The Spinozist

Richard Hyland

At the opening of Isaac Singer's short story Der Spinozist (translated into English as The Spinoza of Market Street), Dr. Nahum Fischelson is pacing about his garret room in Warsaw and meditating upon Spinoza's Ethics, a book he has been studying for thirty years. It is summer, and the evening heat is unbearable. Dr. Fischelson mounts the four steps to the open dormer window, leans out to catch the breeze, and proceeds to examine what is visible of the world from his vantage point. Above him is the cosmos. He recognizes the moon, a planet or two, the stars, and perhaps a distant galaxy. Now and again a star seems to tear loose and trace a wide arc across the sky. Dr. Fischelson knows that it is only a meteorite that has entered the Earth's atmosphere and that it will consume itself before reaching ocean or desert. Dr. Fischelson's admiring mind reflects on the infinite substance, nature or God, however it might be named, and its two recognizable attributes of extension and the thought embodied in nature's laws.

Dr. Fischelson's gaze then descends to the long strip of Market Street that stretches below his window. There he contemplates the world of human endeavor and particularly the vain strivings of human law. The noisy street is crowded with thieves, prostitutes, and gamblers. Toughs, out for the evening, get into a fight, and the police have to be called. A passerby is robbed and cries out for help. The mandatory shop closing hour has come and gone, but business has really only begun. The cops have been bribed and pretend to notice nothing as customers are led in through the back doors.

The law in society seems to differ from the law of the cosmos. The laws of nature are such that the heavenly bodies necessarily obey them. Human law, on the contrary, when viewed from the perspective of the purposes it proposes to achieve, appears to be a hopeless enterprise to which the term necessity cannot be applied. A momentary passion inflames the soul and the laws are forgotten. Pockets are picked, fights break out, laws of all kinds are violated, and, for a few kopeks, the police avert their chastening gaze.

For a Spinozist, of course, that is not the end of the story. Though the law achieves its goals only imperfectly if at all, it, like all human activity, when examined sub specie aeternitatis, reveals itself to be necessary. To that extent, the law resembles a shooting star, which, though apparently engaged in an impassioned flight to freedom, in fact reveals the physics of an encounter between the earth's atmosphere and the meteor belt. Two
questions might then properly be put to the Spinozist. The first is how to understand the relationship between the law and its goals and consequences. The other is how to demonstrate the law's necessity.

I.

When teaching substantive law courses, we are, almost all of us, legal realists. I do not mean to imply that we all agree with Holmes or Llewellyn or with any particular legal theory advanced during the 1930s. I mean only that one version of the realist discussion now forms the unquestioned premise of most contemporary thought about the law, whether in the courtroom, the classroom, or the conference room. From the point of view of a Spinozist and the more geometrico, current thinking about the law presents two peculiar characteristics. The first is our inability to proceed by rigorous deduction from abstract principle. We believe that a rule can be applied to a set of facts in various ways, and that no amount of logic or rigor can make a particular result appear to be necessary. In other words, no argument ever completely clinches an issue. The second characteristic concerns our mode of justification. We justify legal rules by pointing to the real world, and especially to the social, political, economic, or moral benefits that the rules are designed to produce.

The American legal mind proceeds by contrariety. I know that once I focus on a particular legal rule, any legal rule, even when it represents a well-established solution, what first comes to mind are the countervailing considerations, first one and then another, and so forth until the counterargument is able to persuade me at least as much as the original proposition. My thinking almost inevitably seeks a balance, in which the pro and the contra are closely (if possible, exactly) in equipoise. The reading of a judicial opinion initiates a similar process. Every set of facts offers a variety of handholds, and each new perspective suggests a different idea of what the case is about, a different strategy for inserting it into the framework of the law, a different sense of the problems to be solved, and thus a different set of solutions.

Many call this idea indeterminacy. It is not just that good arguments can be made on each side of any legal issue. Indeterminacy also means that the facts as they come to a lawyer can be rolled around like the pieces of colored glass in a kaleidoscope. With each turn, the pattern breaks the light in a different way and suggests a different constellation of meaning. Whatever we call it, I suppose that many of us teach it in the same way. In fact, this is the only idea that I really teach. I ask my students to read an opinion not as a statement of a rule but rather as the brief for the winner. In class, we mull it about until we come up with a convincing argument for the losing side. Then we try to defend the court's view against our own challenge. We go back and forth in friendly, scoreless ping-pong until we tire of the case, and then we move on to the next one. Occasionally we think of an argument for which we are unable to discover a response, and that year we get stuck before we get bored. But the next year, or the year after, I present the question slightly differently, and someone finds the way. In the world of
practice, of course, the thrill of the chase, the fact of the fee, and, perhaps above all, the promise of the fabulous rush that comes with winning a case and that vanishes before it can really be enjoyed, all contrive to suggest a convincing argument in very short order. I have given up counting the number of times that I have been compelled to change my mind about a case that I had initially considered to be open and shut for the other side. Each time, after a little research and discussion, someone on the team has come up with an argument that, even if it did not win, easily could have. If, at any point, we are unable to construct such an argument, the problem does not seem to be that the argument does not exist, but rather that we have not thought about it long enough.

Gilmore has recorded in exquisite detail how Corbin conveyed this idea in the last class he taught at the Yale Law School. Those of us who were not present do not know what Corbin taught in that class, but we do know the last words he chose to read to his hushed audience. The text was Cardozo's confession that he had sought certainty in the law but that, just as heaven had escaped the voyagers in Browning's Paracelsus, so too had certainty escaped him in the judicial process. Of course, to find in Cardozo only a resignation to aporia is to draw a very thin lesson from such an august life in the law. Moreover, the ingenuousness of Cardozo's full-hearted quest, his intimation of surprise at the result, and the hopelessly mixed metaphor of the text in which he embedded the conclusion make it somewhat embarrassing today that Corbin and evidently Gilmore himself both thought the passage spoke truth—'As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable.' (The Assignee of Contract Rights and His Precarious Security, 74 Yale L.J. 217, 217 (1964)) Yet perhaps even more than its repeated citation, its sententiousness is what turns the paragraph into the quintessential realist insight. It tells us that the belief in the uncertainty of the law seemed so intolerable for so long that it could be asserted only on the basis of an impressive resume and only after a running start.

To be sure, both the uncertainty and the reason for it had just begun to be understood as Cardozo sat down to write. As Holmes began his reflections on the common law, he suggested that the law's internal resources were not sufficient to compel a result. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow[s], have had a good deal more to do than the syllogism in determining the rules by which [we] should be governed. (The Common Law 5 (1963)) But the idea did not receive a clear formulation until it found its way into Llewellyn's hands. Logic and science can tell us, and tell us with some certainty, what the doctrinal possibilities are. They can tell us whether without self-contradiction the results of the cases can be so settled as to stand together. They can even provide us with a tool for argument to a court that the cases should be made in this fashion to stand together. But they give us no certainty as to whether the possibility embodied in the argument will be adopted by a given court. (The Bramble Bush 67 (1951))

The second characteristic of our conception of law that would interest a Spinozist is really a product of the first. Because there is nothing about the
logic of the rules that can decide the cases, practical consequences are called in to assist. Typically, to decide whether a particular legal norm should be applied to a particular fact situation, we attempt to determine the purpose that the norm was designed to fulfill. Our reflection leads us outside of the law to our vision of society, economics, and morality. We apply the norm in the case before us if doing so will produce beneficial consequences, either now or in the future, and we point to those consequences as the justification for why we apply it. We conceive of the law as a series of unconnected rules, each floating on its own bottom and each justified by the results it is designed to achieve in the real world. This method of norm justification I call consequentialism.

I subscribe to the idea of indeterminacy, but I find consequentialism to be wholly mistaken. Oddly, I continue to teach my classes as though I accepted it. When class discussion turns to a rule, we do not stop after examining the content of the rule and its ambiguities. We always ask why we have this rule rather than another. The answers I receive—and those I provide—always include both a description of behavior patterns in the real world together with the assertion that the rule is necessary to encourage or eliminate the indicated comportment.

I have been unable to identify the source of this idea. Of course, it is present in Blackstone—But property may also in some cases be transferred by sale though the vendor hath none at all in the goods, for it is expedient that the buyer, by taking proper precautions, may at all events be secure in his purchase; otherwise all commerce . . . must soon be at an end. (2 Commentaries 449) Holmes insisted on the idea repeatedly—The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. (The Common Law at 31-32) Perhaps the idea was most clearly expressed by Llewellyn—as civilization grows more complex there is a widening slice of law in which disputes as such sink out of sight, and the focus of law becomes the arrangement or rearrangement of business or conduct to get things done more quickly, more easily, more safely. (The Bramble Bush at 3-4)

II.

Regardless of how well anchored it is in our legal consciousness, the consequentialist method of norm justification creates at least three difficulties. It is worthwhile examining each in some detail.

The first difficulty is that consequentialism proves unable to resolve the problem of indeterminacy. One of the contributions of the critical legal studies movement is to have demonstrated that any and every legal rule can find a real world justification. As James Boyle points out, those justifications hunt in pairs, particularly oppositional pairs—security of transactions and flexibility of transactions, for example, or freedom of contract and consumer protection. (The Anatomy of a Torts Class, 54 Am. U. L. Rev. 1003, especially 1056-61 (1985)) Any time a norm needs a practical justification, it is simply a matter of choosing a reason from the appropriate column. To
make the game more challenging, we sometimes elaborate the consequences that we wish to encourage into theoretical structures, such as individual autonomy, wealth maximization, or communitarianism. The exercise certainly helps pass the time, but it does little to explain why we have the norms we do.

A second difficulty is that consequentialism demands that we limit the creativity of the individual judge. Once it becomes clear that there is a broad spectrum of real world consequences that compete for the judge's favor, we need to know how a judge chooses one over another. The problem is not merely that, like the rest of us, judges have political views, personal prejudices, and family problems and suffer from indigestion and boredom. It is rather that there is no way to distinguish their personal visions from their legal constructions. Like Emma Bovary, they may fall victim to illusions, or, like Ahab, they may destroy themselves and others in a maniacal quest. Some judges, like Dostoevsky's underground man, may be doing everything possible to get even with society. Others may act from a deeply felt estrangement that they share with the characters in the works of Samuel Beckett—telling stories like Gogo and Didi to feed the illusion that they exist, or, like Mr. Endon, not really engaging the world at all but simply moving the pieces about in order to maintain symmetry.

