The Importance of Not Being Ernest

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Formalists have long tried to develop a legal theory, based on the internal rationality of law, which would free it from the influences of instrumentality and ideology. Focussing on the philosophical proposals of Ernest Weinrib, the author argues that this goal is both illusory and undesirable. Weinrib's theory assumes rather than proves the existence of this rationality, which is simply deflned as an interrelationship between form and content. In order to maintain the coherence of this fragile relationship, Weinrib is either forced to articulate his theory on such a level of abstration so as to be irrelevant or to reintroduce the values he has tried to exclude. As a result, his theory is ultimately reliant on an ideology which, disguised in the formal equality of corrective justice, defends a notion of abstract rationality at the expense of political and social responsibility. Moreover, that hidden ideology is of a markedly conservative tilt.

L'école formaliste tente de développer une théorie fondée sur la rationalité interne du droit, ce qui éviterait les influences instrumentales et idéologiques. Prenant pour exemple le discours philosophique de Ernest Weinrib, l'auteur soutient qu'une telle tentative est illusoire et n'est pas souhaitable. Cette théorie, loin de prouver l'existence d'une telle rationalité, la présume et la définit par le lien entre la forme et le contenu. Tentant de maintenir la cohérence de ce lien fragile, Weinrib doit ou bien formuler sa théorie à un niveau d'abstraction tel qu'elle perd toute pertinence ou bien réintroduire les valeurs mêmes qu'il tente d'exclure. Il en résulte une théorie basée ultimement sur une idéologie qui, sous l'apparence de l'égalité formelle de la justice corrective, défend, en fait, une notion de rationalité abstraite au dépens de la responsabilité politique et sociale. De plus, cette idéologie sous-jacente a un clair penchant conservateur.

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Synopsis

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Introduction

More than most continents, North America is a land of dreams. It exists as much in the ideological geography of the imagination as in any political gazetteer. One particular dream that has withstood the reality of waking history is about 'a government of laws, not men'. Although this constitutional vision is predominantly American, it has retained a firm grip on the Canadian popular and legal imagination; it has been a major source of governmental authority and legitimacy. There is a long-standing belief in the United States and in Canada, especially in these post-Charter years, that Law is more than the sum total of extant laws: it is felt to be the expression and repository of a political wisdom that transcends the bounds of its temporary articulation.[1] Democratic law-making cannot be left entirely to its own promptings, but must be judged by its willingness to conform to the

[1]See A. Hutchinson & P. Monahan, "Democracy and The Rule of Law" in *The Rule of Law: Ideal or Ideology*, A. Hutchinson & P. Monahan, eds (Toronto: Carswell, 1987) at 97. Even the most pragmatic of constitutional commentators affirm "repeated acts of faith" that law "has both boundaries and moral significance not wholly reducible to, although never independent of, the ends for which it is deployed". L. Tribe, *Constitutional Choices* (Cambridge, Mass.: Harvard University Press, 1985) at 4.

dictates of a higher law. Whereas Reason and Natural Right used to hold considerable sway, recent sightings of these transcendent authorities are of a more specific and prosaic nature. Recognising that, whatever else it might be, law is a human activity, contemporary legal theorists strive to explain and justify the delicate (and elusive) relation between law's immanence — the idea of law as the rational embodiment of an indwelling necessity — and law's instrumentality — the practice of using law as a democratic tool for social engineering.

Although this challenge is most pressing in constitutional matters, its demands colour all facets of the legal enterprise. At the heart of the matter is the vexing question of normative authority in a world in which people not only have the full prerogative to make new laws, but also the power to remake the very concept of law.[2] Despite the institutional commitment to democracy and the regular incantation that "the life of the law has not been logic, but experience", lawyers are still deep in philosophical sleep. Detached reason remains the touchstone for valid knowledge about ourselves, our predicament and the legal order. In the struggle for social justice, abstract reflection is given priority over democratic engagement.[3] Thus, it is recommended that lawyers become philosophers if law is to perfect itself and operate as a guide for the anguished democrat. Although law is political, it is distinguishable from the more open-ended ideological debates that are the stuff of political struggle. There remains a profound commitment to the idea that we can still "know the dancer from the dance".[4]

This dream, in which the dreamers "see themselves as a nation standing under transcendent judgement ... as a beacon to the world, an American Israel",[5] has neither convinced nor persuaded all lawyers or theorists. They see it more as a nightmare from which people must be awakened. The problem is that the more law is seen as an instrumentality, the less it is able to retain its claims to immanence: the more relevant it becomes, the less

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[2]See D. Boorstin, 'The Perils of Indwelling Law" in R.P. Wolf. ed., *The Rule of Law* (1971) at 78-79.

[3]See M. Walzer, "Philosophy and Democracy" (1981) 9 Pol. Th. 379. Although this ideal seems to speak in the mystical tones of bygone days, it remains the chosen voice of modern jurisprudence. In the Dworkinian Empire of Law, for instance, the princely judges must leave it to philosophical "seers and prophets ... to work out law's ambitions for itself, the purer form of law within and beyond the law we have." While such imaging may elude lawyers, they are not left to their own devices for their "god is the adjudicative principle of integrity...". R. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 407 and 400.

[4]W.B. Yeats, "Among School Children" in *The Poems: A New Edition*, K.J. Finneran, ed. (New York: Macmillan Publishing, 1983) 215. See, *e.g.*, R. Dworkin, *supra*, note 3 and O. M. Fiss, "Objectivity and Interpretation" (1982) 34 Stan. L. Rev 739.

[5]M.J. Perry, *The Constitution, the Courts and Human Rights* (New Haven, Conn.: Yale University Press, 1982) at 98.

transcendental it appears. This leads to a crisis of normative authority: is law nothing more than what lawyers say it is? Is law only as good as the lawyers who interpret it? Has immanence been eclipsed by instrumentality? The charge is that philosophical revelation is a poorly disguised style of political advocacy and that the law's immanence is the reflection of lawyers' instrumentalities. The supposed sovereignty of Reason is suspected to be a "dictatorship of the self-righteous"[6] that cannot claim and is not deserving of authority over democratic deliberation. In short, law is politics.[7]

The contemporary response to this dilemma of legitimacy has taken two general forms. One has conceded the force of much of this critique and accepted that the legitimacy of adjudication is largely tenuous. Nonetheless, feeling obliged to make the best of a bad job, the holders of this view look to the courts as the venue for a civic and situated dialogue that is conducted in accordance with a self-correcting and practical canon of reasoning; law is an integral part of politics.[8] The other form of response has been, so to speak, to pull the legal bedclothes higher and try to go back into a deeper philosophical sleep. The loss of faith in law's immanence is not considered an occasion for a failure of idealistic nerve. Rather than give up the dream of Reason, some have counselled a redoubling of abstract efforts.

One who has answered this call to theoretical arms is Ernest Weinrib. His mission is not only to revive the rationalists' dream, but to establish its relevance and benefits for the waking world. Assuming the mantle of the true philosopher, he brooks no dalliance with instrumental understandings; he makes an eloquent pledge of his unwavering affections and considerable energies to the revelation of law's neglected immanence. Finding his inspiration in the Aristotelian and Kantian traditions, he offers a thoroughly non-instrumental theory of law. Indeed, he suggests that, because rights discourse

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[6]A.M. Bickel, *The Morality of Consent* (New Haven, Conn.: Yale University Press, 1975) at 142.

[7]By 'politics', I do not simply mean conflicts over the exercise and control of government power; this is only a sub-species of a larger genus. I use the term to refer to the conflict over all the terms and conditions — social, economic, institutional, passionate and whatever — of our collective and individual lives. See R.M. Unger, *Social Theory: Its Situation and Its Task* (Cambridge: Cambridge University Press, 1987) at 10. Also, by 'law', I do not mean all phenomena that can be considered legal; my focus is more restricted. While I encompass law as an analytical category and practical activity, my enquiry is about the work of courts and lawyers, whether they are dealing with the common law, statutes or constitutional norms. This essay makes no claims about the work of legislatures or constitutional conferences. Accordingly, my concern is with the relation between the larger world of politics and the smaller sphere of doctrinal development.

[8]See, *e.g.*, F.I. Michelman, "Foreword: Traces of Self-Government" (1986) 100 Harv. L. Rev. 4.

is the modern mêtier of law, "we are all Kant's children".[9] Rather than turn our backs on this heritage, Weinrib urges us to effect a dutiful exercise in jurisprudential rehabilitation. While there is much truth to this assertion of philosophical paternity, there is little reason to visit the sins of the father on his children. After 200 years, the attempt to revive the dubious virtues of purism, scholasticism and logicism in the jurisprudential enterprise is unwarranted. My ambition is to nip this Kantian revival in the bud. For all its philosophical rigour, Weinrib's theory of legal formalism makes no better progress in resolving the law/politics conundrum than those contemporary theorists who eschew such traditions. After outlining Weinrib's central ideas, I will substantiate a set of criticisms that display the fatal philosophical weaknesses and suspect political affiliations of his theory. As a way of giving concrete expression to those criticisms, I will concentrate on developments in tort law. Throughout, I suggest the different shape and direction that the jurisprudential project might take if it were to be fired by the democratic imagination rather than instructed by the philosophical mind.

I. The Weinrihian Gamhit

Weinrib sees the opportunity for his own success in the modern failure of the formalists' project. Grasping the moment, he presents the full-blown culmination of his own developing theory of law and adjudication.[10] He happily concedes that critics, like Unger,[11] have got it right about the inability of Dworkin, Fiss and others to deliver on the formalists' promise. But this, for Weinrib, is only because they are not the true carriers of the formalists' torch; the problem is not with the project, but with its execution. For Weinrib, the defeat of these modern usurpers clears the intellectual roster and allows him to reclaim the formalists' project as his own. The fact that

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[9]"Law as a Kantian Idea of Reason" (1987) 87 Columbia L. Rev. 472 at 472 [hereinafter "Reason"].

