. The manifestation of these values represents the realization in positive law of the conceptual elements that constitute distributive justice and that are accordingly necessary for the juridical ordering of the extrinsic goals pursued by political authority.

As the expositors of the juridical, judges have a legitimate role in developing the notions of personhood and equality. Although judicial review does not allow the substitution of the court's preferred distribution for the one laid down by the authoritative political organ, a court can insist that, in setting up and executing a scheme of distributive justice, political au-

90. *See* R. DWORKIN, LAW'S EMPIRE 178-84 (1986).

thority not treat persons as things or violate the equality of persons under the distributional criterion. Juridical activity of this sort does not encroach on the prerogatives of the political organ; it only insists that the favored distributions conform to their own intelligible structure.

In requiring respect for the values of personhood and equality, courts are not engaging in a new distribution. Personhood and equality are not things that lie stored up somewhere waiting to be dispensed by a political authority according to a certain distributive criterion. They are not themselves distributed, but are the conceptual grounds for the possibility of distributing anything. Judicial review can therefore legitimately give specificity to the concept of the person and to the norm of equality that distributive justice postulates.

Distributions have a two-fold intelligibility, facing outward to the extrinsic purposes that they serve and inward to the form they embody. Accordingly, a distribution must be understood both from the instrumental standpoint of its particular extrinsic purpose and from the conceptual standpoint of its universally immanent structure. The former dimension of distribution is political, the latter juridical. The different institutional competences and spheres of legitimacy for legislative and for judicial action reflect these two dimensions of distribution, both of which must be encompassed in the understanding of distributive justice.

C. *Politics and Corrective Justice*

The situation in corrective justice is categorically different because politics is absent. Since the bilateral interaction between the parties is understood as immediate, no extrinsic purpose can intrude itself. Private law may have political consequences and may be the result of a political decision to establish the appropriate institutions of adjudication, but *qua* realization of corrective justice, it has no political aspect.[91] The parties to a transaction are active and passive with respect to a single harm; the significance of their interaction lies not in the specification by political authority of a collective external goal but in the interpretation of the immediate intersection of doing and suffering as each party pursues his or her own goal.

Corrective justice is therefore immune to the external ends that characterize distributions. This immunity manifests itself in the different ways in which corrective and distributive justice are particularized. In distributive justice, the specification of a distribution involves a choice from among many different possibilities. A workers' compensation scheme, a crime-victim compensation program, and a more general accident compensation plan are different distributions each of which exemplifies the category of

91. In classical terminology, the creation and the consequences of something pertains to efficient causation, not to form. *See* ARISTOTLE, PHYSICS II, § 3 (R. Hope trans. 1961).

distributive justice in personal injury compensation, just as apples and oranges are different examples of the category of fruit. Every distribution has its own separate integrity as the actualization of its own specific purpose and scope; together they constitute the inventory of distributions from which the political authority may or may not select. In contrast, when construing a transaction in accordance with corrective justice, the adjudicator does not choose one scheme of correction over another but rather specifies the meaning of corrective justice with respect to the transaction in question. The varieties of distribution are the several relationships that can be mediated through different distributive purposes, but as between doer and sufferer, a single relationship of corrective justice gets worked out in accordance with its particular facts and history. Whereas the category of distributive justice encompasses different instantiating distributions from which the distributor may choose, the category of corrective justice is a single non-instrumental conception whose meaning is judicially elaborated in the different circumstances of its application.

In illuminating from within the juridical relationships that exemplify it, corrective justice excludes their being oriented toward any extrinsic goal. Corrective justice is intelligible solely in non-instrumental terms. An understanding of corrective justice by reference to something beyond itself transforms it into what it is not and thus fails to grasp it as it is.

The ascription of an external purpose to a transaction is incompatible with the structure of corrective justice in at least two ways. First, corrective justice holds the parties to the equality inherent in their immediate interaction. An extrinsic purpose, however, cannot be true to the unmediated relationship of doer and sufferer; it must favor one of the interacting parties and thereby contradict the initial equality that marks corrective justice as a distinctive form. For instance, the analysis of tort law in terms of possible aims such as compensation or deterrence[92] is incompatible with the understanding of tort law as the operation of corrective justice. The first of these aims is intelligible with reference to the plaintiff only; the second with reference to the defendant only. Yet the form of corrective justice postulates that each party has an equal standing and that neither is subordinate to the other or superfluous to their relationship.

The second way in which the projection of an external purpose onto a transaction is incompatible with corrective justice is that the purpose in question cannot be necessarily limited to the interaction of the two parties to the transaction. The purpose must embrace all those who fall under it; the immediate link between plaintiff and defendant is irrelevant. Since a transaction does not realize a collective goal, there is no necessary reason that the scope of the transaction should be coextensive with the operation of any purpose. Take tort law again as an example. If the purpose of tort

92. *See* Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBS. 137, 144-72 (1951).

law is considered to be the provision of financial support to those who suffer from personal injuries, the claim of a plaintiff can be no stronger than the claim of any person who is injured even non-tortiously and who therefore falls within the ambit of the purpose. Similarly, if one conceives of the purpose of tort law as the deterrence of wrongful behavior, there is no warrant for restricting the deterring sanction to those instances of wrongful behavior which materialize in injury. The purpose as such is indifferent to the transactional context of the tortious injury.

These two incompatibilities between corrective justice and exogenously introduced goals are connected as follows. Corrective justice is the integrated unity of the doer and the sufferer of a single harm. The extrinsic goal disassembles this unity by isolating an aspect that would favor one or the other of the litigants and then bending the entire relationship to its promotion. But once the transaction is decomposed into competing aspects, the preferred goal has a vitality of its own that cannot rationally be confined to the bounds of the transaction's now disintegrated unity.[93] It must float free to cover all the instances that fall under its independent sway.[94]

In displaying the ordering that constitutes a transaction and that distinguishes it from a distribution, corrective justice reveals the inappropriateness of an instrumental interpretation of immediate interaction. The transactional equality between plaintiff and defendant, unlike the proportion that characterizes distributive justice, cannot be oriented towards an

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93. Private law is sheer mystery if it is considered to be solely the combination of independently valid goals. For instance, Marc Franklin's argument for a no-fault compensation scheme is animated by the irrationality of the respective plaintiffs' lottery and defendants' lottery that is set up when the independently conceived interest of each litigant is tied to his relationship with the other. *See* Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967). Whatever the strength of other arguments for a compensation scheme, this criticism of tort law is weak: Since its critical standpoint is external to the integrity of the delictual relationship, it is not a criticism of *tort* law but merely an ascribing to tort law of the defects of the critic's misunderstanding.

94. This conceptual dynamic is explained perfectly by Hegel in his critique of empiricism:

> In an organic relation to the manifold qualities into which the unity is divided (if they are not simply to be enumerated), one certain determinate aspect must be emphasized in order to reach a unity over this multiplicity; and that determinate aspect must be regarded as the essence of the relation. But the totality of the organic is precisely what cannot be thereby attained, and the remainder of the relation, excluded from the determinate aspect that was selected, falls under the dominion of this aspect which is elevated to be the essence and purpose of the relation. Thus, for example, to explain the relation of marriage, procreation, the holding of goods in common, or something else is proposed [as the determinant] and, from such a determinate aspect, is made prescriptive as the essence of the relation; the whole organic relation is delimited and contaminated. Or, in the case of punishment, one specific aspect is singled out-the criminal's moral reform, or the damage done, or the effect of his punishment on others, or the criminal's own notion of the punishment before he committed the crime, or the necessity of making this notion a reality by carrying out the threat, etc. And then some such single aspect is made the purpose and essence of the whole. The natural consequence is that, since such a specific aspect has no necessary connection with the other specific aspects which can be found and distinguished, there arises an endless struggle to find the necessary bearing and predominance of one over the others; and since inner necessity, non-existent in singularity, is missing, each aspect can perfectly well vindicate its independence of the other.

