

How Law Is Formal and Why It Matters

Robert S. Summers

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HOW LAW IS FORMAL AND WHY IT MATTERS†

Robert S. Summers‡

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INTRODUCTION

So far as I have been able to determine, the literature of Western jurisprudence and legal philosophy lacks any comprehensive and systematic treatment of the formal character of law in developed societies.¹ Later in this Article, I will explain at length what I mean by "the formal character of law." For now, I will merely suggest what I mean. By "the formal character of law," I mean first, that rules and other legal precepts, basic functional elements of law such as legislatures and courts, and the legal system taken as a whole, are all formal in the sense that, in their very existence, they conform to accepted conceptions of their essential forms.² For example, for a precept to conform to the essential form of a rule, it must be at least minimally prescrip-

¹ This is a further preliminary formulation of my general thesis that one of the fundamental characteristics of law is that it is formal. This and the prior formulations set forth themes that will be developed much more fully in a book I am writing. A reader who turns to the earlier versions will see that I have altered some of my earlier views considerably, and that my overall thesis is in the course of evolution. See Robert S. Summers, *The Formal Character of Law*, 51 *CAMBRIDGE L.J.* 242 (1992); Robert S. Summers, *Der formale Charakter des Rechts II*, 80 *ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE* 66 (1994); Robert S. Summers, *The Formal Character of Law III*, 25 *RECHTSLEHRE* 125 (1994); see also Robert S. Summers, *The Juristic Study of Law's Formal Character*, 8 *RATIO JURIS* 237 (1995); Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 *RATIO JURIS* 127 (1993).

I am much indebted to several established scholars in the U.S.A., in Great Britain, in Germany and elsewhere for ideas, stimulation, and encouragement, including especially Professor Dr. Okko Behrends of the University of Göttingen and Professor D. Neil MacCormick of the University of Edinburgh. In my forthcoming book, I will record these substantial debts, and my gratitude, in full. For now, I wish to thank my secretary, Mrs. Pam Finnigan, and my most recent student assistants and graduate students: Marshal Grant, Cornell Law School Class of 1996; James Hannon, Cornell Law School Class of 1996; Eric Jacobs, Cornell Law School Class of 1997; Matthew Michaels, Cornell Law School Class of 1997; Donald Stepka, Cornell Law School Class of 1997; and Laura McClellan, Cornell Law School Class of 1998. In addition, Andrew Siff, Cornell Law School Class of 1997; Ted McCutcheon, Cornell Law School Class of 1998; and Mitchell Wong, Cornell Law School Class of 1998 have been especially helpful. I also wish to thank a graduate student who was at Cornell during 1996, Okko Hendrik Behrends, for discussion of themes in the Article. In addition, I wish to record my special indebtedness to the faculty of the University of Florida College of Law for their contributions to my thinking about the formal character of law. On November 19, 1992, April 12, 1995, and March 21, 1996, I conducted research seminars on various aspects of this subject with this faculty, and on March 22, 1996, I gave the Dunwoody Distinguished Lecture in Law at the University of Florida on this subject.

² Though I use the expression "essential form," I do not intend to take sides in the ancient nominalist-realist debate, nor do I mean to commit myself to any one model for the analysis of concepts.

tive, minimally general, definite, and complete. But beyond this most fundamental sense of "formal" in which legal phenomena at least minimally satisfy their defining essential forms as accepted in the society, these phenomena are formal in still other ways.

Prescriptiveness, and some degrees of generality, definiteness, and completeness are defining features of rules. Yet, in rules actually created, such features typically go beyond the essential definitional minimum. Such defining features and their extra-essential elaborations and variations are also formal in the further basic sense that they are structural. These features together structure the form and content of a rule. But some formal features of rules are not defining features. For example, the degree of simplicity (or complexity) of a rule is not a defining feature. Yet, it is a formal feature in the sense that it, too, is structural. Rules are also formal in their mode of encapsulation: some take common law form, some statutory form, some constitutional form, and so on. Thus, features of rules are formal in the foregoing three senses: "essentially," structurally, and encapsulatorily. Rules are formal in still further distinct senses that I will explain.

At the same time, all other phenomena of the law besides rules and other precepts are likewise formal in various senses apart from their conformity to accepted minimal essential forms. For example, basic functional elements of a legal system such as legislatures and courts are formal in the sense that they, too, have structural features. They are formal in the sense that they have procedural features. They are formal in the sense that their institutional features overall are relatively definitive. They are formal in the sense that they are, to an extent, fixed according to rules or other precepts, and so, are "preceptually" formal. Similar truths also apply, *mutatis mutandis*, to a legal system considered as a functioning whole. A legal system is formal in its structure, in its coherence, and in its methodical nature. In sum, the phenomena of law are formal, in various senses which are all well-established in the English language. Thus, as I will demonstrate, formality is a pervasive, varied, and complex general characteristic of law. Moreover, the formality of law in all its varieties poses countless choices of form in the construction and operation of any legal system, choices that implicate not merely problem-specific policies, but also fundamental political values, general legal values, equitable considerations, private preferences, and more.

Because form in the law is a means to such ends, it may or may not be appropriate to those ends. In a particular rule or in a basic functional element such as a court, a formal feature may be ill-designed and so, inappropriate. But it does not follow that "form," "formal," "formality," and "formalism" generally have pejorative meanings in the English language, or even in legal usage. They do not. Yet

some inhabitants of the American legal academy tend not to differentiate between the formal and the formalistic. They also tend to collapse the formal into the formalistic, and frequently end up using "form," "formal," "formality," and "formalism" pejoratively.³ I do not follow them here.

In relation to rules, specific phenomena of law such as legislatures and courts, and the system as a whole, I use form and its derivatives neither pejoratively nor honorifically, but neutrally. However, I do distinguish between form that is appropriate and form that is inappropriate, in light of the ends to be served and other factors. Plainly, within a particular system, a particular formal feature may at a given time be inappropriate. Thus, such a feature may be overformal, and so formalistic; or it may be underformal, and so substantivistic; or it may be malformed in some other way. What is, or is not, appropriate form is a complex question. But it is certainly true that "more formal" does not necessarily translate into "appropriately formal," and "less formal" does not necessarily translate into "inappropriately formal." I wish at the outset to make clear, too, that I do not embrace pre-realist formalism.⁴

This, however, is primarily a jurisprudential article, and I will not concern myself with issues of legal reform, i.e., with reforming the formalistic, or the substantivistic, or whatever, in any particular system. Nor will I be concerned with comparing two or more systems in overall degrees of formality.⁵ Rather, my focus will be on formality as a general characteristic of law in Western systems of law, more particularly, in Anglo-American and Western European systems, for these are the systems with which I am most familiar. My main questions will be these: How is law formal? What are the main varieties of formality in law? Why is appropriate form in the law important? Of course, I do not hold that appropriate form in the law is all that is required for law to be good and effective. Substantive policy and other values must play major roles. So, too, must societal attitudes of agreement, acceptance, and acquiescence in the law's methodology and its operation. Also, a legal system requires trained personnel, material resources, knowledge, language, and more. Thus, there is obviously much more to an effective legal system than form. But form is indispensable, and it may even be said that it is appropriate form that binds all the requisite ingredients into operational law.

³ See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *passim* (1990); Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, *passim* (1975).

⁴ See ROBERT S. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 136-75 (1982) (explaining and criticizing pre-realist formalism at length).

⁵ For such an effort, see generally P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987) (comparing U.S. and U.K. legal systems).

To my knowledge, no Western legal theorist has ever given due credit to the formal character of law.⁶ Even the European and British

⁶ The general thesis that one of law's fundamental characteristics is that it is formal in character, has not, so far as I am aware, been the subject of any extended systematic study in English, German, French, Italian or Spanish. My Scandinavian colleagues tell me the same is true of their literature. The formal character of law is not the thesis of ATYAH & SUMMERS, *supra* note 5. Rather, in that book, Professor Atiyah and I identified a variety of types of formality in law and compared their differing manifestations in the English and American systems, and offered explanations for the differences. In that book, we also used a different typology of form from that which I use here. We did, however, treat tangentially much that is relevant to my present thesis, and I am, accordingly, indebted to that work and to Professor Atiyah as well. My own first published work on themes associated with law's formal nature is: Robert S. Summers, *Working Conceptions of "The Law,"* 1 L. & PHIL. 263 (1982).

In my thinking about the formal character of law, I have found the writings of the nineteenth-century German jurist, Rudolf von Jhering, to be the most useful. See 2 RUDOLF VON JHERING, *GEIST DES RÖMISCHEN RECHTS* (Darmstadt 1993) [hereinafter JHERING, *GEIST*]; RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* (Isaac Husik trans., 1913) (1903) [hereinafter JHERING, *LAW AS A MEANS*]. I have also found certain works of Max Weber useful, especially in avoiding pitfalls. See MAX WEBER, *CRITIQUE OF STAMMLER passim* (Guy Oakes trans., 1977) (1907).

There are important jurisprudential works that address in a general way one or more facets of law's formal character without advancing a general thesis to that effect. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW passim* (2d ed. 1994); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE passim* (Anders Wedberg trans., 1945) (1905); HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY passim* (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992) (1934); see also LON L. FULLER, *THE MORALITY OF LAW passim* (2d ed. 1969) (addressing one major facet of the formal character of law, namely, the principles of legality (often also called the rule of law)).

This is not to say there are no jurisprudential books with such words as "form" or "formal" in the title! There are. See, e.g., THOMAS ERSKINE HOLLAND, *ESSAYS UPON THE FORM OF THE LAW* (1870); GIORGIO DEL VECCHIO, *THE FORMAL BASES OF LAW* (John Lisle trans., 1914). The first of these works is in the Benthamite spirit and advocates that law be expressed largely in statutory or code form. The second book, especially at pages 68-125, addresses what the author calls "the logical form of law" and a "formal analysis of the concept of law," but one does not find a systematic and extended development of the varieties of form in law and how they matter.

There are various jurisprudential works on "legal formalism," a phrase that, like the word "formal," is sometimes used pejoratively. See *supra* note 3. One theorist who does not use the word formal pejoratively is Professor Ernest Weinrib. See, e.g., Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950-57 (1988) [hereinafter Weinrib, *Legal Formalism*]; Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 583, 583-89 (1993) [hereinafter Weinrib, *Jurisprudence*]. Professor Weinrib describes the "project of legal formalism" in these terms: "Formalism is a theory of legal justification. As a theory of *justification*, formalism considers law to be not merely a collection of posited norms or an exercise of official power, but a social arrangement responsive to moral argument." Weinrib, *Jurisprudence, supra*, at 583. My own work on the formal character of law, while not inconsistent with some aspects of the foregoing formulation, nevertheless differs in major ways. First, one of Professor Weinrib's primary aims is to refute a thesis of the Critical Legal Studies Movement (the inseparability of law and politics). See Weinrib, *Legal Formalism, supra*, at 950-52. My thesis is not so motivated. Second, Weinrib views form as including the full "ensemble of characteristics that constitute" law. *Id.* at 958. My thesis focuses on formality as one basic overall characteristic of law, and within that focus treats a number of varieties of formality in addition to what I call essential form. I focus on the conceptual and descriptive far more than he does. Third, Weinrib uses as fundamental units of analysis such notions as "juridical relationship," "immanent

positivists, whose interests have been more formal than other theorists, have failed to address this subject systematically and in depth. I believe that one major explanation for the neglect of law's formal character in Western jurisprudence is that we have never enjoyed a satisfactory conceptual account of what it is in law that is truly formal.⁷ With such an account, we would be in a better position to see form in the law for what it is, and to give it its due. To some, this explanation might seem quite implausible, for whatever the extent and importance of form in the law, this must be right in front of us for everyone to see. Yet, no less a figure in twentieth-century philosophy than Ludwig Wittgenstein stressed that:

The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something—because it is always before one's eyes.)⁸

rationality," "intelligibility," and "coherence." *See id. passim*. My own fundamental units of analysis are quite different. Fourth, Weinrib generally resists conceiving of law in instrumentalist terms. *See id.* at 966-72. While I criticize crude instrumentalism, I treat appropriate form as an indispensable means to policy and other values.

There is also a large body of books and legal periodical literature addressed partly to specific aspects of the role of form in law. Some of these books are highly illuminating. *See, e.g.*, FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* 27-56 (1996); FULLER, *supra*, *passim*; FREDERICK SCHAUER, *PLAYING BY THE RULES* *passim* (1991). Professor Schauer's book may be the best book ever written on rules. While much of what I now say and will say in my book about rules is compatible with his work, there are major differences. For example, I emphasize more than he does the perspective of citizens and others on the front lines of human interaction who must apply rules in advance of and in the absence of particular disputes. I also give more of a place than he does to what I call general legal values (for him, "formal values") in response to charges of "rule-worship." *See* SCHAUER, *supra*, at 132-33, 135-66. Further, I attempt to provide a more systematic and comprehensive account of how rules are formal than he does. For example, I treat in detail the "internal" formal features of rules: generality, definiteness, completeness, simplicity (complexity), and more. One (but not the only) additional difference is that I treat empirical generalizations (e.g., "dogs annoy restaurant patrons") as merely one source of the substantive content for legal rules.

In addition to various articles by the law trained on form, formality, and formalism, which I have not sought to catalog here, there are articles by persons trained in economic analysis of relevance to the formal character of law. *See, e.g.*, Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Werner Z. Hirsch, *Reducing Law's Uncertainty and Complexity*, 21 UCLA L. REV. 1233 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

⁷ The subject is a conceptual minefield. *See, e.g.*, DEL VECCHIO, *supra* note 6, at 113 ("No word is understood in so many ways as the word form."); WEBER, *supra* note 6, at 79 ("As everyone knows, there is no expression more ambiguous than the word 'formal' and no dichotomy more ambiguous than the distinction between form and content.") Some published accounts of form in the law are also distortions. *See, e.g.*, Kennedy, *supra* note 3, at 355-60 (describing formality as mechanical adherence to rigid rules).

⁸ LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 129, at 50 (G.E.M. Anscombe trans., 1953).

Wittgenstein also entered a general plea for “insight into what lies in front of everyone’s eyes.”⁹ In this Article, I seek to identify, to remind us of, to explicate, and to characterize the familiar so that we may recognize formality for what it is, understand it more fully, appreciate it better, and ultimately, give it its due. As Oliver Wendell Holmes, Jr. once emphasized, what we often need is not “investigation of the obscure,” but rather “education in the obvious.”¹⁰

Some, perhaps many, readers will find, in the end, what I characterize as formal in the law to be quite obviously formal. But even for these perceptive analysts, some of what I say may not be quite so obvious, at least *at the outset* (and the outset is what Wittgenstein and Holmes had in mind). In particular, the variety of senses of the word formal applicable to law may not be quite so obvious. Precisely how one or more of these senses applies to rules, institutions, and other legal phenomena may not be quite so obvious. Also, the overall cumulative effect of applying these senses of formal to the phenomena of law—the aggregate quantum of form in law—may not be quite so obvious. Further, the extent of credit that should be given to appropriate form in working the law’s will may not be quite so obvious. In addition, the interplay between the formal and the non-formal may not be quite so obvious. And that form and substance do not exhaust the ingredients of law may not be quite so obvious.

The overall place of form in the law and the credit to be given it has not totally escaped all legal theorists. For me, the work of the great nineteenth-century German thinker, Rudolph von Jhering of the University of Göttingen, has been the most suggestive. He saw that form is grounded in the innermost essence of law (“im innersten Wesen des Rechts begründet”),¹¹ and he appeared to think that form can be found all over the law.¹² Although he did not develop these theses, he was right. Of course, if form is “grounded in the innermost essence of law” and if form is to be found all over the law, this will embarrass those legal theorists who are extreme substantivists. These theorists use the words “form” and “formal” pejoratively, and find little place for appropriate form in the law. But law’s formal character ought not to trouble the moderate substantivist who insists merely on seeing that substance gets its due. Appropriate form and due substance can and should co-exist (though even these together are by no means enough for law to exist, let alone work its will).

⁹ LUDWIG WITTGENSTEIN, *VERMISCHTE BERMERKUNGEN* 121 (1977) (translation my own).

¹⁰ OLIVER WENDELL HOLMES, JR., *COLLECTED LEGAL PAPERS* 292 (1921).

¹¹ JHERING, *GEIST*, *supra* note 6, at 479 (translation my own).

¹² *See* JHERING, *LAW AS A MEANS*, *supra* note 6, at 230-325.

