PROFESSOR WEINRIB'S FORMALISM: THE NOT-SO-EMPTY SEPULCHRE

STEPHEN R. PERRY*

In a series of important and provocative articles[1] Professor Ernest Weinrib has argued in favor of formalism, a position in legal theory that conventional wisdom has for some time pronounced dead. In his present paper, Weinrib tells us that his defense of formalism is a voice from the empty sepulchre.[2] While there is certainly no doubting the ingenuity and inherent interest of Weinrib's efforts to raise the dead, in the final analysis his attempt at revivification must be judged a failure. He may have induced the corpse to twitch a little, but despite all his skillful arguments formalism remains, I shall argue, as dead as it ever was.

Weinrib is primarily a torts scholar, and he has made a significant and strikingly original contribution to the field of tort theory.[3] It is clear that he regards his version of formalism as a comprehensive theory of law, but it is equally clear that his point of departure in developing a general formalist position in legal philosophy is his theory of the law of torts. Most of his examples are drawn from torts, and the moral concept that he views as the normative underpinning of tort law, namely corrective justice, is also an important constitutive element in his characterization of formalism. There is a sense in which Weinrib's formalism draws strength from its roots in tort theory, since it presents a particularly forceful case with respect to that area of the law. I shall argue, however, that those roots

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1. *See, e.g.*, Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987)[hereinafter *Kantian Idea*]; Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988)[hereinafter *Legal Formalism*]; Ernest J. Weinrib, *Aristotle's Forms of Justice*, 2 RATIO JURIS 211 (1989); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992).

2. Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 583 (1993)[hereinafter *Jurisprudence of Legal Formalism*].

3. *See, e.g.*, Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1989); Ernest J. Weinrib, *Understanding Tort Law*, 23 VALPARAISO U. L. REV. 485 (1989); Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283 (1989)[hereinafter *Right and Advantage*]; Ernest J. Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1989).

ultimately weaken the version of formalism Weinrib defends, because they are not hardy enough to sustain the more comprehensive legal theory he tries to cultivate. Weinrib's attempt to inject new life into formalism fails, at least in part, because his version of the theory is unable to transcend its origins in a particular conception of the law of torts.

In Section I of this paper I identify what I understand to be the three fundamental theses of Weinrib's formalism. In Sections II-IV these theses are considered individually and critically assessed.

I. Three Formalist Theses

Before we can confirm the death of formalism, it is necessary to identify the remains. Formalism, Weinrib tells us, is a theory of legal justification. But the justifications for legal institutions it offers are of a very particular sort. There are, I think, three related characteristics of formalist justifications that should be distinguished. These characteristics can be captured in three theses about the nature of law and legal justification. Together these theses comprise the core of Weinrib's formalism.

The first characteristic of formalist justifications is that they are supposed to be, in at least two different senses, internal to law. I shall refer to this aspect of Weinrib's formalism as the internalist thesis. One of the two senses in which formalist justifications are said to be internal consists in their adoption of a perspective or point of view internal to law; law can only be properly understood and justified by looking at it from the inside. But internalism in this weak sense can be found in many non-formalist theories of law, including those of Hart and Dworkin, so for Weinrib this is only a starting point. His second and stronger internalist claim is that law can be understood and justified only in terms of itself, and not by reference to some external goal or ideal. In Weinrib's terminology, formalism regards law as immanently intelligible.[4] This means that formalist justifications are in some way supposed to comprise the internal or deep structure of legal institutions (or at least of those institutions that are acceptable or legitimate). This leads Weinrib to say that formalist justifications are non-instrumental. It is clear, however, that he understands the instrumen-

4. Weinrib, *Legal Formalism*, *supra* note 1, at 961-62.

tal/non-instrumental distinction in a somewhat unusual way. This peculiarity is a point to which I shall return in Section IV.

When we look at law or at a particular legal institution from the inside, we are, according to Weinrib, able to discern its *essence*.[5] In Weinrib's view, the essential characteristics of an institution determine the character of its internal, non-instrumental justification.[6] This is how the two different senses of internalism are supposed to be related. More specifically, the link is provided by two abstract justificatory forms, which in the present paper Weinrib calls *justificatory structures*. These are labelled corrective justice and distributive justice, as originally characterized by Aristotle. Weinrib maintains that a formalist justification must always take one of these two forms. In his view, "[a legal] relationship whose justification is not adequate to either of these structures is unintelligible; in creating such a relationship, positive law commits a juridical mistake."[7] The distinction between corrective and distributive justice corresponds, according to Weinrib, to the distinction between private and public law, and helps to explain the distinction between law and politics.

The second important characteristic of formalist justifications concerns their justificatory aspect. The issue here is the source of a justification's normativity, and the answer for Weinrib lies in the concept of agency or free choice. A certain kind of universality is said to be "inherent in the form of choice," and 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 . . . ."[8] Norms governing the interaction of self-determining agents are thus said to be binding because of the very nature of agency. Weinrib is here espousing a form of rationalism, which is the position in moral philosophy that general moral propositions can be shown to be true or false through the exercise of reason alone, without appeal to empirical knowlege, intuition, or undemonstrable first premises. Weinrib's version of rationalism,

5. *Id.* at 960. I have elsewhere referred to the internalist thesis as "formalism." *See* Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 476 (1992). In that paper "formalism" must be understood in a narrow sense that should not be confused with the meaning adopted here. Following the implicit usage in Weinrib's present paper, I have used the term to refer to his entire legal theory.

6. For an example of how this works, see *infra* text accompanying note 11.

7. Weinrib, *Legal Formalism*, *supra* note 1, at 985.

8. Weinrib, *Jurisprudence of Legal Formalism*, *supra* note 2, at 590.

relying as it does on the idea that normativity is inherent in the concept of agency, has its roots in the work of Kant and Hegel. I shall refer to the claim that the normativity of formalist justifications is to be understood as inhering in agency as the rationalist thesis.

The third characteristic of formalist justifications concerns a special kind of coherence that Weinrib associates with internal unity, or the integration of constituent parts into a unified whole. Coherence, as Weinrib understands the notion, "implies the presence of a unified structure that integrates its component parts."[9] Both formalist justifications themselves and the institutions they justify are supposed to exhibit coherence in this sense. Given the connection Weinrib perceives between coherence and a notion of unity or integration,[10] I shall refer to this double-barrelled claim as the integrationist thesis. Where a particular justificatory structure is incorporated or reflected in a particular legal institution, as Weinrib says that corrective justice is incorporated or reflected in tort law, for example, the coherence of the structure is supposed to be transmitted to the institution. The demands for justificatory and institutional purity that are made by integrationism give rise, as we shall see, to a form of anti-pluralism in moral and legal philsophy. This is because integrationism's pursuit of normative unity leaves little room for a plurality of values, or for the process of finding an appropriate balance or trade-off among values that are in competition with one another.

The three formalist theses I have identified, namely internalism, rationalism, and integrationism, deal with distinct concerns, but in Weinrib's view they are nevertheless integrally connected. Internalism pertains mainly to legal institutions like tort law. It looks at a given legal institution from the inside, in order to discover the underlying justification that is inherent to it. Internalism's starting point, and its central concern, is thus the realm of the social.

Rationalism, by contrast, is primarily concerned with normativity, in the sense of abstract, universal principles that are independent of particular social practices. In Weinrib's Kantian-Hegelian version of rationalism, those principles govern the in-

9. *Id.* at 592.

