Reciprocal Freedom: Private Law and Public Right

Ernest J Weinrib

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*Reviewed by Stéphane Sérafin**

Ernest Weinrib is best known for his view that "the purpose of private law is to be private law",[1] and his concomitant rejection of the suggestion, most closely associated with the legal realist movement, that private law is really "public law in disguise".[2] This account of private law, however, supposes a complimentary account of public law, which some of Weinrib's more recent scholarly output seeks to supply.[3] His latest book, *Reciprocal Freedom: Private Law and Public Right*, revisits and considerably deepens many of these same themes.[4] It is an ambitious volume that begins with an account of corrective justice as the organizing idea of private law (Chapter 1), before moving to an account of rights writ large (Chapter 2), a discussion of the right of ownership (Chapter 3) and onward, past the role of state institutions relative to private law (Chapter 4), to the relationship between corrective and distributive justice (Chapter 5), to the effects of constitutional norms on the development of private

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1. Ernest J Weinrib, *The Idea of Private Law*, 2nd ed (Oxford: Oxford University Press, 2012) at 5 [Weinrib, *The Idea of Private Law*]. In another no doubt deliberately provocative phrase, he suggests that "in this respect, private law is just like love"(*ibid* at 6).

2. *Ibid* at 7, citing Leon Green, "Tort Law Public Law in Disguise" (1959) 38:1 Tex L Rev 1 at 258.

3. See especially Ernest J Weinrib, "Private Law and Public Right" (2011) 61:2 UTLJ 191.

4. Ernest J Weinrib, *Reciprocal Freedom: Private Law and Public Right* (Oxford: Oxford University Press, 2022) [Weinrib, *Reciprocal Freedom*].

law (Chapters 6 and 7), and culminating in an account of the relationship between private law and the rule of law (Chapter 8).

There is much in *Reciprocal Freedom* that will be familiar to readers of Weinrib's first book, the *Idea of Private Law*, and of his second book, *Corrective Justice*.[5] In particular, Chapter 1 offers a fairly orthodox restatement of Weinrib's central ideas about the nature of corrective justice as the distinct organizing idea that both undergirds and defines private law as a distinct subject of study.[6] As Weinrib explained in *The Idea of Private Law*, corrective justice is a "form" that mandates a correlative structure of justification in which the same reasons ground both the plaintiff's right and the defendant's duty.[7] It followed in his estimation that a proper account of tort law could not be grounded on the punishment of the defendant *or* the desire to provide compensation to the plaintiff, taken in isolation from each other.[8] What was required was an account of why *this* defendant is liable to *this* plaintiff.[9] As he now puts the same point in *Reciprocal Freedom*, "[b]ecause of its focus on correlativity, corrective justice treats the relationship as a unity in which each party's normative position is reciprocally intertwined with the other's", while "the reasoning that supports liability should have a justificatory force that occupies and is coterminous with the entirety of the relationship's normative space".[10]

That said, there is also much in *Reciprocal Freedom* that is new, and which even presents a potential departure from Weinrib's earlier arguments. His shift in focus towards what he takes to be a Kantian idea, the notion of "reciprocal freedom", is only the first of many clues as to this potentially novel direction. As he reaffirms in the first chapter of *Reciprocal Freedom*, correlativity is what is distinctive of private law, abstracted from the various rules and doctrines that are recognized by various positive legal systems.[11] But that is not the end of the matter. As Weinrib then goes on to suggest, the idea of reciprocal freedom requires *further* abstraction, that is, a move past corrective justice in order to fit the two forms of justice he recognizes—corrective and

5. Weinrib, *The Idea of Private Law*, *supra* note 1; Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) [Weinrib, *Corrective Justice*]. The most notable ideas he reaffirms are his account of corrective justice itself and his view of corrective and distributive justice as representing completely distinct forms of legal relation. Weinrib, *Reciprocal Freedom*, *supra* note 4 at 5, 95–96.

6. For those familiar with Weinrib's earlier work, the most interesting feature of this chapter is probably his novel engagement with many of the central themes of general jurisprudence, including the work of Ronald Dworkin. See Weinrib, *Reciprocal Freedom*, *supra* note 4 at 21–22.

