FORMALISM AND PRACTICAL REASON, OR HOW TO AVOID SEEING GHOSTS IN THE EMPTY SEPULCHRE

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Professors Ken Kress, Jean Love, and Stephen Perry have my gratitude for their thoughtful and extensive comments. The occasion precludes a comprehensive response.[1] Instead, I will focus on three fundamental questions: (i) does formalism countenance distributive justice? (ii) is coherence desirable? and (iii) is formalism internal to law?

I. THE QUESTION OF DISTRIBUTIVE JUSTICE

Formalism links Aristotle's forms of justice and the natural right conception of normativeness. On the one hand, the forms of justice (corrective and distributive justice, as explained by Aristotle) constitute justificatory structures governing interaction. On the other hand, natural right (as explicated by Kant and Hegel)[2] presents normativeness as implicit in free and purposive agency. Practical reason, on this view, is literally the union of reason and practice: reason regulates action from within by holding it to its immanent norms. Natural right normatively grounds the forms of justice by exhibiting them as expressions of practical reason.

This fusion of justice and agency prompts Professor Perry to conclude that by grounding corrective justice in natural right, formalism leaves no room for distributive justice.[3] Following Kant and Hegel, the formalist traces corrective justice to a conception of agency that features the capacity to abstract from any particular purpose, including particular promotions of well-being. Corrective justice protects interests in human well-being not for their own sake, but only to the extent that they have crystallized into rights, which are the juridical embodi-

1. A reformulation of the formalist approach to private law appears in ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1993).

2. Throughout this essay, "natural right" refers to the conception of natural right found in the writings of Kant and Hegel; *see* GEORG W.F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT (Thomas M. Knox trans., 1952); IMMANUEL KANT, THE METAPHYSICS OF MORALS (Mary Gregor trans., 1991).

3. Stephen R. Perry, *Professor Weinrib's Formalism: The Not-So-Empty Sepulchre*, 16 HARV. J.L. & PUB. POL'Y 597, 602-08 (1993).

ments of such abstracting agency. Hence, corrective justice is composed of negative duties against interfering with rights, rather than positive duties to promote human well-being. Clearly, distributive justice cannot similarly abstract from well-being. Therefore, Professor Perry argues, distributive justice cannot be normatively grounded in the natural-right conception of agency. In his view, recognition of distributive justice is at odds with the formalist's normative premises. "The thrust of the theory is towards a particularly pure form of libertarianism in which corrective justice . . . [is] all the justice there is."[4]

Professor Perry's argument presupposes that, regardless of moral context, practical reason invariably abstracts completely from well-being. Corrective justice is all the justice there is because the practical reason operative in corrective justice is all the practical reason there is. Ignored is the notion—elaborated in the works of Kant and Hegel—that the normative implications of agency include but also go beyond corrective justice.

The following sections explain why it is a mistake to assume that the invocation of natural right restricts legal formalism to corrective justice. Section II points out that formalism recognizes different shapes of moral experience and construes practical reason as addressing the issues specific to each shape. Section III goes on to suggest that practical reason, although always conceived by natural-right theory as the normative dimension of agency, operates differently for different shapes of moral experience. To illustrate, section IV considers Rawls's idea of distributive justice. Section V takes up the question of the relationship between the different operations of practical reason by situating them within an ordered sequence. The priority of the right within this sequence is important when we move in section VI from Professor Perry's remarks about distributive justice to Professor Kress's focus on formalist coherence.

II. The Shapes of Moral Experience

A familiar feature of our moral life is our awareness that our moral experience has a variety of shapes.[5] For instance, my obligations as parent or as friend differ from my obligations as

4. *Id.* at 607.
5. The phrase "shapes of experience" is Hegel's. *See* HEGEL, *supra* note 2, at § 32.

citizen. An ethical duty (such as to rescue another from imminent danger) may have no corresponding private-law duty. A claim in distributive justice may have no place in corrective justice.

