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## *Mit Schlag (Repetitions)*

Patrick O. Gudridge  
*University of Miami School of Law*, [pgudridg@law.miami.edu](mailto:pgudridg@law.miami.edu)

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# Mit Schlag (Repetitions)

PATRICK O. GUDRIDGE\*

Pierre Schlag's *The Aesthetics of American Law*<sup>1</sup> seems to me to be immediately illuminating, elegantly intricate, readily celebrated . . . . Grids, force attributions, attention to perspective, disassociative transition effects: all appear—once described—to do much of the work of ordering in legal writing and argument.<sup>2</sup> Is there any clashing politics implicit in this recognition? Apparently not: *Aesthetics* briefly sketches a possible historical association of grids and conservatives, forces and realists and their various heirs, and perspectives and identity politics.<sup>3</sup> But it soon becomes clear that there is nothing necessary in these juxtapositions. Thus, the example of corporate law that Pierre Schlag explores to great effect need be amplified only a little further to show that all four of the aesthetic configurations he identifies are useful (and used) in ordinary business jurisprudence—constituents, therefore, of the most obvious status quo.<sup>4</sup>

Sometimes, at least, universality or neutrality can be subversive. Schlag's readers get the impression that all legal projects, however sharply particular they appear to be, consist mostly of the play of com-

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\* Professor, University of Miami School of Law.

1. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002) [hereinafter Schlag, *Aesthetics*].

2. These are all terms that Pierre Schlag puts to work, and that cannot be explained in detail short of reproducing his essay. For present purposes, it is enough (I think) to connect use of grids in legal reasoning with the invocation and enforcement of arrangements of more or less mutually exclusive categories like, say, tort and contract or substance and procedure or (in the older constitutional law) manufacturing and commerce. See *id.* at 1055-70. Force (or energy) is the underlying notion deployed in balancing tests (opposing forces) and equilibrium analyses of various kinds (attributions of tendencies). See *id.* at 1070-80. The possibility of differing perspectives is the starting point, for example, for analyses of institutional constraints, assertions of the importance of various social identities, "we/they" accounts of constitutional law, and the like. See *id.* at 1081-92. Disassociative arguments call attention to the incompleteness of the other aesthetics; in turn, of course, the other aesthetics implicitly critique disassociative arguments. See *id.* at 1092-1101.

3. *Id.* at 1053-54.

4. See *id.* at 1094-95. The idea of the corporation as a legal entity as such—in law, an individual—helps fill out the grid of legal "persons," as do taxonomies of shareholders, creditors, stakeholders, and the like. References to markets for corporate control or informationally efficient capital markets, as well as critiques of these ideas, suppose that equilibrium effects matter. It is enough simply to mention the term "insider trading" to show how prominent the sense of perspective is in corporate law. Cases concerned with legal disregard of the corporate entity—even if sometimes preoccupied with the vividly forceful rhetoric of "piercing the corporate veil"—are plainly disassociative, obviously ad hoc in reasoning and result, precisely after the fashion of this last aesthetic.

mon elements. These elements, moreover, are oddly massless—modes of presentation implying nothing at all about the existence of underlying structures or processes, motivating historical triumphs or outrages, recurring socio-psychological needs or warps, or the like. All legal projects float free—the moral equivalent of whipped cream.

This brief essay reaches towards a third thought. I think that Pierre Schlag is right to overlay law and aesthetics. But that overlay does not dictate his decision to pitch his characterizations in relatively abstract terms, and to trace their interplay at the same high level. It might be possible to proceed otherwise.<sup>5</sup> Aesthetic effects may result from decisions to call to attention and manipulate or alter what are ordinarily barely noticed, altogether mundane assumptions or conventions concerning presentation. To take two obvious examples: It was supposed for a long time that the paint in paintings was to be applied mainly with a brush; it is still ordinarily assumed that the lines of a poem, as they appear on a printed page, should not overlap each other. These expectations, we know, can be made explicit and challenged as a matter of artistic strategy, at times with great effect.<sup>6</sup> Are like strategies available in law?

Here I seek out repetition repeatedly. I take as points of departure *Correction*, a translated edition of a novel by the Austrian writer Thomas Bernhard,<sup>7</sup> Ernest Weinrib's *The Idea of Private Law*,<sup>8</sup> *Palsgraf v. Long Island Railroad*,<sup>9</sup> and one chapter of *Difference and Repetition*, a translation of a philosophical-psychological dissertation written by Gilles Deleuze.<sup>10</sup> Repetition, from one perspective, verges on writerly bad manners (except in cases of terms of art). This sometimes stupefying formal device, however, can also be deployed to deliberate effect. Repetition figures as a formal counterpart of, or substitute for, substance or structure. Attention to repetition, as a result, becomes a first step at least, a means of extracting jurisprudence. Or so I will try to show.

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5. There is no reason to suppose that Pierre Schlag would disagree. *See id.* at 1051 (noting "four such aesthetics").

6. *See, e.g.*, James Coddington, *No Chaos Damn It*, in JACKSON POLLACK: NEW APPROACHES 101-15 (Kirk Varnedoe & Pepe Karmel eds., 1999); Susan Howe, *A Bibliography of the King's Book, or Eikon Basilike*, in THE NONCONFORMIST'S MEMORIAL 45-82 (1993). Departures of this sort, of course, are not unique to modern or contemporary work.

7. THOMAS BERNHARD, *CORRECTION* (Sophie Wilkins trans., 1990).

8. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

9. 162 N.E. 99 (N.Y. 1928).

10. GILLES DELEUZE, *DIFFERENCE AND REPETITION* (Paul Patton trans., 1994) (1968).

## A.

In *Correction*, Thomas Bernhard deploys three principal devices. He divides the text into two (*only two*) paragraphs of roughly equal length. The first runs about one hundred forty pages, the second about one hundred thirty pages. Individual sentences are often very long, usually organized simply as sequences of phrases divided by commas. Sentences or groups of sentences frequently exhibit much internal repetition. Phrases recur, or are modified only slightly; repetition occurs often enough to be one of the most prominent features of the text.

These devices politicize the process of reading. The reader is left without the help of important ordinary cues in the absence of regular paragraphing, and the frequent presence of sentences running on, phrase after phrase, without internal differentiation, too long to be comprehended as a unit. Reading becomes work. The reader is made aware that persisting in reading *Correction* is a conscious choice. The repetitions compound the difficulty of reading as such; more importantly, they allow the substance of what is repeated to be presented to the reader in a forceful, almost violent way—communicating an intensity, a kind of volume, that the reader cannot readily moderate or otherwise filter. Again, the reader becomes aware that reading is difficult work, costly, continuously a matter of choice and not momentum. *Correction* thus formally provokes and tests the commitment of the reader—demands active involvement, complicity, or enlistment as it were. The substance of the novel, it will become apparent, makes clear what that participation ultimately entails. *Correction* positions its reader as a judge—indeed, demands judgment—with regard to the content of *Correction* itself.

