Canadian Journal of Law & Jurisprudence XXXVII No.1 February 2024, 323-341

 doi: 10.1017/cjlj.2023.17

Book Review

The Rise and Fall of Private Law

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Reciprocal Freedom: Private Law and Public Right
Ernest J. Weinrib*

In *Reciprocal Freedom*, Ernest Weinrib brings the ideas he introduced in *The Idea of Private Law*[1] to a consummate precision, while situating them within a comprehensive liberal republic ordered to freedom in its several meanings. As those familiar with Weinrib's work will know, his theory of law is avowedly Kantian. It does not, however, follow Kant's account to the letter. Most noticeably, it veers from Kant's account of redistributive taxation, giving us, instead of transfers to the destitute for the sake of civil order, a full-scale welfare state grounded in human independence. Also altered is Kant's absolute obligation to obey the law, which Weinrib softens by distinguishing between laws that are unjust in the circumstances, to which obedience is owed, and laws that are unjust simply ("inhumane"), which may be resisted. (198) Still, Weinrib is faithful enough to Kant's state-of-nature based liberal republicanism to warrant calling *Reciprocal Freedom* a Kantian portrayal of the model post-World War II liberal state best exemplified, in his view, by today's Federal Republic of Germany.

The picture of the liberal republic Weinrib paints stands to actual liberal republics as essence stands to existence. Elevated above the peculiarities of this or that state's history, culture, and traditions, his account describes the liberal legal order in its universal and essential features, integrating its plural spheres of justice into a whole whose pervasive theme is the reciprocal freedom of dignified humans. Beginning with a formal conception of reciprocal freedom in a stateless state of nature, Weinrib shows, in lean and lucid prose, how this conception grows more robust as it responds to challenges to human independence posed by the civil condition itself—by court judgments, by the institution of property, and by the apparatus of state coercion. The end-point of this sequence of moves, never completely attained in actual republics, is a liberal *Rechtsstaat* articulated into spheres of justice—corrective, distributive, and constitutional—that jointly satisfy all the requirements of reciprocal freedom. Each sphere fits into a system unified by the abstract concept of reciprocal freedom, which concept determines itself in meanings fulfilled in their respective spheres. In turn, the

*Ernest J Weinrib, *Reciprocal Freedom: Private Law and Public Right* (Oxford University Press, 2022) pp. 240 [ISBN 978-0198754183]. All parenthetical references are to this book.

1. See Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, 2012).

general meanings regulative in each sphere determine themselves in positive laws that form a sub-system unified by the general meaning. At book's end, we are left gazing in wonderment at a conceptual republic whose articulated and well-ordered unity might well be beauty itself.

Presented with a picture of the liberal republic as beautiful as this, a reader might be moved to ask whether the beauty it exhibits is the beauty of innocence or the beauty of wisdom. The beauty of wisdom would acknowledge and overcome the antinomies inherent in state-of-nature based liberal republicanism that tear actual republics apart. Specifically, it would overcome the antinomy between reciprocal freedom's strict requirement that its concrete meaning be determined by a democratically elected assembly and its equally strict requirement that its meaning be determined by an expert body independent of the assembly's electoral majority; between reciprocal freedom's demand that the democratic assembly alone make binding law and reciprocal freedom's need for subordinate law-making by agronomists, economists, epidemiologists, etc. to make it a reality in individual lives; between reciprocal freedom's imperative that the representative assembly be sovereign and its imperative that the assembly be dependent on the favour of the *demos*; and between reciprocal freedom's injunction that laws, not natural persons, rule, and the republic's need, acknowledged by Kant, of a supreme executive commander who, because they cannot be commanded, is above legal constraint.

Yet none of these conundrums receives a mention, let alone a resolution, in Weinrib's account of the model liberal republic. The troubling concept of sovereignty never appears in the book. A search for the word 'democracy' turns up general references to 'liberal democracies' but no discussion of the concept; there is no index entry for democracy. Accordingly, we are left wondering whether Weinrib's republic is beautiful by virtue of having resolved the contradictions latent in state-of-nature based liberal republicanism and expressed in aged republics or by virtue of having warded them off with a kind of philosophical elixir. Is Weinrib's ideal republic one that, in Hegel's words, has attained its beauty only after "looking the negative in the face and tarrying with it,"[2] or is it a Pleasantville inhabited solely by those who close their eyes to the negative?

In this review essay, however, I won't harp on the ingenuousness of Weinrib's model liberal republic. The succession of five French republics since 1792, the catastrophic fall of the Weimar republic, the turn toward authoritarian populism in Russia, Hungary, Poland, and Turkey, as well as the drift toward that abyss in the United States and Israel are perhaps criticism enough. Instead, I want to focus on a question raised by the subtitle of Weinrib's book: *Private Law and Public Right*. The question is whether, on a Kantian account of public Right, private law can maintain its autonomy as a distinct kind of legal ordering once it moves from the state of nature to a civil condition. Weinrib's aspiration, announced in his preface (xii), is to show that it can, and in *Reciprocal Freedom* he presents

2. GWF Hegel, *Phenomenology of Spirit*, translated by AV Miller (Oxford University Press, 1977) at 19 (§ 32).

his fullest argument to date in execution of that aim. Before turning to that argument, however, let me provide some context for it.