In this Article, I try to give due credit to form (1) by introducing, mainly from general English usage of the words "form" and "formal,"¹³ a stock of concepts that may be used faithfully to represent or portray the major varieties of form in the phenomena of Western legal systems; (2) by introducing a uniform and felicitous nomenclature for designating and articulating these concepts of form; and (3) by demonstrating, albeit only suggestively, the jurisprudential and practical significance of the varieties of form in the law. In demonstrating the significance of form, I also emphasize that appropriate form must be distinguished from inappropriate form, that appropriate form should not, even in the course of its application, generally collapse into something else, such as "substance," or "policy," or "equity;" and that issues of appropriate form pose many significant choices in legal ordering, ones that implicate fundamental political values, basic policies, general legal values, equitable considerations, private preferences, and more. Thus, my general theory of form in the law may be said to be prescriptive and normative in its implications, as well as conceptual and descriptive. The theory provides concepts and terminology for the perspicuous representation of the varieties and complexities of form in positive law and other legal phenomena, and provides concepts and terminology for the jurisprudential characterization of law's basic nature as formal (a characterization that rests on more than merely an aggregation of the varieties of form in law). The theory also identifies the main types of choices of appropriate form, the types of considerations relevant thereto, and standards for the evaluation of form. Jurisprudentially, the theory exposes

¹³ Although I have consulted several dictionaries, including historical and etymological dictionaries, I rely mainly on the OXFORD ENGLISH DICTIONARY (2d ed. 1989) [hereinafter OED] and WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) [hereinafter WEBSTER'S]. Of course, the latter draws to some extent on the former. It is enough for my present purposes to consult only usages in the English language. These dictionaries represent the best of British and American lexicographic scholarship. Such dictionaries indicate how the linguistic community generally understands the use of words such as "form" and "formal." (Both dictionaries record non-pejorative uses of "form" and "formal" ahead of pejorative ones.) See 6 OED *supra*, at 78-83; WEBSTER'S, *supra*, at 892-93. One well-known defense of my extensive reliance here on general usage is as follows:

[O]ur common stock of words embodies all the distinctions men have found worth drawing, and the connexions they have found worth marking, in the lifetimes of many generations: these surely are likely to be more numerous, more sound, since they have stood up to the long test of the survival of the fittest, and more subtle, at least in all ordinary and reasonably practical matters, than any you and I are likely to think up in our arm-chairs of an afternoon—the most favored alternative method.

. . . When we examine what we should say when, what words we should use in what situations, we are looking again not *merely* at words (or 'meanings' whatever they may be) but also at the realities we use the words to talk about: we are using a sharpened awareness of words to sharpen our perception of, though not as the final arbiter of, the phenomena.

the intimate relations between form and values in a system of law, and gives due credit to form in the law, overall. My effort here, however, is only a preliminary one. A book will follow in which I develop my theory more fully. In that work, I will also expound the view that appropriate form is hardly enough, for a functioning system of law is necessarily a fusion of many varieties of form with policy and other value content, with trained personnel, with material resources, and with much else.

I

HOW LAW IS FORMAL

I use the word "law" to include rules and other precepts, and also legal devices such as particular rulings and orders. I also use "law" to encompass all the basic functional elements in a legal system that together provide for the creation and implementation of law. These basic functional elements include elections, legislatures, courts, administrative agencies, the institutions of private law, and state sanctioning processes. Such elements also include criteria of validity; bodies of state-made law; privately made creations such as contracts, wills, and property arrangements; interpretive methodologies; a precedent system; and recognized entities such as the state, corporations, business and other associations, ordinary legal persons, and a legal profession. Further, I use "law" to refer to the legal system as a whole, which includes its basic functional elements; its general operational techniques which systematically order, integrate, and coordinate these basic functional elements; its system-wide principles of legality securing the rule of law; its systematic ranking of sources of valid law, whereby constitutional law is prioritized over all other law, statute law over merely judge made law, and so on. As I will explain, the varieties of form, the choices involved, and the values at stake vary somewhat depending on whether the object of study consists of rules or the like, of basic functional elements such as a legislature or a court, or of the system taken as a whole.

A. The Formal Character of Rules

Rules are of special importance. Rules are the primary means we use to prescribe the internal organizational features and subject matter of basic functional elements for creating and implementing law. As I have said, these basic elements include electoral processes, legislatures, courts, and interpretive methodologies. Thus, rules provide for and limit legislative, judicial, and executive authority. Rules also provide for and limit the powers of private persons and entities to enter and enforce contracts, to make wills, and to acquire property. Rules

also specify criteria of valid law, define and regulate interpretive method, govern the imposition of sanctions, and more.

Rules are the main legal instruments for authoritative embodiment not merely of essential civic policies such as community peace, order and safety, but of all kinds of problem-specific policies ranging from the reinforcement of the family, to facilitation of traffic flow, to regulation of food and drugs, and so on. Rules are also the principal means of authoritatively incorporating into the system such fundamental political values as legitimate authority, interpersonal justice, and basic freedoms, which include not merely political freedom but freedom to enter contracts, to own property, to make wills, to form associations for business and other purposes, and more. Further, we use rules to incorporate such general legal values as certainty and predictability, the dignity and efficiency of citizen self-direction under law, equality before the law, freedom from official arbitrariness, dispute avoidance, dispute settlement, and various other "rule of law" values. We use rules not merely to authoritatively incorporate all of the foregoing types of policies and values. We also devise and utilize many auxiliary rules to implement the authoritative policies and values so incorporated.¹⁴

Moreover, when we turn to a legal system as a whole, we find heavy reliance on rules to organize, integrate, and coordinate basic functional elements into general operational techniques for the creation and implementation of state-made law, and of privately-created law such as contracts and wills. Thus, we typically use rules to incorporate basic functional elements into one or more of five general operational techniques for making and implementing law, namely: the penal, the grievance-remedial, the administrative-regulatory, the public-benefit conferral, and the private-ordering (on which, more later). Furthermore, in system-wide perspective, rules figure prominently in the definition and implementation of those principles of legality and the rule of law that we deploy to regulate and police the workings of the foregoing five general operational techniques and the legal system as a whole. Indeed, the rule of law is largely a law of rules.

What are legal rules? There are many varieties of such rules in any functioning legal system. Of most, perhaps of nearly all such rules, we can say the following:

- (1) they have content;
- (2) are prescriptive rather than hortatory, or merely descriptive;
- (3) directly or indirectly prescribe action and thereby prohibit, permit, or require such action (deontic modalities);

¹⁴ See SUMMERS, *supra* note 4, at 195.

- (4) are designed directly or indirectly to serve substantive policy or to serve fundamental political values or general legal values, or rule of law values, or private preferences, or equity (or one or more of these types of ends at the same time);
- (5) are based directly or indirectly either on an empirical generalization implying a causal relation between means and ends, or on a theory about how law can organize and facilitate some end such as the election and accountability of political leaders, or on a general moral or social principle, or on a conception of the essential form or the otherwise appropriate form of an institution, process, method, or the like;
- (6) are expressed in a form that prescribes content as above, and exhibits a degree of generality, of completeness, and of definiteness;
- (7) are simple or complex (or something in between);
- (8) are embodied in some authoritative encapsulatory form, be it statutory, an administrative regulation, a common law form, a contractual form, or some other recognized authoritative form;
- (9) are usually expressed relatively explicitly and in writing at least if the rule is a state-made rule;
- (10) are expressed in a common language of the system;
- (11) can usually be found recorded in official books or other sources.

How are rules formal? I propose throughout this Article to use the word "formal" in accord with standard English usage, rather than merely with some personal theory of what might be formal. Thus, I claim that all the concepts of "formal" that I invoke here are well-grounded in English usage (though I do not claim that every application I make of "formal" to legal phenomena is itself established English usage.) It follows that what I designate here as formal is not, conceptually, my own invention. I use "formal" as an adjective in the English language, and as an adjective, it is largely an expression that derives its meanings from the noun forms of the word "form" recognized in English. I will now introduce five such meanings of "formal." I would formulate the first standard meaning of "formal" as follows: "pertaining to the form or constitutive essence of a thing."¹⁵ I call this "essential form." Every thing or idea has to take some relatively constant form to be a thing or idea of that type. Thus, a rule, to be a legal rule, must be prescriptive, as above, and be sufficiently general, complete, and definite. Plato identified all of these features, and singled out definiteness for special emphasis: "[U]nless you are definite, you

¹⁵ 6 OED, *supra* note 13, at 82 (quoting entry for "formal" no. A.1.a). See WEBSTER'S, *supra* note 13, at 893 (entry for "formal" no. 1.a.).

must not suppose you are speaking a language that can become law."¹⁶ (A broad grant of discretion can, of course, be law.)

Prescriptiveness, and minimal degrees of generality, completeness, and definiteness, then, are defining features of a rule, and so, formal in the above sense. Each feature is different from the others, is independently significant, and can be analyzed on its own (and in relation to the others) in some depth. Moreover, each serves or can be designed to serve, severally or conjointly, significant policies or values.

Thus, ordinary legal rules are, first of all, formal insofar as their defining features are present, that is, insofar as they take what I call at least the minimum essential form of legal rules. It might be objected that this is only to say that such rules are rules, a mere tautology, empty of all significance. But if this be a tautology (which it is not), then it is one worthy of explicit formulation. A totally formless "rule"—one that fails to prescribe, one that is totally incomplete, or totally indefinite, or totally particular—would not be a rule. An extended analysis here would further our understanding of the essential form of legal rules, of their defining features, of the types of policies and values these features may serve, and of how appropriately formal features shape the form and content of rules in the course of their creation.¹⁷ When I say the formal features of rules shape the form and content of rules, what I mean can be readily understood if we imagine varying formulations of a rule having the same general subject matter, such as the regulation of speed on highways. For example, a higher degree of the formal feature of definiteness in such a rule shapes the form and content of the rule differently from a lower degree. A 65 mph rule shapes form and content differently than a "drive reasonably" rule.

When we say that a given rule is formal, we often mean something more than that it merely conforms to the minimum essential form of a rule, i.e., more than that the rule is just barely over the definitional threshold of "ruleness." Often we mean that the rule is appropriately formal, that is, appropriately prescriptive and appropriately general, complete, and definite, given its subject matter and the policies and values to be served. When we mean by "formal" that the rule is appropriately formal, we are not saying that the rule is formal in a second sense wholly independent of essential form. Appropriate form generally presupposes minimum essential form.

Appropriate form often goes far beyond minimum essential form, and the scope for elaboration and variation to achieve appropriately

¹⁶ 2 THE DIALOGUES OF PLATO 491 (B. Jowett trans., 1937). Aristotle, too, identified all of these formal features. See, e.g., THE BASIC WORKS OF ARISTOTLE 1326 (Richard McKeon trans., 1941).

¹⁷ In my book in process, I have separate chapters on each such feature.

formal features is often considerable, depending on the nature of the form involved, the subject matter, and the policies and values at stake. These elaborations and variations may show themselves in further degrees of generality, completeness, and definiteness that are simply continuous with these defining features. For example, the policy to be served by a rule often requires a much higher degree of generality than merely that which is minimally necessary for it, conceptually, to be a rule at all. Or it may be that a degree of definiteness, a major formal feature itself defining in nature, must go well beyond that minimum merely required for ruleness, if the rule is appropriately tailored to serve its ends.

The features of essential form, and of any extra-essential form continuous with essential form and thus beyond its threshold requirements, are formal in a second sense of the word, well recognized in another commonly used noun variant of "form" in the English language, namely structure. "Formal" in our language thus also has a second meaning that I would formulate as follows: "of or pertaining to structure."¹⁸ I would then formulate the meaning of structure as follows: "the way a part or parts of a whole is organized."¹⁹ Thus, alternative formulations of a rule may display differing prescriptive modalities (duties, prohibitions, powers, etc.), differing degrees of generality, differing degrees of completeness, and differing degrees of definiteness. Definiteness of a given degree, for example, contributes in its own way to how the parts of a whole rule are put together. It is not merely an ingredient or part of the rule (like policy); it is also a way of organizing the parts of the rule. It follows that definiteness in a rule is formal not only because it is a defining feature, i.e., not only because it pertains to the essential form of a rule. Definiteness is also formal because it is structural. It is a feature that contributes to, and so structures, the overall form and content of a rule. Such a feature then, is formal both in the sense of being a defining feature of the essential form of a rule, and formal also in the sense of contributing to the structure of the rule—to how it is organized. Thus, definiteness

¹⁸ "The particular character, nature, structure, or constitution of a thing . . ." 6 OED, *supra* note 13, at 78 (entry for "form" no. I.5.a). "[T]he shape and structure of something as distinguished from the material of which it is composed." WEBSTER'S, *supra* note 13, at 892 (entry for "form" no. 2.a.). In OED, both completeness and definiteness are specifically recognized as formal. See 6 OED, *supra* note 13, at 82 (entries for "formal" nos. 3.b & 5).

¹⁹ "Manner of building or construction; the way in which an edifice, machine, implement, etc. is made or put together." 16 OED, *supra* note 13, at 959 (entry for "structure" no. 2). See also entry no. 3 for "structure." "The mutual relation of the constituent parts or elements of a whole as determining its peculiar nature or character; make, frame." *Id.* In entry no. 3.d for "structure," OED notes that this applies to linguistic phenomena, too. See *id.* Webster's entry no. 3 for structure is: "the manner of construction: the way in which the parts of something are put together or organized." WEBSTER'S, *supra* note 13, at 2267.

is nonetheless structural for also being defining. When the structural feature of definiteness, though continuous with the minimum definiteness required for essential form, is elaborated beyond that minimum, we should still say that this extra-essential degree of definiteness is also formal in the second sense, i.e., "structurally formal." That is, the degree of definiteness contributes to the structure of the rule—to the way in which the parts of the rule are organized. Generality is thus structural, too. So is completeness. As I have said, there is great scope for elaboration and variation here beyond the definiteness, generality and completeness required for the minimal essential form of a rule. Indeed, the formal features of rules typically go beyond the requirements of minimal essential form. Such features just are, up to their threshold of minimum "essential form," formal in essential form and also formal in how they contribute to the structure of the rule, and beyond that threshold, are formal merely in the sense of structural.

There are still other major varieties of form which are not at all continuous with features of the essential form of rules. For example, all rules exhibit another feature of form and content, namely that of being either simple, not so simple, somewhat complex, or very complex. The appropriate degree of simplicity or complexity of a rule is affected at least by its degrees of generality, completeness, and definiteness, by variations in its subject-matter content and by the policies and values at stake. This feature of simplicity (or complexity) is also structurally formal.²⁰ For example, a decrease in the complexity of a rule must show itself in content, and may also show itself in effects on other formal features such as definiteness or generality or completeness. It then becomes appropriate to say that the relations between form and content in the rule have changed—its structure has changed. The feature of simplicity (or complexity) is a structural feature. The degree of simplicity or complexity of a rule is not, however, continuous with any defining feature of a rule, and is thus structurally formal quite independently of the defining features of the essential form of a rule.

There is a third major sense of "formal" that is also not continuous with any feature of the essential form of rules. All rules are what I call "expressional formal" in varying degrees. I formulate this meaning of "formal" as follows: "of or pertaining to mode of expression."²¹ The mode of expression of a rule encompasses:

²⁰ See *supra* note 19.

²¹ Thus, *OED* entry no. I.9 for "form" as a noun provides: "Style of expressing the thoughts and ideas in literary or musical composition, including the arrangement and order of the different parts of the whole." 6 *OED*, *supra* note 13, at 79. See also *id.* at 82 (entries A.1.c & A.5 for "formal"). *Webster's* definition for "form" as a noun includes references to "style," method of expression, and "orderly arrangement." WEBSTER'S, *supra* note 13, at 892 (quoting entries 4.a & 10.a).

- (1) the extent of its explicitness;
- (2) the extent it is set forth in writing;
- (3) the extent it is set forth in a technical or other specialized vocabulary; and
- (4) the extent it is formulated with compactness and organizational rigor.

The appropriate mode of expression of a rule may be highly formal or less formal or even informal, depending on the subject matter and the policies and values at stake. Again, the degree of expressional formality of a rule is not a feature that is continuous with prescriptiveness of content, generality, definiteness or completeness. Thus, it is quite independent of the essential form of a rule. It is also not the same as structural form.

Yet a fourth major sense of "formal" is also one that is not continuous with any feature of the essential form of rules. This fourth sense derives from the fact that all legal rules are set forth in some recognized legal form or mould. Thus, all legal rules are set forth either in: constitutional law, or statutory law, or judge-made law, or customary law, etc. I call this familiar concept encapsulatory form. "Formal," in reference to this type of feature, means something like: "of or pertaining to mode of encapsulation."²²

So far I have considered the formal character of rules in terms of their essential form, of their continuous "extra-essential" form that is structural, their non-continuous extra-essential form that is structural, and of further varieties of form that are expressional and encapsulatory. In this, I have treated the prescriptive nature of the content of

²² One *OED* entry for the adjective "formal" provides in part: "pertaining to the form, arrangement, external qualities (*e.g.*, of a work of art, a composition, etc.)." 6 *OED supra* note 13, at 82 (entry no. A.1.c). Another *OED* entry for the adjective "formal" provides in part: "Done or made with the forms recognized as ensuring validity . . ." *Id.* (entry no. A.5). The *OED* entry for the noun "form" provides "One of the different modes in which a thing exists or manifests itself; a species, kind, or variety." *Id.* at 78 (entry no. 5.b). *Webster's* offers an entry for the adjective "formal" that provides: "relating to, concerned with, or constituting the outward form, superficial qualities, or arrangement of something as distinguished from its content." *WEBSTER'S, supra* note 13, at 893 (entry no. 1.b).