10. On this connection see also Ken Kress, *Coherence and Formalism*, 16 HARV. J.L. & PUB. POL'Y 639 (1993).

teraction of self-determining agents and derive from the concept of agency itself. The bridge between abstract principles and legal institutions—in other words, the bridge between abstract normativity and the realm of the social—is provided by the concept of a justificatory structure. According to Weinrib, there are two such structures, namely, corrective and distributive justice. These forms of justice are claimed to have normative force because they embody the normativity posited by the rationalist thesis. But at the same time, they are supposed to constitute the inner or deep structure of particular legal institutions. The internal or non-instrumental justifications sought by internalism must take one or the other of these two forms.

As for integrationism, its primary domain is the justificatory structures themselves. It constitutes, in effect, one plank in the bridge between the normative and the social. Corrective and distributive justice each have, according to Weinrib, their own formal unity or integrity, which must be preserved when either form of justice is embodied in a legal institution or practice. These points can be illustrated by reference to corrective justice and tort law. Weinrib holds that corrective justice has normative force because it embodies the abstract interactional norms that are entailed by the concept of agency. Because the understanding of normativity it presupposes is a limited and univocal one, corrective justice is itself an internally unified notion. This unity is then supposed to be transmitted to the realm of the social in the following way. When the social institution of tort law is considered from an internal perspective, its essential features can be seen to be a "bipolar" procedure and a causation requirement.[11] The only justificatory structure that corresponds to these features is corrective justice. One of the implications of integrationism, however, is that any given legal institution can be based on one and only one justificatory structure. Hence the normative unity of corrective justice will be present in tort law as well, undiluted by any other normative considerations.

This version of formalism, based on the three intertwined theses of internalism, rationalism, and integrationism, is undeniably elegant. Elegance is a virtue that often hides a host of vices, however, and regrettably that turns out to be the case

11. Weinrib, *Understanding Tort Law*, *supra* note 3, at 494.

here. In the sections that follow, I shall consider each of the three formalist theses in turn. I begin with rationalism, which is supposed to impart normative or justificatory force to the two forms of justice.

II. The Rationalist Thesis

Weinrib's rationalism is based on the claim that interactional norms inhere in the concept of agency. There is a fundamental problem with this claim, however, which is that Weinrib does little more than *assert* it; he does not provide a satisfactory supporting argument. Weinrib states that free will is, because of its "indifference to the particularity of choice," a kind of universal, and then moves directly to the conclusion that "[p]articular acts must conform to the free will's universality."[12] In the present paper he says, following Kant, that the universality of free agency requires that "purposive beings" should only act on principles that can be valid for all such beings.[13] It would thus seem that the universality of the will is supposed to be translated into a different kind of universality altogether, namely, the universality of a principle that is applicable to all rational agents. But Weinrib does not establish a connection between these two types of universality.

It is far from clear, moreover, what Weinrib means by the claim that the free will is a universal. One possibility is that it is a universal in the sense of a universal-particular relationship. The domain of this universal would presumably be particular instances of exercising free will (particular choices), but even so it does not appear to be any more *normative*—that is, reason-affecting—than the universal "redness." A more plausible possibility is that Weinrib means to emphasize the *capacity* for choice that free will represents—the ability to choose to do one thing rather than another—but there is no obvious sense in which this capacity is properly labelled a "universal." Whatever the notion of free will as a universal is supposed to mean, Weinrib offers no argument to show why it supports or validates normative principles that are universal in the sense of applying to and binding all self-determining agents. Weinrib gestures approvingly in the direction of the work of Kant and

12. Weinrib, *Right and Advantage*, *supra* note 3, at 1288.
13. Weinrib, *Jurisprudence of Legal Formalism*, *supra* note 2, at 590.

Hegel, but their arguments in support of agency-based rationalism are deeply controversial and cannot simply be treated as self-evidently correct.[14] At the very least, Weinrib requires more argument to make his version of rationalism plausible.

Even if Weinrib were to offer a satisfactory argument showing that interactional norms are inherent in the concept of agency, the difficulties with his rationalism would not end there. The concern of this brand of normativity is not with human well-being, from which it expressly abstracts, but rather with the obligations that self-determining agents owe to one another not to show disrespect or to cause harm in certain ways. The norms in question are thus limited to the regulation of direct interaction between particular agents. The difficulty is that, while corrective justice is relational in this way, distributive justice is not. In the present paper Weinrib says that "[c]orrective justice relates the parties directly through the harm that one of them inflicts on the other," whereas distributive justice "relates the parties not directly but through the medium of a distributive scheme."[15] He notes that "[c]orrective justice presupposes [the Kantian] notion of agency,"[16] but it is by no means clear how the same could be true of distributive justice, given the indirect manner in which it relates persons to one another. Weinrib has maintained elsewhere that "[b]oth corrective and distributive justice incorporate the normativity of externally interacting Kantian moral persons."[17] However, in light of the fact that, according to Weinrib's own characterization, Kantian normativity governs direct interactions only, it is difficult to see how this could be so. The resultant privileging of corrective justice is one of the ways in which Weinrib's version of formalism fails to transcend its roots in a theory of tort law.

The difficulty just described is not simply a matter of form, in

14. The most prominent advocate of agency-based rationalism in modern times is Alan Gewirth. *See* ALAN GEWIRTH, REASON AND MORALITY (1978). Gewirth's sophisticated and complex arguments have, however, persuaded very few readers. *See, e.g.*, GEWIRTH'S ETHICAL RATIONALISM: CRITICAL ESSAYS WITH A REPLY BY ALAN GEWIRTH (Edward Regis ed., 1984). *But see* DERYCK BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY: AN ANALYSIS AND DEFENCE OF ALAN GEWIRTH'S ARGUMENT TO THE PRINCIPLE OF GENERIC CONSISTENCY (1991). Bernard Williams offers a sympathetic but powerful critique of agency-based rationalism in BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 54-70 (1985).

15. Weinrib, *Jurisprudence of Legal Formalism*, *supra* note 2, at 588.

16. *Id.* at 591.

17. Weinrib, *Legal Formalism*, *supra* note 1, at 998.

the sense of direct versus mediated relationships. The problem goes deeper. Distributive justice, in the form of general social justice, is generally thought to involve a concern for human needs and well-being. But Kantian interactional norms, as characterized by Weinrib, do not share this concern. In the present paper Weinrib states 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.[18]

This might be thought to suggest that well-being has normative significance within the Kantian schema, albeit of a derivative and dependent character, but I have argued elsewhere that this is not so. For Weinrib, the interests that individuals have in their persons and in tangible property are important *only* because they constitute "embodiments of abstract agency," and not because they are aspects of, or means for forwarding, those individuals' well-being.[19]

Moreover, Weinrib has himself recognized that the "internal aspect" of distributive justice "must be supplemented from the outside."[20] In corrective justice, he contends, "the relationship between the interacting parties is not mediated by the internal particularity of need or want," whereas distributive justice "mediates the relationship between persons through an extrin-

18. Weinrib, *Jurisprudence of Legal Formalism*, *supra* note 2, at 591.

19. *See* Perry, *The Moral Foundations of Tort Law*, *supra* note 5, at 478-88. In that article I also argue that the failure to attribute an independent normative significance to human well-being means that Weinrib can neither explain nor justify the remedial aspects of corrective justice and tort law. The concern at the remedial stage of tort law is compensation for loss, but a loss is just an interference with well-being. The remedy of compensation must therefore treat protected interests as aspects of well-being, and not just as embodiments of what Weinrib calls abstract agency. Weinrib responds to these criticisms by arguing that human interests do count in his version of formalism, because they constitute the content of particular rights. Ernest J. Weinrib, *Formalism and Its Canadian Critics*, *in* TORT THEORY 6, 21 (Kenneth Cooper-Stephenson & Elaine Gibson eds., 1993). But this response does not deal at all with the central objection, which is that in Weinrib's version of formalism human interests are only protected by rights because, and to the extent that, they embody abstract agency (or moral personality, or free will, or the capacity for rights, to use alternative terminology employed by Weinrib); rights do not protect interests *qua* aspects of human well-being. As Weinrib himself puts it, "the significance of particular rights consists solely in their being actualizations of [the] capacity [for rights] and not in their contribution to the satisfaction of the right holders' interests." Weinrib, *Right and Advantage*, *supra* note 3, at 1290; *see generally* Stephen R. Perry, *Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice*, in TORT THEORY, *supra*, at 24, 30-36.

