ESSAY

TAking RESPONSIBILITY: LAW'S RELATION TO JUSTICE AND D'AMATO'S DECONSTRUCTIVE PRACTICE

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In 1989, Anthony D’Amato hung out a shingle for a new practice—in deconstruction.1 A law professor brings Professor D’Amato any rule he has been unable to cure of the ills of determinacy, and Professor D’Amato—the best deconstructionist in the business—shows him2 how. The practice, so far as one can tell from the record in this and other reviews, has flourished. Not one rule suffers from determinacy in the United States today. Mere law words have completely stopped constraining any judicial decision. I know. I’ve litigated.3

In place of determinate rules, Professor D’Amato puts justice. This is very different from what others who have sought to cure rules

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2 “She’s,” so far as I know, have not had need of Professor D’Amato’s services. To date, D’Amato has deconstructed only male legal scholars.

3 In one case that I second-seated, we were trying to explain some bewilderingly complex Federal Aviation Administration regulations to a jury. The trial judge, in a fit of exasperation, cut us off, saying: “Enough law, let’s get on with the trial!” We proceeded to win a jury verdict, undoubtedly because the jury felt that our client could not possibly be expected to understand what the regulations required. One of the best litigators in Manhattan once said to me: “Arthur, courts are the only lawless places in the United States.”
of determinacy offer and is what makes D'Amato a deconstructionist rather than a realist or a crit.⁴ "Deconstruction," says Jacques Derrida, "is justice."⁵ Both Derrida, the theorist of deconstruction, and D'Amato, its consummate practitioner, put justice at the center of deconstruction.

D'Amato's critics have not adequately appreciated the reason D'Amato wants law to be indeterminate. Alan Madry, for example, lumps D'Amato and deconstruction with the crits, completely misconstruing the intentions of deconstruction.⁶ The mini-symposium in this Law Review criticizing D'Amato's indeterminacy thesis completely ignored D'Amato's more striking and difficult theses about justice.⁷ Nobody wants to talk with D'Amato about justice. I will.

This Essay defends the indeterminacy thesis, not as an argument simply about law, but about law in relation to justice. The Essay focuses on a view of law's relation to justice that is implicit in D'Amato's deconstructive practice. This view regards justice as responsibility, and law as enhancing the opportunity for taking responsibility. It is at odds with the usual view, which regards justice as liability and law as the occasion for defining liability. This Essay argues that the usual view is morally incomplete and an inadequate description of legal reality. Defending the indeterminacy thesis this way is thus a process of moral completion and a project of descriptive adequacy.

To begin, the argument surveys the possible views of law's relation to justice, fixing D'Amato's view and Derrida's in a broader array. Their positions in the array suggest that they agree in one respect about the relation, and disagree in another. The agreement, disagreement, and a suggestion for bridging the disagreement form the argument of Part I.

D'Amato and Derrida agree in opposing a position known as "formal justice." Formal justice holds that justice cannot be known or done apart from law. They believe the contrary, that it is possible to

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⁴ "Crit" is short-hand for anyone who claims adherence to any significant subset of the doctrines, methods, visions, or aims of the Critical Legal Studies movement. Realists offer other sorts of rules, such as rules of economics or political science, in place of determinacy. Crits offer politics.

⁵ Jacques Derrida, Force of Law: The "Mystical Foundation of Authority," 11 Cardozo L. Rev. 919, 945 (Mary Quaintance trans., 1990). This line in Derrida's talk, which was presented at my law school in October 1989, undoubtedly struck many listeners, I thought at the time, with the force of Cathy's confession in Wuthering Heights: "I am Heathcliff."

⁶ Alan R. Madry, Analytic Deconstructionism? The Intellectual Voyeurism of Anthony D'Amato, 63 Fordham L. Rev. 1033, 1033-38 (1995). He does, at least, understand that D'Amato is interested in justice. Id. at 1037.


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know and do justice apart from law. It is the demand for justice apart from law, unmixed with determinate rules, that enables deconstruction to unsettle apparently determinate results. Let us call "substantive justice" the position that insists on formal justice's opposite.

Though D'Amato and Derrida agree that it is possible to know and do justice apart from law, they disagree about justice. They disagree, because each of them assigns determinacy a different role in the relation between law and justice. Deconstructionists they may be, but neither dispenses with determinacy altogether.

D'Amato assigns determinacy to justice. Determinacy is a virtue, as it is part of justice. Justice is determinate, because good-willed, impartial observers of a dispute always agree on the just result, even if they can't say in words why the result is just. Justice is a realm of super-determinacy, beyond law. Precisely because justice is determinate, law must be indeterminate. If law were determinate, the results it commands would sometimes be unjust. Law would not then be in accord with justice. D'Amato does not give this position a name. Let us call it "absolute justice."

Derrida, in contrast, assigns determinacy to law. Determinacy is not a virtue, but a fact to be overcome by justice. Justice is a demand to disrupt determinacy, not for disruption's sake, but in order to allow a person rendering judgment to take responsibility for the judgment. No one can take responsibility for a determinate result, precisely because the result has always already been determined. One begins to take responsibility by demonstrating the contingency of an apparently determinate result, in law or especially in justice. One takes responsibility, then, by signing one's name to a decision that reinvets or re-institutes law by responsible interpretation. This position—let us call it "contingent justice"—is at the heart of deconstructive practice. It is at war with the strict logic of determinate law, but also with absolute justice.

Though their accounts of justice differ, D'Amato and Derrida agree that law has little capacity for justice. Take D'Amato's view. Were law determinate, it would be the enemy of absolute justice. Formally realizable rules either lead decision-makers into unjust results, or confirm what they know already to be just, without rules. But law is not determinate, D'Amato argues. It is not, in fact, the enemy of justice. Worse, it is irrelevant. Mere law words do not constrain justice. Derrida's view is different. Law serves a role, albeit paradoxical, in achieving justice. Without determinate law, no one could take responsibility for overcoming it. By providing material for the exercise of responsibility, law is a factor in the production of justice. But determinate law itself, on its own terms, is the enemy of contingent justice.
The balance of this Essay undertakes to show that both D’Amato and Derrida underestimate the capacity of law—on its own terms, in its own logic—for justice. D’Amato errs by allegiance to absolute justice. The contingency of law is a fact, having no impact on justice. Derrida errs paradoxically by assigning to law a logic of determinacy. In Derrida’s view, contingent justice has no reflection in law’s logic. In order to appreciate law’s capacity for justice, D’Amato must give up absolute justice for the view of justice implicit in his deconstructive practice; Derrida must accept that law has a logic other than determinacy. Both must acknowledge that in some forms of jurisprudence responsibility, not determinacy is the aim of law.

Part II makes good the claim that law in itself has the capacity for contingent justice. It surveys two sorts of devices: those that provide a refuge from responsibility and those that permit or cultivate responsibility. The refuge includes procedural devices—acting on orders, appeals, and group decision—and substantive ones—insurance, indemnification, and suretyship. Law permits or cultivates responsibility either by assigning responsibility, or by encouraging or requiring persons to take it.

Law assigns responsibility in civil or criminal liability. Legal theory has focused exclusively on liability, as if it were the only path to responsibility. Yet liability also destroys the opportunity for taking responsibility, exactly because it always already assigns it. Liability’s effect on responsibility is ambivalent. Even when liability is not imposed, the resulting immunity tolerates taking responsibility, but does not encourage or require it.