The Rise

Weinrib's project began as a bold attempt to vindicate private law's autonomy against the view, still prevalent in the legal academy, that private law is best understood as a means for the attainment of public goals determined as desirable from a standpoint, moral or economic, external to private law. Here is how, in the book that launched the project, Weinrib described the standard view he would challenge:

> The functional approach to private law has an understandable appeal. The proposed goals specify aspects of human welfare ... that it is desirable to promote. ... The task for scholars is then to specify the goals relevant to the incidents regulated by a particular branch of private law, to indicate how different goals are to be balanced, to assess the success of current legal doctrine in achieving the specified goals, and to recommend changes that might improve that success.[3]

Against the functional approach, *The Idea of Private Law* argued that private law is understood best when it is understood in its own welfare-indifferent terms. For the earlier Weinrib, this meant that the legal order as a whole is rightly cognized as a duality of mutually exclusive compartments, each home to a particular kind of justice distinguished primarily by structure and secondarily by the content suitable to the structure. In one compartment lie transactions involving the direct impingement of one person's action on the legally protected interests of another. The central feature of these transactions is the correlativity of one person's doing and another person's suffering the same injury. The justice pertaining to such transactions is corrective justice, the defining feature of which is the correlativity of the defendant's liability to a particular plaintiff and the plaintiff's entitlement to recover from a particular defendant, a correlativity matching that of the defendant's doing and the plaintiff's suffering the same injury. Though a structural concept, correlativity (argued Weinrib) already suggests an implicit normative principle of equality, because, in regarding the parties solely as doers and suffers of the same injury, it abstracts from differences in their wealth, social status, and moral character.[4] It also rules out reasons for liability (e.g., deterrence, loss-spreading) that apply separately to each party rather than correlatively to both —reasons that, if given force, would subordinate one party to the interests of the other.

In the other compartment of the legal order lies a public authority's distributions of benefits and burdens among an indefinite number of claimants. Here the

3. Weinrib, *supra* note 1 at 4.
4. See *ibid* at 81. This idea is restated in *Reciprocal Freedom*: "[C]orrective justice is fair as between the parties because, in looking solely to the parties' legal relationship and thus to their correlative positions, it excludes considerations that are unilaterally applicable ... to one or the other of them. Corrective justice thus treats the parties as normative equals." (21)

relevant kind of justice is distributive justice, the structure of which is not correlativity between two but comparison among many. A distribution is structurally just if it allocates a benefit or burden among individuals in proportion to the degree to which they satisfy a certain publicly determined criterion of merit. Crucially, the corrective justice compartment is sealed off from the kind of reasoning germane to distributions, for, there being no intrinsic connection between the societal goals of distributive justice and bilateral transactions, pursuing the former in the context of the latter would yield incoherent justifications for liability and recovery. It would be incoherent, for example, to make the plaintiff the beneficiary of a penalty meant to deter inefficient risk-taking by the defendant and incoherent to single out the defendant from all the other actors capable of spreading the loss through their prices. At bottom, the cause of the incoherence lies in the invocation of reasons for liability and recovery that apply to each party separately rather than to both correlatively.

For the earlier as for the later Weinrib, the normativity incipient in correlativity receives its fitting substantive complement in Kant's idea that human beings are normatively equal by virtue of their formal capacity for acting from self-chosen ends, leaving aside the source of the ends they choose. In a state of nature abstracted from public authority, such beings have an innate, albeit inchoate, right to the pursuit of their particular purposes free of constraint by others. Correlative to this right is the obligation of all others, also inchoate, to respect the right. A breach of the obligation gives rise to a secondary obligation in a defendant wrongdoer to acknowledge the enduring right by repairing the plaintiff's loss that, caused by the wrongful conduct, is the wrong's material appearance. Thus, Kantian Right in the state of nature supplies the juridical content adequate to the correlativity structure pairing plaintiff and defendant in a suit at private law.

At the outset, Weinrib's insistence on the impermeability of private law adjudication to the welfarist concerns animating distributive justice was firm. Met with a Hegelian argument that, in cases where the enforcement of purpose-blind property and contractual rights would corrupt both private law and the court into a tool of domination, a court must care about the frustration of a litigant's self-formed projects and can do so without saddling private persons with affirmative duties (henceforth the 'modification thesis'), Weinrib shot back:

> No intrinsic connection exists between private law transactions and a positive right to the realization of one's projects. . . . [A] positive welfare right, extended to the full range of what it justifies, swallows up corrective justice in a general redistribution. Because a welfare right is not conceptually connected to transactions, actualizing it through private law arbitrarily foreshortens its reach. When conjoined, both the welfare right and private law are incoherent.[5]

So, the nub of the criticism was that, once we introduce into private law a conception of freedom less formal than the one to which it is cohesively ordered,

5. Ernest J Weinrib, "Professor Brudner's Crisis" (1990) 11:1 Cardozo L Rev 549 at 550.

there is no logical stop short of a thoroughgoing repurposing of private law toward the public realization of the richer conception.

Publicness, Systematicity, Horizontality

In *Reciprocal Freedom*, Weinrib adopts a Kantian version of the modification thesis, though without acknowledging the shift from his earlier insistence on a compartmentalized picture of the legal system.[6] Once the innate right to independence drives human agents into a civil condition, the private rights to bodily integrity and acquired things become, in their public realization, informed by distinctively public law imperatives that, he now says, apply in private law adjudication to reshape the rights. Weinrib groups these public law requirements into three categories: publicness, systematicity, and horizontality. The requirement of publicness obliges a court to determine the rights and obligations of the parties to a lawsuit solely in the light of evidence ascertainable by all in the public domain. The requirement of systematicity obliges a court to regard any specific private law right as existing, not in isolation, but as part of a society-wide ensemble of rights wherein each adjusts to the others so that all can co-exist within a system ensuring the most extensive freedom for all. Horizontality refers to the applicability of constitutional rights held vertically against the state to lateral transactions between private persons. Viewed as a requirement of constitutional law, it obliges courts to align private law with the norm of human dignity fundamental to the liberal republic and specified in its constitutional rights. That norm enjoins the state to respect in all its acts the intrinsic worth of the individual person as well as to secure the conditions for "the free development of the human personality within social community." (122)

Weinrib acknowledges that behind these public law modifications of private rights lie conceptions of independence or of reciprocal freedom more robust than the one at work in the state of nature. In the natural condition, the innate right to independence is a negative right against the constraint of the will by force or the threat thereof, so also a positive right to act on self-chosen ends to the maximum extent consistent with the equal right of others. It is not, however, a right to the possibility of acting on ends that, rather than being passively received from one's environment, are independently set by the will itself as the will's self-determinations. Innate right in the state of nature does not care where the ends one freely chooses come from. As long as they do not come from the coercively imposed choice of another, they can originate in impulse, social opinion, scripture—wherever. However, in the right to a court decision based exclusively on evidence in the public domain, innate right expands into a right to be bound only by legal decisions fetched from public grounds that are knowable and whose cogency one can appreciate. This enlargement draws out the meaning that an innate right to independence must have in a condition where

6. This shift was foreshadowed in Ernest J Weinrib, "Private Law and Public Right" (2011) 61:2 UTLJ 191.

rights are determined by a public court of justice. As Weinrib says, "[f]ree and equal persons could not be bound by a principle of action that depended on its being concealed from them." (73) Accordingly, the right to evidentiary transparency is a right to the determination of the will not only by contents one freely chooses, though they might be passively received, but also by contents—here legal decisions—that can be actively self-endorsed and so self-posited by one's agency.

