1-1-1993

Legal Formalism from the Perspective of a Reasonable Law Professor

Jean C. Love
Santa Clara University School of Law, jlove@scu.edu

Recommended Citation
16 Harv. J.L. & Pub. Pol'y 627

LEGAL FORMALISM FROM THE PERSPECTIVE OF A REASONABLE LAW PROFESSOR

JEAN C. LOVE*

In January of 1992, I was asked to comment on Professor Weinrib's paper, entitled "The Jurisprudence of Legal Formalism," at the Annual Meeting of the Association of American Law Schools. Because I am not trained in philosophy, I agreed to speak from the perspective of the "ordinary torts professor." When I received Professor Weinrib's manuscript, it arrived under cover of the following letter:

> Here is the text of the paper for the AALS session. . . . What I have tried to do is reduce the formalist position to its main elements through the contrast of the formal with the substantive. I have tried to pitch the presentation to the reasonable law professor, who mows the lawn in short sleeves, who rides the Clapham omnibus, and who is not excessively concerned with the matters we are going to discuss.[1]

In this piece, I will speak for those of us who "mow the lawn in our short sleeves"—women and men alike.

The first observation that I want to make is that Professor Weinrib may have overestimated the ability of the reasonable law professor to comprehend abstract philosophical terms. In an Afterword to the University of Southern California Symposium on the Renaissance of Pragmatism in American Legal Thought, I commented that pragmatism offers "both the hope of a constructive way of thinking about society's problems and the hope of a common language."[2] Those are *not* the first words that come to my mind as I attempt to sum up the value of formalism. Formalism, unlike pragmatism, operates at a level of abstraction that requires the use of words and phrases that are not part of the working vocabulary of the ordinary law professor.

Having identified a major vice of formalism, let me now focus on some of its virtues. Professor Weinrib's "voice from the

* Professor of Law, University of Iowa Law School.

1. Letter from Professor Ernest Weinrib to Professor Jean Love (Dec. 2, 1991)(on file with author).

2. Jean C. Love, *Renaissance of Pragmatism in American Legal Thought: Afterword*, 63 S. CAL. L. REV. 1911, 1925 (1990).

empty sepulchre"[3] resonates with ancient wisdom. It speaks to us of forms of justice. It talks about correlative rights and duties. It echoes in the air with words like freedom, equality, and human dignity—words that the reasonable man *and* woman have always understood, regardless of race, color, culture, creed, class, age or sexual orientation. Formalism, then, takes us back to our roots. It asks us to think about the basic structures of our legal system. It reminds us that if we want to reform the substantive law, we must do so in a way that is consistent with the basic forms of justice.[4]

Formalism, as defined by Professor Weinrib, also entails a way of looking at law. In order to understand legal relationships, we must examine legal institutions and practices from an internal standpoint, using the skills acquired in law school, rather than examining them from an external standpoint, using the skills that might be acquired in other graduate school disciplines.[5] Because we, the reasonable law professors who mow the lawn and ride the bus, usually have only one advanced degree—a J.D.—we should embrace Professor Weinrib's theory of formalism if for no other reason than that it validates our own intellectual endeavors!

On a more serious note, I will now examine the strengths and limitations of Professor Weinrib's legal formalism as applied to tort law and tort reform. I have chosen to focus on tort law both because Professor Weinrib uses it to illustrate his theory[6] and because it is a topic that I have taught for the past twenty years.

Let me begin by summarizing Professor Weinrib's formalism, as I understand it.[7] Legal formalism identifies two basic

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

4. *See id.* at 587-89.

5. *See id.* at 592.

6. *See id.* at 584.

7. *See id.*; *see also* Ernest J. Weinrib, The Idea of Private Law (forthcoming 1993)(unpublished manuscript on file with author). Weinrib's theory of formalism is further explained in the following articles: Ernest J. Weinrib, *Aristotle's Forms of Justice*, 2 RATIO JURIS 211 (1989); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992); Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988); Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283 (1989); Ernest J. Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1989); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. L. REV. 485 (1989). In subsequent footnotes, I will make repeated references to the published articles, but I will not continue to cite to the unpublished manuscript.

forms of justice: corrective justice and distributive justice. Corrective justice is the form underlying private law; distributive justice is the form underlying public law. Professor Weinrib is interested in developing a theory of private law that concentrates on liability, rather than on property: a theory that will distinguish private law from public law. To that end, he defines private law institutionally as a bilateral process of adjudication that retroactively affirms the rights and duties of the parties by first determining liability and then awarding appropriate remedies. Conceptually, he describes private law as a regime of correlative rights and duties designed to protect the bodily integrity of individual human beings as well as the property that they happen to hold. Public law, by contrast, is a multilateral process of redistributing property in accord with some collectively determined criterion, such as merit or need. Fields of law that are clearly encompassed by Professor Weinrib's definition of private law include torts, contracts, and restitution. Fields of law that clearly fall within the domain of public law include taxation and social welfare legislation.

