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Ernest J. Weinrib’s Legal Formalism and the Philosophies of Aristotle, Kant and Hegel

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Ernest J. Weinrib’s Legal Formalism and the Philosophies of Aristotle, Kant and Hegel

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Abstract

This paper may be seen as a contribution to a symposium on the legal theory of Hegel which was first published in *Cardozo Law Review* in 1988-89: 10 Cardozo L. Rev. (1988-89). (Hegel and Legal Theory Symposium, I). It presents a critique of the doctrine of ‘legal formalism,’ as this is presented in the writings of Ernest J. Weinrib. Weinrib associates legal formalism with the legal philosophies of Aristotle, Kant and Hegel. So far as Aristotle is concerned, the paper argues that Weinrib is wrong to argue that Aristotle is a forerunner of the legal philosophy of Kant or of contemporary ‘neo-Kantian liberalism.’ In order to evaluate the claims made in this area, the paper examines the debate between Weinrib and Steven J. Heyman over the interpretation of Aristotle’s philosophy of law in general, and his views on corrective justice in particular. It is argued that neither Weinrib’s ‘neo-Kantian’ reading nor Heyman’s ‘communitarian’ reading adequately captures the complexity of Aristotle’s views on law, but that they might be combined so as to form a third view which does so.

So far as the philosophies of Kant and Hegel are concerned, it is argued that Weinrib is more interested in the similarities between the views of these two thinkers than he is in the differences. The paper argues that there are problems with this because the views of Kant and Hegel differ fundamentally with respect to some issues. The paper argues that although there are times when Weinrib associates legal formalism with the philosophy of Kant, and evidently thinks of it as being a ‘neo-Kantian’ project, nevertheless there are also times when he identifies legal formalism with the view of law expressed by Hegel in his *Philosophy of Right*. The paper argues that this leads to a mis-reading of the Hegel precisely because it does not attach sufficient importance to the differences which exist between his legal theory and that of Kant.
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Introduction

Ernest J. Weinrib is an advocate of a particular approach to the philosophy of law which he refers to as ‘legal formalism.’¹ He associates this doctrine with the writings of Aristotle, Kant and Hegel. But how, in his opinion, are the views of these three thinkers supposed to be related to one another? In particular how does Weinrib understand the relationship between the legal philosophy of Kant and that of Hegel, given that these are two philosophers whose views on at least some issues are generally acknowledged not to be the same but rather opposed to one another? It is

arguable that Weinrib’s views on this subject are not entirely consistent. There are in
effect two ‘Weinribs,’ or two different accounts of legal formalism, one of which is
might be said to be Weinrib’s ‘majority’ and the other his ‘minority’ view. The first of
these is ‘Kantian,’ so far as its philosophical inspiration is concerned, and the second
‘Aristotelio-Hegelian.’ In this paper I claim that although there are indeed some
important similarities between the views of Kant, on the one hand, and those of
Aristotle and Hegel on the other, and therefore also between these two accounts of
legal formalism, nevertheless there are also significant differences. I also claim that
on the whole Weinrib’s ‘majority’ view has relatively little in common with the views
of either Aristotle or Hegel, whose respective philosophical outlooks have much more
in common with one another than either of them has with that of Kant. However this
is not true of course in the case of Weinrib’s ‘minority’ view, most of the basic
assumptions of which are incompatible with Kantianism.

In order to establish this conclusion I shall begin by outlining the basic
assumptions of Weinrib’s Kantian understanding of legal formalism (Part 1). I then
examine the relationship which exists between his minority understanding of legal
formalism and the philosophies of Aristotle (Part 2) and Hegel (Parts 3 and 4). Any
discussion of the relationship which exists between Weinrib’s legal formalism and
Hegel’s philosophy of right or law is made more complicated because with respect to
this issue also Weinrib says different things at different times. In Part 3 I consider the
accusation that although Weinrib does on occasion explicitly endorse the standpoint
of Hegelianism, nevertheless the Hegelianism in question is of a peculiarly
emasculated kind. In effect Weinrib, on this view, reduces the standpoint of Hegel to
that of Kant, thereby completely ignoring the significance of the differences which
exist between these two thinkers. In Part 4 I argue that, nevertheless, there is evidence
to support the view that Weinrib does not always do this, and that legal formalism as he understands it can legitimately be seen not as a ‘pseudo-Hegelian’ but rather as an authentically ‘Hegelian’ doctrine. This is Weinrib’s ‘minority’ understanding of legal formalism. The assumptions associated with it are in a number of key respects quite different from those associated with the Kantian understanding of this doctrine. My conclusion is that Weinrib’s overall characterization of legal formalism is not logically coherent, and that this is so precisely because he is not sufficiently cognizant of the importance of the differences which exist between the standpoints of Kant, on the one hand, and of Aristotle and Hegel on the other.

Part 1: Weinrib’s Legal Formalism as a Kantian Project

According to this first account, Weinrib argues that legal formalism is an intellectual tradition which has its origins in classical antiquity and which has continued unbroken from that time to the present day. He also argues that the two main modern exponents of this doctrine are Kant and Hegel. Weinrib does not, therefore, attach so much importance to the differences which exist between the legal theory of Kant, on the one hand, and that of either Aristotle or Hegel on the other. He is more interested in what he considers to be the similarities which exist between their views. But what are these similarities? What are the core beliefs which Weinrib associates with legal formalism, on this Kantian understanding of it, and which he thinks can be found in the philosophies of all three thinkers, Aristotle, Kant and Hegel?

