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Symposium: *Reciprocal Freedom*

Private Right and Public Right

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Abstract

This comment focuses on two intersections between private right and public right: (1) permissions to use another's property in circumstances of necessity, and (2) distributive justice. My overall claim is that the boundaries Weinrib deftly articulates between private right and public right should not be drawn exactly as *Reciprocal Freedom* maintains.

Keywords: *Ernest Weinrib; public right; corrective justice; rights; tort; distributive justice*

1. Introduction

The central theme of Professor Weinrib's work in the philosophy of private law is that there is a "distinctive morality" that applies to private law—corrective justice—and which private law, in turn, partially constitutes, such that a private law which fails to live up to its demands is defective.[1]

1. Ernest J Weinrib, *Reciprocal Freedom: Private Law and Public Right* (Oxford University Press, 2022) at 69. Kant's description of the norms that apply in the state of nature, prior to institutions, is described by Weinrib as a "distinctive morality" (*ibid*). There is a risk of a purely terminological dispute if one debates whether this or the closely connected theory of corrective justice as developed by Professor Weinrib is properly described as a 'morality' (this came up in discussion at the Symposium on Ernest Weinrib's *Reciprocal Freedom* in Surrey). Weinrib would agree, I believe, that there are normative standards (not being standards of logic or aesthetics or mere virtue) that apply to private law which do not owe their existence entirely to private law. 'Do not owe their existence to' means that these standards would exist even if private law did not exist. Surely this is true of the normative demand to respect each other's independence and, if Kant is right, the demand to enter the civil condition that the former demand entails. Insofar as there are non-aesthetic, not purely logical, non-virtue-based, non-epistemic, not purely prudential, requirements that do not owe their existence to law, a reasonable use of language is to describe them as 'moral'. All of this is consistent with (1) the fact that legal institutions may render determinate indeterminacies in normative standards that exist independently of the positive law; (2) the positive law may change the normative position such that certain acts become permissible or impermissible that otherwise would not be so (such that *some* normative requirements would not exist but for positive private law's say-so); and (3) epistemically, perhaps (though this is more mysterious) our knowledge of pre-institutional normative standards is sometimes a causal upshot of our institutional experience.

What makes this morality distinctive is its apparently exclusive focus upon the 'relationship' between persons (or the relationship that would exist were they to behave in certain ways). Private law normative incidents—in particular, claim-rights and their correlative duties—are all to be justified by attention to the relationship between the parties. Negatively, this entails that benefits to third parties, the public as a whole, or one party's need, wealth, or subjective fault as such, are normatively excluded from determining what private law duties *A* should owe *B*. These do not concern the parties' *relationship* in the relevant sense. Positively, the focus is on private law duties reflecting and constituting a specific kind of relationship between the parties: The duties should reflect, and partly constitute, the parties as *normative equals*.[2]

Although this view is sometimes described as involving 'formal equality', the notion of equality requires more than that everyone has the same legal rights. A world in which no one had a legal right to exclude another person from the use of their body would not be one consistent with relations of normative equality. It is, however, 'formal' in the sense that acting consistently with another's equality does not require one to promote any specific *end*, nor is the wrongness of harming another (when it is wrong) to be explained by the frustration of such an end. Instead, the facts which ground *A*'s duties to *B* are exclusively determined by facts about *A* and *B*'s respective claims to equal *freedom*. Consequently, even if *B*'s urgent interest in the preservation of *B*'s life could be protected by *A* at low cost, *A* is under no duty to *B* to provide such protection, since *B*'s claim to protection in such a case is not grounded in *B*'s freedom from *A*'s choice. Hence, the absence of an enforceable, relational duty of easy rescue in private law.