[10]See, *e.g.*, the following articles by Weinrib: "A Step Forward in Factual Causation" (1975) 38 Mod. L. Rev. 518 [hereinafter "Causation"]; "The Case For A Duty To Rescue" (1980-81) 90 Yale L.J. 247 [hereinafter "Rescue"]; "The Intelligibility of The Rule of Law" in *The Rule of Law: Ideal or Ideology*, A. Hutchinson & P. Monahan, eds (Toronto: Carswell, 1987) 59; "Toward A Moral Theory of Negligence Law" in *Law and Philosophy: An International Journal for Jurisprudence and Legal Philosophy*, vol. 2 (Dordrecht, Holland: D. Reidel Publishing Company, 1983) 37 [hereinafter "Negligence"]; "The Insurance Justification and Private Law" (1985) 14 J. Leg. Stud. 681 [hereinafter "Insurance"]; "Enduring Passion" (1985) 94 Yale L.J. 1825 [hereinafter "Passion"]; "Reason", *supra*, note 9; "Causation and Wrongdoing" (1987) 63 Chi.-Kent L. Rev. 407 [hereinafter "Wrongdoing"]; and "Legal Formalism" (1988) 97 Yale L.J. 949 [hereinafter "Formalism"].

[11]See R.M. Unger, *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press, 1986).

his work might appear "out-moded or fantastic"[12] and "a world apart from the assumptions of contemporary scholarship"[13] is not considered by Weinrib to be its weakness, but its very source of analytical power and philosophical strength. By moving away from the modernist mishmash of contemporary theorising, Weinrib aims to restore jurisprudence to its rightful place in the durable traditions of classical philosophy and to revive the flagging fortunes of legal formalism.[14]

For all the difference in style, source, temperament and method from contemporary writers, Weinrib remains engaged in the same apologetic undertaking of showing that contemporary law is the "deserving object of our allegiance".[15] Like Moses and Marx, he is a discoverer who declares the good and urges its controlling power on the world. Yet, like those prophetic dreamers and their modern legal imitators, Weinrib must negate his project if he is to have any hope of completing it. He has to reach outside the law to make good on his claim that law possesses a unifying vision of authoritative morality. Furthermore, Weinrib's theory is impaled on the same dilemmatic horns as those of his more voguish chums. He is unable to solve the inescapable riddle of formulating a workable combination of analytical generality and contingent specificity: he runs the risk of over-inclusion or under-inclusion. A theory that merely describes the extant details of legal practice will not be able to predict the direction and nature of change; it will cease to be useful at the very time its assistance is most required for the identification and resolution of hard cases. On the other hand, a theory that attempts to move beyond such detailed description either will not be able to account for a sufficient range of present legal data, or will be compatible with combinations of legal materials that are different than those which comprise existing legal doctrine.

Reversing Holmes' famous dictum, Weinrib contends that the life of the law is the logic of its own experience. Immersed in and confined by the raw legal materials of social history, the legal theorist must work to reveal the formal coherence that unifies them into a meaningful order of moral worth; legal formalism is the normative truth of that legal history. The law is nothing more (or less) than an immanent moral rationality: it is less than a positive instrument at the ideological disposal of its temporary guardians

[12]"Insurance", *supra*, note 10 at 685.

[13]"Reason", *supra*, note 9 at 507.

[14]Formalism is the attempt to define and defend a method of legal justification, distinct from open ideological debate, that represents a workable scheme of social justice. See Unger, *supra*, note 11 at 5-42 and A. Hutchinson, *Dwelling on the Threshold: Critical Essays in Modern Legal Thought* (Toronto: Carswell, 1988) at 23-55.

[15]"Formalism", *supra*, note 10 at 952.

and more than an empty vessel waiting to be filled. With such a philosophical schema, it is nonsensical to talk of purposes and ideals outside the law for "law has a content that is not imported from without but elaborated from within."[16] Law reaches its fullest perfection when its form and substance are conjoined in harmonious unity. This "supreme achievement of mind"[17] is the raison d'être of legal theory which must forever strive to bring formal order to the unruly content of positive law. The route to justice is through reflective self-consciousness and not immersion in empirical detail. As such, the Weinribian mode of internal theorising is the embodiment of the natural law tradition which involves "the application of conscious human reasoning, critical intelligence, to the creation, interpretation and inner ordering of a legal system so as to provide a just result."[18]

For Weinrib, therefore, the forms of justice are embedded in and make possible the content of law. Unlike its Platonic counterpart, the Weinribian form is not discoverable *a priori*. It is beholden to the historical context of its legal content; form is content made pure and content is form made contingent. Accordingly, legal theory must endeavour to let the light of law's immanent normativity shine through its substantiating content:

> The task for the legal formalist is to make explicit the intelligibility that is latent in the legal materials and thereby to indicate that from which legal error is a deviation. Because form represents the interplay of character, unity and genericity, the formalist will attempt to discern the essential characteristics of a legal relationship and to disclose how these characteristics cohere to make this relationship an irreducibly single one that can be classified with other relationships of the same sort. The function of form is thus to draw out the law's immanent intelligibility by making salient the nature of unity and coherence both within and among legal relationships.[19]

For Weinrib, the form of justice that inheres within the law and illuminates its moral coherence is the Aristotelian notion of corrective justice. For example, the essential and interdependent qualities of a juridical relation in tort law are its immediacy, formal equality, causative connection and harm-loss symmetry. This is very different from distributive justice which judges a legal relation by reference to a standard outside itself and, therefore, is only appropriate for political guidance in legislative law-making; distributive justice of any kind is inimical to adjudicative ideals.[20] For Weinrib, the contemporary law of negligence, with its mutually sustaining components of causation, duty, reasonable care and remoteness, embodies corrective justice. For instance, it is not the Learned Hand cost-benefit test that

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[16]*Ibid.* at 956.
[17]*Ibid.* at 1016.
[18]D. Sawer, "The Western Conception of Law" (1975) 2 Int. Enc. Comp. L. 33.
[19]"Formalism", *supra*, note 10 at 963.
[20]*Ibid.* at 978-81.

is erroneous, but the scholarly attempt to understand it in an instrumental manner.[21] Provided it is elaborated within an internal rendering of the law and in accordance with its justificatory dynamic, negligence is the contingent expression of the pure form of justice. This, for Weinrib, necessarily follows because "the only function of the law of torts is to be the law of torts":[22] it neither demands nor can expect further justification.

Weinrib's attempt to apply Kantian philosophy to jurisprudence is not new. Many different theories have drawn their inspiration from the eccentric sage of Koenigsberg. Weinrib is, of course, aware of this and pays nodding respect to those efforts.[23] While this lack of originality is not fatal to its

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[21] *United States* v. *Carroll Towing*, 159 F. 2d 169 (2d Cir. 1947). See "Negligence", *supra*, note 10 at 52-53 and "Wrongdoing", *supra*, note 10 at 428.

[22] "Insurance", *supra*, note 10 at 686.

[23] "Formalism", *supra*, note 10 at 958 n.30. At the turn of the century, there was a spirited neo-Kantian revival. Although it took many different forms, its shared focus was how law could be understood as a separate sphere of knowledge through the application of a universally valid critique. See G. Del Vecchio, *The Formal Bases of Law*, trans. J. Lisle (Boston: Boston Book, 1914) at 81-82: "The concept of law must have reference only to its form ... to the logical type ... inherent in every case of juridical experience .... The logical form of law is more comprehensive than the sum of juridical propositions."A leading figure in this neo-Kantian jurisprudence was Rudolph Stammler (1856-1938), whose work bears a strong resemblance to that of Weinrib. He recognised that Kant himself had held to his idea of critical reason with insufficient rigour when it came to law and had fallen into the old naturalist trap of attempting to formulate a body of legal rules that would be valid for all time. Stammler sought to establish a legal epistemology truly consistent with Kant's larger critical ambitions. The mark of critical philosophy is the striving to bring an order of coherent unity to what would otherwise be the chaos of human life. Accordingly, the possibility and suceess of legal theory depends on its capacity to determine what is permanently valid in the constantly changing phenomena of law. To do this, Stammler developed a juristic methodology of pure forms which fixed the abiding and irreducible constituents of law in the flux of its transitory manifestations. Although form and content are inseparable and constitutive of each other, form has theoretic primacy as the regulative and ordering mode of content. Nevertheless, to avoid Kant's error, Stammler took on board the positivists' insight that law's content is irresistibly contingent. He insisted that legal knowledge must never part company with legal history and, therefore, he resisted the temptation to turn legal science into political dogma; "there is not a single rule whose positive content can be fixed *a priori*." See R. Stammler, *The Theory of Justice*, trans. I. Husik (New York: Macmillan, 1925) at 90. While there is one immutable form of legal justice, there is a multiplicity of just laws. The quality of universality is attached to the method and not to the results of its contingent application. As such, it is the task of the legal theorist to elucidate from within the formal method that bestows the content of law with objective justice. Stammler published a wide range of theoretical and practical work. His writings translated into English were *The Theory of Justice*; "Fundamental Tendencies in Modern Jurisprudence" (1923) 21 Mich. L. Rev. 623, 765 and 862 [hereinafter "Fundamental Tendencies"] and "Legislation and Judicial Decision" (1924-25) 23 Mich. L. Rev. 362. For critical evaluations of Stammler's work, see R. Pound, *Jurisprudence* (St. Paul, Minn.: West, 1959) vol. 1 at 142-56; M. Ginsberg, "Stammler's Philosophy of Law" in W. Jennings ed., *Modern Theories of Law* (London: Oxford University Press, 1933) 38; L. Recaséns Siches, C. Cossio, J.L. de Azevedo & E.G. Maynez, *Latin-American Legal Philosophy*, trans. G. Ireland, M. Konvitz, M.A. de

ambitions, Weinrib's work suffers from most of the failings — question-begging, tautological reasoning, sterile abstraction and political indifference — that defeated earlier neo-Kantian theories; the trash can of natural law writings is full of such failed attempts. Further, he makes some errors that those neo-Kantians had avoided in their reworking of the original Kantian insights. And, for good measure, he manages to throw in a few of his own more modern and idiosyncratic failings. Sadly, Weinrib's writings show that those who ignore the past are destined to repeat it. By returning to Kant in his efforts to resolve the problems of contemporary jurisprudence, Weinrib takes three steps back and one step forward.