G. HEGEL, NATURAL LAW 60 (T. Knox trans. 1975).

extrinsic objective. The exclusion of extrinsic purposes means that instrumentalism plays no role here.[95] Because corrective justice is therefore purely juridical, its elaboration can be assigned to the judiciary. Private law is the detailed and concrete elaboration of corrective justice by the authoritative judicial institutions. Corrective justice yields a completely non-instrumental and non-political understanding of law.

D. *The Normative Force of the Forms of Justice*

Formalism thus derives the distinction between the juridical and the political from the immanent rationality of the forms of justice. Corrective justice exhibits the form of rationality indigenous to transactions and presents a structure of interaction that is immune to an understanding in terms of extrinsic purpose. Distributive justice is the ordering immanent to distributions; it structures and constrains the operation of the extrinsic purposes that characterize particular distributions. Law is by its nature apolitical to the extent that it translates the conceptual contours of these forms into a legal reality.

Recall that Unger described formalism as postulating an "immanent moral rationality."[96] The immanence and the rationality (or intelligibility) of the forms of justice have perhaps now been sufficiently exhibited and related to the distinction between law and politics. What, however, is the moral force of these forms? For clearly they must have a moral dimension if the law is required to conform to their structure. Although they describe the nature of coherence in the content of sophisticated legal systems, the

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95. For a specific account of the difficulties besetting instrumentalist considerations in the context of private law, see Trebilcock, *The Role of Insurance Considerations in the Choice of Efficient Liability Rules*; 4 J.L. ECON. & ORG. ___ (forthcoming). With reference to a variety of legal situations, Trebilcock outlines the indeterminacies resulting from the attempt to achieve efficiency through judicial attention to insurance. He classifies these indeterminacies under three headings: (i) the uncertainty generated in determining whether to confine the search for the best insurer to the immediate parties; (ii) the uncertainty over which of these two parties is the better insurer in view of the fact that the defendant can more readily estimate *ex ante* the likelihood of injury, whereas the plaintiff can more readily estimate the extent *ex ante* of the damage; and (iii) uncertainty as to trade-offs between insurance and other efficiency rationales. These three kinds of indeterminacy follow in the tracks of formalist objections to the application of extrinsic purposes to the immediate external interactions of corrective justice. The first arises from the indifference of extrinsic purpose to the immediacy of the transaction; the second from the decomposition of the unified normative relationship of doer and sufferer into aspects that are independently relevant to one or the other of them; the third from the fact that all extrinsic purposes are arbitrary with respect to the corrective justice relationship, and that therefore this arbitrariness generates uncertainties in the trade-offs possible among them. It should be noted that the difficulties Trebilcock discusses are not, as his formulations imply, mere uncertainties, similar in kind to the question of who will win the World Series fifteen years from now, for which we have at this moment too many possibilities and too little knowledge. Rather, these indeterminacies reflect the incoherence of applying to the bipolar relationships of corrective justice the extrinsic purposes available to distributive justice. This lack of fit between the normative considerations of economic analysis and the legal context is structural, not factual. Seen in this light, Trebilcock's powerful but straightforward exposition indicates why the normative economic analysis of private law can never, despite the intellectual virtuosity of its distinguished expositors, rise above unilluminating technicality.

96. *See* Unger, *supra* note 8, at 571.

implicit demand that they issue to the positive law attests to a normative relevance that overrides any extrinsic political purpose. On what is this relevance based? How do the forms of justice secure a dimension of normativity that is independent of the justification of a particular extrinsic purpose or of the lawmaking process by which this purpose is brought into existence as a matter of positive law?

The answer to this cannot, of course, be derived from any good ulterior to these forms; if it were, their intelligibility as justificatory structures would be dependent on an extrinsic value. As a result, their normativity would be secured at the price of their immanence. Maintenance of the internal perspective requires that the normativity of juridical relationships be as immanent as their intelligibility. In other words, their moral force must come from the very integration of immanence and intelligibility in a juridical relationship. Because the justification of all immediate and mediated juridical relationships must—if there is to be such justification—conform to the shape of one or the other of these structures, the forms of justice carry with them the seeds of their own moral force. For the formalist, corrective and distributive justice are normative not because something else makes them normative, but because they constitute the essential nature of normativity with respect to the external relationships of persons.

The non-instrumental normativity that undergirds the forms of justice is to be found in Kantian legal philosophy. The forms of justice transpose into the intelligibility of external interaction the Kantian notion of obligatoriness. On the one hand, Kantian normativity is presupposed in the forms as a condition of their being justificatory. On the other, the structures of the two forms are themselves the juridical expressions of this presupposed Kantian normativity.

Because, as I shall argue, Kantian normativity is presupposed by the forms of justice, it does not supervene upon them from the outside as an optional or arbitrary postulate. Rather, it is implicit in them as justificatory structures. If we take the forms of justice as hitherto explicated and inquire into the preconditions of their justificatory function, we are ineluctably brought to their Kantian grounding. This is because the forms are so abstract that they do not incorporate a determinate notion of the good and therefore can be based only on a notion of Kantian right. The Aristotelian forms of justice and Kantian right provide dovetailing accounts of the non-instrumental intelligibility of juridical interaction. Kantian right traces this intelligibility back to the free acts that are necessitated by categorical imperatives of reason. Inasmuch as Kantian right is implicit in the forms of justice, they are grounded in a conception of normativity—indeed, in a particularly stringent conception of normativity.[97]

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97. I am not concerned here to describe or defend Kantian right (which I have done elsewhere, *see*

Consider first corrective justice, the presuppositions of which are all the clearer because it excludes the mediation of extrinsic purpose. Two features of corrective justice that are embedded in private law bear on the form's immanent normativity. First, corrective justice ignores such factors as the wealth, virtue, or merit of the interacting parties.[98] Second, the rectification worked by corrective justice is a restoration of an initial notional equality. The quantity transferred from defendant to plaintiff represents the amount by which this initial equality has been disturbed. This equality is itself formal and does not refer to the parties' particular attributes of need, merit, or status. In corrective justice the equality of the plaintiff and the defendant is neutral to all the particularities of condition or character that mark their difference and their possible inequality.

Corrective justice ignores the particular attributes of the litigants because these attributes are not relevant to the transaction as such. In corrective justice the interaction of the parties is immediate; there is no place for consideration of the varying degrees in which they partake of particular qualities and in accordance with which the mediating proportion of distributive justice might be constructed. In this respect corrective justice postulates an extreme version of interpersonal externality. All that matters is the interaction itself.

The parties may be conceived to be so completely external to one another because each is assumed to be internally constituted as a single person who acts and produces effects upon the circumambient world. The equality that corrective justice presumes is that which parties owe each other as persons with an equal capacity for acting.[99] Corrective justice conceives of the parties as freely active, purposive beings. As such, they are not determined to perform or pursue any given action or purpose; the essence of their activity and their purposiveness lies precisely in their being self-determined. This capacity for self-determination is an abstraction from all particularity; its very abstractness as a capacity is what allows it to be equally applicable to all actors. Corrective justice refers only to the person's formal capacity for free purposive action, while remaining indifferent to the background from which particular exercises of this capacity issue. In abstracting from the concrete richness of human particularity, corrective justice pays it the supreme compliment of seeing it as conceptually posterior to the operation of a self-determining will.

The presupposition of corrective justice outlined here will be familiar to readers of Kant and Rawls as moral personality.[100] Indeed, corrective jus-

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Weinrib, *supra* note 4), but only to outline how the elements of Kant's legal philosophy are presupposed in the Aristotelian forms of justice.