Perhaps the most important similarity, so far as Weinrib is concerned is a particular way of thinking about legal subjectivity, or about the nature of the individual moral agent who is the subject of law within the sphere which Aristotle
refers to as that of ‘corrective justice.’ With respect to this issue Weinrib emphasizes the fact that for legal formalists this subject is a ‘free purposive being,’ that is to say a human being, or an ‘abstract moral person.’ The equality of the ‘parties’ within this sphere is, Weinrib maintains, ‘the equality of what Kant (and Rawls following him) have termed moral personality.’ The Aristotelian category of corrective justice is, in Weinrib’s view, again ‘intimately tied to the Kantian notion of moral personality.’ A second similarity is a belief in the ‘autonomy of law,’ which Weinrib associates with the claim that it is possible to draw a ‘rigorous separation’ between questions of law, on the one hand, and questions of ‘politics’ on the other, or between the ‘form’ of law and its substantive ‘content.’ Indeed, Ian Ward has claimed that ‘the separation of the form of law from its content’ is the ‘centrepiece’ of Weinrib’s doctrine of legal formalism. In Weinrib’s thinking this idea is connected to a third similarity, namely the further distinction which legal formalists make between the notion of ‘private law’ and that of ‘public law.’ Weinrib claims, for example, that in the history of legal philosophy ‘private law was Aristotle’s discovery.’ In his view ‘the earliest elucidation of private law is Aristotle’s treatment of what he called “corrective justice”’ in the *Nicomachean Ethics.* Fourthly, Weinrib also maintains that legal

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2Weinrib, Corrective Justice, 404.

3Weinrib, Liberty, Community and Corrective Justice, 8.

4Weinrib, Liberty, Community and Corrective Justice, 8.

5Weinrib, Legal Formalism, 951, 984, fn. 75.

6Weinrib, Legal Formalism, 952, 950, 985.

7Ian Ward, An Introduction to Critical Legal Theory, 41-42.

8Weinrib, Corrective Justice, 403.

9Ibid.
formalism ‘challenges the assumption that law’ (by which Weinrib evidently means private law) ‘should be thought of as being ‘essentially political.’” Against this view, he argues that in the sphere of private law (Aristotle’s corrective justice) ‘politics is absent’.

Fifth, as Steven Heyman has observed, Weinrib’s legal formalism thinks of private law or corrective justice as being ‘a system of right uninformed by a conception of the good.’ In the parlance of modern moral philosophy, it is a philosophy of ‘the right’ rather than of ‘the good.’ That is to say, it is associated with a deontological rather than a consequentialist approach to ethics. In Weinrib’s opinion then, at least on this first reading of his views, all five of the above ideas are to be found in the writings of Aristotle, Kant and Hegel, and it is for this very reason that they can all be identified as advocates of legal formalism.

On this account, then, legal formalism as Weinrib understands it is a ‘Kantian’ or at least a ‘neo-Kantian’ enterprise. This is probably the understanding of legal formalism which is held by most commentators, and by most of Weinrib’s critics, especially those associated with the Critical Legal Studies movement. Ian Ward, for example, explicitly associates Weinrib’s view that we can and should rigorously separate the form of law from its substantive content with ‘neo-Kantianism’.

Moreover, Weinrib himself at times identified legal formalism as being a Kantian doctrine. For example on one occasion he states that Aristotle’s theory of corrective justice

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10 Weinrib, Legal Formalism, 949.
11 Weinrib, Legal Formalism, 992.
12 Heyman, Aristotle on Political Justice, fn. 39, 856.
13 See Brudner, Hegel and the Crisis of Private Law, 953: ‘private law theorists have insisted that a faithful account of private law must rest on the priority of right.’
14 Ian Ward, An Introduction to Critical Legal Theory, 41-42.
justice, in so far as it is ‘concerned with the sheer correlativity of doing and suffering,’ presupposes ‘a conception of the person’ which is identical with that of Kant and which might, in consequence, be said to be ‘inchoately Kantian.’ Indeed there are numerous occasions when he associates Aristotle’s doctrine of corrective justice, and the philosophical assumptions upon which it relies, specifically with the philosophy of Kant rather than with that of either Aristotle or Hegel. For example, as we have seen, at one point he suggests that ‘the presupposition of corrective justice outlined here will be familiar to readers of Kant and Rawls as moral personality. Indeed, corrective justice can fairly be described in Kantian terms as the point of view form which noumenal selves see each other.’ And elsewhere he maintains that ‘the equality of the parties in corrective justice is the equality of what Kant (and Rawls following him) have termed moral personality’ and that, generally speaking, ‘it is worth recovering Kant’s perspective on these matters.’ Finally, three of the legal philosophers that Weinrib relies on when offering an account of legal formalism,

15Weinrib, Corrective Justice, 424.

16Weinrib, Legal Formalism, 996, fn. 97, 996, 997. See also Michael Rosenfeld, The Aristotelio-Kantian Formalism of Weinrib, in Just Interpretations: Law Between Ethics and Politics (1998), 45-54, which offers a Kantian understanding of Weinrib’s legal formalism. Finally see Ernest J. Weinrib, Law as a Kantian Idea of Reason, 87 Columbia L. Rev. 472 (1987), which appears to more or less identify the standpoint of legal formalism with that of Kant’s legal philosophy.

17Weinrib, Legal Formalism, 997.