II. The Notion of Law

The first difficulty is that of question-begging. Weinrib assumes the existence of that which he seeks to prove. He uses a methodological apparatus which takes for granted the existence and identity of "law". It is the essence of his critical method to take a substantive idea for granted and analyse it in its formal quality: the critical method takes "the principal doctrinal and institutional components of ... law more or less as given and then work[s] back from them to the structure that they embody."[24] It presupposes the subject matter that is to be investigated and gains its epistemological purchase from that fact. Obviously, however, it is impossible to define that subject matter without already knowing what it is; identification must precede analysis. Weinrib posits that which he intends to demonstrate. What are the legal data to be studied? Do they include policies as well as principles? Are political considerations part of the law? Are the purposes of the law-makers relevant to the law's meaning? The answers to these questions are where the inquiry is supposed to lead: any study that begins there is destined to end at the same place. This observation cuts to the heart of Weinrib's idealist project and demonstrates that Weinrib's "critical analysis ... is a pseudo-method which discovers nothing, but baptises as *a priori* whatever [he] is sufficiently convinced of in advance".[25]

By way of illustration, Weinrib explains how it is possible to isolate the formal elements of a table and how this ensemble of unified properties —

Capriles & J.R. Hayzuz (Cambridge, Mass.: Harvard U. Press, 1948) at 281-90; W. Friedmann, *Legal Theory*, 5th ed. (London: Stevens & Sons, 1967) at 177-86; E. Bodenheimer, *Jurisprudence: The Philosophy and Method of Law* (Cambridge, Mass.: Harvard University Press, 1974) at 135-38 and the studies by F. Geny, I. Husik and J. Wu in Stammler's *The Theory of Justice.*

[24]"Wrongdoing", *supra*, note 10 at 444. See Stammler, "Fundamental Tendencies", *supra*, note 23 at 890-903 and Weinrib, "Formalism", *supra*, note 10 at 957-66.

[25]G.H. Sabine, "Rudolph Stammler's Critical Philosophy of Law" (1932-33) 18 Cornell L.Q. 321 at 341.

"elevation, flatness, hardness, typical function, and so on"[26] — interpenetrate with its content to make a table the determinate thing that it is. There are at least three comments which can be made about this illustration. First, Weinrib must be familiar with brute tableness before he can begin to discover its formal characteristics. In order to resist this charge, he must do one of two things. He can assume that tables as recognisable objects — that is, as distinct arrangements of wood or other material — really do exist independently of our comprehending them and our linguistic means of comprehending them. This assumption runs foul of two objections. It undercuts the idealistic foundations of Weinrib's whole epistemology and commits him to an understanding of the relation between language and reality that is thoroughly discredited.[27] Alternatively, he can retreat to the idea that tables are nothing more than the *a priori* projections of human thought and contradict his central account of the synthetic relation between form and content. Secondly, Weinrib recognises that the table's form also comprises its 'typical function': this seems to jeopardise quite seriously any claim to be making an exclusively formal, internal and non-instrumental mode of analysis.

Thirdly, Weinrib is on dangerous ground in suggesting that law is like a table. Even a dyed-in-the-wool Kantian would be hard pressed to claim that there is an inherent normativity to tables. It is surely the case that an operating table and a torture table are both tables, but not of equal normative worth; the better table is more a function of its extrinsic purpose than its internal form. Weinrib seems to recognise the force of this very point when he states, on a different occasion, that "without the concept of right, law would be a merely empirical phenomenon: like a wooden head, beautiful, but brainless, it would lack inner intelligibility."[28] This simply underlines the fact that he begs the very question his enquiry is intended to answer — is law an empirical phenomenon or is it an intellectual activity? Does law have a mind of its own or is it an instrumental artifact of human creation? Of course, the response to this criticism is to concede that law is not like

[26]"Formalism", *supra*, note 10 at 958-59.

[27]It is not necessary to adopt a radical view of language to reject the simple idea of law as a labelling tool. See, *e.g.*, the works of L. Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (Oxford: Blackwell, 1953) and B.L. Whorf *Language, Thought and Reality: Selected Writings of Benjamin Lee Whorf*, J.B. Carroll, ed. (Cambridge: M.I.T. Press, 1956). In law, see H.L.A Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); J.B. White, *When Words Lose Their Meaning* (Chicago: U. of Chicago Press, 1984) and C. Stone., "From a Language Perspective" (1981) 90 Yale L.J. 1149. For a more radical understanding, see G. Peller, "The Metaphysics of American Law" (1985) 73 Calif. L. Rev. 1151 and A.C. Hutchinson, *supra*, note 14. I am not suggesting that 'tables' do not exist in some strong Cartesian sense, but only that we cannot identify them as meaningful and distinct objects except within a particular language context.

[28]"Reason", *supra*, note 9 at 472.

a table. While this rather invalidates the explanatory force of the illustration, it is a sensible move and one that Weinrib indirectly does make. He falls back to the extreme idealist position that law is "an exhibition of intelligence", in the sense that, as law is a mode of thinking, "there is in law an integration of the activity of understanding with the matter to be understood."[29] In short, the relation has a reflexive quality. But Weinrib's attempts at confession and avoidance compound the difficulty of his situation. With any purposive product of human agency, it is always pertinent to inquire what it is willed or made for.[30] Whether it is an act of construction (table) or an exercise in intelligence (law), "what it is" is related to "why it is". This means that law, unlike a table, is not simply something that we know, but also (and only?) something that we do.[31] And law, like a table, is something that we use as well as something that we think about. As a purposive activity, law cannot be understood in and of itself. In short, form, substance and function are twisted into a thread of historical narrative that can never be fully disentangled. History can only be retold by someone and for some purpose; its components never can be exhibited in their pristine untoldness as Weinrib desires. There is nothing beyond history and narrative but more history and narrative. It is not that everything is without meaning, but that everything has meaning *for us* as a collective and contextualised entity.

III. Legal Intelligence

The second general difficulty with Weinrib's theory of legal formalism is that it all too readily collapses into empty tautologies. If the interpenetration of form and content is taken at face value, there is no possibility that there can be a maladjustment between law's content and its internal structure. Form will always be the intelligible order of its content and content will always be the contingent embodiment of its form; "juridical intelligibility emerges from a mutually reinforcing movement between form and content ... ."[32] In the Weinribian scheme of things, law is and could never be other than it is. However, this conclusion is profoundly empty and uninteresting: the Weinribian jurist would have nothing to say about those questions that interest us most. His conclusions would have as much cogent force as the discovery by Molière's physician that opium puts people to sleep because it contains a sedative principle. Even if it were possible to treat law as an intelligible activity that is truly knowable only in terms of itself, that knowledge would say nothing about law's moral worth. When asked any

[29]"Formalism", *supra*, note 10 at 962.

[30]See T. Morawetz, *The Philosophy of Law: An Introduction* (New York: Macmillan, 1980) at 12-16.

[31]See A.A. Leff, "Law And" (1978) 87 Yale L.J. 989 at 1011.

[32]"Formalism", *supra*, note 10 at 974.

"why" about the law, Weinrib will only be able to respond, like my children, with a lame "because ...". That explanation is understandable, if inadequate, when it comes from children, but not when it comes from a legal theorist. Moreover, if form is taken extremely seriously, its essential abstractness leaves its historical content and therefore its ethical value to the forces of instrumental lawmaking. Always beholden to its experiential matter, the moral fibre of form can never deviate from the normative substance of its contingent content. Accordingly, for a perfectly critical Weinrib, the law's moral worth would consist of nothing more than being the most coherent and consistent exemplar of whatever it happens to be at any particular time: "[t]he formalist's concern is not with whether a given exercise of state power is desirable ... but with whether it is intelligible as part of a coherent structure of justification."[33] But such a formalism can tell us nothing about whether what it is has any independent claim to our moral allegiance; moral worth is trivialised and drained of all sensible meaning. Within such a theory, successful or conscientious torturers are entitled to as much moral approbation as successful or conscientious surgeons. Like Fuller's attempts to articulate an "inner morality of law", the best that a rigorous Weinribian formalist could offer is a morality of efficiency, which is no morality at all.[34]

Consider the example of "running". While running is something that we do rather than think, it is also something that we can know: law is something that we think and can know, but it is also something that we do.[35] There are many kinds of running — sprinting, jogging, trotting, loping, etc.. Definition involves both a question of degree and of relative purpose. It can be difficult to distinguish one person's fast walk from another's slow jog. While there seems to be a unifying notion of quickened motion, there is always the activity of 'running on the spot' to comprehend and integrate. From these many different kinds of running, what would it mean to identify the pure form of running? What would *the* form of running comprise in contrast to *a* kind of running? What would be gained by such an intellectual inquiry? Surely any attempt to know running as a practice internal to itself is futile.