How does Professor Weinrib's formalism help us to resolve the controversies that are raging within the field of tort law in the 1990s? First of all, his formalism instructs us to evaluate tort law by focusing on its form, not its goals. We must understand that the purpose of tort law is to correct injustice, not to compensate or to deter.[8] Many observers criticize tort law from a multitude of viewpoints, often advocating its abolition. If we evaluate tort law, however, from the standpoint of formalism, rather than functionalism, we may find fewer flaws and be less inclined to abolish it.[9]

In addition to telling us to focus on form rather than substance, Professor Weinrib's formalism tells us that if we view tort law through the lens of corrective justice, we will see that tort liability must be based on fault.[10] Why? Not because of the bilateral structure of corrective justice per se, but because there is an underlying concept of free and equal agency that is implicit in the bilateral structure of corrective justice. Drawing on Kant[11] and Hegel[12] to flesh out the concept of free and equal

8. *See* Weinrib, *supra* note 3, at 586.

9. For a discussion of recent trends in tort law, see Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

10. *See* Weinrib, *Right and Advantage in Private Law*, *supra* note 7, at 1297-1308.

11. *See* Weinrib, *Law as a Kantian Idea of Reason*, *supra* note 7, at 72.

agency, Professor Weinrib concludes that "freedom" entails the ability to choose and that "human equality" gives rise to an obligation to choose to live one's life in a manner that does not interfere with another human being's equality. Whenever two human beings interact, they have a mutual obligation to respect each other's equality. Put another way, they have a mutual right to be treated as equals in both their personhood and their capacity to hold property. A violation of the right to be treated as an equal is a wrong which gives rise to liability based on fault. We describe it as liability based on fault because it requires proof of an intention to run the risk of interfering with another human being's equality.[13]

The third insight we gain from Professor Weinrib's formal-

12. *See* Weinrib, *Right and Advantage in Private Law*, *supra* note 7, at 1283.

13. *See* Weinrib, *Corrective Justice*, *supra* note 7, at 419-24.

Professor Weinrib does not distinguish between intentional torts and unintentional torts in his description of "liability based on fault." He describes all fault-based tortious conduct as conduct by an actor who intends to run the risk of interfering with another human being's equality. Other commentators who argue that principles of corrective justice require the imposition of tort liability based on fault, such as Professor David Owen, distinguish between intentional "takings" and accidental injuries:

> [T]he moral character of a person's choice to act in a manner causing harm to another person is dependent upon whether the actor accorded equal concern and respect to the other's interest at the time of choice and action. Such respect requires, first, that actors properly regard the vested "property" (and other established) rights of other persons, just as actors would want others to respect their own possession of such rights. Both the law of crimes and torts thus protect persons against the theft of a book and against an unprovoked punch in the nose. . . .
>
> Accidents, however, ordinarily cannot be viewed usefully as "takings" of such established "rights," demanding compensation. The general application of this form of "taking" perspective to every accident would amount to a rule of strict liability, which is unacceptable . . . .
>
> Instead, when an actor's choice of action involves only a *risk* of harm to others, necessary and incidental to the pursuit of some proper goal not harmful in itself, then the moral character of the action depends on an evaluation of the *relative worth* of the affected *interests*—principally of the actor and the victim, but also of other persons. If an act is likely to achieve a good for the actor and others that is greater than any harm foreseeably risked to the victim and others, then it is morally justifiable in terms of equality, and vice versa. . . .
>
> [I]f aggregate interest balancing of this type were used as the *primary* definition of liability for accidental harm, it could be faulted for denying value to important individual rights of the parties to an accident. For this reason, risk-benefit analysis generally should be resorted to only as a "default rule," for use when a freedom and vested rights analysis fails to provide an adequate resolution of a dispute. Even in such a default role, however, risk-utility principles are valuable tools for determining responsibility. Principles of freedom and vested rights alone frequently are unable to resolve the complex questions of accountability . . . , and risk-benefit analysis often provides the most helpful guide for determining moral and legal responsibility for accidental harm.

