

## Justification in Private Law

Kenneth W. Simons

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## BOOK REVIEW

### JUSTIFICATION IN PRIVATE LAW

*Kenneth W. Simons*†

THE IDEA OF PRIVATE LAW. By *Ernest J. Weinrib*. Harvard University Press, 1995. Pp. x, 237.

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#### INTRODUCTION

In a series of articles published during the last decade, Professor Ernest Weinrib has developed a highly distinctive perspective on corrective justice and private law. His new book, *The Idea of Private Law*, refines and crystallizes these earlier arguments.

In many ways, the book is impressive. It contains intricate, careful, and often insightful analysis of some of the most basic issues in legal theory in general and tort theory in particular. The book is also courageous, and even defiant. Over the years, a wide range of schol-

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† Professor of Law, Boston University School of Law. An earlier version of this review was presented at the Program of the Society for Systematic Philosophy, Eastern Division Meeting, American Philosophical Association, December 27, 1994. I thank Eric Blumenston and Wendy Gordon for helpful comments, and Kurt Dumaw and John Mills for their research assistance. I also thank Ernest Weinrib for offering his thoughtful reactions to many of the points in this review. If neither of us has convinced the other, it is not for lack of trying. I appreciate the financial support of the George Michaels Faculty Research Fund.

ars have criticized Weinrib's views,<sup>1</sup> some with extraordinary vigor. But Weinrib has stubbornly persisted in arguing for a formalist approach to law while rejecting major modern jurisprudential perspectives.

Legal formalism, for Weinrib, requires that law be strongly autonomous—that legal doctrines and concepts be understood from an “internal” perspective, not from any “external” perspective, such as politics, economics, or morality. The internal perspective requires a coherent set of justifications appropriate to the formal characteristics of the phenomenon being explained. Thus, in private tort law, formalism requires a coherent explication of the relationship between the doer and the sufferer, because this relationship is the phenomenon that tort law explains. On the formalist view, it is irrelevant whether legal doctrines are socially desirable. As Weinrib bluntly says, society might be better off with a no-fault system than with a system of private tort law that lives up to Weinrib's formalist ideal of justificatory coherence.<sup>2</sup>

Weinrib's arguments in *Private Law* are lucid, and often elegant. Weinrib illuminates a number of areas of legal doctrine. He draws a clear line between corrective and distributive justice, explaining why corrective justice need not presuppose the distributive justice of background entitlements.<sup>3</sup> He takes some familiar areas of doctrine, such as tort and unjust enrichment, and paints them in new and contrasting colors. He also presents some original and intriguing conceptual distinctions, such as accidental versus intrinsic unity,<sup>4</sup> factual versus

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<sup>1</sup> See, e.g., JULES L. COLEMAN, RISKS AND WRONGS 200-11 (1992); Joseph Raz, *Formalism and the Rule of Law*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 309 (Robert P. George ed., 1992); Allan C. Hutchinson, *The Importance of Not Being Ernest*, 34 MCGILL L.J. 233 (1989); Ken Kress, *Coherence and Formalism*, 16 HARV. J. L. & PUB. POL'Y 639 (1993); Dennis Patterson, *The Metaphysics of Legal Formalism*, 77 IOWA L. REV. 741 (1992); Stephen R. Perry, *Professor Weinrib's Formalism: The Not-so-empty Sepulchre*, 16 HARV. J. L. & PUB. POL'Y 597 (1993); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 475-88 (1992); John Stick, *Formalism as the Method of Maximally Coherent Classification*, 77 IOWA L. REV. 773 (1992); Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 631-64 (1992); Leslie Green, *Law's Rule*, 24 OSGOODE HALL L.J. 1023, 1030-34 (1986) (book review).

<sup>2</sup> ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995) [hereinafter *PRIVATE LAW*]. As Weinrib explains in this new book, formalism is unconcerned with the desirability of any goals. Although he believes that compensation for injuries cannot serve as a coherent goal of tort law, he also believes that it could be a valid justification if the actual doctrines and institutions happened to fit that justification, e.g., by covering nontortious injuries. In this sense, formalism would not object to replacing tort with a social insurance scheme. *Id.* at 45-46.

For an earlier statement of this view, see Ernest Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37, 40 (1983) [hereinafter Weinrib, *Toward a Moral Theory*].

<sup>3</sup> *PRIVATE LAW*, *supra* note 2, at 79-80.

<sup>4</sup> *Id.* at 34-36.

normative gain (and loss),<sup>5</sup> and correlatives operating as an articulated unity versus correlatives operating as an analytic reflex.<sup>6</sup> But this book will not satisfy Weinrib's critics. Weinrib continues to say little about the desirability of a formalist account of law, and the formalist strictures that he insists are necessary to the coherence of private law remain extremely severe.

Perhaps there is a middle ground. I suggest that a modest version of Weinrib's approach is more defensible. One of the great strengths of Weinrib's argument is its trenchant criticism of much contemporary analysis of private law. Some of that analysis, Weinrib rightly insists, belittles the independence of legal doctrine and blurs its distinctive normativity. A more modest version of Weinrib's thesis will still have the power to undermine these contemporary arguments. But Weinrib's actual thesis defends an extremely narrow conception of acceptable justifications in private law generally and of corrective justice in particular. Legal theorists and judges are more likely to accept a more modest version. Additionally, a modest version is more consistent with actual legal practice and doctrine.

To telegraph my conclusion, very briefly, the more modest version emphasizes the rights-based nature of private law, permits pluralistic grounds or justifications for the scope of rights, and accepts the teachings of moral theory insofar as those teachings support the distinctive role and structure of legal rights. This proposal preserves the most valuable part of Weinrib's analysis, by recognizing the autonomy of legal doctrine. At the same time, the proposal escapes some of the more powerful criticisms of Weinrib's views by endorsing a more realistic and more attractive understanding of legitimate justification in law.

In this review, rather than discuss Weinrib's conceptual approach in the abstract, I will structure my analysis around four concrete examples that help illustrate some important features of Weinrib's thesis. The examples suggest that Weinrib's analysis often reaches results that are inconsistent with contemporary law, and that are not morally defensible. I will then try to show how these problems reveal serious difficulties with Weinrib's deeper theory—a formalism that justifies only an extraordinarily narrow type of private law, and, more specifically, a corrective justice theory that does not justify tort doctrine adequately.

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<sup>5</sup> *Id.* at 115-20.

<sup>6</sup> *Id.* at 123-26.

I  
FOUR EXAMPLES

This review begins with four concrete examples, and then explains briefly why the examples are problematic for Weinrib's theory. The remainder of the review will flesh out that explanation.

The first example is mundane. Christine is driving her automobile cautiously on a highway, obeying all traffic rules. But, despite her caution, she causes an accident. As explained below, Weinrib's analysis commits him to the view that Christine should be found negligent, because she has created significant risks to others. The view of tort law is different: Christine is not liable, even though she has created risks to others. She is not liable because it would be too burdensome for her to avoid those risks by abstaining from driving altogether.

The second example is more exotic. Holly is fond of wild boars. She keeps one in her yard. Unfortunately, it escapes and mauls a neighbor, Nick. Nick might be able to prove that Holly failed to use reasonable care in keeping the boar safely within her yard. Or he might be able to prove that it is wrongful to keep a boar at a private residence at all, given the inevitable risks that such an animal poses. But what if Nick cannot prove either of these things? Suppose Holly has taken extraordinary measures to keep the boar safely confined, but her precautions surprisingly fail. And suppose the risk of harm is insufficient to permit neighbors or the government to enjoin Holly from keeping the boar.<sup>7</sup> Under traditional tort law Nick will still be able to recover damages. The law will impose liability on the basis of *strict* or *non-fault* liability, not negligence, on the ground that anyone who chooses for her own benefit to introduce a dangerous animal into the community should bear the associated costs. Weinrib would probably agree that Holly should be liable, but, in order to do so, he must argue that Holly is negligent because Weinrib does not believe that corrective justice principles can ever support *strict* liability in tort.

The third example involves a question of excuse. Edward is driving when he suddenly encounters an emergency: a young child darts into the middle of the street. Edward has a split second in which to decide whether to swerve to the left or to the right. He swerves to the left; but, in doing so, he seriously damages someone's car. If he had swerved to the right, he would have caused no harm at all. The law considers the emergency a partial excuse, and gives Edward considerable leeway: he will not be liable for simple negligence, but only for being rash or reckless. But Weinrib would, I believe, reject this ex-

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<sup>7</sup> Assume, similarly, that public authorities have not prohibited the keeping of such an animal by regulation and have no right to an injunction under private law doctrines such as public nuisance.

cuse, because Weinrib broadly rejects any legal justifications that are one-sided, i.e., that pertain to only one of the parties to the interaction.

The fourth example is based on the famous case of *Vincent v. Lake Erie*.<sup>8</sup> A storm suddenly arises. Bill decides to tie his boat to a dock, and keep it tied there, rather than risk losing his boat in the storm. The boat damages the dock. (No reasonable precaution by Bill could have avoided the damage.) Must Bill compensate Delbert, the dock owner, for that damage? The *Vincent* court held that he should. But why? After all, Bill acted reasonably in deciding to dock.

American tort law holds that the boat owner, although acting without fault, is, in effect, strictly liable for this harm. But, again, Weinrib believes that corrective justice principles cannot justify strict liability. As a result, he is forced to invoke a very different theory, one of "unjust enrichment," to account for liability in this case.

These examples reveal some serious problems with Weinrib's approach. The example of cautious driver Christine implies that Weinrib's analysis justifies an extraordinarily broad type of negligence liability, whenever an activity or product creates nontrivial risks. The example of Holly and the wild boar supports the proposition that fairness or corrective justice principles can sometimes justify strict liability. Yet Weinrib denies this proposition. The example of Edward suggests that asymmetrical justifications—justifications that directly pertain to only one party to a transaction—can sometimes be defensible. Again, Weinrib denies this. Finally, in order to explain the liability of the boat owner in *Vincent*, Weinrib must make a difficult, and ultimately unpersuasive, argument. He must argue that the boat owner, Bill, is liable because the damage to the dock somehow represents a gain to Bill that would unjustly enrich Bill if he were not required to pay for it. A more plausible argument, I believe, is that the damage is a straightforward loss to Delbert, the dock owner. Although it was reasonable under the circumstances for Bill to bring about that loss to Delbert, justice requires that Bill be strictly liable for that loss.

## II

### NEGLIGENCE AND RISK-CREATION

Let me turn to a more detailed analysis of these examples. In the first case, Christine is driving her automobile cautiously on a highway, obeying all traffic rules. Assume that she is not negligent, as judged by the standards of reasonable care that American tort law imposes. Nev-

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<sup>8</sup> *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910). My account in the text simplifies the facts, but in ways that remain true to the court's rationale for its holding.

ertheless, she might well cause an accident; even careful drivers create risks. In Weinrib's view, any person who creates significant risks to others should be considered negligent and subject to liability if harm results, quite apart from the cost or burden of taking a precaution to avoid prospective harm. Weinrib calls this view the "English rule" of negligence, in contrast to the American "Learned Hand test," under which courts do consider the cost or burden of taking a precaution as well as the benefits (i.e., the risks that taking a precaution would avoid).<sup>9</sup>

Thus, if Christine's cautious driving nevertheless causes someone harm, Weinrib's analysis suggests that she should be liable for negligence.<sup>10</sup> His analysis similarly implies that legal liability should attach to an enormous range of social activities that create risk even when conducted carefully such as driving, riding bicycles, or providing medical services. This would be a remarkable expansion and transformation of tort law, and a result that he would undoubtedly reject.