Legal formalism recognizes this variety of moral experience in two ways. First, it demarcates a specifically juridical domain whose concerns are categorically different from those of other shapes of moral experience. Second, it distinguishes corrective justice and distributive justice as different shapes of experience within the juridical domain.

Legal formalism exhibits the distinctiveness of the juridical shapes of experience by delineating their structures. Hence arises the formalist's preoccupation with corrective and distributive justice as "forms," or as different ways to organize the external relations of interacting persons. Because the forms of justice are each internally unified and irreducible to the other, they constitute structures of justificatory coherence for the legal relationships they inform. On this basis the formalist concludes, for instance, that the introduction of distributive reasoning into corrective justice relationships necessarily undermines the coherence of those relationships.

Legal formalism, accordingly, is both pluralistic and monistic. The pluralism recognizes a manifold of shapes of moral experience. The monism insists on the internal coherence of the specifically juridical shapes. The pluralism and the monism are compatible because the requirement of coherence within a shape does not deny the existence of other shapes.[6]

Through this pluralism, however, runs a single thread: the various shapes of moral experience participate in the same conception of normativeness. Such participation, indeed, is what renders them shapes of *moral* experience. For the formalist, all morality is immanently grounded in free and purposive agency. In Kant's words, "the concept of the action itself contains a law for me."[7] As an internal dimension of agency, normativeness is implicit in one's status as an agent, so that the freedom of purposive agency is both the source and the locus of morality. Practical reason, then, is nothing more than the operation upon the agent of the moral requirements immanent in agency.

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6. *But see* Perry, *supra* note 3, at 617-19.

7. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 19 (Lewis W. Beck trans., 1959).

The formalist explication of corrective justice illustrates the connection between a specific shape of moral experience and a specific operation of practical reason. Corrective justice links the parties directly as the active and passive poles of a single legal relationship. The sheer correlativity of doing and suffering means that the agent's particular purposes—even such morally plausible purposes as the promotion of well-being or of the good—are irrelevant to corrective justice. All that matters for this shape of experience is that, whatever their particular purposes, agents do not exercise their free purposiveness in a manner inconsistent with the free purposiveness of other agents. As operative within corrective justice, therefore, practical reason abstracts from the particularity of this or that purpose to the very idea of purposiveness itself.

One should not conclude, however, as Professor Perry does, that the promotion of well-being or the furtherance of the good are beyond the scope of practical reason. All that follows so far is the more limited conclusion that well-being and the good are beyond the scope of practical reason *as operative in corrective justice*. Corrective justice, however, is only one of the shapes of moral experience. Other shapes, such as distributive justice or the non-juridical varieties of morality, might readily admit what corrective justice excludes. Indeed, the very affirmation of differently shaped moral experiences entails a difference in the moral considerations applicable to them.

III. Practical Reason: Conception and Operation

We should distinguish between the conception and the operation of practical reason. The general point is this: the *conception* of practical reason refers to what it is for something to be a moral point of view within any shape of experience; the *operation* of practical reason refers to the distinctive working of a moral point of view within its specific shape of experience. Natural right conceives of practical reason in terms of a normativeness intrinsic to agency. Within any specific shape of moral experience, however, practical reason so conceived operates to address the issues peculiar to that shape.

The *conception* of practical reason postulates that, whatever the shape of experience, its moral point of view is intrinsic to agency. In this conception, moral significance arises out of the capacity for self-determination and does not immediately at-

tach to given particularities, whether of nature, inclination, or circumstance. Practical reason, therefore, involves two steps. The first is the negative one of abstracting from the agent's particularities to a moral standpoint intrinsic to agency. The second is the positive one of holding particular acts to the requirements of this moral standpoint.[8] Thus, the normative constraints on the exercise of agency flow from the nature of agency.