The events Bernhard's novel claims as its points of departure can be briefly summarized.<sup>11</sup> Roithamer, heir to the lands and fortune of a wealthy Austrian family, is also an accomplished scientist, a professor of genetics at Cambridge University. He decides to spend his inheritance constructing a house for his sister, located at the exact center of a large forest. The house is in the shape of a cone (the "Cone"). Roithamer does not discuss this project with his sister, who becomes ill and dies shortly after visiting the Cone for the first time. Roithamer commits suicide. Bernhard spends surprisingly little space in *Correction* filling in the details of these events. Rather, the text presents two seeming streams of consciousness (each depicted in one of the two paragraphs). The first purports to be the thoughts of Roithamer's literary executor

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11. Because of its many repetitions, close footnoting of *Correction* would be tantamount to constructing a concordance. For other summaries (and also differing readings), see, e.g., STEPHEN D. DOWDEN, UNDERSTANDING THOMAS BERNHARD 36-41 (1991); GITTA HONEGGER, THOMAS BERNHARD: THE MAKING OF AN AUSTRIAN 161-65 (2001).

(never identified by name), a childhood friend and now a mathematician colleague at Cambridge, who has come to the home of Hoeller, also a childhood friend of Roithamer and the executor. Hoeller designed and built his home in a gorge above a powerful river; it was in the garret of this home that Roithamer worked out his plans for the Cone; many of his papers remain there. The second stream presents itself as an accumulation of Roithamer's attempts to explain his project and himself, before and after his sister's illness and death, indeed down to just before his suicide.

The two streams each include frequent battering repetitions underscoring extreme emotions. The thoughts of the literary executor range widely and anxiously, touching on memories of childhood, the executor's sense of Roithamer's circumstances, efforts, and death, aspects of the character of ordinary life in Hoeller's home (for example, the effect of the continuous roar of the river through the gorge), Hoeller's taxidermy work at home, and the difficulties involved in serving as Roithamer's literary executor. The executor's account culminates in his description of a panic episode, in which the executor spills and intermingles a huge quantity of Roithamer's notes, thereby making their organization seemingly impossible. Until the last few pages of defenses and doubts, Roithamer's part consists mostly of extended denunciation of his family and repeated insistence upon the importance of ruthless, thorough-going analysis.

In both parts, discussions of editorial sensibility are prominent. Roithamer's working procedures include a distinctive use of texts:

I had squirreled away in Hoeller's garret every conceivable book and paper I could lay hands on and that could be of use to me, as well as all the books and papers I could do without, and I'd torn the pages I most valued out of these essential books and papers and tacked them on the walls of Hoeller's garret, pages of Pascal, for instance, again and again, much of Montaigne, very many pages of Pushkin and Schopenhauer, of Novalis and Dostoyevsky, I'd tacked almost all the pages of Valéry's *M. Teste* on the walls before I'd covered the walls of Hoeller's garret with my plans and sketches for building the Cone; to gain perspective I've always pasted or tacked all the papers important to me on my walls, even as a child I'd covered the walls of my room in Altensam with other people's most important (to me) ideas, pasted or tacked on, so I'd first covered the walls of Hoeller's garret with the most important sayings of Pascal and Novalis and Montaigne, before I'd tacked them up and pasted them up with my sketches and anyway all kinds of ideas for building the Cone, and so I always could immediately clear out of Altensam and move into Hoeller's garret and find refuge in Hoeller's garret in those thoughts on the walls of Hoeller's garret, the fact that it is possible for me to go to

Hoeller's garret where I always found everything I needed for my thoughts and reflections, all those thoughts of other men and through them, also all my own thoughts. . . .<sup>12</sup>

Texts such as these are to be put to use, but also to be put to the side. For Roithamer, they supply working materials to be subjected to his own ordering, to be preempted by his own work. Roithamer is emphatic (also despairing) in his rejection of inter-relating texts (characteristically legal):

We reject everything having to do with contracts, because we reject bureaucracy *in toto*, but in fact the world is only held together by a patchwork of contracts, as we soon perceive, and in this network of hundreds and thousands and hundreds of thousands and millions and billions of contracts the trapped human beings are squirming. There's no way to get around contracts except by suicide. Contracts everywhere, they've already choked everything to death, a whole world choking to death on its contracts, so Roithamer. To suppose that it is possible to exist without contracts or other written agreements and run away, anywhere at all, is to find ourselves soon caught again in contracts and written agreements, anyone who thinks otherwise is a madman, a malicious falsifier of the nature of things. It's only in childhood that we don't know what kind of a trap it is in which we squirm and despair and keep on despairing as we go on squirming in it, ignorant that these are the nets of contracts and other written agreements made by the grown-ups, by history. If anyone were to succeed in doing away with all these contracts and other written agreements, all he'd have accomplished would be the end of the whole world. In the future, where everything is possible, this too is possible. But so far it hasn't been possible, nor is it possible in the immediate future, so Roithamer, the foreseeable future is all contracts, written agreements, and the resulting fits of despair, impediments, sicknesses, causes of death, that's all. Our entire being is tied to contracts, written agreements, assessments, we're trapped in them for life, no matter what we do, no matter who we are. Still we keep trying all our lives to escape from these contracts and other written agreements, efforts as painful as they are senseless, so Roithamer.<sup>13</sup>

Roithamer is entirely consistent. He subjects his own writing to a kind of exclusionary rule, conceiving of editing not as elaboration or overlay or some other expression of inter-connection, but as obliteration and replacement.

. . . I was once more in the same state in which I've always been when I believed I was finished with something, at such a moment I know it's all the other way round, and I'm willing to do it over the

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12. BERNHARD, *supra* note 7, at 223-24.

