FOREWORD: THE CHALLENGE OF LEGAL FORMALISM

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Just when everyone thought legal formalism was dead, Ernest Weinrib gives us collective pause. Over the course of the last decade, Professor Weinrib has championed the cause of legal formalism. Of course, like all works of sophisticated legal theory, Professor Weinrib's defense of legal formalism is remarkable, compelling and, at times, startling. Perhaps the most startling of his views is his claim that most of the tasks that contemporary legal theory sets for itself are misguided. The truth of this claim depends upon central features of Professor Weinrib's account of key issues such as justification, truth, and coherence.

The principal feature of Professor Weinrib's account of formalism is his claim that, to be understood properly, law must be examined from the "inside." In other words, no critique of law can be successful unless it is an *immanent* critique. An immanent critique is one that starts with legal discourse and, through a process of critical reflection, discloses the nature and structure of legal thought. To those in sympathy with its spirit, the challenge of legal formalism is to present an account of law which equals formalism's analytic power without embracing its metaphysical presuppositions. In other words, the question whether one can do legal theory without metaphysics is the central challenge of legal formalism. It is to this challenge that the critics of legal formalism respond, both in the pages that follow and elsewhere. It is the power of legal formalism that makes such a challenge both exciting and invigorating. In this Foreword, I shall briefly explain the nature of the formalist challenge and its implications for contemporary legal theory.

A central tenet of formalism is that law is an "immanently intelligible enterprise." According to Professor Weinrib, we cannot understand law from a perspective other than the internal standpoint, for it is only with respect to this standpoint that we can be certain we have made contact with the subject matter of law. It turns out that the internal perspective is largely a mat-

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ter of the relationship of form to content. Professor Weinrib describes these two concepts as "correlative and interpenetrating." Form is that which gives structure and unity to a set of particulars. No group of particulars can amount to anything without the imposition of form. Thus, form and content are necessarily related.

To better understand Professor Weinrib's point in this connection, consider how one might use the distinction between form and content to apprehend the notion or idea of a "table." Any individual table has certain characteristics. It has three or four legs, is flat, is of a given height, and so forth. Each table is somewhat different in its particulars, yet we use the same word to refer to all these different items as "tables." How is this possible?

Form is a principle of structure or unity through which we apprehend or see many different things (in this case, "tables") as "the same." To see a collection of particular attributes as a table is to grasp the unity in this particular ensemble of characteristics. In a sense, there are no "tables" in the world. The table, like the law, is a product of mind. Understanding law then, is an accomplishment of thought or, as Michael Oakeshott puts it in *On Human Conduct* (1975), an "exhibition of intelligence."

In the context of law, the distinction between form and content tells us something about the nature of legal ideas. For example, Professor Weinrib often makes his philosophical points with illustrations from tort law. Of tort law, one might ask the question how it is that one understands the concept of negligence. The content of negligence—that is, the particular elements of duty, breach of duty, causation, and harm—cannot be understood apart from one another. For instance, the very idea of tort requires an injury. We cannot "make sense" of the notion of tort—in fact, we cannot properly employ the concept of tort—in contexts where there is no injury.

Professor Weinrib uses the distinction between form and content to make sense of the structure of private law. He begins with the basic distinction, taken from Aristotle, between distributive and corrective justice. In a scheme of distributive justice, the basic question is how some benefit or cost is to be imposed across the population. Insurance is a classic example of a distributive scheme. What is distributed, of course, is risk.

A corrective justice regime, on the other hand, assigns relative degrees of fault. Giving the non-breaching party in a contract dispute the benefit of the bargain is an example of corrective justice. Something wrongfully taken from another is restored to him by forcing the breaching party to make the non-breaching party whole.

At a more general level, the bipolar structure of litigation can only be explained as embodying the presupposition that it is individuals who do harm to one another. The reason the plaintiff sues the defendant is not because we have adopted a convention. The reason is that the person who has caused the injury is the one properly (as a matter of justice) made to compensate the victim. The idea of negligence is the perfect embodiment of a corrective scheme of justice: the whole point of the enterprise is not merely to compensate someone for an injury, but also to require the injurer to pay.

Professor Weinrib uses the philosophical distinction between form and content, the bipolarity of litigation, and the basic distinction between distributive and corrective justice to make the point that the American tort system is incoherent. This incoherence is best illustrated by the concept of strict liability. Because the concept assigns fault where no duty has been breached, strict liability is essentially a distributive scheme clothed in the vocabulary of corrective justice. Strict liability can never be a scheme of corrective justice because it fails to reflect the element of fault. Without the element of fault, the joinder of the other three elements is rendered incoherent. In short, American tort law, at least in this instance, is a conceptual monstrosity.

Professor Weinrib asserts that virtually every contemporary account of law fails because each takes an "external" perspective. By external, Professor Weinrib means a perspective that imposes upon the law a set of goals, purposes, or the like which seek to make law intelligible through an analytic of imitation. For example, the idea that law is directed to the promotion of efficiency is an attempt to understand law as a *process* directed toward an end or goal. The desirability of this goal is either argued for or simply assumed; law is analyzed and assessed according to the degree to which it embodies, reflects, or lives up to this goal, and is thus evaluated.

Legal formalism challenges us to understand law from a per-

spective that avoids the mistakes of external accounts, yet does so in a way that precludes commitment to the metaphysical dictates of formalism. The key to a non-metaphysical alternative to formalism lies in a non-metaphysical account of the nature of justification in law. Yet, Professor Weinrib is correct when he argues that critiques of law which proceed from external perspectives cannot make sense of the law on its own terms. It simply does not advance the understanding of law, or any other enterprise, to redescribe the activities of participants in that enterprise in the vocabulary of one's discipline.

Conclusion

In this Foreword, I have stressed the power of the formalist analysis of justification in law from the perspective of the challenge it poses to those who seek to avoid its metaphysical requirements. I have adopted this posture because I believe that it is the best way to appreciate the virtues and the demands of formalism. Formalism, as developed and defended by Ernest Weinrib, presents contemporary legal theorists with the challenge of equaling its rigor, inventiveness, and analytic power. This, perhaps, is its greatest virtue.