Hans Kelsen, Rudolf Stammler and Giorgio del Vecchio, are all widely considered to be ‘neo-Kantian’ thinkers.\textsuperscript{19}

Given all of this it is not too surprising, then, that a number of Weinrib’s critics have associated legal formalism not only with Kantianism but also with a certain form of liberalism. For example Drusilla Cornell, Michel Rosenfeld and David Gray Carlson have argued that one of the features of what they refer to as ‘Neo-Kantian liberalism’ is the fact that its proponents have a tendency to ‘purge history and politics from the arena of social interaction,’ thereby enhancing ‘law’s importance at the expense of politics and historically grounded collective norms and customs.’ In so doing, however, Neo-Kantian liberalism ‘impoverishes the realm of social relations by reducing it to an arena of formal rights attaching to largely ahistorical and unduly abstract individual subjects.’\textsuperscript{20} These remarks suggest that Cornell, Rosenfeld and Carlson would consider Weinrib’s doctrine of legal formalism to be a specific example of Neo-Kantian liberalism, as the basic philosophical assumptions of the two doctrines, at least on Weinrib’s first account of it, are one and the same.

It is worth noting in this connection that Cornell, Rosenfeld and Carlson make a point of contrasting Neo-Kantian liberalism with the legal philosophy of Hegel, whereas Weinrib maintains, to the contrary, that Hegel is best thought of as being a proponent of legal formalism. It is also worth emphasizing that, given the account of the core principles of legal formalism presented above, Weinrib’s claim that Aristotle too is a legal formalist, indeed the first legal formalist in the history of Western philosophy, amounts in effect to the claim that it is legitimate to think of Aristotle as a

\textsuperscript{19}Weinrib, Legal Formalism, fn. 30, 958.

\textsuperscript{20}Drusilla Cornell, Michel Rosenfeld and David Gray Carlson, Introduction, \textit{in} Hegel and Legal Theory, x (Cornell, Rosenfeld and Carlson eds., 1991).
forerunner of contemporary Neo-Kantian liberalism, and that he too adopts an approach to questions of law which is premised on the assumptions of atomic individualism and ahistorical universalism. Not surprisingly a number of commentators have objected to this reading of Aristotle, just as they have objected to Weinrib’s reading of Hegel. One reason for this is the fact that when Weinrib suggests that we can read Aristotle in this way he appears to be guilty of the charge of historical anachronism. Another is that, according to Weinrib’s critics, it is simply not the case that Aristotle subscribes to the five core principles of legal formalism, as this doctrine is understood by Weinrib. In the next section I will consider the second of these criticisms in more detail by focusing on the work of Steven J. Heyman.

Part 2
Weinrib’s Legal Formalism and Aristotle’s Philosophy of Law

It remains to compare the philosophical assumptions of legal formalism, as understood by Weinrib, with the legal philosophies of Aristotle and Hegel, which in my view closely resemble one another. So far as Aristotle is concerned, Weinrib makes some interesting remarks about legal formalism and Aristotle’s views on natural and conventional justice. He correctly argues that it would be wrong to think of Aristotle as being exclusively a relativist, a legal positivist, or a conventionalist, that is to say somebody who rejects the notion of natural justice or law entirely. For in Aristotle’s legal thought ‘the intelligibility of juridical relationships is not merely a conventional opinion.’ \(^{21}\) Rather Aristotle’s principles of corrective and distributive justice are ‘perduring justificatory structures’ which (allegedly) can be found in all

\(^{21}\) Weinrib, Legal Formalism, 1012.
societies and at all times.\textsuperscript{22} Weinrib claims, however, again in my view rightly, that the different ways in which these two ‘forms of justice’ are ‘realized’ in the legal systems of particular societies and/or times, is ‘subject to the variations inherent in their public interpretation and application,’\textsuperscript{23} a task which is undertaken by positive law. Thus for Aristotle, as Weinrib again rightly understands him, the forms of justice, that is to say the fundamental principles of natural justice or law, ‘coexist’ (again immanently) within positive law together ‘with indeterminacies whose resolution can vary from time to time and from culture to culture.’\textsuperscript{24} Weinrib argues, therefore, that legal formalism, from the time of Aristotle though to that of Hegel, and down to the present, ‘gives voice to the most ancient aspirations of natural law theorizing by construing the law as permeated by reason.’\textsuperscript{25} As in the case of perhaps most traditions of natural law theorizing, legal formalists hold the view that the ‘paradigmatic legal function is not the manufacturing of legal norms but the understanding of what is intimated by juridical arrangements and relationships.’\textsuperscript{26} On this view the process in and through which law comes into being is ‘essentially cognitive.’\textsuperscript{27} As such, ‘it is most naturally expressed in adjudication conceived more as the discovery than as the making of law.’\textsuperscript{28}