The same kind of transformation of innate right occurs in Weinrib's move from the negative rights of the state of nature to the social and economic entitlements of the civil condition. Once property is established and accumulated within the civil condition, the innate right to independence becomes a right vis-à-vis the civil order to the material conditions of remaining independent of the discretion of a benefactor or of an employer's unilateral imposition of terms of employment. Weinrib alternately calls this enlarged right to independence a right to the possibility conditions of "taking charge of one's life as an independent person," (113) or of making "one's way in life in accordance with one's own purposes," (154) or of persons' "independently setting and acting towards their own ends." (106) Absent such a right, terms of employment, though formally self-chosen, are not self-determined, for the employee faces a choice between starvation and accepting the employer's terms. In the state of nature, material need was juridically unnoticeable because the interest in satisfying it was considered particularistic, not inherently general and relational in the way that freedom is. (58) In the civil condition, however, need becomes salient for distributive justice, because it can engender relations of "practical domination" that are not strictly coercive. (104) Evidently, the right to the possibility conditions of independently setting and acting toward one's own ends is a larger conception of independence than the right to be free of another's coercion, for it includes the freedom to *choose* one's ends within a more comprehensive freedom to *author* one's ends; and it has the leverage to criticize non-coercive but domineering relationships that formal freedom lacks. But now the objection that Weinrib raised earlier against the Hegelian version of the modification thesis can be turned against him. Once we move to a conception of reciprocal freedom as the general possibility of independently setting and acting toward one's own ends, why limit the realization of that conception to occasional modifications of private rights ordered to the formal freedom of choice? Why not apply it systematically to transactional disputes so as to turn private law toward the end of equal self-determination? Why allow a formal conception of independence to continue governing a sphere of justice once a richer conception is attained?

The Hegelian understanding of private law has its own answer to these questions, one toward which I can only gesture in a review of another scholar's work. The inadequacy as conceptions of independence of both freedom of choice and self-determination leads by a process of conceptual synthesis to a comprehensive conception of independence within which the superseded conceptions are demoted to instances and by which (since they are now constituent rather than fundamental) they are coherently kept within their respective spheres. Hegel

has a term for the preservation within a whole of superseded conceptions of independence along with the spheres of justice they govern. He calls it *Aufhebung*, usually translated as sublation, which unites three meanings: cancellation, preservation, and elevation. On leading, when realized, to external dependency, a conception of independence is cancelled as fundamental, preserved as a determination of the conception that is truly fundamental, and raised to a necessary step in the proof of the comprehensive conception, which, while arriving last, is inherently and always first.

Conceptual Sequence

Kant, however, does not have Hegel's idea of *Aufhebung*, nor does Weinrib, after his earlier blind foray against it, pay any further attention to it. So, to explain how a private Right belonging to a stateless condition, ordered to the formal freedom of choice, and distinguished by the correlativity of wronging and being wronged can be preserved in the transition to a public Right that infuses it with new normative requirements, Weinrib introduces an idea of his own. He calls it 'conceptual sequence'. Beginning with the innate right to independence in a stateless state of nature, we see that innate right defeats itself in this condition, because, in precluding us from being bound by others' opinions regarding what innate right requires in particular cases, it permits everyone to act as they see fit, with the result that rights are non-existent. This conundrum of innate right in the stateless condition generates what Kant calls the "postulate of public Right."[7] This is a reciprocal obligation to submit to a public will that, by virtue of its impartial determinations of rights, solidifies the rights to bodily integrity and property that were merely conceivable in the state of nature. Since the logic of innate right led us from A to B, B presupposes A, which is completed and realized in B. Thus, (the argument concludes) A is preserved within a sequential unity that includes both A and B. Without public Right, natural rights would be unreal; without private Right, there would be no idea of natural rights for public Right to realize. Weinrib expresses the idea of conceptual sequence so:

> In the Kantian account, the state of nature and the civil condition are interdependent and mutually complementary. Formulated sequentially as moments in an articulated unity, neither makes any normative sense without the other. Without the civil condition, the rights of the state of nature could not be actualized; without the state of nature, there would be no rights for the civil condition to actualize. . . . Thus, the civil condition comes not to abolish the rights conceivable in the state of nature but to fulfil them, that is, to fulfill the idea of reciprocal freedom that animates them and that they inchoately express." (71, 72)

I'll assess the idea of conceptual sequence as a preserver of private law presently. It is telling, however, that Kant himself does not invoke this idea to show the

7. Immanuel Kant, "Metaphysics of Morals" in Immanuel Kant, *Practical Philosophy*, translated & edited by Mary Gregor (Cambridge University Press, 1996) 353 at 451 (Ak 6:307, § 42).

enduring force within the civil condition of Right in the state of nature. To the contrary, he gives every indication that he regards Right in the state of nature (i.e., private Right) as unstable, provisional, and ephemeral, so lacking limiting force against public Right.[8] For Kant, the sovereignty of the united will is a jealous one that will not tolerate the force of any supposed right conceived independently of it. "For since," he writes, "all right is to proceed from [the united will of the people], it *cannot* do anyone wrong by its law."[9] That is why, in dealing with conflicts between a right in the state of nature and the requirement of publicness in the judicial determination of rights, Kant simply dispatches the natural right. For example, in the conflict between an owner at private law and a bona fide purchaser in a market overt of a defective title, Kant sides with the bona fide purchaser with no hint of a duty to accommodate the owner, though an accommodation is—as Weinrib points out (79)—conceivable.[10] In other cases that Weinrib omits to mention, public Right supplants *even innate right*, imposing interpersonal obligations that violate innate right's basic norm against unilateral obligations. For example, Kant argues that, absent a declaration by a donor that she does not mean to be bound by her promise, the rule of publicness binding a court requires her to keep a gratuitous promise accepted by the donee even though, at private law, a court must assume that the donor did not intend to bind herself, for to have done so would have been "to throw [her]self away."[11] In every collision between public and private Right, private Right yields without remainder.