Weinrib would respond, one suspects, that a cautious driver does create some risks to others, but that those risks are not sufficiently "substantial" to make the actor negligent. But the problem goes deeper. For Weinrib also argues that the only relevant factor in assessing an actor's negligence is the risks she poses to others, not the burdens to herself or to society of her taking a precaution and avoiding those risks.<sup>11</sup> So Weinrib considers it irrelevant how difficult or costly it would be for Christine to avoid causing accidents. (By hypothesis, the only practical way she could avoid such accidents is by not driving at all.) Thus, the problem would arise no matter what threshold we set for "substantial" risk. If the threshold is relatively low, then virtually every driver who causes harm would be liable, regardless of the

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<sup>9</sup> PRIVATE LAW, *supra* note 2, at 148. It is not entirely clear that this is the English view. Stephen Gilles asserts that the English courts do consider precaution cost, though they differ from American courts in an important respect. English courts find an actor negligent only if the benefits of taking a precaution are *much* greater than, or *greatly* disproportionate to, the costs; American courts find an actor negligent so long as the benefits are greater than the costs. Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1026 n.28 (1994).

<sup>10</sup> *But cf.* RESTATEMENT (SECOND) OF TORTS § 520 cmt. i (1977) (stating that driving is not an abnormally dangerous activity, "notwithstanding the residue of unavoidable risk of serious harm that may result even from [ ] careful operation," because automobiles have come into general use).

<sup>11</sup> At times, to be sure, Weinrib equivocates on the question of whether the cost of taking a precaution ("B" in the Learned Hand "B < PL" test) is irrelevant, or instead is simply a minor factor in most cases. Compare PRIVATE LAW, *supra* note 2, at 150 n.9 (suggesting that "B" should not count at all) *with id.* at 149-150 (suggesting that cost of precaution is irrelevant for substantial risks, and that cost is relevant for small risks, but only if the cost is "considerable"). But it is not clear how Weinrib's underlying justification for deemphasizing costs of precaution permits him to give them any weight at all. For he considers the saving of such costs a mere private benefit to the injurer, a surplus that the injurer has no right to appropriate at the expense of the victim. *See id.* at 148.

degree of attention and care she has shown. If, on the other hand, the threshold is relatively high, then drivers who create lower levels of risk but could avoid the risks relatively easily would not be liable.<sup>12</sup>

Why would Weinrib argue for this implausible view of negligence? Consider some of the reasons that he offers.

First, Weinrib argues that the law should not follow the Learned Hand test in considering the private burden that the actor must personally incur to avoid risks to others because:

The [Learned Hand] test centers on whether the defendant who does not take precautions gains more *ex ante* than those exposed to the risk lose. It thus pivots not on the equality of the parties to the transaction but on the surplus that one party realizes at the expense of others.<sup>13</sup>

From the standpoint of corrective justice, Weinrib argues, the defendant has no right to appropriate such a benefit at the expense of others. Thus, if Christine were to be found nonnegligent, she would be permitted to obtain a private benefit—the privilege of driving, which creates unavoidable risks—at the expense of potential victims

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<sup>12</sup> Consider a driver who, to win a bet, agrees to drive with his eyes closed for ten seconds on an apparently deserted highway late at night. Here, to be sure, the “cost” of the precaution takes the form of the loss of a desired benefit, not the form of a financial expenditure or of personal effort or exertion. But both traditional and economic accounts of the Learned Hand test do consider lost benefits as a relevant factor in determining negligence. See RESTATEMENT (SECOND) OF TORTS §§ 291-92 (1977) (considering “utility” of the act or the manner in which it is done); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972) (explaining that in referring to the “burden of taking precautions,” Hand meant the cost of taking precautions, which “may be the cost of installing safety equipment or otherwise making the activity safer, or the benefit forgone by curtailment or eliminating the activity”).

Indeed, whether the requisite threshold is high or low, it is not the case that an injurer should automatically be absolved of negligence liability whenever the risks, considered alone, are below the threshold. Consider two more cases. The first is mundane: throwing a banana peel on a public street in broad daylight. The probability of injury here is pretty small, since most people will see the banana peel, and someone is very likely to pick it up and remove the danger. Still, the act is negligent, for it has no social value and can be avoided very easily. Second, we require a very high degree of care in operating nuclear power plants, notwithstanding the very low probability of an accident. If the substantiality of a risk is measured only by the probability of a harm, not its severity if it occurs, then a case like this might fall below Weinrib’s threshold of potential negligence liability. But it is surely unacceptable to excuse nuclear power plant operators from the obligation to take care. (It is unclear whether Weinrib believes that the magnitude of the risk should be measured only by probability. Most of his examples involve differentials in probability. On the other hand, he also describes abnormally dangerous activities as involving an unusually severe loss rather than an unusually high likelihood of a loss. See PRIVATE LAW, *supra* note 2, at 189).

Weinrib does suggest that cost, though irrelevant when the risk is substantial, is relevant when the risk is small. But even in this last case, he says, the cost must be “considerable” in order to justify treating the actor’s conduct as non-negligent. *Id.* at 149-50. Again, however, it is unclear why balancing cost and benefit is suddenly justifiable once the risk is below a defined threshold, or if it is, why it is not also justifiable above that threshold.

<sup>13</sup> PRIVATE LAW, *supra* note 2, at 148.



of those risks. Weinrib puts the point nicely: "To refuse to mitigate the risk of one's activity is to treat the world as the dumping ground for one's harmful effects, as if it were uninhabited by other agents."<sup>14</sup>

This is an important argument. It overlaps with the familiar claim that injurers should not be permitted to "externalize" costs on others, a claim that has both moral and economic dimensions.<sup>15</sup> But the argument needs careful scrutiny and serious qualification. In a world of interacting agents, who is the "dumper" and who is the "dumpee"? Christine, as a driver, creates risks to other drivers or to pedestrians, but the latter groups obviously expose themselves to risk by driving or by walking near the road. One can, of course, distinguish "dumper" from "dumpee" according to a number of possible criteria such as whether an agent has exposed himself or others to risk; whether the agent has imposed more than some understood background level of risk; or whether the risks, or the benefits, are nonreciprocal. But the possibility of such distinctions also makes Weinrib's original argument for always ignoring the burden of precaution at least overstated, if not beside the point.

Another problem with this argument is that it confuses the concept of negligence with the concept of strict liability. Even if we were to conclude that an actor should not be permitted freely to appropriate a private benefit and to impose the costs on others, and even if we could identify clearly a category of unilateral impositions, we might hesitate to impose on the actor a duty to mitigate or avoid all such impositions. Suppose we conclude that Christine has unilaterally imposed costs on pedestrians. It does not follow that she should have acted differently. Instead, we might conclude that she should pay for the harm she has caused. We might permit the activity of nonnegligent driving (i.e., we would not enjoin that activity, even if an injunction were feasible), but we would simply require the actor to pay its costs.<sup>16</sup>

A second reason underlying Weinrib's endorsement of the English approach to negligence appears to be as follows. Weinrib seems to assume that any approach that considers the cost or burden of taking a precaution as well as the benefits is necessarily an instrumental, utilitarian approach.<sup>17</sup> Furthermore, he seems concerned that this

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<sup>14</sup> *Id.* at 152.

<sup>15</sup> See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 613-16 (1985).

<sup>16</sup> For a further discussion of the distinction between negligence and strict liability, see *infra* part III.

<sup>17</sup> PRIVATE LAW, *supra* note 2, at 148 ("As its role in economic analysis shows, the Learned Hand test aims not at achieving corrective justice between the plaintiff and the defendant, but at maximizing the aggregate wealth of those affected by the risk-creating act.").

cost-benefit approach fails to take seriously the idea that the victim has a right against the injurer. Weinrib's assumption is understandable, and his concern is legitimate. Many commentators who argue that the actor's burden of precaution is relevant to whether she is negligent indeed believe in an economic approach to law.

Yet there is no necessary connection between considering the burden of precaution and endorsing the economic approach. American courts have, for many years, recognized that precaution cost or difficulty is relevant without endorsing an economic approach to law. It is striking that courts typically give little or no attention to the deterrent effect of a liability rule; such inattention suggests that they do not always employ the Learned Hand test for the purpose of creating optimal economic incentives.<sup>18</sup> Moreover, recognizing precaution cost is consistent with a number of different possible fairness rationales for negligence liability. For example, one fairness rationale is that an injurer is negligent when he fails to respect the interests of others as much as he respects his own interests.<sup>19</sup> Then the cost of precaution could be relevant to negligence simply because the injurer, in his own *self*-regarding behavior, would consider the cost of precaution. People often create risks of injury to themselves when they consider the burden of avoiding the risks too high. (To take a simple example, when you drive alone on a deserted highway, posing risks of harm only to yourself, you implicitly find the benefits of driving—which are equivalent to the burden of not driving—worthwhile notwithstanding the risks.)<sup>20</sup>

Third, and most fundamentally, Weinrib believes that only a risk-centered definition of negligence conforms to corrective justice. Only such a definition truly respects the equality of the injurer and the victim by connecting doing and suffering consistent with Kantian right.<sup>21</sup> According to Weinrib, Kantian right requires that the position of each party be consistent with each being a self-determining agent. Thus,

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<sup>18</sup> For further discussion of this point, see Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. REV. 273 (1996).

<sup>19</sup> Weinrib himself once endorsed this Kantian interpretation of the Learned Hand test. Weinrib, *Toward a Moral Theory*, *supra* note 2, at 49-57. For a recent "social contract" version of the Kantian interpretation, see Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996).

<sup>20</sup> Weinrib would, however, reject a pluralistic approach to tort law that encompassed a number of distinct fairness justifications. He would also claim that the moral attractiveness of fairness justifications is insufficient to warrant their acceptance as legitimate justifications of private law. I disagree with his views on these matters, insofar as he would preclude even those fairness or other noninstrumental justifications that are consistent with a genuine rights-based account of private law.

<sup>21</sup> PRIVATE LAW, *supra* note 2, at 147-52. In part, Weinrib's argument here seems to reflect his objection to any justifications in private law that are asymmetrical, referring only to one party to the transaction. That objection seems unwarranted, for reasons explored below in parts IV-V.

the injurer cannot be completely *denied* the right to impose any risk, for then he could not act; but he also cannot be permitted to impose a risk of *any* magnitude, for then he could completely ignore the effect of his actions on others.<sup>22</sup>

This analysis is inadequate. These two principles that Kantian right (so interpreted) excludes are extreme, polar principles. Many intermediate positions, including *both* the American balancing approach and the English liability-for-risk-alone approach, survive comfortably between these poles. The American approach, whatever its faults, does not permit the actor to ignore completely the effects of his actions on others. It simply draws the line between permissible and impermissible effects at a different place than the English approach. In the end, Weinrib's Kantian analysis seems indeterminate: it cannot justify his preference for the English approach over the American. Moreover, it cannot even justify his preference for a negligence approach over a strict liability approach. To explain this last point, I will turn to the next example.