The devices encouraging or requiring responsibility include contingent liability, the duty to answer, and power. Each of these devices intimates a different type of responsibility, each a more complete account of responsibility than that assigned by liability.

Part III presents a general account of the types of responsibility. Following the classification in Part II, it divides responsibility into types assigned and types taken. Each type is associated with a distinct conception of law and a characteristic account of justice. The types assigned flow from formal justice and a static conception of law. The static conception assigns responsibility for the purpose of constraining personality. Constraint is imposed through liability and character. The types of responsibility taken, in contrast, flow from substantive justice and a dynamic conception of law. The dynamic conception permits or encourages people to take responsibility precisely in order to cultivate personality. Personality may be cultivated three ways, through the following three types of responsibility: recognition, responsibility proper, and sociability or the responsibility to create and maintain a legal order in common.
Each type of responsibility outlined in Part III suggests one or more maxims for realizing responsibility in practice. Part IV surveys these maxims. It turns them back finally to D'Amato's deconstructive practice. The maxims of justice implicit in D'Amato's deconstructive practice are at odds with the account of justice in his work on justice proper. He does both perfectly, but they are at odds. Though his deconstructive practice is imbued with maxims of responsibility, the idea of responsibility, resolutely held, is inconsistent with absolute justice.

I. LAW AND JUSTICE

Two positions dominate thinking on the relations between law and justice. Formal justice holds that justice can be known and done only through the maintenance and equal application of general rules of law. Substantive justice holds the contrary, that justice can be known and done apart from law. Each position has several variants and characteristic images of justice and law.

A. Formal Justice

Formal justice limits justice to the maintenance and equal application of general rules of law. Justice, in this position, cannot be known or done apart from law. Formal justice is a consequence of the maxim it shares, we shall see, with one variant of substantive justice, that justice, whatever else it is, must command general assent at every moment in every case where justice is in question. Justice apart from law, precisely because it is not law, fails to command general assent. It is subjective preference, not justice.

Formal justice supposes that in a reasonably democratic and pluralistic political community general assent is possible only on two propositions of justice and nothing else. The first is that certain of our fundamental relationships must be governed overall by general rules.

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8 Accounts of justice in relation to institutions other than law do not figure here. For instance, Rawls examines justice as it relates to major political institutions, not law. See John Rawls, A THEORY OF JUSTICE 7 (1971). Though a general account of justice in Aristotle's style may still be possible, particular accounts differ in relation to different institutions. Rawls's analysis, while cogent and illuminating in relation to political institutions, has less to say about justice in relation to law.

Sustaining the distinction between justice in relation to law and a more comprehensive vision of justice is necessary in practice, but also ultimately impossible. See Michel Rosenfield, Restitution, Retribution, Political Justice and the Rule of Law, 2 Constellations 309 (1996).


10 See infra text accompanying note 17.

11 This supposition is unlike the supposition of the version of substantive justice sharing formal justice's maxim.
The second is that rules, whatever they may prohibit, facilitate, or require, must be applied equally in like cases. No propositions of justice apart from these, formal justice argues, gain general assent, even propositions concerning the justness of law's content (except in the unlikely case that enactment of law must be unanimous). Rules are the repository of the whole of justice, not because they have a specific content, but because they are rules.

Formal justice entails a certain account of law, known as legal positivism. In order for the maintenance and equal application of rules to be the whole of justice, application must include the whole of justice that can be known or done in each and every case. If general assent could be had in any case on a proposition of justice other than equal application, justice could be known or done apart from law, and formal justice's supposition—that it cannot—would not be justified. Likewise, in order for the supposition of formal justice to be justified, equal application must be more than just a proposition. It must be possible in practice for rules to be applied equally in like cases, according to the strict terms of a known set of rules and no other. If any case resists application of the set, either because it is ambiguous which rule applies or because it is necessary to use a rule outside the set, then once again justice can be known or done apart from law, and formal justice collapses.

Implicit in formal justice is the value of equality. Everyone agrees on the propositions of formal justice because everyone considers equal application of a known set of rules to be desirable. Though equality is a value for formal justice, formal justice confines equality to application. Formal justice admits—who could not?—that the value of equality inevitably informs the content of rules, that people who want law to treat them equally in application want other sorts of equal treatment as well. Yet formal justice stands by the supposition that people generally agree on equal treatment only in the application of a known set of rules and in nothing else.

Formal justice is undoubtedly correct in supposing that people generally agree only on propositions of formal, not substantive equality. Even so, the temptations of substantive equality exert pressure against the claim of equal application. Formal justice embraces equal treatment as a value, but then restricts it to equal application as a fact, supposing that no proposition of justice apart from maintaining and equally applying rules can gain general acceptance. Formal justice is thus always open to empirical challenge in the name of the very value it embraces. Litigants will always make this challenge, and judges will often respond to it, casting into doubt the transparency of cases to equal application.

The temptations of substantive equality may also prevent formal justice from maintaining indifference to the content of rules.

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D’Amato has made exactly this point. In a rebuttal to Peter Westen’s spirited defense of formal equality, D’Amato argues that formal equality is impossible on its own terms absent agreement on propositions of substantive equality. If a rule creates an arbitrary classification that treats people unequally, he says, they are not being treated equally, even if the rule is applied equally according to its terms. The claims of substantive equality are inescapable. Formal justice inevitably embraces substantive justice as a supplement. Ronald Dworkin makes the move to substantive equality explicit in both his works of general jurisprudence. In Taking Rights Seriously he proposes a “right to equal concern and respect”, in Law’s Empire, an equality of “associative or communal obligations.”

B. Substantive Justice

Unlike formal justice, substantive justice does not limit justice to the maintenance and equal application of general rules. Justice can be known and done in this position apart from law. Substantive justice diminishes the centrality of rules as a repository of justice. It does so in two ways. Absolute justice abolishes rules altogether as a repository of justice. This is now D’Amato’s position (it was not always). Contingent justice marginalizes rules as a repository of justice, rather than abolishing them. This is the position of D’Amato’s colleague in deconstruction, Jacques Derrida.

1. Absolute Justice.—Absolute justice holds that good-willed, impartial observers of a dispute will always agree on the just result, even if they can’t say why the result is just, in words. In principle, Everyman can get the just result by himself, without the benefit of agreement with others. The justness of a result commends it, not the fact of agreement. Justice is Everyman’s constant companion, his prosecutor, protector, and guide. Everyman is Hercules.

Absolute justice is a doctrine about disputes, not rules. In formal justice, rules are primary, and disputes must fit into them as best they can. In absolute justice, disputes are primary, and rules must try to fit into them. Though absolute justice turns round formal justice’s relation between rules and disputes, it shares the maxim of formal justice that justice must command general assent at every moment in every

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16 Derrida does not label his position on justice in his fullest account of justice so far. See Derrida, supra note 5.
17 By Hercules, I refer of course, to Dworkin’s brainy judge, who always gets the right answers. See Dworkin, supra note 14, at 105-30.

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case in which justice is in question. It does not, however, share the
supposition of formal justice that general assent is possible on only
two propositions. But absolute justice may not share the supposition
in two ways, and D’Amato, at different stages, has used both.