Still, Kant's clear dictum that all Right ultimately proceeds from the people's united will might not be dispositive, for Weinrib's idea of conceptual sequence might give Right in the state of nature a continuing force in the civil condition that Kant himself did not see. So, let's now examine this idea.

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8. Weinrib addresses this claim, initially put forward in Alan Brudner, "Private Law and Kantian Right" (2011) 61:2 UTLJ 279, in *Reciprocal Freedom* (72, n 10). Knocking down his points one by one would sound a disagreeably combative tone, but there is one that I cannot let stand. Weinrib writes: "[I]n accordance with his thesis that private right has no residual force under public right, Brudner … asserts that, under Kant's conception of public right, a person whose property has been expropriated has no right to compensation. Kant, however, is explicit that such a right exists." The passage to which Weinrib refers (see Kant, *supra* note 7 at 502 [Ak 6:639]) says that the state owes feudal tenants of church land compensation upon the state's taking control of the land. For Kant, however, the duty of compensation is a conditional one deriving from public distributive justice, not an unconditional one correlative to private property. It takes hold when the landholder would otherwise shoulder a burden that ought to be spread over the citizenry, but not where the expropriated land was unfairly concentrated in the first place. That is why only the tenants of church property are owed compensation, not the church itself. Granted Kant's postulate of public Right, there can be no appeal from public distributive justice back to the state of nature, hence no *right* to compensation based on a private property that limits public distributive justice. The right of feudal tenants to compensation for takings of church property must, on Kant's principle that all Right proceeds from the people's united will, be viewed as the correlate of the state's duty to include the tenants' interest in secure possession in the public interest. It cannot be a duty to compensate for an infringement of property, for Kant says that "[t]hose affected by [land reform] cannot complain of their property being taken from them." Kant, *supra* note 7 at 467 (Ak 6:325).

9. Kant, *supra* note 7 at 457 (Ak 6:313, § 46) [emphasis in original].

10. See *ibid* at 446 ff (Ak 6:301-303).

11. *Ibid* at 444 (Ak 6:297-98).

By itself, the fact that a conceptual sequence links pole A to pole B does not guarantee that the poles will be conjoined in a stable relation of mutual dependence within which both are preserved as moments of a transition. No doubt, A requires B for completion and B requires A to be the completion that it is. However, if the complementary poles are also opposites, then the conceptual momentum generated by A's self-inadequacy will drive A into the embrace of a B antithetical to A's independent existence. Completion, fulfillment, will turn into the converse—nullification. Now, not-state is the opposite of state. Kant-Weinrib equate private Right with Right in a not-state condition. Private Right is self-inadequate in this condition. It exists in concept but not in reality. Thus, it requires completion by state, now equated solely with public Right. But state is the antithesis of not-state. So, if private Right is not-state Right, then its statist complement must gather it into a public Right antithetical to private Right. Private Right will move toward a realization that turns round into its destruction. Of no avail here is the reply that, as the realization of not-state Right, public Right presupposes that of which it is the realization; for if the realization turns to negation, then what is negated is precisely the presupposition of a possible Right prior to the state. The starting-point of the sequence turns out to be self-nullifying, thereby revealing itself as a philosophical mistake. That is the logical phenomenon, demonstrated most systematically in Hegel's *Logic*, of dialectical inversion.[12] Referring to the self-criticism of one-sided concepts set up as fundamental, dialectical inversion is the process whereby the realization of a concept that is self-inadequate alone proves to be a self-contradictory realization because it requires union with an antithetical term that annuls it.

Let us now fill this rather abstract discussion with some content. Consider Kant's theory of ownership. We begin with a private Right defined as Right in a condition *absent* a public authority. In this condition, persons have a natural right to use the usable things they have reduced to their control, because they have a right to the most extensive freedom of action compatible with the equal right of others. However, this right is unreal, because the innate right to independence precludes being obliged to respect boundaries unilaterally drawn by another. Acquired rights become real only under a condition of public Right that relates the unilateralism of each to that of all within a general system of acquisition. (62) Because, however, public Right was initially abstracted from, it now comes forward as something antithetical to private Right. So now an inchoate private property is driven by its need for completion into the arms of its antithesis, which, of course, must destroy it as private.[13]

If the conceptual sequence linking the state of nature to the state destroys private ownership (along with the idea of a private wrong against ownership), so,

12. See GWF Hegel, *Hegel's Logic: Being Part One of the Encyclopedia of the Philosophical Sciences (1830)*, 3rd ed translated by William Wallace (Clarendon Press, 1975) at 115ff (§ 81).

13. Thus, Kant says: "[*A*] *right to a thing* is a right to the private use of a thing of which I am in (original or instituted) possession in common with all others." Kant, *supra* note 7 at 413 (Ak 6:261) [emphasis in original]. On this view, there is no sharp distinction between yours and mine; there is only ours.

without further argument, does the sequence linking negative rights to social and economic entitlements destroy the private law system ordered exclusively to negative rights. Again, let's begin with an abstract formulation. Let A and B represent law-organizing principles. Suppose that in the conceptual sequence leading from A to B, B contains what A contains but also more of what A needs in order to be fully A. In that case, B is superior to A from A's own point of view. A is better as B than as A. But if that is so, then merely pointing to the conceptual sequence that led from A to B cannot save A as a law-organizing principle, for why would an inferior version of A get to organize a sphere of law once a superior version emerged? Far from saving A, the conceptual sequence provides a convincing argument for jettisoning A.