20. Weinrib, *Legal Formalism*, *supra* note 1, at 988.

sic purpose determined by political authority. . . ."[21] The "extrinsic" character of such a purpose ensures that it cannot derive normative force from Kantian agency, even though for Weinrib "[t]he integration of free choice and practical reason [that is, Kantian agency] contains all the normativity there is."[22] It is thus not clear how, on Weinrib's understanding of distributive justice, an extrinsic purpose could ever have normative force.

It is consistent with the above analysis that Weinrib does not even require extrinsic purposes in distributive justice to be directed towards promoting human needs or serving human welfare. The choice among extrinsic purposes is a matter purely for political decision, where that decision is constrained only by notions of fair procedure and formal equality. Weinrib claims that distributive justice presupposes a conception of equality, but "[e]quality . . . is not a substantive ideal that stands outside distribution, nor does it refer to any particular subject matter (such as welfare or resources) whose equal distribution is independently desirable."[23] It is thus clear that a political authority is not, in Weinrib's view, obligated to implement a distributive scheme that would serve or promote the well-being of its community's members—or, for that matter, to implement any distributive scheme at all. This should not come as a suprise, since Weinrib's claim that well-being has no independent normative significance ensures that a conception of well-being can neither infuse extrinsic purposes with normative force nor constrain which of these purposes are acceptable and which are not.

The uneasy position of distributive justice in the formalist schema can also be brought out by reference to Weinrib's integrationist claims. In an earlier article he wrote that a legal form is "a unity,"[24] and that the distinction between form and content is "notional, not ontological."[25] In the present paper he says that coherence "is the interlocking into a single, integrated justification of all the justificatory considerations that pertain to a legal relationship."[26] The meaning of these statements is by no means clear, but they seem to suggest that a legal form is

21. *Id.* at 999.
22. Weinrib, *Kantian Idea*, *supra* note 1, at 486.
23. Weinrib, *Legal Formalism*, *supra* note 1, at 990.
24. *Id.* at 976.
25. *Id.* at 959.
26. Weinrib, *Jurisprudence of Legal Formalism*, *supra* note 2, at 588.

constituted by a fixed set of elements, all of which are integral and necessary parts of a unified whole. This is indeed how Weinrib characterizes corrective justice.[27] In the case of distributive justice, however, because it requires supplementation in the form of an extrinsic purpose, form and content begin to come apart in a way that formalism apparently does not permit.

Weinrib's understanding of distributive justice can be usefully contrasted with that of John Rawls. Rawls, unlike Weinrib, thinks that distributive justice in its most general political form *does* specify an "intrinsic" distributive criterion, namely, the difference principle.[28] Thus Rawls believes that a just "basic structure" must give effect to the difference principle, whereas Weinrib thinks that political authorities are not obligated to adopt *any* form of distributive justice, let alone a particular version like Rawls's.[29] Rawls also employs a Kantian framework, but for him human well-being has a much greater normative significance than it does for Weinrib. Certain primary goods and the human interests they promote are important for Rawls not because they are "embodiments of abstract agency," but because more particular conceptions of the good cannot be pursued without them.[30] The difference principle itself applies to certain primary goods only, namely, income and wealth broadly understood, so in effect it defines a conception of equality of resources.[31] The distributive subject matter of Rawls's theory is primary goods rather than well-being or welfare, but the selection of primary goods depends in part on facts about human well-being, and it also elevates certain needs to special status within the theory.[32] This understanding of dis-

27. *See, e.g.*, Weinrib, *Understanding Tort Law*, *supra* note 3, at 510-14.

28. JOHN RAWLS, A THEORY OF JUSTICE 75-83 (1971). This is not to deny, of course, that the difference principle is sufficiently abstract to be capable of instantiation by means of a number of quite different social, political and economic institutions.

29. Weinrib does write that "[l]egislative and administrative action can legitimately be made to respect the conceptual contours of personhood and equality that underlie the ordering of distributions." Weinrib, *Legal Formalism*, *supra* note 1, at 991. But because he understands Kantian moral personality in a way that attributes no intrinsic normative signficance to human well-being, and accordingly gives only a formal gloss to equality, these constraints cannot embody any substantive distributive ideals, such as the difference principle. *See supra* note 23 and accompanying text.

30. "[T]he index of well-being and the expectations of representative men are specified in terms of primary goods. Rational individuals, whatever else they want, desire certain things as prerequisites for carrying out their plans of life." RAWLS, A THEORY OF JUSTICE, *supra* note 28, at 396.

31. *See* John Rawls, *Social Unity and Primary Goods*, *in* UTILITARIANISM AND BEYOND 159, 166-67, 172-73 (Amartya Sen & Bernard Williams eds., 1982).

32. In his more recent writings, Rawls has modified the account of primary goods so

tributive justice thus accords a normative significance to well-being that Weinrib's very austere conception of moral personality does not permit. In a word, Weinrib's conception of distributive justice is formal, whereas that of Rawls is substantive.

Weinrib is precluded from taking a Rawlsian line on the nature of distributive justice because he makes the following related assumptions: first, distributive purposes are "extrinsic" and hence not conceptually entailed by Kantian agency; second, human interests have normative significance only insofar as they embody abstract agency and not because they are aspects of, or means for forwarding, human well-being; and third, Kantian agency is the source of all the normativity there is. In fact, the upshot of these assumptions is that there is no room in Weinrib's formalist schema for *any* conception of distributive justice, his own claims to the contrary notwithstanding. This is only a problem, of course, if one believes that distributive justice has a place in moral and political life, but Weinrib clearly thinks that it does. Should he think this, though? Perhaps he is not taking the radical implications of his rationalism sufficiently seriously. The thrust of the theory is toward a particularly pure form of libertarianism, in which corrective justice, together with principles of original acquisition that have no distributive dimension, represent all the justice there is.[33] Weinrib maintains that notions of well-being have no place in corrective justice, but the assumptions supporting this position in fact point to the further conclusion that well-being has no role to play in moral or political theory at all. Weinrib might give up those

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as to make it depend in part on a normative conception of the person, but the connection with a notion of need or well-being remains. *See, e.g.*, *id.* at 172-73, where Rawls says this:

> [T]he idea of restricting appropriate claims to primary goods is analagous to taking certain needs alone as relevant in questions of justice. . . . Thus, in regarding the members of society as free and equal moral persons, we ascribe to them certain requirements, or needs, which, given the nature of these requirments and the forms of rational plans of life, explain how primary goods can be used to define appropriate claims in questions of justice. In effect, the conception of the person and the notion of primary goods simply characterise a special kind of need for a conception of justice.

See also John Rawls, Justice as Fairness: A Briefer Restatement 43-44 (1990)(unpublished manuscript on file with the author).