\textsuperscript{22}Weinrib, Legal Formalism, 1012.
\textsuperscript{23}Weinrib, Legal Formalism, 1012.
\textsuperscript{24}Weinrib, Legal Formalism, 1012.
\textsuperscript{25}Weinrib, Legal Formalism, 1016.
\textsuperscript{26}Weinrib, Legal Formalism, 956.
\textsuperscript{27}Weinrib, Legal Formalism, 956.
\textsuperscript{28}Weinrib, Legal Formalism, 956.
Weinrib is quite right, I think, to suggest that the legal formalism of Aristotle might be associated with the notions of natural law, and natural law theory, in some sense of the term. However he is uncertain at times regarding the issue of what this involves. There are occasions when he appears to be suggesting that it implies that Aristotle must hold that there are certain ‘higher’ principles of justice or law which stand above positive law and which might be employed (presumably by individuals) as a critical standard for the evaluation of positive law from the point of view of its justice or injustice. At the very least he maintains that what he refers to as ‘the determinations of the legal system’ might be ‘adjudged confused or mistaken to the extent that they are inadequate expressions’ of legal form, that is to say, inadequate expressions of Aristotle’s principles of natural justice. It is arguable, however, that this view fails to take into account the fact that, for Aristotle, because the necessary ‘determinations’ of the abstract principles of natural justice to which Weinrib is referring here are carried out by positive law, or what Aristotle refers to as the principles of legal or conventional justice of a polis, it follows that in Aristotle’s opinion any decision made in respect of them is entirely arbitrary or contingent when considered from the moral point of view, or from the standpoint of natural justice. For Aristotle, therefore, it makes no sense to talk about one such determination being superior than or more ‘adequate’ than another on the grounds that it conforms more closely to the requirements of natural justice. Rather, Aristotle accepts that all such determinations by the positive law of different societies and cultures are equally valid. They are not better or worse than one another, merely different from one another. As I have argued elsewhere, this way of thinking about the relationship which exists between natural justice or law and positive law or political justice ensures that there is

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29Weinrib, Legal Formalism, 975, also 977.
an ‘uncritical’ or ‘conservative’ dimension to Aristotle’s legal philosophy which is not present in other types of natural law theory.\(^\text{30}\) I agree therefore with Weinrib’s (in the light of the above, admittedly somewhat surprising) comment that, so far as Aristotle is concerned, ‘the formalist understanding law is not the realization of a utopian project.’\(^\text{31}\) This seems to me to be correct. However, if it is correct then the reason why it is correct is again because Aristotle’s views are much closer to those of Hegel than they are to a figure like Kant or Plato.\(^\text{32}\) As again I have suggested elsewhere, for

\(^{30}\)For the evidence which supports these claims see Tony Burns, Aristotle and Natural Law, 19 History of Political Thought, 3, 142 (1998); The Tragedy of Slavery: Aristotle’s Rhetoric and the History of the Concept of Natural Law, 24 History of Political Thought, 1, 16 (2003); Sophocles’ Antigone and the History of the Concept of Natural Law, 50 Political Studies, 3, 545 (2002); Aquinas’s Two Doctrines of Natural Law, 48 Political Studies, 5, 929 (2000). See also Aristotle and Natural Law (2010 forthcoming) and Gabriela Remow’s critique of the thesis developed in these writings in an article entitled Aristotle, Antigone and Natural Justice, 29 History of Political Thought, 4, 585 (2008).

\(^{31}\)Weinrib, Legal Formalism, 1016.

Aristotle just as for Hegel, but emphatically not for Kant or Plato, ‘reason is the rose in the cross of the present.’

It is interesting to compare Steven J. Heyman’s ‘communitarian’ interpretation of Aristotle with the ‘Kantian-liberal’ interpretation of Aristotle which is associated with this first account of Weinrib’s legal formalism. For Weinrib does consider Aristotle to be a legal formalist as he understands the term. Such a comparison is especially interesting because Heyman considers his own reading of Aristotle to be directly opposed to that of Weinrib. He insists that ‘Aristotle does not support the formalist project,’ and that Aristotle’s views on justice and law, properly understood, are ‘fundamentally inconsistent with legal formalism as articulated by Weinrib.’ This is so because, according to Heyman, Aristotle rejects all five of the core beliefs associated with the ‘Kantian’ account of legal formalism presented above.

So far as the first of these beliefs is concerned, Heyman argues that in Aristotle’s view the subject of law is not an ‘abstract moral person’ but the individual citizen of a particular polis. Heyman concedes that the idea that the legal subject is an ‘abstract moral person’ is indeed central to the legal philosophies of Kant and Hegel. However he denies that this idea has a part to play in that of Aristotle. As Heyman puts it, ‘Aristotle provides an implicit account of the equality that characterizes corrective justice, an account based on equal citizenship in the political community. It is unnecessary therefore to supplement his account with one derived from the natural right theories of Kant and Hegel, who based juridical equality on the abstract equality

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33 Tony Burns, Aristotle, in Political Thinkers: From Socrates to the Present, 2nd ed. 83 (David Boucher & Paul Kelly eds., 2009).

34 Heyman, Corrective Justice, 863.

35 Heyman, Corrective Justice, 853.
of private individuals. Indeed, not only is this unnecessary, it is also unjustified. For in Heyman’s opinion, it is precisely because legal formalism endorses the ‘abstract conception of the equality of autonomous individuals’ which ‘lies at the basis of what Weinrib, following Kant and Hegel, refers to as private or abstract right,’ that its conception of freedom is ‘fundamentally different’ from that of Aristotle.  

Similarly Heyman denies that the notion of the ‘autonomy of law’ has any part to play in the legal philosophy of Aristotle. Indeed, to the contrary, he maintains that as a matter of fact Aristotle emphatically rejects the idea of a ‘rigorous separation’ of law and politics which Weinrib considers to be a defining characteristic of legal formalism, and that it is for this very reason that Aristotle’s views are fundamentally inconsistent with those advocated by Weinrib. Another way of putting this, Heyman maintains, is to say that it is impossible to clearly differentiate between the notions of private and public law in Aristotle’s thinking. Rather ‘law,’ or what Heyman refers to as ‘substantive justice,’ is ‘not an autonomous realm, but instead expresses the community’s view of justice and the common good.’ All of which is but another way of saying that for Aristotle, unlike for Weinrib and legal formalism, law just is ‘essentially political’ in ‘several respects.’ According to Heyman, then, Weinrib is mistaken when he suggests that for Aristotle corrective justice is a ‘system of right uninformed by a conception of the good.’ Indeed, in Heyman’s opinion, the very