7. See Weinrib, *The Idea of Private Law*, *supra* note 1 at 73.

8. See *ibid* at 124.

9. See *ibid* at 120–22.

10. Weinrib, *Reciprocal Freedom*, *supra* note 4 at 9.

11. See *ibid* at 7–8.

distributive—into a single juridical unity embodied in a system of rights.[12] Thus, the image suggested by the book's cover, of a "juridical version of Jacob's ladder . . . Each rung of this ladder both abstracts from the determinations below it and provides the determination for the rung above it".[13]

In particular, although Weinrib continues to resist the subordination of corrective to distributive justice, and by extension of private law to public law, many of his arguments in *Reciprocal Freedom* cast serious doubts on the tenability of this position.[14] Difficulties emerge fully beginning in Chapter 4, in Weinrib's treatment of two discrete areas of private law doctrine—namely, nuisance and the privilege of necessity.[15] In Chapter 3, he had accepted the Blackstonian definition of ownership as a "sole despotic dominion" enjoyed by an owner over a thing.[16] In Chapter 4, he is then compelled to account for limits on this right by introducing a distinction between the "internal logic" of private

12. See *ibid* at 97. As Weinrib puts it, "[v]iewed as the components of a system of rights, corrective and distributive justice participate in a progression, the stages of which are tied together by the idea that inherent in reciprocal freedom is the mutual independence of persons".

13. *Ibid* at 7.

14. See *ibid* at 95–96. *Cf* Weinrib, *The Idea of Private Law*, *supra* note 1 at 74; Weinrib, *Corrective Justice*, *supra* note 5 at 19. Contrast the likely more widely held view that corrective justice is limited to the preservation of whatever distribution has been established under the aegis of distributive justice. See e.g. James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford: Oxford University Press, 2006) at 12–13; Peter Cane, "Corrective Justice and Correlativity in Private Law" (1996) 16:3 Oxford J Leg Stud 471 at 476. I note also that Alan Brudner has cast doubt on the tenability of this distinction even in the form in which Weinrib initially presented it in *The Idea of Private Law*. See Alan Brudner with Jennifer M Nadler, *The Unity of the Common Law*, 2nd ed (Oxford: Oxford University Press, 2013) at 24–25.

15. Two further doctrines are considered in this chapter, namely the tort of inducing breach of contract and the assignment of contractual rights. For a critique of Weinrib's position on the former, see Stéphane Sérafin & Kerry Sun, "Corrective Justice and In Personam Rights: Reconsidering the Tort of Inducing Breach of Contract" (2024) 3 SCLR (3d) [forthcoming], DOI: <10.2139/ssrn.4707488>. For an alternative view of assignment that builds on Weinrib's Kantian account of contractual rights, see Stéphane Sérafin, "Transfer Theory and the Assignment of Contractual Rights" (2023) 60:2 Osgoode Hall LJ 251 at 282–87.

16. Weinrib, *Reciprocal Freedom*, *supra* note 4 at 60, citing William Blackstone, *The Oxford Edition of Blackstone's Commentaries on the Laws of England: Book II: Of the Rights of Things*, ed by Simon Stern (Oxford: Oxford University Press, 2016) 1.

law rights and the "operation" conferred upon them by courts acting within the civil condition.[17]

In Weinrib's estimation, both the tort of nuisance and the privilege of necessity are grounded in this distinction between the "internal logic" of private law rights—specifically, of the right of ownership—and the "operation" conferred upon those rights by courts acting within the civil condition. These courts, it is claimed, are required to "reconcile" the competing uses of various owners—that is, their respective, free-standing rights of ownership—against one another. Public right is what serves to determine the "operation" of ownership notwithstanding its theoretically absolute "scope", and thus serves to ground both doctrines.[18] Accordingly, the owner of a thing can be liable in nuisance where that owner's use adversely affects the use of another's property, notwithstanding the owner's "sole despotic dominion" over the thing or things being used.[19] Similarly, the privilege of necessity arises from the justifiable limitations which public courts of justice must impose on private law rights, such as ownership, in the name of reciprocal freedom, notwithstanding that the conduct protected by the privilege remains an infringement of the rights in question.[20]