Consequentialism thus tempts us to impose guarantees of fairness and neutrality on the judging process. The requisite theory of adjudication would leave the judge enough freedom to do justice in the common law tradition while at the same time maintaining enough structure to prevent bias and prejudice. Many have attempted such a theory, particularly in the jurisprudential school of Hart and Dworkin, but I have yet to meet anyone who is taken with the results. Common law judges have been deciding cases pretty much in the same way for several centuries, yet we do not have a clue how they do it. As a result, even if someone were to formulate acceptable limitations to judicial creativity, we could never be certain that judges respect them. In short, to the extent the legitimacy of the law requires that restrictions be placed on the creativity of the individual judge—even a judge as disciplined as Dworkin's Hercules (unless Hercules has no unconscious)—there is little that can be done to save it.

The classical German discussion about legal methodology has encountered similar difficulties. Since Savigny, the grand tradition of German legal thought has attempted to specify the method by which cases should be decided. For example, Karl Larenz, the dean of the contemporary debate, recognizes that numerous criteria may be used when construing a legal norm. To assure his readers that judges may not employ the criteria arbitrarily, Larenz orders the factors into an interpretive hierarchy. Yet he is compelled to admit that neither absolute hierarchy nor absolute precision is possible and therefore concludes that the law remains a creative intellectual activity. (Methodenlehre der Rechtswissenschaft 298-350, especially 328-32 (5th ed., 1983)) As a result, some additional constraint is needed to guarantee that judges employ creativity only at the appropriate moment.

One recent contribution to the German discussion radically transforms the problem by positing the value of legal construction wholly apart from its role in decision-making. The authors distinguish between the process of
reaching a decision and the method of legal construction used to justify and explain it. As far as the actual decision process is concerned, all that can be done is to examine as subtly as possible how various factors—ranging from individual psychology to political conviction—combine to produce the result. Methods of legal construction, on the other hand, once they no longer have to sustain a theory of adjudication, can be discussed with great rigor. It continues to be useful to note that the question concerning the actual making of a legal decision must be strictly distinguished from the question of the acceptability of a given legal construction. The distinction between the two questions is important because the answer to either one of the questions yields fundamentally nothing as far as the answer to the other is concerned: questionable motives do not turn a good construction into a bad one, and praiseworthy motives do not turn a bad construction into a good one. (Hans-Joachim Koch & Helmut Rüsßmann, *Juristische Begründungslehre* 1 (1982) (my translation))

Of course the distinction between decision and construction is old realist hat, already perfectly exemplified in the story that amused Llewellyn—"Judgment for the plaintiff", runs the old anecdote of Marshall; ‘Mr. Justice Story will furnish the authorities’. (The Bramble Bush at 33) To Llewellyn, the tale confirmed his suspicion that legal construction is scarcely relevant to the decision process—the facts more than the rules decide the cases.

By separating construction from decision-making, Koch and Rüsßmann open the way to a different vision of the law. Among other things, they help us to understand why, though we know that elegant legal constructions do not determine the results, we nonetheless continue to seek them. Legal construction is the way judges suggest how to integrate their decisions into the structure that is the law. Each decision is another element, another brick. The techniques of construction are flexible enough to permit those who come later to suggest a different niche for the decision. In other words, the law is not the simple accretion of individual decisions, each based on its own facts. It is rather an attempt to integrate decisions into a preconceived system. Like all construction, legal construction is a question of integrating the element into the whole. It is not concerned with where the bricks come from, only with where they belong.

The obvious objection is that Koch and Rüsßmann have done nothing to insure that judges reach their decisions in an appropriate manner. Once the judge’s bonds are released, will we still be able to distinguish a decision that is just from one that is not? It is strange that we cling to such concerns in the law, for we have abandoned them almost everywhere else. In literature, for example, as Emil Staiger explained decades ago, the critic is concerned with the writer’s text, the text for its own sake, and not with anything that is to be found somewhere behind it, above it, or below it. (Die Zeit als Einbildungs- kraft des Dichters 11 (2d ed., 1953) (my translation)) The analogy of literary creativity demonstrates how important it is to distinguish between the work itself and all that lies behind it. For example, many have admired the exquisite quality of the descriptions in *Madame Bovary*. Something flashes in the midst of the prose, and the scene Flaubert has been describing comes not just to life but to immediate, palpable presence. When that happens, I am always tempted to ask how Flaubert produced the effect. Is the secret that he recreated the scene from his memory of a similar event that he had
once experienced? Or was he perhaps, at the very moment he was writing, observing the scene from a corner and recording the way the light reflected off the auburn hair and the nimbleness of the fingers as they braided the thick tresses? Speculation about the question is so intriguing that it conceals a certain danger. Those who themselves wish to write may be misled into thinking that, by putting themselves in Flaubert's place, they may be better able to produce Flaubert's art. That was the twinge of conscience that occurred to Pound after he attempted in half a page to summarize Eliot's poetic method. It is, however, extremely dangerous to point out such devices. The method is Mr. Eliot's own, but as soon as one has reduced even a fragment of it to formula, some one else, not Mr. Eliot, some one else wholly lacking in his aptitudes, will at once try to make poetry by mimicking his external procedure. And this indefinite 'some one' will, needless to say, make a botch of it. (T.S. Eliot, in Ezra Pound, *Literary Essays* 418, 419 (T.S. Eliot ed., 1954)). In fact, neither in the law nor in literature are points awarded for following the how-to books in a conscientious fashion. The novel is literature, an art form, and as such aspires to beauty. Novelists strive to achieve that goal, and they earn our recognition when they succeed. The law aspires to justice. That is what judges strive for, and that is what we applaud in a fine judicial opinion. Whatever constraints there are in the fact that, in general, our judges share our sense of justice. The real question then is not what to tell judges about how to decide cases, but rather whence our shared sense of justice. That question too might be put to the Spinozist.

There is yet a third problem with the consequentialist method of norm justification, a problem that is central to the discussion here, and that is its dualism. Consequentialism tends to isolate the lawgivers from society. The lawgivers stand apart, observe society's flaws, and attempt to correct them. By means of the law, they seek to mold society according to their intention. Society is the raw material, the law is the form. The law is the plan generated by the creative vigor of the active mind. It is the instrument by which intellect gives structure to the social world. The difficulties with this dualistic conception become clear when the realist vision of the lawgiver is compared with what might be considered its literary equivalent, the modernist conception of the writer. The comparison demonstrates that, while dualism can be enjoyed in literary criticism, it produces frightening consequences in the law.

It seems to me that the two relevant aspects of modernism are these: first, the conception that individual intelligence is free, and second, the belief that free intelligence can restructure the world. These two elements of the modernist vision were elaborated with astonishing power in two book reviews that Ezra Pound wrote in 1917, one of Eliot's poetry and the other of Joyce's early fiction. For Pound, the supreme test of a book is that we should feel some unusual intelligence working behind the words. (T.S. Eliot, in Ezra Pound, *Literary Essays* at 420) The essential quality of this artistic intelligence is its individuality and unpredictability, its lack of commitment to any particular movement, its absolute uniqueness. That is what struck Pound about Joyce as he sat down in 1917 to read *A Portrait of the Artist—The last few years have seen the gradual shaping of a party of intelligence, a party not bound by any central doctrine or theory.* (James Joyce: At Last the Novel Appears, in *Pound/Joyce* 88, 89 (Forrest Read ed., 1967))
One indication that we in the law share the modernist appreciation of free intelligence is the delight we experience when we recognize the flaws in a newly published theory of adjudication. Of course we claim to be seeking such a theory ourselves, in the name of the cardinal virtues of certainty and predictability, but it is obviously much more complicated than that. For us, the common law judge is free, and far more profound and subtle than all the theories. This is Dewey's vision of Holmes, which Llewellyn approvingly reported: the vision of a judge who cuts behind the fallacious certainties of formal logic in decision, of the free mind, of the experimentalist, of the man of faith in the ultimate power of intelligence. (Book Review, 31 Colum. L. Rev. 902, 902-03 (1931)) Joyce expressed the thought in much the same way—He would create proudly out of the freedom and power of his soul, as the great artificer whose name he bore, a living thing, new and soaring and beautiful, impalpable, imperishable. (A Portrait of the Artist as a Young Man 170 (Chester Anderson ed., 1977)) We take great joy in the untrammeled nature of judicial creativity and in fact would be quite saddened to see it reduced to a method. That is why the brilliance of any proposed theory of judging only makes its failure that much more satisfying.