### III

#### NEGLIGENCE AND STRICT LIABILITY

Recall Holly, our second example. Holly keeps a wild boar in her yard. The animal escapes and injures Holly's neighbor, Nick. Suppose Nick cannot prove that Holly failed to use reasonable care in keeping the boar safely within her yard. He can still recover damages, but damages based on strict liability, not negligence. The law provides that owners of dangerous animals are strictly liable for the harms that their animals cause, even without proof that the owner was insufficiently careful in her efforts to control the animal. Weinrib would probably agree that Holly should be liable for the damage caused by her wild boar, but, in order to do so, he must argue that Holly is negligent; for Weinrib does not believe that corrective justice principles can ever support *strict* liability in tort.<sup>23</sup>

As a parallel to the Holly example, consider a variation of Christine's case. Ivy is cautiously driving a truck containing toxic chemicals. Despite her best efforts, she gets into an accident, and the spilled chemicals harm someone. Here, in contrast to Christine's case, the law *will* hold her liable for the harm. Weinrib might cite such a case

<sup>22</sup> *Id.* at 152.

<sup>23</sup> Weinrib does endorse a type of strict liability theory in the more limited context of unjust enrichment: an actor who is innocently enriched is nevertheless under a duty to disgorge the benefit. But Weinrib makes no effort to give an unjust enrichment explanation of the traditional strict liability categories of abnormally dangerous activities or dangerous animals, *see id.* at 140-41, 189-90, and I doubt that such an explanation would be persuasive.

in *support* of his point that cost of precaution should be considered irrelevant in defining negligence. But what is crucial is that the law imposes liability here on the basis of strict liability, *not* negligence. The activity of transporting dangerous chemicals, like the use of explosives, is considered "abnormally dangerous."<sup>24</sup> Again, Weinrib must argue that this is a case of negligence liability in order to explain how corrective justice principles can justify liability in such a case.

The distinction between negligence and strict liability is important for several reasons. First, courts do endorse and apply the distinction, and to that extent, Weinrib's theory is not an accurate description of tort law.<sup>25</sup> Second, the distinction is critical to any defensible theory of corrective justice. Strict liability and negligence liability provide two quite different accounts of the nature of a tortious wrong. On the other hand, if Weinrib is right that corrective justice only justifies negligence doctrine, then two unpalatable alternatives remain: either ignore tort doctrine, for much of tort doctrine is explicitly based on strict liability; or argue that strict liability doctrine is really negligence in disguise. Weinrib takes the last tack. Ultimately this tack fails.

Weinrib gives several specific arguments in his attempt to show that traditional strict liability for harm caused by wild animals or by abnormally dangerous activities (such as blasting) is really liability for negligence. Each is unsatisfactory.

First, Weinrib points out that even a strict liability regime does not render an actor's culpability completely irrelevant; for example, acts of God or of third parties can exonerate a defendant.<sup>26</sup> But this observation shows only that strict liability is subject to causal limitations, not that the standard of care of the actor approaches negligence. The extremely narrow causal limitations that Weinrib notes are a far cry from a disguised negligence standard.

Second, Weinrib claims that the abnormally dangerous category:

echoes the commonplace of negligence law, that the more risky the defendant's activities, the more diligent the defendant must be to prevent the risk from materializing. . . . [T]here must be some point on this continuum where activity is sufficiently risky that lack of care can be imputed from the very materialization of the risk.

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<sup>24</sup> RESTATEMENT (SECOND) OF TORTS §§ 519-20 (1965); W. PAGE KEETON ET AL., PROSER AND KEETON ON THE LAW OF TORTS § 78, at 549-50 (5th ed. 1984).

<sup>25</sup> Of course, Weinrib's project is not simply to rationalize all current tort doctrine. See PRIVATE LAW, *supra* note 2, at 8-11. Still, the negligence/strict liability distinction is a central conceptual organizing principle in tort law. It is a principle that any satisfactory theory of corrective justice in tort law should explain.

<sup>26</sup> *Id.* at 188.

Strict liability for abnormally dangerous activities represents the law's judgment that such activities are at that point.<sup>27</sup>

This argument represents a misunderstanding about the abnormally dangerous activity category. As the text of the Restatement Second of Torts explicitly states, strict liability attaches to such an activity "although [the actor] has exercised the utmost care to prevent the harm."<sup>28</sup> And, lest one conclude that such an actor is negligent for carrying on the activity at all, rather than for carrying it on without appropriate precautions,<sup>29</sup> the commentary explicitly rejects that conclusion as well.<sup>30</sup> (Weinrib's argument here is surprising in another respect: it appears to accept the relevance of the burden or difficulty of taking a precaution, notwithstanding Weinrib's argument elsewhere that negligence consists simply of creating substantial risks, apart from the burden of avoiding those risks.)<sup>31</sup>

<sup>27</sup> *Id.*

<sup>28</sup> RESTATEMENT (SECOND) OF TORTS § 519 (1965).

<sup>29</sup> This is the distinction between level of care and level of activity. See PRIVATE LAW, *supra* note 2, at 189 & n.41; *infra* note 36.

<sup>30</sup> RESTATEMENT (SECOND) OF TORTS § 520 cmt. b (1965) states that the strict liability rule:

is applicable to an activity that is carried on with all reasonable care, and that is of such utility that the risk which is involved in it cannot be regarded as so great or so unreasonable as to make it negligence merely to carry it on at all. . . . If the utility of the activity does not justify the risk it creates, it may be negligence merely to carry it on, and the rule stated in this Section is not then necessary to subject the defendant to liability for harm resulting from it.

Weinrib might reply that Commonwealth law supports his view, whatever may be the state of American law. However, one prominent commentator, John G. Fleming, concludes that Commonwealth law follows American law in distinguishing negligence at the level of the activity from strict liability for abnormally dangerous activities:

The hallmark of strict liability is . . . that it is imposed on lawful, not reprehensible activities. The activities that qualify are those entailing extraordinary risk to others, either in the seriousness or frequency of the harm threatened. Permission to conduct such an activity is in effect made conditional on its absorbing the cost of the accidents it causes, as an appropriate item of its overhead.

JOHN G. FLEMING, THE LAW OF TORTS 304 (7th ed. 1987) (footnote omitted).

<sup>31</sup> Weinrib's argument that the actor must become more diligent as the risk increases might be limited in one of the following ways. First, perhaps the burden of taking a precaution (i.e. the degree of required diligence) increases only after the actor has created risks that exceed some threshold. Below that threshold, the burden is irrelevant. Still, this is a significant compromise of a principle that was supposed to rely on risk-creation. Nor is it clear why burden suddenly becomes relevant only after the risk exceeds a specified threshold.

Second, perhaps "diligence" should be understood much more narrowly than American courts understand the "cost" or "burden" of precaution. But Weinrib does not pursue this point, and it seems difficult to sustain. The effort required to avoid a risk of harm is certainly a type of cost or burden. Moreover, insofar as the requisite effort (to avoid negligence liability) increases as the risk of harm increases, the analysis certainly resembles a Learned Hand balance.

Third, Weinrib argues that the abnormal danger consists in the gravity rather than likelihood of the loss; that the law permits the activity on the assumption that it can be carried off safely; and that the occurrence of injury shows that the injurer must have done something faulty to bring the injury about.<sup>32</sup> Strict liability simply relieves the victim of the need to prove the specific faulty act.<sup>33</sup> This argument again is flawed. It ignores the explicit strict liability rationale that the *Restatement* offers. Moreover, the notion that the occurrence of harm proves fault is quite overbroad. Such a generalization might be adequate for an advocate of economic analysis, but it should not satisfy a theorist interested in providing a corrective justice account of the scope of an injurer's individual duty to his potential victims.

Weinrib's attempt to assimilate strict liability doctrine into negligence doctrine reveals an underlying problem. A necessary element of the concept of negligence is that the actor should have acted otherwise.<sup>34</sup> Yet that is not the case, or at least need not be the case, under the concept of strict liability.<sup>35</sup> It is not the case that the boat owner in *Vincent* should have acted differently. He acted permissibly in choosing to keep his boat attached to the dock. It is not the case that Holly should have acted differently in controlling her wild boar. By hypothesis, she maintained the enclosure carefully. And just because her boar happened to cause an accident, it does not follow that she should not have been housing a wild boar at all. (In theory, at least, a negligence approach can consider that more dramatic precaution.)<sup>36</sup> To put the matter another way, the wrong in negligence is in failing to

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<sup>32</sup> PRIVATE LAW, *supra* note 2, at 189.

<sup>33</sup> *Id.*

<sup>34</sup> In two recent essays, I denominate this the "deficiency" view of negligence. Kenneth W. Simons, *Contributory Negligence: Conceptual and Normative Issues*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 461 (D. Owen ed., 1995); Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693, 1698-1700 (1995). This view also presupposes an *ex ante* perspective. *Id.* at 1698; Kenneth W. Simons, *Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation*, 15 HARV. J.L. & PUB. POL'Y 849, 870 (1992) [hereinafter Simons, *Jules Coleman and Corrective Justice*].

<sup>35</sup> Another way to see this point is to distinguish between a primary right that the injurer not act negligently and a secondary right to compensation in case the injurer does act negligently. With respect to strict liability, by contrast, the primary right is not that the injurer act differently, but that she pay for the harm (or, more abstractly, that her engaging in the activity be conditioned upon her willingness to pay for the harm). See Simons, *Jules Coleman and Corrective Justice*, *supra* note 34, at 867-72, 880.

<sup>36</sup> Some argue that strict liability in such circumstances is simply a device for improving safety. As economists explain, strict liability forces injurers to consider their level of activity as well as their level of care. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 21-26 (1987). This argument might have some merit, but it cannot account for the scope of the traditional strict liability categories. For it is sometimes relatively clear that the actor who is held strictly liable should not have done otherwise. And if proof problems were the major concern, then a more appropriate response would be to expand *res ipsa loquitur* or to shift the burden of persuasion to injurers to prove they were not negligent, rather than to create a category of strict liability.

act differently (specifically, failing to act with reasonable care), while the wrong in strict liability is in acting without paying for the consequences.<sup>37</sup>

Weinrib seems to agree with the conceptual requirement that a negligent actor is an actor who should have acted otherwise. He emphasizes that the victim of a negligently-inflicted injury has an entitlement that the injurer not act negligently. The injurer is not entitled to act negligently and then pay for the consequences. Tort liability is not, he correctly states, simply "the retrospective pricing or licensing or taxing of a permissible act."<sup>38</sup> Similarly, in discussing nuisance law, Weinrib correctly argues that injunctions are the appropriate remedy, while a liability rule designed to promote aggregate wealth is not.<sup>39</sup>

Unfortunately, Weinrib's assertion that negligence can consist solely in the creation of significant risks (with resulting harm) is inconsistent with this entitlement view of negligence. It simply is not the case that an actor should never create substantial risks to others, regardless of the cost or burden of the precaution.<sup>40</sup> Negligent con-

<sup>37</sup> This latter category could be further divided into two subcategories, of strict liability/condition fault, and of strict liability/non-fault. In the first subcategory, the injurer's primary duty is not to engage in the activity unless he pays; the duty might entail a secondary duty to provide insurance or a bond to assure payment. In the second subcategory, the injurer has no such conditional duty. See Simons, *Jules Coleman and Corrective Justice*, *supra* note 34, at 880.

<sup>38</sup> PRIVATE LAW, *supra* note 2, at 143.