It is unclear why Weinrib feels compelled to ground nuisance and necessity in the role of courts under public right rather than directly in corrective justice, and, thus, in private law principles as he has defined them. In *The Idea of Private Law*, his objective had been to show precisely how nuisance and necessity were compatible with the correlative structure mandated by corrective justice, in which the reasons for the imposition of liability on the defendant directly mirror the reasons for the plaintiff's recovery.[21] In the case of nuisance he argued, for instance, that, "were the law to legitimize the defendant's incompatible use, it would preclude the plaintiff from making use of his or her property, and would thereby negate the plaintiff's status as owner".[22] And, he added, "[p]arties whose uses conform to what is ordinary treat each other equally as owners, because each use allows the other what it takes for itself".[23]

17. Weinrib, *Reciprocal Freedom*, *supra* note 4 at 80.

18. *Ibid* at 89. This solution to the problem of potentially competing property rights presents interesting parallels with the approach to riparian rights sanctioned by the French *Civil Code*. See arts 644–45 C civ. As James Gordley has remarked, these provisions appear to be unique in that they borrow from the seventeenth-century French jurist Jean Domat's treatise on *public* law, rather than his treatise on private law which served as one of the primary inspirations for the other portions of the *Code*. See Gordley, *supra* note 14 at 125–26.

19. Weinrib, *Reciprocal Freedom*, *supra* note 4 at 90–91.

20. See *ibid* at 86–87.

21. See Weinrib, *The Idea of Private Law*, *supra* note 1 at 190, 196.

22. *Ibid* at 191.

23. *Ibid* at 192.

Contra the Ernest Weinrib of *Reciprocal Freedom*, the Ernest Weinrib of *The Idea of Private Law* thus appears to have understood the tort to reflect the scope of the right of ownership, understood through the framework of corrective justice, rather than a qualification imposed upon its operation by courts acting under public right. He appears to have understood it as a function of correlativity, of the bilateral private law relation between the parties, rather than of an external balancing by courts of competing, otherwise free-standing, individual rights of ownership.[24]

A similar but likely more profound difficulty emerges in Chapters 6 and 7, which focus on the effects of constitutional rights on private law—which is to say on what Weinrib, mostly following German scholarship, terms "horizontality". Here, he adopts an analysis that effectively subordinates corrective justice to the constitutional rights in question, conceived of as embodiments of distributive justice. This much is perhaps already implied by the unexamined commitments he brings to bear in his discussion of constitutional materials, all of which point to an expansive account of constitutional rights broadly in line with the "living tree" approach that currently prevails in Canada.[25] For example, Weinrib contends that constitutional interpretation ought to be "purposive", without acknowledging alternative possibilities or any of the voluminous literature on constitutional interpretation.[26] He also suggests that courts are entitled to disregard the intentional choice of legislators, where this choice conflicts not with the provisions, but with the "values" that underlie a constitutional bill of rights.[27] And—implicitly throughout—we are expected to assume that courts play an exclusive role as guardians of the constitution, to the apparent exclusion of legislatures and the executive.[28]

These assumptions about the expansive nature of constitutional rights and constitutional adjudication colour Weinrib's treatment of horizontality. On his account, the horizontal effects of constitutional rights on private law are

24. Compare Weinrib's treatment of negligence, which involves a form of "balancing" that takes place entirely within the bilateral framework imposed by corrective justice, without the need to appeal to public right. See Weinrib, *The Idea of Private Law*, *supra* note 1 at 147; Weinrib, *Corrective Justice*, *supra* note 5 at 43–44.

25. The "living tree" approach is generally traced back to Lord Sankey's dictum in *Edwards v Canada (Attorney General)*, 1929 CanLII 438 (UKJCPC). However, some have questioned the extent to which Lord Sankey's dictum truly supports the approach in question. See e.g. Bradley W Miller, "Origin Myth: The Persons Case, the Living Tree, and the New Originalism" in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge, UK: Cambridge University Press, 2011) 120.