13. *Id.* at 153.

other way around. Little by little a new manuscript would be the result, as it is now again, an entirely different, new manuscript resulting from the destruction of the old one. . . .<sup>14</sup>

This conception of editing—"correction"—is (for Roithamer) as applicable to people's lives as to texts, and as applied in life points to a decisive possibility:

We're constantly correcting, and correcting ourselves, most rigorously, because we recognize at every moment that we did it all wrong (wrote it, thought it, made it all wrong), acted all wrong, how we acted all wrong, that everything to this point in time is a falsification, so we correct this falsification, and then we again correct the correction of this falsification and we correct the result of the correction of a correction andsoforth, so Roithamer. But *the ultimate correction* is one we keep delaying, the kind others have made without ado from one minute to the next, I think, . . . whom we knew, as we thought, whom we knew so thoroughly, yet we didn't *really* know all these peoples' characters, because their self-correction took us by *surprise*, otherwise we wouldn't have been surprised by their *ultimate existential correction, their suicide*.<sup>15</sup>

At the end, Roithamer thinks through his own circumstances in precisely these terms:

[B]est of all was not to let a new one come into being, to stop making positive corrections, best to destroy it altogether, so Roithamer. When I make corrections, I destroy, when I destroy, I annihilate, so Roithamer. What I used to consider an improvement, formerly, is after all nothing but deterioration, destruction, annihilation. Every correction is destruction, annihilation, so Roithamer. This manuscript too is nothing but a mad aberration, just as perhaps and with certainty, "with certainty" underlined, the erection of the Cone was nothing but a mad aberration, those who always regarded the building of the Cone as a mad aberration, seem to have been proven basically right, so the manuscript was also nothing but a mad aberration, but he'd have to accept responsibility for this mad aberration and take it to its logical conclusion, it was absolute madness, so Roithamer, to build the Cone and to write this manuscript . . ., and these two crazy acts, one resulting from the other and both with the utmost ruthlessness, have done me in, "have done me in" underlined.<sup>16</sup>

The last word of the manuscript, it would seem, refers not only to the place but to the purpose of his suicide: "Clearing."<sup>17</sup>

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14. *Id.* at 266.

15. *Id.* at 242.

16. *Id.* at 266-67.

17. *Id.* at 271.

Of course, the manuscript that *Correction* puts before its readers as Roithamer's was not destroyed, although it was edited (editorial insertions, as the preceding quotations illustrate, show up intermittently in the text). Plainly, the literary executor did not adopt—or at least did not carry through to conclusion—Roithamer's own editorial philosophy. The question of editing is one of the preoccupations of the first part of *Correction*.

Early on, the literary executor is fearful of the overwhelming effect of Roithamer's ideas.

. . . I was too weak to confront Roithamer's mental world head on, knowing that I had never been a match for Roithamer's ideas and what he did with them, but had, in fact, sometimes succumbed entirely to these ideas and actions of Roithamer's, whatever Roithamer thought I also thought, whatever he practiced, I believed I also had to practice, . . . he warned me to take care, not to give in to this tendency, because a man who no longer thinks his own thoughts . . . , such a man is in constant danger of doing himself in by his continual thinking of the other man's thoughts, in danger of deadening himself out of existence. . . . Since my thinking had actually been Roithamer's thinking, during all that time I simply had not been in existence, I'd been nothing, extinguished by Roithamer's thinking. . . . My extinction by Roithamer's thinking probably lasted until Roithamer's death. . . .<sup>18</sup>

The executor at times fears for his own safety.

[I]n giving me this task he may well have meant to destroy me, which is why I lived in constant fear, actually, of getting involved with this legacy of his, I fully expected to be annihilated or at least destroyed or at the very least to become permanently disturbed by it, irreparably chronically disturbed.<sup>19</sup>

He hits upon a strategy:

For me to bring together all these bits and pieces, perhaps to put them in the right relation to each other so as to make a whole out of all these bits and pieces of his thought, something to be published, was out of the question, for I'd had to consider, from my first contact with Roithamer's papers, that they consist for the most part of mere fragments which he had intended to combine into a whole himself, after completing or perfecting . . . the Cone. . . . So what we have here are in fact hundreds, or thousands, of fragments which Roithamer left to me, but which I shall not edit, because I have no right to edit them, anyway no one has a right, no matter who is editing what, he never has a right to do it, . . . I shall not commit this editorial crime, . . . I shall put Roithamer's papers in *order*, *sift* them, then possibly pass

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18. *Id.* at 25-26.

19. *Id.* at 116.



them on to his publisher, . . . I would sort and sift Roithamer's legacy, . . . but I will not edit it I won't change a line, I won't move a comma, I shall sort and sift it. . . .<sup>20</sup>

But this is not what happens.

On my arrival here I actually put only Roithamer's so-called major work, the manuscript on Altensam and everything connected with Altensam, with special attention to the Cone, into the desk drawer, while the rest of the papers were still in the knapsack . . . I . . . suddenly grabbed the knapsack and turned it over and dumped its contents on the sofa. . . . I went over to the sofa and grabbed handful after handful of the Roithamer legacy and crammed the desk drawers full of it. . . . I had done a terrible thing. . . . [I]n unpacking the knapsack, by abruptly turning the knapsack over on the sofa, I had probably, I thought, mixed the papers up even more hopelessly than before. And since Roithamer's papers are hardly ever dated or numbered or anything, as I know for a fact, there was no hope at all that I could ever put them in order again. . . .<sup>21</sup>

The executor had earlier outlined his plan for the Cone manuscript.

I shall pass it on to his publisher untouched, just as I found it, the first eight-hundred-page draft, and the second three-hundred-page revision of this first draft, and the third version, boiled down to only eighty pages, of the second version, . . . for all three versions belong together, each deriving from the previous one, they compose a whole, an integral whole of over a thousand pages in which everything is equally significant so that even the most minor deletion would reduce it all to nothing, . . . each a revision of the previous version about which he could not help being of two minds, . . . he finally, just before his death, . . . in fact, had started on the train revising even his final eighty-page version, correcting it and taking it apart and thereby, as he believed, starting to destroy it and by proceeding to shorten even that latest shortest version, as he believed, to arrive at an even shorter one, . . . ultimately leaving absolutely nothing of the entire work behind, that all of it together *came into being, all this taken together is the complete work*. . . .<sup>22</sup>

This was no longer an available option. The executor's thoughts conclude ambiguously, at least with regard to the strategy he would follow with the Cone manuscript. "I thought, just before falling asleep, how utterly exhausted I felt. In the morning I'll sneak up on Roithamer's legacy, I'll just sort of *sneak up* on it first, then I'll *sift* it and *sort* it."<sup>23</sup> Does the editor propose to recover the Cone manuscript as it was, ulti-

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20. *Id.* at 127-30.

21. *Id.* at 132-33.

22. *Id.* at 130-31.

23. *Id.* at 140.

mately to pass it on “untouched,” a “complete work”? But there is now “no hope” of “order.” What does “sift” and “sort” mean now?