36Heyman, Corrective Justice, 863.
37Heyman, Corrective Justice, 860.
38Heyman, Corrective Justice, 853.
39Heyman, Corrective Justice, 852, 853.
40Heyman, Corrective Justice, 852-53.
41Heyman, Corrective Justice, fn. 39, 856.
opposite is the case. Far from being a theorist of ‘the right’ as opposed to that of ‘the good,’ Aristotle is in fact a theorist of ‘the good’ as opposed to that of ‘the right.’ For all of these reasons then, or in all five of these areas, Heyman claims that Weinrib has not properly understood Aristotle’s views. As we have seen, however, the beliefs which Weinrib attributes to Aristotle with respect to these five issues are the hallmarks of legal formalism as Weinrib understands it. Indeed it is precisely because, in his judgment, Aristotle holds these five beliefs that Weinrib considers Aristotle to be the very first legal formalist. It is not at all surprising then that Heyman should deny that this is the case and arrive at the opposite conclusion, namely that Aristotle is best thought of as some kind of ‘communitarian’ thinker, rather than as a distant forerunner of the Kantian philosophy of law, which rests upon quite different, indeed opposed, philosophical assumptions from those of Aristotle.

What are we to make of this disagreement between Weinrib and Heyman over the interpretation of the views of Aristotle? It might be suggested here that although there is at least something to be said for each of these readings of Aristotle nevertheless neither of them is entirely correct. Neither of them adequately captures Aristotle’s views on justice and law, especially his view of the relationship which exists between natural law and positive law. Heyman is, I think, right to object to the atomic individualism and ahistorical universalism of the doctrine of legal formalism, as Weinrib understands it at least some of the time. That is to say, he is right to object to the Kantian reading of Aristotle which Weinrib occasionally appears to endorse. Such a reading overlooks those beliefs of Aristotle to which Heyman quite rightly attaches importance. No interpretation of Aristotle which overlooks the points which Heyman makes could possibly be adequate. I take it that this is another way of saying that Aristotle’s views are much closer to those of Hegel than they are to those of Kant.
and that this is overlooked by Weinrib, precisely because he focuses on the similarities and does not attach sufficient importance to the differences which exist between the outlooks of Kant and Hegel.

On the other hand, though, it is arguable that Heyman takes a good idea much too far. So keen is he to criticize the views of Weinrib that he succumbs to the temptation to go to the opposite extreme. In effect Heyman interprets Aristotle as being someone who exclusively embraces the standpoint of ethical conventionalism as opposed to that of ethical naturalism. In Heyman’s view, Aristotle’s basic philosophical assumptions are those of a positivist, a particularistic and an historicist of some kind. Aristotle therefore rejects completely the rationalistic, ahistorical and universalistic philosophical assumptions which are usually associated with natural law theory, as it is commonly understood. Against this it might be argued that, like Hegel after him, Aristotle’s intention was in fact to provide a theoretical synthesis of these two opposed but equally one-sided theoretical positions, which are usually considered to be logically incompatible with one another. This was indeed Aristotle’s contribution to the ‘naturalism versus conventionalism debate’ in ancient Athens. 42

This amounts to saying that Aristotle is indeed a ‘natural law theorist’ of some kind. However, like Hegel, Aristotle is not to be placed in the individualistic tradition of

natural law speculation which can be traced from the Stoics down to Kant, and on to the present, but rather within a distinctive communitarian natural law tradition which rightly bears his name.\textsuperscript{43} There are times when Weinrib perceives this. However, the views associated with this perception are not logically compatible with the five assumptions associated with the Kantian understanding of legal formalism outlined above, assumptions to which Weinrib is also committed.

**Part 3:**

**Weinrib’s Legal Formalism as a Pseudo-Hegelian Project**

We have seen that there is evidence to support the view that Weinrib’s legal formalism might legitimately be characterized as a Kantian enterprise. On the other hand though, there are also occasions when Weinrib associates legal formalism not only with the name of Kant but also with that of Hegel. Indeed, there are times when Kant drops out of the picture altogether and Weinrib appears to identify the standpoint of legal formalism \textit{exclusively} with that of Hegel and the Hegelian philosophy of law. For example at one point he states that his own understanding of the relationship which exists between Aristotle’s corrective justice and the modern law of torts ‘draws heavily,’ not on the philosophy of Kant, but on ‘Hegel’s \textit{Philosophy of Right}.’\textsuperscript{44} He also suggests that ‘in Hegel’s legal philosophy, what Aristotle calls corrective justice appears as abstract right.’\textsuperscript{45} Elsewhere Weinrib maintains that ‘Hegel’s account of

\textsuperscript{43}For some remarks about Aristotelianism as a distinctive tradition in the history of legal philosophy see Tony Burns, Aristotelianism, in The Sage Encyclopaedia of Political Theory (Bevir ed., 2010 forthcoming).

\textsuperscript{44}Weinrib, Legal Formalism, fn 73, 982-83.

\textsuperscript{45}Weinrib, Corrective Justice, 423.
abstract right is the most sustained attempt in Western legal philosophy to capture the distinctive rationality of private law.'  

46 The ‘treatment of abstract right at the beginning of Hegel’s Philosophy of Right is,’ he says, ‘the purest and most uncompromising account of private law from the perspective of right.’  

47 Moreover, in his view, many of those who write about this subject today ‘mistake the significance of private law’ precisely because ‘they ignore Hegel’s abstract right.’  