<sup>39</sup> *Id.* at 195. As Weinrib says, the plaintiff is entitled to use his property free of the defendant's use, and cannot be required to accept compensation instead. *Id.* See also *id.* at 56 n.2 (noting Aristotle's view that an injunction is an appropriate prospective remedy to restrain a wrong). More generally, Weinrib asserts: "Corrective justice refers to a structure of wrongfulness that directly links doer to sufferer. Any remedy responding to liability that reflects that structure is consonant with corrective justice. Corrective justice thus allows for injunctions that prevent unjust harm. . . ." *Id.* at 144 n.41.

A tension exists between Weinrib's endorsement of injunctive remedies and his dismissal of the argument that corrective justice supports damage liability for probabilistic risk-creation and damage recovery by those exposed to risks (when it is not known who was actually harmed by the risk). See *id.* at 156-58. Liability for risk-creation, to those exposed to the risk, seems to link doer and sufferer in a direct way. Injunctive relief is similarly based on probabilities. Although the requisite probability for injunctive relief is higher than the requisite probability in some risk-creation approaches, this difference in degree seems based on pragmatic concerns rather than principle. For an argument suggesting that liability for risk-creation satisfies corrective justice, see Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990); Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113 (1990).

<sup>40</sup> Consider, for example, Weinrib's discussion of the leading English case of *Bolton v. Stone*. PRIVATE LAW, *supra* note 2, at 149 (citing *Bolton v. Stone* [1951] App. Cas. 850 (H.L.)) Weinrib cites with approval Lord Reid's suggestion that a court should not consider the difficulty of remedial measures in determining the negligence liability of a cricket club for a ball that was hit over a fence and injured the plaintiff. "If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all." *Id.* at 149 (quoting *Bolton*, [1951] App. Cas. at 867). This suggestion can be interpreted in two different ways, only one of which reflects an attractive conception of negligence. The attractive interpretation is that cricket is too dangerous an activity at that

duct is conduct that would be enjoined or prevented, if that were feasible.<sup>41</sup> But this risk-creation approach would condemn as negligent an extraordinary range of activities that create inevitable risks such as driving an automobile, providing medical care, or distributing a consumer product. In short, an unadorned risk-creation criterion of negligence is seriously inconsistent with the entitlement view of negligence.

If, however, Weinrib were to accept that corrective justice principles can justify at least certain narrow categories of strict liability, then it would be easier to account for cases in which the creation of risks should result in liability, even though it might not be true that the risk-creator should have acted otherwise. At the same time, one could also explain why in many instances of simple risk-creation the actor should not be liable at all. For example, suppose one accepts George Fletcher's principle that it is unfair to impose nonreciprocal risks on others without paying for them.<sup>42</sup> Then Holly, who keeps a wild boar, should pay her victims, even though it is not the case that she should have acted differently.<sup>43</sup> But Christine, who drives an ordinary automobile, should not be required to pay her victims, since the nonnegligent risks she poses to other drivers are similar to the nonnegligent risks they pose to her. I am not arguing for the particulars of Fletcher's theory.<sup>44</sup> I only suggest that corrective justice principles can plausibly account for some categories of strict liability. Debate should turn to the merits of the specific accounts; we should not rule

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location, given the risks to neighbors. In other words, the cricket club should take the dramatic precaution of moving the field to a more remote location. Further, if it were feasible, a court should be willing to enjoin the continuing operation of cricket at that location. Although it is doubtful that the dangers are really that great, in light of the benefits of playing and watching cricket in a residential neighborhood, this interpretation is indeed a negligence perspective. Note, however, that the cost of precaution is relevant under this interpretation. Its relevance is less obvious because the suggested precaution is to alter the location of the activity itself, not the way in which the activity is conducted at that location. See discussion of level of care versus level of activity *supra* note 36.

A second interpretation is that it is always wrong and negligent to create a substantial risk of harm, regardless of whether any alternative locations or other alternative precautions exist, and regardless of their cost. This is an unattractive interpretation of negligence, for it would condemn as negligent an extraordinary range of activities that create inevitable risks.

<sup>41</sup> See Simons, *Jules Coleman and Corrective Justice*, *supra* note 34, at 869-70; Simons, *The Puzzling Doctrine of Contributory Negligence*, *supra* note 34, at 1699.

<sup>42</sup> George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 540-42 (1972).

<sup>43</sup> And similarly, Ivy, who transports poisonous chemicals, should pay her victims, even though it is not the case that she should have acted differently.

<sup>44</sup> For some criticisms, see Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1078-82 (1972); Jules L. Coleman, *Justice and Reciprocity in Tort Theory*, 14 W. ONTARIO L. REV. 105 (1975); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 977-86 (1981).



out in advance the possibility of any corrective justice justification for strict liability.

Under the view I endorse, negligence liability should be imposed for deficient conduct, while strict liability should be imposed for conduct that might not be deficient but that should, in justice, pay its own way. This view illustrates another problem with Weinrib's analysis of the basis of negligence liability in Kantian right. Recall Weinrib's concern that a strict liability principle would deny the right to impose any risk. Weinrib then argued that only the English rule of (so-called) negligence liability for creation of a significant risk is consistent with avoiding that extreme restriction on action. But this argument fails. Even the apparently extreme polar position of "denying the right to impose any risk" is *not* inconsistent with the right to act, *if* the quoted phrase describes a strict liability principle rather than a negligence principle.

Once again, Weinrib's slighting of strict liability principles is problematic. If, in some cases, liability for risk is a kind of strict liability, then liability does not imply that the injurer has no right to act and to impose a risk, in the sense that he should have acted differently. Rather, liability might be premised on the view that defendants must pay for the costs or consequences of certain of their acts, even if it is not the case that they should have acted differently. A system of worker's compensation, for example, does not deny the employer the right to act. It does, however, require that the employer compensate employees for a broad range of harms that might not be the employer's fault.

#### IV

#### ASYMMETRICAL JUSTIFICATIONS GENERALLY

Thus far we have ignored a critical aspect of Weinrib's approach, one that underlies his view that corrective justice justifies only negligence liability, and only a particular type of negligence liability at that. Weinrib believes that corrective justice justifications must, in order to be genuine justifications, apply *equally* to both parties to the interaction—the injurer and the victim.<sup>45</sup> Weinrib is understandably concerned about certain one-sided justifications in tort law, but his

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<sup>45</sup> It is this belief that causes him to recognize only an unjust enrichment form of strict liability; for he believes that unjust enrichment is a form of justification that applies both to victims and to injurers in a way that other types of strict liability justifications (such as Fletcher's nonreciprocal risk theory) do not. Thus, in Weinrib's view, an unjust enrichment theory can explain why some injurers ought to pay their victims for harms, even if it is not the case that the injurer should not have acted as he did. I will later criticize this view of unjust enrichment, suggesting that the strict liability form of unjust enrichment is no more symmetrical than the strict liability form of tort law, which he rejects. See *infra* notes 111-17 and accompanying text.

solution is far too drastic and excludes too many legitimate justifications.

Courts and commentators routinely assert that tort law serves two distinct purposes—deterrence of injurers' misconduct and compensation of victims for their injuries. Weinrib points out, however, that these commentators fail to explain why these distinct purposes justify the particular set of rights and duties that tort law recognizes, and only those rights and duties. If deterrence is the goal, for example, then it is not clear why victims are given a right to recover (especially if criminal law or regulation could more effectively deter injurers). And if compensation is the goal, then we should institute a system of compensation for all injuries, however caused.

To be sure, there is a possible institutional efficiency explanation of why tort law is an appropriate vehicle for serving the distinct goals of deterrence and compensation. Perhaps tort law represents a pragmatic institutional response to these two goals: it is the unique context in which the law can achieve both deterrence and compensation efficiently. But this explanation is unsatisfactory. Even if it is somewhat less efficient to serve only deterrence, or only compensation, serving one goal exclusively might be preferable on balance, depending on the relative importance of that goal and on how effectively the other goal can be served outside the tort system. A broad strict liability rule, for example, would achieve compensation, even if it would not also serve deterrence. If the compensation goal is important enough, and if criminal law and government regulation can adequately achieve deterrence, then it might be preferable for the tort system to ignore deterrence as a goal. Moreover, as Weinrib carefully explains, the tort system does not further either compensation or deterrence to the logical extent that justification would suggest.<sup>46</sup> This further suggests that tort practice is not simply a convenient system for "killing two birds with one stone."

But Weinrib gives another, less persuasive reason for his dissatisfaction with the deterrence and compensation justifications for tort law, which can be called the "asymmetry objection." Weinrib complains that these justifications are "one-sided": they pertain only to one of the parties to the transaction. Deterrence provides a reason for the injurer to pay, but not a reason to pay the victim; the need for compensation provides a reason for the victim to obtain damages, but not a reason for the victim to obtain them from the injurer.<sup>47</sup> Weinrib also applies this complaint to other important issues of tort doctrine. One of the reasons that he finds negligence to be consistent with corrective justice and strict liability to be inconsistent is his belief that

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<sup>46</sup> PRIVATE LAW, *supra* note 2, at 36-42.

<sup>47</sup> *See id.* at 38, 121-22, 142-43, 213.

strict liability centers only on the victim. Similarly, he objects to a *subjective* negligence test—one that examines the injurer's fault by reference to the injurer's individual capacities. He believes that a subjective test is incompatible with corrective justice, because it centers only on the injurer. Neither test, in Weinrib's view, treats the litigants as equals.<sup>48</sup>

Weinrib does express a valid concern, but he mischaracterizes the problem. With respect to justifications such as deterrence and compensation, the problem is not that the justifications refer only to one party to the transaction, but rather that they might not be consistent with the rights-orientation of private law. As Weinrib emphasizes, deterrence justifications are typically invoked as part of an instrumental, economic rationale for tort liability, a rationale that does not take rights seriously. Under economic analysis, the reason for recognizing rights in victims is simply to provide a useful private attorney general to regulate the misconduct of injurers.<sup>49</sup> Weinrib is correct to emphasize that a defensible theory of the private law should provide a more substantial conception of rights, a conception in which the victim's right against the injurer is not merely an accidental offshoot of the desire to achieve other goals. And I agree with his fundamental conception of private law as "an elaborate exploration of what one person can demand from another as of right."<sup>50</sup> As Weinrib explains:

Liability transforms the victim's right to be free from wrongful suffering at the actor's hand into an entitlement to reparation that is correlative to the defendant's obligation to provide it. The remedy consists not in two independent operations—one penalizing the defendant and the other benefiting the plaintiff—but in a single operation that joins the parties as obligee and obligor.<sup>51</sup>

But it is a very different matter to insist, as Weinrib does, that all justifications in law, and all doctrinal requirements, must somehow pertain to both of the parties to the transaction. This is an exceedingly stringent requirement, one that is almost impossible to satisfy. Indeed, Weinrib's own approach does not satisfy the requirement, for reasons that we shall see.

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<sup>48</sup> *Id.* at 177-79.

<sup>49</sup> Victims are useful enforcers of safety standards, according to this analysis, because they have a strong personal incentive to discover and seek damages for inefficient conduct. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 191 (4th ed. 1992).

<sup>50</sup> *PRIVATE LAW*, *supra* note 2, at 230.

<sup>51</sup> *Id.* at 143.

