Book Review

Law for Law's Sake

The Idea of Private Law. By Ernest J. Weinrib.[*] *Cambridge: Harvard University Press,* 1995. Pp. x, 237. $35.00.

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For almost thirty years now, a poor beleaguered torts professor, who once could rest comfortably on the mastery of Prosser and the latest case law developments, has been assaulted from any number of directions. First it was the economists, championed by the path-breaking work of Guido Calabresi and Richard Posner, who recast analysis of the tort system in economic efficiency terms.[1] Strong medicine for the uninitiated. But at least the adherents of optimal resource allocation and their antagonists from other "law and" perspectives labored within the same vineyards—namely, academia.[2]

Then came the assault from without. Political activists, marching under the banner of tort reform, began to propose every manner of change through legislative action: constraints on intangible and punitive damages, limitations on the contingency fee, elimination of joint and several liability, and a host of others.[3] If there was any common message for the academic torts contingent in all this clamor, it was to this effect: "Get beyond your excessive

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1. *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). Calabresi's influential series of articles, which culminated in *The Costs of Accidents*, actually began in the early 1960s with Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961). He, in turn, along with all subsequent contributors to the law-and-economics movement, was substantially influenced by Ronald H. Coase's seminal article, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

2. For two highly influential law-and-morality theories of the 1970s, see Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) [hereinafter Epstein, *Theory*]; George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

3. For a discussion of tort reform in the 1980s, see Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990).

preoccupation with doctrine—tort law is only legitimate if it serves some useful purpose, and whether it meets this test depends on its satisfaction of independent societal goals."

Now comes Ernest Weinrib, addressing the system of private law generally, but mostly with reference to tort law, who tells us:

> [D]espite its current popularity, the functionalist understanding of private law is mistaken. Private law, I will claim, is to be grasped only from within and not as the juridical manifestation of a set of extrinsic purposes. If we *must* express this intelligibility in terms of purpose, the only thing to be said is that the purpose of private law is to be private law.
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> . . . It cannot be (one hopes) that the very idea of a phenomenon intelligible only in terms of itself is unfamiliar. Some of the most significant phenomena of human life—love or our most meaningful friendships, for instance—are intelligible in this way. We immediately recognize the absurdity of the suggestion that the point of love is to maximize efficiency by allowing for the experience of certain satisfactions while at the same time avoiding the transactions costs of repeated negotiation among the parties to the relationship. . . . Love is its own end. My contention is that, in this respect, private law is just like love.[4]

From this dramatic opening thrust, Weinrib proceeds to construct an autonomous model of the tort system, built on the framework of negligence law but supported by a venerable foundation of Aristotle and Kant, that is about as far removed as one can get from the rough-and-tumble of legislative tort reform or the instrumentalism of cost-benefit analysis.

In Part I of this Review, I will describe Weinrib's private law system—built on the foundations of legal formalism.[5] Part II of the Review

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4. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 5–6 (1995).

5. Weinrib's version of formalism, it should be underscored, rests firmly on a foundation of Aristotle and Kant. Nineteenth-century American formalist legal thought, most closely identified with Christopher Columbus Langdell, is never mentioned by Weinrib, most likely because it reflects a purely doctrinal notion of "legal science" that is entirely distinct from Weinrib's philosophically grounded system. The flavor of Langdellian conceptualism is well captured by Tom Grey:

> [T]he heart of classical [Langdellian] theory was its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order. A few basic top-level categories and principles formed a conceptually ordered system above a large number of bottom-level rules. The rules themselves were, ideally, the holdings of established precedents, which upon analysis could be seen to be derivable from the principles. When a new case arose to which no existing rule applied, it could be categorized and the correct rule for it could be inferred by use of the general concepts and principles; the rule could then be applied to the facts to dictate the unique correct decision in the case.

Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 11 (1983) (footnote omitted).

More surprisingly, Weinrib is similarly indifferent to nineteenth-century German legal formalism, which is far more closely aligned with the philosophical tradition that animates his system of private law. For discussion of the German intellectual movement, in the context of both Langdell and the great antagonist of formalism in all its manifestations, Oliver Wendell Holmes, see Mathias W. Reimann,

will offer a critique of the formalist credo. I will argue that Weinrib's claim for the autonomous character of his formalist thesis cannot be sustained either as a logical proposition or, in application, as a satisfying positive or normative perspective on the development of the tort system. Weinrib's theory of private law is meant to embrace the private law system in its entirety, but his applications are almost exclusively to the tort system—where he offers a comprehensive critique of competing doctrinal theories of negligence and strict liability. I will similarly limit my discussion of the private law applications of his theory to the tort system. In Part III, I will address some particularly salient current policy issues in tort law that underscore the shortcomings of his analysis. Part IV, a concluding observation, will bring the argument back full circle to Weinrib's claim for a private law system subject solely to internal validation. Ultimately, I will suggest, Weinrib's notable intellectual accomplishment in fashioning a doctrinal universe to fit his philosophical principles is undermined both by its highly conceptual normative character and by its insistent indifference to functional concerns about the impact of tort law on society.

I. THE FORMALIST CREDO

Weinrib is an unabashed conceptualist—or formalist, as he would put it. The structure of his formalist approach is conveyed in an introductory reference to "three mutually reinforcing theses," which turn out to be architectonic.[6] His first thesis is that private law, properly understood, is immanently, or internally, intelligible; in Weinrib's terminology, the elements of "character, kind, and unity" must cohere.[7] More directly, his initial proposition is that private law has certain essential structural features that can only be justified in terms of their interlocking, mutually reinforcing relationships.

Under this stricture, two commonly specified goals of the tort system—compensation through loss spreading, and deterrence—are in immediate trouble. Loss spreading is incoherent, Weinrib argues, because it focuses on the plaintiff's need for compensation—but, through the inconsistent doctrinal limitation of a causation requirement, fails to embrace comprehensively the underlying insurance rationale of a compensation-driven system.[8] Deterrence is similarly incoherent, because its avowedly single-minded focus on risk minimization is at odds with the tort requirement that the

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Holmes's Common Law *and German Legal Science, in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 72 (Robert W. Gordon ed., 1992).

6. WEINRIB, *supra* note 4, at 18–19.

7. *Id.* at 22.

8. *Id.* at 36–38.

risk-creating conduct result in actual injury to a plaintiff.[9] Thus, coherent pursuit of the compensation goal is in tension with the two-party, causation-based structure of private tort law; so too, logical pursuit of the deterrence objective is unrelated to the ends of the tort plaintiff—indeed the plaintiff's main function is to serve as a bounty hunter who energizes the regulatory drive of the system.