David G. Owen, *The Fault?*, 26 GA. L. REV. 703, 720-23 (1992).

ism is that the two forms of justice[14]—corrective justice and distributive justice—are "categorically different and mutually irreducible."[15] Because of this dichotomy, a single legal relationship "cannot coherently partake of both."[16] Consequently, Professor Weinrib cautions tort reformers that they must either modify tort law to accord with the form of corrective justice or replace it with an accident compensation plan that conforms to the structure of distributive justice. As a formalist, he has no stake in establishing the superiority of tort law over other mechanisms for handling injuries inflicted by human beings upon each other.[17] He does, however, have a stake in policing the purity of the form of whatever alternative to tort law is chosen.[18]

Let me now question these three admonitions to torts scholars spoken from the empty sepulchre of legal formalism. First, do I think that it is appropriate to describe the purpose of tort law as "correcting injustice," rather than achieving compensation, deterrence, or some other functional goal? Is formalism superior to functionalism in helping us to understand the essence of tort law? I think that it is. Formalism captures the bilateral nature of tort litigation in a single snapshot. Functionalism takes two separate photos: one of the plaintiff, who is receiving compensatory damages or some form of specific relief; the other of the defendant, whose tortious activity is being deterred by the imposition of a judgment either for damages or for some form of specific relief. From a functionalist's perspective, tort law tries to accomplish too many objectives simultaneously and attains none of them completely.[19] From a formalist's perspective, however, tort law is doing just what it is supposed to be doing—correcting injustices.[20]

Let me provide a concrete example from the field of constitutional tort law. In the 1970s and 1980s, many constitutional tort scholars, myself included, were urging the United States Supreme Court to award damages for the "inherent value of the plaintiff's constitutional right" on the theory that such an

14. For a discussion of Aristotle's two forms of justice, *see id.* at 404-09.
15. Weinrib, *supra* note 3, at 588.
16. *Id.* at 589.
17. *See id.* at 587.
18. *See* Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, *supra* note 7, at 985; *see also* Weinrib, *Understanding Tort Law*, *supra* note 7, at 492.
19. *See* Weinrib, *supra* note 3, at 586.
20. *See* Weinrib, *Understanding Tort Law*, *supra* note 7, at 510-15.

award of damages unquestionably would be sufficiently large to deter violations of the United States Constitution.[21] Justice Powell, writing for the Court in both *Carey v. Piphus*[22] and *Memphis Community School District v. Stachura*[23], rejected the concept of awarding compensatory damages for the "inherent value of the plaintiff's constitutional right."[24] Instead, he insisted upon limiting the amount of the compensatory damage award to the value of the "particular injury" caused to the particular plaintiff by the deprivation of the constitutional right.[25] He explained the Court's decision by saying that he could find no evidence of Congressional intent to "establish a deterrent more formidable than that inherent in the award of compensatory damages."[26] Professor Weinrib's formalism tells us that Justice Powell's reasoning was correct. Because Congress chose to create a constitutional tort action under § 1983[27] pursuant to the form of corrective justice, any remedy for a violation of § 1983 must conform with the basic structure of corrective justice.[28]

The second issue that I want to consider is whether corrective justice requires that tort liability be based on fault. This is a critical question because some torts scholars, such as Richard Epstein, have argued that corrective justice mandates the imposition of strict tort liability,[29] whereas other torts scholars, including Professor Weinrib, have contended that corrective justice mandates the imposition of fault-based liability.[30] My own opinion is that corrective justice, as a *form* of justice, is not capable of speaking definitively to the issue of substantive tort liability.[31] Corrective justice, as a *form* of justice, may place cer-

21. A summary of my argument is presented in Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67, 71-73 (1992).

22. 435 U.S. 247 (1978).

23. 477 U.S. 299 (1986).

24. Love, *supra* note 21, at 71-79.

25. *See id.* at 79-90.

26. Carey v. Piphus, 435 U.S. 247, 256-57 (1978).

27. 42 U.S.C. § 1983 (1988).

28. *See* Love, *supra* note 21, at 67-68, 79-80.

29. *See, e.g.*, Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEG. STUD. 165 (1974).

30. *See, e.g.*, Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CANADIAN J. LAW & JURIS. 147 (1988); *see also* Weinrib, *Right and Advantage in Private Law*, *supra* note 7, at 1297-1308.

31. Professor Weinrib, in his discussion of Aristotle, acknowledges that Aristotelian corrective justice describes the form, but not the content, of tort law (and of private law):

> Aristotle's description of corrective justice is . . . devoid of specifics. None of

tain constraints or outer limits on the contours of substantive private law, but I do not think that it is capable of mandating the adoption of one tort liability regime over another. Rather, corrective justice, as a *form* of justice, accommodates a wide variety of liability regimes, including liability for restitution, liability for breach of contract, and liability for tortious conduct.