Now in the movement from the state of nature to the civil condition, the conception of independence as the freedom to act from self-chosen ends proves inadequate as a conception of independence because, as the phenomenon of labour exploitation shows, it is possible to act from self-chosen ends (free of coercion) without acting from ends one independently sets for oneself. Hence it is possible to live in a state of abject dependence while formally choosing one's ends. It is impossible, however, to act from ends one independently sets for oneself without acting from self-chosen ends. So, independence as self-determination includes independence as freedom from coercion within a more comprehensive and more adequate conception of independence. Furthermore, the initial equation of independence with the formal liberty to act on self-chosen ends assumed that all ends chosen are particularistic, hence excluded from juristic notice. But the civil condition showed that this assumption was mistaken because having enough for "a dignified human existence" (105) is objectively and universally necessary for making "one's way in the world on one's own terms." (103) The argument from conceptual sequence cannot explain why an inadequate conception of independence based on a mistaken equation of ends with particularistic ends and belonging to a propertyless condition survives to organize a sub-system of law *within a property condition* once a more enlightened, more capacious conception suited to the property condition is reached. Nor, since its thrust is to jettison the private law system belonging to the propertyless condition and based on an overbroad relativization of ends, can the conceptual sequence unify a legal order consisting of both a private law and a public law system.

What *would* explain the survival of the inadequate conception is a demonstration that when the superior conception is made fundamental to the exclusion of the inferior one, independence turns to subordination as the rights of separate persons disappear in the mobilization of all toward the common good of self-determination. This inversion would show that the discarded conception, though inferior and based on a mistake, is in some inherent but as yet unclear sense as much a complement of the better conception as the better was of the first. Then the question would be, what third conception of independence intermediate between the first two and synthesizing both as each other's complement (a *tertium quid*) brings the inherent connection to clear intelligibility? To this Hegel responds: one that has interiorized the process of inversion and synthesis

connecting progressively better conceptions of independence within a comprehensive conception whose status as best is confirmed only through the process of inversion and synthesis ending with it.[14] As the middle term between independence as freedom of choice and independence as self-determination, the comprehensive conception is the means whereby each can recognize the other's province without losing its own.

We can see that the idea of a conceptual sequence figures in both Weinrib's and Hegelian accounts of the *Rechtsstaat*. But whereas Weinrib's conceptual sequence is a story *about* conceptions of independence that have no interior story, Hegel's is the self-development story of a comprehensive conception of independence that encompasses all stages of its coming to be. This is an enormously consequential difference. For whereas an account of how a paltry conception of independence belonging to a propertyless condition climbs a ladder to a fuller one suited to a property condition argues for pulling up the ladder once the fuller conception is attained, a conception of independence that *is* the ladder keeps the ladder in place.

The phenomenon of dialectical inversion is not simply fodder for the troublemaker's gleeful negation of every principle held up as fundamental. It is rather, as Hegel taught, the engine of intellectual and historical progress.[15] This is so because disinterested truth-seekers, having learned from the aporetic experience with a particular fundamental principle, move to a new one that, by incorporating from the outset the complement previously held in contradictory opposition, immunizes itself against the fate of its predecessor. For example, the Hobbesian experience with a liberty right conceived as absolute and that, for the sake of peace, must be surrendered to what then becomes a virtually absolute authority at war with the subject taught Locke that rights are reciprocally limited by a natural law from the outset such that only the liberty to determine and enforce them must be surrendered, not the rights themselves. The Kantian experience with an apolitical, inchoate right of the individual that dissolves in the state it requires for actuality taught Hegel that a philosophy of Right cannot make the inchoate rights of a stateless condition the state's foundation or *raison d'être*. The lesson is that the objective mind embodied in the state is from the outset the common foundation of public and private Right, considered as equal and mutually complementary sides of one substance.

To sum up: on a Kantian account of private and public Right, there can be no 'articulated unity' of the two. In the end, the sole coherent Kantian position on the status of private Right is Kant's position—namely, that private Right is passing

14. "Why then, it may be asked, begin with the false and not at once with the true? To which we answer that truth, to deserve the name, must authenticate its own truth." Hegel, s*upra* note 12 at 122 (§ 83).

15. "But by Dialectic is meant the indwelling tendency outwards by which the one-sidedness . . . of the predicates of understanding is seen in its true light, and shown to be the negation of them. For anything to be finite is just to suppress itself and put itself aside. Thus understood the Dialectical principle constitutes the life and soul of scientific progress, the dynamic which alone gives immanent connexion and necessity to the body of science." Hegel, s*upra* note 12 at 116 (§ 81).

Right, destined to be consumed by a public Right whose desiderata overwhelm the merely provisional force that private rights exert in the state of nature. That, from Kant's own mouth, is the outcome of the conceptual sequence he lays out in his *Doctrine of Right*. A prominent characteristic of *Reciprocal Freedom* is that it helps itself to a Hegelian conclusion regarding the articulated unity of public and private Right that is not only unsupported by its Kantian framework but actually contradicted by it.

The Fall

Despite Weinrib's emphasis on conceptual sequence as a bond connecting private Right in a stateless condition with public Right, one may question whether he adheres to this idea more in speech than in practice and whether, consequently, private law's autonomy and integrity are really preserved in the republic of reciprocal freedom after all. I raise this question because, in fleshing out his version of the modification thesis, Weinrib is no more respectful of private law's distinctive normativity than Kant is. There is, in other words, a disparity between Weinrib's verbal assurances of private law's continued integrity within the civil condition and his manner of treating it in the course of exhibiting public Right's modifications of private Right. What he says (erroneously) on the surface is that Kant's conceptual sequence saves private Right in the state of nature in the transition to public Right. Yet what he does below the surface is exactly what Kant does: he asserts the one-sided authority of public Right so as to cast aside features of private law that he acknowledges are essential to its identity—its exclusion of affirmative duties, its correlativity structure, and the equality of persons that he says is implicit in the structure. I'll show this with two examples from the requirement of systematicity and two from that of horizontality.