All of this is by way of criticism of widely accepted current theory. Weinrib's *affirmative* case for the formalist approach to private law turns on his second thesis—that Aristotle's conception of corrective justice offers an appropriate framework for an internally consistent, unified approach to private law.[10] Initially, we need to understand what private law is not. By *distributive* justice, Aristotle had in mind a notion of horizontal equity in which benefits and burdens were allocated among a class on the basis of a merit principle—presumably, any intelligible criterion of comparative desert. For example, in the world of accidental harm a no-fault compensation scheme offers a straightforward illustration of the distributive justice notion.[11] Under workers' compensation, for instance, injured workers base their compensation claims on a politically designated entitlement (injury arising in the workplace), rather than a normatively grounded individual right.

By contrast, Weinrib posits, as the appropriate basis for private law, an interpersonal, Aristotelian vision of *corrective* justice:

> Corrective justice embraces: a bipolar conception of interaction that relates the doer of harm to the sufferer of that harm; a bipolar conception of injustice as a violation of quantitative equality; a bipolar conception of damage as a loss by the plaintiff correlative to the defendant's gain; a bipolar conception of the adjudicative process as a vindication of the quantitative equality of the litigants; and a bipolar conception of the remedy as the annulment of the parties' correlative gain and loss.[12]

This is fine as far as it goes. But, as Weinrib recognizes, the very power of Aristotle's contrast between corrective and distributive justice could also be taken to be its main deficiency. For we are left with form without content. Corrective justice as defined posits a bipolar structure of reparation, but it is indifferent to matters of status, wealth, and merit of the parties. Gains and losses are to be annulled without reference to these considerations.

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9. *Id.* at 39–41.

10. For Weinrib's account of Aristotle's treatment of distributive and corrective justice, see *id.* at 56–83; it draws upon ARISTOTLE, NICOMACHEAN ETHICS (Martin Ostwald trans., Bobbs-Merrill 1962).

11. For a comprehensive description of no-fault systems, see MARC A. FRANKLIN & ROBERT L. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 720–94 (5th ed. 1992).

12. WEINRIB, *supra* note 4, at 65–66.

What then is to be the guiding normative principle that gives meaning to rights and duties of the parties? Here is where Weinrib's third thesis and Immanuel Kant enter the picture. Weinrib derives the normative aspect of corrective justice from Kant's concept of right—a conception driven by the principle of regard for the "self-determining agency" of individuals—that is, respect for the free will of others.[13]

Despite its normative content, on closer examination the Kantian edict turns out to have a distinctly conceptualistic character. Kant's notion of free will or freedom of choice, not unlike Aristotle's conception of corrective justice, lacks ethical direction. It exalts respect for the autonomy of others as an end in itself, without reference to any specified code of moral conduct. Anything goes, so to speak, as long as each individual respects the self-actualizing space of others. The focus of Kant's legal philosophy, according to Weinrib, is "not on an action's goodness but on its consistency with the freedom of all persons."[14]

Thus, Weinrib's three organizing theses come down to this. First, a system of private law should pursue a coherent end or set of ends, rather than pursuing an amalgam of objectives—a misguided pursuit found in the present-day structure of American tort liability rules. Second, a private law system should follow the dictates of Aristotle, reflecting the formalist perspective of bipolar rights and duties envisioned in his model of corrective justice. Third, a private law system should take, as its substantive definition of bipolar obligations, the dictates of the Kantian norm of protecting individual autonomy.

Fair enough, one might respond, but how do these theoretical claims bear on the character of tort law? The port of entry for Weinrib is the concept of *correlativity* of rights and duties, which is central to the bipolar structure of corrective justice.[15] Individuals, under Kant's notion of autonomy, can claim protection both for "bodily integrity" and for "external objects of the will."[16] This conception of "right" creates a correlative "duty" in others to abstain from interference. It is these correlative rights and duties that define the two-party bipolarity that is central to Weinrib's formalist vision:

> The plaintiff's right to be free of wrongful interferences with his or her entitlements is correlative to the defendant's duty to abstain from such interferences. The plaintiff's suffering of an unjust loss is the

13. For Weinrib's discussion of Kantian right, see *id.* at 84–113; he draws on a number of sources, principally IMMANUEL KANT, THE METAPHYSICS OF MORALS (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

14. WEINRIB, *supra* note 4, at 94.

15. The concept of correlativity is sufficiently important to warrant an entire chapter. *See id.* at 114–44.

16. *Id.* at 128. The latter "external objects of the will" are largely protected by systems of property and contract law that Weinrib does not explore in this volume.

> foundation of his or her claim against the person who has inflicted that loss. The transference from the defendant to the plaintiff of a single sum undoes the injustice done by the former to the latter.[17]

Still, one might reasonably ask, what is it about negligence law that makes it particularly suited to Weinrib's version of corrective justice? Why is corrective justice "immanen[t]," as he insists, in *negligence* liability?[18] Weinrib begins his chapter on negligence law—his working illustration of formalist jurisprudence in action—with this assertion of immanence, by which he appears to mean that the conceptual scheme of negligence liability as he defines it is the embodiment (or realization), by its very nature, of Aristotelian/Kantian corrective justice principles.

The touchstone of Weinrib's analysis is foreseeability, and here the celebrated case of *Palsgraf v. Long Island Railroad*[19] commands center stage.[20] The facts of *Palsgraf* are well known: A station attendant had dislodged a package while assisting a passenger who was racing to board a departing train. Unbeknownst to the attendant, the package contained fireworks, which exploded after the package was dislodged. The plaintiff, a passenger who was standing on the station platform at some distance from the site of the explosion, was injured when struck by a falling weighing scale. In denying recovery, Judge Cardozo insisted that the central tort concept of duty be defined relationally between a particular defendant's risk-creating conduct and a foreseeably endangered plaintiff. By defining duty in relational terms, Cardozo's opinion faithfully reflects the bipolarity of Weinrib's formalist perspective on rights and duties. By contrast, the idea of tort duties owed to the world at large—an idea articulated in Judge Andrews's dissenting opinion in *Palsgraf*—is anathema to the bipolar perspective and consequently fails, in Weinrib's view, to "preserve[] the normative correlativity of the parties' relationship."[21]

In like fashion, for Weinrib proximate cause is properly defined in terms of foreseeability, since liability for all "direct harms," let alone *strict liability* for accidental harm, would infringe on the autonomy of the defendant as a self-regarding agent. Weinrib straightforwardly criticizes strict liability: "To ascribe liability to an action, regardless of culpability, for whatever harmful effects it has had simply because they *are* its effects, is to hold the agent liable

17. *Id.* at 144.
18. *Id.* at 145.
19. 162 N.E. 99 (N.Y. 1928).
20. WEINRIB, *supra* note 4, at 159-65.
21. *Id.* at 163.

for being active."[22] Negligence liability for unforeseeable "direct" (or, in doctrinal parlance, proximate) harms suffers from the same defect.[23]