The second element of the modernist conception of the writer is what, in both reviews, Pound chose to call realism. Like legal realism, literary realism is the idea that the writer's creative work gives form to society, even to an entire epoch. As one of Thomas Mann's protagonists explained, I am looking into a world unborn and formless, that needs to be ordered and shaped .... (Tonio Kröger, in Thomas Mann, Stories of Three Decades 85, 132 (H.T. Lowe-Porter trans., 1936)) Or, as Stephen Daedelus recorded at the end of his diary, I go to encounter for the millionth time the reality of experience and to forge in the smithy of my soul the uncreated conscience of my race. (A Portrait of the Artist at 252-53) To the modernist mind, society is a confused and meaningless series of facts, figures, and events, the raw material waiting to be shaped by the artist. Only the artist sees deeply enough into the soul of the age to be able to give to it the configuration by which it will be known to posterity. It is only the slightest exaggeration to say that everything that Pound wrote was dedicated to demonstrating the superiority of the form given by the artist over that provided by the lawyer or politician. As far as oral recitation is concerned, of course, the race was over before it began. I have heard the best orchestral conductor in England read poems in free verse, poems in which the rhythm was faint as to be almost imperceptible. He read them with the author's cadence, with flawless correctness. A distinguished diplomat read from the same book, with the intonations of a legal document, paying no attention to the movement inherent in the words .... And, for Pound, academics fare no better than lawyers—I have heard a celebrated Dante scholar and medieval enthusiast read the sonnets of the Vita Nuova as if they were not only prose, but the ignominious prose of a man devoid of emotions: an utter castration. (Literary Essays at 422) The perspicacity of the artist's vision continues into politics. The Portrait is very different from L'Education Sentimentale, but it would be easier to compare it with that novel of Flaubert's than with anything else. Flaubert pointed out that if France had studied his work they might have been saved a good deal in 1870. If more people had read The Portrait and certain stories in Mr. Joyce's Dubliners there might have been less recent trouble in Ireland. A clear diagnosis is never without its value. (Pound/Joyce at 90)
Because today, at least in literature, we have lost the modernist faith in artistic vision, Pound's sentences seem to be a childish caprice that might best be answered by a smile. But even these sentences do not fully express Pound's radical conception of the role of the artist in providing shape to society. For Pound, the idea of shape was not to be taken metaphorically. He concluded his review of Joyce's novel with sentences that make me wonder whether the artist does not in fact see further than the rest of us. Every time I read them, they take my breath away. It is very important that there should be clear, unexaggerated, realistic literature. It is very important that there should be good prose. The hell of contemporary Europe is caused by the lack of representative government in Germany, and by the non-existence of decent prose in the German language. Clear thought and sanity depend on clear prose. They cannot live apart. The former produces the latter. The latter conserves and transmits the former. The mush of the German sentence, the straddling of the verb out to the end, are just as much part of the befuddlement of Kultur and the consequent hell, as was the rhetoric of later Rome the seed and the symptom of the Roman Empire's decadence and extinction. A nation that cannot write clearly cannot be trusted to govern, nor yet to think. . . . Only a nation accustomed to muzzy writing could have been led by the nose and bamboozled as the Germans have been by their controllers. . . . Clear, hard prose is the safeguard and should be valued as such. The mind accustomed to it will not be cheated or stampeded by national phrases and public emotionalities. (Pound/Joyce at 90-91) In the end, as Pound saw it, it is the responsibility of the artist—and of the artist, especially the heroic artist, alone—not only to provide posterity with an image of the epoch, but also to safeguard political liberty.

The duality that legal realism creates between the lawgiver and society thus stands in a great tradition. And it also shares in the problems. Whoever speaks of duality speaks of conflict. Society resists, obstructs, avoids. Pound understood social opposition to be a necessary consequence—a test even—of a real work of literary creativity. Two of these writers [Joyce and Wyndham Lewis] have met with all sorts of opposition. If Mr. Eliot probably has not yet encountered very much opposition, it is only because his work is not yet very widely known. My own income was considerably docked because I dared to say that Gaudier-Brzeska was a good sculptor and that Wyndham Lewis was a great master of design. It has, however, reached an almost irreducible minimum, and I am, perhaps, fairly safe in reasserting Joyce's ability as a writer. It will cost me no more than a few violent attacks from several sheltered, and therefore courageous, anonymities. When you tell the Irish that they are slow in recognizing their own . . . genius[es] they reply with street riots and politics. (Pound/Joyce at 89) Conflict between the artist and society usually works itself out at the expense of the artist—a reduction in income, political opposition, banishment, or, as Salman Rushdie learned, even threats of assassination. The writer has really only a few means of defense—satire and irony, of course, and best and most potent of all, time. Yet the worst that can happen to those who protest too loudly about the daring of a great writer is that they later may look very silly.

Things are different in the law. It is one of the law's defining attributes that, however lacking a norm may be in persuasive ability, it generally has behind it the enforcing power of the state. A problem arises when the lawgivers come to regard themselves as the unerring custodians of political
liberty and decide to promulgate their visions as law. They may then come into conflict with a portion of the citizenry and may even awaken one morning to discover, as did Pound himself, that liberty has had to defend itself against them. Oddly, it does not seem to matter whether the lawgiver’s conception of freedom is progressive or conservative. For the problem is not merely that no theory of liberty, even when promulgated as legislation, has been able to overcome the execrable practice of persecution and discrimination against minorities of all kinds. The problem is that these theories and their codification seem to be related to persecution in an entirely unintuitive manner. While the theories and laws of liberation might be expected to follow in protest against violent acts of repression, in fact they often precede and produce the very practices those theories condemn. Modern European history is perfectly exemplary in this regard, though I do not thereby mean to suggest that we in this country are any less adept at the practice of intolerance. The highlights of the last five centuries of European history include the Spanish Inquisition, the Peasant Wars in Germany, the French Revolution, the repression following the Paris Commune, the Spanish Civil War, Stalinism, and the Third Reich, as well as conflicts between racial, national, and linguistic groups in almost every country in the New Europe. Though there is no need to exaggerate the relationship, I think it clear that admirable and progressive theories have played a major role in all of this, including the New Testament’s conception of salvation, the Protestant Reformation, the Rousseauian notion of human freedom, liberal theories of democracy, anarchosyndicalism, Marx’s vision of the classless society, Hegelian notions of community, and social democratic theories of the welfare state.

At first it may seem that the problem lies not in the theories themselves, but rather in the insensitive manner with which they have been turned into law and applied in practice. Yet the consistent pattern makes me wonder whether the problem may not lie elsewhere. If attractive theories, when misinterpreted, can produce intolerance, and if theories are virtually always misinterpreted when applied, then perhaps the problem is rather the belief that we can improve the world by tinkering with the law. As Walter Benjamin saw on the brink of the last catastrophe, when the Angel of History is wafted toward paradise by the stormwinds of progressive theories, when it attempts to free human beings from their earthly bonds, the flapping of its wings leaves behind only ruins and death. (Theses on the Philosophy of History, in Walter Benjamin, Illuminations 253 (Harry Zohn trans., 1968)) I suspect that it may be possible to reduce the human suffering that persecution and intolerance produce merely by abandoning the temptation to use the law as a means to adjust the world to our desire.

In short, the problem seems to me to be the conception of the lawgiver as a demiurge able to work its will on society, and the corresponding vision of society as the dumb matter that is destined to receive the imprint of the law. Once the law is conceived in terms of this duality, there is conflict in the nature of things. When the law becomes a servant of politics, a tool to force form on a recalcitrant world, when polar opposites are locked in struggle, then contradiction takes a terrible human toll. A further question for the Spinozist is whether there is another way to conceive of the law.
Partially because of dualism's fearsome effects, many have endeavored to reduce the tension between the lawgiver and society. Llewellyn himself took a stab at it. In the decade that followed The Bramble Bush, Llewellyn became ever more convinced that the main problem that plagued the law was the distance that separated norm-generating orthodox theory from social practice. 

"The chief reason why [the law of offer and acceptance] continues unnecessarily obscure, and troublesome, and more often unpredictable than Reason would allow, is that the sustained illumination of point after point after point has been presented with a certain almost desperate regularity as a series of minor qualifications of basic theories and of a basic analysis which have not for a century or so rested on either case-law or on sense . . . . (On Our Case-Law of Contract: Offer and Acceptance, I., 48 Yale L.J. 1, 1 (1938))"

In order to resolve the problem, Llewellyn proposed a twofold reduction. First, he reduced the law to a prediction of future case results. There is one test, however, which in the long run we all use to determine the rule of law in a case law field. That test is in first instance the test of how future cases will come out. . . . [A]nd it is the Rule, irrespective of whether it is a nice rule or a wise one or a just one. (The Rule of Law in Our Case-Law of Contract, 47 Yale L.J. 1243, 1248 (1938)) Then he suggested that, since the case law will always fit the facts, case law can be reduced to a recognition of real world conditions. Then he suggested that, since the case law will always fit the facts, case law can be reduced to a recognition of real world conditions. When in doubt whether a given body of Contract doctrine is case-law doctrine, one very hopeful approach is to examine the fact-conditions to which that doctrine purports to apply. If it fits those conditions, it is likely to fit the cases, more or less roughly; if it does not, it is not. (Our Case-Law of Contract: Offer and Acceptance, II., 48 Yale L.J. 779, 779-780 (1939)) Though Llewellyn took different positions on these questions at different times, his thrust is clear: business practice cries out to eliminate the duality. On one side is the world—the fact situations, business people steeped in horsesense, and their traditional allies, the common law judges. On the other are the orthodox theorists and their taught doctrine. Since the theoretical pole makes no sense, Llewellyn thought, the dualism has no purpose. The law is simply the consciousness business practice has of itself. In other words, Llewellyn overcame the duality by abandoning one of its poles.

In hindsight, it is obvious that Llewellyn's idea presents a slightly foreshortened vision of the law. Even in those fields in which the law and business must work together, the law is not bound by commercial practice. Where that practice is particularly rapacious, the fact that it is widespread not only does not redeem it but may even serve to condemn it. Some of the flaws in the UCC are due to the drafters' unwillingness to liberate the law from the logic of business. Take, for example, their refusal to abandon the holder-in-due-course doctrine in consumer transactions.

Ernest Weinrib's extraordinary article on formalism suggests a related method for overcoming the dualism. (Legal Formalism: On the Immanent Rationality of Law, 97 Yale L.J. 949 (1988)) For Weinrib, the pole of the lawgiver is called politics. Like Llewellyn, Weinrib wishes to abandon it. He seeks to do so by demonstrating that politics does not determine the content
of the law. That content, Weinrib tells us, is not dictated by anything external to the law but is rather immanent in the concept of legal form.

There is something astonishing about the first ten pages of Weinrib's article. They seem to offer an answer to the main problem that tortures the law's self-consciousness (and self-confidence)—namely its apparent dependence on politics. Unfortunately, a second reading reveals that Weinrib has succeeded in transcending the duality between law and politics only to fall victim to what is arguably even worse, namely a duality between form and content.

Of course, Weinrib knows that the matter is delicate and tries to be very careful. He certainly assures us that he does not wish to create tension between form and content. Form, he tells us, therefore is content and content form, with the distinction between them being notional, not ontological. . . . Whatever is thought to be in the gap between content and form . . . is either error or ignorance. (Id. at 959) The difficulty, however, is that Weinrib's exposition also includes a second, entirely different and inconsistent conception of the same relationship. Woven into the selfsame paragraph that presents the distinction between form and content as a matter of perspective are other sentences that assume an ontological difference between the two terms. Form and content are correlative and interpenetrating, he writes. We understand something when form and content are congruent, that is, when the ensemble of characteristics that we consider to be the form represents what the content really is . . . . (Id.) In other words, form and content are intimately related to one another, so intimately, in fact, that they interpenetrate. But—and here is the problem—they are not literally identical. Or rather, they are identical when they are congruent, when the form represents the form of this content, and the content is really the content of this form—but not otherwise. The gap between the two is palpable.