Systematicity, recall, is a public law requirement that rights be exercised only as part of a total system wherein the rights are mutually adjusted so that all can co-exist within the most extensive freedom for all. Among the examples Weinrib gives of the systematicity requirement in action are the privilege to preserve property and the law of nuisance.[16] Regarding the former, he endorses Samuel von Pufendorf's doctrine, adopted by the German Civil Code, stating that the private right to the exclusive control of one's possession is defeated by the necessity to save property of greater value if no alternative to the destruction of the lesser property is available and if the owner is compensated for damage. (86) Weinrib's argument is that, in the civil condition, an ownership right is limited by the need to unite each individual's ownership with that of others within a system of ownership, and the necessity doctrine is an example of public law's meeting this need. More specifically, the qualified necessity privilege is the means by which the usability of things to their respective owners can co-exist. (87)

16. The others are the tort of inducing breach of contract and the assignability of contractual rights.

Now in the conflict between A's exclusive right to control his property and B's right to the use of her endangered property, the only feature that privileges the property in danger is its greater value. However, that value is not, in Weinrib's terminology, a correlatively structured consideration. The only person who will enjoy it is B. So, A's right of ownership is subordinated to a consideration—the greater value of the endangered property—in which only B has an interest.[17] With that, the correlativity structure of private law is sacrificed to a public law norm of systematicity along with the equality of the parties implicit in that structure. It matters little that compensation is paid in recognition of A's ownership, because, according to the doctrine of which Weinrib approves, compensation pays for the damage but not for the expropriated right to exclude or to dispose of one's property as one chooses. This is the right of free alienation that Weinrib says is part of the right to use usable things and that is now subordinated to another's particular interest. (60) So, in approving this doctrine as an instance of public law's modification of private Right through systematicity, Weinrib does what Kant does in a collision between public and private Right: he ousts private Right.

Next, consider nuisance. According to Weinrib, nuisance law is a product of public Right's systematicity demand that each person's user right be adjusted to that of all others. His allocation of nuisance to public law may surprise some of his adherents, but it follows from the unrelenting negativity of rights in Kant's state of nature. If my natural right is to the exclusive use of the usable things I acquire, then, as long as others do not use my land without my permission, nothing obliges them to accommodate my uses of my land in the use of theirs. Accordingly, in the state of nature, persons have an unrestricted right to use their land as they please even if their use renders their neighbours' lands unusable. Under public Right, however, the "scope" of the natural right is narrowed to what Weinrib calls the "operation" of the right. (89) There, user rights operate only within the bounds of ordinary use ensuring equal rights to enjoyment. This entails, however, that once public law delineates the operative right, the natural (private) right to unlimited use is stripped of its force; so again, public Right supplants private Right. Here Weinrib tries to assure us that this is not so, that the "scope" of the natural right remains unaffected; only the "operation" is curtailed. (90, 92) But this is a verbal shuffle. One can just as easily say that public law delineates the scope of the right to use, and once it does, the natural right to an unlimited scope is annulled. If the natural right to a noxious use retained some residual force, we would expect the law of nuisance to seek an accommodation between plaintiff and defendant. For example, instead of simply enjoining a nuisance, the law would enjoin it subject to the plaintiff's compensating the defendant for its lost use. That is what a law reflective of the supposed interdependence of the state of nature and the civil condition would look like. But (exotic cases aside) nuisance law does not do this, and Weinrib nowhere suggests that it should. In omitting this suggestion, Weinrib is true to the real direction of

17. Here I assume that Weinrib would not say that ownership is subordinated to the general interest in the maximization of value, for that un-Kantian suggestion would rob ownership of meaning.

Kant's thought despite all the talk of a conceptual sequence preserving state of nature rights in the civil condition.[18]

It is with horizontality, however, that Weinrib's subordination of private to public law becomes total. Here is what he writes about it:

> The phenomenon of horizontality is a conspicuous example of the public character of private law in the civil condition. Horizontality brings constitutional law's notion of human dignity and of the particular rights that specify it to bear on legal relationships between private parties. The most fundamental ideas governing the exercise of public authority are thereby brought into the consideration of private law controversies. That this does not leave the posited private law unaltered is undeniable. (123)

What, according to Weinrib, is "constitutional law's notion of human dignity"? It is, first, the familiar Kantian idea that the individual person is an inviolable end in itself who must never be treated simply as a means for others or punished for incidents for which he/she is not responsible. However, it is also the idea that the human personality possesses a capacity for free self-development the conditions for which the state is obligated to secure. (125) So understood, the dignity norm, Weinrib says (quoting from the *Lüth* decision of the German constitutional court), "must hold as a constitutional axiom for all spheres of law; legislation, administration, adjudication, all of which receive guidance and impulse from it. . . . [N]o rule of private law may contradict it, and every such rule must be explicated in its spirit." (117)

Weinrib distinguishes three ways by which constitutional norms might be brought to bear on disputes governed by private law. One technique would be for courts, in the exercise of their interpretive discretion, to look to constitutional law to specify the abstract standards of private law just as they look to statutes to specify the common-law standard of care in particular contexts. This is the method followed in Canada, whose *Constitution Act* (1982) declares itself to be supreme law but expressly applies only to acts of state, hence places no new duties on private individuals.[19] Another method would place courts under a duty to develop by incremental steps new causes of action or new parameters for existing ones in accordance with the constitutional norm protecting and fostering human dignity. Because these indirect methods of giving horizontal effect to constitutional rights would advance constitutional values subject to constraints (for example, the exclusion of affirmative duties) posed by the autonomous operation of private law, they would preserve private law's independence in its

18. On a Hegelian understanding of nuisance, the latter differs from trespass in that, whereas a trespass infringes a possessory right that can be established unilaterally, a nuisance infringes a property in use that is mediated by reciprocity. But the concept of a property that is mediated by reciprocity is already present in contract, so that nuisance law applies to use the idea of a right mediated by reciprocity that contract law embodies with respect to acquisition. Accordingly, no public law modification of private Right is needed to understand nuisance law; the latter is as firmly ensconced in private law as contract is.