Roscoe Pound, following the practice of E.C. Clark and noting that the expression has come into "more or less general use," refers to the variety of encapsulatory forms in which rules and other legal precepts may exist as "forms of law." 3 *ROSCOE POUND, JURISPRUDENCE* 382 (1959) (quoting E.C. CLARK, *PRACTICAL JURISPRUDENCE* 198-99 (1883)). Pound describes these "forms of law" as: "the literary shapes in which legal precepts and doctrines are authoritatively expressed, the authoritative forms of expression to which courts are referred in the decision of controversies and to which counselors must resort for the bases of prediction when called on to advise." *Id.* at 383. Pound notes that what I call the encapsulatory forms of legal precepts may be divided generally into three categories: "In general, they may be classified as (1) legislation; (2) case law, *i.e.*, law expressed in the form of judicial decisions of past controversies; and (3) text book law, *i.e.*, law expressed authoritatively in juristic writings." *Id.* at 416. Of course, a more extended typology is possible. (I am indebted to Professor Peter Müller-Graff for suggesting the name "encapsulatory.")

rules as a feature of the essential form of rules. So far, I have not focused on the subject-matter content of rules. There is still a fifth major sense of "formal" recognized in our language that is relevant here and one might formulate it as follows: "of or pertaining to organization, procedure, technique or methodology."²³ I call this "organizational form." In this fifth sense, the subject-matter content of many types of legal rules is formal. Indeed, all the rules that prescribe features of such basic functional elements of a legal system as elections, legislatures, courts, administrative bodies, and methods of interpretation, are formal in subject-matter content. This is also true of all rules that specify the methodical and the unifying features of a legal system and its operations as a whole. Likewise, any rules which prescribe the structural, expressional, or encapsulatory form of other rules are also formal in content. For example, a constitutional rule prescribing a high degree of definiteness in criminal statutes is formal in content.

All the foregoing varieties of form reveal and reflect numerous types of choices of design in the formality of a rule. The policies and values at stake in such choices are varied and significant.

To summarize, all legal rules are formal in that they:

- (1) exhibit at least the defining features of the *essential form* of rules, including especially
 - prescriptive content,
 - minimum generality,
 - minimum completeness, and
 - minimum definiteness;
- (2) exhibit features of *structural form* either within, or beyond, minimum defining prescriptiveness, generality, completeness, and definiteness continuous with those defining features, and exhibit structural form in non-continuous features such as simplicity or complexity;
- (3) exhibit features of *expressional form*;
- (4) exhibit features of *encapsulatory form*; and
- (5) in some rules, exhibit form that prescribes the *organizational form*—organizational formality of content—of basic functional elements such as elections, legislatures, courts, criteria of validity, interpretive methodology, or of organizational aspects of the system as a whole, or prescribe features of structural, expressional, or encapsulatory form.

²³ The *OED* entry for "form" as a noun provides the following: "Due shape, proper figure; orderly arrangement of parts, regularity, good order . . .," 6 *OED*, *supra* note 13, at 79 (entry no. I.8); "Manner method, way, fashion (of doing anything)," *id.* (entry no. I.10); and, "A set, customary, or prescribed way of doing anything; a set method of procedure according to rule (*e.g.*, at law); formal procedure," *id.* (entries I.11.a & b). See also the *OED* entry 4.a for "formal": "Regular, having a definite principle, methodical." *Id.* at 82. *Webster's* entry for "form" at 4.b provides: "established method of expression or practice: fixed or formal way of proceeding . . ." WEBSTER'S, *supra* note 13, at 892.

The foregoing scheme of concepts, distinctions, and nomenclature affords a relatively comprehensive basis for analyzing the formal character of rules, and for identifying significant choices of form in the construction of rules. It also affords a basis for the systematic and stable use of the concept of a "highly formal rule." Indeed, the most formal rule might be analyzed as one that exhibits high degrees of structural features that are defining or continuous with defining features; exhibits a high degree of structural complexity; exhibits a high degree of expressional form; exhibits canonical encapsulatory form; and incorporates subject-matter content that is itself formal, i.e., organizational.

A critic might object that the foregoing varieties of the formal are all my own invention. But the above five senses of formal—essentially formal, structurally formal, expressional formal, encapsulatorily formal, and organizational formality of content—are all rooted in standard English usage of the words form, formal, and their derivatives. It is true that some of my applications of concepts of form and formal to legal phenomena may not themselves be established uses of these words. For example, we do not ordinarily refer to the mode of encapsulation of legal content as formal (let alone use the word "encapsulatory" in this way). But this does not mean that the relevant legal phenomena do not answer to the relevant concept or concepts of the formal. They do, as I have demonstrated.

A critic might also object that the five senses of formal have "nothing in common." But there is no inconsistency between them, and each coheres with the others. Moreover, it is not necessary that these usages have anything in common. Each except the last (organizational formality of content) applies to all rules. Each except the last is a common "golden thread"—a standard understanding of the word "formal" applicable to all rules. I am not claiming that each of the four types of "golden threads"—each standard meaning of formal—applies to the same facet of each rule. While it is true that essential form and structural form do, to some extent, pertain to the same facet of rules, expressional form, encapsulatory form, and organizational formality of content pertain to their own relatively distinct facets: mode of expression, mode of encapsulation, and any organizational content. In sum, there are always at least four "golden threads" here, running through all rules, and these establish that form pervades rules. It would be an objection to my thesis if some rules were formal only in the sense of essential form, other rules only in the sense of structural form, still other rules only in the sense of encapsulatory form, and so on. If that were so, my thesis would rest on equivocations. But this is not the case.

A critic might also object that my analysis proves too much. It might be said that since my analysis indicates rules are far more formal, in perfectly intelligible and well-recognized senses of the word, than at least American theorists have heretofore generally assumed, the analysis leaves no place at all, or very little place, for the non-formal in rules, and is therefore very largely a vacuous thesis devoid of contrast and rebuttability. But it is not true that my analysis leaves no place for the non-formal in rules. First, any subject-matter content of rules that does not itself prescribe organizational or other formal features is not formal. This means that a great many rules have content that is not formal. Foremost among these are rules with problem-specific policy content. Then there are still other facets of rules that are obviously not formal in any of the senses used here. The particular natural language in which the rules are expressed is not formal in the senses explicated here. Nor are the authoritative books and other repositories in which rules are set forth formal. Moreover, rules are not the whole of the law, and much of the remainder is not formal, though it is intimately concerned with the creation and implementation of rules. Essential social acceptance of law is not. Trained personnel are not. Material resources are not.

Finally, a critic might object that my analysis fatally omits the negative or contrastive meanings that "form" and "formal" have in our language, and that these are the true meanings of these terms. One possible thesis here might be that form and formal are entirely parasitic for their meanings on negative contrasts with the other side of a dichotomy—with whatever they are used to negate or rule out on particular occasions, such as substantive policy content, or justice and equity in a particular case, and so on.²⁴ Thus, on such a view, the meaning of formal in regard to a rule is essentially negative—is merely whatever is not substantive policy content, for example. But each of the five senses of formal taken here from standard English usage is, on my analysis, affirmative or positive in meaning. A formal feature is affirmative or positive in the sense I intend if it is actually present, as distinguished from merely lacking or failing to express an opposed quality, such as policy content. Whatever is formal in any one of the foregoing five senses exists apart from, and can be characterized independently of, any relation of negation or contrast that it may have with an "opposite" such as substantive policy or the like. Thus, form and formal in the five senses I have identified are not parasitic on any contrast with opposites. They have affirmative or positive meanings of their own. Consider a feature of what I call essential form—a degree of generality. This feature is affirmatively present in a rule. It is not a

²⁴ It is true that some words are best understood as excluders. See J. AUSTIN, *SENSE AND SENSIBILIA* 70-71 (G.J. Warnock ed., 1962).

feature that merely lacks or fails to express the opposed quality of particularity. (The same is true of generality as a structural feature of a rule.) Similarly, the degree to which a rule is set forth in writing, a feature of what I call expressional form, is something actually present. It is not a feature that merely lacks or fails to express the opposed quality of not being in writing. The same is true of encapsulatory form and of organizational form, *mutatis mutandis*.

A closing caveat is in order. When the formal features of a rule are well drafted and are enshrined in written form—even in constitutional or statutory forms, it still does not follow that subsequent practice under these seemingly “fixed” forms cannot effectively alter the degree or level of any of the varieties of form in such rules. Here we know that there may even be considerable divergence between law in books and law in action, especially if there is a highly activist judiciary.

B. The Formal Character of Basic Functional Elements Within a Legal System

Rules alone are not enough. Plainly, they cannot create themselves. They cannot qualify themselves as authoritative. They cannot apply themselves. They cannot enforce themselves. Nor can they serve in place of rulings, principles, orders, maxims, nor in place of other species of law such as private contracts, wills, and property arrangements not reducible to rules.

As I have indicated, an operational system of law requires authoritative institutions and processes by which representatives of the state may make, apply and enforce law. It also requires authoritative arrangements by which private parties and officials may make and carry out contracts and wills, create and transfer property, and more. A system of law also requires interpretive and other methodologies for applying state-made, and privately created, forms of law to particular states of fact. This list is by no means exhaustive. Such elements of a legal system I call “basic functional elements,” and when operational, these elements also utilize official and other personnel, a common language, material resources, and more. An extended categorization of such elements in a modern system of law would include:

- (1) electoral processes;
- (2) a legislature;
- (3) courts and a court system;
- (4) administrative hierarchies;
- (5) institutions and processes for the creation and administration of law by private parties and entities;
- (6) public and private entities such as the state, corporations, partnerships, private persons with legal capacity, etc.;
- (7) interpretive methodologies for state-made law and for privately created forms of law;

- (8) a body of constitutional law, including criteria for determining the validity of law;
- (9) a body of state-made substantive law;
- (10) a body of state-made procedural law;
- (11) a body of evidentiary law;
- (12) a sanctioning system;
- (13) mechanisms and devices for recruiting and assigning personnel to roles in the system; and
- (14) a legal profession.

Each of the foregoing basic functional elements is more or less discrete in its own way. Each element has a special function, or functions, within the system as a whole. In addition, each is internally organized to fulfill that function or functions. Each presupposes other such elements, and, within an operational system, each is integrated and coordinated with certain other elements in one or more basic ways, as we will see.

Some of the basic functional elements of a legal system are highly complex. Among the most complex are certain legal institutions such as legislatures, courts, and administrative hierarchies. These institutional elements have organized functions. They have organized differentiation, specialization and centralization of roles. They have organized procedures, organized supervisory and other hierarchies, organized selection of personnel, and more. A well-organized legal institution effectively organizes who is to do what, when, where, and how, all in order to discharge the essential functions of that institution. An institution just is an organ that is *organized* in a variety of dimensions. Legal rules are the principal social device for designing and organizing a legal institution, and indeed, for designing and organizing any basic functional element of a legal system. Valid legal rules not only specify and prescribe the features and subject matter of such a basic functional element, but most importantly of all, express the initial authoritative understanding of the system as to the specific nature of the element. Thomas Hobbes was among the first to stress the role of rules here: "The skill of making, and maintaining commonwealths, consisteth in certain rules . . . not . . . on practice only" ²⁵

Yet, institutions, processes, methodologies, entities, and other basic functional elements of law cannot be reduced to rules. These elements consist of far more than the rules used to organize them. In developed systems, we use rules to organize institutions and other basic functional elements of the system in the first instance. The resulting institution or other element, however, does not itself consist of those rules, and its features and subject matter, as an "up and run-

²⁵ THOMAS HOBBS, *LEVIATHAN* 136 (Michael Oakeshott ed., 1960).

ning" element, are not the features and subject matter of the rules organizing it. Institutions and other functional elements have features and subject matter of their own, quite apart from the rules that prescribe such features and subject matter. Also, the features and subject matter of institutions and other basic elements of law, once "up and running," frequently thereafter diverge somewhat from the prescriptions in their organizing rules. This is one type of divergence between law in books and law in action. Such "divergence gaps" may be wide or narrow, depending partly on how effectively the rules and other machinery can be invoked to close such gaps. But the very reality of such gaps is still another reason why institutions and other basic functional elements cannot be reduced to rules. Moreover, institutions and other elements of a system of law require far more than rule-prescribed modes of organization to exist as functional social phenomena. They require general social acceptance for their very existence and operation; trained personnel; specialized knowledge; a common language; material resources; and still more if they are to function at all. And these social assets, too, can hardly be reduced to rules. Yet, without rules systematically organizing the legal uses of these social assets, basic functional elements as we know them simply would not exist.

How are the basic functional elements of a legal system formal? For now, I will treat illustratively, and in abbreviated fashion, how only three types of such elements are formal: namely a legislature, courts, and an interpretive methodology for statutes. Legislatures and courts are institutional in character, whereas methodology is not.

A system of law in a modern Western society would be fundamentally defective without a legislative body as a basic functional element of the system. Some such body must exist with legitimate power to make general written law ordering human relations in advance. Accordingly, the composition, powers, and procedures of a legislature are a focus of natural legal concern in a society to be ruled by law.

A legislature is not formless. It is, first of all, formal in the sense that it conforms in some degree to the minimum essential form of a legislature. This minimal form varies somewhat from society to society.²⁶ In most developed Western societies, the legislature is:

- (1) a representative body;
- (2) with power to make general and prospective written law for the whole society (though this may require concurrence of an executive);
- (3) with power to make law which takes priority over all other law except constitutional law;

²⁶ Here, "formal" is used in the sense "of or pertaining to essence." See *supra* note 15 and accompanying text.

- (4) and which has a procedure generally designed to bring facts, reason, and public opinion to bear on proposed laws;
- (5) and has voting and other procedures that enable it to resolve differences over proposed laws.

I do not claim that these are universal defining features of all legislatures—a universal essential legislative form. But for my purposes, the foregoing is sufficient to identify a “noun foundation” of minimal essential form for the corresponding adjectival expression “formal,” as applied to legislatures. Any developed society has at least some such minimal conception of the defining features of a legislature—of its essential form, though that conception is not identical for all such societies. When it is said that a legislature is formal, one sense of “formal” that may be meant, then, is simply that what is referred to conforms to the prevailing minimal conception of essential legislative form, whatever that conception for the particular society happens to be.

The accepted appropriate form of a legislature in a given society may, and commonly does, go beyond what is required by the minimal essential form for a legislature. That is, what is accepted as the appropriate form of a legislature commonly includes elaborations and variations that go beyond its minimal defining features. As I will explain, these elaborations and variations in the name of appropriate form are themselves formal in further major senses fully recognized in our language. Of course, these elaborations and variations likewise differ from system to system. Conceptions of the overall appropriate form of a legislature probably differ between Western systems more than do conceptions of minimal essential form. An account of the main ways in which a legislature is formal in Western systems requires that we go beyond “formal” in the sense of “essential form.”

Some of the formal elaborations and variations that go beyond the essential form of a legislature are continuous with one or more defining features of the essential form of a legislature as sketched here. That is, they are continuous at least in the sense that they consist of further auxiliary rules and other devices designed to secure these very features. For example, the defining feature of a legislative procedure designed to secure rational deliberation on legislative proposals may be quite elaborate, and may vary significantly from system to system. A given legal system may, for valid enactment of a statute, require merely a majority vote of a single chamber favoring a bill after being through only a single “reading” before the legislature. But another system may go well beyond this, and require not only several “readings” of a proposed law at periodical intervals but also require public hearings, and require a committee report supporting the final version of the bill to be voted on. Whether or not continuous with

any defining features, at least some of these elaborations and variations that go beyond minimal essential form are formal in a second major sense also fully recognized in our language. That is, they are formal simply in the sense that they are procedural. They pertain to the well-established noun meaning of form, which we may formulate as: "manner, method, or style of proceeding."²⁷ I will call this procedural form. Of course, insofar as such procedural features of a legislature are also defining features, they are formal in two senses at the same time: formal in the sense of conforming to minimal essential form, and formal in the sense of procedural.

Some of the defining features and some elaborations and variations on the essential form of a legislature are formal in a third well-recognized sense of the word, namely, "of or pertaining to structure,"²⁸ where what structure means is itself formulated as follows: "the way a part or parts of a whole is organized."²⁹ The organizational framework of a legislature is structural. For example, its structure may include one chamber or two chambers. Again, that a legislature must have at least one chamber is also formal in the sense that this feature is a defining feature which pertains to the essential form of a legislature as well. Beyond the number of chambers, there are other features of the organizational framework of a legislature, too, such as differentiation of official roles within the legislature, any committee system, relationships between the legislature and the executive, and the extent to which legislative power overall is centralized in a single body for the whole society instead of "federally" shared.

An institution such as a legislature may also be described in terms of its overall definitiveness. Thus, its composition, structure, and procedures may be tightly organized and operate in a highly regularized fashion. The more so, the more definitive; the less so, the less definitive. The overall definitiveness of the organization and mode of operation of a legislature is a fourth type of formal feature of such an institution. This sense of formal derives from an established usage of "form" which may be phrased as follows: "fixed, orderly, and clear in outline."³⁰ The factors that most affect the definitiveness of an institution such as a legislature include the precision of its organizational

²⁷ See *supra* note 23 and accompanying text.

²⁸ See *supra* note 18 and accompanying text.

²⁹ See *supra* note 19 and accompanying text.

³⁰ *OED* entry no. I.8 for the noun "form," provides: "Due shape, proper figure; orderly arrangements of parts, regularity, good order . . ." See *supra* note 23. See also *OED* entry no. I.11.a for "form": "A set, customary, or prescribed way of doing anything . . ." See *supra* note 23. *Webster's* entry no. 4.b for the noun "form" says: "fixed or formal way of proceeding," *WEBSTER'S*, *supra* note 13, at 892, and at entry 10.a: "orderly arrangement or method of arrangement," *id.* Under synonyms, *Webster's* states that "Form may suggest an appearance in which both clear outline and also structure and orderly disposition of details are presented or suggested." *Id.*

design; the faithful prescription of that design in rules; and the readiness of legislators, judges, officials, and affected parties to criticize departures from those rules and to take action to remedy or counter such departures.³¹

A fifth meaning of formal as applied to a legislature or other institution is simply arranged or fixed "according to rule."³² The various dimensions of a legislature are, in varying degrees, arranged or fixed according to rule, and so are what I will call "preceptually" formal. Moreover, these rules are also formal in that they display all of the varieties of formality already addressed here in my discussion of the formality of rules, including their structural, expressional, and encapsulatory formality.