The first way, which D’Amato held before deconstruction, claims
that general assent is possible on propositions beyond the two of for-
mal justice. The discourse of disputes in this conception remains one
of propositions, or rules, of law. These differ from rules in formal
justice, however, in that they are presumptions, not fixed rules. They
are defeasible by intuitions of justice, formed out of the effect legal
materials have on parties to a dispute and the effect, in turn, that the
parties have on legal materials.18 Absolute justice lays down pre-
sumptions and then dispels them. What is obscure in the first formu-
lation of absolute justice is whether a presumption dispelled by
intuitions of justice yields a fresh presumption, rather than, say, a di-
rect expression, in words or not, of an intuition of justice.

Absolute justice fails to share the supposition of formal justice a
second way, which D’Amato now holds. The second formulation of
absolute justice denies altogether that general assent on propositions
of justice is possible, including even the two propositions of formal
justice. Instead, it embraces the direct expression, in words or not, of
intuitions of justice. In the first formulation, presumptions have nor-
mative force until intuitions of justice dispel them. Law is part fact
and part justice at different moments in the unfolding of a presum-
tion. In the second formulation, in contrast, law has no normative
force whatsoever. Law is a fact, just like any other.19

19 When D’Amato held the first formulation of absolute justice, he was still concerned
that law be certain, despite systemic forces conspiring to make it uncertain. See Anthony D’Amato,
Legal Uncertainty, 71 Cal. L. Rev. 1 (1983). Treating law as a presumption defeasible by gener-
ally shared intuitions of justice is an immensely clever way of defending law’s certainty. By the
time D’Amato held the second formulation of absolute justice, he wanted to show in every way
he could that law, taken on its own terms, is absolutely uncertain, in order to allow the free play
of intuitions of justice uncorrupted by legal argument. See Anthony D’Amato, On the Conne-

Aristotle conceives of justice as virtue, and law as a part of virtue, hence justice. Aris-
totle, Nicomachean Ethics, bk. V, § i, at 12-15 (H. Rackham trans., 1926). Modernity in-
volves a permanent break between justice and virtue, and between law and justice. Hence,
Aristotle’s conception is virtually unrecoverable, despite all the efforts in recent political philos-
ophy and legal theory. Aristotle’s discussion of justice in relation to law, which he calls “par-
ticular justice,” id. at bk. VI, § ii, at 6, thus ignores all the issues that moderns must confront in
taking positions on law’s relation to justice. Aristotle’s conception of particular justice is at once
broader and narrower than absolute justice, though it is a species of it. Particular justice is
broader than absolute justice, because it concerns distributive justice, or the distribution of
honor, wealth, and other divisible assets of the community. Id. at bk. V, § ii, at 12. Absolute
justice, in contrast, governs only disputes over distribution, not the form or content of institu-
tions through which distribution is accomplished. Particular justice is also narrower than abso-
If law is a fact and has no normative force, why do we have it at all? Why this law and not that law? The second formulation of absolute justice delivers no single or compelling answer to these questions, since law in this position, if it satisfies any need at all, satisfies some need other than justice.

Absolute justice entails a different account of law than that of formal justice. Each type of absolute justice entails some version of natural law. Every version of natural law holds that law may be found in the perceptions of qualified observers. Just who the observers are and what makes them qualified varies from version to version. Both types of absolute justice agree that qualification is the birthright of all reasonably intelligent, reasonably sane persons in the habit of speaking and acting in good faith. The difference between the types lies in the character each assigns to the observers’ perceptions. The first type allows perceptions to take the form of rules, even if the rules can be trumped by intuitions of justice. (When formal justice succumbs to the temptations of substantive equality, it shares this account of law with absolute justice.) The second type insists on confining perception to intuition. Again, it is obscure whether intuition may take the form of rules, and it would be fruitful for D’Amato to elaborate his position on this question.

2. Contingent Justice.—Contingent justice agrees with absolute justice that justice can be known and done apart from law. It differs with absolute justice, though, by rejecting the maxim absolute justice shares with formal justice that justice must command general assent at every moment in every case in which justice is in question. Instead, contingent justice sees a perpetual struggle over justice, a clash of perspectives among cultures, between people, and especially in ourselves. No one is Hercules. No one has just the answer, the just answer. In Derrida’s formulation, contingent justice agrees with Dworkin that law (on its own logic) has right answers. Law insists on being calculable. But it is not just, just because it is calculable. One does not calculate justice. Instead, one responds to the “infinite demand of justice, for justice.” One responds; one is responsible. Contingent justice is responsibility. It is endless engagement in a struggle over

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lute justice, because it also concerns corrective justice, or a corrective principle in private transactions. Id. at bk. V, § ii, at 13. Absolute justice, in contrast, is not confined by principle.

20 Derrida’s formulation is, of course, not inevitable. See infra text accompanying note 34.

21 This is found in Taking Rights Seriously, supra note 14, but not in Law’s Empire, supra note 15.

22 Derrida, supra note 5, at 959. Derrida’s version of deconstruction does not stand for law’s indeterminacy, a common mistake. See Madry, supra note 6, at 1035.

23 See Derrida, supra note 5, at 955.

justice. All that we necessarily share in common in the struggle over justice is responsibility. We necessarily agree only that it is just to struggle, to be responsible. Everything else is strife.

For Derrida, justice begins with a “sense of responsibility without limits.”25 “Without limits” means “excessive,” always exceeding whatever limit has been established in any way limits can be established. It also means “incalculable”; no one can ever say exactly where the sense of responsibility begins or where it ends for sure.26 Finally, it means “before memory” (devant la mémoire27), and this in two senses. First, “before memory” means an original, unreserved sense of responsibility as it happens in the moment it happens, fresh, not as it is experienced second-hand, in memory. Second, “before memory” means before interpreting responsibility through myriads of relationships, experiences, and most important of all, concepts of justice, law, and right that one learns in all the ways one learns about such matters. Justice as “a sense of responsibility without limits” then has a double emotional-practical movement. First, one is responsible for learning and understanding the limits—the limited ways one’s “heritage” has established responsibility. Second, one is responsible for suspending the responsibility given by the heritage, always questioning and possibly exceeding it.

Consider this: parents are legally bound to care for minor children, but not grown children for parents. Some children, nonetheless, feel responsible for parents. Their responsibility is “excessive, incalculable.” It does not measure what parents did for them, or what law requires. It comes, perhaps, from a time when the child felt immediate, unreserved gratitude toward the parents. It is “before memory.” An adult experiences this gratitude at a distance, as he or she remem-

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25 Derrida, supra note 5, at 953.
26 This is the meaning Jack Balkin assigns to “without limits,” believing he has discovered a new sort of deconstruction. See J.M. Balkin, Transcendental Deconstruction, Transcendent Justice, 92 Mich. L. Rev. 1131, 1140, 1149-54 (1994).
27 Derrida, supra note 5, at 953. “Devant” means “opposite,” “toward,” “before” as in “before the judge” or “before the law” (devant la loi, Vor dem Gesetz, see id. at 929), as well as “anterior to.” See Cassell’s French-English English-French Dictionary 250 (Ernest A. Baker ed., 29th ed. 1958). Derrida undoubtedly means all the senses of “devant.”
bers it. Also, the adult interprets the gratitude through relationships, experiences, and concepts of justice, law, and right.

