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On Giving Legal Form Its Due. A Study in Legal Theory

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Abstract. The four theses of this paper are: (1) that an appropriate organizational form is used to design, define, and organize a functional unit of a legal system, (2) that the functional units of a legal system, contrary to the emphasis in Hart and Kelsen, consist of far more than rules, and include institutions, interpretive and other methodologies, sanctions and remedies, and more, (3) that frontal and systematic study of the forms of these units is a major avenue for advancing understanding of them as duly organized wholes, and, (4) that such study reveals that much credit is due these forms, along with complementary material or other components of the units, for values realized through law.

I. Introduction

Here, I summarize in necessarily very general terms the central themes of my book in process on legal form. The book is called: "Form and Function in a Legal System—A General Study", and is to be published by Cambridge University Press in 2005. Here, I use the word "form" to mean the purposive systematic arrangement of the parts and the whole of a legal phenomenon.

I use the phrase "legal phenomenon" to mean any type or sub-type of functional legal unit in a system of law, including an institution such as a legislature or court, a species of law such as a rule, principle, contract or property interest, a methodology such as one for the interpretation of statutes or for the application of case law, and a sanction or a remedy such as imprisonment, or money damages. Every instance of a legal phenome-

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non takes a basic form and has non-formal elements. For example, a rule takes a basic form and has the non-formal element of content. As a second example, an institution such as a legislature takes a basic form and also has non-formal elements including personnel and material resources. Thus, in the theory here, a comprehensive analysis of a given phenomenon would differentiate and focus upon (1) its basic form, (2) the constituent features of this form, (3) its non-formal elements, and (4) any rules or other species of law the contents of which purport to prescribe (1), (2) and (3).

The three most important themes I seek to develop in my work on legal form are these: first, that the various phenomena of law take their own distinctive forms and these define and organize the phenomena as unitary wholes, second, that the frontal and systematic study of these forms alone, and in relation to their complementary non-formal elements, is a major way to advance understanding of the phenomena, and third, that these forms are entitled to a share of credit for values realized through the phenomena.

What can be better understood about legal phenomena, and how might my study here advance such understanding? Each phenomenon—each type of functional unit, can be better understood in terms of its make-up, its unity, its provision for continuity of existence, its general mode of operation, its instrumental capacity, its integration with other phenomena, its overall intelligibility and its distinct identity. The understanding I seek to advance here is not, however, of the kind that requires discovery and presentation of new facts. Rather, it calls for focused attention on, analysis of, and comparison of, generally familiar yet often unnoticed or unappreciated facets of the forms and complementary non-formal elements of legal phenomena, themselves already fully in view. This understanding calls for the formulation of felicitous concepts and terminology to portray these facets. It therefore requires felicitous definitions and a perspicuous vocabulary. And it calls for some disentangling and re-ordering of subject-matter in terms of formal facets and complementary formal elements.

Furthermore, my attribution in general terms of shares of credit to form and features thereof for values realized through duly formed legal phenomena does not require systematic empirical studies. Rather, for my purposes it is enough to rely on necessary truths, on general facts already known, on highly plausible supporting assumptions, and on tried and true modes of argument.

II. A General Theory of Legal Form

Few legal theorists have taken interest in developing a general theory that gives legal form its due in a frontal and systematic fashion. Such a theory must, among other things, differentiate types of legal phenomena, and must differentiate between the formal and the non-formal in legal phenomena. Rudolf von Jhering was a leading 19th century theorist who appears to have

perceived these truths and to have believed in the potency of a general theory of form. His works include many scattered insights into legal form, and these insights have inspired my own efforts. Jhering did not, however, develop a general theory here (see, e.g., Jhering 1933).

There are many good reasons to develop a general theory of legal form. First, form, conceived in most general terms as the organizational essence of a phenomenon, is certainly central to many branches of human learning and endeavor. The study of form has been central to the fruitful study of types of government, economic organization, architecture, literature, musical composition, and much more. If the study of forms in legal phenomena were not similarly fruitful, this would be highly anomalous.