26. See Weinrib, *Reciprocal Freedom*, *supra* note 4 at 145.

27. See *ibid* at 144.

28. Or, to put the point in less Kelsenian terms, Weinrib conceives of legislative activity as an "act of will", while judicial activity is (perhaps uniquely) an "act of reason"(*ibid* at 202).

not only wholly admissible, but can be further divided into a tripartite taxonomy corresponding to the Kantian categories of substance, causality, and community.[29] In the first, most straightforward form of horizontal development, which Weinrib dubs the "determinacy function", constitutional rights simply supply a basis on which to reason analogically in private law cases.[30] In the second form, which he terms the "development function", courts are instead *obligated* to develop private law doctrine in a manner consistent with recognized constitutional values.[31] And in the third form of horizontal development, which he calls the "dignity function", courts are obligated not only to take constitutional values into account, but to specifically develop private law doctrine in order to give a progressively fuller effect to what Weinrib, following former Israeli Supreme Court President Aharon Barak, terms the "mother right" of dignity.[32]

There is little difficulty with Weinrib's "determinacy function", which is his suggestion that constitutional instruments, like statutes, may provide a basis for analogical reasoning that can influence the development of private law.[33] The trouble is with his view that courts are specifically *bound* to develop private law in accord with constitutional rights, under the "development" and "dignity" functions. This suggestion is difficult to reconcile with his contention that corrective and distributive justice represent distinct juridical forms.[34] As Weinrib recognizes, constitutional bills of rights are not a source of free-standing principles, but instead serve to merely *specify* or *determine* the content of distributive justice as a matter of positive constitutional law.[35] How and why

29. See *ibid* at 132. This use of the Kantian categories is not found in Kant proper, as he did not discuss "horizonatality" at all.

30. *Ibid* at 133–35.

31. *Ibid* at 135. According to Weinrib, Canadian jurisprudence on horizontality largely falls within the development function (*ibid* at 136–38).

32. Weinrib, *Reciprocal Freedom*, *supra* note 4 at 141. Weinrib illustrates the dignity function by drawing almost exclusively on German examples. A notable exception is the South African case *Governing Body of the Juma Musjid Primary School v Essay NO and Others (Centre for Child Law and Socio-Economic Rights Institute of South Africa as Amici Curiae)*, [2011] ZACC 13, 2011 (8) BCLR 761 [*Juma Musjid Primary School*], while the American decision *Snyder v Phelps*, 562 US 443 (2011), serves as an example of an approach that Weinrib believes should be avoided.

33. See Weinrib, *Reciprocal Freedom*, *supra* note 4 at 133, n 54. As Weinrib suggests, this form of horizontality is analogous to the way in which statutory instruments influence the development of negligence law under the framework provided by *The Queen v Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC).

34. *Cf ibid* at 96–97.

35. See *ibid* at 128.

such determinations are relevant to private law, except in an analogical manner, is unclear, especially if—as Weinrib also contends—private law doctrines already serve to work out the same higher-order principles from the standpoint of corrective justice.[36] To suggest that courts have a duty to develop private law doctrine in accordance with determinations made in the realm of public law, then, is suggestive of a duty to subordinate corrective justice not only to distributive justice principles, but also to *positive* norms developed under a distributive justice framework.

Admittedly, Weinrib recognizes and attempts to respond to this problem at length in Chapter 7. His response, however, only serves to raise further, potentially more serious doubts about his subordination of private law to something *other* than corrective justice. Consider his main illustration of how horizontality integrates constitutional "values" into the corrective justice framework, the South African Constitutional Court decision in *Juma Musjid Primary School*.[37] His account of this case, in which the Court found that the landlord, a Mosque, could not evict a school that had not been paying its rent until the government could provide an alternative place to educate the affected students, relies on the same dubious distinction he first drew in Chapter 4, between the "scope" and "operation" of rights.[38] The idea is that, while the Mosque's property right is in principle absolute, a court adjudicating such a case must ultimately "balance" or "reconcile" the value of such a right with that of the right held by the children attending the school under the South African constitution.[39] The Mosque's ownership of the building, in other words, must be balanced against the independently-held, constitutional right of the schoolchildren to receive an education. Where correlativity factors into this overarching analysis, in which competing one-sided considerations are to be reconciled by a third-party decision-maker, is at best unclear.[40] It is tempting to conclude instead that this case combines notions of corrective and distributive justice, such that "each necessarily undermines the justificatory force of the other".[41]

In fact, Weinrib's treatment of the South African decision reveals a potentially even deeper problem with his account of horizontality. This problem

36. See *ibid*.

37. *Juma Musjid Primary School*, *supra* note 32.