In Weinrib's defense, it might be argued that these matters are extremely subtle. Everyone who has tried knows how difficult it is to get them right all the time. Why not then simply give Weinrib the benefit of the doubt and accept his statement that for him form is identical to content? The reason is that his examples illustrate the distance between the two concepts rather than their identity. Every time Weinrib discusses the positive law, form and content are significantly distinct. The second conception does all the work.

Weinrib illustrates his conception of the relationship between form and content in a subsequent text about the field of tort law. In Weinrib's view, tort law should be understood in terms of the Hegelian concept of abstract right and therefore must be based on fault rather than on strict liability. Weinrib argues that any content other than fault would be incoherent when regarded in light of the particular form of tort law, namely as an institution designed to guarantee corrective justice among free actors. (Right and Advantage in Private Law, 10 Cardozo L. Rev. 1283, 1301-08 (1989)) It is the power and elegance of Weinrib's argument that causes the difficulty. For, no matter how persuasive Weinrib's argument, it remains only one of many alternative conceptions of tort law, and not the one that can best be said to summarize the case law. The fact is that common law courts and lawyers seem to feel comfortable with the notion of
strict liability—after all, they invented it—and do not seem to experience any incongruity between it and abstract right. The example demonstrates that, in Weinrib's view, the actual content of the law may in fact differ from the requirements of the form. At that point, the question arises whether the content must be altered to cohere to a particular conception of its form, or whether the problem is rather that the form has been conceived in an inadequate and overly rigid manner. There is enough of a gap between the two concepts for political conflict to arise. Politics has slipped in through the back door.

Interestingly, Weinrib's approach also has a modernist pedigree. Eliot took advantage of precisely the same method in his amusing attempt to demonstrate that Shakespeare's *Hamlet* is an artistic failure. (Hamlet, in T.S. Eliot, *Selected Essays* 141 (1951)) Eliot was convinced that Shakespeare had taken an earlier play by Thomas Kyd, which had already suffered revisions through another hand, and had sought to impose on the preexisting material a uniquely Shakespearean vision. Reading the play from the modernist point of view, Eliot was interested chiefly in how well the Poet had created a form to correspond to his vision of the content. Not well at all, Eliot thought, as he began to tilt with the giant. *Shakespeare's Hamlet, so far as it is Shakespeare's, is a play dealing with the effect of a mother's guilt upon her son, and . . . Shakespeare was unable to impose this motive successfully upon the 'intractable' material of the old play.* (Id. at 143) Eliot found the Shakespearean motive or vision neither in the action nor in any quotations one might select from the dialogue, but rather in an unmistakable tone which is unmistakably not in the earlier play. A play with this content cannot be presented in just any form—the role of the artist, in fact, is to come up with precisely the right form. The appropriate form is dictated by the content. The *only way of expressing emotion in the form of art is by finding an 'objective correlative'; in other words, a set of objects, a situation, a chain of events which shall be the formula of that particular emotion; such that when the external facts, which must terminate in sensory experience, are given, the emotion is immediately evoked.* . . . The artistic 'inevitability' lies in this complete adequacy of the external to the emotion; and this is precisely what is deficient in *Hamlet.* (Id. at 145) Once again, the relationship between content and form is so conceived that the necessities of the one demand that an adjustment be made in the other.

It is perhaps useful to note that another conception of the relationship between form and content is available, one that avoids both the dualism and the political tension between the two. Unfortunately, it would have been useless to Weinrib and Eliot, because it does not generate the critical vision each was seeking. If I were to be asked to identify the content or meaning of *Hamlet,* I would proceed differently. I would agree with Eliot that the content of the play is not immediately accessible from a diagram of the plot or from quotations taken from the better-known dialogues and soliloquies. Those acts are undertaken and those speeches given by particular characters in particular scenes, and they each play a specific role in the development of the drama. I would also be happy to admit that Shakespeare introduced a unique tone to the writing that was not present in earlier versions of the play. But I would find it somewhat arbitrary to declare that tone to be the meaning of the play. The meaning of the work, in my view, can best be ascertained by discovering its particular form,
namely the way speech and action interact to produce an aesthetic cosmos. Once we discover how the play works (its form) we know what it creates (its meaning). If we accept this relationship between form and content, then once we arrive at a satisfactory conception of the form of the play, we know what the play means—but we also know nothing more than that. In particular, we are unable to distinguish between form and content on the basis of which of the two is more objective or coherent. In other words, there is no meaningful way to distinguish between the content of a play—or of a legal institution—and its form. Of course, we may discover that we disagree about how to interpret and construct the form of the play—or of the law—but, according to this conception of form and content, whatever we eventually decide about the form, that too will be the content. They are simply identical.

It is worth pausing for a moment to examine the consequences of Weinrib's modernist conception of the relationship between form and content, and particularly of the gap that he introduces between the two. In my view, Weinrib has managed to come in out of the rain only to fall into the trough. He sought to exorcise the influence of politics on the law, and particularly to prevent case law from being used to impose a political vision on society. I believe that he has failed at that enterprise, chiefly because the political conflict has been transposed to the question of how to make form and content coincide. But it might seem that we are no worse off than we were before, for even if form and content are conceived as I conceive of them, namely as literally identical, disagreement about the construction and meaning of the form is still possible. There is a difference though, and it is this. As long as the disagreement is merely political or interpretational, there is no moral high ground: each position rests only on the merits that it can show for itself. By claiming, however, that the law has an objectively verifiable form and a necessary content, Weinrib has raised the stakes. His theory suggests that science or philosophy or whatever has proved one theory right and its opponents wrong.

In the realm of literary criticism, this method may produce not only brilliant essays such as Eliot's, but also an overbearing tone and frequent misunderstanding. In the end, however, there is little harm done. In the fields of law and politics, on the other hand, the idea sends shivers up the spine. Marx's theory provides a convenient example. As is well known, Marx argued that the capitalist production process, though private in form, is objectively social in content. Some of his more militant readers concluded that it would be best to liberate society from the limitations imposed by the form, namely private property in the means of production. Forced collectivization, the purge trials, and all the rest were then just down the road. In this regard, it seems to me that Weinrib has socialized the Kantian opposition between duty and inclination. There is a truly brutal moment in Kant's philosophy, a philosophy that otherwise seems quite peace-loving, and that occurs throughout the \textbf{Groundwork of the Metaphysic of Morals}, where Kant suggests that an act is moral only when inclination has been completely suppressed and duty has been imposed in its place. Whatever might be said about the elegance with which the idea represents the \textit{a priori} in the field of practical philosophy, it is obvious today that, certainly in its radical form, it represents a disastrous strategy for personality development (at
least it has—of this of all things I am certain—in the case of my own). What I believe Weinrib has done is to transfer the notions of duty and inclination into the law as the concepts of form and content. The form is the rational conception of the homo noumenon; the content the hypothetical imperative, based on need and desire. What Weinrib recommends—no, to be accurate, what Weinrib demands—is that form be imposed on content at the social level just as Kant requires the individual to impose duty on inclination. Of course, Weinrib underscores the importance of consensus and intersubjective discussion and firmly respects the individual integrity that he believes is incorporated into the Hegelian notion of abstract right. Nonetheless, there is more than just a little revolutionary militancy in his suggestion that the form of the law is objectively verifiable and that the law's current content should be sacrificed to its needs.

I do not mean to push the parallel too far. I simply conclude that, for all of its scintillation, Weinrib's theory fails to overcome—and in fact incorporates within itself—the dualist conception of law and politics that it justly condemns. The question remains whether there is not some other way to conceive of the law.

Intermezzo

It seems to me that the realist conception endangers us all. Yet, at the moment, all I can propose as an alternative is a vague image, a vision, of the world and of the law. This is not meant to be a description of Utopia. It is rather a sense of life in society as I believe it to be. I am fully aware of how odd this vision will seem. But that is not what causes my uncertainty and my reluctance to proceed. The difficulty is that I do not feel right about simply outlining my conception of the law and then stopping. To do that would simply be reporting my private thoughts. To do philosophy, in my eyes at least, means to read and misinterpret the classical philosophers. Our job is not simply to formulate our vision but also to locate a classical thinker whose phrases—and sometimes the space between whose phrases—we can twist into support for our views. This I take to be what Heidegger meant—and prettified slightly—when he noted repeatedly that the task of the philosopher is not to say something original but is rather to understand and appropriate the classics in a more radical manner.

In fact, it is a game that delights me. On past occasions, I have much enjoyed convincing the great philosophers to say for me what it was that I was too sheepish to say for myself. And I would have done so here without even mentioning the fact. Except that I have been unable to find a philosopher who goes anywhere near as far as I would like to in the direction I wish to take. Theoretically, that too should not pose a problem. Lawyers and philosophers share the ability to induce any text to say what they need it to say. And I suppose that I am at least as good at misinterpretation as the next person. But there is one limit to philosophy, and that is shame. The greatest philosophers are logically the most shameless. Shamelessness is the medium by which we turn our visions into philosophy. To judge by his use of his sources, this is something Hegel understood far better than the rest of us.
In order to proceed with at least a modicum of propriety, I intend to invoke two seemingly unrelated elements of the tradition—general relativity theory and the work of Baruch Spinoza. I am interested in relativity theory only as a metaphor, as a way of presenting an alternative to the realist vision that haunts us in the law. That is why it matters little that I understand next to nothing about modern physics. I do not intend to argue that general relativity theory has a claim to explain the law because of its success in describing the motion of light through the heavens. I am interested in relativity theory because it abandons a spectacularly misdirected search for the force that holds the Earth in its place—a force that does not exist—and thus may serve as a means of operating a similar conceptual transformation about the nature of the law. The work of Spinoza is useful because it presents the first, and by far the best, critique of dualist philosophies. That said, I will admit that Spinoza has traditionally been invoked only by those whose ideas are so peculiar that they can find no other hook upon which to hang their hats.