48 Weinrib insists that ‘the centrality of rights in current legal discourse’ guarantees ‘the continuing relevance of Hegel’s philosophy of right,’ and that ‘if the contemporary analysis of private law is truly to take rights seriously, it will,’ again, ‘have to come to terms’ with Hegel’s doctrine of ‘abstract right.’  

49 Moreover, given that Weinrib associates Aristotle’s doctrine of corrective justice with the concept of natural law, and therefore locates Aristotle within the natural law tradition, this implies of course that he would place Hegel’s doctrine of ‘abstract right’ within that tradition also. Now in one sense there can in my view be no objection to this. Indeed I have myself argued in the past along precisely these lines.  

46 Ernest Weinrib, Right and Advantage in Private Law, 10 Cardozo L. Rev. 1283 (1989), 1308.  

47 Ernest Weinrib, Right and Advantage in Private Law, 10 Cardozo L. Rev. 1283 (1989), 1286.  

48 Ernest Weinrib, Right and Advantage in Private Law, 10 Cardozo L. Rev. 1283 (1989), 1286.  

49 Weinrib, Right and Advantage in Private Law, 1309.  

50 Tony Burns, Hegel and Natural Law Theory, in Natural Law and Political Ideology in the Philosophy of Hegel, 42-74 (1996); Hegel and Natural Law Theory, 15 Politics, 1, 27 (1995); and Metaphysics and Politics in Aristotle and Hegel, in A. Dobson and
The really important issue here is not so much whether it is fruitful to consider Hegel’s legal thought as representing a certain kind of natural law theory but rather, more specifically, with which kind of natural law theory, or with which specific natural law tradition, ought Hegel to be associated? Is this, as Weinrib occasionally suggests, the Kantian liberal tradition which can be traced back to the Stoics, or is it rather, as I believe, the more communitarian natural law tradition which runs from Aristotle through the writings of medieval scholastics such as Aquinas down to the present?\(^5\)

Given that Weinrib does say such things about Hegel and legal formalism from time to time it is not too surprising that at least some commentators, for example David A. J. Richards and Lawrence G. Sagar, have concluded that legal formalism is essentially an *Hegelian* rather than a Kantian enterprise.\(^6\) At first sight, therefore, there appears to be an inconsistency in Weinrib’s account of legal formalism and its relationship to the views of Kant and Hegel respectively. The significance of this is especially marked for critics like Alan Brudner who, unlike Weinrib, consider the

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\(^5\) Burns, Aristotle and Natural Law; Aquinas’s Two Doctrines of Natural Law; Aristotle and Natural Law (2010 forthcoming)

Kantian and the Hegelian philosophies of law to be opposed to one another with respect to at least some fundamentally important issues.\footnote{Alan Brudner, Hegel and the Crisis of Private Law, 10 Cardozo L. Rev. 949-1000 (1988-89). (Hegel and Legal Theory Symposium, I); Alan Brudner, Weinrib’s Formalism, in The Ideality of Difference: Toward Objectivity in Legal Interpretation, 11 Cardozo L. Rev. 1133-1210 (1990), 1168-80. See also Ernest J. Weinrib, Professor Brudner’s Crisis, 11 Cardozo L. Rev. 549 (1990) and Alan Brudner, Professor Weinrib’s Coherence, 11 Cardozo L. Rev. 553 (1990).}

At first sight it is not clear whether this inconsistency in what Weinrib says about legal formalism is real or whether it is merely apparent, and can therefore be resolved by further clarification of Weinrib’s beliefs. In the next section I will consider the view that this inconsistency is real. In the remainder of this section I shall examine the suggestion it is merely apparent and easily resolved. Here the solution is a simple one. Not surprisingly, Weinrib argues here that the views of Kant and Hegel are in fact logically compatible with one another, and that Hegel is in effect himself a Kantian thinker with respect to the issues with which the doctrine of legal formalism deals. For example Weinrib claims that both Kant and Hegel place the notion of the ‘abstract moral person’ at the heart of their respective philosophies of law. In their case also, therefore, ‘the equality of corrective justice is the abstract equality of free purposive beings.’\footnote{Weinrib, Corrective Justice, 404.} According to Weinrib, then, whatever the disagreements between Hegel and Kant might be with respect to other issues, so far as this particular issue is concerned there is no disagreement between them at all. However, in Weinrib’s opinion, this is the most significant issue so far as the doctrine of legal formalism is
concerned. Hence we are justified in associating both Kant and Hegel with legal formalism.

It seems to me, however, that Weinrib’s views on this subject are open to a number of decisive criticisms which, in the end, undermine his claim that the views of Hegel and those of Kant are fundamentally the same so far as the questions with which legal formalism deals are concerned. For example, as Alan Brudner has noted, at the most general level Weinrib’s reading of Hegel tends to ignore the fact that Hegel’s views on law and politics are informed by the basic assumptions of his metaphysical system, and need to be related to the theoretical categories of Hegel’s general philosophy if they are to be properly understood. According to Brudner, ‘Weinrib’s difficulties stem from his indifference to the metaphysical grounding’ of the view of law expressed in Hegel’s *Philosophy of Right*, ‘an indifference he apparently regards as no obstacle to understanding the text.’

\[55\] In Brudner’s view Weinrib ‘neither accepts nor rejects Hegel’s ontology,’ when discussing questions of private law. Rather, ‘he simply ignores it.’