Second, the frontal and systematic study of legal forms qualifies as something of a new branch of legal theory in itself in which the phenomena of law are understood as functional wholes in terms of their make-up, unity, mode of operation, instrumental capacity, integration with other phenomena, overall intelligibility, and distinct identity. Such understanding of the variety of legal phenomena and how they are integrated and coordinated within functional legal techniques also enables us to grasp better the very nature of a legal system, for such a system consists of functional legal units—phenomena—with their formal facets and complementary non-formal elements duly integrated and coordinated within operational techniques for the creation and implementation of law (see Summers 1971). A focus on form also casts light on traditional problems of legal theory such as the instrumental character of law, the rule of law, and the nature of legal rules.

Third, form is highly important in practical terms. Without the requisite forms, legal phenomena could not even exist. We could not have legislatures, courts, statutory rules and other species of law, interpretive methodologies, sanctions and the like. These phenomena consist of more than non-formal elements. Forms are required to define and organize these phenomena, non-formal elements and all, into functional wholes. Moreover, the better designed these forms, the more effective the phenomena.

Fourth, the study of legal form is an intellectually difficult yet exciting subject. It offers a new approach to legal phenomena from a fertile point of view. False starts and all, one learns that it is possible in this way to advance understanding considerably.

Fifth, the study of legal forms promises to enrich professional education in the law. Much legal education, at least in the Western world, is excessively oriented to the contents of legal rules. Legal education needs to be much more form-oriented. It needs to dig more deeply into the purposive systematic arrangements of legal phenomena with distinctive formal facets and complementary non-formal elements all defined and organized into functional wholes. A general theory of legal form can even improve such seemingly mundane activities as the drafting and interpreting of statutes. A grasp of form advances the understanding of lawyers and can improve lawyer

skills. These are only a few of the many types of practical relevance that a general theory of form can have.

A sixth reason to try to develop a general theory of legal form is that fallacies about form are rampant in the general literature of law. For example, form is not, as Jhering put it when mocking his critics, "bare and thin" (Jhering 1933, 479). If form is to define and organize a legal phenomenon, it must be rich and robust, which is what it is. Form is therefore far more than a mere skeletal peg on which to hang substance. This is only one of many fallacies about form that a theory of form can expose.

III. Conceptual and Related Matters

I will focus first on some conceptual and related matters that bear on the nature of form.

(1) In the languages of developed Western societies, the term "form" is not merely ambiguous. It is polysemous. In English, for example, there are numerous different uses of the term. A skeptic might conclude, therefore, that we should dispense with the word "form" altogether. This is a fallacy.

Merely because the word form has various meanings in a given language, it does not follow that no one of these can be central in formulating a general theory of form. Indeed, I here stipulate that form means the "purposive systematic arrangement of the parts and the whole of a legal phenomenon." This stipulated meaning is compatible with one widely accepted meaning of the word form, namely, that technical philosophical meaning in English and in certain other languages in which form is what "makes anything [. . .] a determinate species or kind of being."[1] The purposive systematic arrangement of the parts and the whole of, for example, a given institution such as a legislature goes far to make it the determinate kind of institution that it is. The same is true of the form for rules, of the form for an interpretive method, and of the form for any other type or sub-type of legal phenomenon. As Jhering put it, form is to a given phenomenon as "the mark of the mint is to coinage" (Jhering 1933, 479). Form, according to the meaning for it I have stipulated, defines and systematically organizes a phenomenon, and thus renders it intelligible as having a distinct identity.

Furthermore, the meaning of form I have stipulated here also conforms to, or is at least closely compatible with, one important ordinary meaning of the word form in English and certain other languages, namely, the "orderly arrangement of parts" of a phenomenon.[2] The definition of form I stipulate here—the purposive systematic arrangement of a legal phenome-

[1] See the entry for "form" at I, 4a and 5a. In what follows, I draw on the entries under "form" and "formal" in the *Oxford English Dictionary* (1989. 2nd ed. 11 vols. Oxford: Clarendon).
[2] *Oxford English Dictionary*, "form" I, 8.

non—can be refined to fit felicitously all major types and sub-types of functional legal units, that is, legal phenomena.

(2) As I have suggested, it is not infrequently assumed in ordinary discourse and even in some legal circles that form is "bare and thin" and thus only a simple and minor facet of any phenomenon, legal or other. Thus we may hear someone characterize *X* as a mere matter of form, and assert that it is therefore simple and of minor significance. At least as applied to the forms for legal phenomena, these are fallacious characterizations.