The *operation* of practical reason, so conceived, varies with the specific concerns of each shape of moral experience. Each shape has its distinctive process of abstraction geared to the kind of problems relevant to that shape. Because, for instance, corrective justice governs the interaction of doer and sufferer, practical reason as operative in corrective justice abstracts from the particularity of welfare and good to the sheer purposiveness of agency. In other shapes of experience, which are concerned specifically with distributing the constituents of welfare or with promoting the good, practical reason operates to connect the normativeness of agency to the welfare or the good at issue. Thus, practical reason regulates every shape of moral experience by operating in a manner appropriate to the specific shape in question.

Consider, for instance, Kant's treatment of virtue as the ensemble of purposes that are in themselves duties.[9] Kant grounds such duties, as he grounds all morality, in the intrinsic normativeness of free and purposive agency. From the standpoint of virtue, practical reason requires the agent to adopt certain purposes, not as means to other goods, but as necessary expressions of the agent's freedom and therefore as unconditionally good. In this shape of experience, practical reason operates so that its requirements are themselves the incentives for action. The goodness of the agent's will is paramount: the moral law specifies purposes that flow from the normative requirements of agency, and the virtuous person acts for the sake of the moral law.

As compared to corrective justice, Kantian virtue features the same conception of practical reason, but a different operation. Like the norms of corrective justice, the duties of virtue originate in a moral point of view intrinsic to agency. These duties

8. *See* HEGEL, *supra* note 2, at §§ 5-7; KANT, *supra* note 2, at 42, 52.
9. KANT, *supra* note 2, at 185-90.

are derived through a process that abstracts from the particularity of inclination and holds action to the requirements of the moral law. However, practical reason cannot determine virtue's morally obligatory purposes by operating, as it does in corrective justice, in a mode that renders any particular purpose morally irrelevant. This is merely to say that practical reason must operate so as to reflect the unsurprising truth, fundamental to formalism, that corrective justice and virtue signify differently shaped moral experiences.

The distinction between the conception and the operation of practical reason also applies to corrective and distributive justice. As forms of *justice*, both are expressions of practical reason, but as *different* forms of justice, practical reason operates within them differently. Corrective justice, as we have seen, presupposes practical reason working in a mode that is indifferent to the promotion of human well-being. This mode, of course, cannot address the problem of collectively distributing the resources that serve the well-being of the community's members. But distributive justice is on that account no less compatible with formalism than is the Kantian treatment of virtue. Formalism simply requires that practical reason operates in a manner appropriate to the specific structure and concerns of distributive justice.

IV. Rawlsian Distributive Justice

How might practical reason operate in the just distribution of society's resources? The work of John Rawls provides an example—and one that is all the more pertinent in view of Professor Perry's assertion that "Weinrib is precluded from taking a Rawlsian line on the nature of distributive justice."[10] The basis of Professor Perry's assertion is that Rawls, through his idea of primary goods, ascribes to human well-being a normative significance inadmissible under corrective justice. However, precisely because Rawls is dealing with distributive justice, the incompatibility of the primary goods with corrective justice is irrelevant.[11]

10. Perry, *supra* note 3, at 607. Rawls's theory is not the only possible example. Many thinkers in the natural-right tradition, including both Kant and Hegel, thought that practical reason allowed for both corrective and distributive justice. *See* Hegel, *supra* note 2, at § 242; Kant, *supra* note 2, at 136.

11. On the compatibility of corrective justice and Rawls's conception of distributive justice, see Peter Benson, *The Basis of Corrective Justice and its Relation to Distributive Justice*,

Rawls's project is to work out the principles of justice for society regarded as a fair system of social cooperation. He connects his central organizing idea of social cooperation to a series of companion ideas: that social cooperation applies to the basic structure of society; that the cooperating persons are regarded as free and equal citizens; and that the fair terms of cooperation are to be specified by agreement of the parties in the original position. From this framework emerge Rawls's principles of justice, including the distributive principle that inequalities are to be to the greatest benefit of the members of society who are the least advantaged in terms of primary goods.[12]