A basic concern with this picture is that, if the only admissible normative considerations are those that can be interpreted as bearing on the freedom of one person in relation to another, this seems to leave out too much. Here are three aspects to this concern. First, if the underlying relational norms are themselves indeterminate and multiply realizably by different positive law configurations, as Weinrib emphasises, then it follows that they cannot themselves *determine* the content of the positive law. This does not mean that these norms are empty and exercise no normative constraint: They may still narrow down the admissible range of positive laws considerably. Still, *ex hypothesi*, there would seem to be a need for *something else* to guide decisions (beyond a roll of the dice) in which the underlying morality is indeterminate.[3] Nor does this mean that wealth-maximisation may now seep in through the indeterminacies of relational equality. It just means that, when there are multiple ways of filling out the underlying moral norms in positive law, there is room for other valid normative considerations to play a role—for instance, which formulation will provide more effective guidance, be less costly to administer, prevent more violations of equal freedom, and so on.

Second, even when the underlying norms of equal freedom are determinate, they do not register what some regard as right-violating conduct. While the idea

2. Henceforth I will not repeat the point about partly-constituting. In speaking of private law being required to 'reflect' a certain set of normative demands, I am accepting that it also has a constitutive role.

3. For a 'semi-Kantian' view which accepts this point, see Yitzhak Benbaji, "Welfare and Freedom: Towards a Semi-Kantian Theory of Private Law" (2020) 39:5 Law & Phil 473.

that interpersonal wrongdoing *often* involves violations of a person's right to equal freedom is very plausible, it has been less clear why this is the only kind. The answer cannot be that positive duties of easy rescue treat the duty-bearer as a mere instrument for another's welfare. If one is only required to bear *minimal* costs to preserve another's life, this is already a reflection of the fact that one is not a mere instrument. If one were a mere instrument for the service of others, there would in principle be no limit to the burdens one could be required to bear for the preservation of others. The prohibition on private law relational duties of easy rescue, in turn, raises the concern that positive duties (other than those voluntarily created) are problematic elsewhere. If I cannot be required to protect another's dire need in private law, because this uses me illegitimately, why does this become permissible outside of private law, when, for instance, I am taxed to provide assistance to relieve poverty? [4]

Third, an exclusive concern for relations of equal freedom sets aside potentially *competing* normative considerations. While the right-related wrongness of certain conduct depends only on facts relating the duty-bearer and the right-holder as free and equal, and not upon what (non-relational?) duties the parties have to make available their resources for distribution, it is not obvious why this entirely rules out the normative relevance of duties of distributive justice to private law. The fact that right-related wrongness is (sometimes) positively grounded in relational inequality does not show that other normative considerations are irrelevant to how the law should respond to such wrongs. It seems possible, for instance, for the state's duties of distributive justice to run into tension with its enforcement of the interpersonal corrective duties of wrongdoers.[5]

Although not directly motivated by these concerns, the newest book-length addition to Weinrib's impressive theoretical writing on private law, *Reciprocal Freedom*, aims to explain the interaction between the relational morality of (corrective) justice and other normative considerations, and the role of different legal domains in responding to them.[6] In chapter 4, the book argues that 'public right' can affect the exclusive focus of 'private right' upon the parties' relationship. Following Kant, public right refers to the normative standards that apply to legal institutions, at least in part, in their law-creating or law-modifying activities. These include requirements to make each person's rights consistent with each other's, to make rights sufficiently determinate, and to provide institutional assurance to people that their rights will be respected. 'Public right', while it includes normative principles that would conventionally be said to be part of 'public law', is broader than public law. It includes, for instance, a requirement to make 'private right' consistent. 'Private right', in turn, refers to the normative standards that apply to persons exclusively in their relationship with each

4. For (part of) Weinrib's answer, see *supra* note 1 at 58-59, ch 5. See also section 3.
5. See *infra* note 26.
6. In Weinrib's terminology, 'corrective justice' is not exclusively about correction but refers to a normative theory about enforceable relational, primary, *and* secondary legal rights and duties. See e.g. Weinrib, *supra* note 1 at ch 2.

other prior to the normative impact of institutional involvement.[7] Weinrib explains:

> In the state of nature, the parties to a legal relationship are conceived as being related to each other bilaterally as bearer of a right and obligor of a correlative obligation. In contrast, the civil condition encases the relationship of right-holder and obligor in a framework that links everyone to everyone else through the legal system that all share. In the civil condition, the bilateral relationships of private right are incorporated within a public right that is omnilateral, in the sense that it connects each person to all and all to each.[8]

The basic idea here seems to be that, considered independently of public institutions, what rights *A* has against *B* are determined solely by facts about the relation of *A* and *B* (so far as concerns their equality). However, the 'encasing' of these rights in positive law requires institutions to render these rights—determined purely bilaterally—to form a consistent, and publicly ascertainable, set. This demand for consistency and publicity may then result in alterations of what *A* can demand of *B* as a right. In this way, the exclusively relational focus of 'private right' is, in one respect, loosened.

Still, it is not that 'anything goes' when one moves from private right to public right. The bilateral position between *A* and *B* continues to exert a normative constraint, such that departures which limit *A*'s (bilaterally construed) right against *B* are only justified if this is a necessary and proportionate means of pursuing a proper purpose.[9] Further public right aims only at responding to "considerations relevant to the achievement of reciprocal freedom through a system of private law rights that operates … within the framework of public institutions."[10] So the move to public right, in its application to private law rights and duties, does not license, for instance, an appeal to aggregate welfare in determining their content. Moreover, the state's duty in public right to pursue distributive justice still operates externally to private law. Although public right requires systematicity between bilaterally-construed rights, it remains true that a person's duties in distributive justice are not duties owed to specific others by virtue of the relation between them, and so these do come into conflict with private rights.[11]

However, tentatively—and this is my suggestion, rather than one found explicitly in the book—public right might permit considerations of *overdeterrence* to determine the content of private law incidents, in particular immunity rules. Suppose it is clear that without certain immunities from liability, private

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7. 'Prior to' here does not necessarily mean 'temporally prior' or that there ever was a point in history at which there were no institutions in the relevant sense. It just means that we can hypothetically conceive of the parties' normative relationship without at once considering the effect of public institutions.

8. Weinrib, *supra* note 1 at 70 [footnote omitted].

9. *Ibid* at 86-89.

10. *Ibid* at 67-68.

11. Weinrib does not put the point quite this way, but this seems to be part of the explanation of why public right does not lead to distributive justice becoming directly relevant to determining the content of private rights.

persons will not undertake permissible conduct that preserves the rights of others, as in public necessity cases in which one person altruistically intervenes permissibly to protect another's right, but causes right-infringing damage in the process. In these circumstances, it is conceivable that public right might permit the law to immunise permissible harm-causers from liability in order to preserve the likelihood of right-preserving interventions, perhaps on condition that the state instead provide compensation for harm caused by such interventions. In doing so, public right need not contradict the position as a matter of right between the parties, focussing exclusively on their relationship. Rather, it removes the right to sue on the basis of that relationship, qualifying the state's provision of assistance in enforcing remedial rights on the grounds of ensuring that everyone has a better prospect of their rights being preserved, and no one is significantly harmed by this if the state provides compensation in lieu.[12]

The remainder of my comment will focus on two intersections between private right and public right: (1) permissions to use another's property in circumstances of necessity, and (2) distributive justice. My overall claim is that the boundaries Weinrib deftly articulates between private right and public right should not be drawn exactly as *Reciprocal Freedom* maintains.

2. Permissions to use another's property

Suppose that, in order to save my life from being extinguished in a violent storm, I need to anchor my boat to your pier. I do so, knowing that the effect will be to ram my boat against your pier, damaging it. I will call this example, *Storm*.[13]

The law in the jurisdictions which concern Weinrib appears to be that you are not permitted to exclude me from your pier in *Storm*, once I am there and while my life is otherwise endangered. Were you to exclude me, you would commit a (tortious) wrong.[14] I am, however, duty-bound to compensate you for the damage to the pier, even though you are not so permitted.