In sum, a legislature is formal (1) in terms of those of its features that are defining, i.e., that pertain to its essential form; (2) in procedural terms; (3) in structural terms; (4) in definitiveness; and (5) in being fixed according to rule. A critic might ask: Is there anything about a functioning legislature that is not formal? My thesis is not vacuous. Many things about a legislature are not formal, including most obviously, its actual acceptance in the society as a law-making institution, the personnel elected to the legislature, the material resources they utilize, the language they utilize, the knowledge and expertise they bring to bear, the substantive policy content of proposed legislation, and more. Of course, such non-formal social assets are duly organized within an operating legislature partly through the use of rules and other formal devices.

I now turn to courts, mainly trial courts, as another basic functional element of a legal system. A system of law without courts would be fundamentally defective. For a variety of reasons, disputes of law and of fact are inevitable in any society. The disputing parties cannot alone resolve all such disputes through negotiation or other means, even when acting in good faith. Courts are needed to resolve some proportion of these disputes. No other institution has the impartiality and objectivity, nor the required procedural apparatus, to resolve such disputes in accord with law and fact. Accordingly, the design of a court is also a focus of natural legal concern.³³

³¹ See HART, *supra* note 6, at 56-57, 88-90, 102-03, 115-16.

³² *OED* entry no. 1.11.a for the noun "form" states: "a set method of procedure according to rule . . ." See *supra* note 23. The *OED* entry for "formal" no. A.3.a. provides: "That is, according to recognized forms, or to the rules of art or law." 6 *OED*, *supra* note 13, at 82. *Webster's* entry no. 4.b for the noun "form" says: "procedure according to rule . . ." See *supra* note 23. *Webster's* entry no. 2.a for "formal" reads: "following or according with established form, custom, or rule." WEBSTER'S, *supra* note 13, at 893. See also entry no. 3.a: "based on forms and rules." *Id.*

³³ In Anglo-American law, Lon L. Fuller wrote more perceptively about adjudicative design than anyone else. See ROBERT S. SUMMERS, LON L. FULLER 90-100, 164 (1984).

A trial court is not formless. It is, first of all, formal in the sense that it takes the form essential for its existence as a court. That is, it conforms to the minimum essential form of a court. Again, conceptions of what this is vary somewhat from system to system. In most Western systems, the essential form for trial courts includes the following features:

- (1) provision for an independent and impartial official decision maker (which may include lay jurors);
- (2) provision of some opportunity for each disputing party (with or without a lawyer) to prepare and present evidence and argument to the decision maker, and to respond to the other party in the presence of the decision maker;
- (3) provision that the decision maker is to decide largely on the basis of the evidence and argument so presented by the parties;
- (4) provision that the decision maker shall have power to enforce any decision made not only against a party who fully participates, as above, but also against any party properly notified who refuses to participate.

The foregoing features of the essential form of a trial court are designed to fulfill the dispute-resolving function of a court, and to do so in accord with law and fact, thereby also serving the policies of the legal rules ultimately applied, general legal values, equitable considerations, any private preferences embodied in a contract or the like, and other values.

As I have said, the notion of minimal essential form of a trial court varies somewhat from system to system. But when it is said that a court is "formal," a primary sense that may be meant is simply that the institution conforms to the prevailing minimal conception of the essential form of a court for that society, whatever that conception. The defining features of the essential form of a court, even with the basic auxiliary rules that secure them to some degree, comprise no more than a minimal conception. As instantiated in practice, this minimal conception could only imperfectly fulfill the function of a court to resolve disputes in accord with law and fact. Further elaboration is required.

As we saw with regard to rules and with regard to a legislature, the accepted appropriate form of a trial court in a given society also usually goes well beyond what is required merely by its defining features of essential form. That is, the appropriate form of a court typically includes significant elaborations and variations on the minimal conception. These elaborations and variations are themselves formal in straightforward ways fully recognized in our language. Again, these further elaborations and variations that do not pertain to the essential form of courts are themselves not uniform across Western systems. Here, conceptions of overall appropriate form probably differ be-

tween Western systems even more than conceptions of minimal essential form. A full account of the main ways in which a court may be formal in Western systems requires that we go far beyond the sense of formal which merely means the minimal essential form.

Many of the elaborations and variations going beyond essential form are formal in the further sense that they pertain to procedural form. Consider, for example, the vast elaborations of court procedures for defining and resolving disputed issues of fact that exist in many systems. These procedures for preparation and trial of factual issues are typically extensive and complex. These procedures, though continuous with, typically go far beyond what would be required merely to satisfy the minimal requisites of "essential form." These procedures are formal in the sense that they pertain to the well-established noun meaning of form: "manner, method or style of proceeding."³⁴ Again, insofar as such procedural features of a court are also defining features, these are formal in two senses at the same time: formal in the sense of conforming to essential form, and formal in the sense of procedural.

Furthermore, the essential form of a court requires an independent adjudicator to secure impartiality. Elaborations and variations here include some that go beyond, yet are continuous with, the essential feature of independence. At least they are continuous in the sense that they consist of further auxiliary devices that secure this very feature. In all developed systems, judicial impartiality is secured at least by rules that prohibit outside political interference with judicial decision-making. But some systems have numerous auxiliary rules here, too. Thus a system may have rules prohibiting the parties from making any contact with the judge except in the presence of the other party. A system may have rules prohibiting judges from deciding disputes between corporations in which they have a financial interest. A system may have rules requiring judges to recuse themselves when a party is a personal acquaintance. Elaborations and variations that thus secure impartiality through independence of the judge from the influence of politicians and of parties are formal in the sense of structural. These structural features organize the whole process so to shield the judge from improper influence. Insofar as these features are also defining features, they too are formal in two senses at the same time: formal in the sense of conforming to essential form and formal in the sense of structural. Still other elaborations and variations of a structural nature are known to Western systems. For example, in American public law litigation,³⁵ the party structure may go

³⁴ On procedural form, see *supra* note 23.

³⁵ See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (explaining public law litigation).

well beyond simply two opposing parties or sides. Also, within a court system as a whole, important features of structure include the degree of centralization of courts and whether there be one level or two levels of appeal in the hierarchy. All the foregoing are structural and so formal. That is, they pertain to "form" in another of its standard meanings, namely "structure."³⁶

As we have also seen, the definitiveness of a legal institution introduces still another formal dimension. Thus, a court, like a legislature, may be tightly organized and operate in a highly regular fashion. Or a court may be loosely organized and operate not so regularly. The more closely organized and the more regularized its operations, the more definitive a court is. Overall definitiveness is partly a function of structural and procedural form, though some varieties of structural and procedural form may have little bearing on definitiveness. The main factors that affect the definitiveness of an institution such as a court are the precision of its organizational design, the faithful prescription of that design in rules, and the readiness of judges, officials and affected parties to criticize departures from those rules and to take action to remedy or counter the departures.³⁷ The definitiveness of an institution is formal in a fully recognized sense of that word, namely the sense derived from the noun in which "form" means, simply, "fixed, orderly, clear in outline."³⁸

Again, a further basic use of formal as applied to an institution means that it is something "fixed . . . according to rule."³⁹ A court is also formal in this way. As I have already indicated, numerous and elaborate rules define, constitute, and regulate a court. Such institutions, then, may be said to be preceptually formal, that is, significantly dependent on rules for their contours. All such rules also take some encapsulatory form, as we have seen. That is, all are encapsulated either in constitutional, statutory, regulatory, common law, customary, or other form.

In sum, a court is formal in terms of those defining features of form essential to its being a court at all. Beyond that, a court is also an institution that is elaborately organized in a variety of ways, and these are formal procedurally, structurally, definitively, and preceptually. Moreover, the preceptual formality of a court is itself set forth in a recognized encapsulatory form.

³⁶ On structural form, see *supra* note 19 and accompanying text.

³⁷ See *supra* note 31.

³⁸ On definitive form, see *supra* note 30 and accompanying text. Definiteness of rule is different from definitiveness of institutions and processes. Definiteness of rule pertains to its meaning, whereas definitiveness of institutions and processes pertains to the operational contours thereof. On definitiveness of rule see *supra* note 16 and accompanying text.

³⁹ See *supra* note 32.

With all these ways in which a court is formal, a critic might ask what there is about a functioning court that is not formal? Again, the formality thesis is not vacuous. Many things about a functioning court are not formal, including its general social acceptance as an authoritative body, the official personnel and other persons participating in its processes, the policy content of substantive law that a court applies, the testimonial and other evidence introduced to establish facts, the natural language utilized, the material resources deployed, and still more, all of which are likewise essential to the workings of a court.

All the varieties of form that I have identified here reveal, reflect, and pose countless choices of design in the formality of legislatures, courts and other legal institutions.⁴⁰ Of course, at any given time, only a few of these choices will be open. That is, at least the basic choices of design will have already been made. The values at stake in such choices are numerous and often fundamental. Well-designed legislatures serve democracy, rationality in law-making, social policies of many kinds, the rule of law, and more. Well-designed courts and court systems function to resolve disputes in accord with law and fact and thereby serve the policies of the substantive law in issue; rule-of-law values; process values such as procedural fairness; and general legal values such as certainty, freedom from official arbitrariness, and more. Another formal feature that legislatures, courts and other institutions share is this. Legislatures have authority to address proposed law of highly varied content. Courts of law have authority to resolve disputes of highly variable content. Similarly, other legal institutions of public and of private law are set up to deal with matters that are highly variable in content. This generality of institutional scope is methodical, another established meaning of the word formal.⁴¹ Each institution stands ready to apply the same systematic general method or approach not to a single instance but regularly to many relevantly similar instances, though highly varied in content. Of course, institutions are specialized as to scope and method. Some make general written law, some resolve disputes and so on.

I now turn to a third illustrative basic functional element in a legal system, and consider how it is formal. This element consists of the interpretive methodology for statutes, an element that, unlike a legislature and a court, is not institutional in nature. Of course, courts regularly deploy some such methodology, and insofar as it is formal, this is a further respect in which we can say that courts, too,

⁴⁰ On appropriate form, see *infra* Part III.A.

⁴¹ *OED* entry no. A.4.a for "formal" states: "Regular, having a definite principle, methodical." 6 *OED*, *supra* note 13, at 82. *Webster's* entry no. 3.b for "formal" states: "characterized by punctilious respect for form: exact, methodical, orderly." *WEBSTER'S* *supra* note 13, at 893.

are formal. In Western systems, interpretive methodologies for statutes appear to be less formally organized and more variant in features and subject matter than legislatures and courts. Again, a system of law without any interpretive methodology for statutes would be fundamentally defective. Issues of statutory interpretation are inevitable and numerous in any system, all the more so to the extent a system lacks a sound and coherent interpretive methodology. An interpretive methodology has vast scope for operation. It is not merely that courts apply it. Administrative officials apply it. Legislators apply it when creating statutes in the first place. And, above all, citizens apply it outside of court and beyond official settings when they make decisions in daily life and work. Without a sound and coherent interpretive methodology, life under law would certainly be more disputatious and more disharmonious. Also, less legislative policy would be served. Legislators would not know how to draft statutes in the first place. Different, or even the same, judges would resolve the same issues differently. Citizens and others would not be able to rely sufficiently on their interpretations from the inception of statutes, and so would frequently be required to guess until courts speak. The rule of law would flounder. Regularly determinate statutory reasons for action would not be available. Indeed, statutory rules might in practice come to lack all prescriptiveness.

A methodology for interpreting statutes is not formless. As with other basic functional elements such as legislatures and courts, an interpretive methodology is formal in a number of ways. First and foremost, such a methodology is formal in that it conforms to the minimum essential form required to count as an interpretive methodology at all.⁴² While there is far from universal agreement in Western systems on what this essential form is, several general features of operative methodologies of interpretation are widely shared.⁴³ Thus, many such systems explicitly recognize a number of the same basic types of interpretive arguments.⁴⁴ Further, many systems tend to accord the argument from ordinary meaning (and its variant, the argument from technical meaning) some special weight or primacy.⁴⁵ Nearly all such systems tend to interpret criminal statutes, in certain types of doubtful cases, favorably to defendants.⁴⁶ While these defining features fall far short of a developed interpretive methodology, they can be considered to provide at least a minimal "noun" founda-

⁴² See *supra* note 15.

⁴³ See generally D. NEIL MACCORMICK & ROBERT S. SUMMERS, *INTERPRETING STATUTES—A COMPARATIVE STUDY* (1991) (discussing similarities and differences; for summary see Chapter 12).

⁴⁴ See *id.* at 464-65.

⁴⁵ See *id.* at 466.

⁴⁶ See *id.* at 559 (providing index entry citing relevant pages).

tion of "essential form" for the adjectival expression "formal," as applied to interpretive method.

In some Western societies, what is generally accepted as the appropriate form of an interpretive methodology goes far beyond the foregoing minimalist conception, but in other societies, such as the United States, not nearly so far.⁴⁷ The further elaborations and variations of appropriate form likewise vary from society to society. It is possible to sketch a model that captures most of the directions which many such further elaborations and variations take, or would conceivably take, though no particular system known to me conforms fully to this model. A sketch of such a model of interpretive methodology would include: (1) a preamble which states that the purpose of the methodology is to define and organize processes of resolving issues of statutory interpretation in the best justified way; (2) definitions and descriptions of the authorized types of interpretive arguments; (3) general procedures for the rational construction of instances of such types of arguments, with inventories of the materials that may be incorporated in such instances; (4) procedures for evaluation of the force of instances of each type of argument, with some focus on the main ways each type can break down; (5) specification of any "top-rung" or other primacy that any general type of argument, e.g., the argument from ordinary meaning, is to have, in competition with other types; (6) any special considerations of relevance to general types of statutes, e.g., criminal statutes may not be extended by analogy; and (7) appropriate methodological maxims for constructing well-justified interpretations for use by judges when writing opinions, and for use by other officials, and lawyers.

We may treat the foregoing, then, as merely general directions in which a legal system might elaborate its own conception of the essential form of an interpretive methodology. Many systems have in fact so elaborated their interpretive methods in some such directions to some extent. As I have said, no single system known to me fully conforms to the foregoing model of the appropriate general form of an interpretive methodology, and systems differ greatly in the degree to which they resemble the model. Moreover, such elaborations and variations on minimal essential form are formal in several further ways fully recognized in our language. All such elaborations and variations are, of course, methodical, and we have seen that this is another established meaning of the word "formal."⁴⁸ Additionally, some of these elaborations and variations are also structural, and so formal in that

⁴⁷ The United States does not have an accepted general interpretive methodology for statutes. For an account of method and its variations in the U.S. Supreme Court, see *id.* at 407-59.

⁴⁸ See *supra* note 41.

way, as well.⁴⁹ Consider, for example, an elaboration which prioritizes one general type of argument over another. Such an elaboration concerns the relations between different elements of the methodology and thus is structural. Furthermore, some elaborations and variations contribute to the definitiveness of the methodology, and so are formal in this sense.⁵⁰ For example, those that define types of arguments and specify procedures for their rational construction contribute to the overall definitiveness of the methodology. In addition, the fact that such a methodology is to a large extent prescribed in rules signifies that it is preceptually formal, and therefore in this respect formal in all the ways that rules are formal.

Nevertheless, even an interpretive methodology, which by nature seems formal through and through, is not, in its operation, totally formal. Its general social acceptance as an authoritative methodology is not formal. The "raw materials" that interpreters must deploy to instantiate types of argument are not formal. For example, the resources of ordinary language argumentation that figure in the argument from ordinary meaning are not themselves formal. Nor are committee reports, records of floor debates, and other evidence of legislative history that figure in the argument from legislative history. Nor is extrinsic evidence of legislative purpose that figures in the argument from ultimate purpose. Moreover, citizens, officials, judges and other persons must apply a methodology if it is to be effective. Yet, these requisite types of personnel, of course, are not formal. Nor is the policy content of statutes being interpreted.

Basic functional elements of a modern legal system, then, are all formal in a number of ways. Most fundamentally, all basic functional elements of a legal system, even in their minimalist defining conceptions, are formal in the sense that each conforms to its own essential form. A legislature without, for example, any voting procedure for decisive resolution of conflicting views would not be a legislature. A court that, for example, does not even require judicial impartiality would not be a court. An interpretive methodology that imposes no restrictions on what can count as an interpretation would be formless, and so could not be a methodology. And so on, for each functional element of a legal system. But beyond the minimal defining features of the essential form of these constituent elements, there are, as we have seen, also features, including elaborations and variations, that are formal in still further ways. Here, we have encountered the procedural, structural, definitive, preceptual, and methodical formality of legislatures, courts and of legal institutions generally. With regard to

⁴⁹ See *supra* notes 18, 19.

⁵⁰ See *supra* note 30.

interpretive technique for statutes, we have encountered methodical, structural, definitive and preceptual formality.