The purposive systematic arrangement of even the simplest seeming legal phenomenon is complex and multifaceted. Consider, for example, the basic form of a six-word legal rule such as: "Do not drive over 75 mph." The basic form—the purposive systematic arrangement of this type of phenomenon—is a general directive to a class of addressees to the effect that acts of a certain type should not be done on certain types of occasions. Even this seemingly simple basic form can in turn be studied in terms of several constituent features, each of which can be elaborately analyzed: prescriptiveness, completeness, generality, definiteness, internal structure, mode of expression, and mode of encapsulation (as statutory, common law, etc.). Such basic form is hardly simple. Nor are the constituent features thereof simple or minor.

The whole of a legal phenomenon consists of its basic form, constituent formal features, and their complementary non-formal elements. In the case of a rule, for example, these complementary elements consist of components of content. These include addressees, prescribed action or inaction to serve ends, circumstances of such action, and more. The nature of complementary non-formal elements varies with types of phenomena. For example, the non-formal elements of a legislature include certain types of personnel and various material resources.

(3) Some would conceptualize and represent the whole of any legal phenomenon not in terms of its form and its non-formal elements, as I do here, but in terms of its form and its substance. This is to invite fallacious analyses. I will consider here only three or four, including ones to which I have fallen victim.[3]

Resort to a "form v. substance" contrast may easily tempt the person involved to lapse into uses of "form" and "formal" merely to mean whatever is *not* substance or *not* substantive in a phenomenon. After all, if "substance" is truly the substantial one within this contrasting pair, then form, in contrast, must not be substantial in any sense. This form-substance contrast even invites the assumption that "form" does not really have any affirmative significance of its own, but, as in many contrasting pairs of words, is used in contradistinction to "substance" merely to exclude or to rule out one or more varieties of substance. Yet, in the analysis I set forth here, basic form does have an affirmative and well justified general meaning

[3] All of the relevant usages to be discussed here can be found in the *Oxford English Dictionary*.

of its own, namely, the purposive systematic arrangement of the parts and the whole of a legal phenomenon. The parts and the whole of any type or sub-type of phenomenon must be defined and organized. Basic form and its constituent features do this. The resulting form is thus not anemic and can be affirmatively characterized, often robustly. My form v. non-form differentiation does not imply the contrary.

Another common "form v. substance" contrast similarly downplays the extent and density of the organized form of a legal phenomenon. This usage exalts substance as the "real meat" of the phenomenon which the form merely encapsulates. Yet form, defined as a purposive systematic arrangement of the whole phenomenon, is again a far more robust and thus "meaty" conception. My own "form v. non-form" contrast does not downplay the extent and density of form.

Another familiar use of the "form v. substance" contrast exalts substance as the subject-matter content of a species of law such as a rule or a contract and restricts the form and the formal in any such species of law to any formalities that must be satisfied for such to be valid law. My "form v. non-form" differentiation does not similarly tempt one to reduce form in legal phenomena solely to such formalities.

The "form v. substance" contrast, as it is invoked in various ordinary English usages recurring in legal discourse, often implies that only a study of the "substance" and not the "form" could ever contribute either to the advancement of understanding of legal phenomena, or to the realization of ends and values through such phenomena. One such ordinary usage is that substance consists of that which is "essential," implying that by contrast, form and the formal must be inessential. Another usage is quite explicit that form is "mere" form and is "not of substantial import" in contrast to substance. Still another usage has it that substance is "real" whereas form and the formal are not, and can at most be "mere appearance." On such views as these, which are embedded in a wide range of English usages, it is not merely the case that substance is superordinate, with form subordinate. Rather, form cannot be efficacious at all—cannot contribute to the realization of ends and values. Indeed, form may not even exist. Instead, it may only be mere appearance! Again, the contrast between form and non-form I adopt here in analyzing the parts and the whole of a legal phenomenon does not suggest any of these things. Rather, in my scheme, form can contribute, *jointly* with the non-formal, to the realization of ends and values, and to the advancement of understanding. It follows that well-designed form is neither value-neutral nor anemic.