What makes this compensatory duty an endless source of fascination to philosophers of tort liability—tort law's Trolley Problem—is that it appears to be a duty to compensate for harm that one permissibly caused. For those, like Weinrib, who believe that reparative duties only ought to arise when one has acted wrongfully, there appears to be a problem with accommodating this duty.[15] Moreover, if

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12. For further arguments that deterrence considerations may permissibly be taken into account within a non-consequentialist normative theory of private law, see Sandy Steel, "Deterrence in Private Law" in Haris Psarras & Sandy Steel, eds, *Private Law and Practical Reason: Essays on John Gardner's Philosophy of Private Law Theory* (Oxford University Press, 2023) 123.

13. It is, of course, based on *Vincent v Lake Erie Transportation Co*, 109 Minn 456, 124 NW 221 (1910), but with the (clearer) risk of death, rather than of property destruction.

14. See *Ploof v Putnam*, 81 Vt 471, 71 A 188 (1908). The English law position regarding compensation when bodily harm is at stake is less clear.

15. Setting aside contribution claims between wrongdoers, which might be thought of as reparation of a sort, although now typically classified as restitutionary.

one accepts the legitimacy of the duty, it seems to open the door to significantly more wide-ranging duties to compensate in the absence of wrongdoing and fault. If permissible harm-causing generates liability here, why not elsewhere?

Weinrib seeks to explain the privilege to use the property and the duty to compensate in *Storm* (strictly, Weinrib considers the case where property is damaged to save *property*) as a duty justified by public right's effect on the position between the parties as a matter of pure private right. Explaining this duty as a kind of 'add-on' to the position as a matter of private right is thought to avoid the tension between this duty and a general insistence on wrongdoing as a condition of reparative duties:

> To see in the privilege a ground for reconsidering the fault-based nature of tort law or the divide between non-feasance and misfeasance is to commit what Kant stigmatized as the 'common fault of experts on right'.[16]

In "the state of nature" the position is that:

> [A]n owner's property right operates unidirectionally to allow the owner to prevent others from using the property. When considered as part of a system of property rights, however, an owner's property right is modulated by the presence of an adjacent property right.[17]

When one moves into the civil condition under a system of positive law, there is now a demand in public right to reconcile the rights of everyone in a single system.[18] This justifies, according to Weinrib, a *permission* to infringe the property right in order to protect the right of the owner to preserve their endangered property (or, we can add, their right to preserve their endangered body), but a *duty* to compensate so that the interference is not unduly extensive. A privilege to use and damage without compensation would be a disproportionate interference with the owner's right. The civil condition thus qualifies the position as a matter of pre-institutional private right, but being a qualification to this position, cannot justify a wide-ranging departure from the basic starting point of wrong-based fault-liability.

While Weinrib's view that the positive law makes determinate private right—and may justifiably qualify it—is persuasive, I am less persuaded of his analysis of this particular matter. The qualification on the owner's right in necessity cases does not necessarily arise from being in a legal system which, as a matter of positive law, requires or permits the existence of this permission. Nor is it the result of a normative demand that arises when one is in the business of positing law for right-holders.

To see this, consider a variant on the *Storm* case in which I need to shelter on your dock momentarily in order to protect my life. In this case, there is no question of rendering consistent one property right with another property right, but