## V

## ASYMMETRICAL JUSTIFICATIONS AND EXCUSED CONDUCT

Consider the third example, described at the outset. Edward is driving when he suddenly encounters an emergency not of his making. Under traditional tort principles, Edward is held, not to the standard of a reasonable person in normal circumstances, but instead to the lower standard of a reasonable person in an emergency. Typically, he is only liable if his conduct is "rash or reckless" under the circumstances. Presumably, Weinrib would reject this concession to human frailty because he explicitly rejects other excuses such as ignorance or compulsion.<sup>52</sup> Weinrib also rejects attempts to individuate the reasonable person test to account for individual, subjective capacities, such as below-average intelligence.<sup>53</sup> In Weinrib's view, allowing such excuses or individuating criteria is improper because it provides a justification that pertains only to one of the two parties in the interaction, and therefore favors that party at the expense of the other.<sup>54</sup>

A justification can be asymmetrically relevant, however, without unduly favoring one party to the interaction. For example, consider the requirement that the injurer perform a voluntary act before he can be subject to tort liability. This is a justificatory consideration that only applies to the injurer, but it hardly follows that it is unfair. In-

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<sup>52</sup> See *id.* at 53-55 (discussing Fletcher's theory of excuses). Elsewhere, Weinrib very briefly defends a doctrine of excuse of unspecified scope on quite different grounds. He writes that where positive law cannot serve its function, i.e., cannot deter, then "the impugned act is a wrongful one, but it is excused because any punishment would itself be inconsistent with the concept of [Kantian] right." *Id.* at 109. Weinrib's brief suggestion here is frustratingly incomplete. How broad a concept of excuse would he accept? On its face, his analysis seems to permit excuse in a very wide set of circumstances. Moreover, Weinrib creates a tension which he fails to resolve. He accepts amenability to deterrence as a legitimate criterion for shaping tort doctrine, but, at the same time, he rejects deterrence arguments as inconsistent with the retrospective orientation of a corrective justice approach to law. See *infra* note 133.

<sup>53</sup> PRIVATE LAW, *supra* note 2, at 178.

<sup>54</sup> Weinrib notes that the objective test contains certain exceptions, but he believes that the exceptions support the rationale behind the objective test, namely, to express the principles of Kantian right, including self-determining agency. *Id.* at 183 n.22. Unfortunately, his analysis depends on controversial assertions about the nature of that agency. Thus, to defend the common law's recognition of physical but not mental characteristics in subjectivizing the reasonable person test, he claims:

Kantian right regards agency as a causality of concepts, thereby treating the agent as a thinking will. Intellectual processes are constitutive of the exercise of agency, whereas physical characteristics are part of the context within which, under the conditions of human existence, agency occurs. Accordingly, the characteristics of the agent's physical embodiments are distinguishable from the intellectual processes through which agency operates as a causality of concepts.

*Id.* This abstract argument does not directly meet the standard moral objection that persons of below-average intelligence often cannot meet the higher, objective standard of care.

deed, as a logical matter, the requirements that the injurer cause harm to another, and that the victim suffer injury at the hands of another, are also asymmetrical; but those requirements are surely critical to the very application of a corrective justice theory.

Weinrib might respond that the voluntary act, causation and harm requirements are intrinsic to the very phenomenon he seeks to explain—the interaction of an injurer and a victim. Yet it is crucial to see that Weinrib has *chosen* to define the phenomenon in a particular way, as a harmful interaction that expresses a particular conception of Kantian right. A different definition of either the interaction being explained, or the underlying Kantian right, would permit and prohibit different types of justifications. For example, if the phenomenon is not “doing” and “suffering,” but “power” and “vulnerability,” then the misfeasance versus nonfeasance distinction ceases to follow from the very nature of the interaction. (One might have a duty to rescue simply because another is vulnerable to harm and one has the power to save him.) Or if Kantian right does not presuppose voluntary human agency, but only physical conduct of a human being, then voluntariness need not be a prerequisite to legal liability. To be sure, it is not illegitimate for Weinrib to build assumptions into his argument, such as the assumption that corrective justice pertains to the interaction of a “doer” affirmatively causing harm to a “sufferer.” But it is important to see just how potent those assumptions can be. The assumptions might explain Weinrib’s conclusion better than does the superficially attractive argument that all justifications in private law must be symmetrical in a strong sense.

Perhaps Weinrib is unduly dismissive of asymmetrical justifications because he overreacts to two legitimate concerns—the importance of distinguishing corrective justice from other forms of justice, especially retributive justice, and the importance of distinguishing corrective justice from ethical considerations that are not a matter of legal justice at all. Weinrib’s discussion of Fletcher’s theory of excuses is illustrative.<sup>55</sup> Fletcher argues that excuses such as compulsion and unavoidable ignorance should, as a matter of fairness, excuse defendants from liability. That is, anyone similarly situated would have acted as the defendant did; excuses are an exercise of compassion for human failings in time of stress, and they express the moral equivalence between acting under exigent circumstances and not acting at all.

Weinrib replies, correctly, that this argument is incomplete. It is not enough, he points out, to demonstrate that an excuse shows the defendant to be less blameworthy; Fletcher must also show why that

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<sup>55</sup> See *id.* at 53-55.

excuse neutralizes the plaintiff's right against the defendant. "Even if the excusing condition moves *us* to compassion," Weinrib asks, "on what grounds does our compassion operate at the *plaintiff's* expense?"<sup>56</sup>

Weinrib's challenge is important, and a plausible theory of private law must answer it. He is quite right to insist that not every noninstrumental moral consideration is a legitimate consideration for corrective justice. To return to Aristotle's original conception of corrective justice, the moral virtue or vice of the defendant by itself is irrelevant to the scope of the injured plaintiff's rights against that defendant. A defendant might give generously to charity, or she might have a lengthy criminal record. Obviously, neither consideration should affect the plaintiff's rights against the defendant in tort law.

Weinrib incorrectly concludes, however, that the problem with Fletcher's excuses is that they are asymmetrical. Weinrib objects that:

Fletcher postulates a justificatory consideration that applies to the defendant independently of the plaintiff. His account leaves us wondering why the moral force of an excusing condition that pertains solely to the defendant's act (and seems therefore morally irrelevant to the plaintiff) should operate at the expense of the plaintiff's right.<sup>57</sup>

The problem, I believe, is subtly different. One does indeed need further argument to show that a moral consideration relevant to the defendant is also relevant to the plaintiff's rights against the defendant. Weinrib's skepticism of asymmetrical arguments is extremely valuable in forcing us to articulate more clearly the grounds of rights and duties in private law. But the simple fact that a justificatory argument is asymmetrically relevant does not, by itself, disqualify the argument as a ground for such a right or duty.

In this space, I cannot provide a full-fledged alternative account of tort law, including tort excuses. Let me simply suggest some plausible rights-based accounts of tort excuses. Fletcher himself suggests one: injuries that result from acts of the defendant while under compulsion or from his unavoidable ignorance are essentially similar to injuries that are not the result of any act of the defendant at all. Weinrib correctly criticizes Fletcher's other suggestion—that one feels compassion for such a defendant—as inadequate. But that suggestion might be elaborated into a rights-based account. For example, a more general rights-based account could be based on reciprocity: victims are entitled to expect of injurers the degree of care that victims exercise with respect to their own interests, or the degree of care that vic-

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<sup>56</sup> *Id.* at 54.

<sup>57</sup> *Id.* at 55.

tims exercise with respect to the interests of others when victims are creating risks to others. Under such a reciprocity scheme, it is plausible to allow an excuse of compulsion or unavoidable ignorance to defendants if plaintiffs would ordinarily not be able to avoid causing harm in similar circumstances where they were creating risks to themselves or to others.<sup>58</sup>

Judges and legal theorists do struggle with the proper bounds of rights-based conceptions of tort law. The emergency exception, illustrated by Edward, is a potent example. Why is a sudden emergency a partial excuse for Edward, when it is not an excuse for Bill, the boat owner in the storm? Weinrib might well be correct that *certain* asymmetrical justifications cannot support a tort remedy or an excuse from a tort remedy. (Why, for example, must Bill pay for deliberately appropriating a dock, while Edward need not pay for taking the risk of harming his victim's property?) But the debate should focus on whether a particular justification indeed supports a right-based account of private law, not simply whether such a justification pertains mainly or only to one party to the interaction.

Finally, Weinrib seems to be inconsistent in his objection to asymmetrical justifications. For example, although he objects to Fletcher's conception of excused wrongs, he endorses a different, Kantian conception. An excused wrong is a violation of right, Weinrib asserts, but it is a violation in which any legal punishment would itself be inconsistent with the Kantian concept of right, since the defendant cannot be deterred.<sup>59</sup> Yet Weinrib does not explain why the inability of the defendant to be deterred is an acceptable justification, since this justification certainly seems to pertain only to one party to the interaction.<sup>60</sup>

The asymmetry objection, in short, proves too much. It would condemn much legal doctrine and many of our moral intuitions. And

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<sup>58</sup> It is interesting that Weinrib, argues for a similar position in defending rules of nuisance that condition liability, in part, on the uncommon nature of the use of property. PRIVATE LAW, *supra* note 2, at 190-92. However, Weinrib's justification for that position is not based on reciprocity as such.

<sup>59</sup> *Id.* at 109.

<sup>60</sup> More generally, why does Weinrib include deterrence and retribution as necessary aspects of Kantian analysis? *Id.* at 108. These justifications are one-dimensional, focusing only on the wrongdoer. Such a focus, according to Weinrib, is ordinarily illegitimate. Weinrib draws a distinction between law's internal principles of corrective justice (the second stage in the Kantian progression from free will to public law) and law's coercive power (in the final stage of that progression). He then explains:

For Fletcher, excusing conditions give rise to humanitarian considerations that apply to one of the parties, thereby splitting the relationship between the plaintiff and the defendant. For Kant, in contrast, the excuse maintains the integrity of the relationship, but places that relationship beyond the reach of the law's coercion.

*Id.* at 109 n.70. I will say more about this distinction below. See *infra* note 136.

the objection seems unnecessarily broad to achieve the legitimate purpose of ensuring a rights-based conception of private law.

My point also relates to another reason why Weinrib is suspicious of asymmetrical justifications. Weinrib argues that only "internal," not "external," purposes are compatible with corrective justice.<sup>61</sup> An internal purpose, he claims, is one that is immanent in the interaction between doer and sufferer. By contrast, an external purpose (such as deterrence or compensation) "cannot necessarily be limited to the interaction of the two parties to the transaction . . . [but] must embrace all who fall under it."<sup>62</sup> Once again, a more limited version of Weinrib's argument is more persuasive. Many of the concerns that he seeks to address by a broad prohibition against such asymmetrical "external" justifications could be addressed just as easily by a more modest prohibition against justifications inconsistent with the right-based nature of corrective justice.<sup>63</sup> Simple, one-sided appeals to compensation or deterrence would still be excluded.<sup>64</sup> But the argument that an injurer cannot fairly be made liable if he did not engage in a voluntary act would not be excluded simply because it is asymmetrically relevant. Similarly, on this basis one could not exclude arguments that the injurer is excused from the ordinary test of reasonable care because of factors such as emergency, duress, compulsion, or immaturity.<sup>65</sup>

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<sup>61</sup> PRIVATE LAW, *supra* note 2, at 212-13.