98. The significance of this was first noted by Aristotle. *See* ARISTOTLE, *supra* note 57, at 120-21, 1132a2-7.

99. In this conception, no individual is synonymous with his particular determinations: Of no particular action can it be said that it could not have been otherwise.

100. *See* I. KANT, *supra* note 14, at 24; Rawls, *Kantian Constructivism and Moral Theory* 77 J.

tice can fairly be described in Kantian terms as the point of view from which noumenal selves see each other,[101] i.e., as the ordering of immediate interactions that Kantian moral persons would recognize as expressive of their natures. Kantian moral persons are duty bound to interact with each other on terms appropriate to their formally equal status: Their acts, as the acts of freely purposive beings, must be capable of co-existence with the freedom of everyone.[102] This normative requirement is not introduced from the outside but attaches at once as a conceptual consequence of their being moral persons.[103] Corrective justice's presupposition of moral personality therefore means that implicit in the intelligibility of immediate interaction are the obligations incumbent in Kantian legal theory on free beings under moral laws.

Distributive justice also presupposes moral personality. We have already seen that distributive justice postulates a distinction, explicable in Kantian terms, between persons and things. This distinction can be related to the abstractness of moral personality in the following way. Although particular distributions connect the subject matter of the distribution to the recipients of it, and are therefore not abstract, distributive justice as an ordering concept specifies no particular subject matter. A particular distribution concretizes the person by bestowing an entitlement to a particular benefit or an incumbency to a particular burden. Accordingly, the concreteness of personhood in a distribution is a consequence, not a presupposition, of that distribution. In particular distributions the person must be conceived as concretely attached to a share in the thing being distributed. Distributive justice, however, is the form underlying all possible distributions; in itself it is neutral to any particular ones. Therefore it presupposes abstract moral personality no less than does corrective justice.

Both corrective and distributive justice incorporate the normativity of externally interacting Kantian moral persons, but they express this normativity through distinct structures of quantitative and proportional

PHIL. 515, 525 (1980). It could also be termed (and its connection to my theme would be clearer if it were) "juridical personality," not only because this conception of the person is presupposed in juridical relationships, but also because law is the most primitive actualization of the freedom that exists in its potential state in the person so conceived. *See* Weinrib, *supra* note 4, at 481-85, 501-03.

Of the two capacities that mark moral personality for Rawls, only the first, the capacity for a conception of the good, is involved here. As for the second (the capacity for a sense of justice), the coercion of law, in the Kantian view which distinguishes justice from virtue, is grounded precisely on the conceptual irrelevance of any person's having or not having this sense. *See* I. KANT, *supra* note 14, at 76. Even for Rawls, the two capacities of the moral person are not parallel. *See* Rawls, *The Basic Liberties and Their Priority*, in LIBERTY, EQUALITY AND LAW 27-30 (S. McMurrin ed. 1987).

101. Rawls characterizes the original position as "the point of view from which noumenal selves see the world." J. RAWLS, A THEORY OF JUSTICE 255 (1971).

102. *See* I. KANT, *supra* note 14, at 35.

103. For a fuller treatment of the inherent normativity of the components of Kant's legal theory, see Weinrib, *supra* note 4, at 485-87 (1987).

equality. Hence the single normative presupposition that underlies immediate and mediated interactions has two different manifestations in positive law. In corrective justice, the relationship between the interacting parties is not mediated by the internal particularity of need or want. The relationship cannot, therefore, be understood in terms of an obligation on one to bestow a benefit on the other. What remain are the parties' reciprocal duties not to interfere wrongly with the embodiments (physical and proprietary) of each other's moral personality, and the rights that are correlative to these duties. The immediacy of their interaction yields in private law a set of negative rights and duties that immediately appertain to all interactors.[104] Distributive justice, on the other hand, mediates the relationship between persons through an extrinsic purpose determined by political authority and establishes no duties immediately owed by person to person. It operates on the mediation itself, requiring the exercise of political authority to respect moral personality by conforming to the justificatory structure immanent in all distributions. This normative constraint on collective purposes expresses itself legally in the possibility of invalidating legislative and administrative action through judicial review.

Positive law reflects the immanent normativity of corrective and distributive justice through the retrospective operation of legal remedies. When a court strikes down an administrative or legislative act or awards damages to a private law litigant, its judgment does not merely state what the law shall be from that moment on; it authoritatively defines the legal standards antecedently applicable to the very behavior at issue. This retrospectivity is problematic if the judgment is itself conceived as essentially legislative, since such legislation would give the parties affected no chance to guide their conduct by its prescriptions. The retrospectivity presumes that the standard had moral force at the time of the action at issue in the suit, and that the judgment is declaratory of this pre-existing moral force. Inasmuch as the judgment is itself a specification of the meaning of corrective or distributive justice in a particular context, the judgment's retrospective normativity presumably reflects the normativity that attaches at once to the juridically intelligible nature of a transaction or a distribution. The law assumes that the declared standard is notionally present to the interaction in advance of its being declared, thus implicitly attesting that the ordering of transactions and distributions through their respective forms of justice is an inherently normative exercise.[105]

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104. *See id.* at 489.

105. Because the forms of justice are inherently normative, the elucidation of the adequacy of a particular legal arrangement to one or the other of these is itself a normative argument. It therefore makes no sense, for instance, after the demonstration of the way in which a given private law doctrine conforms to corrective justice, to demand a separate enquiry into the normative basis of the private law doctrine. Such a demand would be the equivalent of asking "What is the color of the color green?" This fallacy has a distinguished intellectual history: Kant pointed out that Moses Mendelssohn's account of contractual obligation committed this very error. *See* I. KANT, THE PHILOSOPHY OF

VI. Conceptualism and Social Context

A. *The Challenge to Conceptualism*

So far I have set out a version of legal formalism that construes juridical relationships in terms of the contrasting forms of corrective and distributive justice. Formalism, understood in this way, is avowedly and unabashedly conceptual in two respects. First, the components of form are conspicuously manifested in the concepts through which a coherent legal system is organized. Second, the forms are themselves the most abstract concepts that bear upon the intelligibility of juridical relations. These two points are related, in that the concepts of a coherent legal system are both the expression and the means of discovering the most abstract concepts of juridical coherence.[106]

At the heart of this conceptualism is the difference between the form of corrective justice and the form of distributive justice. Just as these two forms are the most abstract concepts underlying juridical relationships, so the difference between these forms is itself a conceptual one. The two forms of justice and the difference between them, although they are manifested in sophisticated legal systems that are socially and historically conditioned, are not themselves socially and historically conditioned. As patterns of intelligibility latent in the justification of all interactions regarded as external, they are not restricted to any particular episode of such interaction or to any particular set of such episodes. Their conceptual status guarantees for them a significance that embraces external interaction whenever and wherever it occurs and that, accordingly, transcends society and historicity. As the categorically distinct abstractions underlying the particularity of external interaction, corrective and distributive justice are the stable substrata of intelligibility that persist through all the multifarious juridical relationships that realize them. In other words, the forms of justice are universals.

The current disfavor of formalism involves a rejection of such an essentially conceptual understanding of law. The contemporary assumption is that formalism is a necropolis of lifeless abstractions that repel meaningful contact with the movement and vitality of social life. Formalist conceptu-

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LAW 103-04 (W. Hastie trans. 1887); Benson, *External Freedom According to Kant*, 87 COLUM. L. REV. 559 (1987).