Some scholars, including Richard Posner[32] and Richard Wright,[33] have returned to Aristotle's original text[34] in an ef-

---

> the issues that preoccupy modern scholars of private law—the standard of liability in tort law, the measure of damages in contract law, and the definition of causation, for example—receives any attention. Instead, Aristotle presses the obvious point that a defendant who has taken something from a plaintiff has a comparative excess of twice the amount taken, so that the initial equilibrium is restored when the defendant returns the amount taken to the plaintiff.

Weinrib, *Corrective Justice*, *supra* note 7, at 412.

Professor Weinrib concludes that corrective justice mandates fault-based liability by connecting the concept of "equality" (which is implicit in the Aristotelian form of corrective justice) with the concept of agency (which is at the core of the natural right theories developed by Kant and Hegel). *See id.* at 421-24.

Professor Weinrib's response may have weakened his argument that the natural right theory of agency mandates fault-based liability. *See* Ernest J. Weinrib, *Formalism and Practical Reason, or How to Avoid Seeing Ghosts in the Empty Sepulchre*, 16 HARV. J.L. & PUB. POL'Y 683 (1993). In proving that both corrective justice and distributive justice are informed by the natural right theory of agency, Professor Weinrib adopts a contextual approach to the meaning of "agency." *Id.* "Agency" and "practical reason" operate differently within different contexts, according to Weinrib, because "our moral life expresses itself through a variety of shapes" of experience. *Id.* at 684. Agency and practical reason are highly abstracted concepts within the sphere of corrective justice, symbolized by a "free and purposive" agent who does not act in a manner "inconsistent with the free purposiveness of other agents." *Id.* at 686. Such a highly abstracted conception of agency gives rise to "negative duties" only. *Id.* at 687. By contrast, within the sphere of distributive justice, agency and practical reason are more particularized concepts, symbolized by a "free and equal" agent who acts with the "moral capacity" to create a "fair system of social cooperation" so that "primary goods" will be distributed in some way that promotes "some notion of good." *Id.* at 689-90. This more particularized conception of agency and natural reason creates "positive duties" as well as negative duties. *Id.* at 690.

It seems to me that Weinrib's highly abstracted concept of "agency" within the sphere of corrective justice is as compatible with strict tort liability for abnormally dangerous activities as it is with fault-based liability for intentionally, recklessly, or negligently inflicted harm. Both classes of cases require proof of conduct by a "free and purposive" agent that is "inconsistent with the free purposiveness of other agents." Both types of tort action fit within Weinrib's description of corrective justice:

> Corrective justice is the sphere of practical reason that establishes norms for agents solely on the basis of their purposiveness without considering the desirability of their particular purposes. All that corrective justice requires is that one not do wrong to the rights that are personal, proprietary, and contractual embodiments of another agent's purposiveness.

Id. at 693.

32. *See* Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEG. STUD. 187, 189-91 (1981).

33. *See* Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 691-702 (1992).

34. A translation of the original text appears *infra* at text accompanying note 38.

fort to resolve the question of whether corrective justice requires liability based on fault. I have followed in their footsteps, only to lose my way in the thicket of conflicting translations of ancient Greek to modern English.[35] Suffice it to say that Richard Posner tells us that Aristotle appears to have defined the term "wrong" to encompass only the commission of an intentional tort,[36] whereas Richard Wright tells us that Aristotle understood the term "wrong" to include intentional torts, recklessness, negligence, and strict tort liability.[37] The critical passage from Aristotle states:

> [I]t makes no difference [from a corrective justice perspective] whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it.[38]

I am content to regard corrective justice as a *form* of justice that accommodates any bilateral dispute in which one party seeks a remedy for another party's violation of a legally recognized right.[39] I think that interpretation is consistent with Aristotle's description of corrective justice, as opposed to distributive justice. I agree with Richard Posner that, *if* Aristotle *did* define the term "wrong" to encompass only the commission of intentional torts, he defined the term narrowly because the Greek law of his time confined the concept of tortious conduct to intentionally tortious conduct.[40]

The third issue that I want to consider is whether corrective and distributive justice are categorically different, so that tort reformers must either modify tort law in accord with the form of corrective justice or replace it with an accident compensation

35. For the transliterated Greek, see Posner, *supra* note 32, at 189 n.8. For two different translations of the ancient Greek to modern English, *see id.* at 189; *see also* Weinrib, *Corrective Justice*, *supra* note 7, at 419.