<sup>62</sup> *Id.*

<sup>63</sup> Weinrib's original definition of the concept of private law that he seeks to elucidate primarily emphasizes its rights-based nature:

Whatever our difficulty in defining private law or resolving particular issues within it, we are aware of a body of law possessing such characteristics as an allegation of wrongdoing, a claim by one person against another, an injury, a demand for redress, a system of adjudication, a set of liability rules, a corpus of case law, and so on.

PRIVATE LAW, *supra* note 2, at 9. *See also id.* at 9-10 ("[P]rivate law involves an action by plaintiff against defendant . . . that retroactively affirms the rights and duties of the parties . . ."); *id.* at 10 ("[T]he master feature characterizing private law" is "the direct connection between the particular plaintiff and the particular defendant.").

<sup>64</sup> On the other hand, insofar as a compensatory rationale is employed only to define the scope of the victim's right against the injurer—e.g., a right not to be made worse off as a result of the injurer's violation of the victim's autonomy—then the compensatory rationale is indeed relevant. Weinrib seems to agree. He states that compensatory damages for negligence are justifiable because when injury results from negligence, "the only way the defendant can discharge his or her obligation respecting the plaintiff's right is to undo the effects of the breach of duty." *Id.* at 135. He also states that damages in excess of actual compensation—for example, punitive damages—are *inconsistent* with corrective justice. *Id.* at 135 n.25.

<sup>65</sup> Weinrib's argument against asymmetrical justifications is also part of the claim that justifications must be "coherent" in the strong sense of being integrated, and not simply consistent. *Id.* at 32-42. Again, I partially agree, to the extent that "integration" demands only that the justification support a rights-based conception of private law.



We can now see more clearly the flaw in Weinrib's argument that only objective negligence respects the equality of victim and injurer, while strict liability unduly favors the victim and subjective negligence unduly favors the injurer. Consider two of Weinrib's objections to strict liability,<sup>66</sup> both of which seem misplaced. First, Weinrib objects that under strict liability, "the interests of the plaintiff unilaterally determine the contours of what is supposed to be a bilateral relationship of equals."<sup>67</sup> I disagree. Strict liability need not be understood as a unilateral concession to the victim's needs. Instead, the theory can embrace a variety of principles which link the victim to the injurer. After all, strict liability, even in a very broad form, renders an injurer liable only if he has caused harm to the victim. In what sense, then, does the victim's interest "unilaterally" determine the relationship, when the injurer's causal contribution is also central to defining the victim's right? Weinrib's concern would be more justifiable if the victim's need for compensation alone sufficed for his recovery. For example, suppose a victim of negligence who could not identify the injurer were permitted to recover from any person in the world. Then the need for compensation alone would be overriding and would impermissibly create a right in the victim against an injurer who was not appropriately linked to the victim under any defensible moral theory.<sup>68</sup> But one might develop a plausible corrective justice argument for a relatively broad strict liability rule, an argument that does not simply rely on the victim's need for compensation.<sup>69</sup>

Weinrib's second objection is that a strict liability rule holds an injurer liable simply for being active, and thus, in effect, makes action

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<sup>66</sup> I also believe that a subjective negligence test can be consistent with corrective justice, for some of the reasons suggested in the discussion of excuse *supra* notes 52-60 and accompanying text.

<sup>67</sup> PRIVATE LAW, *supra* note 2, at 177.

<sup>68</sup> Some, including Weinrib, object that innovative modern approaches to causal uncertainty, such as *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980) and *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989), compromise corrective justice principles in this way. See PRIVATE LAW, *supra* note 2, at 154-58; see also COLEMAN, RISKS AND WRONGS, *supra* note 1, at 395-406 (interpreting these decisions as consistent with, but not an expression of, corrective justice). Although I do not share their objection, the objection does point to the need to reconcile these innovative decisions with a rights-based theory. See Simons, *Jules Coleman and Corrective Justice*, *supra* note 34, at 883-85.

<sup>69</sup> For example, Richard Epstein argues that property rights necessarily entail a domain of strict liability for intrusions upon those rights. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 239 (1985). Weinrib's criticism of this argument, PRIVATE LAW, *supra* note 2, at 175-77, is rather obscure, and largely relies on the assertion of Weinrib's preferred view—that "Kantian right construes the right of property as the embodiment of the agent's freedom in the external world." *Id.* at 176. But it is not clear why a broad property rights approach cannot be consistent with other views of corrective justice. (To be sure, such an approach might well be objectionable on substantive normative grounds, e.g., that it overvalues the liberty of the powerful and overprotects the status quo.) By contrast, Weinrib's criticism of Epstein's "hypothetical of self-injury" justification for strict liability is lucid and devastating. See *id.* at 173-75.

itself impermissible.<sup>70</sup> This objection fails, for the reason noted earlier: a strict liability rule only makes action more costly, not impermissible. To be sure, a strict liability rule *would* signify that the action triggering liability is impermissible if that rule were *conjoined* with a second rule making the action subject to injunction or to liability well beyond its actual costs. But this second rule would make sense only on the assumption that the conduct at issue is wrongful and should have been otherwise. And that assumption, I have argued, expresses an unacceptable conception of strict liability.

## VI

### VINCENT, UNJUST ENRICHMENT, AND INTEGRATED JUSTIFICATIONS

Let us turn to the final example of Bill, the boat owner, who made a reasonable decision to dock rather than lose his boat in the storm. As suggested above, American tort law holds Bill liable for damaging Delbert's dock on a strict liability principle, not a fault principle.<sup>71</sup> A strict liability principle is a principle under which the injurer is liable for the harm even if it is not the case that he should have acted otherwise. The court in *Vincent* endorsed a particular strict liability principle: the injurer has appropriated another's property to his own use, and therefore has a duty to pay compensation.<sup>72</sup>

Weinrib rejects this traditional perspective. Instead, he claims that tort law should consist only of fault principles. Although Weinrib agrees with the result in *Vincent*, he believes it is necessary to invoke a principle *outside* of tort law—the principle of unjust enrichment—to explain that result. In brief, Weinrib believes that the boat owner would be unjustly enriched if he were permitted to obtain the benefit of using the dock owner's property without paying compensation for the harm that he causes to that property. Moreover, Weinrib argues that only an unjust enrichment approach can be part of an integrated explanation of both Bill's privilege to dock during the storm and of Delbert's right to recover damages caused by Bill's permissible dock-

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<sup>70</sup> PRIVATE LAW, *supra* note 2, at 181.

<sup>71</sup> Technically, *Vincent* is a case of incomplete privilege to commit an intentional tort. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910). It is not a case of "strict liability" in the narrow doctrinal sense of liability in the absence of technical "fault" (either negligence or an intentional tort), for the boat owner did commit an intentional trespass. But in the broader sense of liability without genuine fault, *Vincent* is indeed a case of strict liability. In this broader sense, genuine "fault" includes negligence, recklessness, and unprivileged intentional torts. See Simons, *Jules Coleman and Corrective Justice*, *supra* note 34, at 868. Intentional torts that are privileged by necessity (such as the trespass in *Vincent*) are not instances of genuine "fault."

<sup>72</sup> *Vincent*, 124 N.W. at 222.

ing. It is worth reviewing Weinrib's arguments on this subject with some care.

First, Weinrib objects to standard tort analysis because it cannot give mutually coherent justifications for both the lawfulness of using another's property and the other's right to compensation.<sup>73</sup> Under that analysis, according to Weinrib, the privilege to use another's property is justified by a principle of maximizing social wealth, for one only has a privilege to use another's dock if doing so will save property more valuable than the value of the dock. At the same time, tort law justifies the boat owner's right to compensation by a different principle—that justice requires the party benefiting from an act to bear its costs.<sup>74</sup>

Weinrib's analysis differs. He believes that only restitutionary principles, principles which do not require wrongdoing for liability, can explain the case. The general restitutionary principle is that one cannot keep a benefit obtained at the expense of another unless the other intended to confer it.<sup>75</sup> In *Vincent*, the boat owner benefitted from using another's property; the use was not the gift of the dock owner; so the boat owner must "remove the detrimental effects of that use."<sup>76</sup>

But this analysis prompts serious objection because it apparently misconstrues the benefit that the boat owner has obtained. The real benefit to Bill from using the dock to save his property is the value of the boat. Under Weinrib's unjust enrichment theory, the value of the boat would then be the proper measure of damages. But it would follow that if the boat had been lost in the storm, Bill would have had no duty to pay for the damage to the dock, because he would have received no benefit. And that conclusion surely is unacceptable.

Weinrib has an interesting response to this objection. Bill was enriched, he says, not by the continued existence of the boat, but rather by the use of the dock:

Throughout the storm the boat belonged to the boat owner and was therefore not something that could be the locus of the boat owner's unjust enrichment. To be sure, the survival of a boat that otherwise would have sunk was a gain to its owner, but only a factual one. Although the boat owner would have been poorer had the boat been lost, he realized no normative gain—no excess over what was normatively his by right—by virtue of the continued existence of what already belonged to him. In this transaction, only the dock belonged to the plaintiff. Accordingly, the only basis for the plain-

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<sup>73</sup> PRIVATE LAW, *supra* note 2, at 197.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 198.

<sup>76</sup> *Id.*

tiff's complaint was the defendant's use of his dock, a use which, although lawful, was at the plaintiff's expense because of the damage the dock thereby suffered.<sup>77</sup>

Weinrib's response does not go far enough. Although his answer might explain why Bill need only pay for the value of the use of the dock as opposed to the greater value of the boat that might have been saved as a result of that use, it does not explain why Bill must pay for the physical damage to the dock.<sup>78</sup> Weinrib's only suggestion here is that the use was "at the plaintiff's expense because of the damage the dock thereby suffered." But that interpretation of "plaintiff's expense" seems to turn the unjust enrichment theory into a tort theory, for it makes recovery dependent upon the loss to the plaintiff, not the gain to the defendant. A pure unjust enrichment theory would look only to the defendant's gain.<sup>79</sup> And while one can understand why it might be appropriate to measure the defendant's gain by the value of the use of the dock (e.g., by the nonemergency market price for using the dock for the relevant time period), it is difficult to justify measuring the defendant's gain by the loss to the plaintiff.<sup>80</sup> This is not, of

<sup>77</sup> *Id.* Weinrib gives another analogy: The use of the dock is like the use of a service, where the restitutionary claim to the service's value does not depend on the outcome of the larger enterprise that made the service necessary. For example, if I use my resources to save you in an emergency, I get the value of those resources regardless of whether my rescue succeeds. *Id.* at 199.

<sup>78</sup> Even here, doubts remain. Specifically, there are problems with Weinrib's argument that the value of the boat cannot be the measure of unjust enrichment because the boat owner continues to own the boat throughout the storm. Suppose that Bill was planning to resell the boat, or to sell some of its cargo, when the storm arose. It is doubtful that the profit that Bill expected to make on such a transaction is a benefit that he must disgorge to Delbert, simply because the form of his ownership has changed from ownership of the boat to ownership of the proceeds from the sale of the boat or its cargo.

<sup>79</sup> See Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1279 n.15 (1989) (citing 1 GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 2.10, at 140 (1978)). Laycock notes that "restitution" is sometimes used to mean restoring the value of what the plaintiff lost, as in statutory requirements that criminals make restitution to victims. "But restitution of the value of what plaintiff lost is simply compensatory damages. Used in this sense, 'restitution' loses all utility as a means of distinguishing one body of law from another." *Id.* at 1282-83.