Practical reason as operative in corrective justice is inapplicable to Rawls's project on two related grounds. First, corrective justice deals with the bipolar interaction of parties to a transaction, whereas Rawlsian justice deals with social cooperation among all citizens over time. Second, as operative in corrective justice, practical reason abstracts from all particular conceptions of the good, whereas Rawlsian justice makes certain goods ("the primary goods") the subject matter of the distribution. These two points merely show that Rawls is not dealing with corrective justice. Rawls himself indicates as much by postulating a division of labor between the principles regulating the basic structure over time and those that apply to separate transactions.[13]

The key to the compatibility of natural right and Rawls's principles is his idea of free and equal persons. Negatively, such persons can be viewed as independent of and not identified with any particular conception of the good.[14] Positively, they have the moral capacities (for a sense of justice and for a conception of the good) required for social cooperation and for honoring principles that specify its fair terms.[15] This idea of personhood is, in turn, decisive both for the procedure determining the principles of justice (deliberation in "the original position") and for the set of goods ("the primary goods") to

77 Iowa L. Rev. 515, 601-624 (1992). My brief discussion here has benefitted greatly both from numerous conversations with Professor Benson and from his published account.

12. John Rawls, A Theory of Justice 60-83 (1971); John Rawls, Political Liberalism 281-282 (1993).

13. Rawls, Political Liberalism, *supra* note 12, at 268.

14. *Id.* at 30.

15. *Id.* at 19.

which those principles apply. In abstracting from the contingencies of luck, social class, and natural endowment, the original position models the conditions under which the contracting parties are viewed *solely* as free and equal.[16] In addition, the primary goods are not simply components of well-being, but rather are the goods appropriate to and needed by free and equal persons.[17]

From the natural-right perspective, the idea of free and equal persons—along with its companion idea of the original position—signals the operation of practical reason within the Rawlsian approach. Legal formalism can regard Rawls's free and equal person as the normative agent of natural right adapted to the project of social cooperation. On the one hand, this agent is an abstraction from elements of particularity, such as particular conceptions of the good that are normatively irrelevant to the choice of principles for society regarded as a fair system of social cooperation. (Similarly, the original position abstracts from the particularities of luck, class, and endowment.) On the other hand, the principles of justice and the procedure for choosing them are intended to express the agent's freedom and equality. As in the case of corrective justice, the normative conception of agency involves both an abstraction from particularity and the elaboration of norms appropriate to agency, so abstracted. But in this context practical reason operates through an agent characterized by the moral capacities appropriate to the project of social cooperation.

Accordingly, the legal formalist can regard Rawls as showing how the natural-right conception of practical reason might operate when society is viewed as a fair system of social cooperation. In this respect, Rawls's principles of justice are no more inconsistent with legal formalism than is Kant's doctrine of virtue.[18]

16. John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 522 (1980).

17. John Rawls, *Social Unity and Primary Goods*, *in* UTILITARIANISM AND BEYOND 159, 164-167, 172-173 (Amartya Sen & Bernard Williams eds., 1982).

18. The issue is whether, given formalism's incorporation of the natural right conception of practical reason, the legal formalist can endorse Rawlsian distributive justice. It therefore does not matter to the present discussion that Rawls, although inspired by Kant's conception of practical reason, does not *derive* his theory of justice from it. Because Rawls wants principles of justice suitable to a modern and pluralist democratic society, he does not base his theory on any comprehensive moral view, including the Kantian one. In particular, Kant's idea that the activity of practical reason can constitute the order of moral and political values plays no part in Rawls's exposition. RAWLS, POLITICAL LIBERALISM, *supra* note 12, at 99-101. But this does not mean

V. THE ORDERED SEQUENCE

The suggestion that there are various operations of practical reason corresponding to the shapes of moral experience may be thought to give rise to the following difficulty. Legal formalism is supposed to be a systematizing theory. Yet by distinguishing corrective and distributive justice within the juridical domain and by differentiating between juridical and non-juridical moralities, the formalist recognizes a pluralism of operations of practical reason. This pluralism may appear to be at odds with formalism's systematizing aspirations. Professor Perry formulates the difficulty this way: "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?"[19]