\[56\] In Brudner’s view, then, although Weinrib’s acknowledgement of the contemporary relevance of Hegel’s philosophy of law is certainly something to be welcomed,

\[57\] nevertheless there are serious doubts

\[55\] Brudner, Professor Weinrib’s Coherence, 558.

\[56\] Brudner, Professor Weinrib’s Coherence, 554.

\[57\] Although critical of one another so far as the specifics of Hegel’s philosophy are concerned, both Weinrib and Brudner approve of the recent revival of interest in Hegel by legal philosophers. For this see in particular Peter Benson, Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory, 10 Cardozo L. Rev. 1077 (1989) (Hegel and Legal Theory Symposium); and Peter Benson, The Priority of Abstract Right and
surrounding Weinrib’s understanding of Hegelian metaphysics. Nor, it might be added, does Weinrib acknowledge the significance of the similarities which exist between Hegel’s metaphysical beliefs and those of Aristotle.\(^{58}\)

Indeed the weaknesses of Weinrib’s understanding of Hegel become readily apparent if one compares the basic principles of Hegel’s philosophy of right with the account of legal formalism presented above. For example, with respect to the issue of legal subjectivity, it is not at all clear that the role which the notion of an ‘abstract moral person’ plays in Hegel’s philosophy of law is the same as that which it plays in the thinking of Kant. This view overlooks the fact that for Hegel, just as for Aristotle, the individual legal subject is always a complex or ‘concrete’ entity, only one of the component parts of which is an ‘abstract moral person.’ Moreover, as again Brudner has noted, Weinrib’s reading of Hegel also overlooks the architectonic structure of the argument which Hegel develops in his *Philosophy of Right*. That is to say, it takes Hegel’s remarks about abstract ‘moral personality’ in Part One of that work out of context and fails completely to take into account the fact that, for Hegel, the standpoint of ‘abstract right’ discussed in Part One is later surpassed or sublated by that of ‘ethical life’ in Part Three, when the fundamental principles of abstract right

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**Constructivism in Hegel’s Legal Philosophy**, in *Hegel and Legal Theory*, 174-204 (Drusilla Cornell et. al. eds, 1991). This last is an edited collection of the proceedings of a conference devoted to Hegel and Legal Theory which were first published in 1989 in a Special Issue of Cardozo L. Rev. Benson’s understanding of Hegel is somewhat similar to that of Weinrib.

\(^{58}\)For this issue see Tony Burns, Metaphysics and Politics in Aristotle and Hegel; also *Natural Law and Hegelian Metaphysics*, in *Natural Law and Political Ideology in the Philosophy of Hegel*, 66-74.
are both surpassed and preserved by being transformed into concrete principles of positive law, and where the legal subjectivity of the abstract moral ‘person’ is again both surpassed and preserved by being transformed into that of the citizen of a particular historical community.

Similar remarks might be made about all four of the other core principles which Weinrib associates with legal formalism. For instance it is not at all clear that Hegel shares Kantianism’s belief in the ‘autonomy of law,’ its belief in the ‘rigorous separation’ of law from politics, of private law from public law, or of the ‘form’ of law from its substantive ‘content.’ Nor is it clear that Hegel rejects the view that law is ‘essentially political,’ or that he is exclusively a philosopher of ‘the right,’ as opposed to being a philosopher of ‘the good.’ With respect to all five of the beliefs which Weinrib uses to characterize legal formalism, it is arguable that although Kant did indeed endorse the beliefs in question, Hegel did not. Thus Hegel is not a legal formalist as Weinrib understands that expression, at least on the first Kantian understanding of that doctrine outlined earlier. It is arguable, therefore, that Weinrib is only able to bring Hegel into the camp of legal formalism by misrepresenting his position with respect to all five of these issues. In effect Weinrib reads Hegel (wrongly) as if he uncritically endorsed Kant’s philosophy of law as a whole rather than just certain selected aspects of it.

Part 4:
Weinrib’s Legal Formalism as an Authentically Hegelian Project

I suggested earlier that there are two ‘Weinibs,’ that is to say two quite different, indeed mutually incompatible, accounts of legal formalism in Weinrib’s writings, one of which might be characterized as being Kantian and the other as being Hegelian. I
discussed the first of these in Parts 1 and 3 of this paper. Here I turn to consider the second. We have seen that although Weinrib does associate Hegel with legal formalism, and does occasionally suggests that he thinks that legal formalism is an Hegelian project, nevertheless there is some doubt as to whether this is indeed the case, just as there is some doubt about the adequacy of the Weinrib’s understanding of the relationship which exists between Hegel’s views on law and politics and his general philosophy. In short there is evidence to support the view that, despite Weinrib’s occasional claims to the contrary, his doctrine of legal formalism is best seen as a Kantian and not an authentically Hegelian project. On the other hand, though, Weinrib’s remarks about legal formalism are not entirely consistent with one another. For there are times when he says things which do genuinely support his claim that legal formalism is best understood by reference to the philosophy of Hegel rather than to that of Kant. The most significant feature of Weinrib’s account of legal formalism here are the remarks which he makes about the relationship which exists between the ‘form’ or law and its substantive ‘content.’

As we have seen a Kantian, as opposed to an Hegelian, understanding of legal formalism would take the view that it is possible for us to draw a ‘rigorous separation’ between questions of law and questions of politics, or between the ‘form’ of law and its substantive ‘content.’ A Kantian philosophy of law is interested in questions relating to the form of law only and not at all in questions relating to content. It is for this reason that (rightly or wrongly) Kantianism is so often associated with the notion of an ‘empty formalism.’ When discussing this issue, however, there are times when Weinrib explicitly rejects the view that legal formalism, in the specific sense in which he understands the term, is of this kind. At one point, for example, he insists that legal

59Weinrib, Legal Formalism, 958-61.
formalism, as we find it in the writings of Aristotle, is ‘by no means empty.’