Then, suppose law required children to care for parents. Children who would have cared for them anyway no longer have the pure experience of responsibility. Caring for parents is the law. One obeys the law. One cares for parents, in part, because one fears liability, not because one wishes to pattern one’s actions after an image of perfection or because one wants to maintain one’s dignity. “The sense of responsibility without limits” can be achieved only once one peels away the layers of injunction, of rules backed by criminal or civil sanctions, that force one to do what one might otherwise have done out of a sense of responsibility. The result of this suspension and questioning need not even exceed the heritage of injunctions. It is enough for justice that the breadth of responsibility always be contingent.28

One who has a sense of responsibility without limits takes responsibility. One who takes responsibility is not assigned it. Being assigned or assigning responsibility is the province of law. It is what others do to me or I do to others. Taking responsibility is the province of justice. It is what I do for myself and others—a gift—without the expectation of a gift in exchange. Looking forward, taking responsibility is forgiveness. Looking backward, it is a gift. One is not paid for it. It is for free. It is freedom. In order to take responsibility, one must be free, not embroiled in networks of political, emotional, or economic exchanges. Freedom is the absolute, uncompromising condition of responsibility. Contingent justice, like formal justice, has a maxim: Create freedom, in yourself and for others.29

Contingent justice has a jurisprudence, but not the ones assigned to it variously by D’Amato or Derrida. For Derrida, the pessimist, “the exercise of justice as law or right, legitimacy or legality, stabilizable and statutory, calculable, a system of regulated and coded prescriptions,” is always far stronger than justice itself, “infinite, incalculable, rebellious to rule and foreign to symmetry, heterogeneous and heterotropic.”30 For D’Amato, the optimist, law is always far weaker. Neither deals justly with the capacity of law for justice, or the capacity of justice to find its way in law. D’Amato misestimates law, because he is eager to hold on to absolute justice, even in the midst of a deconstructive practice. Derrida misestimates law for a different

28 Derrida, supra note 5, at 961 (“No exercise of justice as law can be just unless there is a ‘fresh judgment.’”)
29 Id. at 961 (“Our common axiom is that to be just or unjust and to exercise justice, I must be free and responsible for my actions, my behavior, my thought, my decisions.”); id. at 971 (“Nothing seems to me less outdated than the classical emancipatory ideal.”)
30 Id. at 959.
reason, because he is deeply suspicious of any regulation, any "Kantian regulative idea." \textsuperscript{31}

The jurisprudence fully responsive to contingent justice is one that makes production and reproduction of law the responsibility of persons, rather than the impersonal consequence of either a procedural mechanism (positivism) or rational perceptions of nature (naturalism). This jurisprudence connects law with the deepest interests of personality. It is dynamic, because the personality is dynamic, and because it rejects a fundamental hypothesis shared by both the static forms of jurisprudence, naturalism and positivism. \textsuperscript{32} The hypothesis that dynamic jurisprudence rejects is that rights and duties are always in correlation, so that every right has a mirror-image duty and vice versa. A consequence of this hypothesis is that correlations and rules laying down correlations may be fully known at every moment. Every person, in principle at least, perfectly grasps the background manifold of rules. By doing away with correlation, dynamic jurisprudence requires constant alteration of the manifold of rules, according to three interests of personality that are beyond, that exceed, the contents of any rule already in the manifold.

Dynamic jurisprudence takes three positions on the interests of personality, according to the three ways whereby it is possible to break the correlation of rights with duties. Perfectionist jurisprudence is the dynamic jurisprudence that emphasizes duty to the exclusion of right. Its interest of personality is self-perfection according to the model of an ideal legal commander, such as a god. Rights-based jurisprudence is the dynamic jurisprudence that emphasizes right over duty, but not to the exclusion of duty. Its interest is mutual recognition of right, hence legal dignity. Common law is the dynamic jurisprudence that preserves both right and duty, but does not, like positivism or naturalism, suppose that right and duty are always perfectly in correlation, that correlation is complete all in one moment. Common law suggests that persons achieve correlations only over time, through struggle, in relationships devoted to settling, disrupting, and resettling correlations incessantly. The interest of personality in common law is sociability and commitment to coming to terms in a dynamic series of correlations.

\textsuperscript{31} \textit{Id.} at 967; see also \textit{id.} at 965. Kant opposes "regulative" to "constitutive" principles. A "constitutive" principle really constitutes the object. A "regulative" principle is one we construct from experiences of the object's appearance, in order to proceed with investigation, manipulation, etc. See \textsc{Immanuel Kant}, \textsc{Critique of Pure Reason} 210-11 (Norman K. Smith trans., 1929) (1781).

Each form of dynamic jurisprudence, we shall see, makes its own contribution to contingent justice, to the overall notion of responsibility. Each sets its own field for the struggle over justice. Law in dynamic jurisprudence is not disabled from making contributions to justice. D’Amato’s indeterminacy certainly destroys the claims of static jurisprudence to justice, since determinacy and formal equality are the only principles known to formal justice. Derrida’s calculability vindicates the claims of static jurisprudence to justice on the terms of formal justice, but then condemns the terms. In contrast, perfectionist jurisprudence and rights-based jurisprudence revel in indeterminacy and loath calculability. Persons opportunistically seek out moments of indeterminacy either to become a more perfect legal person or to get fresh materials for mutual recognition. Common law goes so far as to foment indeterminacy, precisely in order to inculcate the virtue of sociability.

3. Mediated Positions.—Dworkin has taken two mediated positions on law’s relation to justice, one in Taking Rights Seriously, the other in Law’s Empire.

In Taking Rights Seriously, Dworkin mediates absolute justice with formal justice. Unlike decisions of judges in formal justice, the decisions of judges in Dworkin’s jurisprudence are just, not only because they are right according to a formal system of rules, but also because they are substantively right, are just, according to a system of rules supplemented by principles. The right answers do absolute justice. At the same time, it is supremely important for Dworkin that answers be formally right, that equals get equal treatment according to a formal system. Law must respond to the value of formal equality.

In Law’s Empire, Dworkin mediates absolute justice with contingent justice, in his notion of law as integrity. The maxim of integrity is: Make law the best it can be according to a coherent set of principles about justice and fairness and procedural due process. Law as integrity is thus one sort of perfectionist jurisprudence. The task of the judge is to realize in his or her own personality the decision-making capacity of a hypothetical single author: Dworkin’s ideal legal commander. Dworkin continues to suppose a formal system. Now however, contingent justice exerts constant pressure on the formal system through interpretation, not just through the value of equality. Law as integrity differs from Derrida’s position in that Dworkin sup-

33 See infra Part III.
34 As well as to substantive equality, reflecting Dworkin’s attraction to absolute justice. See supra text accompanying notes 11-15.
36 Id. at 225, 245.
poses a single author who supplies a criterion for judging the good in law, at least in principle. Derrida does not. He supposes many authors. The most they can do is take responsibility for their decisions.