*Correction* names Roithamer’s part “Sifting and Sorting.”<sup>24</sup> It is not “over a thousand pages,” just one hundred thirty. One hundred thirty pages, though, is longer than either the “final” eighty page draft or the even shorter product of Roithamer’s last corrections. The reader of Thomas Bernhard’s novel, obliged by the difficult form of the text to attend carefully to its words, discovers that the text turns on itself. *Correction* puts into play—requires its reader to choose from among the proffered options—the fictions that the reader needs to treat as true for purposes of reading.<sup>25</sup> If Roithamer’s part is read as a whole, it is not Roithamer’s, at least not within the editorial approach with which Roithamer himself is associated. The reader should have been left with only the last few pages, or perhaps (taken to the limit—Roithamer’s own preferred course) nothing at all: “Clearing.” The last few pages, however, question all that Roithamer had thought previously and this should include, presumably, his editorial approach as well. But if this were the case, shouldn’t Roithamer, having given up his particular idea of correction, rejected the parallel logic of suicide as well? The second part of *Correction* is also not the entirety of Roithamer’s accumulated Cone manuscripts. They have been “sifted and sorted.” Roithamer’s part is the literary executor’s work product. Is it therefore an “editorial crime”? Or is only an editor’s “correction” in Roithamer’s sense what the executor means by “editorial crime”? If “sifting and sorting” is different, how can the reader determine that this is so? That which sifting excludes is missing just as much as that which an editor annihilates. It is clear, at least, that the literary executor does not regard suicide as self-editing. Suicide, the executor muses at one point, is a kind of environmental risk—part and parcel of living in Austria—and thus like disease or geographic hazards, more a matter of bad luck, less a matter of individual judgment.

The editorial irresolution that *Correction* propagates clouds the overall structure of the novel itself. It is not even clear if Roithamer and his suicide are supposed to be the principal focus. If only the last-drafted writing matters, the passages in which the executor describes his thoughts and reactions at Hoeller’s house take priority. Of course, those passages reject the idea of editorial correction as annihilation in favor of sifting and sorting. It is not clear why this last strategy isn’t as available to *Correction*’s reader as to the literary executor; if so, we might think, individual passages in *Correction*, perhaps some of the especially vivid

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24. *Id.* at 141.

25. See MICHAEL RIFFATERRE, *FICTIONAL TRUTH* 1-6, 33, 52 (1990).

repetitive sequences (hateful, bizarre, poignant, and so forth), might be what the reader is likely to take away, rather than any particular conclusion drawn from Roithamer's conduct or the executor's predicament.

Reading, the reader must judge—decide which of the alternative interpretive strategies to adopt. Perhaps this is always the case. Thomas Bernhard, however, makes readerly adjudication seem to be an especially pressing, and at the same time difficult responsibility. And yet: *Correction* is not simply a mess. Its spiraling possibilities, opening up the structure as well as the content of the novel, are contained *within* the novel. Formal idiosyncrasies, it turns out, are functionally central. Bernhard uses (abuses) utterly ordinary surface features of the text—paragraphing, sentence structure, word repetitions—to attract and organize the reader's attention. As a result, the questions of structure and content that would seem to be more important, that would seem to require resolution first and foremost, present themselves to the reader mostly in passing, in the course of the work of reading, the effort to come to terms with formal transgressions that Bernhard sets up as the reader's always immediate task. Judgment is postponed, accordingly, until the conclusion of *Correction*, until (as it were) the construction of the record as a whole.

## B.

Ernest Weinrib does not write at all like Thomas Bernhard. Weinrib's great provocation, *The Idea of Private Law* ("Idea"), observes all the usual writerly conventions, and plainly means to present itself to its reader as readily accessible, an essay in coherent, intelligible prose. *Idea* indeed elaborates its account of private law precisely within terms embracing and enforcing coherence. Weinrib proposes a version of legal formalism. *Idea* "first elucidates a[n] . . . internal principle of organization" characteristic of private law; discussions of "considerations of substance" (most of Weinrib's specific examples come from the Anglephone common law of torts) proceed "in the light of this formal principle."<sup>26</sup> To give content to this program, *Idea* makes coherence its chief "internal principle": "Coherence goes beyond mutual consistency or noncontradiction to the underlying unity of the elements that cohere. . . . [T]he features of a juridical relationship cohere when their justifications not merely coexist in the relationship but form an integrated justificatory ensemble. . . ."<sup>27</sup> Weinrib elaborates.

Coherence, accordingly, signifies the intrinsic unity of the features that cohere. Unless the justificatory momentum of one feature carries

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26. WEINRIB, *supra* note 8, at 25.

27. *Id.* at 33.

over to the others, the relationship as a whole does not hold together. Conversely, if the consideration that justifies one feature of a legal relationship is independent of the consideration that justifies any other, the relationship is incoherent to that extent.<sup>28</sup>

Intrinsic unity? Justificatory momentum? In practice Weinrib puts these notions to use straightforwardly. He insists repeatedly that seemingly different ideas or perspectives are just variations of each other—repetitions, as it were. Coherence, given repetition, therefore obtains.

This remarkable paragraph is emblematic:

I have reached the correlativity of right and duty by elucidating the intimate connection between corrective justice and Kantian right. Following through on Aristotle's indication that correlative gain and loss operate from a baseline of equality that abstracts from the particularities of social rank and virtue, I identified that equality with the abstracting notion of agency that undergirds Kantian right. On this view, the equality of corrective justice expresses the Kantian conception of normativeness in external relationships. Being variants from a normative baseline, the gains and losses are correlative in their normative and not in their factual aspects. The nexus of right and duty under Kantian right captures this normative correlativity.<sup>29</sup>

Aristotle, Kant, Weinrib! Weinrib "identifies" Aristotle's idea of corrective justice and Kant's idea of agency and right—that is, according to Weinrib, Aristotle and Kant can be treated as elaborating versions of pretty much the same notion, even if adopting different starting points,<sup>30</sup> and also pretty much the same notion—"normative correlativity"—that Weinrib himself applies and endorses. (I will discuss what Weinrib means by "normative correlativity" shortly.) *Obviously, obviously, obviously*: Weinrib is surely not accidentally ahistorical. He expects readers of *Idea* to recall—we should suppose—the centuries separating Aristotle and Kant and Weinrib and all the on-going intellectual tumult and transformation. His indifference to all this, his assertion that he and Kant and Aristotle are all amplifying and in a way repeating each other, and are therefore properly invocable to explain each other, is a kind of dramatization or advertisement. Weinrib's conception of coherence, and the notion of normative correlativity it prompts and informs, carry strong connotations—we are encouraged to think—and therefore should be taken seriously.

I do not mean to suggest that Aristotle and Kant figure only ornamentally in *The Idea of Private Law*. Corrective justice and individual agency are obviously not Weinrib's own inventions. But within his defi-

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28. *Id.* at 35.

29. *Id.* at 126.