English usage also harbors some technical uses of "form" and "substance" and their adjectival counterparts that, in juxtaposition, diminish or marginalize form. Indeed, matters are even worse. Some of these juxtapositions give "form" and its derivatives pejorative meaning. As I have indicated,

embedded within technical legal usages in English are several uses of form and formal that equate it with the "formalistic," or with the "conceptualistic," or with "mechanical" reasoning, or with "rigidity," or with still other pejoratives. The influence of these usages, too, can prejudice from the very start any claim that the basic form of a legal phenomenon, or the constituent features of such form might otherwise have, either as a key to understanding, or as contributing to the realization of ends and values.

Moreover, at the same time, some will assume that there can be no occasion for characterizing "substance" pejoratively at all! Indeed, some substantivists who eagerly contrast substance with pejorative uses of the word "form" seem to assume that "substance" in rules must always be good, even though we know that the substance of rules may even be evil or at least substantivistic! In the contrast between "form" and "non-form," as I invoke it to represent and characterize the parts and the whole of a legal phenomenon, I do not use either term in the pair as pejorative, as such, either standing alone or in juxtaposition, yet I recognize that both form and the non-formal can be ill-designed.

(4) It is also sometimes assumed that form is not only "bare and thin" but has no reality of its own, unlike the reality of the non-formal elements of a phenomenon. This, too, is a fallacy. The basic form of a discrete individual legal phenomenon—its purposive systematic arrangement—has a reality of its own. This reality defines and organizes the parts and the whole of the phenomenon and is identifiable and describable apart from complementary non-formal elements of the phenomenon such as, for example, the personnel and material resources of a legislature, or the policy content of a statutory rule, or the subject-matter preferences of parties to a contract. The distinct organizational reality of the basic form for a type of phenomenon, and the constituent features of this form, are manifest in the overall phenomenon, and can be detailed, dense, and complex. Choices of form even leave their imprint on non-formal elements. Consider, for example, the various constituent features of the basic form of a complex institution such as a legislature. Its formal compositional feature defines and organizes the membership of the body. Its formal jurisdictional feature defines and organizes conferral of law-making powers of the institution. Its formal structural feature defines and organizes its internal committee system, and the management of the body. Its formal procedural feature defines and organizes the steps by which the body is to consider and adopt legislation, and to conduct related activities. Its formal methodological feature defines and organizes the fact-finding, drafting, interpretive, and other techniques required for the conduct of institutional activities. Its formal preceptual feature consists of rules and other norms the contents of which prescribe some of the foregoing features. In sum, the basic form of, and the formal features of, a legislative institution consist of the definitive organizational reality of the parts and

the whole of the institution. Earlier, I explained that rules have such a definitive organizational reality too. The same is true of forms in all legal phenomena. Such forms, as in the legislative example, are often robust. Is such reality also tangible? It can be grasped by the mind. It is susceptible of description. Indeed, a wide range of adjectives can be deployed to describe and characterize the purposive systematic arrangement of the parts and the whole of a given phenomenon, and to contrast this arrangement with alternatives.

IV. Advancing Understanding Through Form

1. What is it to understand a legal phenomenon? What is it to advance such understanding through the study of form? To put this another way, what is there about a type of legal phenomenon such as a legislature or a rule or an interpretive methodology or a sanction that should be understood? As we have seen, all legal phenomena, although they vary greatly in basic forms, have the following aspects or parts which should be understood:

a. determinate make-up;
b. unity of parts and whole;
c. provision for continuity of existence;
d. mode of operation;
e. instrumental capacity;
f. inter-relations with other phenomena;
g. overall intelligibility;
h. distinct identity.

A common fallacy here is that once the contents of a so-called "constitutive" rule or rules purportedly prescribing part or parts of a legal phenomenon are "read-off," this will enable us to understand all there is to know about the phenomenon of relevance to the theorist. For example, it is assumed, falsely, that once we read off the contents of any legal rules prescribing the make up, say, of a legal phenomenon such as a legislature, we will understand what a legislature is. However, study merely of the contents of such constitutive rules purportedly prescribing make-up cannot be an adequate avenue to full understanding of any legal phenomenon. This is so for many reasons.