An analysis of the formal character of law's basic functional elements deepens understanding of those elements. It also heightens awareness of the types of choices that must be made in their design and administration. It likewise sharpens awareness of the distinction between appropriate and inappropriate form. Thus, systematic thought about the formality of a basic functional element can even suggest fundamental ways in which the element may be improved. Systematic thought about the formality of basic functional elements of a given legal system can even uncover major gaps in those elements. The American legal system, for example, lacks an accepted and coherent interpretive methodology for statutes. Nor has the American system ever squarely confronted the problem of justifying judicial amendment of statutes.⁵¹ Indeed, it may even be that American judges depart from statutory rules in the guise of interpretation with some regularity!

C. The Formal Character of the System Viewed as a Whole

The first sense in which a legal system as a whole is formal is, again, that it partakes of at least the minimum "essential form" of a legal system.⁵² In Western systems generally, this minimum includes at least:

- (1) basic functional elements such as a legislature, a court system, etc., as constituents of the system;
- (2) some integration and organization of these elements into general operational techniques, or the like;

⁵¹ As a result, the U.S. system has no methodology for this. Ordinarily, when our judges depart from statutes, they do so in the guise of interpretation. Here are several illustrative examples: *Welsh v. United States*, 398 U.S. 333 (1970) (holding that a personal moral code was a religion within the meaning of the statute despite statutory language expressly to the contrary); *Markham v. Cabell*, 326 U.S. 404 (1945) (permitting claim for debt arising during World War II despite language barring claims after 1917). There are many instances of departures in the highest courts of the states as well. *See, e.g., Friends of Mammoth v. Board of Supervisors*, 502 P.2d 1049 (Cal. 1972) (holding the California Environmental Quality Act applicable to private development despite clear language to the contrary.) As two scholars have stressed: "[J]udicial departures from the obligation to decide in accordance with the established rules has become a deeply ingrained and characteristic feature of the judicial process, a feature sustained by the milieu in which Judges operate." MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY* 91 (1971). I do not argue that no statutory departures are ever justified. I only argue that the U.S. system should have a more formal methodology here in which judicial departures are openly dealt with. The methodology would allow some types of departures but not others. It would not be easy to devise such a methodology, but it would address whether and how far departures would be permissible in such cases as the following: statutory obsolescence, over-inclusion, under-inclusion, "core" inclusion yet in the face of powerful countervailing principle or policy, and so on.

⁵² *See supra* note 15.

- (3) coherent bodies of law ordered in accord with criteria of validity; and
- (4) principles of legality ("rule of law").

Not all systems share the foregoing in the same degree, and there is, of course much elaboration and variation from system to system.

The second way in which a legal system considered as a whole is formal is entirely derivative. A legal system is made up largely of various parts, and these parts include rules and other precepts, various basic functional elements including legislatures, courts, and so on. We have already seen how such rules, precepts, and basic functional elements are themselves formal in a variety of senses. Indeed, several varieties of form pervade such rules and elements.

A system of law is formal in still other ways, too. It is not possible for any single basic functional element of a legal system to operate entirely on its own to achieve the ends and values of a legal order. Each such element must be combined with others. At the same time, no basic functional element can be combined with other elements in ad hoc, haphazard, and patternless ways and yet be consistently effective. Each element must be systematically combined, integrated, organized, and coordinated within general operational techniques for creating and implementing law. These general techniques thus structure how law is made and implemented. Because of this structural effect, and because these techniques are essentially methodical, they are formal.⁵³

Thus a legal system viewed as a whole is far more than a mere inventory of its basic functional elements. It also consists of general operational techniques which combine, integrate and coordinate these functional elements so to create and implement law. In modern systems, it is possible to identify at least five main types of such general operational techniques:⁵⁴

- (1) the penal type of technique in which legislatures and courts prohibit anti-social behavior, and these prohibitions along with police, prosecutors, and systems of punishment operate to punish criminals and deter would-be criminals;
- (2) the grievance-remedial type of technique in which legislatures and courts define wrongful behavior, with courts providing remedies therefor, and the technique as a whole operating not only to remedy grievances, but also to reduce their frequency and to induce private settlement of grievance-remedial claims;
- (3) the administrative-regulatory type of technique in which legislators, courts, and administrative officials lay down standards regulat-

⁵³ See *supra* notes 18, 19, 41.

⁵⁴ See Robert S. Summers, *The Technique Element in Law*, 59 CAL. L. REV. 733, 736-45 (1971).

ing otherwise wholesome economic or other behavior, administrators take steps, such as licensing, designed to secure compliance with those standards, and administrators impose sanctions on violators (which may require court action too);

(4) the public-benefit conferral type of technique in which legislatures and public bureaucracies define substantive benefits such as education, health care, welfare, public roadways, etc., define the classes of eligible recipients, distribute these benefits, and secure the material means required for such distribution (through taxation and otherwise); and

(5) the private-ordering type of technique in which private parties choose to enter into legally recognized types of consensual arrangements such as marriages, business and other contracts, employment relations, corporate and other associations, property arrangements, religious and social bodies, and more, with the law facilitating the realization of the aims of such arrangements in various ways.

It is through these five types of relatively discrete structural patterns (and readily recognizable variants) that modern legal systems combine, integrate, and coordinate basic functional elements of the system to deter and punish anti-social behavior, deter and remedy grievances, administratively regulate wholesome economic and other activity, distribute public benefits, and facilitate private ordering. It would, of course, be possible to provide, for any given system, a highly detailed account of what roles each major functional element plays within each of the foregoing formal techniques. These roles differ somewhat from technique to technique. For example, the law-making roles of a court vary depending on the technique in which the court is functioning. Also, the relative roles of private citizens and public officials to take initiative to enforce the law or put the law in motion vary from technique to technique. A legal system as a whole, then, is formal not only in its essential form, and is formal not only derivatively in the sense that it incorporates functional elements that are themselves formal. A legal system is also formal in its general operational techniques which methodically combine, integrate, and coordinate these elements, and which themselves operate as a whole in methodical fashion.

There is still a further and related way in which modern legal systems viewed as a whole are structurally and methodically formal. Although these systems are far from uniform here, all of them provide, to some degree, for regulation of the law's operations in accord with most or all of the principles of legality, i.e., the "rule of law." These principles regulate how law itself is to be made and applied. These principles generally require that, so far as feasible, the law take the form of general rules; that these rules be clear and intelligible; that any new law be publicly promulgated or otherwise publicly avail-

able; that the citizenry generally have advance notice of the effective date of new law and ready access thereto; that such new law generally be prospective rather than retrospective in operation; that the law be free of conflicts with other law; that all law be interpreted or applied in accord with appropriate methodologies generally understood in advance; that prior to significant denials of claimed right, or to adverse grants of remedy, or to imposition of sanctions, the party to be adversely affected have an opportunity to contest such action before an independent and impartial body in accord with due process; and so on. Such principles of legality regulate the operation of law's basic functional elements and of law's general operational techniques, but they are less concerned with efficacy than with the legitimacy and fairness of how law operates. Indeed, total failure of a system to implement merely a single such principle, e.g., prospectivity, may signify that the system is not truly one of law at all.⁵⁵ Such principles are formal because they are structural and are methodical.⁵⁶ They govern the operation of law's basic functional elements and general techniques, rather than directly determine the content of any law so made and applied.

A legal system considered as a whole is also formal structurally in the degrees to which it centralizes and hierarchically orders the making and implementation of law. It may, for example, centralize all law-making power in one legislature with country-wide jurisdiction or it may decentralize this power. Also, it may, for example, centralize all final judicial appeals from lower court cases in one country-wide Supreme Court, or it may decentralize this role.

A modern legal system, viewed as a whole, is formal in still further fundamental ways. The overall content of its bodies of law is relatively unified and consistent, a fourth major sense in which such a system is formal.⁵⁷ Thus, in a legal system there are many possible sources of *prima facie* valid law. Indeed, even within each type of general operational technique, there may be two or more institutions or entities with authority to create *prima facie* valid law. For example, in a technique of the administrative-regulatory type, legislatures, courts, and administrative agencies may all create *prima facie* valid regulatory law applicable within the technique and to its addressees. In a technique

⁵⁵ See FULLER, *supra* note 6, at 39.

⁵⁶ See *supra* note 41.

⁵⁷ OED entry no. I.9 for "form" reads: "method of arranging the ideas in logical reasoning; good or just order (of ideas, etc.), logical sequence." 6 OED, *supra* note 13, at 79. Also, the OED entry no. A.4.a for "formal" "Regular, having a definite principle, methodical." *Id.* at 82. WEBSTER'S entry no. 10.a for "form" reads "manner of co-ordinating elements . . ." WEBSTER'S, *supra* note 13, at 892. WEBSTER'S entry no. 1.b.1 for "formal" also includes "having a symmetrical arrangement of elements . . ." *Id.* at 893. The foregoing notions at least implicitly rule out inconsistency and incoherence.

of the private ordering type, private parties, corporate and non-corporate, enter consensual arrangements of many kinds that, along with legislative and judge-made law, are also *prima facie* valid. Indeed a complete inventory of the authorized makers of law within a complex modern system would extend well beyond those identified so far.

Given this multiplicity of authorized lawmakers in modern systems, the potential for conflicts between *prima facie* valid forms of law emanating from different sources is considerable. The reality is that such conflicts are common in some systems, and that in all systems with which I am familiar, the prevailing criteria of validity provide, to some extent, for the resolution of such conflicts in accord with a systematic hierarchical ranking of the law-making sources, e.g., legislative, judicial, etc. (Such criteria are mainly source-oriented rather than content-oriented, and so are themselves largely formal.) It is familiar that in the United States, constitutional law takes priority over statute law, and over all other conflicting types of law. Statutory law takes priority over conflicting administrative regulations, over non-constitutional judge-made law, and over all other law emanating from sources lower in the hierarchy.⁵⁸ Judge-made law generally takes priority over contract law and other privately made law, including custom. Contract law takes priority over custom. Thus, a modern legal system secures system-wide consistency in the content of its bodies of law to a large extent through a hierarchical ranking of law-making sources.⁵⁹

But inconsistencies between laws arise not only from different law-making bodies or sources of law. Inconsistencies also arise between laws made by the same law-making body or source. Thus inconsistencies may emerge as between two statutes or between two rules of judge-made law. Mere hierarchical prioritization of different sources is incapable of purging a system of inconsistencies such as these. Yet the desiderata of systemic unity and consistency apply here, too, and modern systems recognize various ways of securing these ends. For example, statutory coherence is sought through interpretive techniques validating more specific statutes over more general ones, more recent ones over earlier ones, and the like. Statutory coherence is also achieved through model codifications and through ad hoc legislative intervention. Similarly, a unified and coherent case law is secured partly through a centralized judicial hierarchy that enforces adherence to higher court precedents and resolves conflicts in precedents set by the lower courts of the same jurisdiction. Ad hoc legislative intervention occurs here to secure consistency of precedent, too.

⁵⁸ But American courts not infrequently depart from statutes in the name of interpretation when they are in fact amending statutes. See *supra* note 51.

⁵⁹ See HART, *supra* note 6, at 100-110.

The degree to which a legal system is complete in overall content is still another dimension of formality.⁶⁰ A system may be more, or less, complete not only in basic policy content but also in basic organizational elements as well. (But then, too, there may be gaps.) Still another formal systemic dimension is the degree of definitiveness of a legal system as a whole.⁶¹ A system is definitive to the extent that its five general operational techniques, its devices for securing coherence in the content of the system, and its provisions for orderly modes of change are tightly organized and operate in regularized fashion. This, in turn, is partly a function of what is yet another formal dimension, namely, the extent such matters are well-prescribed in rules with citizens and officials ready to condemn departures and to take necessary remedial steps. In many Western systems, many such rules are expressed in the special encapsulatory form of a written constitution.

In sum, a legal system is formal insofar as it conforms to the conception of the essential form of such a system accepted there, formal derivatively in that its constituent functional elements are themselves formal in a number of ways, formal structurally in its organization and coordination of these elements into integrated general operational techniques for making and implementing law, formal structurally and methodically in its functioning in accord with such techniques, formal structurally and methodically in its deployment of principles of legality and the rule of law, formal structurally in the degree it centralizes the making and implementation of law, formal in the unity and consistency of its bodies of substantive and procedural law, formal in the degree of completeness of its basic policy content and its basic organizational content, and formal in its overall definitiveness and in how far its systemic features are preceptually prescribed and also embodied in a written constitution or other law.

II

WHY APPROPRIATE FORM MATTERS—SOME JURISPRUDENTIAL IMPLICATIONS

The central problem of jurisprudence and the philosophy of law is that of providing an account of the nature of law. One way to cast light on the nature of law is to analyze law's basic characteristics and the relationships between them. One such characteristic is that law is formal. Among law's basic characteristics, form has special primacy.

⁶⁰ OED entry no. A.3.b for the adjective "formal" states: "Made in proper form, regular, complete." ⁶ OED, *supra* note 13, at 82. Webster's entry for "formal" includes at 2.b: "characterized by or formal in due order: regular." WEBSTER'S, *supra* note 13, at 893.

⁶¹ See *supra* note 30.

A. Generally Appropriate Form as One Basic Characteristic of Law

Law in a developed society consists of highly complex and varied social phenomena which cannot be reduced to a simple set. The basic characteristics of law are numerous, multi-faceted, and inter-related. These basic characteristics may be succinctly categorized as follows:

(1) Characteristically, a system of law serves human interests, and if it generally fails to do so, it is, as Plato suggested, not truly law.⁶²

(2) Where there is law in a modern society, it is characteristic that the society recognizes and accepts as legitimate an authoritative, relatively autonomous, exclusive, and organized methodology for making and implementing legal rules and other legal devices of social facilitation and control.

(3) This recognized and accepted methodology can itself be broken down into a characteristic set of basic functional elements including electoral processes, a legislature, courts, interpretive methods, criteria of validity, bodies of law, and so on, some of which consist of highly complex institutions and other social arrangements.

(4) These basic functional elements are characteristically combined, ordered and integrated by and within various general operational techniques: penal, grievance-remedial, administrative-regulatory, public-benefit conferring, and private-arranging.

(5) Within these basic functional elements, and within these general operational techniques, the state, official personnel, private citizens and other legal entities characteristically fulfill law-making and law-implementing roles in accord with a complex division and specialization of legal labor, itself defined and delimited by law.

(6) Characteristically, most of the law made by state organs is in the form of general rules reduced to some written form, i.e., statute, regulation, judicial opinion, etc., while law created by private parties and entities may or may not be written, and takes more varied forms, e.g., contracts, property arrangements, and wills.

(7) The totality of the bodies of state-made law characteristically has a minimum substantive policy content encompassing at least basic protection of the bodily integrity of human beings, the protection of property and promises, and thus, characteristically serves corresponding values.

(8) The law publicly and privately created is characteristically regarded as generating, in accord with criteria of validity and with prescribed interpretive and other applicational methodologies, authoritative reasons for citizens and other entities, and for officials, to take action or to make decisions accordingly.

(9) The addressees of the law characteristically act or decide voluntarily in accord with the authoritative reasons for action or decision

⁶² See PLATO, *supra* note 16, at 486-87.

so generated by valid law and relevant interpretive or other applicational method, and the system is thus generally efficacious.

(10) The system, however, characteristically has the capacity to coerce or sanction those persons or entities who do not voluntarily act in accord with the authoritative reasons so generated.

(11) The system characteristically provides for orderly modes of change in the content and form of the law, in basic functional elements, and even in features of the system as a whole.

(12) The system characteristically operates, to a large degree, in accord with certain general legal values, in accord with principles of legality and the rule of law, and in accord with various limitations on governmental power, and thus, characteristically serves the corresponding values.

(13) The operations of the system are characteristically dependent for their efficacy on social acceptance and social attitudes, on a common language, on the dissemination of various forms of legal and other knowledge, on trained personnel, and on various other social and material resources.

(14) The system is characteristically formal in rules and related devices, in basic functional elements, and in core features of the system taken as a whole.

The last general characteristic in the foregoing categorization is that law is formal. In Part I of this Article, I have already introduced the concepts required for the perspicuous and synoptic representation of this complex characteristic in its wide-ranging varieties. To recapitulate briefly: rules of law are formal in that they conform to the essential form of rules. Beyond this, all rules are formal structurally, expressionally, and encapsulatorily. Some rules are also formal in that they have organizational content. A similar yet appropriately modified analysis can be deployed to explicate the formality of rulings, principles, maxims, and other species of law. All basic functional elements of a legal system such as the institutions of legislatures, courts, and interpretive methodology for statutes are formal in their conformity to the essential forms of such phenomena accepted in the society, and are formal in their elaborations and variations beyond minimal essential form: procedurally, structurally, methodically, definitively, preceptually, and encapsulatorily. The system as a whole is formal insofar as it conforms to the minimal essential form of a legal system, and is also derivatively formal insofar as its constituent functional elements are formal. The system as a whole is also structurally and methodically formal in its general operational techniques which incorporate, integrate, and coordinate these elements within functioning wholes. Further, the system as a whole is formal in its conformity to systemic rule-of-law principles which regulate how law is made and applied in accord with each general operational technique. The system as a whole is structurally and methodically also formal in

its consistency and coherence of content, which is secured mainly (though not only) through formal prioritization of potentially conflicting sources of law.