Moreover, at least some of the remarks which Weinrib makes about the relationship which exists between the form of law and its substantive content are authentically and recognizably ‘Hegelian’ in spirit (sic). For example at one point he states that ‘form and content are not separate [my emphasis - TB]. Rather, they stand in a reciprocal relationship, with form being the intelligibility of determinate content and content being the realization of intelligible form.’ And elsewhere he maintains that for legal formalists ‘form and content are correlative and inter-penetrating. If any content were formless, it would lack the very determinateness which makes it possible of us to experience it as a something, and it would therefore be, so far as we are concerned, an indeterminate something or other that is nothing in particular. If a form, on the other hand, were without a content, it would not be a form of anything, and therefore not a form at all.’

Couched in these terms, which are indeed ‘Hegelian’ in spirit, Weinrib’s remarks are evidently somewhat obscure. However, once it is remembered that in his view questions of ‘form’ relate to matters of law and of ‘the right,’ as opposed to matters of politics and of ‘the good’; whereas those of ‘content’ refer to matters of politics and the good, as opposed to matters of law and the right, then their significance is readily apparent. For it then becomes clear that a logical implication of these remarks about the form and content of law is that law and politics, or private law and public law, cannot in Weinrib’s view be ‘rigorously separated’ (that is to say, completely separated) from one another after all. Moreover, on this view it follows

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60 Weinrib, Corrective Justice, 404.

61 Weinrib, Legal Formalism, 966.

62 Weinrib, Legal Formalism, 959.
that law properly understood is after all ‘essentially political’ (that is to say
necessarily contains a political component). Thus legal formalists, at least on this
second reading of Weinrib’s understanding of that doctrine, reject the principle of the
‘autonomy of law.’ In other words what Weinrib says about the doctrine of legal
formalism in these remarks about the form and content of law is entirely at odds with
what he says about legal formalism elsewhere. If these views can legitimately be said
to characterize a certain way of thinking about legal formalism then it follows that
there are two quite different (and indeed opposed) versions of that doctrine, one of
which is Kantian and the other Hegelian in terms of its fundamental philosophical
inspiration. These two accounts sit together uneasily side by side in Weinrib’s
writings.

The difference between these two ways of thinking about legal formalism can
be summarized by saying that for the latter, but nor for the former, what Weinrib
refers to as the ‘forms of justice,’ specifically in relation to the two spheres of
corrective justice and distributive justice, are immanent rather than entirely
transcendent principles of law. They subsist immanently within the principles of
positive law of a particular society, and therefore constitute one of the component
parts of positive law. Moreover given their character as immanent principles of justice
they do not, in Weinrib’s view, ‘operate in detachment from society or from
history.’ 63 They are, therefore, emphatically ‘not to be conceived as having an
existence parallel to, but separate from, the existence of human interaction [my
emphasis – TB].’ 64 Thus, far from there being a ‘rigorous separation’ between law and
politics, or between the form of law and its substantive content, on this second

63 Weinrib, Legal Formalism, 1003.
64 Weinrib, Legal Formalism, 1002, 1011-12.
account of legal formalism Weinrib holds that law is emphatically ‘not unconnected’ to ‘positivity and history.’ Indeed, according to Weinrib, when ‘comprehending the social and historical arrangements established by positive law as the possible expressions of a coherent legal order’ legal formalism ‘does not,’ on this second view, ‘ignore the history, positivity and social reality of law.’ Rather, it ‘claims to be their truth.’ This Hegelian understanding of legal formalism may be contrasted with the Kantian understanding presented earlier because, as Weinrib puts it, according to the latter the two fundamental ‘forms of justice,’ which operate within the spheres of corrective and distributive justice respectively, are ‘categories of legal philosophy’ and ‘not ingredients of positive law [my emphasis – TB].’ As such they ‘exhibit the structures of justification latent in a sophisticated legal system’ without ‘being themselves necessarily parts of it.’ So if on the Kantian account the hallmark of legal formalism is the principle of ‘ahistorical universality,’ or of what might be referred to as ‘form without content,’ by way of contrast, according to the Hegelian understanding of this same doctrine, it is that of ‘form with a variable content.’ That is to say, unlike in the case of Kant’s philosophy of law, according to the Hegelian understanding of legal formalism the substantive content which is given to the formal principles of justice is thought of as being provided, not by reason alone, but at least in part by society, by culture and by history, that is to say by custom and tradition.

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65 Weinrib, Legal Formalism, 1012.

66 Weinrib, Legal Formalism, 1012.

67 Weinrib, Legal Formalism, 987.

68 Weinrib, Legal Formalism, 1011.
Conclusion

We saw earlier that Weinrib is of the opinion that Aristotle is an advocate of legal formalism. However, given that Weinrib offers not one but two different accounts of this doctrine, one Kantian and the other Hegelian, it is a legitimate question to consider which of these is closest to the legal philosophy of Aristotle. I have argued that the legal formalism of Aristotle as Weinrib understands it, at least on occasion, has much more in common with that of Hegel than it does with that of Kant. What seems to me to be remarkable about Weinrib’s account of legal formalism is the fact that he does not see that, with respect to at least some issues, the Kantian and the Hegelian versions of that doctrine, both of which can be found in his writings, flatly contradict one another.

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