THE JURISPRUDENCE OF LEGAL FORMALISM

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INTRODUCTION

Rumour has it that legal formalism is dead.[1] This rumour is false. Formalism reflects the law's most abiding aspiration: to be an immanently intelligible normative practice.[2] The rumour will become true only with the passing of that aspiration.

This symposium on the jurisprudence of formalism provides an opportunity to hear a voice from the empty sepulchre. In this article, I outline a particular conception of formalism. This conception differs from the caricature current in contemporary legal scholarship, where formalism—usually identified as postulating the mechanical application of determinate rules—serves principally as a "loosely employed term of abuse."[3] The crucial issue, of course, is not the proper reference for formalism as a word, but the most plausible conception of formalism as an idea. My own version claims fidelity to law's normative dimension, to juristic thinking, and to a philosophical tradition stretching back to classical antiquity.

I. THE PROJECT OF FORMALISM

Formalism is a theory of legal justification. As a theory of *justification*, formalism considers law to be not merely a collection of posited norms or an exercise of official power, but a social arrangement responsive to moral argument. As a theory of *legal* justification, formalism focuses on the phenomena most expressive of the juridical aspect of our social lives: on interactions between parties who regard their interests as separate, and on the role of courts in resolving the consequent controversies. Thus, formalism's project is to elucidate the forms of

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1. *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 11 (1987); Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1812 (1990).

2. *See* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

3. A.W. Brian Simpson, *Legal Iconoclasts and Legal Ideals*, 58 U. CIN. L. REV. 819, 834 (1990).

moral argument appropriate to adjudication among mutually disinterested parties.

The basic unit of formalist analysis is the legal relationship. Law connects one person to another through the ensemble of concepts, principles, and processes that come into play when a legal claim is asserted. If, for instance, the claim is for breach of contract, the legal relationship between the parties is defined by the doctrines and concepts of contract law and by its accompanying procedures of adjudication. Similarly, if the claim concerns a non-consensual harm, the legal relationship of the injurer and victim is composed of the norms, concepts, and institutions of tort law.

Formalism's interest is in the internal structure of such relationships. The relationship's components—its various doctrines, concepts, principles, and processes—are the parts of a totality. The formalist wants to understand how these parts relate to one another and to the totality that they together form. Is a legal relationship merely an aggregate of autonomous elements, where these parts are connected to one another only through their contingent juxtaposition within the same legal relationship, like so many grains in a heap of sand? Or are the parts the interdependent constituents of an internally coherent whole?

Law's justificatory aspect provides the standpoint from which to address these questions. Underlying any element in a legal relationship is some consideration that supposedly justifies it. The formalist concern with the structure of a legal relationship is, therefore, a concern with the connection between justificatory considerations. Do the considerations that justify the various parts of a legal relationship play their justificatory roles in isolation from one another? Or do they interlock to form a single justification that coherently pervades the entire relationship?

The term "formalism" suggests a contrast between the formal and the substantive. That contrast lies at the core of the formalist methodology. The formalist approaches legal relationships by first discerning their necessary conditions, their internal principles of organization, and their presuppositions. These formal aspects then guide the process of substantive determination.

To understand law as a justificatory enterprise, the formalist

elucidates three features of justification: (1) its nature; (2) its structure(s); and (3) its ground. By the nature of justification, I mean the minimal conditions that any consideration must observe if it is to be justificatory. By the structure of justification, I mean the most abstract and comprehensive patterning of justificatory coherence. By the ground, I mean the presuppositions about agency that ultimately account for the normative character of any justification.

Let me turn to each of these features. The following discussion indicates how the consideration of formal aspects precedes the drawing of substantive conclusions. Throughout, I use tort law to illustrate. The illustration itself reflects the formalist insistence that private law is a distinctive mode of legal ordering and not merely a disguised form of public law. The formalist affirms, in other words, the categorical difference between justice between the parties, on the one hand, and justice in the pursuit of collective goals, on the other.

II. The Nature of Justification

A common criticism of tort law[4] contends that in combining the goals of deterrence and compensation, tort law sets up a lottery for both litigants. From the plaintiff's standpoint, tort law recognizes a moral claim to compensation in the aftermath of injury. Yet instead of treating alike the sufferers of like injury, tort law makes the victim's compensation depend on the fortuity of a tortious act. Similarly, from the defendant's standpoint, tort law is a mechanism for deterring carelessness. Yet tort law makes the occasion and scope of deterrence depend on the fortuity of the injury's occurrence and extent. Linking the compensation of victims to the deterrence of actors causes both compensation and deterrence to work capriciously. The legal consequences for the litigants are normatively arbitrary.