The immediate response to Professor Perry's questions is that legal formalism systematizes only to the extent that the nature of justification allows. Because the forms of justice are distinctive and irreducible, there is no overarching justificatory structure that can coherently integrate them. Aiming at a larger unity, as Professor Perry suggests, would introduce incoherences that would undermine justification. Ultimately, the "recogni[tion of] two justificatory structures and not just one"[20] is based on the demonstrable truth that corrective and distributive justice are categorically different from each other.[21] Of course, the demonstration of this truth needs to be assessed on its own terms. But if the demonstration is sound, it excludes the kind of integration that Professor Perry's questions envisage.

Beneath this response lies a consideration fundamental to legal formalism. In postulating different operations of practical reason, legal formalism repudiates the remaking of moral experience in the image of a single substantive principle. In this re-

that Rawls's theory is incompatible with a comprehensive Kantian view. Indeed, Rawls expressly points out that his more limited view of the role of practical reason could be endorsed by Kant "as far as it goes." *Id.* at 98. Rawls expects that his principles will accord with and be supported by an overlapping consensus of reasonable comprehensive doctrines, including a comprehensive Kantian moral view. *Id.* at 133-172.

19. Perry, *supra* note 3, at 609.

20. *Id.*

21. Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 416-418 (1992).

spect, legal formalism differs from systematizing approaches (utilitarianism is an example) that apply a single principle to the entire range of normative phenomena.[22] Like the natural-right tradition on which it draws, legal formalism respects the diverse shapes of moral experience and assigns to theory the task of understanding what is immanent in that experience. Accordingly, in its treatment of law, legal formalism makes explicit what sophisticated legal systems implicitly recognize: that law includes different modes of ordering and that legal reasoning is distinguishable from other kinds of moral argument. This treatment of law is incompatible with insisting that a single substantive principle governs all the shapes of moral experience.

To be sure, these shapes embody the same conception of practical reason. Practical reason, however, is not itself a substantive principle; it is a process that makes salient the inherent normativeness of agency. Nor does the process generate a single comprehensive principle. As we have seen, the characteristic stages in the process are, first, the abstracting from morally irrelevant particularities and, second, the holding of acts to the moral standpoint that emerges from this process of abstraction. Since the moral relevance of particularities varies with the shape of experience in question, the degree of abstraction is not uniform. The process, therefore, does not yield a single substantive principle that applies equally to all moral experience.

If practical reason does not express a single substantive principle, how are its various operations related to one another? In the natural-right tradition, the operations of practical reason are regarded as forming an ordered sequence. The operations each have their own integrity, but they are nonetheless conceptually interconnected as members of a series. The sequence is ordered because of the conceptual dependencies among the various operations of practical reason: certain of these operations presuppose others, and the operations that are presupposed are conceptually anterior to those that presuppose them. The sequencing of these operations is crucial to determining the justificatory considerations that legitimately count in a

22. On utility as a principle of universal scope that does not distinguish between classes of social forms, see RAWLS, POLITICAL LIBERALISM, *supra* note 12, at 260. The grounds on which Rawls there contrasts his social contract theory with utilitarianism also apply to the contrast of legal formalism with utilitarianism.

given shape of experience. A consideration that arises for the first time in one operation can play no role in a conceptually anterior operation.[23]

The most significant aspect of this ordered sequence for legal theory is the priority of the right to the good. In natural-right theory, the priority of the right reflects the relationship of the agent's purposiveness to particular purposes.[24] Purposiveness as such is conceptually prior to particular purposes because, obviously, particular purposes presuppose the capacity to pursue a purpose. Similarly, practical reason concerning purposiveness as such is prior to practical reason concerning particular purposes. If we think of "the right" as the normativeness that pertains to purposiveness as such and "the good" as the normativeness that goes to the desirability of particular purposes, we reach the conceptual priority of the right to the good.