First, the contents of what rules there are often do not frontally and systematically address important aspects or parts, let alone the whole, of a legal phenomenon. Yet the aspects or parts, and the whole, of such a phenomenon, as defined and organized by form, must be grasped, if the phenomenon is to be adequately understood. Formal features as well as non-formal elements figure in the foregoing aspects or parts of a legal phenomenon, and also, therefore, in the whole. For example, features of form define and

specify the make-up of a legislature. Rules may in a general way specify some of this make-up, but the contents of rules do not typically differentiate between the formal and non-formal elements that figure in this make-up. Rules also do not frontally address how an understanding of formal make-up advances understanding of the whole phenomenon. In a legislature, the make-up of the body—including its membership, is organized often in complex ways that may or may not be revealed in the legal rules purportedly constitutive of this make up. For example, these legal rules may not even provide for the roles of political parties, yet such parties may actually be dominant in the operation of the legislature. What is needed here is form-oriented analysis—analysis oriented to the actual purposive systematic arrangement of the aspects or parts, and of the whole of the phenomenon.

Second, the contents of a so-called constitutive rule that in part prescribes formal features may not be very explicit. For example, a rule of legislative procedure may merely prescribe "debate" of proposed statutes. Debate is a facet of mode of operation, another important aspect or part of such a phenomenon. To understand debate, we must understand much more than that "debate" is required. We must also understand what debating procedures are required. A rule merely specifying debate does not itself impart such understanding. Debate is a complex formal feature, procedural in nature, that requires its own frontal form-oriented analysis, if we are to understand it. Of course, in some systems, the contents of some legal rules sometimes do provide in detail what "debate" calls for.

Third, most constitutive rules say nothing of the rationales for the choices informing their contents. A form-oriented analysis necessarily takes us into the purposive rationales that inform the form. For example, a form-oriented analysis takes us into the rationales for the choice of the procedurally formal feature of debate. These rationales include deepening of understanding of the proposed law and furtherance of democratic participation in the process. A grasp of these rationales advances understanding of this formal feature and how it is to operate in practice. This grasp also advances understanding of the whole of the phenomenon involved.

It is true that the contents of constitutive rules could be more or less fully faithful to the form of a phenomenon. When so this is because form-oriented analysis has already occurred and the rule-maker has duly taken form into account. Plainly, form still figures.

2. Another common fallacy here is that if we are to understand a legal phenomenon as a whole, our primary focus should be on its non-formal elements rather than on its form. On this view, to understand an institution such as a legislature, the primary focus should be on such non-formal elements as the personnel elected as legislators. Or to understand a statutory rule, the primary focus should be on its policy content. Or to understand an interpretive methodology, the primary focus should be on the acts of interpreters.

In truth, both the formal and the non-formal must be considered in mutual relation if we are to fully understand the parts and the whole of any legal phenomenon as duly unified. The formal features of a rule—its generality and definiteness, for example, interpenetrate its policy content. The features of generality and definiteness of a rule setting a speed limit for cars on highways at "70 mph" interpenetrate the resulting policy content of the rule (policies of safety and of efficiency of traffic flow) very differently from the way that the generality and definiteness of a "drive reasonably" rule interpenetrate such resulting policy content. At the same time, the policy contents of these rules also affect the levels of generality and definiteness of the rule. The relation between form and content is thus not like the relation of mutual independence between a container and that which may be contained, as with a bucket full of water. When the water is poured out, the form of the bucket loses all shaping effect. Form and content in rules are not like this. They are complementary and interdependent. In rules and other species of law they may even be said to "merge." Again, consider the contrast between high and low definiteness in the content of a rule. As we have seen, the formal feature of high definiteness in a 75 mph speed limit rule for highways shows itself in the content of the rule very differently from how low definiteness shows itself in content, as in a "drive reasonably" rule. Form leaves imprints on the non-formal.

Yet form has another special claim to primacy here. The formal features of a phenomenon not only render it intelligible and thus identifiable as a phenomenon of a given type. Through form we also understand more fully than we could if we focused solely on non-formal elements. For example, we can understand more fully what goes on at a given stage of a process inside of a legislature by reference to its organization—its form—its composition, structure, procedure, and methodology. Non-formal elements alone cannot advance understanding of the whole. A person is merely a person. A building is merely a building. Roles and pathways within the whole must be defined and organized for the personnel of an institution to follow. Form does these things, along with any required rules (which themselves take a form). Something similar is true with regard to any necessary material resources such as buildings, communicative devices, and libraries.