33. Weinrib has criticized Robert Nozick's version of libertarianism because it is tainted by distributive considerations, in the form of the Lockean proviso. *See* Weinrib, *Right and Advantage*, *supra* note 3, at 1293-97. In the same article Weinrib argues that private law cannot accommodate distributive concerns of any kind. The suggestion in the text is that his formalist premises do not permit him to limit this proposition to private law; it necessarily extends to public law and politics as well.

assumptions in favor of, say, a more Rawlsian view of moral personality, but it is difficult to see how he could do so without introducing contaminating distributive elements into the distinctive and uncompromising vision of corrective justice that lies at the core of his legal theory.[34]

Weinrib has written that formalism does not prefer one form of justice over the other because its concern is "entirely with the coherence of legal arrangements. . . ."[35] It thus gives us, he states, no reason to prefer tort law, which is an embodiment of corrective justice, to a general social insurance scheme, which is an embodiment of distributive justice.[36] But Weinrib can hardly say that formalism is concerned *entirely* with the coherence of legal arrangements—coherence being, for him, simply a matter of integrating constitutive elements—while simultaneously maintaining that the two forms of justice "constitute the essential nature of normativity with respect to the external relationships of persons."[37] If either corrective or distributive justice has normative force, then it must have a mandatory quality that imposes obligations, or at least affects reasons for action, even in the absence of instantiating legal practices. But then the idea of being completely free to apply one form of justice or the other to a given area of life (for example, losses caused by accidents) on the basis of a radically free political choice of some kind seems quite unwarranted. Such a choice would surely have to be governed by normative metaprinciples, but formalism appears to have no place for anything of the sort. I have suggested that the resolution of this difficulty, as well as of several related difficulties that arise within Weinrib's version of formalism, requires the elimination of distributive justice from the formalist schema. Weinrib should grasp the nettle and acknowledge that, on his rationalist assumptions, corrective justice is all the justice there is.

III. The Integrationist Thesis

I have thus far considered various difficulties that formalism

34. Rawls himself appears to conceive of corrective justice as ancillary to distributive justice. Rawls, A Theory of Justice, *supra* note 28, at 10-11. *See also* John Rawls, *The Basic Structure as Subject*, *in* Values and Morals 47, 52-55 (Alvin I. Goldman & Jaegwon Kim eds., 1978).

35. Weinrib, *Legal Formalism*, *supra* note 1, at 985.

36. *Id.* at 973.

37. *Id.* at 996.

encounters as a result of its incorporation of a Kantian-Hegelian version of rationalism. Let me turn now to problems arising from the integrationist thesis. Integrationism requires, as we have seen, that both justificatory structures and the legal institutions that instantiate them exhibit a certain unity or integration of component elements. We have already encountered one troublesome aspect of formalism that originates with Weinrib's requirement of internal unity, namely, the problematic status of "extrinsic" purposes in distributive justice. But the difficulties that flow from integrationism by no means stop there.

We might ask, to begin with, why the integrationist thesis applies only to discrete justificatory structures and their institutional manifestations, and not to the formalist schema as a whole. If unity is a value in its own right, why does Weinrib recognize two justificatory structures and not just one? Why, in other words, should the integrationist constraints not apply to the nature of justification generally, and not just within separate structures of justification?[38] The force of these questions is all the greater in light of our earlier conclusion that Weinrib's formalism cannot accommodate more than one justificatory structure in any case. If I am right in thinking that formalism has room for corrective justice only, and none for distributive justice, then the tripartite formalist schema, based on the internalist, rationalist and integrationist theses, is even more elegant and cohesive than I have so far described it. The unity called for by the integrationist thesis applies not just to legal institutions and practices, which are the primary subect matter of the internalist thesis, but also to the notions of justification and normativity themselves, which are the concern of the rationalist thesis. This enhancement of elegance and cohesion is purchased, however, at the price of an extreme and intuitively very unattractive form of anti-pluralism in moral and political theory.

Weinrib admits to being an anti-pluralist,[39] but he does not acknowledge that his particular version of anti-pluralism leads

38. *Cf. id.* at 972: "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." In light of these comments, the recognition of *two* "structurally different and mutually irreducible" forms of justice, *id.* at 983, appears to be a defect in formalism.

39. Weinrib, *Kantian Idea*, *supra* note 1, at 474-78.

to radical libertarianism and the rejection of any patterned conception of distributive justice. I do not see how these implications of both the rationalist and integrationist theses can be avoided, but in order to facilitate the discussion to follow I shall assume that distributive justice can somehow be fitted into the formalist schema, as Weinrib maintains. The question I next address is, in a sense, the converse of the one just considered. Given Weinrib's recognition of two distinct justificatory structures, each of which is said to possess normative force, why should unity or integration be any more important at the social or institutional level than it is at the purely normative level? Why, in other words, is the integrationist thesis not even more restricted than Weinrib suggests, given that he does not in the end accept a radical and thoroughgoing form of anti-pluralism? It seems innocuous enough to say that the principles of corrective and distributive justice each possess a certain internal unity or integrity of some kind.[40] Something of the sort seems to be implied just by the identification of a separate principle which is distinguishable from other principles.[41] But what is the reason for insisting that that unity must be transmitted to, or reflected in, legal institutions or practices? Moreover, what exactly does it mean to say that institutions must, like their justifying principles, manifest a notion of unity?

Before we address these questions, it will be helpful to note and bracket two related, preliminary difficulties concerning formalism's scope. By recognizing two distinct and mutually irreducible justificatory structures, namely, corrective justice and distributive justice, Weinrib implicitly accepts a form of moral pluralism. He does so despite the inherent anti-pluralist pull of his rationalist and integrationist premises. In fact, the pluralism Weinrib is willing to tolerate is more extensive still, since he acknowledges the normative force of principles that do not seem reducible to either corrective or distributive justice. He states in the present paper, for example, that the formalist does

40. In light of Weinrib's claim that corrective and distributive justice both have normative force, I shall sometimes refer to them as principles. Weinrib himself prefers always to call them forms.

41. Weinrib himself has the following to say on the unity of corrective justice: "Corrective justice is a unity in two senses. First, it gathers all the legal categories of voluntary and involuntary transactions into a single mode of interaction by disclosing the pattern that makes them transactions. Secondly, it shows that a transaction itself has a given structure that cannot be further decomposed." Weinrib, *Aristotle's Forms of Justice*, *supra* note 1, at 221.

not dispute the desirability of compensation and deterrence,[42] which are goals often attributed to tort law (wrongly attributed, in Weinrib's view). It is plausible to think that compensation is best understood in distributive terms, but deterrence is not readily reducible to either of formalism's two officially accredited forms of justice. Deterrence does not necessarily presuppose a corrective justice-type relationship between persons, for example, since the undesirable behavior to be deterred might not impinge directly on someone else; the relevant law might be intended to achieve consequentialist or collectively-oriented goals. Weinrib must nonetheless make room for such instances of deterrence if he wishes to be able to explain criminal law in the larger sense, that is, as including the full range of policy-based regulatory offences that are recognized in modern law.[43]

The first preliminary difficulty to be noted, then, is that the use of deterrence to achieve collective or policy-based goals appears incompatible with the restricted Kantian understanding of normativity that Weinrib's formalism presupposes. This is in part an extension of the point made in the preceding section about the difficulty of fitting distributive justice into the formalist schema. If Kantian normativity is all the normativity there is, then how can it ever be justifiable, in the limited moral universe of formalism, to rely on deterrence to achieve economic efficiency, say, or some other collective goal?

There is also a second difficulty that deterrence faces, however, which distributive justice avoids. Weinrib states that the basic unit of formalist analysis is the legal relationship, by which he means the way that law connects one person to another.[44] Corrective justice is said to relate persons directly, whereas distributive justice "relates the parties not directly but through the medium of a distributive scheme."[45] It is thus an implicit requirement of formalism that acceptable principles

42. Weinrib, *Jurisprudence of Legal Formalism*, *supra* note 2, at 587.

43. Weinrib does say that "criminal law falls under corrective justice, since it presupposes the special significance of doing and suffering." Weinrib, *Legal Formalism*, *supra* note 1, at 982 n.73. He adds that *mens rea* involves a rejection by the criminal of "the very idea of the formal equality of corrective justice," so that state prosecution and punishment is required to undo the "general wrong." *Id.* at 983 n.73. It is clear, however, that Weinrib is talking here only about wrongs that fall within the traditional core of criminal law. Such crimes typically involve the violation of individual rights, and they are ordinarily accompanied by a culpable state of mind. Criminal law in the broader, regulatory sense encompasses offences that do not necessarily possess these features.