106. We discover the concept of corrective justice, for instance, by reflecting on the legal institutions we have and on the forms of order they presuppose. We see that particular legal holdings fit into a certain conceptual framework that makes salient the apparently fixed points of legal reasoning in a sophisticated legal culture (e.g., that a finding of negligence grows out of an adjudicated conglomerate of cause, standard of care, and causation). We can then examine the presuppositions about interaction evidenced in the components of this framework, all the while preserving the tendency toward coherence that characterizes both thought in general and sophisticated legal systems in particular. This process of regression on the conditions of private law leads to the category of corrective justice, which is, so to speak, the arch-concept in terms of which all other private law concepts must be conceptualized if they are to be coherent. And to see the forms of justice as presupposed in the concepts of a sophisticated legal system is also to see those concepts as expressive of the applicable form.

alism is thought to be incapable of comprehending the concrete legal reality that it wishes to illuminate. This assessment, however, is perhaps the most unfortunate consequence of the estrangement of contemporary legal thought from the tradition on which legal formalism draws.[107] In fact, formalism does not fall foul of the defect for which it is so routinely condemned. That, at least, is the theme of my argument in this Part.

The charge against formalism amounts to an accusation that it holds itself out to be a kind of moral geometry. These concepts are alleged to exist in a world of their own—they are, in Holmes' famous phrase, "a brooding omnipresence in the sky"[108]—and that world is categorically separate from the world of human activity. Formalism is dismissed as "the dogma that legal forms can be understood apart from their social context."[109] Further, critics claim, parallel to formalism's separation of concepts from social context is its separation of the self from connection with others. The Kantian notion of moral personality is said to ignore the way community is constitutive of the individual.[110] Thus the conceptual abstractness of formalism is equated by its critics with a withdrawal from social and historical situatedness.

This conception of formalism's separation from the world is matched by a conception of the way it impinges on the world. The formalist is alleged to construe legal analysis as the geometrical working out of the logical conclusions of a limited number of axioms. Its procedures are said to be deductive, and hence to ignore the inevitable indeterminacy inherent in the application of legal rules. Such indeterminacy purportedly can only be handled by reference to the political.[111]

These charges touch many profound issues: the relationship between the way law is and the theory of law; between the abstract and the concrete; between the universal and the particular. I wish to outline the misconceptions on which such criticism rests. My basic point is that this criticism does not take seriously the immanence of formal intelligibility.

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107. Compare the following response to the parallel criticism of Spinoza:

> Spinoza's method of exposition of his philosophical principles is particularly open to criticism in that he seems to begin from an abstract concept of being, which makes impossible his ever reaching the concrete reality whose nature and action it is his purpose to disclose. But what he wants to affirm is a reality that is not indeterminate but fully determinate and therefore the determinant of all lesser or derivative forms of existence. Such reality is not the negation of all characters and relations but their totality or correlation.

Forsyth, *Spinoza's Doctrine of God in Relation to His Conception of Causality*, in STUDIES IN SPINOZA 4 (S. Kashap ed. 1972).

108. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1916).

109. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 68 (1984).

110. *See, e.g.*, M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81 (1984).

111. *See, e.g.*, Kennedy, *supra* note 14; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

B. *The Detachment Issue*

In the formalism I have been describing, the forms of justice do not inhabit a world detached from the juridical relationships they govern. They are not to be conceived as having an existence parallel to, but separate from, the existence of human interaction. The forms of justice go to the immanent coherence of juridical relationships. The formalism of these forms does not lie in their existing somewhere apart from the social world, but in their representing the different ways in which the juridical relationships of that world can be coherent.[112] Because they render interaction intelligible from within, they presuppose interaction and cannot be elucidated without it.

This point can also be made by reference to the concept of moral personality, which abstracts from particularity without dismissing it. One might think that, strictly speaking, moral persons as such cannot interact. The purposiveness characteristic of moral personality is a mere potentiality that, so long as it remains potential, does not issue into the world and therefore does not act upon or interact with anything or anyone. In abstracting from all particularity, moral personality, it might be said, withdraws from the world and cannot leave its mark upon it. Only through the realization of specific purposes does purposiveness radiate out from the actor and reach his surroundings: The faculty of will impinges upon others only insofar as it wills something. All this is true so far as it goes. But far from undermining the significance of moral personality, this merely indicates how moral personality wins its way into the concreteness of interaction. Indeed, it confirms the essentiality of moral personality to freely purposive beings by acknowledging that the rich variety of specific purposes is but the actualization of the potentiality of purposiveness. The will, to be a will, must will something. The particularity of what it wills, however, does not confirm its status as a will; it merely completes its operation. From the standpoint of the forms of justice, purposiveness must issue into a particular purpose but into no purpose in particular. These forms, then, do not deny particularity; they treat it as a universal. They acknowledge that my purposiveness is complete only in *this* purpose; the content of the purpose, however, does not matter for them, because the "thisness" of this purpose refers to any and every purpose.[113]

Inasmuch as they admit the particularity of interaction, the forms of justice differ from the forms of geometry. The relationship of corrective

112. The forms of justice are not forms in the Platonic sense, supposed to exist in a peculiar world of their own "on the other side of being." *See* PLATO, THE REPUBLIC 195-99 (R. Sterling & W. Scott trans. 1985) (on the form of the good). *But see* H. GADAMER, THE IDEA OF THE GOOD IN PLATONIC-ARISTOTELIAN PHILOSOPHY 27-31 (P. Smith trans. 1986) (Plato did not conceive of form of good as a trans-existent entity, but as the unity of what is unitary, i.e., as what is presupposed by anything ordered, enduring, and consistent).

113. *See* G. HEGEL, PHENOMENOLOGY OF SPIRIT 62 para. 102 (A. Miller trans. 1977).

and distributive justice to the transactions and the distributions that they respectively govern is not that of a triangle in Euclidian geometry to a triangle drawn on the blackboard. Whereas the geometer's triangle is completely intelligible apart from the blackboard representation—indeed the drawn triangle is always and necessarily a defective version of the idea that it supposedly renders—the forms of justice cannot be understood detached from the particularity of the external interactions that they govern and from the specific regimes of positive law that actualize them. As the ordering principles of interaction that become concrete in positive law, corrective and distributive justice are the structures of coherent meaning implicit in sophisticated legal systems.

The forms of justice are aspects of a mutually reinforcing movement between legal content and juridical form. The form, being the form *of* the content, does not exist separately from legal content. Indeed the notion of form, taken in itself and divorced from all inkling of what this form might be the form of, could never constitute a mode of intelligibility for anything. For a form that is not implicit in a determinate content whose form it is would be an abstraction from everything and thus, in itself, an absolute nullity. Even if we see corrective and distributive justice in terms of their different notions of equality, we must see these notions as devices that model different justificatory structures and that therefore refer to phenomena to which justificatory structures are pertinent. Otherwise the forms of justice would represent not modes of ordering interaction but merely the mathematical difference between a quantity and a proportion. This is why we first come to an appreciation of the forms of juridical relationship by working back from the content of legal systems that attach a value to coherence. This procedure ensures that the elucidation of form takes place in the context of a content whose forms they are.

The forms of justice are immanent and do not operate in detachment from society or from history. Their significance as forms is understood through the relationships they inform. These relationships are necessarily social and historical ones. They are social in that they feature the interaction of one person with another and thereby do not construe the person as living isolated on a desert island. They are historical in that they are the products of events in history, since these relationships come into being and fade away in a world of temporality, flux, and change.[114]

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114. A historicist critic of formalism might object that the formalist's pointing to the historical situatedness of juridical relations is beside the point because the real difficulty is with the historical intelligibility of those relations. The formalist postulates that though the forms govern historically situated relationships, the forms themselves are not *qua* abstractions historically situated. These forms are the ahistorical residue that is exposed to the historicist objection.