IV.

The basis for cosmological speculation in the Greek world was what Thomas Kuhn has called the two-sphere universe. *(The Copernican Revolution 25-98 (1957))* From classical antiquity through Ptolemy, the Earth was generally conceived as a tiny globe suspended at the stationary geometric center of a much larger rotating sphere that carried the stars. The space between the Earth and the stars was usually believed to contain additional spheres that carried the planets. Aristotle, for example, thought that the space was filled with exactly fifty-five shells made of a transparent and weightless crystalline solid known as the aether. *(Metaphysics 1074a)*

When Copernicus challenged the ancient cosmology with a heliocentric vision of the universe, a new explanation was needed for the planetary orbits. Galileo seems to have suspected that his law of falling bodies was related to a general notion of gravity, but, instead of projecting his law onto the movement of the planets, he followed Aristotle and held that the planets naturally follow a circular path—this time around the sun. Kepler explained the orbits of the planets in terms of a force that emanates from the rotating sun and that draws the planets through the heavens like a magnet. Newton developed the notion of force, and particularly the idea that a body remains at rest or in linear motion until compelled to change. He illustrated his theory by explaining the orbits of the planets in terms of the gravity exerted by the sun. Every particle of matter in the universe attracts every other particle with a force that is proportional to the product of their masses and inversely proportional to the square of the distance between them. This gravitational force causes the Earth to orbit around the sun, or more precisely, to orbit around their common center of gravity, which is a point very close to the center of the sun.

Deviations were slowly recorded between the predictions of Newton's theory and the actual motion of the heavenly bodies, including certain irregularities in the orbit of the moon and the precessional motion of the perihelion of Mercury. The deviations were minor, and a little mathemat-
ical adjustment would have taken care of them, had not the shoe begun to pinch on the other foot. The source of the discomfort was that no one could explain exactly how one body could exert force on another body over distance. (Sir Arthur Eddington, *Space, Time and Gravitation* 63-64 (1953)) Force transmitted by material contact could be explained in terms of molecular bombardment, but material contact could not account for gravitational force. Two hundred theories, an average of one a year following the publication of Newton's treatise, were put forward to explain the mechanism of gravity.

Beginning in the middle of the nineteenth century, gravity was often conceived in terms of the field theories that Faraday and Maxwell had developed for electricity and magnetism. The problem of the exercise of force over distance was thereby eliminated, for the Earth's orbit was described as the result of the sun's gravitational field, which was thought to reach out and envelop the planets. The field was said to exist whether or not a planet was present. In the presence of a planet, the strength of the field was defined as the gravitational force of the sun at that point, divided by the mass of the planet. Since the notion of gravitational force was employed in the definition, the basic difficulty was not thereby resolved. (Bruce Gregory, *Inventing Reality* 46-47 (1988))

Einstein's solution to the problem was simply to abandon the notion that force could have effect over distance and, instead, to explain the movement of the sun and the Earth in terms of the structure of the spacetime in which they both move. Objects moving through spacetime follow the path of least resistance from one point to the next. The orbits result from the fact that spacetime is curved. As Hans Reichenbach explained, a planet does not follow its curved path because it is acted upon by a force, but because the space-time manifold leaves it, so to speak, no alternative path. Its motion resembles that of a sphere rolling on an irregular surface along some definite curves. (The Philosophy of Space and Time 257 (1958)) Bruce Gregory analogized the idea to travel on the surface of the Earth. Imagine two travelers who set out, at the same time, traveling north from different points on the equator. They are on parallel paths, but as they approach the North Pole, they will come closer and closer to each other. We could even say they are being attracted to each other by a force that grows stronger the closer they get. But of course there is no need to talk about such a force. Each traveler is simply moving along the shortest route to his or her objective. (Inventing Reality at 67)

In other words, there is no mutual attraction between heavenly bodies. The motion of one is not determined by a force exerted by another. As Hegel wrote, [t]he motion of the heavenly bodies is not due to their being pushed this way and that, but is rather a free motion; they go their way, as the ancients used to say, like the blessed gods. (2 Enzyklopädie der philosophischen Wissenschaften § 269 Zusatz (1842) (my translation)) The heavenly bodies are free to do anything they wish, as long as they do not violate the laws of the curvature of spacetime. And it is this particular notion of freedom that makes relativity theory of heuristic relevance to the law. It demonstrates that there is an alternative to understanding the world in terms of polar tension and duality. All that is needed is to conceive of a universe in which motion is determined by the structure of the environment rather than by the force...
exerted by other bodies. A final question for the Spinozist is whether the law too is free to pursue its course without fearing the gravitational attraction of morality, politics, economics, and the like.

V.

The aspect of Spinoza's theory that responds to all of these questions is his critique of the Neoplatonism that had been incorporated into medieval Jewish conceptions of Creation and that survived in the philosophy of Descartes. Many of those conceptions were based on dualistic assumptions similar to those that today underlie our legal realist heritage and the consequentialist method of norm justification it implies. Both the Neoplatonist and the realist traditions share the belief that the universe consists of two separate elements. First there is the material world, innately chaotic and strife torn. Then there is thought or mind, which, by an act of will, gives form to the material world according to its design. Spinoza both demonstrated the flaws in the dualist conception and explained why dualist theories repeatedly arise. The power of Spinoza's critique becomes especially clear after a brief examination of the history of dualism. (I draw heavily on Harry Austryn Wolfson, *The Philosophy of Spinoza* (1962), especially pages 79-111 of the first volume, and on Colette Sirat, *A History of Jewish Philosophy in the Middle Ages* (1985).)

Plato, at least as he was generally interpreted by the medievals, analogized Creation to the work of the artisan, who produces objects by conceiving of a form in the mind and then imposing it on matter. Similarly, the Platonic world architect or demiurge did not create *ex nihilo* but only imposed order and system on preexisting material—the eternal forms are mapped onto matter to produce the copies we encounter in daily life. (*Timaeus* 27D-29C, 47E-51D)

Philo began the attempt to integrate the Neoplatonist conception of Creation into Jewish theology. (*See Philo of Alexandria* (David Winston trans., 1981)) Philo rejected the Torah's anthropomorphic conception of God and instead, in the tradition of the Platonic forms, conceived of God as the eternal archetype. Philo held that Creation was the act by which God, the universal mind and active cause, shaped primordial matter and conferred on it order and harmony. (*De Opificio Mundi* 7-9, 21-23) Philo, however, seems never to have resolved the crucial issue, one that has continued to confound philosophers and theologians alike, namely how primordial matter arose. If, as Philo occasionally suggested, primordial matter preexisted Creation (*De Plantatione* 3), it would then represent a foreign element that could never be completely subjected to Divine law. If, on the other hand, as he also seems to have suggested, God created primordial matter before the actual Creation process began (*De Providentia* Frag. 1), the question arises as to how an immaterial and undifferentiated God could create a material and multifarious world.

Gersonides also attempted to make sense of the apparent contradiction between an immaterial Creator and a material world. (*See Charles Touati, *La Pensée philosophique et théologique de Gersonide* 243-67 (1973)) He
conceived of God as intellect totally detached from matter, the form of forms. Gersonides tried to resolve the difficult relationship between ideal form and matter by merging matter and nothingness. He conceived of primordial matter as a something that is barely distinguishable from nothing. Because matter was not created, it is absolutely deprived of form, totally neutral, and purely potential. At the beginning of Creation, God endowed it with the ability to maintain fixed geometrical shapes. By progressively shaping and molding this primordial matter, God was able to merge it with perfect form. (*The Wars of the Lord* 6:1:17, summarized in Jacob J. Straub, *The Creation of the World According to Gersonides* 45-52 (1982)) Nonetheless, the dualism remained: a something that is barely distinguishable from nothing is still something. Creation remained the act by which God imposed form on the chaos of matter.

Such was the state of the Neoplatonist tradition within Jewish philosophy at the moment Spinoza encountered it. In the first book of his *Ethics*, Spinoza presented the definitive critique of the logical difficulties that confront those who argue that the world consists of form imposed on matter by an act of will. His solution was to postulate the materiality of God as well as to deny that the world was created by Divine act. Perhaps it is worth mentioning at the outset that many have found Spinoza’s cure to be far more painful than the disease.

Since Spinoza wished to slice several pieces of toast in a single stroke, he decided to demonstrate the problems with medieval Creation theories in a vocabulary borrowed from the contemporary dualist theory of Descartes. The *Ethics* thus begins with a discussion of the central Cartesian concept of *substance*. The term had had a long history, particularly in Aristotelian philosophy and the school tradition, as the focus of the question about the essence of the universe, namely that which remains constant throughout fluctuation and change. Descartes defined *substance* as an entity whose existence depends upon nothing but itself. (*Principia* 1.51) As Descartes explicitly noted, only God fulfills this strict definition of substance, for everything in the world owes its existence to God. Descartes decided to relax his definition to consider as substance any entity whose existence depends upon nothing other than God, thereby subsuming under the term both thought and extension. Spinoza, however, rigorously followed the Cartesian definition of substance to its logical conclusion. If a substance is its own cause, it obviously cannot be produced by another substance, or, for that matter, by anything external to itself. Moreover, even if there did exist two substances of different attributes, such as thought and extension, the one could not have caused the other, for things that have nothing in common cannot be the cause of one another. Therefore there can be only a single unique substance. That substance is God. Among the infinite number of Divine attributes are included both thought and extension. In other words, both the reason that gives form to the universe and the primary matter that bears that form are Divine: God is, among many other things, material.

Since the difficulty the medievals encountered in explaining Creation arose from their belief in the immateriality of God, the refutation of that belief would have made it possible for Spinoza to incorporate Divine
Creation into his system. This, however, he chose not to do, partially because he denied that free will was a characteristic that could be attributed to God.