3. A further fallacy is that a legal phenomenon can be adequately understood merely by concentrating on its ultimate instrumental function or functions. We may label this the "form follows function" fallacy. This is less a total fallacy than an error of emphasis. There is much more to a legal phenomenon than its instrumental functions. As I have suggested, to understand a legal phenomenon in its parts and as a whole, we must also consider how form and complementary non-formal elements are combined in the various facets of the institution, including make-up, unity, conditions required for stable existence, mode of operation, inter-relations with other phenomena, intelligibility, and distinct identity. It may be that all of these

have some bearing on instrumental capacity—on functional capacity, but all of these also have standing on their own as facets or parts of a phenomenon. For example, unity merits frontal focus too, as I will now show.

4. Another fallacy is that the whole of a legal phenomenon is merely the sum of its parts or facets. It is possible to advance understanding of a legal phenomenon through form by concentrating on how it is more than a mere aggregation of parts—on how it is unified and thus more than the mere sum of its parts. A phenomenon cannot be reduced, without remainder, to its parts. Its parts are organized into a unified whole. Here Kant insisted on a holistic analysis—on how the basic form of the phenomenon and its constituent features are interrelated, and how these features "regiment" complementary non-formal elements.[4]

A phenomenon, then, consists of more than its parts. It is purposively and systematically arranged: it takes a basic form. The unity of this whole, its inner order, can be more fully understood by way of contrast with ways in which the whole could lack such unity. It might lack unity because the purposes that purport to inform the arrangement as a whole are conflicting and unprioritized. For example, in a given legislative phenomenon, the purposes of democracy and of operational efficiency might be in conflict. Institutional architects, to serve what they think to be the purpose of "representative democracy," might misguidedly compose the body with a large and unwieldy membership that would be fatal to operational efficiency.

Further, the whole might not be sufficiently complete in its parts to be a functional whole. For example, a legislature might lack a jurisdictional feature, or a procedural feature (along with complementary non-formal elements). Without such part or parts, the phenomenon would simply be incompletely formed and thus could not be a satisfactorily functional whole.

Finally, although existing parts could be "unifiable" into a working whole, the designers of the institution might still fail to specify the integration. For example, they might create a two-chamber legislature, with both chambers to participate in the making of laws, yet without providing adequately for how the two chambers are to reconcile differences over proposed new statutes.

The foregoing sources of institutional disunity (and still others) have been manifest at different times and places. Merely to contemplate them is to see the importance of securing unified operational inner order through well-designed basic form and its constituent features.

In a phenomenon that is truly a unified whole, the purposes of the systematic arrangement will be duly formulated, and where conflicting, duly prioritized. Also, the whole will be sufficiently complete in its parts to

[4] "There is another thing to be attended to which is of a more philosophical and architectonic character, namely, to grasp correctly the idea of the whole, and from thence to get a view of all those parts as mutually related" (Kant 1909, 95).

constitute a functional whole, with each part duly designed and integrated. Choices of well-designed form, with complementary non-formal elements, unify this whole. Basic form, with its constituent features, has unifying effect. This fundamental effect of form has been explicitly recognized as such in technical usage, and in English lexicons, as what "holds together the several elements of a thing."[5]

Here, I have only been able to identify some of the major ways that attention to the forms of legal phenomena can advance understanding. I now turn to the credit that may be due to form for values realized.

V. Examples of Credit Due Form for Values Realized

When ends are realized, and values served through the deployment of legal phenomena, the non-formal elements of these phenomena such as personnel, material resources, policy content, or the like should not get all the credit. Nor should the contents of legal rules purportedly constitutive of aspects of the phenomenon get all the credit.

1. The realization of value through deployment of legal phenomena is necessarily dependent partly on form. Without form, there simply could be no legal phenomena. To exist as such, the parts and the wholes of legal phenomena must be defined and organized. Without legal phenomena, no values could be said to be served through law. For example, there could be no legislatures, no statutory rules, and thus no ends served through such law.