30. *See generally id.*

inition of normative correlativity—which is both his term and the term that does the most work within his analysis—Weinrib plainly gives priority to the originating idea of coherence “to illuminate the inner workings of the private law relationship.”<sup>31</sup>

To satisfy the dimension of correlativity, the justificatory considerations at work in corrective justice must be unifying, bipolar, and expressive of transactional equality. . . . [F]or normative gain and normative loss to be relative to each other, the same norm must be the baseline for both. . . . [B]ecause one party’s normative gain is the other’s normative loss, the justificatory considerations must link two, and only two, parties. . . . [B]y being equally applicable to the party realizing the gain and to the party suffering the loss, they accord a preferential position to neither.<sup>32</sup>

Strong conclusions follow: “[A] justificatory consideration that fits into the normative structure of corrective justice cannot have a justificatory force that reaches only one of the parties.”<sup>33</sup> Familiar concerns for compensation and deterrence in tort law become irrelevant.<sup>34</sup> Negligence law is largely defensible, but strict liability is largely not.<sup>35</sup>

Ernest Weinrib is not Thomas Bernhard. *The Idea of Private Law*, however, putting reiteration to work at every turn, minimizing differences and underscoring repetition, organizes and presses the *substance* of its argument in a fashion strikingly reminiscent of the way *Correction* structures its *form* in order to govern its readers. It is tempting, moreover, to imagine Weinrib and Roithamer as brothers in arms. The abstracted equivalences of coherence and correlativity, the capacity and demand for rigor that these formulas define, build up an account of corrective justice, we might think, that is pretty much the jurisprudential counterpart of the Cone. But Bernhard divided *Correction*. The executor espouses “sifting and sorting,” an editorial strategy in opposition to Roithamer’s annihilatory simplification. Is there a similar counterweight evident in Weinrib’s elaboration of his *Idea*? Not explicitly—although Weinrib introduces his own analysis as “contrasting,” as a departure from “the standard view.”<sup>36</sup> Does Weinrib expect readers of

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31. *Id.* at 114.

32. *Id.* at 120.

33. *Id.*

34. *Id.* at 121-22.

35. *Id.* at 145-203.

36. *Id.* at 2. Weinrib characterizes “the standard view”—including notions of compensation and deterrence, and also the distinctive perspectives of law and economics—in terms that in the first instance serve to illustrate what he believes to be the very different emphases of his own approach. We might wonder whether, outside *The Idea of Private Law*, there is a “standard view” as such, or rather a complex of overlapping, but also in some ways differing, or at least differently nuanced, accounts. There is, obviously, good narrative reason for Weinrib to stylize approaches

*The Idea of Private Law*, even as they consider his argument, to also consider an alternative perspective?

### C.

Usefully in this respect, Weinrib includes in his elaboration of coherence and correlativity discussions of judicial work in a few famous cases.<sup>37</sup> The best known—*Palsgraf*,<sup>38</sup> inevitably—serves as an especially telling medium for present purposes. Its strange facts, along with the ambitious, disagreeing judicial opinions in the case, together function as a kind of legal theory Rorschach, readily provocative of alternative visions.<sup>39</sup>

Chief Justice Cardozo's majority opinion, emphasizing "relation" as key to the existence of a duty of care, is made to order for Professor Weinrib:

[Cardozo] integrates wrongfulness and the resulting injury. Only when the plaintiff's injury is within the risk that renders the defendant's act wrongful is the plaintiff entitled to recover in tort. Then, because the plaintiff's right is the ground of the duty that the defendant breached, the parties are intrinsically united in a single juridical relationship.<sup>40</sup>

Weinrib treats this sentence as the crux of Cardozo's analysis: "The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation; it is risk to another or to others within the range of

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that he treats as foils. These approaches, were they to be restored to full detail, would swamp discussion here; thus, in the next section I draw a narrower contrast.

37. See, e.g., *id.* at 148-52, 196-203.

38. *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

39. [A]n explosion at one end of a . . . [railroad] station overturned a scale that fell on the plaintiff, . . . standing at the end of the platform. The explosion occurred when a railroad guard pushed a passenger into a crowded train and accidentally knocked a package of fireworks he was carrying onto the tracks.

MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 61 (1992). Horwitz is less interested in the "bizarre series of events," *id.*, than in the *Palsgraf* opinions as exemplars of the declining confidence in "objective causation" in the first decades of the twentieth century. See *id.* at 61-63. See also G. EDWARD WHITE, *TORT LAW IN AMERICA* 94-101 (1980) (noting that opinions show, albeit incompletely, emergence of interest-balancing as replacement for earlier theories of causation); WILLIAM L. PROSSER, *Palsgraf Revisited*, in *SELECTED TOPICS ON THE LAW OF TORTS* 228-34 ("The Problem of the Place to Stop."). For discussions of *Palsgraf* finding keys in aspects of the facts of the case itself, see, e.g., RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 33-41 (1990); Robert L. Rabin, *The Historical Development of the Fault System: A Reinterpretation*, in *PERSPECTIVES ON TORT LAW* 68 (Robert L. Rabin ed., 4th ed. 1995).

40. WEINRIB, *supra* note 8, at 160. Weinrib argues at length that Justice Andrew's dissent—positing a duty of care to the world at large coupled with a proximate cause limitation—is incoherent. See *id.* at 161-64. "The breach of the obligation at large wrongs everyone who has been injured as a result, but only an arbitrarily specified subset made up of those whose injuries are proximate can receive compensation in tort." *Id.* at 161.

apprehension."<sup>41</sup>

Versions of the sentence are in fact repeated throughout *Palsgraf*. Read together, they disclose a recurring metaphor:

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing *far away*. Relatively to her it was not negligence at all. Nothing *in the situation* gave notice that the falling package had in it the potency of peril to persons *thus removed*.<sup>42</sup>

If no hazard was *apparent to the eye of ordinary vigilance*, an act innocent and harmless, at least to *outward seeming*, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong. . . .<sup>43</sup>

[T]he *orbit* of the danger as disclosed to the *eye of reasonable vigilance* would be the *orbit* of the duty.<sup>44</sup>

We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and therefore of a wrongful one irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the *eye of vigilance perceives* the risk of damage.<sup>45</sup>

The risk reasonably to be *perceived* defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the *range of apprehension*.<sup>46</sup>

If the harm was not willful, he must show that the act as to him had possibilities of danger so many and *apparent* as to entitle him to be protected against the doing of it though the harm was unintended.<sup>47</sup>

Duty originates in vision, in seeing—not in the abstract, moreover, rather in the particular, within the precise point of view, “the orbit of . . . the eye,” “the range of apprehension,” of the defendant. What must the defendant see? Cardozo does not suppose that the defendant must literally see the plaintiff: He reaches the same result as Justice Andrews in the hypothetical case of the speeding car by treating knowledge of the presence of “other travelers” as a group as enough, and emphasizing rather more the perceptible risk of “reckless speed.”<sup>48</sup> In the case at

41. *Id.* at 160 (quoting *Palsgraf*, 162 N.E. at 100).