B. Appropriate Form as a Characteristic Having Special Primacy

The formality of law is not merely one of the basic characteristics of law, in itself and on its own. Generally, appropriate form has special primacy among all of law's characteristics, in five major respects. Appropriate form underlies or figures in each of the other leading characteristics of law. Moreover, appropriate form is required for the very existence of the preceptual, institutional, and other elements of a legal system. As Jhering emphasized, form is grounded in the innermost essence of law ("im innersten Wesen des Rechts begründet").⁶³ In addition, appropriate form has primacy because it is indispensable to legitimate, civic authority. Also, appropriate form has primacy because it goes to the very identity of a legal system. Further, appropriate form, especially in the institutionalized methodology of the system, distinctively enshrines, symbolizes, radiates and reinforces most of the fundamental values of the system.

First, the formal character of law has primacy among law's characteristics because it underlies or figures in each of the others. Rules figure in all of these other basic characteristics, and rules are formal in several major ways. Indeed, each of the other characteristics is itself internally organized, and rules are the primary instruments of such organization. One or more basic functional elements figures, directly or indirectly, in each of the law's characteristics, and again, we have seen that such elements are formal in several major respects. Further, the formal features of the system as a whole, e.g., its structural, its methodical, and its unifying features, are system-wide in scope and bearing. Moreover, many varieties of form contribute directly and indirectly to the incorporation and organization of non-formal elements within the law and the law's general operational techniques. These non-formal elements include substantive policy content, official personnel, material resources, specialized knowledge, and more. Here, form is a kind of binding that ties all together.

Secondly, the formal character of law has primacy among law's characteristics because it is required for the very existence of the preceptual, institutional, and other elements of any legal system. As I have shown, rules can be formal in at least five major ways, and without rules in appropriate form, a modern system of law could not exist because its essential institutions and processes could not be duly organized in the first place. Also, a system of law depends on basic func-

⁶³ JHERING, *GEIST*, *supra* note 6, at 479.

tional elements such as a legislature, courts, criteria of validity, bodies of rules, interpretive methodologies, and more. Plainly, such elements could not exist at all if they failed to conform at least to their minimal essential forms, whatever those might be for the society involved. Also, such elements are dependent for their efficacy on elaborations of their formal features and subject matter, elaborations that, if appropriate to their ends, typically must go beyond their minimal essential forms. Even were such basic functional elements to exist and be duly elaborated beyond their essential forms, we could still not have a system of law in its full sense unless these elements were duly combined, integrated, and coordinated within general operational techniques for making and implementing law: the penal technique, the grievance-remedial technique, the administrative-regulatory technique, the public-benefit-conferral technique, and the private-ordering technique. Such techniques are structural and methodical and so, formal. Similarly, we could not have a system of law if these techniques failed to an appreciable degree to operate relatively systematically in accord with formal principles of legality and the rule of law. A formless regime of political administration, or a formless reign of "state" terror, could not operate in a sufficiently law-like way and so could not count as a system of law, whatever the temporary efficacy of any such "state" force and violence. Nor could we have a system of law without general coherence of content, a further general formal feature.

Thirdly, appropriate form has primacy among law's characteristics because it is indispensable to the very existence of duly constituted, and so legitimate, civic authority. Such authority is foundational. The most fundamental political value is that of securing within a society legitimate political authority to make and implement law. Here, the antithesis is anarchy. Appropriate form is indispensable to organized public decision-making—to the very existence of legitimate authority. Without duly constituted authority, there can be no valid rules or other law, and no authoritative interpretive and other applicational method, and so, no legally authoritative formal reasons for action. Without such reasons, there is no law. In order for authority to make law to exist, the "authors" who make law must be authorized. This authorization cannot exist if "law"-making is ad hoc and haphazard. It must be organized and regularized through the adoption and implementation of formal rules establishing law-making roles and conferring law-making power on occupants of those roles.⁶⁴ Moreover, such authority must be similarly established for

⁶⁴ An American judge once put matters this way:

Those who are impatient with the forms of law ought to reflect that it is through form that all organization is reached. Matter without form is

those who interpret and apply rules in cases of dispute. The very efficacy and legitimacy of the law's methodology for making and applying rules and other law is heavily dependent on form. Appropriate form is indispensable to organized public and private decision-making—to the very existence of effective and legitimate authority. Without such a "set" methodology and operational techniques, and without the established mandatory and exclusionary force of legally authoritative reasons for action that this methodology and these techniques generate, there could be no social objects of sufficient determinateness and constancy through time to which the people of a society could express or imply their assent, acceptance, or acquiescence—the primary sources of legitimacy in modern systems. And without such legitimacy, the levels of voluntary compliance in accord with the formal reasons for action that law generates could not be sustained. Yet because the efficacy of the coercive apparatus of such systems is itself also heavily dependent on such legitimacy, it might well be that this apparatus could not then alone secure sufficient levels of compliance.

Fourth, any basic feature, or general set of features, that goes to the very *identity* of the phenomena in question has a claim to primacy. A primary measure of the very identity of any particular legal system is the nature and extent of its formal character, overall. One way to test this view is to imagine that a number of basic changes in the formality of a given system take place over a discrete period, and then to pose the issue of whether that system might be said to have lost its very identity and to have taken on a new one. Suppose, for example, that the formal constitutional structure of the system is changed in basic ways, as from a cabinet form to a non-cabinet form, from a limited electoral franchise to a fully democratic one, from a system without judicial review of legislation to one with it, or from a system without independence of the judiciary to one with it. And suppose also that the system is changed from one of commonly incomplete rules at inception to largely complete ones; that the system is also changed from one of open-ended rules to highly definite ones; that the system is changed from one in which law is interpreted ad hoc and rather freely in light of substantive ends and means implicated in particular cases to one in which law is interpreted and applied more strictly in light of an interpretive methodology of some formality; that the system is changed from one in which judges have vast power to modify antecedent law at point of application to one in which they have only very restricted power to do so. Now, if even only some of these changes

chaos; power without form is anarchy. The state, were it to disregard forms, would not be a government, but a mob. Its action would not be administration, but violence.

were cumulatively to occur, such a system, so changed solely in these *formal* respects with their complementary manifestations in content, would not any longer be considered the *same* legal system. And yet many more such formal changes, major in nature, can be imagined.

Fifth, a system of law in appropriate form not only creates and implements policy. The contours and content of its very institutional and processual architecture, and its daily operations, can distinctively express, enshrine, symbolize, radiate, and reinforce the legal commitments of the society to such fundamental political values as democracy, justice and fairness of process, rationality of decision-making, principles of legality and the rule of law, liberty, limited government, and still more. Appropriate form is indispensable here.

Consider the example of democracy. Appropriate form in the law's institutional architecture and daily functioning is required to express, enshrine, symbolize, radiate, and thus reinforce this fundamental value. Without appropriate form, there can be no electoral process and no elected legislature. Appropriate form here requires not only the minimal essential forms for the existence of an electoral process and of a legislature, but also various elaborations on these basic functional elements if they are to be effective. Many of these elaborations are organizational, structural, methodical, and procedural, and so formal in all these ways. An electoral process is highly rule defined, and it includes such rules as those that prevent ineligible persons from voting, and prevent persons from voting twice. Further, the legislature has to be formally organized so that the results of democratic elections are, in turn, implemented in the law-making process. Moreover, if the fundamental political value of democracy is to be realized, organizational, structural, methodical, procedural, and other formal limits must be imposed on still other institutions of the legal system, and these must take appropriate encapsulatory form. For instance, courts and other authoritative institutions must not have a general power, in the guise of interpretation, to amend and thus undo statutes adopted by the democratically elected legislature. This seems obvious, but in some major Western democracies, judges amend statutes in just this way, a practice that has other adverse secondary effects as well. For example, it imposes an impossible burden on what should be the leading type of argument in any rationally designed methodology of statutory interpretation, namely, the argument from ordinary meaning. This type of argument simply cannot survive the double duty of justifying particular statutory interpretations when it is also purportedly used to "justify" departures from statutes as well.

The foregoing mode of analysis is only one way that the formal character of law can cast light on the very nature of law itself, and this mode of analysis is susceptible of further elaboration. Moreover, the

formal character of law bears on still other major problems of jurisprudence and the philosophy of law besides the nature of law. It even reveals in its own way important necessary connections between law and morals. I will consider these and still other theoretical issues in the book I am writing.

III

WHY APPROPRIATE FORM MATTERS—SOME FURTHER PRACTICAL IMPLICATIONS

We have already seen how the jurisprudential implications of appropriate form in the law are not merely jurisprudential. They are themselves freighted with practical implications. What could be of more practical relevance than the very existence of such basic functional elements of a legal system as a legislature and courts, and still other types of institutional phenomena heavily dependent for their efficacy on choices of appropriate form? Indeed, one may readily hypothesize the availability of all possible "raw materials" required for a functioning legal order, including embryonic ideas of basic functional elements, mere notions of relevant policy and of other values, potential official personnel, possible citizen willingness to accept duly constituted authority, available physical resources, general knowledge, and more. Yet, all these "raw materials" would be useless without numerous choices of appropriate legal forms and their due implementation. Duly organized and duly formal institutions, processes, methodologies, entities, and more, are required for the incorporation of both formal and non-formal "raw materials" into an effective system of law. Thus, as I have argued, appropriate form is indispensable to the very creation of a system of law and to the very existence of legitimate civic authority. Also, if appropriate form in legal institutions, processes and other basic functional elements incorporates, expresses, enshrines, symbolizes, radiates, and reinforces fundamental values of the society, then this must matter practically, too. Here, the distinction between theory and practice dissolves. Yet appropriate form is of immediate practical significance in still other ways, too.

A. Appropriateness of Form in the Law Has an Integrity of Its Own, Cannot Be Taken for Granted and Must Be Planned, Designed, and Secured

Although form pervades rules and other precepts, basic functional elements, and the system taken as a whole, it still does not follow that all these varied and wide ranging formal features and subject matter will be *appropriately* formal in any particular system at any particular time. And if form is not appropriate, it may be ineffective as a means to ends. It can even become an instrument of evil. And if form

is not appropriate, if wrong choices are made as to form, and if these wrong choices are consequential, it follows that form matters practically and that it requires due attention. The hazards of inappropriate form are all the greater if unsound theories of form abound in a given legal culture. Thus, if many theorists believe that any insistence on formality must be formalistic, then it becomes all the more important to demonstrate the contrary, and to give due attention to appropriateness of form. Alternatively, if some theorists believe that form really has no integrity of its own, and, in application, always collapses into something else, such as "substance," or "material content," or "policy," or the like, then again it becomes all the more urgent to demonstrate the contrary, and to give due attention to appropriateness of form.

I do not believe it is possible usefully to characterize appropriate form in the abstract. What constitutes appropriate form will vary with the type of form involved. For example, appropriate structural form, i.e., an appropriate degree of generality in a rule, is one thing, appropriate encapsulatory form for that same rule something else. What is appropriate form will vary also with the type of legal phenomenon involved. For example, an appropriately formal feature of a rule, such as definiteness, may be one thing, while the appropriate overall definiteness of an institution such as a court will be quite another. Similarly, the appropriate procedural form for a legislature will be quite different from the appropriate procedural form for a court.

Appropriateness of form depends not only on the type of form, and the type of legal phenomenon involved. It also depends on the type of subject matter involved. In the case of rules, for example, some types of subject matter require, or perhaps even dictate, highly formal rules whereas other subject matter dictates rules that are less formal. The very subject matter of a statute of limitations may be said to dictate high degrees of definiteness and completeness, for example. Otherwise, it could not serve its primary function of repose. The very subject matter of a rule providing for the award of custody of children, however, may be said to require or dictate a less definite and less complete rule. Of course, appropriateness of form also depends on the problem-specific policy or policies to be served, and any general legal values implicated, a subject I will treat at length in Part III.D of this Article.

It may be that at some future time it will be possible, on the basis of accumulated experience and reflection, to articulate what might be called "laws of appropriate form." For example, it *may* be possible to formulate a kind of "law" to the effect that whenever the rights of third parties may be adversely affected, as with the issuance of certain commercial instruments, appropriate form generally requires highly definite and complete rules. Such "laws" could serve as maxims for

drafters, and could have still other uses. But whatever the prospects here for the formulation of such "laws" of appropriate form, the very exercise of trying to formulate such laws and of then evaluating them is certainly one way to deepen our grasp of this complex subject. Let us consider another simple example, a more general one. We might imagine the following candidate for status as a "law" of appropriate form: "The more formal, or the more highly formal, the more appropriate." On reflection, however, we should reject any such "law." It is familiar that, for example, some precepts require relatively low degrees or low levels of formal attributes. Awarding custody on the basis of the best interests of the child is an example. A high degree of definiteness and completeness in a rule on custody could, for example, require that the child always be awarded only to one parent, such as the mother, or to the parent with the most material resources. But such a more formal rule could be justly criticized for neglecting other considerations more relevant to the well being of the child, overall. In an important sense the rule would be over-formal, i.e., formalistic (though this is not the only sense of "formalistic"). It is simply a fallacy to conclude that in matters of legal ordering the more formal or the higher formality is always the more appropriate. Likewise, it is a fallacy to conclude that low formality or lesser degrees of formality are always inappropriate.

It follows that form can be appropriate, and yet not be formalistic. Appropriate form, then, is hardly a contradiction in terms. This is not to say that what is truly formalistic can still be appropriate. When form is appropriate, it is not formalistic—is not overformal and thus bad form. But the pathology of form—the systematic study of the major varieties of inappropriate form—would also require that we go beyond the over-formal, i.e., the formalistic. The study of the pathology of legal form requires that we also consider the underformal, and thus the substantivistic (though in the legal academic world in America, some scholars are not especially sensitive to this type of defect). Just as there can be many meanings of formalistic, so there can be various meanings of substantivistic. One of these is simply that the rule is too open-ended, providing little or no firm guidance to its addressees on the front lines of human interaction, and in instances of disputed applicability, inviting an endless canvassing of all possible substantive considerations. An example is a highway "speed limit" (as in Montana) requiring only that drivers drive "reasonably."⁶⁵

The pathology of legal form also includes the study of how rules that are initially well-designed and so appropriately formal become substantivistic in judicial application.⁶⁶ In such instances, it might be

⁶⁵ MONT. CODE ANN. §61-8-303 (1995).

⁶⁶ I am indebted to Professor DeMott for leading me to think further about this.

said that appropriate form in the rule is swallowed up by (or collapses into) substantive considerations of policy or of justice and equity in the particular case.⁶⁷ It cannot be denied that, in the American system, appropriate form in a rule sometimes, perhaps frequently, vanishes in judicial application, especially when the rule seems to over- or under-include. Versions of the parol evidence rule in the American law of contracts provide familiar examples. So many meanings have been given to its terms, and so many exceptions created to it, that in some jurisdictions it has become something of a sieve.⁶⁸ But the problem is hardly confined to judge-made law. Even appropriate form in a well-designed statute may be swallowed up in a frenzy of judicial policy making at point of application.

But there is nothing inevitable about the undue collapse of appropriate form into substance, into policy, or into justice and equity in the course of applying a rule to a particular case. While any legal system might reasonably confer on judges some limited power of dispensation or even power of statutory amendment (duly circumscribed), thereby explicitly enabling judges to disregard appropriate form in certain cases, it would hardly follow that appropriate form in rules would then no longer have any role to play. Appropriate prescriptiveness, generality, definiteness, and completeness in rules, for example, would continue to be general desiderata if for no other reason than that there is much more to rules than substantive policy. Moreover, there is nothing inherent in these formal features that lends them to being so swallowed up. They have an integrity of their own. Indeed, any legal system that regularly tolerates wholesale judicial departures from appropriate form in antecedent rules simply cannot be said to have a genuine rule of law.

The study of the pathology of legal form also requires that we study what might be called the "malformed." An *institutional* example of malformation is an adjudicative process in which the role of zealous complainant-oriented prosecutor is purportedly combined with the important role of an impartial and neutral tribunal finding facts and applying law. Any attempt to combine these inconsistent roles to a significant degree risks the forfeiture of both the reality and the appearance of the impartiality and neutrality of the tribunal. A body that seeks first to approach the evidence in a partisan prosecutorial

⁶⁷ This way of thinking has some respectable antecedents. See, for example, the work of John Stuart Mill: "All action is for the sake of some end, and rules of action, it seems natural to suppose, must take their whole character and color from the end to which they are subservient." JOHN STUART MILL, *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 2 (A.D. Lindsay ed., 1951).

⁶⁸ See, e.g., *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968). For a different view of the rule see *Trident Center v. Connecticut General Life Insurance*, 847 F.2d 564 (9th Cir. 1988).

spirit is likely in the course of that to prejudice or appear to prejudice when it later comes time to find the facts. Moreover, such a process is likely to be, and to appear, unfair to the adversely affected party. Any such process would be malformed.

But I cite this example not merely to illustrate malformation of an institution. I also wish to contrast this example with its appropriately formal counterpart, an adjudicative process having appropriate role differentiation. Such a process also illustrates how appropriate form in adjudication has an internal integrity of its own which does not collapse into something else such as "substance," or "material content," or "policy," or justice and equity of outcome in the particular case (or whatever the adjudicator takes to be the ultimate end or ends of the process). Indeed, we judge the appropriateness of the design of a basic functional element such as an adjudicative process not only in light of the policy, equity, or other "outcome" ends it may serve through accurate fact-finding and objective application of law. We also judge its appropriateness in terms of whether it is intrinsically fair *as a process*.⁶⁹ And we try to design it to differentiate prosecutorial and fact-finding roles, with an eye to the intrinsic fairness of the process as such. Indeed, let us suppose that the policy ends of substantive rules being adjudicated would be served as well or almost as well without such role differentiation. We ought nonetheless to embrace role differentiation on grounds of intrinsic processual fairness. It follows that appropriate adjudicative form, even insofar as designed to serve policy ends, does not in any sense collapse into those extrinsic ends. Its design is informed by internal considerations of processual fairness, too. And, as appropriate form, it has an existence and a stability all its own. It is not to be "appropriated" to something else.