Those who offer this criticism urge the abolition of tort law. They argue that because tort law cannot intelligibly combine deterrence and compensation, the law should replace tort law's treatment of personal injury with arrangements that aim at deterrence and compensation separately. The criticism assumes

4. *See* Terence G. Ison, The Forensic Lottery (1967); Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 Va. L. Rev. 778 (1967); Stephen D. Sugarman, *Doing Away With Tort Law*, 73 Cal. L. Rev. 555 (1985).

that deterrence and compensation are valid goals and then adjudges tort law incoherent in their light.

In the formalist view, the criticism of the deterrence and compensation goals is correct.[5] Goals, such as compensation and deterrence, that focus on each litigant independently cannot provide the moral underpinning for the relationship between plaintiff and defendant. In the context of tort law, such goals do not observe the minimal condition that any consideration must observe if it is truly to function as a justification.

Critical to this viewpoint is the nature of justification. A justification justifies: it has normative authority over the material to which it applies. The point of adducing a justification is to allow that authority to govern whatever falls within its scope. A consideration that functions as a justification must be permitted, as it were, to expand into the space it naturally fills. Consequently, a justification sets its own limit. For an extrinsic factor to cut the justification short is normatively arbitrary.

This is the arbitrariness to which the critics of tort law point. The goals of compensation and deterrence are independent of each other. Compensation addresses the needs of the injured party and is indifferent to deterrence. Similarly, deterrence looks to the conduct of the injurer and is indifferent to compensation. Consequently, when juxtaposed within the tort relationship, compensation and deterrence are mutually truncating. What limits compensation is not the boundary to which its justificatory authority entitles it, but the competing presence of deterrence in the same legal relationship. Thus, tort law compensates victims only when damages serve the purpose of deterrence. In the same way, tort law artificially restricts deterrence by tying deterrence not to what is needed to deter wrongdoers, but to what is needed to compensate victims. In this mixing of justifications, neither goal occupies the entire area to which it applies. Accordingly, neither in fact functions as a justification. Understood as composite of compensation and deterrence, tort law ceases to be a justificatory enterprise.

That is not to state, however, that tort law *cannot* be a justificatory enterprise. The formalist sees in the abolitionist critique of tort law an indication of what would answer the critique. In

5. As we shall see shortly, however, the dismissal of tort law does not follow.

effect, the abolitionists point to the tension between the bipolarity of the tort relationship and the normative reach of the standard tort goals. Because each goal addresses the situation of only one of the parties, neither justifies the relationship as a whole. When combined, they embrace both parties, but because the goals are mutually independent, the moral force of one artificially limits the moral force of the other. In principle, however, this dilemma could be solved by elaborating a justification that reflects the bipolarity of the tort relationship.

The lacuna in the abolitionist position is the assumption that justification must take the form of goals such as compensation or deterrence. Abolitionists reason that since tort law cannot coherently satisfy such goals, it should be replaced. Ignored is the possibility that the justification applicable to tort law is relational, like tort law itself. The abolitionists assume that justifications refer to goals. The formalist assumes only that justifications justify.

Formalism asserts that formal considerations precede substantive ones. Accordingly, formalism's initial concern is not with a justification's substantive merit, but with the minimal condition for its functioning *as* a justification, namely, that it fill its own conceptual space. Purported justifications that do not respect that condition are not so much villains as imposters: they are not doing anything wrong, but they are pretending to be what they are not.

It is worth noting at this stage what the formalist does *not* maintain. The formalist neither disputes the desirability of achieving both compensation and deterrence nor asserts the superiority of tort law to other mechanisms for handling injury. The claim, rather, is simply that the goals of compensation and deterrence do not serve a justificatory function in the tort context. Whether they can serve such a function in a different context is another matter.

III. The Structures of Justification

As this brief discussion of tort law indicates, justifications do not act as justifications unless legal relationships are coherent. Justificatory considerations provide moral reasons for relating one person to another through a set of legal concepts and consequences. Incoherence in the relationship reflects the presence of mutually independent justificatory considerations.