If intelligibility is concerned with notions of coherence, character, unity and genericity,[36] the best that internal understanding and criticism can do is to adjudge practices to be "confused or mistaken to the extent that they

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[33]*Ibid.* at 975.

[34]See L.L. Fuller, *The Morality of Law*, rev'd ed. (New Haven: Yale University Press, 1969). For criticisms along these lines, see H.L.A. Hart, Book Review (1964-65) 78 Harv. L. Rev. 1281; G. Hughes, "Positivists and Natural Lawyers" (1964-65) 17 Stan. L. Rev. 547; and N. Lyons, "The Internal Morality of Law" (1971-72) Procs. Arist. Soc. 105.

[35]See "Law And", *supra*, note 31 at 1011.

[36]"Formalism", *supra*, note 10 at 960. See also discussion at 957ff.

are inadequate expressions of the underlying form."[37] Even if it were possible to abstract to such a formal description of running, it would be silly to criticise a particular performance of running as being "confused" or "mistaken". To have any critical bite, any meaningful account of running must refer to some purpose or context external to the act of running. At the very least, it might be appropriate to know whether the runner is engaged in a sprint or a marathon in order to be able to understand, criticise or improve on a given instance of running. In law, as in running, a purely internal inquiry trivializes not only the object of study, but also the scholarly enterprise that claims to be its very apotheosis.

IV. The Hidden Agenda

Weinrib, of course, is not content to offer a legal theory that can be dismissed as an empty tautology and a hollow morality. He is adamant that his "version of formalism ... has implications for the law's content ... [and] is therefore distinguishable from the thinner formalism of positivism, which contrasts the formal principle of legal validity with the material content of law and thus makes the notion of law as such indifferent to the law's content." [38] However, in striving to defend himself against these charges, he commits a more debilitating series of philosophical mistakes. What he cannot allow to enter in plain view through the front door of his formalist edifice, he sneaks in through the back door under cover of theoretical darkness. Weinrib acknowledges that the law's content will not always be the perfected manifestation of its indwelling form: there will always likely be a gap between them. But, mindful of law's inner normativity, that gap will be ascribable to "either error or ignorance."[39] When this is combined with the fact that law's form is also a form of justice and that Weinrib's legal formalism is meant to have normative as well as positive force, the magnitude of Weinrib's claim and its indefensibility become apparent. In order to achieve political relevance, he abandons philosophical rigour and reveals his own political agenda and leanings.

In preferring relevance to tautology, Weinrib puts his theoretical neck on the block of Hume's guillotine.[40] He attempts to derive a valuative conclusion from a factual premise. Even if there were "pure forms" of legal thought, they would contain only so much information about what is the

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[37]*Ibid.* at 975.

[38]*Ibid.* at 954 n. 14.

[39]*Ibid.* at 959.

[40]See D. Hume, *A Treatise of Human Nature*, L.A. Selby-Bigge, ed. (Oxford: Clarendon Press, 1906) at 470 and M. Black, "The Gap Between 'Is' and 'Should'" (1964) 73 Phil. Rev. 165. For a thorough survey of this failing in legal theory, see S.P. Sinha, "The Fission and Fusion of Is/Ought in Legal Philosophy" (1975-76) 21 Villanova L. Rev 839.

case and nothing about what ought to be the case. The chasm dividing the realms of "is" and "ought" is not logically traversable without a giant leap of faith. Moreover, this injunction lies at the heart of the Kantian scheme of things. Although one can sympathise with the temptation to attempt such a crossing, one cannot sanction the tendency to turn epistemology into politics or, more accurately, to disguise uncouth ideology in the respectable trappings of epistemological theory. As always, the illegitimate move is not the reliance on ideology, but the unwillingness to acknowledge it. There is no philosophical method, no matter how hard or long any theorist searches for it, that will relieve people of the burden of choosing and taking responsibility for their own value judgments.

Another difficulty with the attempt to go beyond tautology by making legal form into a moral idea is that sooner or later the theory will run up against the hard facts of legal change. To put it bluntly, history has a bad habit of confounding even the most sophisticated of philosophical theories. While it might not be necessary for all law's content to express perfectly its immanent form all of the time, there must be a point at which the discrepancy between form and content will become so large that the form must begin to change, if it is not to lose contact with its content. In Weinrib's terms, this means that, at a certain point, "error" will become insight and "ignorance" will become knowledge.[41] But this places him in a very real quandary. To resist this assessment, he must revise completely his critical method or be prepared to defend the idea of "legal form" as being completely *a priori* in epistemological status and derivation. Alternatively, he can keep faith with his critical methodology and let legal form go in whatever direction its historical content takes it.

The depth of his quandary and the unattractiveness of the alternatives are illustrated by reference to "evil" regimes of law, such as early American slave law and Nazi German law. If Weinrib wants to condemn those legal systems as thoroughly immoral, as he most certainly would, the only way that he can do so and remain true to his critical methodology is by denying their "legal" description.[42] Yet this would commit him to the absurd view that only a regime that is just can be called legal. Moreover, it would completely negate his claim that formalism takes law's content as given and merely elucidates its moral intelligibility from within.

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[41]"Formalism", *supra*, note 10 at 959.

[42]See Stammler, "Fundamental Tendencies", *supra*, note 23 at 879-903. This criticism draws on the celebrated debate between Hart and Fuller over the disposition of the "grudge-informer" cases. See H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1957-58) 71 Harv. L. Rev. 593 and L. Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart" (1957-58) 71 Harv. L. Rev. 630. For an interesting sidelight on this exchange, see H.O. Pappe, "The Validity of Judicial Decisions in the Nazi Era" (1963) 23 Mod. L. Rev. 260.

A similar point is true, although less starkly so, of Weinrib's discussion of contemporary tort law. In the twentieth century, the doctrinal regime for unintentional injuries has been thoroughly transformed. On the road from *MacPherson*[43] to *Sindell*[44] and beyond, tort law has become the "battle-ground of social theory."[45] Even if tort law once approximated the standards of corrective justice, it is now thoroughly dominated by talk of distributive policies and instrumental concerns. As in other areas of the law, there has been a marked shift in emphasis from the attribution of blame to the apportionment of risk; the ascription of liability is more based on a broadly utilitarian accounting of social welfare than on a moral definition of individual responsibility.[46] Although Weinrib is not blind to these developments, he seems unperturbed by them. For instance, he asserts that, as its product law has refused to follow the American shift to strict liability, Anglo-Canadian law retains "a more pristine conception of private law" that better embodies the pure form of tort law, namely corrective justice.[47] This is controversial on a number of grounds. Only certain parts of Anglo-Canadian tort law rely on negligence liability and, even then, its heightened demands often amount to those of strict liability.[48] Also, large areas of Anglo-Canadian law are founded on strict liability, such as vicarious liability and the rule in *Rylands* v. *Fletcher*, and these pre-date the introduction of negligence as the dominant standard of tort law. It is presumably not Weinrib's claim that his "universally valid" theory of formalism is only applicable to contemporary Anglo-Canadian law and not to American nor old Anglo-Canadian law. While American law may be in "error" or "ignorance", it is more than a little embarrassing for Weinrib that vast tracts of it do not amount to "tort

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[43]*MacPherson* v. *Buick Motor Co.*, 111 N.E. 1050 (Ct. App. 1916).

[44]*Sindell* v. *Abbott Labs.*, 163 Cal. Rptr. 132 (Sup. Ct. 1980).

[45]W.P. Keeton, ed., *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul, Minn.: West Publishing, 1984). For an account of this history, see G.L. Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law" (1985) 14 J. Leg. Stud. 461.

[46]For an interesting acknowledgement of this trend by an avowedly enthusiastic supporter of natural law and Aristotelian justice, see J. Finnis, *Natural Law and Natural Rights*, H.L.A. Hart, ed. (Oxford: Clarendon Press, 1980) at 178-79. See also D. Lloyd & M. Freeman, *Lloyd's Introduction to Jurisprudence*, 5th ed. (Toronto: Carswell, 1985) at 140.

[47]See "Insurance", *supra*, note 10 at 684-85.

[48]In Canada, the view is that the shift from negligence to strict liability would be "a comparatively minor modification of the existing system", Ontario Law Reform Commission, *Products Liability* (1979) at 65, and "a less radical step than . . . *Donaghue* v. *Stevenson* itself", S. M. Waddams, *Products Liability*, 2nd cd. (Toronto: Carswell, 1982) at 260. For example, in *Buchan* v. *Ortho Pharmaceutical (Canada) Ltd* (1984), 8 D.L.R. (4th) 373, 46 O.R. (2d) 113, a case involving the paralysis of a young woman through the use of oral contraceptives, Holland J. held that, where the product is inherently dangerous, "the standard of care may be so high that it approximates to or almost becomes strict liability"; *ibid.* at 386. See also *Grant.* v. *Australian Knitting Mills* (1935), [1936] A.C. 85, [1935] All E.R. 209 and *Hill* v. *James Crowe (Cases), Ltd* (1977), [1978] 1 All E.R. 812, [1977] 2 Lloyd's Rep. 450.

law". Of course, he might simply be telling us that, just as "the only function of tort law is to be tort law",[49] the only function of negligence is to be negligence and the only function of strict liability is to be strict liability. But this would seem to be too much of a tautology even for Weinrib to countenance.