44. Weinrib, *Jurisprudence of Legal Formalism*, *supra* note 2, at 584.

45. *Id.* at 588.

(or justificatory structures) reflect a relationship of some sort between or among persons who are subject to the law. Deterrence, however, is not like that. The only relationship it *necessarily* involves is between persons and the legal or political authority doing the deterring. This casts further doubt on whether Weinrib's version of formalism—in which legal relationships, as understood in the sense just considered, serve as the basic units of analysis—is a truly comprehensive theory of law.

There may well be other principles or goals embedded in law besides deterrence that encounter either or both of the two difficulties just described. The general point is that there appears to be more to the law than can be accounted for by distributive and corrective justice alone. I shall not consider this question further here, however, except to note that formalism as Weinrib characterizes it seems to be based on rather limited notions of what a justifying principle in law can look like. I shall simply assume, as Weinrib himself does, that one way or another a goal like deterrence can be accommodated by the formalist picture of law.

Let us return to the question of how the integrationist thesis applies to legal institutions. It is here that the most fundamental problems for integrationism arise. What does it mean to say that legal institutions must manifest a notion of unity, and why should formalism insist that they do so? Weinrib illustrates and defends his integrationist claims by using the example of tort law. He argues that tort cannot be regarded as combining the goals of deterrence and compensation because in those circumstances each would inevitably operate capriciously. Injury would only be compensated if it were the result of a tortious act, while "the occasion and scope of deterrence [would] depend on the fortuity of the injury's occurrence and extent."[46] Compensation and deterrence are, Weinrib states, independent of one another, and consequently are "mutually truncating" when brought together in the manner contemplated.[47] The nature of justification is said to be at stake:

> 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 extrin-

46. *Id.* at 585.
47. *Id.* at 586.

sic factor to cut the operation short is normatively arbitary.[48]

With respect to tort law, the solution in principle "is to elaborate a justification that reflects the bipolarity of the tort relationship."[49] Thus the justification for tort law is "relational, like tort law itself."[50] The appropriately relational justification that Weinrib thinks underpins tort is, of course, corrective justice. Later, Weinrib adds that the concepts of negligence law, namely, risk, causation, reasonable care and remoteness, instantiate corrective justice by "form[ing] an ensemble that brackets and articulates a single normative sequence."[51]

The first question we must ask is, how exactly do legal institutions reflect the unity of justifying principles? There appear to be three possibilities. The first is that each institution must be justified by a single principle only,[52] where the scope of the principle must not be truncated by the operation of the institution and where each of the institution's constitutive doctrines and concepts must make a non-redundant contribution to serving the principle.[53] The second is that each principle must justify only one institution, where the nature of the institution is again subject to non-truncation and non-redundancy riders. The third is a combination of the first two: one principle per institution, and one institution per principle. Let me call these, respectively, unity conditions one, two, and three. Weinrib does not tell us which unity condition he has in mind, although I suspect it is the third.[54] I shall proceed here by considering

48. *Id.*
49. *Id.* at 587.
50. *Id.*
51. *Id.* at 593.
52. *See, e.g.*, Weinrib, *Understanding Tort Law*, *supra* note 3, at 504 ("If coherence requires that tort law be the expression of a single normative idea, an instrumentalism of multiple goals is obviously doomed to failure.").
53. The following passage suggests the non-redundancy idea: "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." Weinrib, *Legal Formalism*, *supra* note 1, at 968. *See also id.* at 970 ("If the intelligibility of a tort relationship could withstand the omission or amputation of any aspect of [the ensemble of conceptual and institutional characteristics that constitutes the tort relationship], that very fact would show that the initial inclusion of that aspect among the relationship's essential characteristics was mistaken.").
54. This is suggested by the following passage: "For a normative phenomenon such as law, the coherence of intrinsic ordering entails a coherence of justification; a single justificatory consideration pervades the entire ordering without being limited by a competing justificatory consideration. *An intrinsic ordering is thus coextensive with the scope of its underlying justification.*" Weinrib, *Understanding Tort Law*, *supra* note 3, at 496 (emphasis added). A similar idea emerges in the present paper: "A relationship is coherent when a single justification animates it, so that the justification's moral force *is congruent with*

the first two unity conditions in turn. Because I conclude that neither can be accepted, the third must automatically be rejected as well.

Let me begin with unity condition one, which calls for one principle per institution. Weinrib's main argument, based on the tort example, appears to be that any attempt to combine more than one principle in a single institution will inevitably result in mutual truncation. But even if we accept that this is true of the tort example we have no reason to think it is true in general, and if formalism is to be an acceptable legal theory it must apply to legal institutions generally. For example, instead of being brought together in a tort regime, compensation and deterrence could be combined in a system of compulsory first-party insurance. Deterrence would be accomplished by differentiated premium levels, which I assume could be set in such a way as to ensure fairness and avoid truncation. But in that case even Weinrib's prime examples of supposedly incompatible goals, namely, compensation and deterrence, could be non-arbitrarily combined within a single institution. It should also be noted that the compulsory insurance scheme just described appears not to contain any redundant institutional elements. This shows that a non-redundancy requirement, while no doubt sensible insofar as it promotes the efficient use of institutional resources, has very little to do with institutional unity in Weinrib's sense, since the requirement can be met by multi-goal institutions. Later I shall take up the question of whether there is any reason for insisting on an integrated ensemble of component parts for its own sake, quite apart from the issues of truncation and institutional redundancy.

If we assume that Weinrib is right in thinking that, in the particular case of tort law, combining deterrence and compensation would result in mutual truncation, then of course it seems natural to say they should not be combined. But mutual truncation is at best just a special feature of the example, as the discussion of the compulsory insurance scheme showed. Hence, it does not offer any general support for unity condition one. Nor is this the only special feature of the deterrence-compensation example that Weinrib implicitly relies on. Another is the fact that we can imagine the goals of deterrence and compensation

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the relationship's boundaries." Weinrib, *Jurisprudence of Legal Formalism*, *supra* note 2, at 588 (emphasis added).

each being pursued by distinct institutional means, such as a system of regulatory fines for the former and a social insurance scheme for the latter. But this characteristic of the example is not generalizable, either.

To see this consider another example, based on the goals of deterrence and retribution. I shall begin by assuming (as many theorists do) that each of these goals is valid (that is, worth pursuing), and that each is independent of the other. (Perhaps retribution is justified on Kantian grounds, while deterrence is justified on consequentialist grounds.) What would be problematic about combining these goals in a single institution of criminal law? In fact, how could we avoid combining them? What institutional arrangements could we make that would achieve complete separation of the pursuit of these two goals? The example is especially interesting because there could well be mutual truncation: the penalties needed to achieve deterrence could differ from those required for retribution. But if we cannot avoid combining these goals in a single institution, then the appropriate conclusion seems to be, so much the worse for the non-truncation requirement. Certainly it does not follow, contrary to what Weinrib apparently assumes about multi-goal institutions generally,[55] that neither goal would have *any* justificatory force at all. If non-truncation means that there can never be compromise among principles, then in any pluralist morality of any complexity it will often be a desideratum impossible to attain.