Jack Balkin in his notion of "transcendent justice" has also taken a mediated position on the relation between law and justice.37 Balkin regards justice as one of a set of "human values that transcend any given culture,"38 that "exist . . . in the wellsprings of the human soul."39 Deconstruction, says Balkin, seizes on the gap between the "articulation of our values in human culture, law and convention" and "the inchoate values they articulate."40 Our transcendent values constantly drive us towards a more perfect realization of value in our culture, laws, and conventions. Balkin believes that we can measure the gap quite precisely, that we can tell exactly which cultures, laws, and conventions are more, and which are less, just.41 He thus shifts the idea of calculability from law, which is where Derrida puts it, to justice, which is where D’Amato puts it. Balkin’s idea is thus a species of absolute justice. Unlike D’Amato however, Balkin believes absolute justice is always only potential, that cultures, laws, and conventions can never achieve absolute justice, now. That is because Balkin, unlike D’Amato, is unwilling to accept the strict consequence of absolute justice and do away with law.

4. Responsibility Apart from Contingent Justice.—Though contingent justice makes responsibility its theme, all the positions on law and justice have notions of responsibility, albeit partial.

Formal justice has a minimal notion of responsibility. The publicity of law and legal decision all but releases legal decision-makers from responsibility. Formal justice assumes that every decision and every law at the heart of any decision is more or less widely known by a critical legal public. If a judge makes an error, someone will catch it. Appellate courts can correct the errors trial judges make. Legislatures can correct the errors appellate courts make. Formal justice recognizes responsibility only in the exercise of discretion. The judge’s responsibility is limited by the doctrine of abuse of discretion. Responsibility ends where abuse of discretion begins.

Absolute justice does not assume that either decisions or laws at the heart of decisions are widely known. It does not have the faith that appellate courts and legislatures will successfully correct errors. As a result, absolute justice has a substantive notion of responsibility. Judges are responsible not to misrepresent facts and not to misstate

37 See Balkin, supra note 26.
38 Id. at 1138.
39 Id. at 1139.
40 Id.
41 Id. at 1155.
the true grounds of decision. Also, because law is indeterminate in absolute justice, judges can disguise error as necessity. They can commit the sin of hypocrisy. Neither publicity nor law can prevent hypocrisy. Hence, responsibility, as absolute justice defines it, is a necessary condition of justice.

In Taking Rights Seriously, where Dworkin mediates formal justice with absolute justice, he takes no special position on responsibility. However, in Law's Empire, in which he mediates formal justice with contingent justice, responsibility plays a significant role as integrity. Judges and legislators are responsible for making law the best it can be according to the formal system's coherent set of principles about justice and fairness and procedural due process. Integrity is an authentic notion of contingent justice, since the formal system has no direct mechanism for insuring that judges and legislators live up to their responsibility. Unlike Derrida however, Dworkin does not treat the formal system as realizable on its own terms without responsibility.

Balkin replaces Derrida's notion of "responsibility without limits" with a responsibility whose boundaries are indefinite, because the scope of responsibility is "heavily dependent on context, and not all future contexts can be prescribed in advance." Of course, Derrida never would suppose that all future contexts can be prescribed in advance. Quite the contrary! It is Balkin who supposes that transcendent justice can measure exactly how near one is to justice in any legal decision. Derrida insists that we can never accomplish this measure, even knowing the entire context of a decision. Justice is always a hazard. Like the judge in Augustine, Derrida's judge always decides in peril of eternal salvation. Not Balkin's. Balkin collapses the contingency of responsibility, the hazard of decision, into the present.

II. INTIMATIONS OF RESPONSIBILITY

Were responsibility a concept of justice alone, it would have no claim on the attention of lawyers. It is precisely because practicing legal systems are rich with institutions reflecting responsibility that law can do justice as contingent justice defines it. Law also creates refuges from responsibility, escapes from the hazards of decision. The refuges adorn substantive law, as well as procedure. Law permits or cultivates responsibility in the following two ways: by assigning responsibility and by encouraging or requiring persons to take responsibility.

42 Id. at 1151.
43 Derrida, supra note 5, at 967-73.
44 H.L.A. Hart has examined legal devices expressing responsibility in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 186-212 (1968). Hart's list includes role-responsibility (the captain of a ship), causal-responsibility (who caused the famine in India, drought, or an
A. Refuges From Responsibility

Law has at least the following three procedural refuges: acting on orders, appeals, and group decision.

Acting on orders both ensures the conformity of official behavior to law and releases officials from responsibility for action. Every ministerial power is also at the same time a duty. Every nondiscretionary official decision is dictated by the rule governing the decision. An officer cannot do other than what law commands. The judge granting or denying a directed verdict has a power, but also a duty. Federal courts may hear actions, but also must hear them. Officers, in contrast, who do not act on orders, such as staffs of administrative agencies, have powers without duties within the ambit of decision circumscribed by the duty not to abuse discretion or engage in irrational or capricious action. Within that ambit, these officers have responsibilities, not duties.

Appeals insulate trial judges from responsibility in two ways. First, an appeal gives the losing litigant another crack at winning. If a judge’s decision is not the last word, then the judge is less responsible for that decision. Second, unsuccessful appeals ratify judges’ decisions. A judge whose decision is vindicated on appeal does not make the decision alone.

Appeals also make use of one of the most effective devices for suppressing responsibility: group decision. Appellate courts always have more than one member. If one judge’s vote on an appeal is also

irresponsible government?), and legal liability-responsibility (whom does law require to pay compensation for harm?). Hart fails to draw a distinction between liability and responsibility. Because I prefer to preserve that distinction in order to locate authentic moments of responsibility in legal systems, my list is different.

Linda McClain has written a useful review of the recent literature in law and political theory (the new communitarians, the Responsive Communitarian movement) emphasizing responsibility over the free, unhampered exercise of rights. See Linda C. McClain, Rights and Responsibilities, 43 Duke L.J. 989 (1994). However, neither Professor McClain, nor the literature she reviews, treat responsibility as a legal category, doing work in law’s logic. Responsibility for them is a cultural, educational, and social background condition for law, not law itself.

Professors Steven Calabresi and Gary Lawson organized a conference, published as Symposium, Speeches from The Federalist Society Fifth Annual Lawyers Convention: Individual Responsibility and the Law, 77 Cornell L. Rev. 955-1123 (1992), in which participants treat responsibility both as a value and as a legal category. However, they equate the legal idea of responsibility with liability. My point is that liability is, paradoxically, the weakest form of legal responsibility.

45 The only exception I know is United Mine Workers v. Gibbs, 383 U.S. 715 (1966), which gives federal judges discretion whether to hear pendent claims. Judges then are responsible for their decisions.

46 To the extent an officer has power without either duty or responsibility, we say that the officer is making a “political decision.” By this we mean that the officer is not accountable to the legal system for the decision, but to the political system instead.
Taking Responsibility

90:1755 (1996)

the vote of the majority,\(^{47}\) the judge is less responsible for the decision. Juries too have more than one member. The fight over the minimal permissible number of persons on a jury is, in part, a fight over the tolerable level of responsibility.\(^{48}\)

Substantive law has at least two refuges from responsibility. First and most prominent is insurance. If the law allows someone else to pay for damages a person has caused himself or others, law has absolved the person from responsibility for the damages. Substantive rules, such as strict liability, are often based on the assumption that people insure, thus effectively forcing them to insure and absolve themselves of responsibility.