19. See *Constitution Act, 1982*, ss 32, 52.

interaction with constitutional law. They are therefore the methods that the supposed logic of conceptual sequence would seem to favour.

Yet Weinrib, true to Kant's thesis that all Right proceeds from the united will, does not favour indirect methods. Instead, he advocates the extreme form of horizontality adopted by the German constitutional court and that actualizes the one-sided authority of public Right by directly subordinating private law to the dignity norm of constitutional law. This method, says Weinrib, gives the principles of human dignity enshrined in constitutional law "maximally concordant effect" in private law. (132) The qualifier "concordant" suggests a duty to harmonize the two spheres, but close attention to what Weinrib does with horizontality reveals this word as lip service to harmony. The sum total of what he does with horizontality is an uncompromising assertion of public law dominance.

Consider, for example, social and economic rights. These are generally excluded from private law by the logic of their origin. Because these rights arose in connection with civil property's threat to human independence, the correlative duty-bearer is civil society's united will, not any private person or body. Hence no action lies against a private person for failing to confer a benefit that is guaranteed to all by the constitution. Nevertheless, Weinrib argues, under the principle of direct horizontality, a private person has a constitutional duty to forbear from exercising its property right in a way that interferes with the ongoing enjoyment of a constitutionally entrenched social entitlement. (157-58) Weinrib assures us that this duty is consistent with private law's exclusion of affirmative duties, and at a superficial level this seems true. (159-60) After all, is not an interference with the enjoyment of a right a case of misfeasance rather than of failing to confer a benefit? However, let us look at what Weinrib does more closely.

The example he uses to illustrate the horizontal effectuation of social rights is the South African case of *Governing Body of the Juma Musjid Primary School v Essay N.O.*[20] The trustees of a mosque, after good faith but fruitless negotiations with a state education department, *reasonably* (as the South African constitutional court found) sought a court order to evict a primary school from the mosque owing to the department's persistent non-payment of rent and failure to reimburse the trust for its expenses in maintaining the school. The trustees resorted to this action only after prolonged efforts to reach an agreement that would have avoided a setback to the children met with stonewalling by the department. Because, however, an eviction would have interrupted the children's enjoyment of their constitutional right to a basic education, Weinrib calls it a misfeasance amenable to corrective justice in civil litigation. (156-59) Yet this is not a misfeasance as private law understands that term. Private law misfeasance is a breach, without normative standing, of an obligation correlative to a right of exclusion. In the *Juma Musjid* case, the 'misfeasance' consists in the trustees' peaceably seeking to enforce an undisputed property right that it had exercised in a restrained manner, yet with the effect of interrupting the enjoyment of a

20. [2011] ZACC 13.

public entitlement that the trustees had no duty to satisfy in the first place. Moreover, even if blocked by a constitutional right, the property 'wrongfully' asserted would retain its normative standing (as it did in *Juma Musjid*), hence would have to be abridged only to the extent necessary to secure the public entitlement. But since when does the interest satisfied by a wrongdoer who cannot invoke legal necessity exert normative force against the right infringed?

The Hegelian way to reconcile a duty to soft-pedal one's property right so as not to interrupt another's enjoyment of a right to education with private law's exclusion of affirmative duties is with a doctrine of necessity. A basic education is essential, in Weinrib's terms, to making one's way in life as an independent person. Owing to its indispensability for an autonomous life in its entirety, a basic education is more important to freedom than the enjoyment of a narrow aspect thereof by controlling the use of a particular space. Accordingly, in a collision between property and the public right to a basic education, the latter justifies the state's *infringing* property but only to the extent needed to satisfy the public entitlement. This means that, in *Juma Musjid*, the wrong is to the trust by the state, not to the children by the trust, yet the trust must suffer the wrong provided the state pays the rent until it makes alternative arrangements for the children. Here private law's exclusion of affirmative duties remains intact, since it is the trust that is wronged by the state's forcing it to continue accommodating the children, not the children by the trustees' refusing to accommodate them further.

However, this is not how Weinrib approaches the case. Instead, he tries to reconcile *Juma Musjid*'s giving horizontal effect to a constitutional entitlement with private law's exclusion of affirmative duties simply by labelling a beneficial owner's reasonable action to evict a delinquent tenant a case of misfeasance where it impairs the enjoyment of a public law right, even though the beneficial owner has no duty to satisfy the right. But this does *not* reconcile horizontality with private law's exclusion of affirmative duties. It merely strains the meaning of misfeasance, while basing liability on what private law would call an omission to extend the term of an unpaid-for benefit.

Accordingly, with the exception of not yet realized social and economic rights for which the correlative duty-bearer is only the state, "the full range of constitutional rights that are specifications of human dignity is admissible to the legal reasoning about a dispute between private litigants." (131) This is so, says Weinrib, because constitutional law imposes a "duty to orient the private law towards the actualization of constitutional values." (132) For any student reared in the intellectual environment shaped by *The Idea of Private Law* and identified by the motto, 'private law in its own terms,' that statement is a jaw-dropper. How this form of horizontality would be structurally different from the functionalist's orientation of private law towards welfare goals specified as valuable external to private law is difficult to discern.