At the heart of this criticism is Weinrib's mistaken insistence on conflating the notion of law (what is law?) with the idea of law (what is just law?). It is a recipe for sure disaster. Yet this very failure to distinguish the distinct epistemological and teleological dimensions of law's form seems not only to be part of Weinrib's formalism, but to be its primary organising dynamic and distinctive feature. A comparison with Stammler's work is profitable on this issue. Stammler maintained that through all the many experiential manifestations of law, there runs a universal thread of law. This is a formal and universal category of thought stamping certain contents of consciousness with the quality of "legalness". He rejected the traditional view that positive law was subject to natural law and recognized that positive law was binding and inherently legal irrespective of its goodness or badness. For him, legality was a distinct quality and existed separately from justice; they are mutually exclusive concepts. The suggestion that there cannot be such a thing as an unjust law is anathema to Stammler. He holds it to be both contradictory and confusing.

Having established a *notion* of law which is present in all the many ways of thinking of law, Stammler turns his back on the epistemological problem of law — what is law? — and turns his attention to the teleological question — what is just law? He moves away from isolating the common determining characteristics of legal thought and concentrates on giving individual instances of legal thought a harmonious position within the totality of all conceivable objects of legal thought. In other words, he sought a universal criterion by which to judge all possible categorics of legal thought and establish the "rightness" of such thought. The pure *idea* of law, in contrast to the pure *notion* of law, is an absolutely valid method of discovering whether any particular legal thought is the right means to the right end. Consequently, any law will be fundamentally right if it fits harmoniously into the unified totality of all possible legal thought.[50]

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[49]"Insurance", *supra*, note 10 at 686.

[50]Stammler found this idea in "the formula of a community of men willing-freely". See *The Theory of Justice*, *supra*, note 23 at 153. Although a formal expression of an abstract unity, it was intended to give direction and substance to any legal system that aspired to be just. Nevertheless, Stammler insisted that, while the idea of law is itself absolute, universal and immutable, the particular categories of legal thought which it considers "right" will be of a relative character, for they are the product of a constantly changing socio-historical experience. See "Fundamental Tendencies", *supra*, note 23 at 902-03.

In conclusion, and in contradistinction to Weinrib, Stammler is involved in two separate formal endeavours. On the one hand, he seeks to analyze the formal nature of those elements entering into consciousness as legal categories and, by subjecting them to critical scrutiny, to isolate those enduring characteristics which designate such a category of thought as "legal". On the other hand, he endeavours to construct a formal method by which to judge the rightness of any law. In returning to Kant, or at least his critical method as opposed to his ethical system, Weinrib ignores the very real steps forward made by Stammler. In particular, Weinrib makes the fatal insistence that it is not necessary to distinguish the "notional" (epistemological) from the "ideal" (teleological) in the pure form of law.

V. Incorrect Jnstice

In an important sense, my previous criticisms of Weinrib's formalism have been clearing the ground for my third and major argument against his theory. To give his theory any chance of operational relevance and success, Weinrib has to introduce the socio-political values that his philosophical method is intended to banish from legal theorising. It is ironic that, to make his "pure" theory work at all, he has to render it impure by importing external values to his internal theory. In short, Weinrib falls back on the same illegitimate manoeuvre as the reviled instrumentalists. Instead of revealing the law's own inner luminescence, Weinrib resorts to a hidden battery of external floodlights that are powered by a non-legal source. In so doing, he mistakes the light for that which is to be illuminated; law's phosphorescence is only the reflected radiance of his own normative lights. While Weinrib's pure forms of law can offer themselves as one abstract distillation of law's contingent content, they cannot claim an exclusive insight nor assert hegemonic authority. The normativity of law will not be established by looking at legal materials alone: it is a question of moral allegiance as much as analytical accuracy.

Although Weinrib works hard to hide the normative sleight-of-hand by which he introduces these extraneous values, the critical eye is faster than the theoretical hand. It is when he plays the Aristotelian card of corrective justice that the formal game is truly up. After a lengthy statement of why law's content secures its intelligibility by being an adequate example of the most abstract conceptions of juridical relationships, Weinrib slides much too quickly into the conclusion that "[t]he first description of these abstractions can be found in Aristotle's discussion of justice".[51] Yet there is nothing in the long history of law's content or of law's form that dictates such a conclusion. More to the point, there is nothing in Weinrib's arguments that

[51]"Formalism", *supra*, note 10 at 977.

explains the appearance of this leading player in the formalist drama. His own summary of his argument exposes the gap in his logic:

> (v) The intelligibility of law therefore involves the disclosure of the relationship between the law's content and the forms of justice that constitute the most inclusive justificatory structures applicable to external relations. (vi) Two different forms of justice can be discerned. Corrective justice constitutes the internal rationality of transactions. Distributive justice, which mediates the relations among persons, and between persons and things, according to some criterion, is the internal rationality of distributions. (vii) These two forms exhibit differing structures and are not reducible one to the other.... [52]

The important stage in the argument is from point (v) to (vi). Weinrib's "discernment" of the two different forms of justice and their appropriateness to particular legal matters is nothing more than that — his own personal discernment of that internal justification. Weinrib allows his prior commitments to determine his philosophical conclusions. It is equally plausible that tort law's internal rationality could be "wealth maximisation"[53] "resource egalitarianism"[54] or "capitalist exploitation".[55] There is nothing in Weinrib's argument that persuades that corrective justice *must* comprisc the internal rationality of tort law or that it is the most morally intelligible explanation of tort law. It is not that the Aristotelian conception of corrective justice cannot plausibly be posited as the abiding moral dynamic of private law, but that it can never be declared to be the only and necessary form of law. The most we can say by way of formal generalisation about the law of torts is that it deals with the determination of liability in situations of risk and injury. Any attempt to go beyond this by identifying a particular mode of determining liability (i.e. negligence as the actual embodiment of corrective justice) from among the plethora of historically specific modes (intention, strict liability, negligence, etc.) must forsake its claim to universal and formal validity. Loss of generality is the price of specificity and the cost of generality is the loss of specificity. It is only by introducing a host of mediating values that are neither exclusively formal nor actual that "that which was empty of meaning acquires an apparent content and this content acquires an apparent evidence".[56]

Even if he could patch up his theory to meet these objections, *any* mode of Weinribian formalism will ultimately founder on its constitutional inability to move from purely formal categories of thought to the determinate

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[52]*Ibid.* at 1012-13.

[53]See W. M. Landes & R.A. Posner, *The Economic Structure of Tort Law* (Cambridge, Mass: Harvard University Press, 1987).

[54]See Dworkin, *supra*, note 3 at 403.

[55]See R.L. Abel, "Torts" in D. Kairys, ed., *The Politics of Law: A Progressive Critique of Law* (New York: Pantheon Books, 1982) at 180.

[56]A. Ross, *On Law and Justice* (Berkeley: University of California Press, 1959) at 276.

solutions of actual problems. Like all formalists before him (and, no doubt, all those after him), Weinrib is obliged to smuggle personal preference into his theory, while passing it off as universal insight. In this, he is no better or worse than Fiss, Dworkin or any one else. Indeed, corrective justice is itself à contested territory of which many different normative maps have been drawn. For instance, whereas Richard Epstein takes it to give rise to a regime of strict liability, Jules Coleman draws from it support for a shift to no-fault liability.[57] Each can claim a plausible degree of interpretive validity for their particular exercise in legal mapping, but none of them can claim interpretive hegemony. The acclaimed "immanent moral rationality" of the law amounts to Weinribian politics in classical costume: politics which are very conservative in sweep and effect. At bottom, the law's inner luminescence is only the reflected image of an external flame that is kept ablaze by Weinribian timber.

The general difficulty is that a purely formal analysis cannot give rise to substantive moral entitlements and still retain its claim to universal validity. A Kantian methodology either becomes locked into a particular socio-historical context and loses its formal status or else it drifts free of its socio-historical context and has no relevance to the resolution of concrete disputes. If the illusion of justice as a category of formal intelligibility is to be maintained, the theory will have to be pitched at such a high level of abstract formulation that it will be dumb in the face of concrete interrogation. If the legal form is to be capable of giving advice on actual problems, it will be impossible to maintain the illusion of formal validity. While Weinrib indulges in both of these strategies at various stages in his account of legal formalism, he seems particularly partial to the former tactic. He elevates the logical form of consistency to the political status of ideal[58] and, in the process, confuses reason with justice. While they may be related, they are not synonymous.

VI. Determining Determinacy

In contemporary jurisprudential debate, traditional legal theorists and their critics join issue over the question of doctrinal indeterminacy. Can the extant law give sufficient guidance and direction in particular disputes so

[57]See R.A. Epstein, "A Theory of Strict Liability" (1985) 2 J. Leg. Stud. 681 and J.B. Murphy & J.L. Coleman, *The Philosophy of Law: An Introduction to Jurisprudence* (New Jersey: Rowman and Allenheld, 1984). For other tort theorists who view corrective justice as consistent with strict liability, see G.P. Fletcher, "The Search for Synthesis in Tort Theory" in M. Bayles & B. Chapman, eds, *Justice, Rights and Tort Law* (Boston: D. Reidel, 1983) 97; and C. Fried, *An Anatomy of Values; Problems of Personal and Social Choice* (Cambridge: Harvard University Press, 1970).