Coherence, on the other hand, is the interlocking into a single, integrated justification of all the justificatory considerations that pertain to a legal relationship. A relationship is coherent when a single justification animates it, so that the justification's moral force is congruent with the relationship's boundaries. Coherence thus denotes unity.

At this point, the question arises: what are the different ways in which legal relationships can express a single justificatory idea? Or, to put it another way, what are the different structures of legal justification?

The classic treatment of justificatory structure is Aristotle's discussion of justice.[6] Aristotle outlines the patterns of justificatory coherence for external relationships. To make their structural dimension salient, Aristotle represents these relationships at their most abstract, stripping away everything but their unifying principles. From this emerge two justificatory structures: corrective justice and distributive justice.

Corrective justice is bipolar. Private law reflects this bipolarity by connecting the entitlement of one party to the liability of the other. Corrective justice relates the parties directly through the harm that one of them inflicts on the other. It treats the doer and the sufferer of harm as the active and passive participants in a single relationship. Its unifying principle is the sheer correlativity of harm done to harm suffered. Neither the doing nor the suffering counts independently of the other. The doing of harm is normatively significant only because of the suffering that is correlative to it. For purposes of corrective justice, doing and suffering are not separate events, but the correlative aspects of a single event.

Distributive justice, on the other hand, relates the parties not directly but through the medium of a distributive scheme. Under distributive justice, persons divide a benefit or burden in accordance with a criterion of distribution. This criterion, the collective purpose served by the distribution, is the distribution's principle of unity.

Corrective and distributive justice are categorically different and mutually irreducible. Corrective justice necessarily construes interaction as bipolar. Distributive justice, in contrast, al-

6. *See* V ARISTOTLE, NICOMACHEAN ETHICS ¶¶ 2-4 (Terence Irwin trans., 1985); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992); Ernest J. Weinrib, *Aristotle's Forms of Justice*, 2 RATIO JURIS 211 (1989).

lows for any number of parties, with the increase in the number of participants merely decreasing the size of each participant's share in what is being distributed. This difference means that these forms of justice can be neither dissolved into each other nor integrated into any overarching form.

A far-reaching consequence follows. Because corrective and distributive justice are mutually irreducible structures of justificatory coherence, a single legal relationship cannot coherently partake of both. Therefore, no distributive justification (that is, one that has the shape, "to or from each according to some criterion") coherently applies to the bipolar relationships of private law. Those relationships require justifications that connect the parties directly as doer and sufferer, rather than through goals whose moral force bears on each of the parties unilaterally.

Tort law illustrates the drastic implications of this line of thinking. All the goals—deterrence, compensation, punishment, loss-spreading, wealth-maximization, cheapest cost avoidance—routinely adduced or proposed for tort law are inadequate because they interrupt the direct relationship of doer and sufferer. Such goals, accordingly, are incompatible with the coherence of the private law relationship. If tort law is to be a truly justificatory enterprise, we must disqualify such goals, even without evaluating their substantive desirability.

IV. The Ground of Justification

Implicit in legal justification is a conception of normativeness. What is that conception?

The standard assumption of legal scholarship is that normativeness is rooted in the substantive desirability of certain goals. Tort theorists who emphasize deterrence, for instance, point to the desirability of reducing the number and severity of injuries. Similarly, the compensation rationale rests on the desirability of alleviating hardship in the aftermath of injury. The goals that validate legal regulation may, of course, be multiple and complex. At bottom, however, they represent aspects of human well-being that law is supposed to promote.

The phenomenon of private law precludes the formalist from sharing this conception of normativeness. Only inasmuch as they reflect the structure of corrective justice do the bipolar relationships of private law manifest justificatory coherence. As-

pects of human well-being are not intrinsically bipolar, however. In our tort example, for instance, the goals ascribed to tort law do not link the doer and the sufferer of harm: nothing about compensation as a justificatory consideration ties it to the action of a particular injurer; and nothing about deterrence ties it to the suffering of a particular plaintiff. Corrective justice, therefore, cannot presuppose aspects of well-being as the sources of its own normativeness.

The formalist locates the ground of justification not in substantive goals that promote well-being, but in the conceptual structure of free agency. Agency is an exercise in purposiveness, in which the agent can reflect on the content of any particular purpose and spontaneously substitute one purpose for another. Accordingly, what characterizes agency is not the particular purposes that constitute the content of choice, but the form of choice evident in the capacity to abstract from any particular purpose.