Corrective justice occupies a special place within this idea of priority. Corrective justice is the sphere of practical reason that establishes norms for agents solely on the basis of their purposiveness without considering the desirability of their particular purposes. All that corrective justice requires is that one not do wrong to the rights that are the personal, proprietary, and contractual embodiments of another agent's purposiveness. Hence corrective justice is a regime of negative duties indifferent to the goodness of particular purposes.

Thus, corrective justice features the most basic operation of practical reason. Corrective justice is not thereby to be adjudged the most desirable shape of moral experience; indeed, judgments of desirability play no part in the practical reason of corrective justice. Rather, corrective justice is basic because it deals solely with purposiveness as such, and purposiveness is the indispensable precondition of agency as a normative phe-

23. For the idea of an ordered sequence in Kant's moral philosophy, see John Rawls, *Themes in Kant's Moral Philosophy*, *in* KANT'S TRANSCENDENTAL DEDUCTIONS 81, 81-95 (Eckart Forster ed., 1989). The full elucidation of the ordered sequence requires attention not only to the presuppositions of practical reason's operations, but to the necessity of an immanent movement through the sequence. The great exemplar of the treatment of practical reason as such an ordered sequence is, of course, Hegel's *Philosophy of Right*. *See* HEGEL, *supra* note 2, at §§ 30-33. For the place of corrective justice (what Hegel called "abstract right") in Hegel's sequence, see Peter Benson, *The Priority of Abstract Right and Constructivism in Hegel's Legal Philosophy*, *in* HEGEL AND LEGAL THEORY (Drucilla Cornell et al. eds., 1991).

24. Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 501-503 (1987).

nomenon. From the standpoint of practical reason, corrective justice is conceptually prior to all other shapes of moral experience.

This priority becomes especially evident when corrective justice is compared to the Kantian conception of virtue. Virtue is a shape of experience that postulates obligatory purposes. Corrective justice, in contrast, has no obligatory purposes; rather, it works out the normative implications of purposiveness as such by permitting whatever actions that do not violate the rights of other purposive beings. Just as the normative relevance of particular purposes presupposes the normative relevance of purposiveness itself (and just as there can be no obligatory purposes unless there are permissible ones), so virtue comes later than corrective justice in the ordered sequence of practical reason. Consequently, from the standpoint of natural right, considerations of virtue play no justificatory role in corrective justice.

Similarly, corrective justice is prior to any version of distributive justice. Every distributive arrangement features some notion of good that the distribution is supposed to promote. Distributive justice, therefore, also presupposes purposiveness as such—and with it, distributive justice presupposes corrective justice. The priority of corrective over distributive justice precludes any distributive justification from playing a role within corrective justice.

One aspect, then, of the priority of the right over the good is that corrective justice is prior to all shapes of moral experience that, on their own terms, require judgments about the desirability of particular purposes. Every shape of moral experience, aside from corrective justice, requires such judgments. (Otherwise, the shape of experience would abstract from all particular purposes and simply be corrective justice.) In the sequence of operations of practical reason, the first component is practical reason as operative in corrective justice.

Another aspect of the priority of the right to the good pertains to distributive justice. Distributions aim at some good through the application of a distributive criterion. Within distributive justice, however, promotion of the good is itself subject to the requirements of right. This means that under natural right, distributive justice recognizes that those who might participate in a distribution must be treated with the respect due to

free and purposive beings. Thus, in distributive contexts, the priority of the right forms the basis for norms of constitutional and administrative law that constrain the operation of the distributing authority.[25]

The priority of the right indicates a normative space unaffected by considerations of the good. This space is the juridical domain, where courts have the moral jurisdiction to work out norms of right. Both corrective and distributive justice participate in the juridical domain. Under corrective justice, courts are authorized to articulate the ensemble of rights and correlative duties that govern the relationship of doer and sufferer. Under distributive justice, courts are authorized to articulate the norms of fairness, equality, and personhood that every distribution must observe.