B. Appropriate Authorizational Form Is Commonly Required Not Only to Validate But Also to Determine the Very Content of Law

The authority to make valid law is always conditioned to a large extent on following appropriate form—on what I will call requirements of "authorizational form." For example, the authority of a legislature to make a valid statute depends on the extent of its law-making power, on the procedures it follows (including voting procedures), and on mode of promulgation. Validity here depends largely on compliance with appropriate authorizational form, and so is largely for-

⁶⁹ See Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974); see also Robert S. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law,* 92 HARV. L. REV. 432, 444-45 (1978).

mal.⁷⁰ The only major exception in some Western systems is where validity depends also on compliance with any applicable content-oriented criterion of validity.

A legislature regularly enacts valid statutes. Administrative officials and bodies regularly make valid orders and valid regulations. Courts create precedents that are valid. Private parties make valid contracts and valid wills, and create corporations and the like. But validative effect is not the only effect of actions that conform to appropriate authorizational form. That is, legislative and other law-making is not merely *validative*. Such action is also commonly *determinative* of law's content as well, a major factor that further demonstrates the practical significance of form in the law. When legislatures enact statutes, this very action commonly resolves issues of content as well as validates that content. This occurs because, as St. Thomas Aquinas long ago emphasized, the powers of human reason and persuasion are limited, and so must often be supplemented by the exercise of formal authority in determining the very content of law.⁷¹ It is only through appropriate form that many necessary law-making choices can be made at all. Appropriate authorizational form is, in such instances determinative, as well as validative, of content.

It is true that the power of human reason, and of persuasion, largely or exclusively determines the content of some statutes. For example, a proposed statute may simply incorporate a ready-made, rationally justified, and intrinsically persuasive moral principle such as the principle that contracting parties shall perform in good faith.⁷² Here, let us assume that the entire content of the law is determined more or less by the force of human reason and persuasion. In its statutory embodiment, the principle may even remain almost identical in content to its usual formulation in the general critical morality of the society. Here we may say that conformity with appropriate authorizational form, in itself, contributes little or nothing to the determination of the content that is ultimately validated. Conformity merely validates. That is, it merely renders the content legal. There are still other types of cases where the exercise of formal authority merely contributes the stamp of validity, the stamp of appropriate authorizational form, while the weight of human reason (including persuasiveness)

⁷⁰ OED entry no. A.5 for "formal" states: "Done or made with the forms recognized as ensuring validity . . ." 6 OED, *supra* note 13, at 82. Webster's entry no. 2.b for "formal" provides: "done in due form." WEBSTER'S, *supra* note 13, at 893.

⁷¹ See, e.g., ST. THOMAS ACQUINAS, TREATISE ON LAW 78 (Gateway ed., 1965). See also JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 284-90 (1980).

⁷² See U.C.C. § 1-203 (1994) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."); Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

determines all else. For example, the weight of policy reasoning is sometimes heavily and discernibly on one side, and general legal values such as predictability and equality before the law may unequivocally point the same way, as with, for example, a rule that generally permits citizens of a society to own property. Here, too, reason (including persuasiveness) may be said to be almost entirely determinative of the proposed content of the law, with formal authority merely validating that content.

But there are many other types of examples along a continuum on which the influence of reason (including persuasion) diminishes, and the role of formal authority—of mere authoritative choice—increases in determining the content of law to be validated. Consider a general highway speed limit of, say 65 mph. Here, the weight of policy reasoning heavily favors having some speed limit. Also, the weight of reason by way of general legal values such as predictability, the “learnability” of law, the dignity and efficiency of citizen self-direction, equality before the law, freedom from arbitrary official interference, factual realizability, and dispute avoidance all weigh heavily in favor of a definite speed limit in a precise rule. But even with this powerful convergence of policy reasoning and general legal values, the power of reason alone in this type of example, is still not itself wholly determinative. Why 65 mph? Why not 64? 66? 67? Here, some exercise of formal authority alone is required to determine the specific number. Thus, we may say that, here, choice in the name of the appropriate authorizational form for enactment of a statute not merely validates content, but also plays at least a limited role in the final choice of the very content to be validated.

And, as we move farther out along our continuum, we encounter more examples in which mere authoritative choice in the name of appropriate authorizational form, not merely validates content but increasingly contributes, in itself, to the resolution of issues of content, and thus, is determinative of content as well. Consider, for example, a proposed statute of limitations for breach of warranty. Should it be for two years? Four years? Here, the force of reason strongly favors the policy goal or end of such a statute, but does not so clearly favor one means over another—two years over four. It might be said here that, as to means, the reasons favoring the alternatives are stalemated. This is not uncommon. And stalemate may occur farther along the means-end continuum, more in respect to ends than means. Consider, for example, a proposed statute always awarding custody of a child of divorced parents to the mother. Here, the reasoning favoring such a proposal may be the argument that the maternal relationship is special. But the policy and the equitable considerations generally weighing the other way could, in a given society be equally or almost

equally strong in many particular cases. When ends are thus stalemated, yet there is still need for settled law, appropriate authorizational form determines, or goes far to determine, that content. Indeed, in cases far along the continuum, it may, in a sense, even be all there is.

So far, I have stressed the determinative effect on content of mere law-making choice in the name of appropriate authorizational form. The formal criteria of authorized source, of scope, of voting and other procedures, of due enactment, of appropriate promulgation, and the like, not merely ultimately *enable* valid law to be adopted. They also *exert pressure* for determinate resolution of issues with respect to the content of proposed law. These, however, are not the only ways that formality in the law exerts pressure for resolution of issues of content in the law-making processes. Anytime the law to be adopted is also to be embodied in a rule or other precept with formal features that may on their own serve policy and other values in varying degrees, those formal features and the values they implicate will exert their own pressure for the structuring of content. I now turn to this.

C. Appropriate Form in a Precept Is Required for It to Serve as an Adequate Means to Policy Goals

If law is to serve adequately as a means to policy goals, law must not only have relevant policy content. It must also have appropriate preceptual and other form. As Jhering said: "There can be no content without form."⁷³ At the law-making stage, various types of choices of preceptual (and other) form are necessary. And each choice might be made appropriately or inappropriately. Consider the example of a legislative proposal to require automobile owners to have periodic inspections for roadworthiness. The proposer of such a law would have to choose an appropriate preceptual form for imposing this duty of inspection, and related duties. Not just any preceptual form would be appropriate. The preceptual form of an order would be too particular. A general principle would be too imprecise. A broad grant of discretion to owners would not be apt, although some cars might not require annual inspection. Clear guidance to citizens out of court is required. Only the preceptual form of a relatively definite rule would be appropriate (and several rules would be required at that). We have seen that the essential form of a rule consists largely of a general prescription that is also complete and definite in some degree.

It is plain that the mere choice of an appropriate preceptual form, i.e., a rule, can not itself guarantee appropriateness of form in all its other varieties. It is even possible to choose an appropriate

⁷³ JHERING, GEIST, *supra* note 6, at 473 (translation my own).

preceptual form, such as a rule, yet fail to choose an appropriate degree of generality, definiteness, completeness, or some other structurally formal feature such as simplicity. If, for example, the duty to have vehicle inspections is not made sufficiently definite, the policy of safety will not be well served. Thus, appropriate form requires not only the choice of a suitable type of precept but also choice of formal features which appropriately structure the policy content of the rule. And in our present example, a number of rules with appropriate formal features would be needed, for the law creator would have to address a number of questions if the policy is to be sufficiently refined to be operational, including: What vehicles should be subject to inspections? How frequently? By whom? What should be the scope of an inspection? With what effects? And so on.

Our law creator would also be called upon to consider, if only briefly, still a further type of choice of form, namely, "encapsulatory form." The decision having already been made that such a regulatory matter cannot be left to enlightened evolution of private customary practice, the lawmaker would also be certain to rule out case-by-case common law development. (Of course, the matter does not qualify for constitutional embodiment.) Only the encapsulatory form of statute or regulation would be appropriate here.

Choices of appropriate expressional form would also be on the lawmaker's agenda, though these overlap somewhat with issues of structural form. Thus, how explicit should the law be? Should it be expressed in lay language or in technical vocabulary?⁷⁴ And so on.

In sum, choices of appropriate preceptual, structural, encapsulatory, and expressional form are required if law is to implement policy satisfactorily. Choice of policy content is never alone enough. Of course, there will be interactions here between formal features and policy content, in the course of arriving at the final form and content of the rule.

D. Appropriate Form in Precepts Is Also Required as a Means to General Legal Values, and Such Form Sometimes Justifies Limited Sacrifice of Policy

Whenever law is used to serve policy goals, this also implicates some general legal values, including predictability, "learnability" of law, fair notice, the dignity and efficiency of citizen self-direction under law, equality before the law, freedom from official arbitrariness, and dispute avoidance. The category of general legal values is large and complex, but for present purposes it is not necessary to catalog

⁷⁴ See HARRY W. JONES, *THE EFFICACY OF LAW* 18-19 (1968) (recounting how the choice of lay terms can be optimal).

these values. Roughly, general legal values differ from policies in two major ways. Policies are problem-specific in scope, whereas general legal values are not. That is, some (perhaps many) general legal values come into play whenever law is used to implement any policy, whatever its problem-specific content. Second, only uses of law bring most general legal values into play. Many policies pursued through law, however, may be or are concurrently pursued through non-legal means as well.

Rules should be designed and administered so far as feasible not only to serve policy goals but also to serve general legal values. But will choice of the same form in a rule or other law that is appropriate as means to policy also be appropriate as means to the realization of general legal values?

Consider this example, again from a familiar context. We may imagine two candidates for a highway speed limit rule: Rule *A* imposes a speed limit of 65 mph (possibly subject to limited modification through enforcement practice) and Rule *B* specifies no precise limit and requires only that drivers drive at reasonable speeds. Both rules have policy content and formal features. We might also say that Rule *A* and Rule *B* have the same degree of the formal feature of generality. Yet Rule *A* is simpler, more definite, and more complete at inception, and thus differs from Rule *B* in these formal features, and so in corresponding content. If we focus merely on appropriate preceptual and structural formality, the question arises: which rule has the form (with corresponding content) that is more appropriate as the means to the policies of highway safety and efficient traffic flow?

In my view, the form of Rule *A* is the more appropriate means to these policies. Its formal features of simplicity, definiteness, and completeness generate more determinate guidance and thus, clearer formal reasons for action by drivers. The conceptual content of the rule is specific and immediately intelligible. The facts on which the rule turns are easily and readily determinable. Hence, the rule is factually realizable. Also, the rule and the formal reasons it generates exclude other substantive considerations that could operate at point of application. Drivers can better self-administer this simpler, more definite, and more complete rule than they can the "drive reasonably" rule. They can also coordinate their driving with the driving of others more effectively. Assuming that a 65 mph speed limit is itself empirically justified, the form of Rule *A* will therefore serve the policies of safety and efficient traffic flow more effectively than the form of Rule *B*. This is true even though Rule *A* over-includes (some roads may be safe above 65) and under-includes (some roads may be unsafe even at less than 65), whereas Rule *B*, on its face, neither over-includes nor under-includes. Under Rule *B*, however, drivers will be called upon to make

far more judgments on their own as to what speeds are safe, and will probably err more often as to what is reasonable (e.g., judge a road safe at a given speed when it is not), a major factor that may well offset any policy losses from the over- and under-inclusion of Rule *B*.⁷⁵

In this example, the choice of form that is more appropriate as the means to policy—here, the simpler, more definite, and more complete 65 mph rule—is, at the same time, also the more appropriate form to serve nearly all general legal values. Thus, the two types of effects of form as means are here concordant. The form of the simpler, more definite and more complete 65 mph rule—Rule *A*—serves general legal values more fully than the form of the “drive reasonably” rule—Rule *B*, and so is the more appropriate form overall. Consider several such general legal values. Rule *A* provides more certainty, more predictability, and fairer notice to drivers than Rule *B* because Rule *A* affords drivers better access to the operative content of the law when driving (including any modifications arising from enforcement practice). Rule *A* also accords drivers the dignity and efficiency of self-direction without official intervention far more than Rule *B* (at least in American conditions). Indeed, Rule *B* may induce police, out of role-borne zeal (or other motives), regularly to second-guess drivers, thereby substituting their own ad hoc substantive judgment for that of drivers. Such official interventions under Rule *B* would diminish scope for responsible and effective choices and so diminish the dignity and efficiency of citizen self-direction under law. At the same time, Rule *A* promises more equality before the law and still more freedom from official arbitrariness, for it vastly reduces the opportunities for officials to treat similar cases differently, as compared to the open-ended Rule *B*. Further, and as already indicated, Rule *A* will generate far less dispute than Rule *B*, for Rule *B* is conceptually less determinate, and a more fecund source of factual dispute.

As the foregoing example indicates, the same formal features that serve policy well may also serve general legal values well. We might call this phenomenon in legal ordering the “CONCORDANT EFFECTS OF APPROPRIATE FORMS.” Here appropriate formality, problem-specific policy, and general legal values are in unison. This highly fortunate convergence, though perhaps only an accident of fate, is, I believe, quite common in legal ordering.

But such “concordant effects” of a choice of appropriate form are far from universal. Sometimes the formal features of law that are appropriate for the realization of certain general legal values serve those values only at the expense of at least some sacrifice of policy efficacy. When that is so, we may encounter what might be called the “DIS-

⁷⁵ See SCHAUER, *supra* note 6, at 149-55 (1991).

CORDANT EFFECTS OF APPROPRIATE FORMS.” The form more appropriate as the means to fuller policy realization should not necessarily take primacy. Rather, the choice of form more appropriate as means to general legal values may, in light of those values, justify some level of sacrifice of policy realization. When that is so, we may call this the “GLV PRIORITAL EFFECT” (an effect of General Legal Values that enthusiasts of “law is policy” tend to overlook).

I will now provide one example of the discordant effects of form that also illustrates how the “GLV PRIORITAL EFFECT” may justify some level of sacrifice of policy realization. Consider another prosaic yet highly important problem of legal policy, namely, when and how to retire and replace aging police officers on the beat. Let us assume that a rule requiring police supervisors to make an ad hoc annual inquiry into the fitness of an officer in each case after an appointed age, say age 55, would in fact be the most effective means of identifying fit and unfit officers, and thereby of serving the policy of having a fit force. Through full-fledged inquiries into fitness, itself a multi-faceted concept, the unfit would be sorted out, case by case, and retired. Such a rule, however, would not be very definite, and it might turn out to be not at all simple. A rule with these formal features would not serve general legal values well compared to an alternative rule requiring all officers in active police work to retire, say, at age 60. This is so in several ways, but I will suggest only four. First, compared to a “fitness” rule, an “age 60” rule would be more certain and predictable in operation and would thus afford officers and their families a more reliable basis on which to plan retirement. It would also afford police supervisors a more reliable basis on which to plan replacements.

Second, the enforced retirement of officers in accord with the “age 60” rule would maximize the freedom of officers and their families from administrative irregularity. The rule would leave little or no scope for official arbitrariness or inconsistency of treatment, and thus would also serve equality before the law. The open-endedness of the fitness rule, on the other hand, would afford administrators opportunities to adjust or even manipulate the concept of fitness or any relevant findings of fact, with consequent decreases in objective and fair administration, and in the appearance thereof.

Third, the officers and others affected under an “age 60” rule would be able to see readily that particular retirement decisions are made solely on the basis of clear antecedent law applicable to their cases, and thus would perceive these decisions to be fully authorized and legitimate. This would be significantly less certain under a fitness rule, which would be far more disputatious, and would provoke calls for a costly appeals procedure inside the administration.

Fourth, the "age 60" rule would be much cheaper to administer. It would not require case by case inquiries into fitness on an individual basis.

The far greater furtherance of general legal values under the "age 60" retirement rule, would, in my opinion, justify a choice of this rule as the more appropriately formal rule over the alternative "fitness" rule, at least assuming there is a close enough general correlation in the first place between age 60 and unfitness.⁷⁶ I believe this choice would be justifiable even though the "age 60" rule plainly over- includes and under- includes, that is, even though it would retire some officers still in their prime at 60 and fail to retire some no longer in their prime prior to 60. As I have earlier suggested, even under an ad hoc fitness rule, mistake or bias would be likely to enter into some decisions, and this, along with the greater realization of general legal values under an age 60 rule, would counterbalance the over- and under- inclusion of such a rule. In the end, perhaps we could say that the "age 60" rule does not over- include or under- include at all. This is because it incorporates, as part of its content, the limited priority of general legal values over the fitness policy as such.