So much for duty and proximate cause. At this point, the playing-out of the leitmotif of foreseeability in the core definition of unreasonable conduct—breach of duty—becomes foreordained. Nonetheless, it is important to be explicit. Weinrib will have no part of what he characterizes as the "American approach" to negligent conduct taken in *United States v. Carroll Towing Co.*, featuring a utilitarian balancing of costs and benefits.[24] Instead, his model is the opinion of Lord Reid in the English case of *Bolton v. Stone*, involving an injury from a cricket ball hit beyond the boundaries of the playing field.[25] Reid dismissed the idea that costs should be taken into account when the defendant creates a substantial risk—holding instead that liability should ensue in any such case, as long as harm was foreseeable.[26] In Holmesian fashion, Lord Reid defined negligence as failure to avoid imposing foreseeable risks.[27]

Here, then, in the concept of protection against foreseeable risk—unfettered by any inquiry into the "reasonableness" of avoidance costs—Weinrib finds the optimal position, "a standard of care in which doer and sufferer rank equally as self-determining agents in judgments about the level of permissible risk creation."[28] Kant actualized in the worldly domain of tort law. As Weinrib sums it up, steering between the Scylla of strict liability and the Charybdis of social welfare-based negligence liability:

> On the one hand, the actor is not held liable for the "fantastic and far-fetched" possibilities of injury that inevitably accompany human action. On the other hand, the creation of risks from which injury is reasonably foreseeable is grounds for liability, because of the failure to modulate one's action in view of its potential to cause others to suffer. Thus the requirement not to create what Lord Reid terms "real

22. *Id.* at 181.

23. Weinrib argues that liability based on direct harm arising from negligent acts—rather than foreseeable harm—"fails to maintain the correlativity of right and duty and thereby leaves us without a reason for holding this particular doer liable to this particular sufferer." *Id.* at 159.

24. *Id.* at 148; *see* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.) ("[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B<PL.").

25. Bolton v. Stone, [1951] App. Cas. 850, 864 (Reid, L.J.). In *Bolton* only six balls had been driven outside the field in 28 years, and no one had ever been hurt. *Id.* at 859 (Porto, L.J.). As a consequence, Lord Reid and the other law lords were unanimous in holding that the risk was not "substantial," and that the defendant club might disregard it. *Id.* at 867–68 (Reid, L.J.).

26. *Id.* at 867–68 (Reid, L.J.).

27. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 96 (1881). Interestingly, while his substantive theory of negligence was strikingly similar to Weinrib's, Holmes, the hard-headed realist, was in fact openly disparaging of formalism—referring to such a perspective, in a famous later aphorism uttered from the bench, as "a brooding omnipresence in the sky." Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting). *See generally* Grey, *supra* note 5. Holmes's foreseeability-based negligence theory was inextricably linked to his broader commitment to the social goal of making the law predictable.

28. WEINRIB, *supra* note 4, at 152.

> risk" translates these two considerations about human action into a standard governing the relationship of doer and sufferer.[29]

A final word about "doing and suffering" is in order, both to encapsulate adequately Weinrib's treatment of tort law and to offer a comprehensive overview of his thesis for purposes of my critique that follows. Doing and suffering, in a world of accidental mishaps, obviously translates into the realization of harm—and Weinrib is not oblivious to the notion of loss and the awarding of damages. In singular fashion, however, Weinrib regards "normative" loss rather than "factual" (or actual) loss as salient to the formalist perspective. The distinction requires explanation.

As he puts it, "Kantian right funnels the normative significance of factual gains and losses through the conceptual categories arising from the abstracting will."[30] To put it more simply, Weinrib's notion of "loss" refers to interference with the plaintiff's autonomy, in and of itself, rather than to the particular harm actually suffered, such as a broken leg. He illustrates by drawing a distinction between individual *welfare*, which is of only secondary consequence to him, and individual *rights*:

> [T]he rights pertinent to interaction among humans crystallize certain welfare advantages and protect them from wrongful interference. And when such interference occurs, the law rectifies the wrong by an award of damages that quantifies the wrong by quantifying the value of the welfare of which the plaintiff has been deprived. But right is not synonymous with welfare, nor wrong with the deprivation of it. I can infringe your rights without thereby decreasing your welfare, as in the case where a court would order me to pay nominal damages. I can decrease your welfare without thereby infringing your rights, for instance by starting a business that successfully competes with yours.[31]

Thus, Weinrib's approach to valuing harm is every bit as conceptual as his notion of responsibility. Just as one is responsible for an infringement of another individual's personal autonomy without reference to any normative judgment about the character of the infringer's conduct, so harm is defined "normatively" in terms of infringement per se, without reference to the particularities of actual harm done.

Uncompromising to the very end, Weinrib insists in his final summary chapter that, contrary to the claims of the denigrators of formalism, his private law vision is both public and grounded in social reality[32]—but not in the

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29. *Id.*
30. *Id.* at 130.
31. *Id.* at 131.
32. *Id.* at 204–31.

conventional sense. The public nature of his formalist perspective is institutional: Judges, operating as "'justice ensouled,'"[33] articulate and legitimate the principles of corrective justice in individual cases as they arise. But only with reference to the doctrinal expression of Kantian norms. Social reality is ever present, since the dictates of Kantian right are applied today to auto accidents just as they were a century ago to horse-and-buggy injuries. But corrective justice remains immanent: Whatever the immediate context, "no extrinsic purpose intrudes."[34]

Indeed, we are reminded at the last that the forms of justice "embrace[] external interaction whenever and wherever it occurs"; their conceptual status "transcends particular social and historical contexts."[35] Weinrib has come full circle—the only purpose of private law is to be private law.

II. A CRITIQUE

A. *The Intrinsic Character of Private Law*

What is perhaps most startling to the modern ear—trained, as Weinrib notes, to think of law as a purposive enterprise—is his baseline claim, referred to above, that private law "is to be grasped only from within and not as the juridical manifestation of a set of extrinsic purposes."[36] Indeed, Weinrib is careful to distance himself not just from wealth maximizers—his principal antagonists—but from other proponents of corrective justice as well, such as Richard Epstein, whose theory of strict liability remains anchored in external designs—specifically, promoting liberty as a social goal.[37] The reflexive nature of Weinrib's formalist approach, sharply distinguishing between distributive and corrective justice and grounding the latter in timeless structural features of bipolarity, causation, and reciprocal rights and duties, seemingly underscores the hermetic character of his system.

But at bottom there is a puzzle here. After all, the system does not run on automatic pilot. His protests to the contrary notwithstanding, once Weinrib activates his Aristotelian model of corrective justice by grounding it in the Kantian conception of rights, he enters the marketplace of competing external norms. His claim for the superiority of a foreseeability-guided negligence system is inextricably linked to his corresponding claim that such a system of rights and duties—formalist though it may be from a structural perspective—optimally protects individual autonomy, or free will.