VI. WHAT GOOD IS COHERENCE?

With these considerations in mind, we can now turn to the valuable observations of Professor Kress.[26] Troubled by the stringency of the formalist idea of coherence in justification, Professor Kress repeatedly asks: why is coherence desirable?

This is a curious question. By calling for the justification of justificatory coherence, it implies that something can be justified in an incoherent way. For unless an incoherent justification were in principle possible, Professor Kress's query would presuppose the very coherence that it calls into question. However, once one assumes with him that justification need not be coherent, the question would envisage the absurd possibility of justifying coherence on incoherent grounds.

An additional difficulty stems from Professor Kress's assumption that coherence must be justified on the score of "desirability." Formalism locates the normative grounding of juridical relationships in natural right, and natural right in turn postulates the priority of the right over the good. One can therefore not demand that the role of coherence in natural right be justified in terms of goodness or desirability. For, as we have seen, natural right opens up a normative space that is conceptually anterior to such terms. Professor Kress's question assumes that desirability is the ultimate criterion of justification. Natural

25. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 990-992 (1988).

26. *See* Ken Kress, *Coherence and Formalism*, 16 HARV. J.L. & PUB. POL'Y 639 (1993).

right, in contrast, argues that the operations of practical reason form an ordered sequence that make questions of desirability posterior to questions of right. If the natural-right tradition is correct, Professor Kress's demand that the justificatory coherence of legal relationships be justified by its desirability incorporates a category mistake.

Part of Professor Kress's disquiet concerning formalist coherence is that he suspects that its plausibility depends upon how the pluralist goals are described. Only when the tort goals of compensation and deterrence, for instance, are described as independent does tort law become normatively arbitrary. Pluralism would be more tractable, he suggests, if one thought of tort law as aiming at the best combination of compensation or deterrence or if the two goals were considered to be parts of a complementary mix (perhaps standing under some meta-principle).[27] When viewed from a more comprehensive perspective, the apparently independent and contradictory goals may turn out to be harmoniously combined after all.

A proponent of coherence certainly cannot object in principle to Professor Kress's suggestions. Much depends, however, on whether the supposed relation between the goals and the more comprehensive perspective can be spelled out. About this there is little reason for optimism. Can one seriously suppose that deterrence and compensation are harmoniously combined when the incidence and amount of the deterrence are set by the fortuity of the victim's injury and when the occurrence of compensation is haphazardly determined by the need to deter potential injurers? That would be a coincidence of Panglossian proportion.

Moreover, why should one work at squaring the circle as Professor Kress suggests? To understand the tort relationship the formalist points to corrective justice, which, because of its inherently bipolar nature, yields an account of the tort relationship that is both normatively coherent and true to tort law's character. It seems pointless to set this account aside in the hope of finding an inordinately contrived one that, in comparison, has the sole merit of according with the dogmas of current scholarship.

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27. *See id.* at 676-81.

VII. The Internal Perspective

This mention of tort law brings us to formalism's claim to have an internal perspective on law. In this connection I want to refer to another objection by Professor Perry, as well as to the remarks of Professor Jean Love.

The formalist perspective on law purports to be internal in several related senses. First, formalism merely draws out the presuppositions internal to law as a justificatory enterprise. Moreover, because coherence is a necessary property of justification, formalism highlights what coherence consists of: the inwardly harmonious relationship between parts of an integrated whole. Finally, on the assumption that legal concepts and institutions mark or reflect the law's striving for coherence, formalism attempts to make sense of legal concepts on their own terms by allowing them to have the meaning that they have in juristic thinking. In thus bringing together the coherence, the justificatory character, and the juridical meaning of legal concepts, legal formalism claims that it makes explicit what is implicit in juristic experience.