16. Weinrib, *supra* note 1 at 89.
17. *Ibid* at 87.
18. *Ibid* at 75.

rather a property right with another's bodily right. In this case, it would also be impermissible to dislodge me from my temporary shelter.[19] If so, then it is difficult to accept that the wrongfulness of this act is a result of public right, in Weinrib's sense: The wrongfulness of doing so is explained by the infringement of the other person's bodily right, and the fact that the other's use is necessary and proportionate in order to avoid (serious) damage to their body. Even if the positive law determined that it were permissible to dislodge, this would be a mistaken resolution of the parties' rights in this situation. It is true that the property right may owe its precise moral content or moral enforceability to the existence of a legal system, but the wrongfulness of excluding a person from one's property in these circumstances is explained in major part by the other's bodily right and the necessary and proportionate interference with a right of lesser importance. More generally, it is the substantive content, or object, of the relevant rights, along with considerations of necessity and proportionality, which fundamentally determine the permissibility of action in these kinds of circumstances. Just as the law defines authoritative standards for what constitutes necessary and proportionate action in self-defence, the general moral contours of necessity and proportionality are pre-institutional, being determined by the substance of the relevant rights. So it is, it seems to me, when one may permissibly protect one's rights against non-culpable creators of risk to one's rights (or the rights of others), as in cases of necessity.

Even if one were persuaded by Weinrib's view that pre-institutional private right permits the owner to exclude, and does not require the injurer to compensate, while public right reaches a contrary conclusion, it is not obvious why this leads to a limited, exceptional liability for permissible infringement of another's rights. In principle, it can be argued that *any* permissible infringement of another's right should be coupled with a duty to compensate, lest the permissibility of the infringement impose too great a burden on the right-holder. For instance, it might be argued that the correct way to make 'consistent' a person's liberty to impose risks upon others through driving a vehicle, with others' right to their bodily integrity, is to require compensation for the materialisation of those risks, even if they are innocently created. Or why is an injurer's permission to defend against another's wrongful attack not subject to a duty to compensate for the permissible harm inflicted? My point is not that there ought to be duties to compensate in these situations (indeed, there should not be in the case of defence against culpable attackers), or that the argument cannot be made that duties to compensate for permissible harm are highly limited in character: It is that the idea that rights must be made consistent with each other needs further specification in order to deliver that conclusion.

It seems to me that the deeper explanation of duties to compensate in necessity situations involves the idea that one innocent person is not generally required to bear harms to their own right-protected resources for the benefit of another person (subject to the possibility of there being an enforceable duty of rescue

19. For support for this in the positive law, see *Depue v Flatau*, 100 Minn 299 (1907), discussed by Weinrib, *supra* note 1 at 158-59.

in situations in which a person is at risk of severe harm and one can assist at minimal cost). Individuals do not have general duties to protect each other's property from imminent destruction at significant cost. In the absence of such a duty, the owner who suffers harm to protect another's (more valuable) property from destruction is made to bear a burden that they had no duty to bear. However, if the harmful imposition is coupled with a duty to compensate, then, so long as the owner can reasonably assume that they will in fact be compensated, the harm will be reduced to such a level that they may be required not to exclude the person in need. If only commercial, fungible property is at stake, the refusal to allow the use, when compensation will be provided, involves gratuitous harm to the person in need: The fungible property can be perfectly compensated.[20]

Although I have given reason to doubt his analysis of permissions to interfere with another's property, there is an important insight in Weinrib's idea that one's enforceable duties to others may involve 'systematic' considerations. The determinants of when an act is permissible cannot be reduced to the considerations fixed by the relationship between the parties alone. If it is permissible to turn the trolley in the Trolley Problem, it is in virtue of the moral status of each of the five on the other track. Their lives constitute moral considerations for turning the trolley which are not part of the relationship between the actor and the person harmed by turning. In more humdrum cases, it might be permissible for a court not to prevent a nuisance because of the overwhelming public interest, and yet the defendant is still infringing on the other's rights. Understanding private right in terms of relational equality gives us an appealing (if potentially incomplete) account of when one person stands to be wronged by another. But it is not the full story of when actions are permissible. Since permissibility also matters to private law—courts generally ought not to stop actions that are permissible, all-things-considered, by injunction—this is a welcome extension.[21]

3. Distributive justice

Weinrib is well-known for the view, developed in *The Idea of Private Law*, that corrective justice (CJ) and distributive justice (DJ) are distinctive and independent normative categories.[22] *Reciprocal Freedom* maintains this view, but deepens Weinrib's account of the interaction between the domains. He writes that "neither offers a reason to eliminate the other," and distributive justice "supplements private law while leaving it intact."[23]

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20. The implication is that the right to exclude *would* exist if it was manifest that no compensation would be provided. That generally seems the right conclusion when all that is at stake for the infringing party is damage to their fungible property. The owner does not have a duty to accept harm to their property to save another person's property without compensation.