33. *Id.* at 218 (quoting ARISTOTLE, *supra* note 10, at 1132a22, but departing from cited translation).
34. *Id.* at 212. Once again, the notion of "immanence" appears to mean that the formalist model of corrective justice is inherent or embodied in Weinrib's particular conceptual version of negligence liability.
35. *Id.* at 205.
36. *Id.* at 5.
37. *Id.* at 3–4.

There is a deeper problem. The claim that law is like love and other "most significant phenomena of human life"[38] simply cannot withstand close scrutiny. Love is not a creature of the state any more than Beethoven's string quartets are. Both may serve an external purpose in that the community benefits from the aggregate pleasure derived from the experiences. But that is incidental—individuals seek lovers or attend chamber music concerts because of the spiritual enrichment gained from the experience itself, whether we label that experience joy, tranquility, bonding, or whatever.

Law is of an entirely different order. No one has recourse to law as an end in itself, rather than as a means to assert a protective claim. It is not by chance that Weinrib must meld Aristotle with Kant to produce an operative system. Weinrib is perfectly free, of course, to declare the Kantian version of individual autonomy, or protected free will, divinely inspired—as is perhaps his intent. But even so, to regard this as something apart from an external perspective on the legal system—or, to put it another way, to regard the legal system's translation of Kantian autonomy into tort or contract doctrine as anything other than purposive—seems logically insupportable.

There is a fundamental point here, almost embarrassing to make. The legal system is a creature of the state. A "tort system" exists only because at some point a sovereign developed the notion that for communal reasons it made sense to provide a mechanism for redress of individual grievances resulting from personal harm through "courts." Indeed, Weinrib offers no argument to the contrary. While he discusses at length the Aristotelian models of distributive and corrective justice, he nowhere claims that a sovereign is inexorably bound to adopt both. Presumably, a community could have accepted from day one Holmes's invitation to redress tort-type grievances exclusively through a "mutual insurance company"[39] and consequently have foregone a corrective justice system altogether.[40] A system of private law does not fall from the sky or emerge mystically from a collective will. Whether it is a response to utilitarian concerns or claims of natural right, it cannot but reflect an independent choice of external purpose.

Weinrib's distaste for purposive private law, responsive to external norms, is inextricably linked to his formalist method—linked, that is, to the centrality he attaches to coherence as expressed in his conception of bipolar correlativity

38. *Id.* at 5.

39. HOLMES, *supra* note 27, at 96.

40. In 1974, New Zealand took just such a step, abolishing tort liability for unintentional harm and replacing it with a comprehensive no-fault system. *See* GEOFFREY PALMER, COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA (1979). Similar proposals have been offered in the American tort reform literature. *See, e.g.*, STEVEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW (1989) (going beyond no-fault accident coverage to eliminate distinction between accident and disease coverage in comprehensive social insurance scheme); Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

of rights and duties. In an extended example, he offers a highly critical analysis of Justice Roger Traynor's influential enterprise-liability rationale for strict products liability in *Escola v. Coca Cola Bottling Co.*[41] In *Escola*, Traynor offered a dual rationale for holding the defendant, Coca Cola, liable without reference to fault when a soda bottle broke in the hand of the plaintiff, a restaurant worker, without explanation. First, according to Traynor, Coca Cola could better spread the loss stemming from occasional injuries due to flaws in the making of soda bottles; and second, the company was also better positioned to respond to incentives for investing in safety that resulted from having to bear the losses associated with the harm.[42]

Weinrib makes clear that he has no quarrel with either the compensation or the deterrence goal. To the formalist, the fatal flaw in the enterprise-liability rationale is its failure to pursue either of these goals in a coherent fashion. Traynor's compensation principle fails the test of coherence, since only victims of *defective*-product injuries collect (and presumably not even these victims necessarily recover, if they are sufficiently incautious). At the same time, Traynor's deterrence principle fails to provide maximum safety, since it is limited to risk that results in injury. It is these failures of coherence that are offensive to the formalist, Weinrib asserts, not the goals themselves.[43] Indeed, Weinrib is emphatic that formalism is not a political position, in the sense that it is agnostic as between tort law and any general social insurance scheme. Weinribian formalism asks only whether a system pursues its goals "coherently"; it declines to look behind the coherence to evaluate the goals themselves.[44]

At this point, one must necessarily pause and take stock; formalism's demand for coherence appears to have taken on the stature of an end in itself. But why should this be the case? More specifically, what convincing reason, other than some puzzling aesthetic principle, is there for supporting a social insurance system that pays no attention to reducing accident costs, solely on the grounds of conceptual purity? The same question can be raised, of course, with regard to the formalist model of correlative rights and duties that provides the framework for infusing Kantian autonomy into tort doctrine. It is one thing to argue the merits of a comprehensive commitment to protecting self-actualization—a substantive argument to which I will return below. But it is

41. 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring); *see* WEINRIB, *supra* note 4, at 36–38.

42. *Escola*, 150 P.2d at 441 (Traynor, J., concurring).

43. While the compensation goal is clearly truncated by its limitation to *tort* victims, it is not apparent why the deterrence goal is similarly "incoherent." The deterrence goal is aimed at providing *optimal* safety, which is in fact linked to the costs of injuries, not absolute safety.

In a larger sense, note that the pursuit of dual goals envisioned in *Escola* is not indisputably to be regarded as incoherent, even if the goals cannot be entirely satisfied in tandem or when measured against competing regulatory and compensatory models; rather, the pursuit is only "incoherent" within the terms of Weinrib's formalist definition of coherence.

44. WEINRIB, *supra* note 4, at 45–46.

quite another matter to afford priority over other substantive goals to the formalist credo of bipolar correlativity of rights and duties itself, entirely apart from the value of protecting self-actualization. This appears to be the injunction of the formalist manifesto.

To bolster his case, Weinrib might argue that there is no absolute compulsion to adopt a complementary corrective justice regime, but once adopted the whole corrective justice package is dictated by its internal logic. But why? If a society is free to forgo a corrective justice model entirely in favor of a distributive justice, New Zealand-type system,[45] why can't it adopt a mixed model of private law?

Let me sum up. Weinrib tells us that "the specifically juridical aspect of [legal] arrangements reflects formal considerations that are in some significant sense anterior to judgments about what is substantively desirable."[46] My contention has been that these "formal considerations," once linked to Kantian regard for individual autonomy, no less than utilitarian or competing corrective justice concerns, provide an animating, purposive foundation for a private law system. On the one hand, formalism as a nonsubstantive aesthetic principle is misplaced and unintelligible in a world of conflict resolution. On the other, formalism as an expression of Kantian autonomy may be distinctly intelligible, but it is necessarily an expression of the "substantively desirable."