[58]M. Cohen, *Law and the Social Order, Essays in Legal Philosophy* (New York: Harcourt, Brace and Company, 1933) at 295-96.

that their resolution can be claimed to be that of the law and not the lawyer or the judge? In addressing this controversial topic, care must be taken not to exaggerate or trivialise the opposing views. The proof that the law is not so determinate as to admit of only one single correct answer will not signal victory for the critics. Nor will the finding that the law is not so indeterminate as to permit *any* answer at all be considered decisive for the formalists.[59] For instance, a showing that the status of pamphleteers in an airport lobby may or may not be protected under a constitutional guarantee of Free Speech will not of itself validate the critics' position, nor will the observation that having three children in a family could never be a contravention of anti-trust laws advance the "indeterminacy" debate.

The crucial question for formalists and critics alike is whether there is a workable range of determinacy that can allow for some interpretive movement, but not be so wide as to be commensurate with the existing spread of views in the political forum. The major critique that the formalists must rebut is that law is different from politics in that the application of legal reasoning to particular problems will make an appreciable difference to their resolution. If these cases had been left to the ebb and flow of ideological exchanges, the formalists' argument must be that the outcome would be different. Of course, it is not necessary for it to be shown that the result will be different in every case; only that there would be a difference in a statistically significant number of cases.[60] Also, it must be possible to demonstrate that this difference is attributable to a reliance upon legal reasoning and not traceable to the political preference of the legal reasoner. For the formalists' claim to pull any epistemological weight, its proponents must show that law is a rational discipline and not merely a convenient battery of technical rationalizations. Further, the demonstration that any particular decision is wrong or errant will not be enough in itself to support their arguments. There must be room for the acceptance of a difference between being a bad judge and not being a judge at all. To put the issue slightly differently, apart from the language in which it is couched, what might *not* amount to a legal resolution of a particular dispute?

Not surprisingly, Weinrib does not claim the law can operate at a perfect pitch of determinacy. However, he does insist, predictably, that the extent of the law's indeterminacy is manageable: it can be handled without reference to the political and through resort to the internal biddings of the law

[59]See L.B. Solum, "On the Interdeterminacy Crisis: Critiquing Critical Dogma" (1987) 54 U. Chi. L. Rev. 462.

[60]For a recent example of this mistake about the critic's charge, see A.B. Rubin, "Does Law Matter? A Judge's Response to the Critical Legal Studies Movement" (1987) 37 J. Legal Ed. 307.

itself.[61] Adjudication consists of an exercise in justification that represents an internal mediation of the formal relation between law's universal generalities and its contingent particularities. In an important way, the law's forms of justice determine the ambit of juridical intelligibility and mark off the boundaries of the legal and the political. As Weinrib himself sums it up:

> The very notion of determinacy relates in different ways to the generality of the forms and to the particularity of external interaction. Formalism comprehends both these ways in their interrelation. The forms of justice are both determinate and indeterminate. They are indeterminate in that they do not predetermine exhaustively the particular results they govern. They are determinate in that they establish the bounds of coherence for the particulars that fall under them, thus making these particulars intelligible as the sorts of things that they are. "In determining character, unity, and genericity for juridical relationships, the forms of justice determine all that they need to, or can, determine as forms."[62]

Pitched at this level of abstract generality, Weinrib's approach to indeterminacy seems sensitive and instructive. But the proof of the theoretical pudding is in the eating. After a substantial sampling, it has to be reported that, as Weinrib himself says of the critics' charge of indeterminacy, there is only air to bite on.[63] And, like the proverbial pie in the sky, it does nothing to sustain the compelling need of legal theory for determinate nourishment. In his long discussion of *Lamb*,[64] he is content to sanction Watkins L.J.'s reliance on "instinctive feeling". This judgment offers little guidance on how the judge arrived at his decision. There are cryptic references to "the nature of the event or act, the time it occurred, the place where it occurred, the identity of the perpetrator and his intentions, and responsibility, if any, for taking measures to avoid the occurrence and matters of public policy".[65] Watkin's judgment is more an excuse for practical reasoning than an exemplar of it. Indeed, he begins his reflection with the unapologetic confession that he finds the doctrine of remoteness of damage to be "of very considerable obscurity and difficulty".[66] His sympathy with Winston Churchill's feelings about mathematics echoes what will be many readers' experience with Weinrib's legal formalism:

> I had a feeling about [legal formalism] — that I saw it all. Depth beyond depth was revealed to me — the byss and the abyss. I saw — one might see the transit of Venus or the Lord Mayor's Show — a quantity passing through an

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[61] "Formalism", *supra*, note 10 at 1008-12.

[62] *Ibid.* at 1011.

[63] *Ibid.* at 1009.

[64] *Lamb* v. *Camden London Borough Council*, [1981] Q.B. 625, [1981] 2 All E.R. 408 (C.A.).

[65] *Ibid.* at 421.

[66] *Ibid.* at 419 (quoting the editor of *Salmond on the Law of Torts*, 17 ed. (London: Sweet & Maxwell, 1977).

> infinity and changing its sign from plus to minus. I saw exactly how it happened and why the tergiversation was inevitable — but it was after dinner and I let it go.[67]

Contrary to Weinrib's view, law is not the arbiter of conflict, but the site for its development. Legal doctrine does not conform to any simple internal rationality nor is it reducible to a cluster of external organising principles. There are a host of different interpretations competing for descriptive and predictive superiority, but none is able to claim final victory. Insofar as uncontested interpretation is only possible where there is a pre-existing and shared set of values, the competing and contradictory forces at work in forging legal doctrine foreclose the establishment of the necessary consensus. Accordingly, legal doctrine is not a reflected embodiment of one indwelling and sufficient theory, but is the formal site for the attempted, but elusive, blending and reconciliation of competing theories. The temporary accommodations made are more a result of political expediency than moral purity. Although one theory may tend to dominate and infuse the law with its guiding principles, a competing theory will constantly challenge it and provide a debilitating set of counter-principles. At times, the tension will precipitate doctrinal crisis; at other times, the friction will be subdued and relatively untroubling. Yet, muted or manifest, it fuels and informs doctrinal development. The particular trajectory charted and followed will, at least in part, be a function of the larger historical forces that impinge on the legal and judicial enterprise.[68]

Consequently, in this general sense, law is another arena for the stylised struggle over the terms and conditions of social life. Determinacy and indeterminacy are polarities on the plain of praxis. While theory has to try and disentangle them, our existential condition means that we must experience and embrace them simultaneously. While we can never erase or deny the drive to wrestle with this predicament, we must remain alive to the evanescence of any proposed resolution. Whereas Weinribian philosophy seeks closure and attempts to privilege the passing as the permanent, a more vigorous commitment to democracy might allow a continuing and popular engagement with the struggle for meaning. While that struggle can never be brought to a final conclusion, its irrepressibility can be recognized and not disguised as a truth in the service of remote philosophical ideals.

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[67] *Ibid.* (quoting Winston Churchill).

[68] This is not to downplay the importance of these forces or the need to explore their precise operation. However, the focus of this paper is on the doctrinal consequences of their impact. For a general study of these wider issues, see J.A.G. Griffith, *The Politics of the Judiciary*, 3rd ed. (London: Fontana, 1987) and A. C. Hutchinson, *supra*, note 14.

VII. A Risky Business

To demonstrate that Weinrib's ideals do not flow inexorably from the law does not dispense entirely with their claim on jurisprudential attention. While this robs them of their objectivity and authority, his theory must still be judged as another contingent proposal for making sense of the world and the possibilities for its remaking. Consequently, I will demonstrate the political interests that drive and are served by Weinrib's devotion to the supposed virtues of corrective justice. Furthermore, I will show that an explanatory account of tort law, based on Weinribian formalism, does not begin to make any real sense of the existing law of negligence, the prevailing conditions of contemporary society and its ecology of accidents. It is neither a sound description nor worthy prescription. By imposing an individualistic scheme of tortious justice, Weinrib denies the collective nature of risk-creation and the potential for collective and egalitarian re-distribution of risk-exposure.[69]

Weinrib's understanding of tort law as a device for corrective justice is restorative and individualistic in focus and function. It looks to the immediate relation of an injuring defendant and an injured plaintiff and imagines them to be formally equal in their tortious transaction; it is a structural and not a substantive inquiry. The symmetry of the relationship is to be found in the congruence of the act of the defendant being wrongful and the injury of the plaintiff being caused by that act. Accordingly, "[t]he function of the court is to preserve the initial equality by transferring from one party to the other the fixed quantity that marks the deviation from the transaction's implicit rationality."[70] Each of these components — formal equality, individual immediacy, factual causation, and quantifiable loss — deserve to be treated separately.

For Weinrib, the need to treat the parties as antecedently equal flows naturally from the formal basis of his legal theory. To ensure that extrinsic factors, more appropriate to questions of distributive justice, are not taken into account, he is adamant that the judge in a tort case must ignore "such factors as the wealth, virtue or merit of the interacting parties".[71] As an account of legal practice, this injunction tells only half the story. While tort

[69]For a fuller account of these possibilities, see R.L. Abel, "A Socialist Approach to Risk" (1982) 41 Mod. L. Rev. 695 and A.C. Hutchinson, "Beyond No-Fault" (1985) 73 Cal. L. Rev. 755.

[70]"Formalism", *supra*, note 10 at 980. This is more fully developed in "Negligence", *supra*, note 10 at 38-49 and "Wrongdoing", *supra*, note 10 at 429-35.