Practical reason is the determining ground of agency so construed. Because only a rational being can abstract, agency is rationality as it operates to change the world. Particular acts are most expressive of the agent's rationality when they are determined not by inclination and circumstance, but by the universality inherent in the form of choice. At a minimum, this universality requires that the principle on which a purposive being chooses to act be capable of functioning as a principle valid for all purposive beings, whatever their inclinations or circumstances and whatever the specific purposes that might promote their well-being. In this conception of normativeness, particular choices are required to live up to the formal standpoint that characterizes the purposive activity of free agents. Normativeness is thus the expression of practical reason in its most literal sense: as a unity of reason and practice.

What I have briefly and inadequately described is the idea of free and purposive agency that figures in the great expositions of natural right by Kant and Hegel.[7] Right is the totality of norms governing the interaction of free, purposive agents. Just as corrective and distributive justice provide the structures of justification and then insist that legal reasoning conform to

7. On Kant, see Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987); on Hegel, see Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283 (1989).

those structures, so the philosophy of natural right elucidates the abstract structure of agency and then insists that particular actions conform to that structure. Accordingly, the obligations emerging from natural right are incumbent on self-determining agents by the very nature of their agency.

Corrective justice presupposes this notion of agency. As Aristotle himself observes, corrective justice is a normative structure that abstracts from considerations of virtue or circumstance, so that all that matters is the correlativity of doing and suffering.[8] Natural right provides the abstract notion of agency that underlies the abstracted justifications of corrective justice and that makes sense of the sheer correlativity of doing and suffering. Corrective justice is an expression of what Kant called the principle of right, under which the action of one freely willing person is conjoined to the freedom of another in accordance with a universal law.[9] Because freedom manifests itself juridically in rights that others are obligated not to violate, the bipolarity of corrective justice emerges in a normative regime of correlative right and duty.

To say that abstract agency, not well-being, constitutes the normative ground of corrective justice is not to deny the significance of well-being. As an activity, agency takes place under certain empirical conditions, which for human beings include the working of one's will through the physical organism of the body, the sentience of the organism, the presence of satisfactions that motivate action, and so on. Of course, for such beings, well-being is normatively significant. The point, however, is that under the natural right grounding for corrective justice, well-being is not normatively *basic*. The significance of well-being is derivative of embodiments of abstract agency and is protected in accordance with the norms implicit in such agency. In contrast to theories that look upon right as a label attached to protected interests in well-being, natural right regards right as the moral reason for protecting them.

V. The Immanent Intelligibility of Law

I mentioned at the beginning that formalism represents the law's aspiration to be an immanently intelligible normative

8. Aristotle, *supra* note 6, at 1132a, 2-7.
9. Immanuel Kant, The Metaphysics of Morals 56 (Mary Gregor trans., 1991).

practice. Immanence bespeaks a standpoint that is internal to law. How does formalism illuminate this immanence?

First, the components of the formalist analysis are not elements of an external ideal, but merely the internal presuppositions of law as a justificatory enterprise. Formalism works backward from the notion of legal justification to the preconditions of that notion and then backward to the preconditions of those preconditions, and so on. My discussion of the nature, structures, and ground of justification has summarily retraced this process of regression. Implicit in justification is the coherent application of a justification to what it justifies; implicit in coherence is the unitary structure of what coheres; implicit in these structures is an abstracting notion of agency. Nowhere does the analysis assume an external standpoint.

Second, formalism tries to make sense of juristic thinking and discourse in their own terms. Formalism is attentive to the striving of sophisticated legal systems toward their own justificatory coherence—to what Lord Mansfield called the law's attempt to work itself pure.[10] Consequently, formalism takes seriously the concepts, principles, and institutions through which the law expresses that coherence. The formalist treats the law's concepts as signposts of an internal intelligibility and tries to understand them as they are understood by the jurists who think and talk about them. The formalist, accordingly, regards law as understandable from within, not as an alien language that requires translation into the terminology of another discipline such as economics. Whereas the practitioner of economic analysis, for instance, might construe the plaintiff's cause of action in private law as a mechanism for bribing someone to vindicate the collective interest in deterring the defendant's economically inefficient behaviour, the formalist interprets it simply as what it purports to be: the assertion of right by the plaintiff in response to a wrong suffered at the hands of the defendant.