Here, then, the choice of form appropriate as a means to general legal values would justifiably triumph to an extent over what would otherwise be the substantive policy content of a rule. As I have said, we might call this the "GLV PRIORITAL EFFECT" on appropriate form in the content of a rule. Here, the formal demands of general legal values diverge from the formal demands of problem-specific policy, and the former take priority to an extent in the adoption of a rule. This is only one of the major ways that a choice of appropriate form affects content in legal ordering, but it takes place in rule-making, and is one of the most dramatic of all types of effects of form on substantive content. Observe that in this and in many similar examples, this dramatic effect occurs not only by way of incorporating the more appropriately formal "age 60" feature of form and content, but also necessarily by way of excluding other substantive content, i.e., excluding a direct and full-fledged inquiry into substantive fitness, case-by-case. This type of exclusionary effect is, of course, a typical normative effect of form in the law. Thus, we must heed not only what form incorporates, but also what it excludes. This effect might be called the "SUBSTANTIVE EXCLUSIONARY EFFECT OF APPROPRIATE FORM."

We may conclude that some problem-specific policies require lower degrees of definiteness for their most effective implementation.

⁷⁶ The question of when a sufficiently close general connection exists, in light of policies and values at stake, is a complex question which I will address in detail in my forthcoming book. Legislative drafting manuals almost universally ignore this and other questions of appropriate form as such.

But most such policies are ones that already depend for their effectiveness not mainly on citizen self-application of rule out on the front lines of human interaction (as in the periodic vehicle inspection example, and in the speed limit example), but rather on official or judicial administration of rule in the usual case. This is true, for example, of various substantive standards for the official issuance by health authorities of licenses to public restaurants, to the "best interest of the child" standard in custody disputes before welfare agencies and courts, and to various sentencing guidelines in criminal cases before judges. In all three of these examples, there is not a "front line of human interaction" where citizens must have "pre-administrative" or "pre-judicial" guidance in the fashion required by citizens in my vehicle inspection example and my speed limit example. All three of these examples require official or judicial application of the law to specially found facts, and depend on this for policy effectiveness, rather than on citizen self-application in the usual case. But even where the policies are thus officially or judicially administered in the usual case, sometimes the highly definite rule will still be preferable, as in my police retirement example.

In concluding this Section, I will add that a choice of form and the general legal values it independently serves may have an even more fundamental kind of legal significance, too. If general legal values are not sufficiently served in an actual or projected use of law, this may be a sign that the use of law may not really be law-like, may lack legitimacy, and so may at least be presumptively unwarranted in its entirety. This is all the more true if fundamental political values such as legitimacy and freedom are adversely implicated as well.

E. Appropriate Form as a Desideratum in the Creation of a Rule or Other Precept Tends to Beget Good Content Therein

When responsible legislators and other lawmakers create rules and other legal precepts, they also strive for good content. Insofar as they also strive for appropriate form, this tends to beget good content. "Good content" in a rule includes content that serves well as a means to policy goals. Suitability as a means to policy is not merely a matter of relying on relevant causal generalizations such as that annual vehicle inspections reduce accidents. We saw in Sections C and D above how formal features of a proposed rule such as degree of definiteness may also be more suitable than others as means to the relevant policy. Indeed, such features manifest themselves in content. When a lawmaker formulates the formal features of a rule so that the rule is more suitable as means to policy, this is one way that attention to appropriate form may tend to beget good content in the precept as a whole.

But “good content” in a rule also includes its suitability as a means to the realization of general legal values, too. We saw in Section D above how some formal features of a proposed rule may be more suitable than others as a means to general legal values. “Good content” in a rule may refer to this. When a lawmaker formulates the formal features of a rule so that the rule is more suitable as a means to general legal values, this is still another way that attention to appropriate form tends to beget good content in the precept overall. When the form required for efficacious policy and the form required for efficacious realization of general legal values are discordant, as illustrated in the police retirement example, and the lawmaker goes on to make the more justified choice, this is a further way that due attention to appropriate form tends to beget good content overall in the precept finally created.

Yet the proposition that due attention to appropriate form in the creation of precepts tends to beget good content overall can be developed still further. Those who create legal rules must choose appropriate degrees of formal features, including appropriate degrees of generality, definiteness, and completeness. Assume the drafter of a statutory rule is one who rigorously considers the appropriate degree of generality in the rule under consideration. Such a drafter will be more likely to identify and incorporate into the rule those general categories of things, persons, actions, circumstances, etc., to which the rule should apply if it is to serve effectively as a means to the problem-specific policy at hand. For example, given the ends of safety and traffic flow, a rule with content specifying a speed limit should be highly general in scope, and thus should apply to all drivers of all types of vehicles. Here, at least some of the resulting “fit” of means to ends should be attributed to the thoughtful consideration given to the appropriate degree of the formal feature of generality. Of course, in this example so far, I assume that the appropriate degree of the formal feature of generality is driven primarily, if not entirely, by the problem-specific policy at stake.

But generality may be rationally driven by general legal values, too. One such value is that of treating like cases alike, and another is the related value of minimizing arbitrariness in lawmaking. A proposed law that would confer benefits on persons may unjustifiably fail to extend those benefits to all who are similarly situated. For example, a local ordinance providing generally for the grant of licenses to supermarkets might include an exception denying such licenses to WalMart. This would not only fail to implement the relevant policy, but unfairly discriminate as well, and thus fail to secure equality before the law, a general legal value. The law would also be unjustifiably under-inclusive in its conferral of benefits and so not appropri-

ately general. The desideratum of appropriate generality may be said to exert special force of its own that distinctively favors more inclusive content, a force attributable to the general legal value at stake. When this wins out, we may say that good form—appropriate generality—is one of the factors begetting good content. And here, the appropriate form of generality is not merely a means to something else, i.e., some policy or policies. We treat similarly situated persons the same before the law also because that is worth doing in itself. (We do not universalize merely in order to do justice. We universalize, and in that, do justice.)

Similarly, the generality of a proposed law that would impose burdens is rationally driven not only by the policy behind the burden, but also by the general legal values of treating like cases alike and the related value of minimizing arbitrariness in lawmaking. Yet a proposed law might, solely because of the excessive political influence of its proponents, fail to impose a burden on all those who are similarly situated. Indeed, it might even create an exception for a favored class. Such a law would be unjustifiably under-inclusive and so not appropriately general. Here, too, the desideratum of generality would exert justificatory force of its own favoring the more inclusive content, force attributable to the general legal values at stake. And when this desideratum wins out, we may again say that good form—appropriate generality—is one of the factors begetting good content in the final version of the rule that is adopted.

Definiteness and completeness are still other formal features of rules that serve not only problem-specific policies but general legal values as well. Thus, among other things, these features provide fair notice and contribute to the determinateness and so, citizen self-administrability of rules. These features exert force that (along with generality) resolves and refines the content of a proposed rule in the course of its rational construction. Without appropriate definiteness and completeness, a rule could not be satisfactorily operational. In resolving and refining the content of a rule, definiteness and completeness (along with generality) express, prescribe, structure, constrain, and delimit content. And the tendency is to beget good content, or at least better content than would otherwise result. Per contra, bad form tends to beget bad content, as Roscoe Pound noted when he said “irrationality of form continually breeds irrationality of substance.”⁷⁷

⁷⁷ 3 POUND, *supra* note 22, at 735-36.

F. Appropriate Form in Basic Functional Elements of the System Tends to Beget Good Content, and Good Processes

We have seen how basic functional elements of a legal system such as a legislature, courts, and interpretive methodologies exhibit minimal essential form, and we have seen how these elements are also structurally formal, procedurally formal, formal in degree of definitiveness, and formal in still other ways. When these varieties of formality are also appropriately designed, they tend, in operation, to beget good legal content and good processes. David Hume once put this even more strongly:

So great is the force of laws, and of particular forms of government, and so little dependence have they on the humors and tempers of men, that consequences almost as general and certain may sometimes be deduced from them as any which the mathematical sciences afford us.⁷⁸

For now, it is enough to provide a few examples that will remind us of Hume's general truth that good form in basic functional elements tends to beget good content and good processes. When a legislature consists of persons who must at periodic intervals be re-elected to continue in office they will, as John Locke also stressed, tend to make better laws.⁷⁹ Yet the mode of composition of a legislature is a matter of organizational and structural form. Similarly, when the mode of operation of a legislature requires that proposed laws be publicized and subjected to scrutiny in committee hearings and in legislative debates, these procedurally formal features will tend to beget good content in the laws finally adopted. At the same time, good form in the design of procedures also tends to beget good processes in actual operation. This is important not merely because such processes tend to yield laws better in content, i.e., better outcomes. It is also important because the form of such a process in actual operation may also be good in itself, as when a formally well-designed process operates fairly, and in a procedurally rational fashion that elicits relevant general facts and brings reason to bear.

The same is plainly true of a court, *mutatis mutandis*. When a court is appropriately formal in structural and procedural terms, it will operate independently of political influence on the decision of particular cases, and of improper litigant influence, and will, in light of the evidence and argument, decide cases more in accord with applicable law and fact. That is, these formal features will tend to beget outcomes that are good in content. At the same time, such good form

⁷⁸ DAVID HUME, POLITICAL WRITINGS 102 (Stuart D. Warner & Donald W. Livingston eds., 1994).

⁷⁹ JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 79 (Thomas P. Peardon ed., 1976).

also begets good processes. This, too, is important not merely because such processes beget better outcomes and so better content, but also because an adjudicative process may, in actual operation, be good in itself, as when a formally well designed process operates fairly and in a procedurally rational fashion.⁸⁰ In fact, good processes are probably even more a function of good formal design than are good outcomes.

G. Appropriate Form in Precepts, in Basic Functional Elements, and in the System as a Whole, Extends and Enriches the Possible Goals and Means of Social and Civic Life

We have seen how appropriate form in the law is required for law to serve as an effective means to policy goals, to general legal values, to fundamental political values and more. I will consider one familiar example of the use of law to serve policy goals. The exhaust from automobiles causes air pollution in cities. For the legislature, let us assume that this causal generalization itself generates a legal "means-goal" hypothesis: if auto drivers are required by legal rules to use lead-free gasoline, this will substantially reduce pollution and thus contribute to the goal of securing cleaner air. Accordingly, the legislature adopts rules requiring that new cars utilize only lead-free gasoline. Now, such rules require not only necessary policy content, but appropriate form as well. They must be appropriately general, definite, complete, and simple. They must also be appropriately expressed, encapsulated, and promulgated, all features of form.

Now, in this example, and in many others like it, the goal (cleaner air), the means (lead-free gas), and the cause-effect relationship on which the rule is based, are all antecedently identifiable, definable, and describable on their own prior to any incorporation in legal rules, or, indeed, prior to the existence of any law. Moreover, in examples of this nature, means, goal, and causality have a reality all their own quite independently of the law. We may assume that the law contributes nothing to this reality as such. It is true that the use of law to prohibit leaded gas serves the goal of improved air quality, and that law itself here may be credited with adding importantly to our social means. But apart from this, it cannot be said that such a use of law extends and enriches the total range of possible goals and means that citizens might pursue in social and civic life.

Yet in modern societies, law is typically used in many ways that can be said to extend and enrich the range of possible goals and means of social and civic life. As a result, citizens constantly entertain and pursue goals and means that would not otherwise be available to them. Indeed, it might even be said that the law creates, or contrib-

⁸⁰ See *supra* note 69.

utes to the creation of new varieties of social and civic life.⁸¹ And in this, appropriate legal form plays indispensable roles. Indeed, it is not even possible to identify, define, and describe the goals and means that the law itself thus makes possible without at least implicit reference to law and to its appropriate form.

Consider, for example, the goal that many citizens have of effectively leaving their property to certain of their descendants on death, and consider the means of doing so by making a will. Such a goal and such a means cannot be identified, defined, and described without at least implicit reference to law and the appropriate legal forms for leaving property by will. Indeed, such a goal and such a means cannot be pursued apart from law and its appropriate form. In these respects, "leaving property by will" is quite unlike "improving the air by reducing the use of leaded gasoline." Not only are the latter goal and the latter means wholly intelligible entirely apart from law; citizens might even voluntarily seek to improve the air this way with considerable effectiveness entirely without resort to any law or to any legal motivation at all. But this is simply not possible with respect to "leaving property by will," a type of goal and a type of means constituted and defined by law itself. Thus, when the law provides for such things as the making and implementation of wills, it extends and enriches the menu of possible goals and possible means that citizens may pursue in society. It makes new varieties of human activity and of social and civic life possible.

Now, so far I have not merely recounted the familiar Hobbesian story that without law there would be no order or social peace, and therefore no commerce, no industry, no productive labor, no architecture, no arts, no letters and no culture at all.⁸² Rather, what I wish to stress here is that the affirmative (rather than merely restraining) contribution of legal form to social and civic life here goes far beyond the securing of order or social peace, important though these are. Moreover, what I have recounted so far gives far more credit to law and to its appropriate form than contemporary philosophical accounts such as those of John Searle.⁸³

We might call law's contribution here the "INVENTIVE EFFECT OF APPROPRIATE FORM IN LAW." Thus, the law invents and provides for new modes of human activity such as the disposition of property by will. Appropriate legal form is indispensable to such inventive effects. In the case of leaving property by will, the law must define the legally essential form of a valid will. The law must set this forth in

⁸¹ See B.J. Diggs, *Rules and Utilitarianism*, in *CONTEMPORARY UTILITARIANISM* 203 *passim* (Michael D. Bayles ed., 1968).

⁸² See HOBBS, *supra* note 25, at 80-84.

⁸³ See JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY passim* (1995).

prescriptive rules with appropriately formal attributes of generality, definiteness, and completeness. There must also be rules with content specifying who has power to make a will, how, and with what effects. Such content is largely organizational in nature, and is in that respect also formal. All these rules require appropriate expressional and encapsulatory form, too.

The law and its appropriate form can, and does, extend and enrich the range of possible goals and means of social and civic life far beyond the familiar case of "leaving property by will." It invents and so provides for the recognized ownership and protection of property in the first place, a highly complex cluster of legal constructs. It invents and provides for the creation of property interests to secure loans of money. It invents and provides for entry into contractual relations. It invents and provides for the creation and operation of corporations, business associations, and still other organizations. It invents and provides for marriage. It invents and provides for money. And much more.

Nor is the inventiveness of appropriate form in law and through law confined to new varieties of social and civic life and new goals and means solely for persons acting as individuals, i.e., solely through individual "acts in the law" such as the making of a will. The law extends and enriches the range of possible collective goals and means as well. Consider for example, the collective goal of democracy as pursued through such means as the public election of lawmakers. Within a particular society this goal and this means cannot be defined, described, and pursued apart from the legally constituted structures and processes for the election of lawmakers in that society. Indeed, such legal means just are very largely constituents of the goal of democracy in that society, and so are not inereely means, but part of the end itself. Appropriate legal form is indispensable here. Thus, just as valid wills and contracts (and all other such "private facilities") are inventions of law, so, too are authoritative elections. The law defines, constitutes, and so invents the essential form of elections. Through appropriate legal form, a system expresses, enshrines, symbolizes, radiates, and enforces commitment to fundamental political values, including democracy. Democratic election of officials is simply a social invention that is necessarily constituted partly by rules and other formal legal devices. Formal rules and other law are required to specify and structure the organizational content of electoral processes. The same is true of legislatures. Here, the appropriate legal forms may be said to create the very possibility of a valued and fundamental form of social and civic life. The social reality in which "elected legislators" exist and carry out their duties presupposes formal electoral processes defined and structured by law, and a legislature defined and structured by law.

Such law has appropriate organizational content, and is formal in this and other ways. There can be no place here for formlessness if these processes are to serve democracy. Appropriate legal form thus makes possible whole new modes of civic thought and action. With this, it becomes meaningful to say, for example, "Edith and Joe want to run for the House of Representatives. It has been their ambition to be members of the majority party, to draft several major bills, especially on fiscal matters, and to see them passed and signed into law."

Of course, the inventiveness of law for collective social life is hardly limited to democratic elections and legislatures. The menu of possible collective "acts in the law" extends far beyond electing and legislating to official administering, adjudicating, interpreting, sanctioning, military defense, and much more. All of these are law-dependent goals and means. The menu includes all the goals and means of government through law. And appropriate form is essential for all of these. The extension and enrichment of possible individual and collective goals and means that appropriate legal form and the law bring to social life must be counted as one of the most fundamental of all contributions to modern civilization from any source.

CONCLUSION

In the literature of Western jurisprudence and legal philosophy, appropriate form is the most neglected of law's general characteristics. Yet once it is duly conceptualized in all of its major varieties and seen to be a relatively discrete general subject, and once a uniform and stable nomenclature is introduced to identify and articulate the formal features and subject matter of law, and once it can be seen to have an existence and integrity all its own that does not collapse into something else (such as substance or policy), it becomes possible to give form its due. We can then see it for what it is, grasp its pervasiveness, identify the types of choices of design and implementation it reflects and poses, differentiate its appropriateness from its inappropriateness, and determine its general jurisprudential and practical implications overall. In the end, it also becomes possible to put form in its proper place in relation to other ingredients of law. Much more remains that I will say about form in my forthcoming book, and my views continue to be in the process of alteration and development. For me, form is one of law's most important characteristics, though, of course, there is far more to law than appropriate form. By now all this may seem obvious, if not also banal, at least to some. Perhaps I may be allowed to close, by way of analogy, with another passage from Wittgenstein:

Philosophical problems can be compared to locks on safes, which can be opened by dialling a certain word or number, so that no

force can open the door until just this word has been hit upon, and once it is hit upon any child can open it.⁸⁴

⁸⁴ LUDWIG WITTGENSTEIN, *PHILOSOPHICAL OCCASIONS* (1912-1951) 175 (James C. Klagge & Alfred Nordmann eds., 1993).