Putting aside, then, the claims that the private law system can sensibly be understood outside the context of its responsiveness to the socioeconomic forces and cultural milieu in which it functions, I turn in the next two sections to the critical issue of how Weinrib's formalist thesis plays out in the area of private law that captures his interest—the tort system.

B. *Kantian Right in the Tort System: The Problematic Case for Bipolarity*

At the outset, a thoroughly modern critic might take umbrage at Weinrib's normative attachment to bipolarity in a world dominated by the reality of liability insurance.[47] In such a world, it might be objected, the two-party structure of tort litigation frequently is simply a facade, behind which loss spreading deflects the impact of tort awards on named defendants.[48] Weinrib's response reflects his focus, referred to earlier, on normative rather than actual loss:

> Corrective justice goes to the nature of the obligation; it does not prescribe the mechanism by which the obligation is discharged.

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45. *See supra* note 40.

46. WEINRIB, *supra* note 4, at 25.

47. On the present-day role of liability insurance, see 1 AMERICAN LAW INST., REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 55–103 (1991).

48. *See, e.g.*, SUGARMAN, *supra* note 40, at 12–18.

> Liability insurance presupposes liability, and it is that liability which is intelligible in the light of corrective justice. Nothing about corrective justice precludes the defendant from anticipating the possibility of liability by investing in liability insurance.[49]

Fair enough; but the critic might remain restive. After all, in today's world, defendants are not just nominal in the sense that they insure. Often, their liability is in reality "strict"—anathema to Weinrib—in the sense that it is based on the fictional fault of *respondeat superior* responsibility.[50] Once again, Weinrib has a rebuttal: When the employee's fault is "sufficiently close to the assigned task," he asserts in somewhat metaphysical terms, "the law constructs a more inclusive legal persona."[51] Thus, through the mechanism of a legal fiction—and Weinrib reminds us that the law is full of legal fictions[52]—the *normative* free will of the employer becomes somewhat dubiously merged with that of the employee.

If the claim for bipolarity grounded in reciprocal respect for individual self-actualization seems a bit attenuated at this point, the normative pathway becomes still more obscure when we consult the guideposts of claiming behavior. A recently published Department of Justice study of tort cases in the nation's seventy-five largest counties in 1992 reveals the extent to which tort liability has become *organizational* liability in the principal categories of accidental harm (auto accidents aside): Organizations are defendants in 96% of toxic substance cases; 99% of products liability cases; 86% of premises liability cases; and 73% of medical malpractice cases.[53] Is respect for the free will of corporate entities (self-actualizing profit maximization, presumably) on the same moral plane with normative claims for respecting individual autonomy? Are the corporate liability bearers to be regarded as simply a pass-through mechanism for protecting shareholders' normative rights?

Weinrib's sole acknowledgement of this central feature of the real world of victims and injurers—a real world in which organizational risk has become dominant—is a passing admonition in a footnote: Nothing about the conception of Kantian right, he asserts, "precludes positive law from constructing more capacious bearers of responsibility than the individual whose act was faulty."[54] This summary remark seems a long way from an adequate explanation for why one should opt for a system premised exclusively on

49. WEINRIB, *supra* note 4, at 135–36 n.25.

50. For a comprehensive discussion of the theoretical basis for respondeat superior, see PATRICK S. ATIYAH, VICARIOUS LIABILITY IN THE LAW OF TORTS (1967).

51. WEINRIB, *supra* note 4, at 187.

52. *Id.*

53. STEVEN K. SMITH ET AL., BUREAU OF JUSTICE STATISTICS, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES 4 (1995).

54. WEINRIB, *supra* note 4, at 187 n.33.

bipolarity and correlative respect for individual freedom of choice in a world characterized by enterprise responsibility for harm.[55]

C. *Kantian Right in the Tort System: The Indeterminacy of Foreseeable-Risk Analysis*

Weinrib illustrates the pervasiveness (or immanence) in private law of Kantian corrective justice through a detailed account of its realization in negligence law. And the mortar that holds together the "ensemble of concepts" including duty, proximate cause, and the standard of reasonableness is the concept of foreseeable risk.[56] As indicated earlier, it is foreseeable risk, as enunciated in cases like *Bolton v. Stone*,[57] that establishes correlativity between doing and suffering. In Weinrib's articulation:

> Under the Kantian principle of right, the position of each party must be consistent with the other's being a self-determining agent. Accordingly, the plaintiff cannot demand that the law regard as wrongful the creation of all risk; such a judgment would render action by the defendant impermissible, thus denying to the defendant the status of agent. Similarly, the defendant cannot claim immunity regarding risks that could have been modulated; that claim would ignore the effect of one's action on other agents and would treat them as nonexistent.[58]

Weinrib's distaste for systems of strict liability and no liability is clear in this exposition. His indictment of cost/benefit-driven negligence liability, which he associates with *Carroll Towing*, is equally uncompromising. *Carroll Towing* violates the fundamental principle of formalist bipolarity by focusing on utilitarian considerations, rather than the rights and duties of the immediate parties.[59] Thus, the American system has gotten it wrong—the burden of

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55. For a more detailed discussion of the role of enterprise-liability thinking in modern tort law, see Robert L. Rabin, *The Ideology of Enterprise Liability*, 55 MD. L. REV. (forthcoming 1996).

56. WEINRIB, *supra* note 4, at 145. The other elements in the "ensemble" are misfeasance and factual causation, but they are not directly related to foreseeability. Factual causation is the mechanism for the bipolar linking of "doing" and "suffering" in Weinrib's model. Misfeasance satisfies the volitional requirement of a wrongful act.

Factual causation plays a corresponding linking role in other corrective justice approaches as well, such as Epstein's libertarian-based theory of strict liability, *see* Epstein, *Theory*, *supra* note 2, at 160–89, and Fletcher's reciprocity-of-risk theory, *see* Fletcher, *supra* note 2, at 540–43, and, in fact, is also central to hybrid welfare-based theories aimed at attaining a mix of compensation and deterrence goals, such as Justice Traynor envisioned in his *Escola* opinion.

Misfeasance as a conceptual requirement has always encountered rough sledding in cases involving the creation of a dangerous condition through passive neglect. Weinrib is aware of these "situations," *see* WEINRIB, *supra* note 4, at 153–54 & n.16, but has little to say about them beyond the opaque suggestion that they "are not so much exceptions to the general rule as particular applications of it," *id.* at 154 n.16.

57. *See supra* text accompanying notes 25–27.

58. WEINRIB, *supra* note 4, at 152.

59. *Id.* at 148.

investment in safety measures has no part to play in a Kantian universe of corrective justice.