38. Weinrib, *Reciprocal Freedom*, *supra* note 4 at 159–60.

39. *Ibid* at 157–58.

40. See *ibid* at 174. As Weinrib himself recognizes, "[f]rom the standpoint of corrective justice, the balancing that characterizes the operation of horizontality is unusual . . . A single homogeneous right pervades the parties' entire relationship, constituting both the juridical manifestation of the plaintiff's freedom with respect to the defendant and the determinant of the defendant's permissible action with respect to the plaintiff".

41. Weinrib, *The Idea of Private Law*, *supra* note 1 at 73.

arises from the particular way in which he assumes we should understand constitutionally guaranteed rights—i.e., as free-standing, subjective entitlements to be wielded against the state, broadly consistent with Ronald Dworkin's account of "rights as trumps".[42] As Weinrib put it in Chapter 6, while discussing the role of rights in the context of criminal punishment:

> [A] state might treat a convicted person who merits even the most severe punishment as an abomination; such treatment would be inconsistent with the criminal's humanity, which, being innate, is not forfeited even through the commission of a crime. Accordingly, the state is subject to a general imperative to be attentive to the innate right of those whom it rules, that is (in terms of the German constitution), to regard human dignity as inviolable and to make its respect and protection the duty of all state authority.[43]

This excerpt again takes for granted the role of courts as singular guardians of the constitution, charged with ensuring that the legislative and executive are properly made to comply with the rights of individuals. But more than this, it also evinces an entirely abstract and subjective account of rights, in which a given right—here, an individual right of dignity—is held out as a one-sided, free-standing claim that a person can wield against state institutions, simply by virtue of that person's humanity.[44] This view presents a rather sharp contrast with that which sees constitutional guarantees as specifications of "objective" norms, reflecting the relational position of individuals within a community in which lawful authorities act in pursuit of the common good of

42. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977) at 20, 90–94; see also Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Harvard University Press, 1986) at 221–23, 310–12.

43. Weinrib, *Reciprocal Freedom*, *supra* note 4 at 128.

44. Contrast Weinrib's view of dignity outlined in the above excerpt with the properly relational conception that emerges from Kant's own theory of punishment. See Immanuel Kant, *The Metaphysics of Morals*, ed by Lara Denis, translated by Mary Gregor (New York: Cambridge University Press, 2017) at 6:331. *Cf* also Aristotle's view of "honour" as something that is a proper subject of distributive justice, and which can further be *earned* and *lost*: Aristotle, *Nicomachean Ethics*, ed by Harris Rackham, translated by Harris Rackham (Cambridge, Mass: Harvard University Press, 1934) at 1130b33, 1134b6. See also Alasdair MacIntyre's recent critique of prevailing views of "dignity", which, in his estimation, contrast with the understanding of dignity prevalent before the Second World War: Alasdair MacIntyre, "Human Dignity: A Puzzling and Possibly Dangerous Idea?" (12 November 2021), online (video): <youtube.com> [perma.cc/D66S-BN9S].

all.[45] On this second reading, a guarantee of "life, liberty and the security of the person", for example, is not a "trump" to be wielded against state power by righteous judges acting in defense of putatively powerless individuals, but a provision which refers to a juridical relation that the state itself safeguards, among other things, through legislative action.[46]

Put differently, the deeper problem with Weinrib's preferred account of constitutional rights, from the perspective of its compatibility with a corrective justice-centred account of private law, is that it does not appear to be compatible with *either* the arithmetic relationship mandated by corrective justice *or* the geometric relationship mandated by distributive justice.[47] On the one hand, the "values" which constitutional rights purportedly enshrine, and that Weinrib suggests must inform the development of private law, are entirely one-sided considerations, of the kind that he has elsewhere argued are irrelevant to private law adjudication.[48] But on the other, they also do not provide a "criterion of distribution" that permits the right-holder to be linked geometrically for the purpose of distribution.[49] True, Weinrib understands constitutional rights to express a particular form of "human dignity" that he holds as the corollary of Kant's "innate right" operating in private law.[50] Nonetheless, these rights are conceptualized entirely in terms of free-standing, subjective entitlements. They are posited exclusively in terms of what a person can *claim* in the abstract, rather than as the "just thing" linking a particular person owed to a particular person owing viewed from both sides of the transaction or distribution.[51]