It is noteworthy, however, that contemporary critics of formalism do not always press their attacks so far. Even while proclaiming their historicism they recognize that the indeterminacies that reflect particular historical circumstances are embedded in an ahistorical framework of understanding. For example, Robert Gordon's justly celebrated account of historicism in legal scholarship begins with the statement that "law exists and must *to some extent* always be understood by reference to particular

Juridical relationships, as comprehended by the formalist, not only take place in society, but have a public meaning. The formalist is concerned with the intelligibility of interactions in which the interacting parties are treated as external to one another.[115] The externality of interaction must be understood from a standpoint that is common to the parties to the interaction.[116] Accordingly, interpreting the interaction requires recourse to a shared public meaning. The forms of justice, as they apply to any specific juridical relationship, must draw upon this public meaning. Indeed, the justificatory structures themselves participate in this public realm, since justification with respect to external relationships involves the negation of purely private significances in favor of meanings that are accessible to all and that can be openly vindicated in the presence of all.

The external character of juridical relationships also means that the determination of the legal significance of a particular interaction must reside in an authority outside the parties. Formalism is not satisfied merely by the correct elucidation of the adequacy of legal content to juridical form. In addition, an impartial and disinterested authority must be available who is recognized as expressing the public meaning of the interaction. In other words, for the forms of justice to be applied, the public significance of particular interactions must be expressible through mechanisms of positive law.[117]

In our legal culture, this function is performed by the judiciary. In determining whether a transaction or a distribution has lived up to its ordering form, the court declares the meaning of corrective or distributive jus-

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contexts of space and time. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981) (emphasis added); *see also id.* note 1. Gordon appears to regard this statement about law's contextual existence as antithetical to the attempt—which he stigmatizes as "rationalizing the real"—to show that "the law-making and law-applying activities that go on in our society make sense and may be rationally related to some coherent conceptual ordering scheme." *Id.* at 1018. However, Gordon's qualification of his thesis by the words "to some extent" indicates that he does not believe that law can exhaustively be understood by reference to particular contexts of space and time. His formulation implies that a residue of intelligibility survives all the particularity of historical context.

Perhaps there is good reason for such historicist self-abnegation. The attack on the ahistorical nature of formalist concepts would presumably have to be grounded in the assertion that all cognition is historically conditioned. But this would imply, paradoxically, that the assertion is itself historically conditioned. Some historicists indeed grasp this nettle boldly, if uncomfortably. *See, e.g.*, M. FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE 205 (A. Smith trans. 1972). For a discussion of the difficulties, see D. CARR, PHENOMENOLOGY AND THE PROBLEM OF HISTORY 237-59 (1974). The historicist may want to claim for his own assertions an immunity from historicism, but if so the question why the immunity extends only so far and does not include the formalist concepts remains unanswered. In this unravelling of historicism, the possibility that law "may be rationally related to some coherent conceptual ordering scheme" (in Gordon's words) cannot be categorically excluded. For this reason, the case for formalism has to be examined on its own merits, not on the basis of historicist preconceptions.

115. Their relationships are, therefore, not construed from a standpoint internal to the person by reference to virtues of character or private sentiments, however laudable, such as the loving identification by one person of the good of another with his or her own good. *See supra* note 58.

116. *See* T. AQUINAS, *supra* note 76, II-II, Q. 60, Art. 1, 3.

117. For a more extended treatment from a Kantian standpoint of the theme of externality summarized in the last two paragraphs, see Weinrib, *supra* note 4, at 491-500.

tice in the context of the specific controversy at hand. It examines the particular transaction or distribution against the background of public understandings through which corrective and distributive justice can be expressed, and its judgment provides the publicly authoritative interpretation of how the appropriate form of justice is applied to the controversy at hand. This function is public, but it is not political. The court elucidates the public meaning of the transaction or the distribution at issue; it does not orient the juridical relationship to any extrinsic purpose.

One can, therefore, distinguish two public functions—one political, the other juridical—that formalism ascribes to the positivity of law. The first is the selection of the goal to be embodied in a particular distribution and thereby to be authoritatively inscribed into the schedule of the community's collective purposes.[118] The setting up of a particular distribution is an act of political authority that clothes its determinations with the attributes of positive law. Although the particular distribution must, if it is to actualize an intelligible order, conform to distributive justice, it embodies an extrinsic—and therefore political—purpose. The second function is juridical: to interpret particular transactions and distributions in accordance with the form of justice they instantiate. This function does not depend on a standpoint outside the forms of justice. Rather, it requires courts to specify, in a publicly authoritative way, the meaning of these forms in the context of particular interactions.

A recent case illustrates the distinction between these two functions. In *Lamb v. London Borough of Camden*,[119] the English Court of Appeal was confronted with a problem of proximate cause. The plaintiff homeowner was suing the defendant municipality for the damage resulting from the negligent repair of a sewer pipe. Contractors employed by the defendant had breached a water main and the resulting flood caused the plaintiff's house to subside. Because the house was then unsafe, the plaintiff used it only for storage as it awaited repair. While the house remained vacant squatters moved in. Subsequently, they were evicted, and the plaintiff boarded up the house. Nevertheless squatters moved in again, and this time damaged the house's interior. The question for the court was whether the municipality was liable for the damage done by the second set of squatters.

This case is typical of situations where several causes, including the actions of third parties, intervene between the plaintiff's damage and the tortfeasor's original negligence.[120] Given the number and variety of possible causes, courts have never been able—and doubtless never will be

118. This function calls for a political body that is recognized as the locus of collective decisionmaking, that can evaluate the full range of possible distributions, and that is accountable to the community as a whole for the particular ones that it selects.

119. 2 All E.R. 408 (C.A.) (1981).

120. *See* W. PROSSER & W. KEETON, THE LAW OF TORTS § 44, at 301-19 (5th ed. 1984).

able—to come up with a definitive verbal formula for resolving these disputes. Confronted with this indeterminacy the members of the court took two different approaches. Lord Denning, declaring it "a question of policy for judges to decide,"[121] thought the decisive consideration was that damage to property, including damage caused by criminal acts, is usually covered by the owner's insurance, and that the insurers whose business it is to cover the risk should not be allowed by subrogation to pass the cost on to the defendant. Through insurance "the risk of loss is spread throughout the community. It does not fall too heavily on one pair of shoulders alone."[122] He accordingly ruled against liability.

In concurrence with Lord Denning in this result, Lord Justice Watkins made no reference to insurance or to loss-spreading. Instead, he drew attention to what is suggested by "the very features" of the act or event for which damages are claimed. This included such matters as the nature of the event, the time and place of its occurrence, the identity and intentions of the perpetrator, and the responsibility for taking measures to avoid the occurrence.[123] These factors did not produce anything that could be a universal test, but Lord Justice Watkins found that they yielded "the instinctive feeling" that the squatters' damage was too remote for the defendant's liability.[124]

Both Lord Denning and Lord Justice Watkins issued public and authoritative declarations of positive law. There is, however, this difference between them. Lord Denning's approach was essentially political. It first required selecting the particular goal of loss-spreading from among the various goals (including general deterrence, specific deterrence and redistribution to the deepest pocket[125]) that his judgment might promote. It then necessitated electing to effect this goal through the homeowner's property insurance, not through the tortfeasor's liability insurance or through the municipality's self-insurance. Loss-spreading, however, like all external goals, is a matter for distributive justice and cannot be coherently achieved within the relationship of doer and sufferer. Nor is its positing the province of a judge, who is neither in a position to canvass the range of possible collective goals, nor accountable to the community for the particular goal chosen.