Indemnification and suretyship form a second, less powerful, device for releasing responsibility. Insurance tolerates the expectation that insureds will sometimes behave less responsibly than they would in the absence of insurance—the “moral hazard.” Insureds who behave less responsibly effectively shift part of the extra costs they impose on insureds who continue to behave responsibly. The punishment for irresponsibility is only a disproportionately small increase in premiums. Indemnity and suretyship, in contrast, do not tolerate the moral hazard. Punishment for irresponsibility is swifter, more certain, and proportionate to the costs imposed when the indemnitee or surety either raise the price or refuse to have anything more to do with the irresponsible party. The equivalent in insurance is either the creation by the insurer of special rates for classes of insureds with identifiable characteristics or loss of the policy. Law sometimes forbids cancellation of insurance, but never cancellation of contracts of indemnity or suretyship.

B. Assigning Responsibility

Law assigns responsibility through civil or criminal liability. Liability divides actions into those it condemns, and those it does not condemn, which are thus protected by immunity. Liability heightens the sense of responsibility; immunity, diminishes it. Liability forces people to do what they might otherwise have done freely, out of a sense of responsibility.\(^{49}\) Immunity permits responsibility, but also suppresses it.

Liability is responsibility in form only. It is responsibility without substance, a null state of responsibility, for two reasons.

\(^{47}\) One reason votes are usually by 50% majority in courts, legislatures, and elections, is that the 50% majority affords each voter the minimum level of responsibility. If I am the fifty-first person in a one-hundred person assembly to vote for a measure, then I am guaranteed to have the maximum number of persons joining me. Super-majorities give the tie-breaking vote greater responsibility.


\(^{49}\) See supra text accompanying notes 27-28.
Civil liability merely imposes a money charge on unlawful behavior. Unlike mandatory injunction, it does not strictly command or forbid behavior on pain of jail or fine. No guilt attaches to liability, unlike crime. Liability tells me that I may do an unlawful act if I am willing to pay for it, just as I may attend a theatrical performance if I am willing to buy a ticket. Once I have paid, the victim of the unlawful act and I are even. It is as if I had not done the act. I have no responsibility in substance, only formal responsibility for damages. Criminal liability is not altogether different. To be sure, criminals are responsible in that guilt attaches to their acts. Yet, we often say that a criminal who has served a jail sentence has "paid his debt to society." Punishment absolves the criminal as well from responsibility.  

Second, liability, unlike duty, always points toward the future. It is never certain that I will be charged damages or convicted of a crime when I do an unlawful act. Liability is a threat as well as an execution. The threat of liability always puts people in mind of calculation, just what Derrida says law does. Everyman (also Everywoman) becomes Holmes's "bad man." Responsibility, in contrast, looks to the present. The responsible person asks, What shall I do now to satisfy my sense of responsibility? She does not calculate.

Immunity returns the calculating person to a sense of responsibility. Since law will not hold a person with immunity guilty or liable, the person must make decisions on her own. The sense of responsibility inculcated by immunity is weak, however, since immunity often accompanies approbation of the permitted activity. I am free to do what law does not condemn. Hence, even in immunity, law does not strongly encourage responsibility.

C. Taking Responsibility

Legal institutions move toward a substantive position of responsibility and away from liability in the following three steps: contingent liability, the duty to answer, and power.

The first step away from the null state of liability is contingent liability. This has the following three prominent forms: vicarious responsibility, joint and several liability, and potentially responsible parties under environmental statutes such as CERCLA. One is contingently liable when one would be liable but for the presence of one or more contingencies. In joint and several liability, for example, a tort victim has the choice whether to sue one, more than one, or all multiple tortfeasors. If the victim of a tort sues less often than all

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50 Hart makes the point, through Dostoevski, that "the murderer thirsts for his punishment," so punishment is in a way a favor to the criminal, absolving him from responsibility. See Hart, supra note 44, at 159.

tortfeasors, the tortfeasors who have paid judgments have the choice whether to seek indemnity from those who have not.\textsuperscript{52} Hence, joint and several liability creates a double contingency standing between a tortfeasor and liability. Ordinary liability shares a form of the first contingency, in that a victim of a single tortfeasor has the choice whether to sue the tortfeasor or not to sue at all. Nevertheless, joint and several liability enhances the victim’s choice, since the victim has alternative targets of judgment.

Inasmuch as liability is only contingent, the person who may or may not be liable bears a form of responsibility. Thus, under agency law, a master is responsible for the unlawful acts of a servant, because the victim of an unlawful act may choose to sue the servant instead of the master, and even if the victim chooses to sue the master, the master may seek indemnity from the servant.\textsuperscript{53} This form of responsibility is minimal, though real, because it affects present behavior. A master contingently liable for the misdeeds of a servant has a motive for behaving responsibly in choosing and supervising the servant. A master who is absolutely liable may decide to structure the relationship with the servant differently in order to escape liability. He may ask the servant to indemnify him or post a bond. He may form a thinly capitalized limited liability entity, purchase liability insurance, or dispense with servants altogether in favor of independent contractors. Vicarious responsibility takes one step, albeit small, from liability.

A second step away from the null state is the duty to answer, the requirement that a person served with a summons file an answer and defend the lawsuit. Here liability is more profoundly contingent than contingent liability, since the contingency affects the existence of liability, not the identity of the target to be saddled with a liability already established. The legal system provides for immunity from the duty to answer only rarely, for sovereigns and certain public and private officers. Even here those claiming immunity must answer and plead the immunity. For the vast majority of persons who do not have immunity from the duty to answer, the contours of responsibility may be found in the law governing relief from default for failing to answer.

Every person, liable or not, is compelled to answer. All of us are always on call in the legal system. To participate in a legal system at all is an undertaking of responsibility. The effects on persons of the duty to answer are often more grave than the liability itself. Litiga-

\textsuperscript{52} Market share liability eliminates this contingency. Because it resembles legally imposed insurance, it is a half-step back toward liability.

tions often settle simply because they demand lawyers’ fees, hurt reputations, cause anxiety, and cost time, whether or not the defendant is or could be found liable. This form of responsibility costs litigants a substantial portion of all the money devoted every year to litigation expenses and judgments. It also modifies behavior, as potential litigants seek to minimize exposure to lawsuits, no less than exposure to liability.

The third, most vigorous, step away from the null state of liability is power. Hohfeld’s definition of power is the starting point. A legal power, in Hohfeld’s scheme, is a right projected into the future. A right is a present claim on the state to force another person to do or refrain from doing an act.54 A power is a claim that could be made on the state in the future, but only after a triggering condition reduces it to a right.55 The bearer of the duty correlative to that future right has a present liability correlative to the power.56

Hohfeld’s definition of power successfully describes relations between private persons, but not between a private person and an officer. Officers, including judges, have powers in a sense slightly different than Hohfeld’s. The powers of officers are a source of liability, but not the way Hohfeld means it. Having imposed duties on litigants, judges do not then have correlative rights. Instead, they have further powers. Suppose a judge issues an order, and the subject of the order disobeys it. We would not say that the judge has the right to hold the subject in contempt. She has the power. The only way the judge would not have the power is if the order was wrongly issued. The powers of officers, unlike those of private persons, are not correlative with liabilities, just as in dynamic jurisprudence rights are not correlative with duties. Were the powers of officers correlative with liabilities, then power, once exercised, would degrade to a right. But officers have no rights, only an endless series of powers. Instead of rights, officers have the responsibility to exercise power in such a way that an exercise of power leads to further power.