The medieval philosophers believed that, since God is perfect, it would make no sense for God not to possess at least the attributes that human beings possess, including the ability to conceive of a goal and to act with design to achieve it. As a result, they understood Divine causality as the product of God's exercise of will, power, and intelligence. The insistence on free will created numerous problems for the medievals, both when they attempted to apply that attribute to God and when they tried to elaborate the sense in which human beings possess it. The difficulty as far as Divine free will was concerned was that it seemed—curiously—to be circumscribed. The medieval philosophers admitted that there are certain things that even God cannot accomplish, including, for example, the alteration of the laws of geometry to permit the creation of a triangle with two right angles. Further contradictions arose from the belief that human beings act by free will. Many of the Jewish philosophers believed that everything that occurs in the universe is ultimately caused by God. The Talmudic literature was even more relentless. It assumed that no one on Earth bruises a finger unless it is decreed in Heaven. At the same time, the philosophers felt constrained to insist that human beings are free moral agents—for otherwise there could be no such thing as sin. Once again, solutions were proposed to resolve the contradiction, each attempting to preserve and reconcile the duality between freedom and determinism. Each of the solutions created at least as many problems as it solved.

The key to Spinoza's resolution of the difficulty was his understanding of the relationship between God and the world. By postulating the divinity of matter, Spinoza had irredeemably altered the medieval conception of God. God could no longer be conceived as an absolutely free will, for both mind and matter henceforth would have to be integrated into a common conception of nature. Both mind and matter are subject to laws. Spinoza took seriously the medieval concession that even God could not create a triangle with two right angles and generalized it into a notion of immanent causality: the cause is inseparable from its effect, just as the sum of the angles of a triangle is already included in the notion of the triangle. Spinoza thereby abandoned any gap between cause and effect, and, at least in this sense, conceived of God and nature as identical. God is free not because Divine will may be freely exercised, but rather because God necessarily exists. If God could have brought things into being as anything other than what they are, both God and nature would be contingent. As far as human freedom is concerned, Spinoza cut through the dualities by concluding that it is an illusion. All elements of nature, including human beings, are determined by God, and none can render itself indeterminate. Since human beings are not their own cause, they are not free. Both the human mind and the human body are modes of the existence of God, both are subject to the universal order of nature, and neither acts independently of the infinite series of causes that proceed from God.

Thus, already by the end of the First Book of the Ethics, Spinoza had developed the cardinal principles of his philosophy—God is material and
acts neither from will nor from design, and human beings are not free—and used them to resolve the problems posed by the dualistic conception that had plagued centuries of medieval philosophy. Despite the logical power of the proofs, there remains something austere about Spinoza’s method. Some readers, though they may understand that an incredible feat has been performed before their eyes, like a long walk on a high wire, may still wonder why Spinoza risked his life to perform it. (It is reported that Spinoza was almost assassinated shortly after his excommunication.)

Perhaps Spinoza himself felt the thinness of the air as he finished Book I, for he concluded it with an Appendix that is not only one of the most memorable passages in his work, but one of such immediate actuality that it seems the ink has not yet dried. Spinoza understood that he had just deconstructed the theoretical basis for all systems of thought based on the willed imposition of form on matter, the same dualism that today lies at the heart of legal realism. He then decided to turn his attention to the question of why such illusions exist. It is as though he had been taken from his rented room, plunked down in the middle of Market Street, and asked to diagnose the causes for our misconceptions. He assumed what he thought would be universally conceded as a starting point, namely that human beings are born ignorant of the causes of things, that we all desire and seek what is useful to us, and that we are conscious of desire and striving. It is then easy to see why we consider ourselves to be free—human beings are conscious of their volitions and their appetite, and do not think, even in their dreams, of the causes by which they are disposed to wanting and willing . . . . (I Collected Works 440 (Edwin Curley trans., 1985)) Moreover, since human beings act to achieve goals which are to their advantage, they seek to know only the final causes of what has been achieved, and when they have heard them, they are satisfied, because they have no reason to doubt further. (Id. (modified slightly)) The idea of freedom originates from a consciousness of willed action together with an ignorance of its cause.

As Pierre-François Moreau sees it, the malediction of Spinoza and his philosophy is the product of the regret that emanates from a certain theoretical space, once its guilty conscience has been revealed. (Spinoza 27, 38 (1975)) The center of that space is the notion of free will, an idea that arises because we are aware of our goals but not of what causes us to seek them. Our ignorance in turn causes us to exclude ourselves from the sphere of application of the laws of nature, and thereby to create two realms—the realm of mind, in which human will freely sets and pursues its ends, and the realm of matter, a realm with no creative capacity and which is subject to the laws of material necessity. This duality, though nothing but confusion based on ignorance, in fact structures the way we do law today in America.

Over three centuries have passed since the spring day in 1675 when Baruch Spinoza, poor, sick, and exhausted from constant persecution, decided to cease the frantic reworking of his Ethics. He put his affairs in order and traveled to Amsterdam to investigate the possibilities for publication. His visit provoked the rumor that he had arrived to publish another attack on God—his Tractatus theologico-politicus, which had appeared five years earlier, was received by a chorus of execration, and was immediately
banned. Spinoza acquiesced and returned to the Hague. Henry Oldenburg, Spinoza's friend and correspondent and Secretary of the Royal Society of Sciences in London, suggested that the Ethics might receive a more favorable response at the publisher if Spinoza were to round some of the corners on the Tractatus, and especially what was said there about the identification of God and nature. Oldenburg was especially concerned lest Spinoza's fatalism subvert the foundations of law and morality. (Philosophy of Benedict de Spinoza 301-13 (R.H.M. Elwes trans., 1936) (Oldenburg's letters of Nov. 15 and Dec. 16, 1675, and of Jan. 14 and Feb. 11, 1676))

The problem Spinoza posed to his contemporaries remains our problem today, for we continue to be as eager as were the medieval philosophers to exclude ourselves from the domain of nature's laws. The consequentialist method of norm justification is exemplary in this regard, for it too postulates a lawgiver, whether legislator or judge, who freely and autonomously conceives of a structure for society and then attempts to shape society to that design. Yet if anything has become clear over these three centuries, it is that Spinoza was right about the inadequacy of such a view. The laws of value, the laws of the unconscious, the laws of linguistics, and even the laws of the text, are all there to demonstrate that there are regularities in human life beyond the control of the individual actors. At least in this sense, Marx, Freud, Levi-Strauss, and Derrida have done little but elaborate the Spinozist position in a millennial debate within Jewish philosophy.

In other words, the dualistic structure of our realist approach to law can no longer be said to be merely problematic. It was problematic three hundred years ago, when it was challenged and undone by what is surely the most daring and courageous act in Western philosophy, with the possible exception of Socrates' decision to stay and drink. Spinoza cut so smoothly that there is little left to do but admire his line. Hegel, who was not fond of praising any modern philosophy but his own, noted that every philosopher's soul must once bathe in the Spinozist aether of the single substance, in which everything that has been held for true has disappeared. (3 Vorlesungen über die Geschichte der Philosophie, in 20 G.W.F. Hegel, Werke 165 (Moldenhauer & Michel eds., 1971) (my translation)) Spinoza is the high point of modern philosophy: the choice is Spinozism or no philosophy at all. (Id. at 163-64) As far as the law is concerned, Spinozism requires the rejection of all theories of adjudication that assume that judges freely decide cases according to their judgments about practical affairs in the real world. Yet that is precisely the basis for almost every theory that passes in America today for serious jurisprudence.

VI.

This problem, of course, has been seen before. As the belief in the untrammeled power of free will worked its way to the surface, both in modernist literary theory and in contemporary legal discourse, a few critics felt uncomfortable enough to challenge it. They perceived correctly that modernist and realist theory—whatever the actual practice of modernism in literature and of realism in the law—tended to neglect the role played by
the tradition in individual creation. The critics counseled moderation and humility in the relation between the individual and the past. Their practical suggestion was for individuals to integrate their own strivings into the wisdom of their predecessors. There is no question that such an approach is a step in the right direction, but the step stops short of the leap I wish to take. In fact, these authors recreate, in yet another form, the dualism they criticize. They distinguish between the tradition, on the one hand, and the individual on the other. They continue to conceive of individuals as more or less free to determine how much attention to pay to the past. Three of those essays—two by Eliot, the other by Arthur Leff—reveal particularly well how difficult it has been to specify the role of individual creativity.

Not long after Pound reviewed Eliot’s poetry and praised his originality, Eliot himself attempted to apply the brakes to the cult of the individual artist. (See Tradition and the Individual Talent, in T.S. Eliot, Selected Essays 13 (1951)) Eliot noted that contemporary criticism focused on a poet’s individuality and tended to praise most highly those aspects of the poet’s work that least resembled the poetry of earlier poets. In Eliot’s view, the time had come to abandon the fixation on originality and to recognize the role of the tradition in fine poetry. [If we approach a poet without this prejudice we shall often find that not only the best, but the most individual parts of [that poet’s] work may be those in which the dead poets, [the] ancestors, assert their immortality most vigorously. (Id. at 14) Eliot suggested that poets should learn to respect their country’s mind more than their own. They must understand that poetry does not so much express personality and emotion as attempt to escape from them. In an addendum published a few years later, Eliot also rejected the notion that the writer should rely on an inner voice. (The Function of Criticism, in T.S. Eliot, Selected Essays 23 (1951)) Instead, Eliot believed, artists owe an allegiance to something outside of themselves. They must surrender and sacrifice themselves to that universal. Literary perfection requires conformity not to an inner voice but rather to an external spiritual authority. Much of the quality of the writer’s work, therefore, depends upon the extent to which the tradition informs the artist’s self-critical appraisal.