What is clear-cut to Weinrib—the utilitarian core of a negligence system sensitive to precautionary costs—seems far less determinate to me. Long before *Carroll Towing* was decided, common law judges were speaking the prose version of the Learned Hand formula without knowing it, in reviewing lower court decisions on the reasonable care issue. They were, in other words, sensitive to the "B" term in Learned Hand's famous formula.[60]

Consider a fairly typical example from the oeuvre of the consummate common law jurist, Judge Benjamin Cardozo. In *Adams v. Bullock*,[61] a young boy walked across a pedestrian overpass, swinging a long wire that made contact with the defendant trolley line's electrified overhead wire system. He suffered serious burns and electrical shock when the wires came together, and proceeded to sue the trolley company. In reversing a plaintiff's verdict and entering judgment for the defendant, Cardozo initially discussed the lack of foreseeability of injury in language that Weinrib would warmly approve. But then, in distinguishing an earlier case involving liability for uninsulated wires transmitting electricity for lighting purposes, Cardozo went on to say:

> There is . . . a distinction not to be ignored between electric light and trolley wires. The distinction is that the former may be insulated. . . . Facility of protection may impose a duty to protect. With trolley wires, the case is different. Insulation is impossible. Guards here and there are of little value. To avert the possibility of this accident and others like it at one point or another on the route, the defendant must have abandoned the overhead system, and put the wires underground.[62]

If this is not sensitivity to precautionary costs, one would be hard-pressed to explain Cardozo's intent. Yet no one would label Cardozo a closet utilitarian on the basis of this opinion and others like it. Rather, he was relying on a general fairness analysis that incorporated the notion of requiring cost-effective safeguards—along with assessing the probability of harm, of course—long before the legal economists discovered *Carroll Towing*.[63] In short, there is no inexorable connection between sensitivity to precautionary costs and social

60. See *supra* note 24.

61. 125 N.E. 93 (N.Y. 1919).

62. *Id.* at 94.

63. *Cf.* Posner, *supra* note 1, at 33–34:

> Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident. . . . If indignation has its roots in inefficiency, we do not have to decide whether regulation, or compensation, or retribution, or some mixture of these best describes the dominant purpose of negligence law.

utility—cost consciousness can be incorporated without friction into a corrective justice model.

Weinrib, of course, would simply extend his indictment of instrumentalism to Cardozo's cost-sensitive vision of negligence liability based on fairness concerns. The question that logically follows is whether sensitivity to precautionary costs, on fairness grounds, can be incorporated into a *Kantian* model. I am at a loss to see why not. Weinrib goes no further in defining the protective space necessary to promoting Kantian self-actualization than to proscribe strict liability and no-liability systems. As far as I can tell, this leaves the test of reasonable care indeterminate, as long as it meets the formalist constraint of correlative rights and duties. The pride of place afforded to the unconstrained concept of foreseeability of risk—indifferent to precautionary costs grounded in interpersonal fairness considerations—seems problematic.

If the American system gets low marks from Weinrib for its embrace of *Carroll Towing* reasonableness analysis, it receives his ringing acclaim for Cardozo's majority view in *Palsgraf*, addressing those other mainstays of the "doctrinal ensemble," duty and proximate cause.[64] Once again, foreseeability is the keynote theme. If a negligent defendant were to be held responsible for all of the direct harm associated with its act—as in the famous *Polemis* case,[65] where the defendant was held liable for unanticipated but "direct" fire damage from the negligent dropping of a plank into the hold of a ship—then the defendant's status as a free agent would be compromised. The bulwark of protection for individual autonomy is, once again, the requirement of foreseeability of harm.

As it happens, Weinrib is a rather selective reader of *Palsgraf*. Cardozo did in fact deny liability because the plaintiff was outside "the orbit of the danger as disclosed to the eye of reasonable vigilance"[66]—Cardozo's rather baroque manner of saying that a defendant's duty only extends to foreseeably endangered plaintiffs, not a passenger on the other end of the station platform. But Cardozo went on to say that *proximate cause* is a separate question altogether: "We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary" (citing, among other cases, *Polemis*).[67] This language is impossible to reconcile with Weinrib's certitude that Cardozo has opted for a comprehensive foreseeability approach:

> Duty of care and proximate cause, in Cardozo's approach, are the headings we use to subsume the particularity of the actual injury under the generality of risk. Duty addresses the question of whether

64. Palsgraf v. Long Island R.R., 162 N.E. 99, 99–101 (N.Y. 1928).
65. *In re* Polemis, [1921] 3 K.B. 560.
66. *Palsgraf*, 162 N.E. at 100.
67. *Id.* at 101.

> the plaintiff, as the person in fact affected, is to be regarded as within the class foreseeably affected by the defendant's negligence. Proximate cause performs a parallel function with respect to the injury and the process through which the harm comes into being.[68]

There is more at stake here, however, than reading Cardozo for what he actually says. Rather, I would suggest that a comprehensive foreseeability principle has never been the touchstone for defining duty and proximate cause in Anglo-American law—the wide variety of no-duty and limited-duty rules at common law, such as the privity limitation in defective-product cases and the assumed-risk defense in workplace accident situations, underscores this point from a historical perspective.[69]

More critically, in my view, foreseeability once again, in these situations of attenuated harm, fails to offer clear guidelines for deciding on the *normative* implications of Weinrib's Kantian autonomy principle. Consider, for example, the case of bystander emotional distress. A mother suffers sustained serious trauma from witnessing the running down of her child by a negligent driver. Put aside arbitrary limitations like the "zone-of-danger" test[70] or the *Dillon v. Legg* factors,[71] adopted by virtually every jurisdiction that has faced this question. Surely, foreseeability of harm exists. But certainly, in evaluating the driver's *ex ante* expectations, foreseeability would exist as to the child's lifelong nanny or inseparable friend as well. Is there no categorical limit under the Kantian right? Or are *all* bystanders asserting "derivative" claims and thus outside the bipolar structure of correlative rights and duties dictated by formalist analysis? An abstract commitment to respecting Kantian self-actualization offers no formula for answering these questions.

More generally, we live in an interconnected world of "ripple effects" from accidental harm.[72] When serious personal injury occurs, it is "foreseeable" not just that a third party will be unfortunate enough to witness it, but that loved

68. WEINRIB, *supra* note 4, at 165 (citations omitted).

69. *See* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 928 (1981) (arguing that "efforts to establish the early vitality of a comprehensive fault principle are seriously flawed"). Indeed, it would require a breathtaking act of historical revisionism to assert that the Anglo-American system reflected a commitment to principles of Kantian right. Until the mid-nineteenth century, there was nothing vaguely resembling a foreseeability-based fault system.

In the context of breach of duty, even today, as I have discussed, Weinrib asserts that American tort law labors under the retrograde influence of cost/benefit-constrained negligence liability, represented by the *Carroll Towing* approach. *See* WEINRIB, *supra* note 4, at 148. Admittedly, however, Weinrib disavows any claim that the courts always "get it right." *See id.* at 13, 195 n.57.