Lord Justice Watkins, in contrast, does not attempt to achieve any goal external to the relationship between plaintiff and defendant. His judgment is an exposition of the nature of that relationship through attention to the link between the defendant's wrongdoing and the plaintiff's damage. For him proximate cause is not an occasion for "policy," but is a juridical

121. *Lamb*, 2 All E.R. at 414.
122. *Id.*
123. *Id.* at 421.
124. *Id.*
125. G. CALABRESI, *supra* note 18.

concept under which the court comprehends the nexus between the litigants by tracing the proximity of the wrongful act to the injurious effect. This concept does not have an existence independent of the interaction to which it is applied, and its features cannot be listed and weighted in a formula that yields a uniquely determinate conclusion. This explains Lord Justice Watkins' reference to intuition. The meaning of proximate cause in this situation is not a result of matching these facts to an independently conclusive formula; it is simply the most plausible construal of the relationship between the parties in light of the factors that are deemed relevant. For these facts, the conclusion constitutes the meaning of the concept they instantiate.

In concentrating on the features of the injurious act rather than on a mediating goal, Lord Justice Watkins treats proximate cause as a concept that bears on the immediate intelligibility of the parties' relationship. Proximate cause so treated is one of the set of concepts through which a delictual interaction is understandable as corrective justice. Because corrective justice is conceived as immanent to the transactions that it regulates, its operation is not intelligible independently of those transactions. The actualization of corrective justice through judicial decisions "is not the subsequent applying to a concrete case of a given universal that we understand first by itself, but it is the actual understanding of the universal itself that the given text constitutes for us."[126] The particular transactions and their intelligibility as corrective justice can be interpreted only

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126. H. GADAMER, TRUTH AND METHOD 305 (1975). Gadamer speaks of "[t]he meaning of application that is involved in all forms of understanding. . . ." *Id.* Although Gadamer considers legal interpretation to be paradigmatic of the hermeneutical approach to the relationship between the universal and the particular, he does not understand legal universals in terms of the formalist conceptions presented in this essay. His exposition of legal interpretation takes the form of a commentary on Aristotle's notion of equity. *See id.* at 278-89. In *Nicomachean Ethics*, Aristotle asserts that equity is:

> a corrective of what is legally just. The reason is that all law is universal, but there are some things about which it is not possible to speak correctly in universal terms . . . . So in a situation in which the law speaks universally, but the case at issue happens to fall outside the universal formula, it is correct to rectify the shortcoming, in other words, the omission and mistake of the lawgiver due to the generality of his statement.

ARISTOTLE, *supra* note 57, at 141.

Gadamer does not relate this passage to Aristotle's discussion of the forms of justice which precedes it by several pages. There is, however, no tension between these passages. Under the rubric of equity, Aristotle analyzes a perennially difficult issue concerning positive law, when the forms of justice are made concrete through definitive statements of legal authorities. For Aristotle's discussion, it is these statements that attract the problem of infelicitous generalization, not the forms themselves.

Gadamer conceives of the universal not in terms of stable conceptual patterns (such as corrective and distributive justice), but—as Richard Bernstein summarizes his view—in terms of "those principles, norms, and laws that are founded in the life of a community and orient our particular decisions and actions." R. BERNSTEIN, PHILOSOPHICAL PROFILES 71 (1986). However, as Lord Justice Watkins' opinion in *Lamb* indicates, the significance of application is no different for the formalist's universals than it is for Gadamer's. The deep issue raised by the difference between Gadamer and the formalist is the following. Gadamer, as a representative of modernity, is situated between the "postmoderns" who postulate the utter contingency of social practices, *see id.* at 83-88, and the "premodern" conceptualists who claim that social practices can be understood through form. Is there room for such comfortable middle ground, or is his position intelligible only as a deformation of one or the other of the two extremes?

from within a public realm of shared social meanings that judicial decision renders legally authoritative. The same process holds for the application to a particular distribution of the components of personhood and equality that are internal to distributive justice. This drawing out of the significance of the forms of justice for particular transactions and distributions is the juridical function of positive law. It is categorically different from the political role of determining the exogenous end that is to be embodied in a distribution.

C. *The Determinacy Issue*

These remarks about the immanence of the forms of justice, and the consequent denial of the claim that they have a socially detached existence, also bear on the relevance of indeterminacy. As this account of Lord Justice Watkins' judgment in the *Lamb* case illustrates, formalism does not rely on the antecedent determinacy for particular cases of the concepts entrenched in positive law, even when those concepts reflect the appropriate form of justice. In *Lamb*, and cases like it, the organ of positive law has the function of determining an antecedently indeterminate controversy. For formalism the crucial distinction is between the juridical, which is comprised of whatever expresses the internal coherence of the forms of justice, and the political, which is the domain of the collective goals extrinsic to those forms. Nothing about formalism precludes indeterminacy, as the critics understand it, within the juridical operation of either of the forms of justice. Formalism merely insists that such indeterminacy not be seen—as it was by Lord Denning in *Lamb*—as a reason for transforming a juridical exercise into a political one.

For formalism the possibility of indeterminacy neither can, nor need be, avoided. Indeterminacy follows from formalism's conception of the relationship between general and particular. Legal formalism deals with the particulars of external interaction by abstracting from them to a coherent set of juridical categories, and ultimately by abstracting further to corrective and distributive justice as the two concepts of juridical coherence. This approach to the intelligibility of the law's content aims at an illumination of the particular through the general: The particulars are the inexhaustible ways in which persons can externally affect one another, whereas the forms are the general patterns through which these particulars are understood as juridically coherent. The forms of justice, as the most abstract representations of a conceptual distinction within the structure of justification, are philosophical constructs that are not themselves variable. In contrast, the particulars of one person's impingement on another are unavoidably contingent. This difference between the enduring generality of the forms and the contingency of the particulars is precisely what, for the formalist, allows the former to be principles of ordering for

the latter. It also prevents the law's treatment of all the possible particulars from being exhaustively specifiable by theory: Such exhaustiveness would mean that the particulars are theoretically as intelligible as the forms through which they are understood, and would render otiose the formalist's invocation of form. The predetermination of a uniquely correct result for every legal controversy, as the critics demand, would make formalism self-stultifying.

The critics deploy the charge of indeterminacy with respect to the results of particular legal controversies, and claim that for any case—or at least for any difficult cased—no uniquely correct solution is available in advance. As directed against formalism, however, this criticism bites on air. Formalism does not require the determinacy of every particular case. The distinctive feature of formalism is that it denies the primacy of the particular by claiming that particulars are intelligible only through conceptual categories. Particulars, considered directly on their own as particulars, are regarded as unknowable. They can become objects of cognition only when their essential characteristics can be grasped as a unity that is classifiable with other unities of the same sort and distinguishable from unities of a different sort. For law this means that juridical relationships can be understood only through the nexus of concepts through which they attain their distinctive inner coherence as expressions of corrective or distributive justice. When these comprehensive abstractions are brought onto the stage, determinacy cannot be a matter of the uniquely correct solution to any particular case, since the particularity of interaction has an aspect of contingency with respect to the concepts under which it falls. A function of positive law is to resolve such unavoidable indeterminacy for particular cases.[127]

In another sense, however, formalist concepts do determine their particulars. To determine something is to set the boundaries that mark it off from something else. A concept can be determinative even though it does not exhaustively predetermine the particulars under it, if it intelligibly performs the determining function of marking something off from something else in a way appropriate to concepts. Corrective and distributive justice are determinative in the sense that they demarcate juridical relationships as ensembles of coherent justificatory significance. Form goes to the character, unity, and genericity of what it informs. The forms of justice determine juridical relationships by representing the justificatory structures through which those relationships can be understood as the sorts of thing that they are and to which they must conform if they are to

127. *See* ARISTOTLE, *supra* note 57, at 132, 1135a, 5-10 (while there are many specific acts, in each case only the universal is just); G. HEGEL, THE PHILOSOPHY OF RIGHT, *supra* note 14, at 137 (the concept merely lays down a general limit within which there is place for contingent decisions of positive law).

be intelligible. The forms of justice are thus determinative as the distinctive—not the exhaustive—modes for the understanding of law.[128]

These abstract forms determine juridical relationships in several ways. First, they set out the different structures of justification that legal phenomena can express and thus mark the boundaries within which coherent justifications subsist. Corrective justice and distributive justice are categorically distinct; as a result any given juridical relationship must maintain itself within the confines of its appropriate framework. Second, these two forms of justice are the most inclusive abstractions of juridical coherence; their conceptual components demarcate the limits of the juridical as opposed to the political. Third, the forms exhibit the different ways in which relations among persons can be understood as external; thus they demarcate a normativity that is distinguishable from the moral excellences, such as love and virtue, that are internal to the agent. Accordingly, the forms of justice are determinative in that they make salient the boundaries of juridical intelligibility. In light of these forms juridical relationships cannot be understood as a confusion either of the corrective and the distributive, or of the juridical and the political, or of the external and the internal. Since juridical relationships are formally determinable in these ways, legal phenomena are more than an indeterminate aggregate of particulars.