Weinrib's argument based on the undesirability of truncation thus does not support unity condition one. What about unity condition two, which calls for one institution per principle? It seems that Weinrib simply assumes rather than argues for this condition. For example, the claim that the goal of compensation will be truncated within a tort system can only be sustained on the assumption that compensation must be completely effected by tort and tort only. But why should we accept this assumption? Why could tort law not be regarded as one element within a larger, multi-institutional compensation system?[56] For example, victims might be given the option of suing their injurers or taking compensation under a comprehensive no-fault

55. *See infra* text accompanying note 70.

56. I ignore any problems of individuating institutions that might arise, although I think they are a source of further potential embarassment for the integrationist thesis.

plan that applied to non-tortious as well as tortious harm. This is in fact a feature of several existing and proposed no-fault compensation schemes in the area of medical injury.[57] Of course, we would presumably not set up a system like this unless we thought that tort law served some goal in addition to compensation, such as corrective justice. But there is no reason why tort law cannot be regarded as serving both objects, at least so long as the goal of compensation is capable of being pursued within more than one institution. I see no argument for concluding that compensation cannot be so pursued, however, and hence unity condition two must be rejected. Since unity condition one has previously been shown to be unacceptable, the third unity condition, which combines one and two, must also be rejected.

The idea that principles should not be truncated is the basis of Weinrib's main argument for integrationism at the institutional level. His argument does not support unity condition one, and it begs the question against unity condition two. Non-truncation does not, in fact, seem to have very much to do with institutional unity at all. There are, however, hints in Weinrib's discussion of other arguments besides non-truncation, although they are not very well-developed. There is, for example, an implicit suggestion that an integrated "ensemble" of institutional elements, which together are regarded as serving a single justifying principle, is desirable for its own sake. This is, perhaps, the basis Weinrib has in mind for what I earlier called the non-redundancy requirement. If there is any such desirability, however, and I very much doubt that there is, it appears to be purely aesthetic rather than normative in character; I do not

57. *See, e.g.*, LIABILITY AND COMPENSATION IN HEALTH CARE: A REPORT TO THE CONFERENCE OF DEPUTY MINISTERS OF HEALTH OF THE FEDERAL/PROVINCIAL/TERRITORIAL REVIEW ON LIABILITY AND COMPENSATION ISSUES IN HEALTH CARE (1990)(proposing a no-fault scheme for medical injury in Canada); David Bolt, *Compensating for Medical Mishaps—A Model "No Fault" Scheme*, 139 NEW L.J. 109 (1989)(describing British Medical Association's proposed no-fault scheme for medical mishaps); Malcolm Brahams, *The Swedish "No Fault" Compensation System for Medical Injuries* (Parts 1 & 2), 138 NEW L.J. 14, 31 (1988); Okianer C. Dark, *Is the National Vaccine Injury Act of 1986 the Solution for the DTP Controversy?*, 19 U. TOL. L. REV. 799 (1988); Carl Oldertz, *The Swedish Patient Insurance System—8 Years of Experience*, 52 MEDICO-LEGAL J. 43 (1984); Larry M. Pollack, Note, *Medical Maloccurrence Insurance: A First Party No-Fault Proposal For Resolving The Medical Malpractice Insurance Controversy*, 20 U. MICH. J.L. REF. 1245 (1987); Peter H. White, Note, *Innovative No-Fault Tort Reform For an Endangered Specialty*, 74 VA. L. REV. 1487 (1988) (discussing Virginia's Birth-Related Neurological Injury Compensation Act of 1987).

see how it could ground an argument for any of the unity conditions we have considered that did not beg the question.

There might also be a somewhat similar, apparently aesthetic concern underlying Weinrib's observation that corrective justice offers a justification for tort law that is as "bipolar," or "relational," as tort law itself.[58] We might call this the congruence requirement, according to which the structure of legal institutions should somehow mirror the structure of their justifying principles; the assumption would presumably be that if the congruence requirement is met, one or another of the unity conditions will also be satisfied. As in the case of the supposedly inherent desirability of integrated institutions, the chief difficulty with a congruence requirement is precisely that it seems to be aesthetic rather than normative in nature: relying on it to set an acceptability condition for institutions that are intended to serve a normative purpose would thus simply beg the question. There is also the additional difficulty of specifying what, in general, would count as resemblance between an abstract principle and a social institution. While there is no doubt a sense in which corrective justice and tort law do resemble one another, at least so far as "bipolarity" is concerned, this again seems to be a special feature of the example that cannot be generalized. Does criminal law somehow resemble or mirror the principle of deterrence? I am not sure the question even makes sense, but I also see no cause for concern if it does not. An argument for thinking that there are reasons of even an aesthetic character why we would want legal institutions to resemble or mirror their justifying principles has simply not been made out.

Weinrib applies the term "coherence" to the integrationist dimension of his formalism, but the word is clearly being given a special meaning. The thought that our institutions might be "incoherent" certainly has an ominous ring, but if it merely means that they are to be understood as serving separate and mutually irreducible purposes that sounds, if anything, like a bargain. On the face of it, what is so terrible about getting two goals for the price of one? Turning the question around, why exactly are unity and integration thought to be so wonderful? At the moral level these notions point to an anti-pluralism that intuitively cannot be accepted, and that Weinrib implicitly does

58. Weinrib, *Jurisprudence of Legal Formalism*, *supra* note 2, at 588.

not accept. At the institutional level, anti-pluralism is as a general matter both undesirable and unattainable. Of course, Weinrib makes some telling points when he claims that, in the special case of tort law, goals often attributed to that institution will mutually truncate one another. But this shows only that a principle of corrective justice has a central place in the best interpretation of that particular social practice, in something like Dworkin's two-fold sense of interpretation based on elements of justification and fit.[59] It does not offer an argument for institutional anti-pluralism in general, or even in the special case of tort law. Institutional structure can constrain acceptable justifications of the institution, for example by privileging a particular principle like corrective justice, without eliminating all other normative considerations completely.[60]

Weinrib has criticized the pluralist strain in contemporary legal thought on the ground that it is "unresolved" and amounts to "a scramble for empire among competing forces."[61] Institutional pluralism need not, however, be conceived as a completely unstructured competition or balancing act. An obvious alternative is that different principles form a lexically ordered hierarchy the shape of which is determined, at least in part, by institutional structure. Suppose that the structure of tort law privileges corrective justice in the way Weinrib suggests. This would mean that corrective justice should be relied on to resolve tort disputes whenever possible. But Weinrib has emphasized many times that corrective justice gives rise to inevitable indeterminacy, especially as regards the standard of care.[62] When indeterminacy strikes, why should a second-tier goal, such as deterrence, not come into play?[63] To resolve the particular dispute and determine the future law on a basis equivalent to a coin toss rather than by reference to some non-

59. RONALD M. DWORKIN, LAW'S EMPIRE (1986).

60. *Cf.* Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233 (1988).

61. Weinrib, *Kantian Idea*, *supra* note 1, at 477.

62. *See, e.g.*, Weinrib, *Right and Advantage*, *supra* note 3, at 1306.

63. Weinrib has suggested that one of the reasons tort law truncates the goal of deterrence is that "the deterrent falls only upon those who have actually caused injury, thus passing over wrongdoers whose actions have fortuitously not resulted in harm." Weinrib, *Understanding Tort Law*, *supra* note 3, at 502. But the *ex ante* incentives—that is, the "deterrent"—will be the same for everyone, and indeed this is true even if deterrence is regarded as the *only* goal of tort law. With respect to the lexically ordered pluralism described in the text, it cannot be argued that it is *unfair* to burden only those deterees whose actions happen to cause loss after the fact, because this aspect of the practice is taken to be justified by the lexically prior goal of corrective justice.

corrective but nonetheless relevant normative consideration seems completely unjustifiable. And if deterrence considerations are indeterminate or otherwise inapplicable, why not rely on loss-spreading? The non-truncation argument offers no reason against doing so, since the basic structure of tort law is assumed to be justified on corrective grounds. But if corrective justice and other lexically prior considerations are of no assistance in a particular case, then what reason could there be *not* to place the loss on the party to the action who is the better spreader, even if neither is the best spreader in society at large?