21. For a brief exploration of the relationship between remedial orders and all-things-considered permissibility, see Alexander Georgiou & Sandy Steel, "Remedies and the Public Interest" in Andrew Robertson & Jason W Neyers, eds, *Private Law and the State* (Hart, 2024) 201.

22. See Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995).

23. Weinrib, *supra* note 1 at 97, 100.

Here is how I think we can faithfully express Weinrib's thesis:

> *Independence*. What *A* owes *B* as a matter of primary right or secondary right (i.e., rights arising from the breach of a primary right) is never (justifiably) determined by facts about *A* and *B*'s position as a matter of distributive justice, and what assistance rights *A* has against the state in relation to the enforcement of *A*'s rights against *B* should equally not be determined by distributive justice.

However, we can each be justly required, under certain conditions, to contribute to distributive justice. Weinrib's argument runs roughly as follows. First, we are each required to enter the civil condition in order to make it the case that we have enforceable rights against each other, including rights to exclude others from physical spaces and rights created by agreements. Second, the foreseeable effect of establishing the civil condition with these features is that some people will be excluded from resources which they may need to live as free and equal persons:

> Although I may be in danger of starving to death unless I get an apple, you may be the owner of the apple and, therefore, have exclusive right to it even when you put it down or add it to your pile of apples. The state thereby enables you to shut me out from what would otherwise be accessible.[24]

Third, because we are required to enter the civil condition, and because the formation of the civil condition foreseeably causes this effect on others, each of us can be required to contribute to the alleviation of these effects. We can formulate this as a thesis about the ground of a person's liability in distributive justice (i.e., the ground of their being required to facilitate the aim of distributive justice):

> *Exclusion.* A person's liability to be required to facilitate the achievement of distributive justice is grounded in the harmful effects on the freedom of others that arise from the ordinary operation of the state, to which each person is required to submit and support in virtue of their free and equal status.

Although appealing in general, the *Independence* thesis is probably too strong, while the *Exclusion* thesis is too weak.

3.1. Independence

There are facts which are partly constitutive of distributive justice which bear upon interpersonal enforceable entitlements. Although it is not usually thought so, the law likely already accepts this. Tax law sets out the law's view about what distributive justice requires. Indeed, it is plausibly partly constitutive of what distributive justice requires, within certain limits.[25] This is why some of the examples in the literature involving compensatory duties resulting from negligent injury of ultra-wealthy individuals do not really demonstrate the law's

24. *Ibid* at 103.

25. On law's constitutive role in relation to distributive justice, see Rebecca Stone, "Distributing Corrective Justice" in Psarras & Steel, *supra* note 12, 106.

insensitivity to distributive justice in private law. Since the tax system determines the law's view about what distributive justice requires, it would be illegitimate, absent very unusual circumstances, for judges to set up their own local private law conception of distributive justice in resources—in contradiction to tax legislation—with Mick Jagger (the archetypal victim here) being subject to Justice So-and-So's personal tax regime.[26] So the law's apparent insensitivity to distributive justice can, in large part, be explained simply on grounds of judicial deference to the legislative determination of distributive justice.

In order to test the current law's insensitivity to distributive justice, one would need a case in which someone seeks to subvert the tax regime through obtaining compensation from another. For instance, suppose that *A* sues *B* for compensation for *B*'s tort against *A*, and *B* can show that *A* would illegally have avoided paying tax on the lost income for which *A* is claiming, and that if compensation is paid, *A* will be able to evade paying tax on the compensation payment after the court's order. In these circumstances, *A* is suing for compensation for income that, according to the governing tax regime, *A* should not have as a matter of distributive justice. At the very least, this seems a much harder case than the compensation for negligent-injury-of-the-super-rich type example. Here, the judge need not rely upon their own conception of distributive justice to deny the claim, but rather would be upholding the tax regime.