Determinacy, therefore, can refer both to the particularity of specific holdings and to the general abstractions under which they fall. In accordance with the meanings respectively appropriate to each, the particular and the general can be said to be mutually codetermining. The forms of justice determine particular holdings by supplying the structure immanent to the justification of those particular holdings. For any such holding the forms determine the kind of holding it is by representing the pattern of coherence that is exemplified in the reasoning that supports it. Conversely, the particular holding enunciated in positive law determines the form by exhibiting the particular shape that the form manifests in a particular social and historical context. The form marks out the conceptual genericity of the particular holding, and the holding marks out the contextual specificity of the form. Thus the form and the holding are locked in an embrace of reciprocal determination.

Both sides of this process are necessary for the understanding of a juridical relationship. A particular determination that is not adequate to any form of justice cannot be grasped as a coherent ordering of external interaction. Similarly, a form that is conceived independently of application to particular interactions is not a form that is immanent to the intelligibility of a legal content. On the one hand, a particular holding is intelligible only inasmuch as it instantiates a form of justice. Although, as *Lamb* illustrates, abstract concepts cannot predetermine the uniquely correct solu-

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128. *Cf.* Radbruch, *supra* note 75, at 75 (justice is principle specific to law, not exhaustive of it).

tion to every particular case, the character of the reasoning underlying a given judgment is limited to—and therefore determined by—what is permissible within the appropriate structure of justification. On the other hand, formalism requires that controversy about particular interaction be determinable through the distillation of social understandings in positive law, for otherwise the interaction could not achieve the full measure of external intelligibility toward which the forms of justice point.

Moreover, since the forms of justice are discovered by regression from the conceptual structure of a sophisticated legal system, they incorporate the recognition that in such systems of the inevitable insufficiency of concepts to predetermine the results of all the cases to which they might be applied. This recognition is institutionalized in the common law, for instance, in the allocation to the jury of deliberation, pursuant to the judge's instructions, regarding mixed questions of law and fact. Under this arrangement, the jury applies standards that are themselves specifications of more general legal categories, but the particularity of the jury function means that the force of its finding is restricted to the case at hand and lacks precedential status. Correspondingly, the conceptual nature of the forms of justice determines not the specificity of these decisions but the coherence of the ensemble of concepts on which the judge draws in formulating the relevant instruction.

Determinacy relates in different ways to the generality of the forms and to the particularity of external interaction. Formalism comprehends both these ways in their interrelation. The forms of justice are both determinate and indeterminate. They are indeterminate in that they do not predetermine exhaustively the particular results they govern. They are determinate in that they establish the bounds of coherence for the particulars that fall under them, thus making these particulars intelligible as the sorts of things that they are. In determining character, unity, and genericity for juridical relationships, the forms of justice determine all that they need to, or can, determine as forms.

As an ordering immanent to the intelligibility of external interaction, the forms of justice necessarily make contact with a social and historical world because they must be specified for particular cases. These specifications depend on the public meanings of such a world. Within the bounds of character, unity, and genericity, the forms are constituted by the shared understandings of society, and the forms' particular public shapes are authoritatively declared by the functionaries of positive law. Thus, although the forms as such, because they are conceptually distinguishable, have an ahistorical universality, their manifestations in a legal system are relative to a set of public meanings that obtain at a given time and place. In its governance of juridical relationships, formalism is universality with a variable content.

This variability has been recognized by formalists almost since the be-

ginning. In his famous discussion of the relationship between what is just by nature and what is just by convention, Aristotle commented that "among us [as contrasted with what holds for gods] there are things which, though naturally just, are nevertheless changeable. . . ."[129] This sentence can now be interpreted as including the following understanding. The intelligibility of juridical relationships is not merely a conventional opinion, because corrective and distributive justice are the perduring justificatory structures through which the coherence of such relationships can be conceived. The way in which the forms of justice are realized in legal systems is, however, subject to the variations inherent in their public interpretation and application. Thus, the forms of justice coexist with indeterminacies whose resolution can vary from time to time and from culture to culture.

The version of formalism that I have been presenting is neither positivist nor historicist. Legal positivism and historicism construe the law's positivity and its history respectively as the exhaustive modes of understanding it. Formalism is not positivist, because corrective and distributive justice are conceptual categories that inform the content of law without themselves being posited by legal authority. It is not historicist because the forms of justice are not bound to a particular social and temporal context. But although formalism transcends positivity and history, it is not unconnected to them. Because formalism inquires into the intelligibility immanent to juridical relations, the object of its attention is the historical domain of social interaction and the public announcements by positive law of the terms of that interaction. In comprehending the social and historical arrangements established by positive law as the possible expressions of a coherent order, formalism does not ignore the history, positivity, and social reality of law. Rather, formalism claims to be their truth.

VII. Formalism and Contemporary Legal Scholarship

My argument has been that the juridical, understood as the immanent intelligibility of the treatment of external interactions in a coherent legal system, is conceptually distinct from extrinsic political purpose. This argument has several steps. (i) Form is the integration of character, genericity, and unity that renders a determinate content intelligible. (ii) The content of a sophisticated legal system is intelligible from within. (iii) The presentation of legal intelligibility as the interpenetration of form and content stakes out a vantage point internal to law. (iv) Law authoritatively orders the external relations between persons, and justice is the intelligibility of this ordering. (v) The intelligibility of law therefore involves the disclosure of the relationship between the law's content and the forms of

129. Aristotle, *supra* note 57, at 131.

justice that constitute the most inclusive justificatory structures applicable to external relations. (vi) Two different forms of justice can be discerned. Corrective justice constitutes the internal rationality of transactions. Distributive justice, which mediates the relations among persons, and between persons and things, according to some criterion, is the internal rationality of distributions. (vii) These two forms exhibit differing structures and are not reducible one to the other. (viii) Justifications that blend the components of these two different forms are necessarily incoherent. (ix) Only distributions are amenable to the extrinsic—and thus instrumental—operation of political purpose. (x) The juridical consists of the elucidation and specification, in the context of particular transactions and distributions, of a content that is adequate to the justificatory structures of these two forms. (xi) The two forms of justice have inherent normative force because they presuppose the Kantian notion of moral personality. (xii) The forms of justice, being immanent to the understanding of external interaction, are not divorced from the social and historical world. (xiii) They determine the juridical character, genericity and coherence of that world through the positive law that is their existence at the level of particular transactions and distributions.

This understanding of law makes salient the venerable notion of form. Legal formalism is the approach that tracks the implications of form through the doctrines, institutions, and conceptual structure of a sophisticated legal system. For such a system its own coherence is a regulative idea. Its determinations are not unconnected bits of particularity but draw their vitality from their participation in a community of concepts and justifications. The forms of justice represent these justifications at their most abstract and inclusive. Inasmuch as law is the ordering of external interaction, corrective and distributive justice provide the fundamental unities that inform such interaction.