70. *See, e.g.*, Bovsun v. Sanperi, 461 N.E.2d 843, 848 (N.Y. 1984) (adopting zone-of-danger test as "alternative" to rule of *Dillon v. Legg*).

71. In Dillon v. Legg, 441 P.2d 912 (Cal. 1968), the California Supreme Court adopted an influential set of limiting factors based on proximity to the accident scene, plaintiff's close family relationship to the injury victim, and contemporaneous observation of the accident. *See id.* at 920.

72. *See generally* Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1526 (1985) (arguing that foreseeability "provides virtually no limit on liability for nonphysical harm").

ones will suffer loss of companionship or, in the case of death, loss of economic and emotional sustenance. When negligent professional services are rendered, such as an improperly executed will or an ineptly conducted audit, it is "foreseeable" that a variety of reliant third parties will suffer economic loss. The concept of foreseeability, informed by Kantian protection of autonomy, offers no bright-line guidance on the scope of correlative rights and duties in these situations.

In a passing effort to address these concerns, Weinrib again invokes Cardozo's *Palsgraf* opinion for the principle that the plaintiff must sue "in her own right . . . and not as the vicarious beneficiary of a breach of duty to another."[73] But the meaning of "right" in these situations, which Weinrib attempts to refine by reference to injuries "such as personal integrity or a proprietary entitlement,"[74] is anything but self-evident.

Perhaps the indeterminacy of this foreseeability/Kantian autonomy analysis can be summed up by coming at Weinrib's admired *Palsgraf* opinion from still another perspective—that of factual characterization. Suppose Cardozo had focused not on the railroad attendant's dislodging of the package as the salient negligent act, but on the railroad maintenance crew's failure adequately to secure the weighing scale, which actually injured the plaintiff, on the platform. Then there would have been no foreseeable plaintiff issue, since a passenger standing next to the scale would clearly have been the most likely victim. Rather, the question would have been whether the toppling of the scale by an explosion was a foreseeable *type* of injury from negligently failing to maintain the weighing scale. Let us assume that disturbances of this kind occurred every now and then on the platform, so that a plausible case could be made for foreseeable risk from such a fragile weighing mechanism. Presumably, the plaintiff now recovers—although her injury is no more foreseeable to the excessively diligent station attendant than before. Does the applicability of the Kantian self-actualization norm turn entirely on how we put the pieces of the factual puzzle together?

To recapitulate, in this section I have argued that, contrary to Weinrib's view, the sensitivity to precautionary costs implicit in the American approach to negligence law is consonant with an interpersonal fairness perspective as well as a social utility approach to fault-based liability. Moreover, in terms of promoting interpersonal fairness, there is no inexorable reason to opt for a foreseeable-risk principle over a probability-of-harm approach that is sensitive to precautionary costs—even if one grounds fairness in protection of individual autonomy. Thus, the relationship between Weinrib's Kantian autonomy and foreseeability as a guiding norm for redressing accidental harm is problematic. The indeterminate nature of the foreseeability concept is further underscored,

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

74. WEINRIB, *supra* note 4, at 134.

I have argued, when one analyzes its applicability in a variety of attenuated-harm scenarios that arise as "ripple effects" of negligent conduct—and that are addressed through the doctrinal categories of duty and proximate cause.

In this section, I have confined my discussion primarily to examining Weinrib's claims for the ineluctable bond between protection of Kantian autonomy and a negligence system of rights and duties linked to the principle of foreseeable risk. But in the final analysis, if Weinrib is to engage a wider audience than just those interested in law for law's sake, the question is whether his discourse resonates with the justice concerns raised by the contemporary performance of the private law system.[75] It is to these concerns that I turn in the following part.

III. A POLICY PERSPECTIVE

I subscribe to the maxim that it is not the province of a reviewer to tell an author what book he should have written. But the *ex cathedra* tone of this volume is bound to limit its appeal. In a way, that is unfortunate. If one gets beyond the persistent assertion that formalism is answerable to none but its own claim to pristine virtue, Weinrib has produced a work that does in fact create its own private law universe, sensitive to the synthetic possibilities of philosophical thought and to nuance within tort doctrine. That is no minor accomplishment.

But an arid universe is not likely to attract many inhabitants. On this score, the principal shortcoming in Weinrib's account, in my view, is not so much its insularity as its lack of moral vitality. The notion of Kantian right that is meant to animate the system is curiously lacking in animation. Like the bipolar structure of correlative rights and duties that it is meant to infuse with normative content, it too is highly conceptual in character. We are never provided with an argument for *why* present-day concerns about compensation for injury victims, predictability for risk producers, safety enhancement for society-at-large—or, for that matter, cost-effectiveness and shared perceptions of fair dealings—are less critical matters of concern for a system of private law than protecting individual autonomy. And recall, as I discussed earlier, that this claim for the primacy of protecting individual autonomy is made in the setting of today's social structure, which features risk-production dominated by organizational entities and widespread loss and liability insurance. In this

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75. There is also an independent question of whether he addresses issues of salience to those engaged in the ongoing discourse among moral philosophers of law. There has been considerable recent attention to that question, based on Weinrib's earlier work. *See, e.g.*, Symposium, *Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 IOWA L. REV. 403 (1992); Symposium, *Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 579 (1993). A particularly interesting critique is Stephen R. Perry, *Professor Weinrib's Formalism: The Not-So-Empty Sepulchre*, 16 HARV. J.L. & PUB. POL'Y 597 (1993).

Apart from what might be of interest in my analysis in the preceding part of this Review, I leave further reflection from the moral philosopher's perspective to other reviewers of the present volume.

milieu, more seems required in the way of normative force than magisterial claims for formalist coherence and protection of individual self-actualization.

Beyond the striking lack of vitality of Weinrib's substantive claims, his insistence on the insular character of private law leads to a second major shortcoming of his analysis that is bound to limit the book's appeal. Weinrib is, by design, totally disengaged from the lively policy debate that rages over the present performance of the tort system. Let me be more concrete by discussing briefly three issues of fundamental current concern: costs, institutional capacity, and valuation of harm.

A. *Costs*

A decade ago, a nationwide study of tort claims conducted by a well-respected research institute estimated that injury victims received only about one-half of the total amount paid by defendants in tort suits.[76] The figure ranged from 52% of total expenditures in auto cases to just 43% in all other accident cases.[77] The study further estimated that the legal fees and expenses of injury victims constituted just under one-third of the total compensation paid to plaintiffs, and that defendants' legal fees and expenses averaged about 28% in non-auto cases and slightly over one-half that amount in auto cases.[78] The study found that, at the time, defendants' legal fees were growing at an annual rate of 15% in non-auto cases and 6% in auto cases.[79] Even under the conservative assumption that the rate of growth has leveled off in the ensuing years, no one has suggested that the overall administrative costs of the system have diminished. Tort law is, by any measure, an expensive way of allocating responsibility for accidental harm.