Weinrib's view is clearly not, however, simply a doctrine of judicial deference, but rather a claim about normative fundamentals: CJ and DJ are normatively independent categories at a foundational level. It is easy to ridicule a different view. How could it make a difference to a person's entitlement not to be negligently injured in their body that they are unjustly wealthy in relation to external resources? The reasons for respecting a person's bodily integrity are unconnected to their wealth in such resources.

As others have pointed out, however, more plausible versions of the view that DJ can undermine or stand in tension with CJ relate not to *primary* moral rights to one's body, mind, privacy, reputation, etc., but to secondary moral rights that involve restoration of resources which, according to DJ, the apparent right-holder ought not to have.[27] In cases in which a person has resources which they ought to know any justified scheme of distributive justice would require them to give up for the benefit of others, and the person has no intention of employing those resources for the ends of distributive justice, this person stands in an analogous position to a person seeking to recover compensation for earnings on which they would have been able unlawfully to avoid paying tax. A different (loose) analogy is a defaulting trustee. A person who has legal title to resources that, in

26. See James Penner, "Don't Crash into Mick Jagger When He Is Driving His Rolls Royce: Liability in Damages for Economic Loss Consequent upon a Personal Injury" in Paul B Miller & John Oberdiek, eds, *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 253.

27. See e.g. Peter Chau, "John Gardner's Continuity Theory of Corrective Justice" in Michelle Madden Dempsey & François Tangauy-Renaud, eds, *From Morality to Law and Back Again: A Liber Amicorum for John Gardner* (Oxford University Press, 2023) 190 at 198-99.

distributive justice, ought to belong to others, is like a constructive trustee of those resources: They ought to hold them for the benefit of others. If, however, it is manifest that the trustee will not perform their responsibility in relation to trust assets, then enforcing a compensatory payment to the trustee simply facilitates the continued default of their responsibilities.[28]

Nothing in the last few paragraphs implies that judges should act upon considerations of DJ in adjudication. DJ is complicated, and judges are likely to get it wrong by attempting to act upon such considerations. Nor does it imply that people ought not to take care in relation to the resources of the obscenely wealthy (!). Failing to take care in relation to such resources is not a means of enforcing the distributive duties of the very rich. Nor is it morally permissible for vigilante distributive justice enforcers to go around enforcing the true set of distributive duties. All sorts of familiar arguments (i.e., arbitrariness of enforcement, risks of error, risks of violating other rights, etc.) provide compelling reasons for the moral impermissibility of such action. Yet this is still compatible with the view that, at a foundational level, a person who has no moral entitlement to retain their resources as a matter of distributive justice, and who has no intention of using such resources for distributive ends, cannot reasonably assert an entitlement against others to their restoration. Such a person asserts an entitlement to resources that ought to belong to others, and there is no procedural case for returning the resources to them so that they can comply with their responsibilities.

3.2. Exclusion

The *Exclusion* thesis is too weak, because many of the persons who intuitively have distributive claims on others do not have such claims in virtue of the ordinary operation of the state and the exclusionary rights it permissibly enforces. Those whose equality of opportunity would be impacted independently of the civil condition due to, for example, disability, are not in such a position by virtue of the harmful effect of the state itself. Nor are those who are incapacitated by natural events. The *Exclusion* thesis seems only to capture a category of persons who have distributive claims on others.