Laycock suggests that there are three legitimate versions of restitutions: where "(1) substantive liability is based on unjust enrichment, (2) the measure of recovery is based on defendant's gain instead of plaintiff's loss, or (3) the court restores to plaintiff, in kind, his lost property or its proceeds." *Id.* at 1293. Whatever the merits of the third interpretation, in kind restoration, that interpretation is not the version of restitution that Weinrib invokes in relation to *Vincent*. The purest form of unjust enrichment, I suggest, is a case satisfying both (1) and (2). However, Laycock notes that some courts do allow plaintiff's loss rather than defendant's gain to be the measure of recovery in cases otherwise satisfying (1), citing to *Vincent* with a "cf." signal. *Id.* at 1285 n.51.

<sup>80</sup> This measure is especially problematic if the value of the service is greater than the harm to the plaintiff. If the value of the use of the dock were figured at \$200, while the damage to the dock were only \$50, it seems unfair to require Bill to pay \$250, representing both the benefit and the loss. But if Bill's liability is limited to \$50, then the supposed unjust enrichment theory really appears to be a theory of liability for loss. On the other

course, meant to deny that Delbert is entitled to recover for the damage to his dock. But I doubt that unjust enrichment, as opposed to tort, explains that entitlement.

Weinrib next tries to explain how a corrective justice account can both justify Bill's privilege to dock and harmonize that privilege with Delbert's right to compensation for the resulting damage to the dock. The first problem is that the privilege to dock is, according to Weinrib, properly based on the relative values of the dock and the boat. (If the expected damage to the dock were clearly greater than the expected loss to the boat, then Bill would have no privilege to dock.) How can Weinrib explain the relative valuation feature of the privilege to dock without relying on the more obvious justification, a utilitarian principle?

Weinrib argues that the right to use property assumes the right to preserve it; thus, the right to preserve has priority. Accordingly, Bill has a right to preserve his property notwithstanding Delbert's ordinary right to the exclusive use of his dock.<sup>81</sup> And the requirement that the value of what is preserved (the boat) exceed the value of what is used (the dock) "is also intelligible from the standpoint of Kantian right."<sup>82</sup> For Bill can respect Delbert's property only by respecting the property's value, not by respecting Delbert's right to use it. And the only way to respect the value of the property is by a direct comparison of the values of the boat and the damage to the dock.<sup>83</sup> Weinrib believes that this argument makes no maximizing moves and no appeal to the social benefit of preserving property.<sup>84</sup>

Accordingly, Weinrib believes that Kantian right explains both the privilege and the liability in *Vincent* in an integrated manner. The boat owner's privilege of saving the boat at the expense of the dock represents the dock owner's recognition of the status of the *boat* owner. The restriction of the privilege to where the boat is more valuable represents the boat owner's recognition of the status of the *dock* owner. And the liability is the remedial expression of the fact that the

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hand, if the value of the service is *less* than the harm to the plaintiff, e.g., if the value of the service is \$200 but the damage to the dock is \$500, then it seems more reasonable to make Bill liable for the loss (\$500). Yet, again, this approach seems more consistent with a tort theory of recovery for loss than an unjust enrichment theory of disgorgement of benefit.

<sup>81</sup> PRIVATE LAW, *supra* note 2, at 200. This argument is problematic. One could imagine a legal regime in which the right to preserve one's property had no such priority. Although the right to use one's property might be less secure in such a regime, it would not be valueless.

<sup>82</sup> *Id.* at 201. However, Weinrib's tentative statement that this requirement is "intelligible" seems close to a concession that Kantian right does not *require* this imbalance of value.

<sup>83</sup> *Id.* at 201-202. "Since value is an aspect of property," Weinrib suggests, "it would not be an affirmation of property to save the less valuable at the expense of the more valuable." *Id.* at 202.

<sup>84</sup> *Id.* at 202.

dock belongs to the dock owner, although the boat owner legitimately uses it.<sup>85</sup>

This argument is unconvincing, not only in its details,<sup>86</sup> but also in its overall structure. First, the boat owner's privilege to dock is "integrated" with his liability for damage to the dock only in an exceedingly abstract sense, namely that each party has *some* status as a property owner. In the same sense, the traditional tort approach to these issues is also adequately "integrated." For example, an abstract concern with "reciprocity" might support both Bill's privilege to dock and Bill's liability for resulting damage.<sup>87</sup>

Second, *why* must the justifications for Bill's privilege to dock and his duty to pay for the resulting damage be integrated at all? Why can't they simply be understood as two rights-based justifications that the factual circumstances happen to bring into play at the same time? Each right or duty can still be genuine, and not a mere cipher for an external goal such as efficiency. For there are certainly cases when the boat owner has a privilege to dock but causes no harm, and the duty to pay simply does not arise; just as there are cases when the boat owner has a duty to pay for appropriating another's property even when he would have had no privilege to dock (e.g., a situation posing

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<sup>85</sup> *Id.* at 202-03.

<sup>86</sup> I do not believe that Weinrib succeeds in showing that Kantian right requires a direct comparison of the value of the boat and of the anticipated damage to the dock. This approach is similar to a Learned Hand balancing test, which Weinrib rejects in the context of defining negligence law. Pursuing the analogy to the British criterion of negligence, why doesn't Weinrib insist that the right to dock depend on the expected harm to the boat being much greater than the expected harm to the dock?

Weinrib attempts to show that the direct comparison is not simply a form of wealth-maximization with the following argument. Value is the abstract aspect of property, allowing qualitatively different commodities to be treated as quantitatively comparable objects when they are exchanged. So the normative significance of value is entirely dependent on that of property. However, the Kantian conception of property is not based on wealth-maximization, so neither is the balancing of values. *Id.* at 201. This argument is unconvincing and incomplete. For example, why is the pragmatic function of "value" in facilitating exchange the appropriate criterion "for judging whether one has a privilege to violate another's property rights intentionally and nonconsensually?"

<sup>87</sup> The privilege to dock might reflect the circumstance that an emergency might suddenly confront anyone, potential injurer *or* potential victim. Perhaps an emergency justifiably suspends the usual rules of property upon which we ordinarily rely. And the liability for resulting harm might reflect the justice of requiring the person who obtains a nonreciprocal benefit to pay for its costs. I do not actually believe that each of these senses of reciprocity is the same, but they seem to be no more dissimilar than the senses of "status of property owner" that Weinrib believes are integrated in his explanation.

However, Weinrib errs if he assumes that courts recognize a privilege to use another's property in times of emergency on purely utilitarian grounds. Certainly the courts in *Vincent* and *Ploof v. Putnam*, 71 A. 188 (Vt. 1908), did not explicitly adduce such grounds. They did not, for example, explicitly mention the standard economic argument—that a utilitarian criterion will induce the boat owners to make reasonable decisions about when to dock. POSNER, *supra* note 49, at 174-75.

no real emergency, or an emergency which the boat owner should have reasonably anticipated).

## VII

### THE DISTINCTION BETWEEN NORMATIVE AND FACTUAL LOSS (OR GAIN)

One aspect of Weinrib's *Vincent* argument deserves further analysis, because it plays a significant role in his more general account of private law. Weinrib draws a provocative distinction between factual gain and normative gain, and between factual loss and normative loss. Factual gains and losses refer to changes in a person's holdings; whereas normative gains and losses:

refer to discrepancies between what the parties have and what they should have according to the norm governing the parties' interaction. . . . A normative gain occurs when one's holdings are greater than they ought to be under those norms; a normative loss occurs when one's holdings are smaller than they ought to be.<sup>88</sup>

Weinrib then suggests that "a person enjoys a normative gain when there is justification for the law's [subsequently] diminishing his or her holdings," and that "a person endures a normative loss when there is justification for the law's [subsequently] augmenting his or her holdings."<sup>89</sup>

Weinrib uses the factual versus normative distinction to emphasize that one can have factual gain without normative gain, or factual loss without normative loss. Here, Weinrib is concerned with a common objection to Aristotle's arithmetic metaphor for corrective justice. Aristotle suggested that a judge enforcing the norms of corrective justice should restore equality by forcing the wrongdoer to disgorge his unjust gain to the victim, thereby compensating the victim for his unjust loss.<sup>90</sup> Some object to this account because it seems to presuppose that wrongdoers always obtain factual gains equivalent, and correlative, to the factual losses that their victims suffer. Yet that presupposition is obviously false. For example, a negligent driver who injures a victim might not obtain any tangible gain from his unreasonable conduct.

Weinrib's distinction between factual and normative gain is one way to preserve the Aristotelian correlativity of the wrongdoer's duty and the victim's right without making that false presupposition.<sup>91</sup> The

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<sup>88</sup> PRIVATE LAW, *supra* note 2, at 114-16.

<sup>89</sup> *Id.* at 116. I add "subsequently" in brackets to clarify what I take to be Weinrib's meaning.

<sup>90</sup> For a more detailed discussion of Aristotle's account, see *id.* at 58-66; Richard Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 688-702 (1992).

<sup>91</sup> As Weinrib argues:

factual versus normative distinction is indeed useful in this respect, because every decrease in the victim's status or welfare should count as a normative loss, i.e., as a loss that is inconsistent with norms of justice, even if the decrease is attributable to the injurer in some way. Apart from loss and gain, one needs an independent normative theory to identify the losses and gains that should be condemned as unjust.

Moreover, the distinction between factual and normative gain permits Weinrib to give an elegant account of the symmetrical requirements of tort law and unjust enrichment. In tort law, he explains, factual loss occurs without any necessary factual gain, and the loss is a normative wrong. (The injurer's negligent driving makes the victim worse off, but it might not make the injurer better off.)<sup>92</sup> In unjust enrichment, by contrast, factual *gain* occurs without any necessary factual *loss*, and the *gain* is a normative wrong. The enriched party might innocently receive a benefit which, in justice, she ought to disgorge, but the party conferring the benefit might not have suffered any factual loss. (The defendant might profit through the unauthorized use of the plaintiff's asset, but the plaintiff might not have intended to use the asset during that period of unauthorized use.)<sup>93</sup>

But Weinrib also suggests that one can have a normative loss without a factual loss, or a normative gain without a factual gain, and this suggestion is quite puzzling. Suppose, for example, that a defendant is negligent, but has no factual gain in terms of welfare or holdings. Weinrib asserts that the defendant has normatively gained.<sup>94</sup> But in what sense has he "gained"? How are his holdings greater than they ought to be under the proper norms? Weinrib's analysis on this point is mysterious. Moreover, to adopt another of Weinrib's criteria for normative gain, it is not the case that there is justification for the law's diminishing the holdings of a negligent driver, unless and until the driver causes a factual loss (or, perhaps, obtains a factual gain).

Similarly, how can one have normative "loss" without factual loss? In both cases, the normative "gain" or "loss" is most plausibly understood as *assuming* a factual gain or loss. This certainly is the meaning suggested in Weinrib's initial definition, that a normative gain or loss

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The requirement of correlativity is sometimes thought to limit or undermine the Aristotelian conception of corrective justice, on the ground that if gain and loss are to be correlative, they must necessarily be equal, which is obviously not the case for the factual gains and losses resulting from negligence. However, that factual gain does not necessarily equal factual loss is true but irrelevant. What matters to the justificatory structure of corrective justice is the correlativity of normative, not factual, gain and loss.