42. *Palsgraf*, 162 N.E. at 99 (emphases added).

43. *Id.* (emphases added).

44. *Id.* at 100 (emphases added).

45. *Id.* (emphasis added).

46. *Id.* (emphases added) (citation omitted).

47. *Id.* at 101 (emphasis added).

48. Andrews famously supposed:

Should we drive down Broadway at a reckless speed, we are negligent whether we

hand, accordingly, the decisive fact becomes the inability of the passenger car guard to see that the package about to fall contained explosives. "It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents."<sup>49</sup>

The defendant in *Palsgraf* was the Long Island Railroad Company, not the passenger car guard personally. Shouldn't the relevant point of view therefore be that of the railroad company? This question appears to take the corporate personality fiction too seriously. All the same, it is not especially difficult to summarize the corporate view if we consider the implications of the corporate document that, in an important sense, is the beginning of Helen Palsgraf's misfortune. That document is the train schedule. It discloses that numbers of trains arrive and leave at given stations within relatively short intervals, and therefore discloses as well the possibility that recently arriving and soon departing passengers are likely, most of the time, to be near trains but not on board. Especially importantly, the schedule shows that trains leave not when all would-be passengers are on board, but at the times the schedule designates. The schedule both creates and suggests the possibility that, at the time of every departure, there may be persons attempting to board trains already in motion.<sup>50</sup> The schedule thus frames the question that the guard in *Palsgraf* faced: What is to be done with last minute passengers? From the perspective of the schedule, as it were, this question is not unique to the circumstances in *Palsgraf*. It presents itself, in principle, in the circumstances of every fixed-time departure—as recurring in a very large number of repeated cases.<sup>51</sup>

Viewed this way, the possibility that running passengers might drop packages, and that packages might pose risks to waiting, departing, and arriving passengers on adjacent platforms, becomes analytically manageable for railroad officials.<sup>52</sup> The contingency will recur often

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strike an approaching car or miss it by an inch. The act itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger, but to all who might have been there—a wrong to the public at large. Such is the language of the street. Such the language of the courts. . . .

*Id.* at 102 (Andrews, J., dissenting).

49. *Id.* at 99.

50. For provocative illustrations, see BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920* 25-26, 46 (2001).

51. "On steam trains boarding and alighting combined amounted to roughly one quarter of all accidents involving nonemployees." *Id.* at 21. Systematic collection of railroad safety data developed relatively early, under the pressure of state regulators. *See id.* at 8-13.

52. Railroad operations were an early occasion for development of techniques of rational administration and analysis. *See* ALFRED D. CHANDLER, JR., *STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE AMERICAN INDUSTRIAL ENTERPRISE* 21-23, 38-39 (1962). Bureaucratic forms of decisionmaking in both business and government were well-accepted and



enough in potential, as it were: Even if dangerous packages are very rare, the likelihood that the contingency will materialize at least few times might be quite high. Chief Justice Cardozo had no difficulty imagining variations of the *Palsgraf* facts. "A guard stumbles over a package which has been left upon a platform. . . . It turns out to be a can of dynamite."<sup>53</sup> "One who jostles another's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb. . . ."<sup>54</sup> The problem, he thought, was that individuals could not fit these unlikely but horrible contingencies into what were otherwise the immediate, almost automatic decisions of everyday life. "Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct. . . ."<sup>55</sup> But railroad officials alert to the implications of their schedules would be able to perceive the matter in more general terms, to perceive the possibility of *both* horrible and harmless cases, and thus to address the question of whether they have available means of addressing and abating the full range of risk. Why not, for example, issue an order to passenger car guards prohibiting any assistance or encouragement to late-arriving passengers?<sup>56</sup>

There may be costs as well as benefits, of course. *Palsgraf* becomes, it appears, a case akin to *Carroll Towing*.<sup>57</sup> The question of duty, for Cardozo and Weinrib a threshold matter, has now, we cannot avoid recognizing, overlapped the question of negligence as such. We have crossed into the realm of the Third Restatement 1999 Discussion Draft: "duty is in truth a nonissue."<sup>58</sup> Not surprisingly, Professor Weinrib disagrees with the Third Restatement.<sup>59</sup> There is more at stake here, however, than just the good sense (or not) of "the standard view."<sup>60</sup>

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increasingly in place by the 1920s. See ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* 286-302 (1967).

53. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928).

54. *Id.* We have no difficulty imagining these scenarios either.

55. *Id.*

56. This approach to *Palsgraf* is, of course, not new. See Note, *Loss-Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case*, 8 U. CHI. L. REV. 729, 737 (1941). The "negligent mode of operation" approach is explained, and applied (likely controversially) in *Markowitz v. Helen Homes of Kendall*, 826 So. 2d 256 (Fla. 2002).

57. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). It is not necessary, for present purposes, to explore the well-documented complexities—including various alternate politics—implicit in the cost-benefit idea.

58. RESTATEMENT (THIRD) OF TORTS § 6 cmt. a (Discussion Draft at 83, 1999). The Draft also emphasizes that there are exceptional cases in which duty is put in question. See *id.* § 6 & comment c, 82, 83-87. *Palsgraf* does not appear in the discussion. See *id.*, at 88-94.

59. See Ernest J. Weinrib, *The Passing of Palsgraf?*, 54 VAND. L. REV. 803 (2001).

60. See *supra* note 36.

The Restatement conclusion itself overlaps, even as it carefully refrains from acknowledging, a distinctive approach to the law of torts—call it “California Modern”—exemplified in the discussion of duty in *Dillon v. Legg*.<sup>61</sup> Sensitivity to the risk of unnecessarily limiting access to courts prompted skepticism as to whether the problems posed in litigating emotional distress claims were in any clear way different from the usual difficulties of civil procedure.<sup>62</sup> This skepticism, we know, would not remain “in-courthouse,” would in later cases reappear prominently and controversially, for example, in judicial responses to invocations of industry practice and industry economics as decisive of products liability controversies,<sup>63</sup> and to invocation of a professional need for confidentiality as similarly conclusive.<sup>64</sup> Individuals, akin to courts in this regard, were held to a duty to inquire, to be prepared to reconsider standard practice in light of circumstances. This obligation, it appeared, did not derive from some sense of the requirements of “the public at large,” but instead presented itself as an essentially individual obligation, always defined only in context even if emblematic of civil sociability, a duty to justify, to defend one’s acts and thus derivatively (as it were) a duty to do what one could, what was reasonably possible, to minimize injury. *Palsgraf* after *Ybarra* and *Tarasoff*, as it were: It is within this perspective, perhaps now no longer a “standard view,” that the responsibility of the administrators of the Long Island Railroad stands out most clearly.<sup>65</sup>