While it is tempting to infer that the idea of "reciprocal freedom" itself corresponds to the criterion of distribution on which Weinrib bases his account of constitutional rights, this notion does not provide a measure by which to determine what is owed to each person. All that it requires is that the

45. Perhaps the leading expositor of this view was the French legal philosopher Michel Villey. See most notably Michel Villey, *Le droit et les droits de l'homme*, 2nd ed (Paris: Quadrige, 2014) [Villey, *Le droit et les droits de l'homme*]. See also Michel Villey, *La formation de la pensée juridique moderne*, 2nd ed (Paris: Quadrige, 2013).

46. See Grégoire Webber & Paul Yowell, "Introduction: Securing Human Rights through Legislation" in Grégoire Webber et al, eds, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge, UK: Cambridge University Press, 2018) [Webber, *Legislated Rights*].

47. See Aristotle, *supra* note 44 at 1131b13.

48. Weinrib, *The Idea of Private Law*, *supra* note 1 at 120. Another reviewer has noticed this problem in Chapter 2. See Daniel Gilligan, Book Review of *Reciprocal Freedom: Private Law and Public Right* by Ernest J Weinrib, (2023) 86:4 Mod L Rev 1063 at 1067.

49. See Weinrib, *The Idea of Private Law*, *supra* note 1 at 62, citing Aristotle, *supra* note 44 at 1131b13; Weinrib, *Reciprocal Freedom*, *supra* note 4 at 110.

50. See *ibid* at 126.

51. See Villey, *Le droit et les droits de l'homme*, *supra* note 45 at 77–78. See also Grégoire Webber, "Rights and Persons" in Webber, *Legislated Rights*, *supra* note 46, 27 at 45–47.

institutions charged with distribution "balance" or "reconcile" the free-standing rights that each person can claim from the state *in some way*. Weinrib's endorsement of the *Oakes* test as correctly translating the justificatory structure of the *Canadian Charter of Rights and Freedoms* (*Charter*) is perhaps particularly illustrative of this difficulty.[52] On this view, a person who has a *Charter* right to "life, liberty and security of the person" is simply entitled to those things in the abstract, though this right must then be "balanced" at the operational level—according to some criterion that is never outlined—against any justification that the state may offer for its infringement.[53] As Weinrib puts it in his discussion of the "dignity function" of horizontality, "freedom is the guiding idea governing all state activity, which must work towards its ever fuller and more adequate actualization over time".[54] But precisely how the freedom of the one is to be balanced against the freedom of the other in the course of an ever-fuller actualization of the freedom of all is never specified.

Applied to Weinrib's account of horizontality, this view of constitutionally-guaranteed rights thus involves the apparent elevation of a fully abstract, *non*-relational ideal of dignity as the lodestar for the development of private law doctrine. It is perhaps unsurprising, then, that Weinrib also endorses the opinion of the Federal Constitutional Court of West Germany in the *Princess Soroya* case.[55] In that instance, the Court confirmed that even an express legislative decision to limit the recovery of damages for non-consequential moral injury, enshrined in the German *Civil Code*, could be safely ignored because it ran counter to the place accorded to the value of dignity in the post-war German constitution.[56] Never mind that the constitution also enshrined the separation of powers or that the decision to limit recovery for

52. *R v Oakes*, 1986 CanLII 46 (SCC); *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

53. *Charter*, *supra* note 52, s 7; Weinrib, *Reciprocal Freedom*, *supra* note 4 at 86. This reading contrasts with an account of rights, including constitutional rights, that sees their boundaries as overlapping with legitimate state action. See e.g. Bradley W Miller, "Justification and Rights Limitations" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, UK: Cambridge University Press, 2008) 93 at 104.

54. Weinrib, *Reciprocal Freedom*, *supra* note 4 at 142. There is an obvious tension between this suggestion and Weinrib's earlier focus on working out the "immanent rationality" of private law. Weinrib, *The Idea of Private Law*, *supra* note 1 at 206–08. A focus on private law's immanent rationality takes extant doctrine largely for granted and seeks to explicate it on its own terms. A focus on the "ever fuller and more adequate actualization" of freedom suggests instead a need to potentially remake the whole of the positive law in the image of an abstract ideal.