Weinrib's private law universe is indifferent to these costs. They play no role in determining the bipolarity of the private law model; no role in establishing the correlativity of normative, as contrasted to actual, gains and losses; and no role in the abstract assessment of individual freedom of choice. In distinguishing sharply between the normative and the actual—that is, as discussed earlier, in focusing exclusively on the *conceptual* correspondence of tort liability rules and Kantian/Aristotelian precepts—Weinrib has insulated himself from the need to address the substantial lawyering and expert witness costs in a contested toxic harm, product defect, or medical malpractice case, or, for that matter, the litigation expenses in proving fault and intangible loss in any high-stakes accidental harm controversy.[80] If private law is answerable

76. *See* JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 68 (1986).

77. *Id.* at 74.

78. *Id.* at 70.

79. *Id.* at 75.

80. On the salient characteristics of high-stakes accidental harm litigation, see DEBORAH R. HENSLER ET AL., TRENDS IN TORT LITIGATION 32–33 (1987). For a concrete illustration of how lawyering and expert

only to itself, its merit is solely a function of internal consistency—even though any meaningful definition of the individual autonomy that Weinrib aspires to protect would seem to be inextricably related to the actual impact of liability rules on victims and injurers.

B. *Institutional Capacity*

My reference above to high-stakes litigation—and, in particular, to toxics, products, and medical malpractice cases—introduces systemic concerns beyond dollars and cents. Are common law judges and lay juries adequate to the task of rationally sorting out conflicting expert arguments in complex scientific and technological disputes? Is the common law system, in its traditional form, capable of handling mass tort claims pitting thousands of similarly aggrieved litigants against a multitude of risk-creating defendants?

These questions raise fundamental policy issues—one might appropriately call them philosophical issues—of institutional design.[81] Indeed, a thoroughgoing institutional capacity critique challenges the fundamental assumptions of a corrective justice model wedded to bipolarity and to resolving claims through traditional retail techniques. But these concerns are again beyond the ken for Weinrib, because they are a matter of indifference to the formalist model of private law. Bipolar correlativity is the quintessential attribute of Weinrib's version of corrective justice. That thousands of related claims might push the system to gridlock is beside the point. Judges exercising their traditional common law role are "justice ensouled," to use his revealing imagery. Their capacity for cutting through the causal complexities of establishing probabilistic harm and attending to the often-conflicting interests of distinct subgroups of injury claimants is taken for granted. Having seen one asbestos case, Weinrib has seen them all.

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witness costs can categorically affect an area of tort litigation, see Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992).

81. *Compare* Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990) (arguing that regulatory systems are not clearly superior to judiciary in dealing with issues of "public risk" that lead to personal injury claims) *with* Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985) (asserting that judicial system is institutionally incapable of making sensible "public risk management" decisions in tort context). For discussion of the ethical dilemmas raised by mass tort cases, see John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994). On the role of experts in scientifically complex tort litigation, see Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993); Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1 (1993). On the handling of mass tort claims under the traditional adversary process, see Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 YALE L.J. 813 (1989) (reviewing PETER SCHUCK, AGENT ORANGE ON TRIAL (1989)).

C. *Valuation of Harm*

Weinrib's single-minded preoccupation with doctrine gives his discussion an odd cast for the observer of the contemporary intellectual and political dialogue over tort issues in the United States, where basic questions of valuing harm have commanded so much attention.[82] Should the system recognize claims based on genuine fear of contracting a disease—say, "cancerphobia" from a toxic exposure, or emotional trauma from an AIDS exposure—when there is no reasonable medical basis for concern?[83] Should pecuniary value be assigned to intangible loss such as past and future pain or loss of enjoyment of life in cases of accident-related death or permanent impairment of consciousness?[84] Should the tort system continue to exercise virtually no control over dissimilar awards of intangible loss in "like cases" (assuming meaningful categories can be defined), despite fairness and predictability arguments to the contrary?[85] Should the increasingly important collateral contributions of nontort sources be recognized in valuing the economic-loss component of physical injury claims?[86] These issues of assessing and monetizing harm are not simply items on today's tort reform agenda; rather, they raise concerns that go to the fundamental character of tort redress.

By positing his theory of Kantian autonomy on normative loss, rather than actual loss, Weinrib in effect writes off these questions as matters of no moment. Whatever the real-world impact of damage awards on individual autonomy, let alone on social welfare, these concerns do not penetrate the normative shell of Kantian self-actualization. Once harm has been identified as a conceptual matter, the demands of formalism are satisfied.

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82. *See, e.g.*, David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, and references in "Notes and Questions" thereafter, *in* PERSPECTIVES ON TORT LAW 349 (Robert L. Rabin ed., 4th ed. 1995).

83. *Compare* Mauro v. Raymark Indus., 561 A.2d 257 (N.J. 1989) (holding that plaintiff may recover for enhanced risk of contracting disease only on showing that plaintiff will more probably than not contract disease) *with* Potter v. Firestone Tire & Rubber Co., 863 P.2d 795 (Cal. 1993) (holding that plaintiff may recover for fear of cancer only upon showing that fear stems from knowledge, supported by expert testimony, that cancer is more likely than not to develop); *see also* K.A.C. v. Benson, 527 N.W.2d 553 (Minn. 1995) (holding that patient of HIV-positive gynecologist could not recover for infliction of emotional distress, absent allegation of actual exposure to virus).

84. On loss of enjoyment of life, compare McDougald v. Garber, 536 N.E.2d 372 (N.Y. 1989) (Wachtler, C.J.) (requiring some degree of consciousness as prerequisite to recovery for loss-of-enjoyment-of-life damages) with *id.* at 377 (Titone, J., dissenting) (concluding that awareness should not be precondition to recovery for loss of enjoyment of life). On assigning pecuniary value to pain and suffering, see generally Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219 (1953).

85. *See generally* James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171 (1991).

86. *See generally* Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75 (1993); John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478 (1966).

IV. A Concluding Word

The brief exposition, in the previous part, of some of the principal intellectual and political crosscurrents on the present-day agenda of tort observers brings us full circle. If private law is viewed as an end unto itself, like lovers pursuing affairs of the heart in Weinrib's imagery, it is not likely to take notice of the surrounding world. But here, I suspect, even Weinrib would agree that a striking image can be carried too far. For lovers generally relish the inattention that they are reciprocally afforded by others—but the author of a comprehensive, carefully crafted theory of private law is not likely to crave a similar fate. Unfortunately, my guess is that Weinrib's single-minded pursuit of a closed universe of private law—indifferent to the purposive concerns about predictability, accident reduction, and compensation that animate present-day debate among both tort scholars and reformers of all stripes—is likely to limit the appeal of this idiosyncratic but interesting volume.