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61. 441 P.2d 912 (Cal. 1968). *Dillon*, we all remember, addressed duty in the particular context of the tort of negligent infliction of emotional distress—specifically, in the case of a mother witnessing the death of her young child. The Third Restatement puts outside its general principles cases of claims of “emotional distress that are not the consequences of physical harm.” RESTATEMENT, *supra* note 58, at § 3, comment a, 37. It is not clear what the Restatement means to make of cases in which emotional distress itself is asserted to be “physical harm.” *Palsgraf*, Richard Posner has documented, was one version of an emotional distress case—the explosion left Helen Palsgraf with a stammer which presented itself (Posner thinks) because “the accident triggered a latent psychiatric problem that the litigation made even worse.” POSNER, *supra* note 39, at 35-36. The fact that the scale fell on Palsgraf, bruising her, *see id.* at 34, perhaps protects *Palsgraf* from the Restatement exclusion. *Palsgraf*—or rather Helen Palsgraf—also reminds us (along with *Dillon*) of the gendering often implicit in legal responses to emotional injury. *See, e.g.,* Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 VAND. L. REV. 751 (2001). Barbara Young Welke explores this topic at length and to great effect, within the context of late nineteenth and early twentieth century railroad accidents and hazards. *See* YOUNG WELKE, *supra* note 50, at 139-246. Richard Posner notes that Palsgraf was a single parent of two children working as a janitor, and thus introduces a class element as well. *See* POSNER, *supra* note 39, at 33.

62. *See Dillon*, 441 P.2d at 917-19. The importance of protecting access to courts was an organizing theme in two famous predecessors. *See Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1947); *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

63. *See Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455-57 (Cal. 1978).

64. *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 345 (Cal. 1976).

65. I discuss all of this at more length in an essay in progress entitled “California Modern.”

Professor Weinrib is not hostile to the idea of affirmative obligation.<sup>66</sup> But neither Cardozo nor Weinrib explores the risk-administrative reformulation of *Palsgraf*. Judging the guard's conduct in isolation, obviously, is not required by the rule of respondeat superior. Risk managers—whatever their particular title would have been in the 1920s—would have been railroad employees also. The problem, we might think, lies in the limits of the idea of corrective justice. Cardozo takes for granted that the relevant “relation” is that between an individual plaintiff and an individual defendant. Weinrib insists that “the justificatory considerations must link two, and only two, parties [so that] one party's normative gain [may be depicted as] the other's normative loss.”<sup>67</sup> This straightforward transactional template does not fit well with *Palsgraf* as restated, however. The injured plaintiff Helen Palsgraf is not the relevant actor from the risk management perspective—it is rather the class of all platform users across some indefinite period of time. There is also no individual defendant—the passenger car guard is one relevant actor, whoever holds risk management responsibility is another, whoever decides that the trains will run according to schedule is still another, and so on. These actors make decisions at different points in time. It is the inter-relationship of their decisions that is the problem if this account rings true; it is the inter-relationship, really, that constitutes the Long Island Railroad Company, at least as defendant in the case. For purposes of judging the plausibility of these characterizations, identifying pertinent risk classes and inter-relationships, Aristotle and Kant do not (at least not without much exegesis) supply especially useful starting points. Their formulations (and Weinrib's) become salient only after the real work of analysis is already done. Weber and Foucault may be more informative guides.

#### D.

This is, Weinrib might argue, all very much beside the point. Coherence and its derivatives—law's increased justificatory capacity and intelligibility<sup>68</sup>—are well served in the *Palsgraf* setting by simply identifying the railroad with the acts of its guard and analyzing accordingly. To proceed using any approach other than corrective justice rigorously defined would quickly reduce to arbitrariness.<sup>69</sup> This may not be true: there may be conceptions of justice that are fundamentally non-Aristotelean, that do not reduce to corrective or distributive principles.

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66. See Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

67. See WEINRIB, *supra* note 8, at 120.

68. See *id.* at 38-44.

69. See *id.* at 41.

Some such conception might cover *Palsgraf* restated. It might be said, less ambitiously but perhaps tellingly, that corrective justice itself includes an element of justificatory arbitrariness if it can only be made to fit the case through a procrustean reading of the facts. But tit for tat arguments like this, it would seem, advance nothing.

Consider, instead, an affirmative defense:

For present purposes, a useful point of departure is “*Repetition for Itself*,” chapter II of Gilles Deleuze’s *Difference and Repetition*.<sup>70</sup> Deleuze begins with Hume and ends up recasting Freud. The pertinent points in this progression, I think, are these: Repetition is a matter of mind, a synthesis—a “contraction”—of individual elements or cases. In this respect, repetition is an exercise in *passive* imagination or contemplation; an on-going, pretty much nonconscious phenomenon that precedes or is otherwise bound up with the sense of time, habit, and memory. But there are also *active* syntheses—for example, conscious reconstructions of the past. Active exercises of imagination not only draw upon the stock of passive syntheses, but also upon other active exercises. There is no single synthesis, whether active or passive. As a result, it is possible to describe various *levels* of synthesis, and to map interactions across levels. These interactions may yield recurring orientations—for example, Freud’s pleasure principle and reality principle: for Deleuze, both have equal status—and also artifacts or *virtual objects* that figure in interactions along with real objects.

Virtual objects and real objects may both be subjects of contemplation, pretty much interchangeably, whether passive or active. Deleuze provides an example drawn from infant psychology: “Sucking occurs only in order to provide a virtual object to contemplate . . . ; conversely, the real mother is contemplated only in order to provide a goal for the activity, and a criterion by which to evaluate the activity. . . .”<sup>71</sup> But a virtual object is *partial*—“a fragment, a shred, or a remainder.”<sup>72</sup> Repeated exercises in synthesis across multiple levels involving virtual as well as real objects point to possibilities of distortions—disguises and displacements—akin to instances of repression in the Freudian account. Individual distortions might be identified and remedied; the existence of

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70. DELEUZE, *supra* note 10, at 70-128. Paul Patton, in the “Translator’s Preface,” notes that *Difference and Repetition* “is a work of prodigious conceptual invention.” *Id.* at xi. Addressing this work as a whole, in a properly engaged way, would be too large a task for this essay. The part of *Difference and Repetition* that I do take up appears to me to suggest provocative extensions of my discussions of Bernhard and Weinrib. I make no claim, however, that my use of Deleuze here is a helpful guide to either *Difference and Repetition* as a whole or Deleuze’s larger body of work. For one attempt at supplying such guidance, see JOHN RAJCHMAN, *THE DELEUZE CONNECTIONS* (2000).