Formalism stands for the possibility that the elaboration of law can be a coherent enterprise in justification. The formalist construes the doctrines, institutions and concepts of a sophisticated legal system as embodying the intelligible structures of external interaction and therefore as expressing in positive law the forms through which juridical coherence can be achieved. These forms are implicit in the content of law. The juridical function of legal ordering is to make transactions and distributions conform to their own latent unity. Correspondingly, the function of legal philosophy is to make these forms explicit as the justificatory structures through which the law's immanent intelligibility is grasped.

In relating law to the most abstract forms of interaction, formalism presents an uncompromising version of law's internal coherence and of the consequent possibility of distinguishing the juridical from the political. Its extremism can be seen from the contrast with the currently dominant modes of legal scholarship. Three approaches are particularly popular

and significant: interpretation, economic analysis, and Critical Legal Studies. I wish to conclude with a criticism—suggestive rather than exhaustive—of each of these approaches.

First, in contemporary writing the internal intelligibility of law is dealt with under the rubric of interpretation.[130] The task of expounding the law's internal dimension is said to be subject to whatever constraints are felt to pervade any interpretive community or are inherent in the nature of interpretation. The phenomenon of interpretation is invoked both because it is familiar to lawyers and because its operation in law can be illuminated by reference to other intellectual domains, especially literary ones. The reference to non-legal interpretive enterprises, however, merely distances us from the task at hand. In the absence of an exposition of the specifically juridical nature of interpretation as applied to law, the appeal to the general phenomenon of interpretation is merely a restatement of the problem that profitlessly enlarges its scope. For it implies that interpretation in literature is a more lucid exercise than interpretation in law, so that the former can cast light on the latter. This ignores the possibility—prominent in hermeneutic writing[131]—that law is itself exemplary for the understanding of interpretation and that therefore one must grasp the nature of legal interpretation before one can grasp the nature of interpretation more generally. Legal formalism supplies the compass points for the specifically juridical interpretation of interaction. From a perspective internal to the law's content, formalism draws out the implications of a sophisticated legal system's tendency to coherence by making explicit the justificatory patterns to which the content of such a system must conform. It thus carries the internal impetus of interpretation forward to its ultimate degree.[132]

130. Influential examples of such scholarship are Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); R. DWORKIN, *supra* note 2, at 146-77.

131. *See* H. GADAMER, *supra* note 126, at 278; *see also* Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 135 S. CAL. L. REV. 136, 150-51 (1985) (discussing whether law or art should be treated as the paradigm of interpretation).

132. Ronald Dworkin's Law's Empire is the most extensive attempt systematically to understand the relationship between law and interpretation. Dworkin's work is an exploration of law from the internal point of view. *See* R. DWORKIN, *supra* note 90, at 49. He characterizes interpretation as the striving to make an object the best it can be. *See id.* at 53. Dworkin's thesis is that the internal point of view necessitates, through interpretation, reference to "the best." Even if reference to "the best" is required by the internal point of view, however, is Dworkin's conception of the best itself internal to law? The matter can be put as follows: Is an interpretation best because it is internal or is it internal because it is best? Although Dworkin does not, to my knowledge, explicitly raise this issue, the answer he would give is crucial. If internality is controlling, Dworkin would be depending on an unarticulated notion of form. If on the other hand, goodness is controlling, Dworkin's theory would not be fully internal. Dworkin seems to want to have it both ways and to be simultaneously inside and outside. He takes legal interpretation to have two dimensions, fit with legal doctrine and attractiveness as an ideal of political morality, each of which influences the other. *See id.* at 231. While he does not tell us whether the second dimension is internal or external, he constantly analyzes it independently of the first, which seems unquestionably internal. Moreover, the ideal he proposes for the common law, an egalitarianism of resources, is defended as being superior to its competitor because "it fits our legal and moral practices no worse and is better in *abstract moral theory*." *Id.* at 301 (emphasis added) (footnote omitted). Since the determination of the second dimension is a matter of "abstract moral

In economic analysis the striving of legal doctrine for economic efficiency is what makes the law coherent. Economic efficiency, however, is a deeply flawed vehicle for the coherence of law. First of all, although efficiency is trumpeted as carrying the implicit logic of the common law,[133] it cannot account for the normative quality that attaches immediately to the holdings of private law.[134] Moreover, the hypothesis of the efficiency of law deals only with the law's specific determinations and not with the structure of thought internal to the law from which these determinations emerge as conclusions or specifications.[135] Consequently economic analysis treats legal results as understandable independent of their indigenous framework of justification. In this way economic analysis is detached from the most internally intelligible aspect of the law. Finally, efficiency is itself composed of a number of considerations—efficiency in incentives that minimize the risk of undesirable outcomes, efficiency in insurance incentives for bearing the risk, efficiency in the administration of legal rules[136]—that are not conceptually integrated and therefore exert competing pressures. Accordingly, in contrast to the notion of juridical form, the goal of efficiency stands to law as something that is neither moral, nor immanent, nor coherent.

Finally, the scholarship of Critical Legal Studies, provides the starkest contrast to the view presented here. Critical Legal Studies denies that law expresses or can express any notion of coherence, either immanent or extrinsic. In the absence of comprehensive frameworks through which the law can be understood, legal determination is dissolved into the particularity of choice. Pretending otherwise merely disguises the oppression of power under the specious vocabulary of right. We can do no more than attend to the very bruteness of our choosings, all the while remaining conscious of the inevitably political nature of our collective decisions. To sanctify some choices as legal rather than political is to indulge in the vanity of myth.

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theory," its moral power is what (providing it satisfies a threshold of fit) qualifies it for admission to law. Perhaps his position can be summed up as follows: One understands law from the internal point of view, i.e., from the understanding of interpretation that this point of view contains. Interpretation, although itself an internal requirement, supplies the theorist with an import license to bring in "the best." This license is a limited one in that what the theorist can import depends on the products already circulating in the interpretive economy. The license is also limiting because the imports drive some of the domestic products out of the interpretive market. If this understanding of Dworkin is approximately correct, his view involves a jurisprudential renvoi, in which the internal notion of interpretation triggers the admission of external elements of political morality. Thus, Dworkin's standpoint is not as thoroughly internal as the formalist's.

133. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 17, at 21-22.

134. As the goal in an instrumentalist theory, efficiency does not attach immediately to private law but is independently posited on the basis of its desirability. Efficiency is also not immediate because it has no normative significance of its own and is at best a proxy for broader instrumentalist considerations. *See* Weinrib, *Utilitarianism, Economics, and Legal Theory*, 30 U. TORONTO L.J. 307 (1980).

135. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 17, at 21.

136. *See* M. POLINSKY, INTRODUCTION TO LAW AND ECONOMICS 116 (1983).

Formalism asserts that this myth is true after all. For the formalist, the salutary contribution of Critical Legal Studies is to show that once we step outside the most rigorous notion of internal coherence, the slide to nihilism is swift and easy. In this sense, Critical Legal Studies captures the essence of contemporary scholarship by accentuating—and then exploding—its makeshift compromises. The significance of Critical Legal Studies is that it forces us to confront anew the problem of coherence in law. It raises the eternal question of legal philosophy, and presents us with its own skeptical answer.

In claiming that that answer is wrong, formalism gives voice to the most ancient aspirations of natural law theorizing by construing the law as permeated by reason. The forms of justice represent the conceptual structures applicable to the understanding of juridical phenomena, and the content of law is intelligible to the extent that its justifications express these structures. Because the forms are implicit in external interaction, they are present in everyday life, are accessible to the workaday jurists who take up the task of legal elaboration, and are reflected in whatever coherence sophisticated legal cultures attain. In the formalist understanding law is not the realization of a utopian project. It is, nonetheless, a supreme achievement of mind.