55. Bundesverfassungsgericht [Federal Constitutional Court], 14 February 1973, BVerfGE 34, 269 (W Germany), online: <bverfg.de/e/rs19730214_1bvr011265en.html> [perma.cc/6TCZ-Z85G].

56. See *ibid.*

moral injuries in this way was, and surely remained, a reasonable determination of the principles of private right.[57] For Weinrib, the free-standing "right" of dignity, held by each person in the abstract, to which the courts are obligated to give full effect as much as is reasonably possible, required this development even where it contradicted the express decision of the legislature.[58]

Framed in these terms, it becomes doubtful that Weinrib's account of the relationship between private law and public right differs significantly from prevailing modes of legal thought in Canada and elsewhere, including, ultimately, in the way it suggests that private law doctrine should be developed by public institutions such as courts. Per Weinrib, are courts not free, or indeed obligated, to develop private law in such a way that progressively serves to give ever-fuller effect—i.e., to *maximize*—the individual, free-standing entitlement to dignity of each and every person? If so, then why should tort law not confer a right of action upon every individual who experiences a subjective feeling of harm or distress, even if such a consideration is entirely one-sided? Why should we insist upon the normative equality of contracting parties, if one party is clearly more harmed by the other's non-performance than the inverse? And why should property law continue to be recognized in any meaningful way at all, when the possibility of mass accumulation by the few poses such a threat to the dignity of the many?

Weinrib would doubtless resist most, if not all, of these conclusions, at least in the form in which I have just presented them. Certainly, he would resist the suggestion that the full realization of "reciprocal freedom" is an instrumental consideration, something to be maximized *through* law, rather than an idea that is already immanent within legal practice.[59] Certainly, he would suggest that the restrictions which public right imposes on the "operation" of private law rights arise at a different "stage" of analysis, and therefore do not displace the arguments he has previously made about the bilateral nature of private law.[60] But at the very least, the concessions which he makes in *Reciprocal Freedom* undermine any claim to the practical relevance of these ideas the moment that constitutional rights are implicated in some way. Such constitutional

57. Per the natural law tradition on which Weinrib has frequently drawn, "the law consists in part of rules which are 'derived from natural law like conclusions deduced from general principles', and for the rest of rules which are 'derived from natural law like implementations [*determinationes*] of general directives'". See John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford: Oxford University Press, 2011) at 284, citing Thomas Aquinas, *Summa Theologiae*, vols 1–2 (New York: Benziger Brothers, 1911), question 95, art 2c. See also Gordley, *supra* note 14 at 40–41. *Cf* Weinrib, *The Idea of Private Law*, *supra* note 1 at 222–26; Weinrib, *Corrective Justice*, *supra* note 5 at 261–62.

58. See Weinrib, *Reciprocal Freedom*, *supra* note 4 at 145–46.

59. See *ibid* at 208.

60. See *ibid* at 97–99.

involvement, moreover, is only likely to increase so long as courts are ready to accept Weinrib's own ever-expanding reading of constitutional rights guarantees.[61]

The question that should confront a reader at the conclusion of *Reciprocal Freedom*, then, is this: does one hold to the view of private law that Weinrib has elsewhere defended, which affirms its bilateral structure of justification to the exclusion of all other considerations, or does one abandon that view, in favour of a conception of private law that potentially integrates other concerns, whether properly sourced in distributive justice or drawn from a free-standing, abstract view of constitutionally-enshrined rights? Perhaps the latter conclusion should prevail. Perhaps the way in which Weinrib insisted upon the distinctiveness of private law relative to public law was ill-conceived from the outset. But if that is not the case, then it would seem to be preferable to stick with his account of private law qua private law, and to find some other framework through which to integrate private law into a broader account of legality writ large. *Pace* Weinrib, "the root of the moral confusion in which we find the contemporary world" does not in fact lie in "the lack of a sufficiently abstract theory".[62] Rather, the true source of confusion lies in a tendency towards over-abstraction and, in the case of private law at least, in a concomitant failure to take seriously the thoroughly relational nature *immanent* within it as an actual, existing practice.

61. See *ibid* at 146.

62. *Ibid* at 209.