[71]"Formalism", *ibid.* at 997. See "Insurance", *supra*, note 10 at 693. Although Weinrib insists that he treats individuals as social beings, situated in real historical contexts, this only applies when trying to understand them as "free-willing" persons. See "Reason", *supra*, note 9 at 503-04.

law does not make consistent reference to all these characteristics, especially wealth,[72] it does recognise that it would be cruelly unjust to ignore the fact that some people, like the blind or handicapped,[73] are unable to meet the usual standards of care and that it is appropriate to adjust the standard in those instances. Furthermore, the law recognises that the normal damage rules will have to be mitigated for those, like haemophiliacs and schizophrenics,[74] who are more susceptible to injury. Furthermore, as Weinrib himself recognises and relies on at other times, a defence of necessity is available in certain circumstances.[75] Consequently, his failure to explain these many deviations from his "formal equality" is doubly troubling. It provides further illustration of the dissonance between law's content and its organising form. But, more importantly, it seems to bear witness to the crass disregard that corrective justice shows to those who are less fortunate in our society.

This insensitivity speaks more generally to the deficiency of a formal standard of justice. To treat those who are substantively unequal as though they were equal is itself a form of crude discrimination. Such a treatment not only feeds off the underlying inequality, but actually perpetuates it in the name of equality. While the realms of corrective and distributive justice might be hermetically sealable in theoretical discourse, they must necessarily interact in the practical world. What I do is conditioned by what I have and what I have is conditioned by what I do. Even if the impact of restorations through corrective justice is *de minimis* in particular instances, its accumulated effect across a range of particular instances will be substantial and regressive: the haves will have more and the have-nots will have even less.[76] For instance, the refusal of the courts to take into account the existence of private collateral benefits in the computation of loss works a continuing and worsening disadvantage to the poor; the distribution of insurance is

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[72]As a general rule, the tortfeasor's financial resources do not lessen the standard of care expected of the poor or increase that expected of the rich. The existence of rare exceptions, for instance, in trespassing, *e.g.*, *British Railways Board* v. *Herrington*, [1972] A.C. 877, [1972] 1 All E.R. 749 (H.L.) underlines the generality of the common understanding..

[73]See, *e.g.*, *Haley* v. *London Electricity Board*, [1965] A.C. 778, [1964] 3 W.L.R. 479.

[74]See, *e.g.*, *Dulieu* v. *White & Sons*, [1901] 2 K.B. 669 and *Bishop* v. *Arts and Letters of Toronto* (1978), 83 D.L.R. (3d) 107, [1978] 18 O.R. (2d) 471 (H.C.).

[75]See "Rescue", *supra*, note 10 at 273-74. Indeed, Weinrib's whole discussion of the duty to rescue is largely at odds with many of the points he makes about the "corrective" nature of tort law in "Formalism", *supra*, note 10 at #978-81.

[76]This is the standard critique made of Posner which notes his loaded assumptions and the nature of his futile attempt to divorce questions of efficiency from the distribution of background entitlements. See C.E. Baker, "The Ideology of The Economic Analysis of Law" (1975-76) 5 Phil. & Publ. Affs. 3 and D. Kennedy, "Cost-Benefit Analysis of Entitlement Problems: A Critique" (1980-81) 33 Stan. L. Rev. 387.

based as much on ability to afford it as it is on common prudence.[77] When the fact that exposure to risk is also revealed as bearing a close relation to wealth (in that this usually affects conditions of work, location of home, etc.),[78] the political biases of Weinrib's scheme become evident.[79]

It will be remembered that, in Aristotle's Athens, justice was "some sort of equality".[80] Formal equality was applied to everyone provided that they were not women, slaves or rank-and-file soldiers: it was fully consistent with political privilege and social hierarchy.[81] But it is not only those who might be excluded that should raise our ire; it is those who are included in the ambit of formal justice that should be a cause for concern. The modern law of tort makes little distinction between human persons and corporate persons in determining the allocation of available rights and duties.[82] While Weinrib complains about that fact when it comes to the division of responsibility between private persons and public authorities in the rescue situation,[83] his formal scheme of tort liability proceeds generally without being encumbered by such niceties. Surely it is stretching things too far even in the rarified realm of philosophic speculation to equate corporations with "Kantian moral persons", "noumenal selves" and "freely purposive beings."[84] To ignore the superior potential of corporations to create and avoid risk is to take a position of harsh indifference to the *real* people who are injured and suffer.

At the root of Weinrib's theory is a profound commitment to an individualistic understanding of the world that leaves no space for, and therefore gives no value to, the formative social context in which risk arises and accidents occur. The Kantian understanding of moral personality is the

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[77]P.S. Atiyah, *Accidents, Compensation, and the Law*, 4th ed. (London: Weidenfeld and Nicolson, 1987).

[78]See, *e.g.*, *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852 and *Halsey* v. *Esso Petroleum Co.*, [1961] 1 W.L.R. 683, [1961] 2 All E.R. 145 (Q.B.).

[79]In making this claim, I do not intend to challenge the *bona fides* of Weinrib in developing this formalistic theory: I simply point out its political ramifications rather than suggest dubious motives.

[80]Politics, BK.III, 1281b.

[81]*Ibid.* at Bk.III, 1284a and Bk.I, 1253b-1255b and 1259b. Kant himself took a similarly elitist attitude and, for instance, refused to confer full citizenship on farm labourers. See Friedmann, *supra*, note 23 at 171. Although slightly more progressive, Stammler held the prevailing Victorian attitudes about marriage and divorce. See Stammler, *A Theory of Justice*, *supra*, note 23 at 450-56.

[82]See, *e.g.*, J.G. Fleming, *The Law of Torts*, 7th ed. (Sydney, Australia: Law Book Co., 1986) at 3-4.

[83]See "Rescue", *supra*, note 10 at 277-78.

[84]"Formalism", *supra*, note 10 at 997-98.

bedrock of the abstract individualism from which modern liberalism still draws much of its support or, at least, inspiration.[85] It is the idea that it is possible and desirable for all individuals, as self-determining and free purposive beings, to celebrate their formal equality in "their abstraction from all particularity".[86] As such, the canons of corrective and distributive justice carry forth in the noumenal rather than the phenomenal world. The criticisms made of this Kantian notion of moral personality are too numerous and too well-known to warrant further rehearsal.[87] Instead of concentrating on its theoretical failings as a socio-philosophical or political ideal, I will focus on the practical shortcomings in its application by Weinrib to the law of torts.

For Weinrib, the judge is constrained to "see controversy through the prism of bipolar argument."[88] Rather than lament this institutional weakness, he attempts to turn it to formal advantage. In a move similar to that of deriving form from a given content, Weinrib seems to assume the identity and existence of a particular defendant and plaintiff and only then proceeds to ask if their juridical relation bears the symmetrical hallmarks of formal justice — did the defendant's wrongdoing cause harm to the plaintiff? The problem is, as Finnis has noted, that corrective justice is "parasitic on some prior determination of what is to count as ... a tort."[89] The pressing difficulty is whether it is possible and desirable to extract two "persons" from their social context and to attribute causation and wrongdoing without reference to the wider setting of their "transaction". For example, in an accident which involves a car overturning after cornering fast, the ascription of cause and responsibility will depend upon the perspective taken. From the driver's perspective, the accident could have been avoided by driving more carefully. From the municipality's perspective, the accident could have been avoided

[85]See, *e.g.*, J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) at 251-57 and J. Rawls, C. Fried, A. Sen & T.C. Schelling in S.M. McMurrin, ed., *Liberty, Equality, and the Law: Selected Tanner Lectures on Moral Philosophy* (Salt Lake City: University of Utah Press, 1987). The whole thrust of Rawls' theory is to strip people down to their essential moral identity and to elaborate an original position as "the point of view from which noumenal selves see the world." *Ibid.* at 255.

[86]"Formalism", *supra*, note 10 at 997.

[87]See R.M. Unger, *Knowledge and Politics* (New York: The Free Press, 1975); A. Macintyre, *After Virtue: A Study in Moral Theory*, 2d ed. (Notre Dame, Indiana: University of Notre Dame Press, 1985); and M.J. Sandel, *Liberalism and The Limits of Justice* (Cambridge: Cambridge University Press, 1982).

[88]"Formalism", *supra*, note 10 at 989. Another neo-Kantian, A. Del Vecchio, makes a very similar observation; see (1955) The Philosophy of Law 71 ("the concept of bilaterality is the key to the vault of the juridical structure"). Although Weinrib is right to note the limited bipolar vision of traditional courts, there is a well-documented account of the developing shift to a more public-oriented viewpoint. See A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281.

[89]Finnis, *supra*, note 46 at 178-79.

by constructing a safer road surface. From the car manufacturer's perspective, the accident could have been avoided by designing a more stable vehicle.[90] The isolation of particular transacting parties will not be self-evident but will depend upon interest and standpoint; an internal analysis is secondary to an external characterization.

A demonstration that the abstraction of the parties from their social context is troubling is best achieved through a critical examination of the ideas of "cause" and "loss" that ground Weinrib's larger moral claims. In order to get his theory of tort law off the ground, Weinrib has to show that it is meaningful to argue that "factual causation establishes [an] indispensable nexus between the parties"[91] in the sense that it can be fixed without resort to any corrupting policy considerations that are extraneous to the individual parties' immediate "transaction". If there are such factors present in the fundamental determination of cause, his whole theory will be revealed to stand on the proverbial stilts. Like the late nineteenth century writers, Weinrib desperately needs a notion of objective causation if he is to keep faith with his defence of tort law as apolitical and non-distributive.[92] As the vast literature on the subject evidences,[93] this is far from a self-evident proposition. Rather than being unique and dichotomous, the world of risk and accidents is probabilistic and continuous. In the modern world of Agent Orange, Bhopal, DES, Chernobyl, the Dalkon shield, and Three Mile Island, the traditional "but-for" test is hopelessly inadequate. The unfathomable interaction of different causes prevents the isolation of particular causes for particular injuries: the best that can be achieved is a general correlation of acts and consequences in terms of their statistical aggregation. The attribution of responsibility is simply a conclusion based on a rebuttable hypothesis of probabilistic generality.