Third, formalism highlights coherence, which is itself an internal notion. Coherence implies the presence of a unified structure that integrates its component parts. In such a structure, the whole is greater than the sum of its parts, and the parts are interconnected through the whole that they together

10. Omychund v. Barker, 1 Atk. 21, 23 (1744).

form. One understands the coherence of something by attending to the self-contained circle of mutual reference and support among its components. Justificatory coherence points not outward to a transcendent ideal, but inward to the harmonious interrelationship among the constituents of the structure of justification.

Negligence law illustrates the coalescence of a number of concepts into a coherent justificatory ensemble.[11] The concepts of negligence law instantiate corrective justice by tracing different aspects of the progression from the doing to the suffering of harm. Throughout, negligence law treats the plaintiff and the defendant as correlative to one another: the significance of doing for tort law lies in the possibility of causing someone to suffer, and the significance of suffering lies in its being the consequence of someone else's doing. Central to the linkage of plaintiff and defendant is the idea of risk, for "risk imports relation."[12] The sequence starts with the potential for harm inherent in the defendant's act (hence the absence of liability for nonfeasance), and concludes with the realization of that potential in the plaintiff's injury (hence the necessity for causation). The further requirements of reasonable care and remoteness link the defendant's action to the plaintiff's suffering through judgments about the substantiality of the risk and the generality of the description of its potential consequences. Each category traces an actual or potential connection between doing and suffering, and together they translate into juridical terms the movement of effects from the doer to the sufferer. The negligence concepts form an ensemble that brackets and articulates a single normative sequence.

Although the formalist approach is internal to law, formalism is evaluative and not merely descriptive. The point of formalism is to discern standards of evaluation that are internal to the phenomenon being evaluated. Implicit in the law's conceptual and institutional apparatus, as well as in the activity of its jurists, is the claim to be a justificatory enterprise. Formalism asks what law would look like if it were true to this claim. Formalism thus has a critical standpoint, but one that emerges from law's own aspirations.

11. *See* Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987).

12. Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928)(Cardozo, J.).

CONCLUSION

Over the last generation, legal scholarship has both lengthened its reach and shortened its ambition. The lengthening of reach is evident in the appeal beyond law to other disciplines and modes of thinking such as economics, literature, and history. The shortening of ambition is evident in the assumption—shared by economic analysts, legal pragmatists, and Critical Legal Studies scholars—that law is not systematically intelligible in its own terms. The lengthening of reach and the shortening of ambition both result from the same phenomenon: the comparative richness of interdisciplinary work reflects the supposed poverty of the law's own resources.

In contrast to this vision of poverty, formalism retrieves the classical understanding of law as "an immanent moral rationality."[13] This conception of law begins with Aristotle's sketch of the justificatory structures for legal relationships; it is elaborated in Aquinas's treatise on right;[14] and it continues through the accounts of normativeness found in the great natural right philosophies of Kant and Hegel. By attending to the distinctive morality expressed in coherent legal relationships, the version of formalism that I have been presenting asserts the autonomy of law both as a field of learning and as a justificatory enterprise. Formalism thus claims to be the theory implicit in the law as the law elaborates itself from within.

Half a century ago, in a fascinating but unjustly neglected analysis, Michael Oakeshott observed the chaos of what was then passing for jurisprudential explanation.[15] After tracing the competing claims of historical, economic, and other jurisprudences, he pointed out that a truly philosophical jurisprudence could not simply accept the conclusions of special disciplines. It must instead start with what we already know about law and then work back through the presuppositions of this knowledge to a clearer and fuller knowledge. This, he wrote, was the procedure followed by all great philosophers, including such figures as Aquinas and Hegel. Jurisprudence, Oakeshott con-

13. Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 571 (1983).

14. II-II ST. THOMAS AQUINAS, SUMMA THEOLOGIAE 57-62 (Thomas Gilby trans., 1975).

15. Michael Oakeshott, *The Concept of a Philosophical Jurisprudence, Part 1*, 3 POLITICA 203 (1938); Michael Oakeshott, *The Concept of a Philosophical Jurisprudence, Part 2*, 3 POLITICA 305 (1938).

cluded, must regain a sense of this tradition of enquiry. Unfortunately, the passage of time has not appreciably diminished the pertinence of his observations.