The foregoing discussion is obviously not intended to provide a complete defense of the claim that tort law should be understood in terms of a lexically-ordered pluralism. I think the claim is a plausible one, but much more would have to be said to establish that.[64] The point of the discussion is simply to show that institutional pluralism need not be the kind of wholly undifferentiated mish-mash to which Weinrib understandably objects.[65] Institutional pluralism is as inevitable, unobjectionable and indeed desirable as pluralism at the level of pure moral theory.[66]

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64. One point that would have to be dealt with is why deterrence is ordered ahead of loss-spreading. The answer, in brief, is that deterrence can be combined with corrective justice in a way that eliminates many of the worries about truncation, *see supra* note 63, but the same is not true of loss-spreading. In addition, deterrence is premised on many of the same notions of personal responsibility and acting for reasons that underpin corrective justice, and this is so even if the end aimed at is a collective one. The same cannot be said of loss-spreading, however, which is simply an ex post attempt to take advantage of the diminishing marginal utility of money.

65. In fact, there is at least one other variety of pluralism that also avoids this objection. It can be called convergent pluralism, and is most easily explained by example. Weinrib at one time argued that the appropriate formulation of the standard of care in negligence law is, from a corrective justice perspective, the Learned Hand test. Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37, 52-53 (1983). Richard Posner, by contrast, maintained that the Learned Hand test was the proper understanding of negligence from an economic perspective. Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). If both were correct, then it would seem natural and appropriate to say that negligence law was justified on grounds of both corrective justice and economics. This would be so in spite of the theoretical incompatibility of the two justifications; all that would matter is their convergence in practice. Weinrib has since repudiated the Learned Hand test, and now defends the formulation of the negligence standard given by the English judge Lord Reid in *Bolton v. Stone* [1951] A.C. 850, 867. But a similar example of convergent pluralism can still be constructed, since Stephen Gilles has recently argued that Lord Reid's formulation is really an instance of the cheapest cost-avoider criterion for determining liability in tort on an economic basis. Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1336-40 (1992).

66. For a discussion of related questions concerning the connection between coherence and anti-pluralism in Weinrib's formalism, *see* Kress, *Coherence and Formalism*, *supra*

IV. The Internalist Thesis

This brings us, finally, to a consideration of the internalist thesis. Internalism, it will be recalled, demands both that we look at and offer justifications for legal institutions from the inside, and that the justifications we offer be themselves in a certain sense internal: legal institutions are to be justified in their own terms, and not by reference to external purposes or goals. We have already seen that this latter condition cannot be met in the case of legal arrangements that embody distributive justice, since reference to an extrinsic purpose is required, but the problem I want to bring to light now is a different one. Weinrib says that "formalism tries to make sense of juristic thinking and discourse in their own terms."[67] What happens, though, when the internal perspective of participants in a legal institution does not coincide with either of the permitted justificatory structures, namely, corrective or distributive justice? More generally, since the moral pluralism Weinrib implicitly accepts extends, as we have seen, beyond these two forms of justice, what happens when the internal perspective of participants does not coincide with the integrationist strictures we have just been examining? Consider once again the example of tort law. Weinrib maintains that the law of torts cannot, because of the requirements of integrationism, be justified by reference to the dual goals of compensation and deterrence. But what if those lawyers and judges who are most familiar with the institution of tort law, and who are responsible for shaping it into its present form, think otherwise? In the United States, at least, this is a not implausible premise.

In the circumstances envisaged the two aspects of internalism come apart. These are, to repeat, the internal perspective of participants—what Weinrib elsewhere calls the "experience" of law, or "the lawyers' understanding" of legal phenomena[68]—and the insistence that legal institutions be understood in their own terms, in accordance with an "underlying form" that is independent of external purposes.[69] As I interpret this latter dimension of internalism, it amounts to a demand that

note 10. For a different criticism of Weinrib's notion of coherence, *see* Dennis Patterson, *The Metaphysics of Legal Formalism*, 77 Iowa L. Rev. 741 (1992).

67. Weinrib, *Jurisprudence of Legal Formalism*, *supra* note 2, at 592.

68. Weinrib, *Understanding Tort Law*, *supra* note 3, at 490.

69. *Cf.* Weinrib, *Legal Formalism*, *supra* note 1, at 964.

the institutional requirements of integrationism must be met, where the validity of the demand in no way depends on anyone's attitude toward, or pre-theoretical understanding of, the institution in question.

Weinrib can presumably opt for one or the other of these two aspects of internalism as offering the true core or essence of the internalist thesis. If he opted for the participants' perspective, he would be led to say that tort law does serve the goals of compensation and deterrence—recall that he does not deny that these are desirable ends in their own right—but that it does so imperfectly because the institutional form of tort does not meet the integrationist requirements. If he opted for the underlying form idea, on the other hand, he would be led to say that compensation and deterrence simply are not goals of tort law; if a goal does not meet the integrationist requirements then it cannot be a justification, even an imperfect one, for the relevant institution. This second option is clearly the one that Weinrib takes, since he states that "[u]nderstood as composite of compensation and deterrence, tort law ceases to be a justificatory enterprise"; when these goals are combined neither one, he says, "functions as a justification."[70] No argument is offered for the implicit assumption that goals that are not given institutional embodiment in accordance with the integrationist requirements cannot justify *at all*,[71] but let us set that point aside and look more generally at the implications of this second option for formalism.

On the interpretation of the internalist thesis that Weinrib accepts, internalism simply collapses into the institutional requirements of integrationism. We saw in the preceding section that we in fact have no reason to accept those requirements, but the point I wish to make here is a different one. It is that there is no warrant for calling the integrationist requirements

70. Weinrib, *Jurisprudence of Legal Formalism*, *supra* note 2, at 586. Weinrib's preference for underlying form over the participants' perspective is also evident in the following passage: "[Any initially identified] feature [of negligence law] incapable of integration into a coherent structure cannot be truly constitutive of the intelligibility of a juridical relationship." Weinrib, *Legal Formalism*, *supra* note 1, at 969; *cf. id.* at 974: "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."

71. *Cf.* Leslie Green, *Law's Rule*, 24 OSGOODE HALL L.J. 1023, 1030-33 (1986); Kress, *Coherence and Formalism*, *supra* note 10.

internal; in Weinrib's terminology, they do not represent the demands of an immanent intelligibility. Legal institutions and other social practices are created by human beings to serve human ends. If, however, we regard ourselves as free to ignore what people think they are doing in creating (and continually re-creating) those institutions, and insist instead that institutions must meet *formal* conditions of the kind described in the preceding section, then surely we are imposing what effectively amount to *external* criteria of acceptability. Is this not the direction, after all, that one would expect a formalist theory to take? The collapse of internalism into integrationism is thus not just a matter of relabelling. When that distinction disappears, so too do the distinctions between external and internal purposes, and between instrumentalism and non-instrumentalism (at least in the sense Weinrib gives these terms). Note that Weinrib does not deny that tort law, for example, has a purpose; he only denies that it has an *external* or *extrinsic* purpose.[72] Thus he could hardly disagree with the statement that the purpose of tort law is to do corrective justice. But when the conditions that determine what counts as an internal purpose must themselves be regarded as externally imposed, the characterization of the purposes that meet those conditions as "internal" clearly becomes problematic.