71. DELEUZE, *supra* note 10, at 99.

72. *Id.* at 101.

some distortions, of whatever content, is a persistent and ineradicable by-product of the accumulating syntheses. In any arrangement of levels, therefore, "there is no ultimate term."<sup>73</sup> For Deleuze, stability or ground can only take the form of questions or problems. "There are no ultimate or original responses or solutions, there are only problem-questions, in the guise of a mask behind every mask and a displacement behind every place."<sup>74</sup>

It is obviously easy to read *Correction* after Deleuze, as it were. Repetitions press; sequences built up from different perspectives interact; the Cone, it would seem, is the quintessential virtual object; the text, in the end, presents itself to its reader as a problem without ready resolution. *The Idea of Private Law* also invites Deleuze. Corrective justice figures as the product of the interplay of Aristotle's initial formulation, Kantian moral agency, and Weinrib's own conception of coherence. Whether this production is simply an artifact, a distortion, another of Deleuze's virtual objects, is plainly an apt question to ask. But we also have enough, in even my overly simple summary, to fashion a more general jurisprudential translation. (This is the affirmative defense.) Plainly, contractions or syntheses—acknowledgements of repetitions framed in terms of rules or standards or other forms—are commonplace in law, accumulating continuously in multitudes of legal documents. Some of these syntheses are routine and might be called passive.<sup>75</sup> Others are consciously considered and actively worked out. The various syntheses interact across sometimes highly fragmented levels. These interactions may display frequently present (if never definitive) orientations or precipitate virtual objects. At least in part because they are difficult or impossible to eliminate entirely, it is not difficult to pick out distortions—disguises and displacements—endemic in legal analysis ("legal fictions," as it were). It would not be at all surprising to conclude that recurring problems or questions supply the only relatively stable ground for a legal regime, like that of the United States, which is characterized by multiple, fragmented levels and attending distortions. Deleuze suggests, as it were, that a legal regime like ours may be, in important respects, a large-scale version of Bernhard's *Correction*.

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73. *Id.* at 105.

74. *Id.* at 107.

Questions and problems are not speculative acts, and as such completely provisional and indicative of the momentary ignorance of an empirical subject. . . . The problems "correspond" to the reciprocal disguise of the terms and relations which constitute the reality series. The questions or sources of problems correspond to the displacement of the virtual object which causes the series to develop.

*Id.* at 106-07.

75. This is just Holmes updated. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 31-32 (Howe ed. 1963) (1881).

None of this, at least at first glance, appears to be especially radical or controversial. There are, however, several notable follow-on conclusions—tantamount, perhaps, to a jurisprudential manifesto:

First, the legal regime itself—the composite interacting levels of synthesis—is the origin of distortion. Certain participants in the regime may be associated with characteristic processes of distortion-making. Duncan Kennedy's *A Critique of Adjudication* is one recent attempt to map this sort of match-up.<sup>76</sup> But the phenomenon is both chronic and ubiquitous, one way or another aided and abetted in exercises in legal synthesis at every level.<sup>77</sup>

Second, there may be good reason to question or re-situate efforts like those of Ernest Weinrib or Ronald Dworkin or Herbert Wechsler to identify notions of coherence or integrity or neutrality or such as distinctly “legal” values, properly governing at least some important subset of the larger composite. Particular orientations, even if recurring, may be fragmentary, artifacts of interactions across syntheses that are always vulnerable to challenge as resting on distortions. “Values” are not legal fundamentals: if anything, accumulating legal materials routinely work, or are chronically prone to work, to put in question, counter, over-simplify, over-qualify, or otherwise undercut values appearing “in” law.<sup>78</sup>

Third, there is no reason why participants in legal regimes cannot press “internal” values like coherence or integrity or neutrality, just as they might press any other values, subject to the counter-efforts of other participants and the fragmenting and distorting effects of the various accumulating and interacting legal syntheses. A legal regime is a political environment (in effect complete with “weather”) of a distinctive sort. There is no mechanism akin to vote counting or market clearing routinely weeding “losing” positions out of the regime as a whole.<sup>79</sup> To be sure, analogous mechanisms might appear as prominent elements of subsets of the regime, but their overall significance may vary depending

76. DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIECLE)* (1997).

77. Peter Fenves moves in much the same direction in an extraordinary essay exploring Schiller's idea of the “right of semblance”:

[T]he legal order whose justification lies in its guardianship of *das Recht*, may only appear legal; and rights, which would serve as the measure and guarantors of the lawfulness of a legal order, would only be functions of fictional personae who are made into semblances of themselves once they are cast—or magically cast themselves into—the role of rights-bearing subjects.

Peter Fenves, *On a Seeming Right to Semblance: Schiller, Hebel, and Kleist, in ARRESTING LANGUAGE: FROM LEIBNITZ TO BENJAMIN* 135 (2001); see also *id.* at 133-34.

78. See also Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,” in ACTS OF RELIGION* 231-58 (2002) (noting the inexpressibility of justice within law).

79. Ideas like *stare decisis*—which might generate at least partial orderings—are not surprisingly understood to be problematic (even if nonetheless sometimes put to use).

upon the impact of other interactions. There is no thorough-going Habermas-like bar to strategy, theater, or disingenuousness. Such modes of action, like all others, run risks of fragmentation and distortion, and the countering efforts of opposing participants. It might be that the appeal of coherence or integrity or neutrality is enhanced in an environment of this sort, and will emerge (sometimes, anyway) in the course of interacting syntheses.<sup>80</sup> But such values do not figure as presuppositions—rather, as results.

Fourth, insofar as legal institutions present themselves to participants as interacting levels of synthesis, critique stands as a constitutive responsibility. If certain questions and problems appear within the legal complex as coming closest to resembling common ground, it is not only because such questions recur, but because proposed answers are regularly revealed to incorporate displacements or disguises, or to make decisive use of the truncated content of virtual objects. It is these exercises in exposure that keep questions open, and at least potentially relevant. The legal complex makes available and organizes access to preemptive resolution and therefore to force (however filtered or many steps removed). Access is not assured or regulated by any axiomatic or otherwise well-established principle of justice. Internal instability, rather—more precisely, the persistence of unresolved problems, and the accompanying, repeated perception of too simple responses—is the register of continuity, a measure of recurring use, and thus (however paradoxical this may seem to be) the organizing form for legal order. It is also, pretty much simultaneously, the organizing form for dissent: the hint, at least, of the always available possibility of legal opposition.<sup>81</sup>

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80. On the use of metanorms to hold together a normative regime, see ROBERT AXELROD, *THE COMPLEXITY OF COOPERATION* 44-68 (1997).

81. For acute analysis of examples of legal opposition at the limit, see MARC LINDER, *THE SUPREME LABOR COURT IN NAZI GERMANY: A JURISPRUDENTIAL ANALYSIS* 246-90 (1987) ("Chapter 11: Jews.").