Professor Perry objects that in specific instances the perspective of a legal system's jurists may not coincide with the requirements of formalist coherence. Pointing to the formalist denial that the goals of compensation and deterrence justify tort law, he asks: "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?"[28]

In fact, the formalist readily admits that specific aspects of even a sophisticated legal system may diverge from formalist postulates. That possibility is the condition for whatever critical power formalism possesses. Because legal formalism is an evaluative theory, it does not regard the specifics of the law as data of nature that one must simply accept. Rather, it assumes that a sophisticated legal system strives to achieve the coherence required by a truly justificatory enterprise and that law can be criticised for falling short of that coherence. Coherence thus serves a criterial function. From the formalist perspective, jurists who refer to compensation and deterrence as tort goals are simply making a mistake.

28. *See* Perry, *supra* note 3, at 620; *cf.* Kress, *supra* note 26, at 668-70.

Of course, any evaluative theory of law includes criteria by which it adjudges certain ideas to be mistaken. In this, formalism does not differ from the crassest Benthamite utilitarianism. But formalism adds a crucial twist to its critical perspective: the claim that its critical perspective is not an extrinsic imposition, but is immanent to legal relationships.

Professor Perry's objection disputes this further claim. If formalism rejects certain elements in juristic discourse, how can it pretend to be internal to that discourse? If jurists themselves discuss tort law in terms of deterrence and compensation, how can one the formalist disavowal of deterrence and compensation manifest a standpoint internal to the experience of jurists?

What the objection ignores is formalism's focus on the legal relationship as an integrated totality. Formalism claims to be internal not to any given consideration in isolation, but to the relationship regarded as a coherent whole. The whole provides the internal standpoint for assessing its components.

Juristic experience is the experience of this whole. In a sophisticated legal system such as the common law, juristic experience regards legal pronouncements as the components of a coherent unity rather than as isolated dooms. The failure of any pronouncement to fit within that unity is a defect from the standpoint of juristic experience itself. Thus, the fact that lawyers and judges treat deterrence and compensation as tort goals leaves unaffected the internal nature of the criticism that such goals are incompatible with the doctrines, concepts, and institutions through which tort law forges a coherent link between the parties. These lawyers and judges are mistaken not from some external perspective, but because they have failed to live up to the standard immanent in their own activity.

Formalism's claim to make explicit what is implicit in juristic thinking challenges the assumption that law can be understood only through external ideals and alien disciplines. The formalist affirms what juristic activity presupposes, that a legal relationship has its own distinctive structure and morality. Thus, legal formalism corresponds to what we know when we think through the law itself, rather than when we think about law through the assumptions of our current theories.

The observations of Professor Jean Love reinforce these reflections about formalism's internal perspective. Disclaiming any philosophical expertise, Professor Love speaks solely as "a

reasonable law professor."[29] Although not convinced of every formalist argument, she finds formalism helpful in thinking more clearly about the tort law she knows so well. I would like to believe that this is not surprising: formalism's continuity with juristic thinking ought to make it especially appealing to "reasonable law professors." Because such scholars start with familiar legal practices, they can agree with the formalist in insisting that theory fit what they already know about law, rather than the other way around.

Centuries ago, a moral philosopher of unimpeachable credentials drew attention to the pertinence of the non-philosophical perspective:

> If one asks, however, what pure morality really is . . . , I must confess that only philosophers can put the decision on this question in doubt. For by common sense it is long since decided, not by abstract general formulas but rather by habitual use, like the difference between the right and the left hand.[30]

In taking its bearings from what jurists implicitly know, formalism reminds us of the difference—often ignored in contemporary theory—between the right and the left hand. Perhaps that is why the sepulchre to which formalism is routinely consigned always remains empty.

29. Jean C. Love, *Legal Formalism from the Perspective of a Reasonable Law Professor*, 16 HARV. J.L. & PUB. POL'Y 627 (1993).

30. IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 159 (Lewis W. Beck trans., 1956).