These two essays of Eliot’s belong to the handful of great critical writings in the language. That is what makes it astonishing that they contain so little argument. Their power comes from Eliot’s exalted position in English letters and the insight he provides into the creative process, as well as from the extraordinary way he manages to groom his own image, almost to the point of self-apotheosis, by means of apodictic statement. Of course Eliot is right on both counts: one of the writer’s primary responsibilities is to listen as the tradition speaks, and one of the certain paths to failure—or (because one’s contemporaries are not the most accurate critics) to eventual obscurity—is an exclusive concentration on the inner voice. But why is that? Eliot did not say. Instead, he focused entirely on what seemed to him to be a free choice and attempted to throw his weight behind the tradition. As he wrote a few years later, [our problem being to form the future, we can only form it on the materials of the past; we must use our heredity, instead of denying it. (The Humanism of Irving Babbitt, in T.S. Eliot, Selected Essays 471, 473 (1951))
What Eliot failed to recognize is that no writer can escape from the tradition. It works every time a sentence is written, both in the patterns that form the sentence as it flows from the writer's pen and in the context within which it aspires to meaning. All of that is given, and no writer, no matter how great the effort, can escape from it. All that writers can do is to spend the time necessary to understand the project of the particular tradition in which they are working and to appreciate the point the tradition has reached as they encounter it. The penalty paid by the spontaneous and untutored writer—and this really is Eliot's concern—is to be guided by the less productive elements of the tradition. A writer who sets out from a point the tradition has overtaken will always fall behind it. Such writing may give pleasure to many contemporaries who themselves have not advanced beyond that point, but in the end it is destined to be forgotten. This is the justification for the hard work of keeping up with the tradition, and the reason for Pound's wonderfully impatient remark that anyone who is too lazy to master the comparatively small glossary necessary to understand Chaucer deserves to be shut out from the reading of good books for ever. (ABC of Reading 99 (1960)) In the end, all writers write within the tradition. The only difference is the extent to which they are aware of it.

Arthur Leff attempted in a similar way to resolve a problem in the realm of legal theory. In order to demonstrate the difficulties with theories of law and economics, Leff imagined scientific research and judicial decisionmaking in a primitive tribe he called the Jondo. (Law and, 87 Yale L.J. 989, 989-93 (1978)) It seemed to him that the tribe (like Eliot's good writer) also chooses to let the cultural tradition play a role in its decisions. Leff was particularly interested in two Jondo institutions, the Astronomer Royal and the Sacred Hermaphrodite. The role of the Astronomer is to ensure that the two great Jondo harvest festivals coincide with the opportunities for harvest. The two Jondo moieties, the Fish-Jondo and the Maize-Jondo, come together in the autumn when the Moon (the Great Cod) enters the Maize Ear constellation, and join forces for the maize harvest. The two again unite in the spring when the constellation disappears below the horizon at the setting of the new moon, and cooperate during the annual run of the river cod. Due to annual variations in the motions of the heavenly bodies, the harvest festivals do not always coincide precisely with the harvest opportunities, and some of the harvest is inevitably lost. However, when there is a risk to so much of the harvest that the continued survival of the Jondo might be endangered, the Astronomer Royal declares the moon bewitched and reschedules the festivals.

The Sacred Hermaphrodite, totemically half-fish and half-grain, descends from an inbred family that is maritally unclean to both moieties and that suffers from a hereditary disease that causes the skin to peel like scales. He (he is always male) is the Jondo's chief judicial officer. The only cause of action recognized by the Jondo is tortiously fishing with insufficient bait. The tort typically occurs when the Fish-Jondo appropriate salted cod stored in Maize-Jondo territory without leaving behind sufficient maize to maintain distributive justice. If the Maize-Jondo protest, the Sacred Hermaphrodite usually decides in their favor, but, because of the mental decline caused by generations of inbreeding, he occasionally decides for the Fish-Jondo.
When that occurs two years in succession, the Sacred Hermaphrodite is accompanied to the river, where he is assisted in accomplishing a final ecstatic embrace with the Great Cod.

Leff asked himself how to explain the Jondo world view, and particularly the adjustments accomplished by the Astronomer and the Hermaphrodite. He concluded that two factors play a role in those decisions—concerns of economic efficiency on the one hand, and, on the other, the symbolic structure by means of which the Jondo make sense of the universe. When the coherence of their symbolic structure conflicts with the demands of their economic system, the Jondo seek to avoid a dramatic loss either in the prospects of survival or in the pattern of meaning. *Thus, in order to preserve the elegance of their cosmic vision, the Jondo will give up some food; to keep from starving, they will suffer some degree of aesthetic decay. But what they will do only in extremity, if then, is accept the total destruction of either their material or their metaphoric universe.* (Id. at 993)

As a response to law and economics, the invention of the Jondo was a clever idea. It provided Leff with a standpoint from which he could reveal the part of the social universe that law-and-economics theory ignores, namely the importance of the quest for meaning. With the suggestion that human beings are governed by laws of which they are not the authors, Leff, like Eliot before him, conceded much to the Spinozist. In Leff’s parable, the limitations on human freedom are imposed by the joint necessities of a coherent system of understanding and biological survival. Yet, like Eliot, Leff believed that, within those limits, human beings are free to impose structure on their world.

What is intriguing is the vision that underlies Leff’s parable and his interpretation of it. For Leff, Jondo society would function perfectly if only the astrological conjunctions, the festivals, and the harvests were always to coincide. Human life could then settle into the perpetual rhythm of an untroubled unity with nature. The fact that the heavens and the Earth are not always synchronized compels the Jondo to establish the intrusive institution of the Astronomer Royal. Similarly, perpetual peace would reign among the Jondo if only the Fish-Jondo would leave enough maize to compensate their Maize-Jondo relations. The legal system is necessary only because one group is occasionally overcome by greed or mischievousness. Each time one of the two officials intervenes, it is to bow to material necessity at the cost of aesthetic decay.

What Leff did not see is that there are countless other interpretations of what the Jondo are up to. For example, the harvest festivals and the tribe’s surplus storage practices may have arisen precisely to facilitate the birth of mind among the Jondo. One of the benefits of a harvest festival calendar is that an astronomer is needed to predict the conjunctions and schedule the feasts. The system permits one member of the tribe a reason to develop a knowledge of the heavens. The fact that rescheduling is occasionally necessary provides legitimacy to the institution and demonstrates the utility of the astronomer’s research. Similarly, the Jondo might greatly reduce the possibility of judicial disputes by establishing a camouflaged system of exchange between cod and maize, or they might simply divide the harvest and the catch at the time of the festivals. Instead, they
seem to be fascinated by the operation of a legal system, in fact they have done everything possible to provide an opportunity for mischief so that disputes will arise—and have to be resolved. Far from constituting aesthetic decay, by this interpretation, the astronomer and the judge represent the principal aesthetic products of Jondo cosmology.

It is particularly interesting that Leff, himself a scholar and a lawyer, did not notice the possibilities inherent in Jondo life. Laws are at work here that are outside of Leff’s control. In his reading of the parable I hear many stories. As far as the astronomer is concerned, Leff seems to have wanted to demonstrate to the law-and-economics theorists how limited the contribution of science can make to the organization of society’s affairs. The figure of the judge, however, tells a much richer tale. He is neither fish nor maize. He is scaly, inbred to the point of imbecility, and involved in a process of divination that occasionally neglects societal necessity no matter how apparent. He therefore lives with the prospect of a premature death that will be received not by collective sorrow but rather by universal rejoicing. This, of course, is not the Jondo vision of the jurist. The Jondo are far too close to the earth to have this kind of attitude about their sacred class. This is rather the vision of the lawyer in late twentieth-century America, a vision borrowed from the joke about how many lawyers it takes to change a lightbulb. The Jondo may be unable to escape from the bonds of their tradition, but neither could Arthur Leff. The evident irony in his portrayal of our primitive colleague demonstrates only that Leff was aware of his helplessness.

There is no reason to insist further. Both Eliot and Leff set out to reconcile the freedom of human will with the dictates of tradition. Through the gaps and contradictions in their accounts, however, a very different picture emerges. The human mind, like everything else in nature, is governed by nature’s laws. If freedom means being the author of the laws by which one is governed, human beings are not free. We are involved in a series of quests that we did not initiate, and we are compelled to use tools that we did not create.

VII.

The remaining question is whether it is possible to escape from the dualist dilemma, and what we might put in its place. Spinoza taught that human law is not the product of the autonomous human will—law is not a question of purposes and goals. If he was right, we do not know much about why we have the laws we do. We generally reduce our understanding of the law to the immediate goals we pursue and never ask what causes us to pursue them. As I understand the Spinozist heritage, the law’s necessity derives from the structure within which we find ourselves as soon as we are asked to think in the law. In the law, we strive to achieve justice. We might well then ask what requires that striving of us, and what tells us when we have been successful.

This, I think, is a Spinozist question, and all Spinoza can do is lead us to ask it. At this point, at the latest, he leaves us, like Moses in sight of the Promised Land, for he did not claim—nor, as a philosopher, would it have
made much sense for him to claim—that he could explain to us the intricacies of every aspect of human endeavor. Once Spinoza has introduced us into the problematic, we all will have our own theories. In what remains of the space accorded to me, I would like to explore my particular proposal, namely that both our conception of justice and the need we feel to strive to obtain it are contained within the language we speak. Spinoza himself displayed a sensitivity to the differences between languages and a frustration at the difficulty of expressing his thought in the theistic idiom that was available to him. Nonetheless, before I begin, I must, in good conscience, release Spinoza from any further responsibility.