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28. A different potential site of interaction between CJ and DJ relates to *rights of assistance* in enforcing one's *secondary* rights. In enforcing a compensatory obligation, a court might put the state in breach of a duty of distributive justice (for instance, if the enforcement leads to the poverty of the duty-bearer). Other institutions are designed in part to resolve this: for instance, bankruptcy law and the welfare system. But this does not show that CJ and DJ never conflict, just that if other institutions exist and do their jobs, the conflict will not arise. In some cases, the conflict may necessarily arise within private law: The question of whether damages ought to be calculated using tables that take into account protected characteristics is one potential, though complex, example. One reason it is complex is that it might be argued that the wrongdoer's secondary duty is to pay compensation for harm measured by the position that the right-holder would be in were others not to commit future wrongs against the right-holder—the appropriate counterfactual looks to the no-wrongs-to-the-victim position; to the extent that discriminatory pay amounts to a wrong, the wrongdoer would be relying upon the hypothetical wrongs of others to reduce their compensatory burden. Arguably, this is all at the level of interpersonal justice.

It seems likely that Weinrib holds *Exclusion*, or something like it, only to be one major part of what grounds claims in distributive justice.[29] In chapters 6 and 7, Weinrib endorses the idea that individuals enjoy certain rights against the state simply in virtue of their "intrinsic human dignity," such as the right to basic education.[30] The development of a child's power freely to set and pursue their own ends is "itself an entitlement under their innate right."[31] While this right does not generate a general duty *on everyone* to provide basic education to a child—this would be inconsistent with their innate freedom—it does generate a duty on the state which it is "duty bound to honour out of respect for the human dignity of the right-holder."[32] Indeed, Weinrib described the significance of the right to basic education as "an aspect of distributive justice."[33]

Conceivably, one could argue that the right to basic education is itself derivable from *Exclusion,* or something like it. So far as the state sets up a coercive regime of rights, that regime would likely violate a person's innate right unless it provided for a sufficient basic education which allowed a person to understand properly the demands of the system of rights. In this way, the right to education would be a necessary incident of a coercive regime of rights, somewhat akin to the duty to take care while driving, which attaches in virtue of the risk imposed to others in driving: The risk of right violations imposed by a coercive regime of rights requires a duty to provide basic education to ameliorate that risk. But this does not seem to be Weinrib's view; the right to education derives simply from innate right, and the intrinsic worth of the person.

While the extension of distributive justice beyond claims grounded in *Exclusion* seems right to me, it does significantly expand the notion of 'equal freedom' that applies to determine the content of rights and duties in private law. This notion of freedom only recognises a relatively limited range of more specific rights, and protects them with only a limited range of negative correlative duties on other private individuals. Notably, it generates only highly limited duties to protect others' economic interests, centrally, when a voluntary undertaking exists between private individuals.[34] It is not clear, when one considers the state's duty to *promote* equal freedom, as with the right to basic education, that the same notion of freedom is really in play here. It is true that the state, on this view, is not duty-bound to promote any particular *end* that persons have or may wish to have, but rather to develop and protect their capacity for free agency. Still, it seems that the kind of assistance the state may be duty-bound to provide goes significantly beyond what is needed to make a person able to respect the innate (and acquired) rights of others. In this way, it goes beyond a concern to ensure that *relations* of equality—as defined by a justified private law—are enjoyed and

29. This was my understanding of remarks made by Professor Weinrib at the Surrey symposium.
30. Weinrib, *supra* note 1 at 154. On the 'dignity function' of horizontal application of fundamental rights, see *ibid* at 141ff.
31. *Ibid* at 154.
32. *Ibid* at 156.
33. *Ibid* at 157.
34. See Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012).

respected by the beneficiary of the assistance. What is involved seems to be a much thicker—and in this context, more appealing—notion of standing as free and equal to others.

4. Conclusion

Reciprocal Freedom usefully makes clear that there is much more to Professor Weinrib's theory of private law than the exacting focus on bilateral relationships with which it tends to be identified. Public right licenses and requires appeal to considerations that extend beyond the parties' relationship. In this way, the theory has some resources to respond to concerns that its conception of private law is problematically and normatively austere. If my observations are correct, however, in the necessity cases, private right already contains the appropriate resolution, and in the case of distributive justice, there is more normative interaction between it and private right than the theory yet allows.

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