The sanction for an irresponsible exercise of power is loss of further power. A judge makes the wrong decision on a summary judgment motion. The decision is overturned on appeal. On remand, the judge’s power of decision is constrained by the ruling of the appellate court. A judge persistently makes irresponsible decisions. The chief judge gives the irresponsible judge fewer responsibilities, or the judge is impeached. Irresponsible behavior by officers leads to loss of power, not in general to liability.

54 Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays 38-40 (1923).
55 Id. at 50-51.
56 Id. at 50, 58.
Legal institutions enforce responsibility as power both by giving power, and by taking it away. Giving power was the subject of a recent opinion by Judge Posner in *Colfax Envelope Corp. v. Local No. 458-3M Chicago Graphic Communications International Union.*

Colfax had reason to believe that it had entered into a collective bargaining agreement with the union providing new and lower manning requirements for presses. The union had reason to believe that their new agreement with Colfax kept the old requirements. Colfax sued under section 301 of the Taft-Hartley Act for a declaration that it had no collective bargaining contract with the union, because the parties never agreed on an essential term—the manning requirements for Colfax's presses. The union counterclaimed for enforcement of the arbitration provision of the agreement. The district judge granted summary judgment to compel arbitration on the ground that the disputed term governing manning requirements was unambiguous.

The Seventh Circuit affirmed, with a caveat: the district judge's conclusion that the term governing manning requirements was unambiguous does not bind the arbitrator. Judge Posner wrote:

[This] is the responsibility, subject to the excruciatingly limited right of judicial review of arbitral decisions, to interpret the agreement. It will therefore be open to Colfax to argue to the arbitrator that, under a proper interpretation of the contract, there really was no meeting of the minds over the manning requirements and therefore that the contract should be rescinded after all. The only essential point at this stage of the litigation is that whether or not there was (as we believe, without meaning to bind the arbitrator) such a meeting of minds, there was sufficient mutual understanding to create an enforceable contract to submit the issue to arbitration.

The arbitrator must have in his arsenal the power to rescind the contract, otherwise he cannot fulfill his responsibility to arbitrate. Responsibility requires power.

The second way of enforcing responsibility as power, taking power away, may be found in mechanisms for disciplining judges, lawyers, and anyone else who practices under license. The sanction for breach of judicial or professional responsibility is almost always deprivation of power. Even a mild sanction, such as censure, curtails power by injury to reputation. Also, sanctions that appear as a liability, such

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57 20 F.3d 750 (7th Cir. 1994).
58 Id. at 755.
59 Judge McDade concurred, but disagreed with Judge Posner's caveat on the reasonable ground that the majority cannot have it both ways: the contract cannot be sufficiently unambiguous to support enforcement of its arbitration clause, yet sufficiently ambiguous to support an arbitrator's remedy of rescission. Id. at 757-58 (McDade, J., concurring). The question may boil down to whether the contract had a severability clause, but Judge Posner does not tell us whether or not it did. Judge McDade's dissent underscores the seriousness with which Judge Posner takes the concept of responsibility.
III. The Types of Responsibility

Armed with these intimations of responsibility in a practicing legal system, let us examine the types of responsibility as law defines them. The account tracks the scheme suggested in Part II, distinguishing the types of responsibility that are assigned in static jurisprudence from those persons are permitted or encouraged to take in dynamic jurisprudence. Each intimation of responsibility—liability, contingent liability, the duty to answer, and power—anticipates a type of responsibility in the overall scheme.

A. Assigning Responsibility

Static jurisprudence assigns responsibility. It does so two ways, according to the following two meanings of the word “liable”: “bound” and “apt,” hence “liability” and “character.” Static jurisprudence assigns responsibility in order to constrain personality. Liability and character are the instruments of constraint.

Liability is the type of responsibility recognized in positivism. It reduces responsibility to an address for visiting penalties upon persons who have exceeded legal constraint. One can be liable for—bound to—anything, however repugnant or absurd, so long as the liability flows from a rule marked as law according to an authoritative procedure. Liability is thus responsibility in form only. Persons experience it as the form of responsibility, not its substance. Hence they do not “feel” responsible. They feel they are “being held” responsible.

Positivism relegates the substance of responsibility to character, which it puts outside the positivist legal system proper. Where liability is formal responsibility unconnected with substance, character is informal responsibility connected with substance. It is the account of responsibility in naturalism. Where positivism excludes character from law, naturalism embraces it. Naturalism understands violations of rules as insights into a violator’s character. It does not “punish” violations, so much as educate the violator. Naturalism disregards the form of responsibility—the violation—in favor of its substance, which is the formation of character. The character that naturalism forms is one that will incline by habit toward the behavior suggested by law’s content.

60 I COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY, supra note 24, at 1611-12 (defining “liable”). The Oxford English Dictionary surmises that “liable” comes through Anglo-French from the Latin, ligare, “to bind.” Id. In the sense of “apt,” then, “liable” reflects “bound to.” CASSELL’S NEW LATIN DICTIONARY, supra note 24, at 346 (defining “ligo”), 668 (defining “bind”). Ligare is also the root of “religion,” “to bind together.” Id. at 668; II COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY, supra, at 2481 (defining “religion”).
Liability and character entail each other, and together form a complete account of responsibility from the static perspective. Character is the product of a sustained trail of liability that transforms punishment into habit. There can be no character without consequence, no habit without the prospect of liability. Similarly, liability assigns punishments to addressees on the principle that punishment leads to habits that make punishment unnecessary. Without this principle, punishment cannot form character. It is simply cruelty.

B. Taking Responsibility

Dynamic jurisprudence asks its practitioners to take responsibility. Though dynamic jurisprudence may assign responsibility as well, the need to make an assignment always marks failure from the dynamic perspective. Taking responsibility has three forms, depending on the dynamic jurisprudence in question.

The first form belongs to rights-based jurisprudence. This is responsibility as recognition. I am responsible for treating you with the dignity I owe you as a legal person, for recognizing your legal dignity. You are likewise responsible for treating me with the dignity I deserve, for recognizing my legal dignity. The responsibility is reciprocal, not personal. It depends on mutual recognition. The responsibility of each of us is a condition of the responsibility of the other. The punishment for irresponsibility is withdrawal of recognition. The responsibility is also expansive, opportunistic. Persons in this jurisprudence are responsible to look for fresh occasions of recognition. Absent the constant expression of mutual recognition, justice is impossible.61

The root of recognition in practicing legal systems is power. Persons get power and give it through mutual recognition. A lawyer has the power to practice, because other lawyers, through the bar association as agent, recognize the lawyer’s dignity as a member of the association, and the lawyer by joining the association recognizes the dignity of other lawyers. Lawyers as a group have power, because other groups, through the state as agent, recognize lawyers as a group, and lawyers as a group recognize the other groups by accepting recognition through the state. The powers we give and get through law are not confined to officials employed by the state. Ordinary citizens give and get power in all the acts by which they recognize mutual condi-

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61 Thus, for example, Hobbes's first law of nature is: "Naturally every man has right to every thing." Thomas Hobbes, Leviathan: Or the Matter, Forme and Power of a Common-wealth Ecclesiastical and Civil 103 (Michael Oakeshott ed., 1962) (1651). Hobbes's is a rights-based jurisprudence. The second law of nature is: Make contracts. Id. at 104. Only the third law of nature, which Hobbes calls "justice," provides: Fulfill your contracts. Id. at 113. This is the law of nature people usually cite and remember, but the third law is impossible without the second, and subsidiary to it.
tions of dignity. Thus power ranges far more widely than the powers Hohfeld tied to liability, more widely even than the powers formally recognized in law. Formal legal power produces an apparently nonlegal surplus of mutual recognition in general.