Weinrib might respond that the dignity norm of constitutional law is continuous with that of private law, whereas welfare goals are not. What drove the transition from private to constitutional law was a single innate right to independence,

so that the horizontality requirement only holds private law to the full elaboration of its own principle. Welfare has to do with whether a life goes well relative to an individual's subjective goals, and, in the republic of reciprocal freedom, this is no more a concern of public law than it is of private law. (107)

Yet this argument fails, because the meaning of innate right changes as it moves through the spheres of justice. In private law, it is a right to act on self-chosen ends free of constraint by another's choice. Here the law is blind and indifferent to the ends people choose and to whether or not they are satisfied over a complete life; none is either legally supported or burdened. In constitutional law, by contrast, innate right includes the right to the legal conditions for the "free development of the personality." (125) That phrase implies that the freedom of personality contains a potential for independence whose development is a good thing and whose failure to develop is a bad thing. Developing the potential for independence latent in free personality is a *public* conception of what it means for human beings to fare well in life, distinct from the variety of personal conceptions. So is having the minimum resources needed to pursue goals of one's own authorship. These are dignity-based conceptions of welfare to which all can subscribe irrespective of their particular goals, and here they are entrenched in an ideal constitutional law that stands in contrast to private law's welfare-blind unity. Now along comes a scholar who compares three ways of orienting private law toward a welfare goal specified as desirable in constitutional law but not in private law, who concludes that the current indirect ways are deficient, and who recommends the direct way as a sure way of improving success. Compare this to the description of the functionalist approach to private law quoted earlier from the *Idea of Private Law* and against which that book so refreshingly set its face.

Weinrib might respond further that private law's autonomy is respected in the way that private rights and constitutional values are balanced or, as he prefers to say, brought into "practical concordance." (175) Private rights are not unilaterally delineated by constitutional values. Rather they yield to these values under the constraints of suitable means, necessity, and proportionality. (178)

However, the requirements that a limit on a private right be a suitable means to, and be necessary for, another's enjoyment of a constitutional right do not save private law in cases where the latter collides with constitutional values; for if the limitation is unsuitable and unnecessary, there is no collision. The litmus test for whether private Right is preserved in the transition to public Right lies in how collisions are resolved. Are they resolved by erasing the essential features of private Right or by reconciling both spheres?

For Weinrib, collisions are resolved, first, by denying right-status to conduct that, under the banner of a constitutional right, treats a private right as non-existent—for example, to spray-painting graffiti on private property under a claim of free expression. (162) In such a case, the activity for which constitutional protection is sought falls outside the scope of horizontality. Where, however, genuine rights clash, horizontality operates by "balancing … [their] divergent effects." (173) For example, in a conflict between a defendant's

constitutional right to free expression and a plaintiff's private-law right to privacy, a court must compare (factoring in the relative closeness to the rights' purposes of the particular doing and suffering) the impact to the defendant of its forgoing the particular expression at issue against that particular expressive conduct's impact on the plaintiff's privacy. If an injunction's adverse effect on the defendant's freedom of expression would be less significant than its favourable effect on the plaintiff's privacy, the plaintiff succeeds. Thus, the parties' final rights with respect to each other issue, not from a hierarchical order of rights, but from a case-specific weighing of the differential impacts of their exercising their equally important rights in the way that they have. Superficially, this looks respectful of private Right, for, considered abstractly, the latter counts equally with the constitutional right. Further, Weinrib assures us that a dispute between a party asserting a private law right and one asserting a constitutional right fits naturally into the bipolar structure of a suit at private law. (177)

The difficulty, however, is that the compared impacts are not correlatively structured. The considerations in play here—the adverse impact on the defendant of forgoing the particular expression and the favourable impact on the plaintiff of enjoining it fall on each party separately rather than on both correlatively. As a consequence, the interests of the losing party are subordinated to those of the winner contrary to private law's norm of equality. In private law taken by itself, rights to non-trespassory actions issue from mediating concepts that reflect the mutual accommodation and equality of persons—by the concept of ordinary use in nuisance law and reasonable care in negligence law. Here, however, there is no such unbiased mediator. Two firm rights collide, and a comparison of the costs to one party with the benefits to the other decides the issue. Perhaps, as Weinrib says, proportionality analysis (as this decision procedure is called) optimizes reciprocal freedom over "the system of rights as a whole." (178) However, to rely on a system-wide consideration to make matters right is to justify unilateral subordination from the standpoint of the generality, a move that comes uncomfortably (for a Kantian) close to one that utilitarianism makes, except that here the sacrifice of equality is to a public Right that abhors the sacrifice. In sum, Weinrib casts aside private law's fundamental norm in the working of horizontality just as Kant does in the working of publicness.

Nor is this all. The constitutional right invoked in a private lawsuit specifies a norm indigenous to public Right, namely, human dignity in its most capacious meaning. As a determination of public Right, the constitutional right is not simply a subjective right of the individual; rather, it betokens, says Weinrib, an objective value of the constitutional order, one that courts are obligated to actualize in all spheres of law. (143) This means that, in a case where the exercise of a private right impairs the enjoyment of a constitutional right, the harming and being harmed are correlatively structured as between defendant and plaintiff, but the wronging and being wronged are not. The defendant's wrong is to the constitutional order directed to human dignity as an objective and public value, not directly or immediately to the plaintiff, for the plaintiff has the subjective right only by virtue of the public value that the right specifies. Consequently, the

plaintiff's standing to sue derives, not by necessity from the wrong done directly to him, but contingently from the state's choice to leave the enforcement of its public value to private individuals. Accordingly, in advocating a form of horizontality faithful to Kant's position that all Right proceeds from the united will, Weinrib would bend corrective justice institutions to the service of a public norm in a way disruptive of the necessary pairing of plaintiff and defendant. But that is just what the functionalists he criticized in *The Idea of Private Law* would do.

Conclusion

In *Reciprocal Freedom*, Ernest Weinrib has produced a work at once rich in conception and spare in execution, one that raises into the element of thought the post-war, individual-centred liberal republic on which, perhaps, dusk is now falling. In theoretical ambition and elegance of expression, the book bears comparison with John Rawls's *Political Liberalism.*[21] With it, however, the project begun in *The Idea of Private Law* to conscript Kant in the fight to save private law from the maw of public law lies in shambles. It now appears that the first book's persuasive power lay as much in its reticence about the larger picture as in what it said about the smaller one. Still, to say that the Kantian private law project has failed is not to say that it was fruitless. By revealing the most rigorously conceptual individual-centred doctrine of Right as a destroyer of private law, it makes way for an alternative understanding of private law from the transcendental standpoint that truly vindicates it.

Acknowledgments: Thanks to Jennifer Nadler for helpful comments.

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21. John Rawls, *Political Liberalism* (Columbia University Press, 1993).