Each language, Hugh Kenner tells us, creates its characteristic force fields. (The Pound Era 120 (1971)) A whole quality of apprehension inheres in its sounds and idioms. Language permeates our minds and obeys not the laws of things but its own laws, it has an organism's power to mutate and adapt and survive, and exacts obligations from us because no heritage is more precious. (Id. at 123) This, Kenner relates, the modernists already understood, and especially Pound, as he drafted the early cantos and reread Arnaut Daniel, in whose Provençal dialect the imagined flush of the cheek is related to the less scarlet shadow of a scarlet curtain. The reading that Pound's generation made of poetry permitted a vision of languages as intertextured, cognate systems of apprehension, to each its special virtù . . . . (Id. at 120) One senses that Hegel was possible only in German, and finds it natural that Locke in a language where large and red precede apple should have arrived at the thing after sorting out its sensory qualities, whereas Descartes in a language where grosse et rouge follows pomme should have come to the attributes after the distinct idea. (Id. at 97)

Together with a wealth of poetic metaphor, each language contains a moral understanding that is prior to any specific moral claim. I call that the morality of a language, Heinrich Boll explained in an interview in 1976. (10 Werke 504 (1978) (my translation)) It has absolutely nothing to do with any conventional conceptions of morality. You see, that is why I continually return to language as my material. A language has its own laws, its own morality . . . . (Id. at 521) For Boll, language was primary not merely because in it conflicts become apparent and are resolved, but also because language, even before it is transformed into morality and law, already provides a forum for judgment. The first step is not always what is called commitment, but rather language, for by means of language, we evaluate the state and society. You see, it is almost a chemist's or a physicist's procedure. And if, as the evaluation finds its way into writing, conflicts arise, or old fears arise, repressed and displaced problems, then it can lead possibly to critique. But I do not believe that critique is primary; primary rather is language . . . . (Id. at 507)

That same understanding structures the language that judges use when deciding cases. Many judges have been aware of the fact. Holmes scribbled the idea into the margin of the first page of his copy of his lectures on the common law: Imagination of men limited—can only think in terms of the language they have been taught. (The Common Law at 5 n.a) The other Cardozo, the author of the passages the realists never quote, also sensed how forces outside the judges' control determine their results: All their lives, forces which [judges] do not recognize and cannot name, have been tugging at them—inherit
instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on
life, a conception of social needs, a sense in James's phrase of 'the total push and
pressure of the cosmos,' which, when reasons are nicely balanced, must determine
where choice shall fall. (The Nature of the Judicial Process 12 (1921)) For
Cardozo, one of those forces is language. We may figure the task of the judge,
if we please, as the task of a translator, the reading of signs and symbols given from
without . . . . [W]e will not set [judges] to such a task, unless they have absorbed the
spirit, and have filled themselves with a love, of the language they must read. (Id. at
174)

As Josef Esser saw a generation ago, a particular understanding
permeates legal language and is reactivated each time the language is used.
(Vorverständnis und Methodenwahl in der Rechtsfindung 10 (1970)) Language
makes cognition and volition possible, it creates an inextricable unity of
experience and imagination. Since judges use their language to formulate
the alternatives and come to judgment, the vision present in their language
is a major element of the prior understanding (Vorverständnis) that deter-
mines their decisions. Esser also examined how the characteristics of a
particular language structure the judicial decision process. (Juristisches
Argumentieren im Wandel des Rechtsfindungskonzepts unseres Jahrhunderts
(1979)) The particular customs and traditions that are present in each
language, together with a particular version of rationality, generate the
categories by means of which conflict is perceived and resolved. Those
categories constitute a preexisting consensus on the basis of which judicial
decisions are made. Statutes and other attempts at innovation alter the
consensus only slowly, for they may be applied in judicial decisions only
after they have been interpreted, and interpretation requires that they be
translated into the traditional categories and plausibly inserted into the
customary discussion framework. That framework is beyond the control of
the individual judge—and even of the legislator.

All of this suggests to me a different conception of the law, one that is
both less perilous and more rewarding than the notion we have inherited
from the realists. The law is our quest to discover and express the
conception of justice that is inherent in the language we speak. Even our
explanations are productive, for, though they tell us little about our norms,
they teach us much about ourselves. The explanations are part of the
tribute we pay to the law. Our norms thus provide us with the opportunity
to understand a little of the wisdom that our language contains. But of
course, we do not create those norms. They are already there by the time
we get to them. All we do is discover and attempt to understand them. Our
legal thought is thus the by-product of the process by which the law creates
and renews itself. The law often moves parallel to other elements in
society—politics, economics, literature, religion—because it is on a parallel
path through what Hugh Kenner calls the force fields—perhaps we should
say rather the curvature—of language. What comes to mind is the Einstein-
ian image of heavenly bodies in motion through a curved universe,
following parallel tracks but exerting no force on each other.

From this point of view, it is equally clear what the law is not. The law
is not there to do anything. It is not anchored in purpose. Of course, the
rules we promulgate structure our perception and, as a result, affect social
reality. But those rules are not designed to facilitate social interaction or reduce transaction costs. On the contrary, the law's effect on individuals is often to obstruct and frustrate. Examples are everywhere—the consideration doctrine and its corollaries may serve as a starting point. Naturally, I do not mean to imply that the law does not change. We simply should not fall victim to the proud illusion that, when the law changes, it is we who change it. You think you are doing the pushing, wrote Goethe, another avid reader of Spinoza, and you are really only being pushed. (Faust 1.4117 (my translation)) It makes no difference in this regard whether the law was dictated to Moses in the form of the Torah or to Karl Llewellyn in the form of Article Two. Above all, the existence and survival of a rule does not depend on our ability to discover a justification for it. Realism therefore gets the whole thing backwards. If the realists cannot explain a norm, they discard it. If a rule interferes with exchange in a way they find inconvenient, they abrogate it. In fact, the vision in which the rules are anchored was there long before the realists and, in its incessant modulation, will certainly survive them. If we cannot explain our rules, the problem is not in the law, but rather, with all due respect, in how we put the question.

This conception has at least the advantage of reconciling the law's traditional antinomies. As Learned Hand recognized, a judge both speaks with the mouth of others, posing as a kind of oracle, voicing the dictates of a vague divinity, and, at the same time, contributes as a builder a few bricks and a little mortar. (Mr. Justice Cardozo, 48 Yale L.J. 379, 379 (1939)) The two activities merge once we return to the metaphor of the law as a construction project. In the law, we attempt to create a legal structure that corresponds to our notion of justice—a notion that our language (the vague divinity) provides to us. Each new decision provides a new brick to be built into the structure of the law.

What then is to be made of our experience of indeterminacy, of our sense that several of the potential holdings often appear to be equally just? The law's indeterminacy is simply a sign that the principles and policies we have formulated do not exhaust the understanding that is present in our language. Law and precedent produce justice only when they become part of the larger search for meaning. In other words, the fact that we are not free does not mean that life is any less difficult. What our language requires of us is that we struggle with the alternatives the tradition offers until we find one that, by virtue of our sense of justice, appears to be the most appropriate. That is the yoke and burden of the law. Everyone with a calling in it has felt driven to pursue a difficult line of argument until it can be presented convincingly, and those with a truly burning vocation may occasionally do so to the point of exhaustion. We construct the law the way a painter paints or a writer writes—because we literally have no choice. There are moments when life speaks to us of this, but we usually ignore those conversations. We begin to pull cases in the library in the early afternoon, suddenly hear a vacuum cleaner, and we turn around, see the cleaning crew, and realize that it must be well after midnight. On a sunny Sunday morning, instead of lingering over breakfast, we kiss our lover goodbye and head into the office. On a normal business day, we work without lunch and dinner in a frenzy of concentration to beat the air courier deadline. When we say that we are free, do we really mean that we
are free to take the law or leave it alone, free to get it right or let it go out half baked, free to prepare the oral argument or let it ride? If we are free, then how do we explain those moments when we are clearly possessed by something beyond ourselves? To put it another way, if the law were just another way to earn a dollar, if we could be just as happy writing screenplays, would we really be doing this at all?

Towards the end of Singer's story, Dr. Fischelson encounters Black Dobbe, and they decide to marry. As they enter the rabbi's chamber, Dobbe wears white silk and gold heels, while Dr. Fischelson has on his black coat and polished dress shoes. The ceremony, we are told, proceeds according to law. The rabbi reads the kesuvah, and the bride and groom touch the rabbi's handkerchief as a sign of agreement. Dr. Fischelson puts on a white kittel, like the one he will wear in his coffin, and stands under the chupah. Dobbe circles him seven times, while the light from the braided candles flickers on the walls. Dr. Fischelson trembles as he tries to slip the ring onto Dobbe's finger. A glass goblet, wrapped in a cloth napkin, is placed at his feet, but he is too weak to crush it, and one of the baker's apprentices breaks it with his heel. They drink vodka and eat cookies and everyone says Mazel tov. And that night the two sleep together, like a young couple in love.

Dr. Fischelson, of course, is aware of what it means to say that there is only one substance. It means that traditional religion, with its customs and mitzvot, no longer provides the possibility of transcendence. Even prayer is meaningless, for there is no partner to the dialogue. All rituals that are meant to please God lose their significance, for a rational morality does not follow anyone's arbitrary pleasure, even if that anyone is God. Why then does Dr. Fischelson agree to participate in a marriage ceremony that proceeds according to traditional law and custom? The tradition is rich in explanations of what the individual elements of the ritual are designed to accomplish, but it is difficult to believe that Dr. Fischelson is satisfied with them. The kittel demonstrates humility before God. The chupah symbolizes the bridegroom's domain. By the sevenfold encirclement, the bride conquers the groom, just as Joshua conquered Jericho. The ring is the price the groom pays for his bride. The crushing of the glass mourns the destruction of the Temple, produces a good omen (Scherben bringen Glück), and lends finality to the ceremony. Yet there remains something unsatisfying about the piecemeal references and the attempt to cling to a method of explanation that here is so obviously overloaded. Even Maimonides, who believed that the mitzvot were promulgated for their utility, understood that practical ends could never explain all of the particulars—why, for example, a particular sacrifice requires a lamb rather than a ram, or why seven lambs and not eight. (The Guide of the Perplexed III.26) Even for Maimonides, the explanation of those particulars would have to be found elsewhere.

Our norms are very patient. When we find it convenient to burden them with consequences, we discover that they have broad shoulders. But a norm can express itself clearly only when it is free, especially when it is free from our longings. For example, the immediate effect of the marriage ritual is that two people who were not married before they performed it are
married afterwards. When left to itself, the marriage ritual simply expresses the particular vision that its tradition has of bonding.

Dr. Fischelson wakes as dawn breaks on his wedding night, walks up the steps to his garret window, and looks out in wonder. Below him, Market Street is asleep, the lamps flickering dimly and the stores barred shut. Above him, the heavens are thickly dusted with stars. Now and again a star tears loose and sweeps across the sky. Worlds are being born, aging, and dying. The Divine substance, extended, with neither beginning nor end, absolute, indivisible, eternal, is seething with the transformations that result from the unbroken chain of causes and effects. Human beings are nothing but elements of the eternal substance. Dr. Fischelson knows that his fate is unavoidable. Yet, as he stands there, the breeze cooling his feverish forehead, he thinks of the foolishness of human passion and of how impassioned human beings can become in their brief span of years. Divine Spinoza, he says under his breath, forgive me. I have become a fool.

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