36. *See* Posner, *supra* note 32, at 190-91. Judge Posner also tells us that, because the Greek word for "wrong" (*adikos*) means "unlawful" as well as unjust, "it is unclear to what extent Aristotle thought he was doing more than describing legal concepts that happened to be prevalent in his society." *Id.* at 206 n. 59.

37. *See* Wright, *supra* note 33, at 697-99.

38. IV ARISTOTLE, NICOMACHEAN ETHICS 1131b26-1132a6 (W. David Ross & James O. Urmson trans.), *in* 2 THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., 1984).

39. In other words, I am content to regard Aristotle's use of the word "wrongful" as meaning "unlawful." *See* Posner, *supra* note 32, at 206 n.59.

40. *See id.* at 201-02.

plan in the form of distributive justice. I believe that Professor Weinrib is correct in concluding that corrective and distributive justice are categorically distinct concepts.[41] Therefore, I think that tort reformers should take seriously both of his admonitions. First of all, when we propose modifications in tort law, we should remember that tort law governs bilateral transactions and that its purpose is to "correct injustice."[42] This means that the remedy should rectify the wrong *completely*—not just partially. For example, in considering whether to put caps on damages, we should ask ourselves whether the truncated remedy will operate effectively to "correct injustice," or whether it will only partially restore the plaintiff to the position that the plaintiff would have been in had the legal wrong not been committed.

Second, when we propose to abolish tort law and replace it with an accident compensation plan, there are two types of questions that we should ask ourselves. Initially, we should contemplate whether we want to abolish *all* tort law actions or only *some* of them. For example, we might want to distinguish between negligence actions and intentional tort actions. Intentional torts often can be characterized as causing losses that are both morally and legally wrongful.[43] This is the type of injustice that the form of corrective justice is ideally suited to rectify. Therefore, we might not want to abolish intentional tort actions and replace them with an accident compensation plan. Instead, we might want to devise an accident compensation plan that replaces only negligence actions, but not intentional tort actions.[44]

Once we have determined which types of tort actions we want to abolish, we should then determine whether the accident compensation plan should be informed by principles of corrective or distributive justice.[45] It would be theoretically possible to design an accident compensation plan based on principles of corrective justice. Premiums would be paid in by those people who create risks of harm; money would be paid

41. *See* Weinrib, *Corrective Justice*, *supra* note 7, at 407-09, 413-18.

42. *See id.* at 417-18.

43. *See generally* Posner, *supra* note 7, at 187.

44. *See generally* Jean C. Love, *Actions for Nonphysical Harm: The Relationship Between the Tort System and No-Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CAL. L. REV. 857 (1985).

45. *See* Weinrib, *Corrective Justice*, *supra* note 7, at 418.

out to those people whose harms are caused by the tortious conduct of another human being; and then, at the end of the year, there would be an adjustment in the premiums paid to reflect the actual losses caused by those people who tortiously inflicted harm. Most jurisdictions, however, do not adopt accident compensation plans premised on principles of corrective justice. Instead, most accident compensation plans reflect principles of distributive justice.[46] Money is paid in by people who are subject to taxation; money is paid out to people who have sustained harm to the person. The critical question is whether the claimants may recover compensation only for tortiously caused harms or whether compensation may be claimed regardless of the cause of the loss.

The lesson that formalism can teach us is that we should identify the claimants in accord with principles of distributive justice, not corrective justice. Otherwise, there will always be pressure on the plan to expand. For example, if a workers' compensation plan that is allegedly based on distributive justice principles confines its coverage to tortiously caused harms, there will be pressure on it to expand its coverage to encompass nontortiously and naturally caused harms, such as being hurt on the job by an inevitable accident or a bolt of lightning. If an accident compensation plan is designed to cover only injuries sustained on the job, there will be demands for it to expand its coverage to accidents in the home. Formalism thus helps us to understand the structure of New Zealand's accident compensation plan as originally adopted.[47] Under the original New Zealand plan, money is paid in by people who are subject to levies or taxation, and money is paid out to anyone who has sustained harm anywhere as a result of an accident.

In conclusion, as a reasonable law professor who teaches torts, I find that formalism helps me to think more clearly about the basic structure of tort law. In particular, it helps me to formulate appropriate remedies for the commission of tortious wrongs, and I find it to be invaluable in evaluating the development of accident compensation schemes. I do not believe, however, that it resolves all of the issues raised by torts scholars in the 1990s. In particular, I do not think that it resolves the ques-

46. *See generally* ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION (1989).

47. *See generally* GEOFFREY PALMER, COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA (1979).

tion of whether tort liability should be based on fault. This determination depends on premises outside the necessary framework of formalism.