Weinrib's argument is, in effect, that if an existing legal practice crosses a threshold of similarity to an ideal institution, where the justificatory structure for the latter is corrective (or distributive) justice, then the practice must be understood exclusively in corrective (or distributive) terms if it is justified at all, and this is so regardless of how participants in the practice understand it. I suggested in the preceding section that the institutional anti-pluralism presupposed by this integrationist approach to justification is unacceptable. The point I wish to

72. *See* Weinrib, *Legal Formalism*, *supra* note 1, at 964-65 ("Formalism repudiates analysis that conceives of legal justification in terms of some goal that is independent of the conceptual structure of the legal arrangement in question."); *see also id.* at 957 ("The function of law for the formalist is to express this immanent rationality in the doctrines, institutions and decisions of the positive law."). We can put this latter proposition together with Weinrib's claim that "[t]he positive law is immanently rational to the extent that it captures and reflects the contours of rationality . . . internal to the relationships that law governs," *id.* at 957 n.26, to arrive at the following: the purpose (or function) of law is, according to Weinrib, to reflect the rationality internal to the relationships among persons that are governed by law. This definition has a decidedly "extrinsic" flavor; the notion of internality it employs applies only to relationships among persons, not to law.

make here is a different one. It is that the purpose or function that integrationism attributes to a given legal institution is no more internal to it in any sense that might matter to us than are the purposes attributed to legal practices by law and economics, or by Dworkinian interpretationism.[73] This is important in light of Weinrib's claim that "non-instrumental understandings" of legal institutions and relations are superior to "instrumental understandings," since Weinrib understands that distinction in terms of the internal purpose/external purpose distinction: non-instrumental understandings posit internal purposes, while instrumental understandings posit external ones.[74] Once the distinction relating to internal versus external purposes collapses, however, so does the one relating to non-instrumental versus instrumental understandings.

Weinrib's discussion of instrumental and non-instrumental understandings is flawed in other ways as well. Consider the following argument:

> 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 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. . . .[75]

This argument contains a double equivocation. Assume that we are trying to understand a particular legal institution, such as tort law. The argument moves from an attempt to understand a certain kind of *institution* or *social practice* to an attempt to "grasp" the *end* or *purpose* attributed to the institution or practice. This shift concerning the subject of understanding is the first equivocation, since it is far from obvious that ends or purposes need to be, or even can be, understood in the same way as institutions or practices. Just how would we go about grasping a purpose that Weinrib would characterize as external, such as deterrence, in non-instrumental terms (that is, by reference to "a point of non-instrumental stability")? If we attempted to

73. *Cf. supra* note 72, where it is pointed out that Weinrib's definition of the purpose or function of law seems to be, so far as the law itself is concerned, more extrinsic than intrinsic in character.

74. *See* Weinrib, *Legal Formalism*, *supra* note 1, at 965.

75. *Id.*

apply Weinrib's version of the instrumental/non-instrumental distinction we would presumably be led to try to understand deterrence in terms of a purpose he would characterize as internal, such as giving effect to corrective justice.[76] But since this makes no sense, it cannot be what Weinrib means.

It is clear at this point, I think, that Weinrib must be implicitly appealing to a different sense of the terms "instrumental" and "non-instrumental," and this is where the second equivocation comes in. In fact, he is appealing to a more standard usage of those terms, according to which something, including an end or purpose, is of non-instrumental value if it is valuable in its own right and of instrumental value if it is valuable only as a means to achieving something else of value. But *this* way of understanding the instrumental/non-instrumental distinction completely cuts across Weinrib's primary understanding, which is defined in terms of external and internal purposes. Utilitiarians will argue, for example, that the end of maximizing utility is non-instrumental in the standard sense just considered, whereas Weinrib would have to call maximizing utility an external purpose. This double equivocation vitiates Weinrib's "indefinite regress" argument, quite apart from the independent problem of how even in his own terms internal purposes are to be distinguished from external ones.

In fact Weinrib sometimes uses the term "non-instrumental" in yet a third sense, which refers to the "non-instrumental normativity" of Kantianism.[77] The idea here is, presumably, that persons should be treated as ends-in-themselves rather than as means. Non-instrumentalism in this deontological sense is very different from Weinrib's idea that we should understand legal institutions in terms of internal rather than external purposes.[78] Kantianism does not, of course, insist that

76. It is worth noting here that within the context of Weinrib's theory, the purpose of giving effect to corrective justice would appear to be the *only* purpose he can plausibly characterize as internal or intrinsic. This is because distributive justice always requires reference to an extrinsic purpose. It would seem to follow that, for Weinrib, the only true non-instrumental legal institutions are those that embody corrective justice.

77. *See, e.g., id.* at 996.

78. Weinrib assumes, of course, that his primary usage and the Kantian usage of the term "non-instrumental" are connected, since the only truly internal purpose in his version of formalism is the goal of giving effect to corrective justice, *see supra* note 76, and on Weinrib's view corrective justice presupposes Kantian normativity. This, as we have seen, leads to problems respecting the role of distributive justice in the formalist schema, but that is not my present concern. The point is, rather, that even if one thought Weinrib had succeeded in demonstrating that internal purposes are necessar-

institutions be treated as ends rather than as means, since on any plausible view institutions—or at least legal institutions—exist precisely to serve human ends. This latter characteristic of institutions in fact goes some way towards explaining the failure of the distinction between external and internal purposes, because it makes clear why all institutional purposes, whether compatible with Kantian non-instrumentalism or not, must in an important sense be regarded as external. Given that legal institutions are nothing more than means to achieve human purposes, there is a clear sense in which they are unavoidably instrumental in character. Similarly, the purposes an institution serves are in a corresponding sense external: the institution is just an instrument for attaining the purpose, and the purpose can be defined independently of the institution's existence. This is true, for example, of the relationship between tort law and the purpose of giving effect to corrective justice, and it would remain true even if Weinrib were right that concerns about truncation meant that tort law could only be justified by corrective justice and corrective justice could only be implemented by an institution like tort law.

Conclusion

Weinrib's theory of legal formalism clearly grows out of the important and interesting theory of corrective justice and tort law that he has developed over the past decade. I think Weinrib is wrong to conceive of corrective justice in purely Kantian terms, but, despite this misconception, he is correct to regard the principle of corrective justice as giving rise to a right to repair for injury and a correlative duty that is limited to the injurer.[79] I suggested earlier that he is also right to regard corrective justice so understood as the primary moral foundation of tort law.[80] It should be noted, finally, that Weinrib has advanced persuasive criticisms of a number of tort theories besides his own. It is thus clear that Weinrib has many insights to

ily Kantian in nature—a conclusion that Weinrib merely asserts, rather than argues for—Kantian non-instrumentalism would still not coincide with Weinrib's understanding of non-instrumentalism. Kantian non-instrumentalism holds that *persons* cannot be treated as means to an end. Weinribian non-instrumentalism makes the further claim that at least certain *institutions* cannot be so treated. This is, obviously, a very different sort of claim.

79. *See* Perry, *The Moral Foundations of Tort law*, *supra* note 5.

80. We disagree, however, about whether it is legitimate to attribute subsidiary goals to the tort regime.

offer about corrective justice and its role in determining civil liability. Difficulties arise, however, when he attempts to transform his tort theory into a full-blown theory of law. Most of the problems with formalism to which I have drawn attention in this paper have their source in this attempted transformation. These range from the trouble the theory has in accommodating distributive justice to its failure to generalize the arguments for institutional integrationism beyond their roots in the law of torts. If Weinrib is to succeed in breathing life into his version of formalism, he will have to make greater efforts than he has to date to ensure that it transcends its origins in a limited theory of private law.