Although seized upon to support all manner of economic theories, a still valid insight of Coase's (in)famous article is that to look for moral guidance in the legal doctrine of causation is to look in the wrong place.[94]

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[90]See R. Collingwood, 'On the So-Called Idea of Causation" (1937-38) Procs Arist. Soc. 85 at 96.

[91]"Negligence", *supra*, note 10 at 38. See also "Wrongdoing", *supra*, note 10 generally.

[92]See M. Horwitz, "The Doctrine of Objective Causation" in *The Politics of Law: A Progressive Critique*, *supra*, note 55 at 201.

[93]For some of the most insightful work, see H.L.A. Hart and A. M. Honore, *Causation in the Law* (Oxford, Clarendon Press, 1959); D. Rosenberg, "The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System" (1984) 97 Harv. L. Rev. 849; R.B. Lansing, "The Motherless Calf, Aborted Cow Theory of Cause" (1984-85) 15 Env. L. 1; and Pincus, "Making Progress on the Causal Chaingang" (forthcoming in Osgoode Hall L.J.).

[94]R.H. Coase, "The Problem of Social Cost" (1960) 3 J. Law & Econ. 1. For a powerful (re)reading of Coase from an unashamedly left-wing perspective, see P. Schlag, "An Appreciative Comment on Coase's 'The Problem of Social Cost': A View from the Left" [1986] Wis. L. Rev. 919.

Reliance on a freestanding and background natural order of things is misplaced. In Coase's example of the farmer and the railroad, the spark-emitting railroad no more caused the fire than the decision of the farmer to grow corn where he did. It is not a question of cause, but the apportionment of responsibility for loss and its future avoidance in unfortunate situations of competing resource use. This does not lend itself to a factual solution, but demands difficult value judgments. The idea that people, as separate individuals, are fully in control of their own lives and that injury, with individual care and foresight, can be eliminated from those lives is mistaken. It is a self-serving myth that fosters the idea that an unwavering commitment to pure reason, as embodied in law, is the route to personal safety. The reality is that "the *dream* of an order that fundamentally simply *protects* or replicates some natural pre-collective set of relations ... is shattered when one realizes that more and less expansive definitions of cause reorder relative social power."[95]

Even the law has begun to recognise these difficulties and has started to replace the "but-for" test with one of "increased risk".[96] However, this legal standard for proving causation must inevitably lead to questions about the nature and size of risk, burden of proof and the like. These are indubitably issues of a policy character and cannot be divined, as Weinrib might have us suppose, from the formal, internal or factual circumstances of the putative victim and alleged tortfeasor. Indeed, and not without irony, one of the best articulations of that assessment comes from Weinrib himself. In an article-length discussion of the *McGhee* case,[97] he accepts that the requirements of corrective justice not only must on occasion give way to pressing considerations of fairness and policy, but that the causal test is never "impervious to the considerations of policy, purpose and value".[98] As Weinrib concludes:

> The dominance of the 'but for' test is itself a result of the urge to banish valuative considerations from the realm of cause in fact. This test is the most mechanical method of handling cause in fact, and therefore it seems to be the most suitable for excluding the considerations of policy which by their nature are too flexible and delicate to be susceptible to an automatic form of treatment.

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[95]M. Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass: Harvard University Press, 1987) at 107 (emphasis in the original). For a detailed elaboration of how the idea of factual causation and the belief in its realisation is tied to an individualistic world-view, see R.A. Baruch Bush, "Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury" (1986) 33 U.C.L.A. L. Rev. 1473.

[96]See *Sindell* v. *Abbott Labs*, 607 P. 2d 924 (1980) and *Allen* v. *U.S.*, 588 F. Supp. 247 (Dist. Crt. 1984).

[97]*McGhee* v. *National Coal Board* (1972), [1973] 1 W.L.R. 1, [1972] 3 All E.R. 1008 (H.L.) in which the plaintiff proved causation by showing that the defendant "materially increased the risk of injury"; *ibid.* at 1017.

[98]"Causation", *supra*, note 10 at 533.

> But it is noticeable that even here the purely factual approach breaks down on occasion, and it is necessary, whether explicitly or not, to supplement the mechanical formula with an infusion of policy. As often in the law, the test must be applied with reference to the purposes which the test must serve.[99]

Weinrib's idea of "loss" can be dealt with more briefly. Again, as a foundational idea in his theory, it must be identifiable independently of any external policy or else it will confound his formalist ambitions. To this end, loss is defined as "the fixed quality that marks the extent of the deviation from the transaction's implicit rationality".[100] It will be a very rare occurrence in which the defendant's gain is equivalent to the plaintiff's loss. In most tortious accidents, the plaintiff's loss will far exceed the defendant's gain. Indeed the defendant's gain will largely be notional in most circumstances; it might be the saving in *ex ante* accident avoidance costs. As long as losses are thought of in terms of personal injury or simple property damage, there seems to be little serious to worry about or, at least, the problem seems relatively mute and manageable. However, as soon as the law moves toward allowing recovery for financial loss, the policy-basis of any determination as to what is a "loss" becomes clear.[101] The attempt to identify "a fixed quantity", in terms of a departure from a given distribution becomes even more elusive; such amounts will not be found, but only created. The question of what is a recoverable loss is one of the most vexatious and topical problems in contemporary Anglo-Canadian (and American?) tort law. Is there recovery for pure economic loss?[102] Can a tort claim be made for expectancy damages?[103] If so, when?

These are fascinating and difficult issues, but they cannot be resolved by a purely formal reflection on the litigating parties' juridical relation. Weinrib presupposes an uncontroversial recognition of loss when there are only controversial choices to be made. Answers to these questions will not be forthcoming from a formal meditation on the immediate transaction between plaintiff and defendant, but demand an external consideration of the nature, worth and purpose of the transaction. Consequently, not only can his theory not end without resort to political values, it cannot even begin without reliance on those "impure" elements of distributive justice that his theory is devoted to eliminating. His initial substantive premises scuttle his formalist voyage of tort discovery before it leaves the launching pad.

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[99]*Ibid.* at 530. Whether or not Weinrib would be of a different view today does not invalidate this critique. I believe that Weinrib was right then and that his observations remain so today.

[100]"Formalism", *supra*, note 10 at 980.

[101]Weinrib reveals as much himself, when he takes Coleman to task for favouring a very different interpretation of corrective justice. See "Wrongdoing", *supra*, note 10 at 434-35.

[102]See *Junior Books Ltd* v. *Veitchi Ltd* (1982), [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.).

[103]See *Ross* v. *Caunters*, [1980] Ch. 297, [1979] 3 All E.R. 580.

VIII. Ghost-busting

The flight to philosophical abstraction is an escape from democratic responsibility. Despite traditional theorists' wishes and work to the contrary, there is no way to escape the politics of our finetude and land in an infinite realm of pure reason that secures us against the need to make difficult and always contestable choices. Legal theory is the opiate of the lawyering masses. No ideology, including Weinrib's, can be formally necessary as well as materially adequate to relieve us of the painful responsibility of knowing what to do. Weinrib and all legal theorists would do well to heed Kant's admonition that "out of the crooked timber of humanity, no straight thing can ever be made".[104] If society is to make good on itself, it must resist the temptation to pay homage to the Kantian deities of Coherence and Reason. Intelligibility is ours, not a gift from the gods. As Dewey put it, "A [person] is intelligent not in virtue of having reason which grasps first and indemonstrable truths about fixed principles, in order to reason deductively from them to the particulars which they govern, but in virtue of [his or her] capacity to estimate the possibilities of the situation and to act in accordance with [his or her] estimate."[105]

In a sense, this essay has merely shown what many thought already to be obvious: that formalism was killed and buried long ago. In fact, Felix Cohen wrote its epitaph — "The Science of Transcendental Nonsense."[106] Although its proponents maintain that it "has always refused to stay dead,"[107] reincarnation is no more likely in jurisprudence than in life. Its revival today in classical guise makes formalism no more real or convincing than it ever was. It is little more than an apparition that preys on the troubled mind of the contemporary lawyer which will seemingly take seriously anything in order to satisfy its desire for cognitive calm. There is no need to be fooled or intimidated by its Kantian-Aristotelian guise. Weinrib's theory of legal formalism is a sophisticated, but equally flawed effort to recycle the failed theories of bygone days. While antiquity is not a weakness, it is not a strength either. Weinrib's hope seems to be that the modern legal mind

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[104]See I. Kant, "An Idea for a Universal History from a Cosmopolitan Point of View", in *Immanuel Kant: Philosophical Writings*, E. Behler, ed. (New York: Continuum Publishing, 1986).

[105]J. Dewey, *The Quest for Certainty* (New York: Minton, Balch and Company, 1929) at 213.

[106]See F.S. Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 Colum. L. Rev. 809 at 821.

[107]"Formalism", *supra*, note 10 at 951.

will be impressed by his subtle combination of historical nostalgia and intellectual amnesia; the glory of past days will be recaptured and their inconvenient transparency forgotten. The appropriate response to such jurisprudential fantasizing is not an awe-induced toleration, but a defiant and decisive act of ghost-busting.[108]

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[108]Otto von Gierke put it quite nicely when he said that "if [the spirit of natural law] is denied entry into the body of positive law, it flutters around the room like a ghost, and threatens to turn into a vampire that sucks the blood from the body of Law". O. von Gierke, *Natural Law and the Theory of Society: 1500 to 1800*, trans. E. Barker (Cambridge, Cambridge University Press, 1958) at 226.