The second way to take responsibility belongs to duty-based jurisprudence. This sort of responsibility—let us call it “responsibility proper”—means having to respond to or answer a legal commander for failing to emulate an image of perfection embodied in the commander’s personality. Responsibility proper has two stages, both of which are nicely articulated in a foundational text on responsibility—the stories of Adam and Eve,62 and Cain and Abel.63

The first stage is response to a command. God told Adam not to eat the fruit of the tree of knowledge of good and bad. Adam did. Instead of simply accusing Adam of disobedience, God asks a peculiar question for an omniscient being: “Where are you?” He does not want Adam to cower at an accusation, but to answer, to respond, to learn to be responsible. The second stage is sin. God rejected Cain’s sacrifices, because Cain was sinful (this before any laws were revealed to anyone, before the Noachide Code and the Sinaitic revelations). When Cain remonstrated, God said: Make yourself less sinful. Instead, Cain continues to be sinful. He kills Abel. Since God had not yet revealed the law against murder to Noah, Cain had not committed a crime. So God does not accuse him. He merely asks: “Where is Abel, your brother?” Sin, the interior knowledge of wrong, appears before law, and persists even when law appears later.

The root of responsibility proper is the duty to answer. Persons experience responsibility proper whenever they expect they may be called upon to answer, not just when they must answer. Responsibility proper thus imbibes every moment of each relation in which law is or could be in question, and that in our society is every relation. Like power, the formal duty to answer produces an apparently nonlegal surplus of responsibility—readiness to answer and an interior knowledge of wrong.

The third form of taking responsibility in common law is sociability or the responsibility to create and maintain a legal order in common. One is responsible for being sociable. Common law makes Hercules into an ordinary fellow. He is not necessarily a judge, as for Dworkin. Everyone is capable of knowing the right answer to every dispute in common law, because all are capable of coming to terms with each other. They may or may not make law the best it can be. Common law’s Hercules knows the right answer, because he makes the answer right together with his fellow Hercules’. A person achieves responsibility by creating the conditions of his own liability in

62 Genesis 3.
63 Genesis 4.
concert with other persons. The person is more Atlas than Hercules, carrying the weight of the legal world on his shoulders.

The root of sociability is contingent liability. Persons in common law must come to terms because liability is everywhere and always contingent. Once again, a formal device—contingent liability—produces a surplus, imbuing every action or failure to act, whether or not legal in form, with responsibility. Here however, the surplus is legal in form, a jurisprudence rather than an apparently nonlegal relation.

IV. **The Pragmatics of Responsibility**

A. *The Maxims of Practice*

Each form of responsibility suggests one or more maxims for realizing responsibility in practice.

The maxim of practice in formal justice is this: Treat like cases alike. That is all one can do or wants to do in order to be responsible, and that is not much, for every decision one makes in formal justice is transparent and open to correction. The decision maker in formal justice can be responsible only for delaying right results or raising the costs of decision. Costs of justice and delays in getting it have no purchase in the structure of formal justice. The maxim of practice is thus not a maxim of individual decision makers in the legal system, but of the legal system as a whole. Responsibility is systemic, not personal. It is not responsibility at all.

Accounts of formal justice succumbing to temptations of substantive equality have a different maxim: Treat everyone equally. Decisions in this sort of formal justice are not transparent, hence decision makers must assume personal responsibility. The virtue of the maxim of pure formal justice is that we think (even if we are wrong) that we can follow it. The maxim of substantive equality, in contrast, immediately embroils us in disputes over the categories of equal treatment. Take one category like “equal medical treatment.” Does equality in this category mean that we spend the same amount of money on each person, no matter what her needs? Or does it mean that we spend whatever each person requires? Formal justice on its own terms cannot supply the answer.

Both absolute justice and contingent justice have two maxims each. The maxims of practice in absolute justice are, first, Do not commit fraud or be hypocritical, and second, Expose hypocrisy and fraud in others. The first maxim in contingent justice is: Press easy cases to the limit, make them hard, so that one can take responsibility for the result, rather than attribute the result to legal calculation. The second is: Create conditions of freedom for oneself and others, so that you and they can be responsible.
B. The Maxims in D'Amato's Deconstructive Practice

D'Amato's deconstructive practice perfectly exemplifies the maxims of contingent justice. He exposes hypocrisy and fraud.\(^6^4\) He presses easy cases to the limit\(^6^5\) and tries through scholarship to create conditions of freedom.\(^6^6\) D'Amato's method for pressing easy cases to the limit is to imagine a world in which the "obvious" result of a rule becomes problematic. He then compares the imagined world in which the rule is problematic with the world in which the result is obvious. This comparison illuminates aspects of the world in which the result is obvious that are hidden to ordinary understandings of the rule.\(^6^7\) The sheer power of D'Amato's method for lawyering is obvious. It is what successful litigators do every day in practice. All D'Amato has done is capture it in theory. And that is a lot.

The difficulty does not lie in D'Amato's deconstructive practice, but in his simultaneous adherence to absolute justice. The responsible person in absolute justice cannot possibly follow the maxims of deconstructive practice. The absolutely responsible person knows all the right answers. The contingently responsible person does not. The absolutely responsible person need make no effort to find the right answers. She need not follow D'Amato's deconstructive practice. All she need do is expose the hypocrisy and fraud of those who put apparently determinate rules ahead of absolute justice. The contingently responsible person is haunted by the necessity for perpetual struggle over justice. She can never rest. She never knows the right answer, only right answers. She must practice. She will never be perfect.

\(^6^4\) See The Ultimate Injustice, supra note 1.
\(^6^5\) See The "Easy Case", supra note 1; Xanadu, supra note 1; One Bold Thought, supra note 1.
\(^6^6\) See Analytic Jurisprudence Anthology 253-60 (Anthony D'Amato ed. 1996) (criticizing the jurisprudence of the anti-slavery judges).
\(^6^7\) D'Amato's critics rap him for ignoring the reality of determinacy in much litigation. Professor Hegland, for one, lists a series of determinate rules in a murder case he second-seated with his wife—admissibility of the coroner's testimony, of grisly post-autopsy pictures, and so forth. See Hegland, supra note 7, at 131. So there, D'Amato! But Hegland mistakes the deconstructive argument. Certainly in the world as we have it, rules are often determinate, because we agree to make them determinate. But D'Amato asks us to imagine another world, then to see what unspoken aspects of our world resemble the imagined one. Hegland says he is unconvinced that the world would be different were all lawyers and judges to wake up tomorrow with vivid legal imaginations. D'Amato's point is different. Of course the world would not be different, for that world is our world.

Professor Madry, for another, accuses D'Amato of essentially distorting the essence of Wittgenstein, amongst others. See Madry, supra note 6, at 1036-45. The essence of Wittgenstein. What a thought! At any rate, I prefer D'Amato's Wittgenstein: Rules may indeed be determinate, but not ever on their own terms, only if they are set in a form of life, which may or may not be expressible in words.