2. Without well-designed forms for legal phenomena, values could not be served as effectively as they could be with well-designed forms. For example, a legislative process without provision for formal committee structures, and without procedures for study of proposed bills, could not bring rational scrutiny sufficiently to bear on proposed statutes. To cite another example, the feature of definiteness is one feature of the basic form of a rule.[6] A duly definite rule on eligibility to vote, for example, "age 21," rather than a vague rule, e.g., "age of mature judgment" better serves the policy that the young voter not be too young, and also better serves the policy of minimizing costs of administration, given that administering a "mature judgment" qualification for voter status case by case would be highly costly.

3. Without well-designed formal features such as definiteness and generality in a rule, rule of law values could not trump competing policies even when they should. Although a "drive no faster than 70 mph" rule would both over-include and under-include as to safety and traffic flow, and thus

[5] See the *Oxford English Dictionary* entry under "form" I, 5, 4 d.

[6] As Plato once said, "unless you are definite, you must not suppose you are speaking a language that can become law" (Plato 1937, 491).

itself sacrifice these policies to some extent, yet it could still be a justified choice over a mere "drive reasonably" rule. That is, this choice of the 70 mph rule might be justified, under the circumstances, on the ground that this more definite rule serves rule-of-law values much better than a drive reasonably rule, and at the same time does not unduly sacrifice policies of safe and efficient traffic flow. The rule-of-law values better served by this more definite rule would be fairer notice to drivers, and more equal treatment of similar cases at the hands of officials.

Here a feature of the form of a rule—due definiteness, also fixes fluid substance. It may, however, be objected that this formal feature of definiteness is so ethereal and fleeting that once incorporated into the policy content of a rule, it loses its identity as formal altogether. But it is false that it loses its identity as a formal feature. We can still identify the feature of definiteness in the 70 mph rule. Moreover, if we were to say that this feature of definiteness loses its identity as formal, then all other features of the form of a rule, including prescriptiveness and generality, would likewise lose their identity when so incorporated in the content of the rule, and this would mean that the rule would become all content and no form, which would be absurd.

4. I now turn illustratively yet very briefly to form and freedom. The recognition and exercise of many free choices would not be possible without the required legal phenomena, and these phenomena could not exist without their forms. Consider, for example:

a. the choice to buy a car;
b. the choice to enter an employment agreement;
c. the choice to own a residence;
d. the choice to borrow money;
e. the choice to become married;
f. the choice to publish a book;
g. the choice to leave property by will;
h. the choice to sue someone for violating one's rights.

All the foregoing free choices presuppose legal phenomena which, in turn presuppose recognized forms such as the form for a valid contract, or the form for a valid will, or the form for a court of law. Without these forms, the phenomenon of an actual contract, of an actual will, of a court of law could not exist. As a result, these choices could not exist, and freedom would be vastly diminished. The dependence of free choices and thus of freedom on the existence of varied legal phenomena, and in turn, the dependence of such phenomena on forms are truths that apply widely far beyond the foregoing examples.

5. Democracy requires various operational legal phenomena, including elections. Democratic elections of governments through majority vote would

not be possible without the phenomena of elections in duly designed form. Among other things, what counts as a valid vote in an election could not be defined without due definiteness, a feature of the basic form of a rule. The choice to vote for a candidate in an election is the exercise of a vital political freedom. The requirements of electoral form extend far beyond this example.

6. Modern legal systems under the rule of law would not be possible without due form. Consider, for example, mode of expression of a law. This is a formal feature, and may be oral, or written, i.e., in print. Without writing—without print, without this formal feature, there could be but little of what we know today in modern societies as law. Without printed law, modern legal systems could not function. There is much more to be said here, too, about the dependence of the rule of law on form.

VI. Conclusion

Form is important. Even vital. But form is not all rosy. It is true that some forms might be said to be intrinsically good. For example, the adjudicative form of a court provides, at minimum, for both sides to be heard to some extent, one requisite of fairness. There are many other examples. Also, many varieties of form are at least instrumentally (if not intrinsically) good, as with duly definite rules which serve rule of law values of fair notice and equal treatment. The list of other examples here could be very long. But form itself can be used instrumentally to serve evil ends. Well-formed rules can discriminate against minorities, and there are many other possibilities. Moreover, even when form is deployed instrumentally in the service of good ends, it can be ill-designed.

Then, too, form has its limits. It alone does not make a legal phenomenon. It cannot alone serve ends. Also, even if well-designed, it may still be ill-deployed, and there are still further limits.

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