PRIVATE LAW, *supra* note 2, at 118-19 (footnotes omitted).

<sup>92</sup> *Id.* at 116.

<sup>93</sup> *Id.* at 118.

<sup>94</sup> *Id.* at 116.



occurs when one's actual holdings are greater or lesser than they ought to be under the governing norms.

The best reconstruction that I can offer is as follows. By "normative gain" and "normative loss," Weinrib does not mean to refer to a "gain" or "loss" in the ordinary sense of those terms. Rather, "normative gain" refers to a person violating a duty, and "normative loss" refers to a person suffering the infringement of a right.<sup>95</sup> One can violate a duty without obtaining a factual gain (or without causing a factual loss), as by negligent speeding that provides the speeding motorist no significant benefit and that causes no harm. And one can suffer the infringement of a right without suffering a factual loss (or without the rights-infringer obtaining a factual gain), as by suffering a trespass that does not impair one's property (and that does not materially benefit the trespasser).<sup>96</sup> Indeed, in Weinrib's discussion of the trespass example, he tellingly identifies the normative loss as the "breach of a norm."<sup>97</sup>

Unfortunately, the problem with the categories "normative gain" and "normative loss" is not merely semantic. Weinrib's confusion here carries over to his subsequent analysis employing the categories. Let us focus, for example, on two important implications that Weinrib draws from these categories—that tort and unjust enrichment are genuine forms of corrective justice, and that tort and unjust enrichment are symmetrical. Each implication falters because of problems with the underlying distinction between the normative and the factual.

First, and most importantly, Weinrib employs these categories to explain why tort law and unjust enrichment law are genuine forms of corrective justice. Tort law and the doctrine of unjust enrichment, he argues, reflect the correlativity of normative gains and losses rather than factual gains and losses. So tort allows recovery in the case of factual loss but no factual gain, and unjust enrichment allows recovery in the case of factual gain but no factual loss; but in each case, a normative gain is connected with a normative loss.<sup>98</sup> Weinrib's argument is unconvincing. He correctly states that factual loss need not be accompanied by factual gain to the injurer in order to justify tort liability (and conversely for unjust enrichment). But he has not adequately explained how either tort law or unjust enrichment law display such *normative* correlativity.

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<sup>95</sup> In a later portion of the book, Weinrib is more explicit about this point than in the section in which he first discusses the normative/factual distinction. As he later says: "Considered normatively, loss refers to the infringement of the plaintiff's right, and gain to the breach of the defendant's duty." *Id.* at 133.

<sup>96</sup> *Id.* at 116.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 117-18.

Weinrib writes that negligence liability displays such correlativity "because the wrongful injury represents both a normative surplus for the defendant (who has too much in view of the wrong) and a normative shortfall for the plaintiff (who has too little)."<sup>99</sup> But what does the defendant have "too much of"? Weinrib cannot mean holdings; as he has explained, a negligent injurer might acquire no factual gain. Then what? One remains mystified.<sup>100</sup>

The problem is that Weinrib uses the terms "normative loss" and "normative gain" inconsistently. Sometimes he means simply "infringement of a right" and "violation of a duty," respectively. But at other times he means "infringement of a right accompanied by a factual loss" and "violation of a duty accompanied by a factual gain," respectively.

The supposed "correlativity" of the normative gain to the normative loss seems to trade on this equivocal meaning of "normative loss."<sup>101</sup> If "normative loss" means "factual loss that is also a normative wrong, i.e., an infringement of the victim's right," then a "normative gain" would mean "factual gain that is also a normative wrong, i.e., a breach of the injurer's duty." But this is an unacceptable interpretation, for it would suggest that a factual loss must have as its correlative a factual gain, a relationship that Weinrib (rightly) denies. On the other hand, if "normative loss" means "infringement of a victim's right (whether or not the victim also suffers a factual loss)," then "normative loss" is indeed correlative of "normative gain" to the extent that

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<sup>99</sup> *Id.*

<sup>100</sup> Put differently, the negligent injurer has "too much" only in the sense that he has caused a factual loss to the victim for which the injurer has a duty to compensate. Thus, in a sense, he has "too much" until something is taken away from him to compensate the victim. Yet this "excess" is just a roundabout way of describing the scope of his duty to compensate; he might not actually be better off in any other sense as a result of his negligent conduct. Insofar as Weinrib wants the "normative excess" of the injurer to have a meaning similar to the "normative deficiency" of the victim, i.e., a factual deviation from what one's holdings should be, then we cannot say that the negligent injurer has "too much" in precisely the same sense that the victim of his negligence has "too little."

<sup>101</sup> For a vivid example of this problem, see PRIVATE LAW, *supra* note 2, at 125-26. In these passages, Weinrib essentially stipulates that "liability" (which presumably means either tort liability for factual loss or restitution of factual gain) causes both the disgorgement of normative "gain" and the reparation of normative "loss." Although Weinrib does consider actual factual gains and losses, he seems primarily concerned about the correlativity of "normative" gains and losses, i.e., about the correlativity of right and duty. But his conclusion—"[h]ence the transfer of a single sum annuls both the defendant's normative gain and the plaintiff's normative loss"—trades on the ambiguity. *Id.* at 126. Insofar as normative gain and loss are stipulated as correlative, any remedy of a factual *and* normative gain will also necessarily annul the correlative normative loss. (And conversely for any remedy of a factual and normative loss.) *See id.* at 136.

"infringement of a victim's right" is correlative of an "injurer's breach of duty to the victim."<sup>102</sup>

This interpretation succeeds in preserving correlativity, but it creates a new problem. It suggests that normative gains and losses can occur even if *neither* a factual gain nor a factual loss occurs; yet Weinrib seems to believe that either a factual gain or a factual loss must occur in order to justify a tort or unjust enrichment remedy. For example, he denies that a potential victim of another's negligent driving is entitled to damages from the driver for risk-creation, because the relevant loss is the ultimate physical harm, not the creation of risk.<sup>103</sup>

In the end, a more modest analysis is more persuasive. When we conclude that one party has experienced a normative "loss" or "gain" because of a tort or unjust enrichment, that "loss" or "gain" does not necessarily produce any corresponding "gain" or "loss" to the other party, factual *or* normative. Rather, the point is simply that it would be unjust to allow the normative loss or gain to remain uncorrected.<sup>104</sup> Or, alternatively, we might endorse Weinrib's concept of normative correlativity, but restrict that concept to the idea that the injurer must have breached a corrective justice duty to the victim. Whether a factual loss or factual gain is also necessary, and how each is defined, depends on the specification of the duty, including the specification of damage and injunctive remedies for the duty. An injunctive remedy for a trespass might be proper, apart from any factual loss, while a

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<sup>102</sup> The phrase "to the extent that" is an important condition, however. See notes 109-11 *infra* and accompanying text for a discussion of the distinction between right and duty as an "articulated unity" or instead as "analytic reflexes" of each other.

<sup>103</sup> PRIVATE LAW, *supra* note 2, at 156-58. Weinrib concedes that exposure to risk might be considered a factual loss in the sense that it "depreciates the value of the body considered as a capital asset." *Id.* at 157. But he concludes that risk-exposure cannot count as a normative loss, on the following ground:

[R]isk of bodily injury decisively differs from bodily injury itself: a human being has an immediate right in his or her own body because it houses the will and is the organ of its purposes. The prospect of injury is, at most, something that may affect the embodiment of the plaintiff's free will in the future. Therefore, security from this prospect does not rank as a present right.

*Id.* at 157 (footnote omitted). This abstract argument seems to beg the question, however.

Moreover, Weinrib's example of nominal damages for trespass is in tension with the interpretation noted in the text. Weinrib emphasizes that the property owner need not suffer any factual loss; yet it seems that the trespasser also need not obtain a tangible factual gain in order to be subject to injunction or nominal damages.

<sup>104</sup> At certain points, Weinrib seems to endorse this more modest analysis. See, e.g., *id.* at 120 ("[T]he plaintiff recovers the defendant's gain not when the plaintiff has suffered merely a factual loss but when the defendant's enrichment represents an injustice to the plaintiff.").

damage remedy for negligence might be limited to cases in which the victim has actually suffered a loss.<sup>105</sup>

A second problem with the normative versus factual distinction concerns the interesting symmetry that Weinrib detects between unjust enrichment, in which a factual gain violates a norm of justice, and tort, in which a factual loss violates such a norm. But that symmetry is problematic, once we examine more carefully the relationship between the norm-violation and the factual loss or gain. In unjust enrichment, the enriched party might *innocently* obtain a factual gain. (A bank might erroneously place a surplus of funds in a merchant's account; justice requires the innocent merchant to return the surplus.) In such a case, what is unjust is not the manner in which the defendant obtained the gain, but instead her retaining the gain rather than giving it back. By contrast, in Weinrib's view of tort, what is unjust is precisely the wrongful way in which the injurer brings about the victim's factual loss.

Thus, a genuine tort parallel to the innocent-gain type of unjust enrichment is the following: the injurer innocently or reasonably causes a factual loss, but it is unjust for her not to compensate for the loss. This, of course, is simply a corrective justice account of *strict liability* in tort! Indeed, this also seems to be a better description of our last example, *Vincent*, where Bill the boat owner causes a factual loss to the dock owner. What is unjust in *Vincent*, however, is not the way in which Bill has caused that factual loss. After all, his decision to dock was reasonable even though he knew that he would damage the dock. Rather, an injustice would occur in *Vincent* if Bill were not to pay for that damage, in light of Bill's appropriating a benefit for his own use, imposing a nonreciprocal risk, or some other criterion of injustice. Weinrib, by contrast, is instead forced to characterize the injustice as Bill obtaining an unjust factual *gain*, which, Weinrib struggles to ex-

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<sup>105</sup> However, others (including this author) believe that it is consistent with corrective justice to award damages to those victims who are endangered by the injurer's risky behavior, and not only to those victims who are actually harmed. See Schroeder, *supra* note 39; Simons, *Corrective Justice and Liability for Risk-Creation*, *supra* note 39.

Indeed, if "normative gain" without factual loss justifies a legal remedy, as Weinrib argues at one point, then it seems that Weinrib himself has moved away from the traditional tort-principles that he otherwise defends, thereby allowing for the validity of non-traditional principles such as liability for risk-exposure alone—principles which Weinrib does not endorse. At least, this is the case if the normative "gain" or "loss" refers to a violation of rights that has not yet caused a factual gain or loss—e.g., negligent driving that endangers but has not yet injured the victim (analogous to Weinrib's actual example of a trespass that does not injure the victim's property). In remedial terms, one could imagine enjoining the conduct that might cause loss, or declaring the victim's right to be free of that loss (or risk of loss).

plain, happily turns out to be equivalent in value to the factual loss that Bill has inflicted on Delbert.<sup>106</sup>

Similarly, a genuine unjust enrichment parallel to Weinrib's fault-based view of tort is the following: the injurer wrongfully obtains a factual gain, but does not necessarily cause any factual loss, and the injustice consists not in the retention of the gain as such, but in the manner in which she obtained the gain. Weinrib does acknowledge that unjust enrichment comprises both innocent and wrongful acts by the enriched party.<sup>107</sup> He does not, however, pursue the implications of the distinction. The implications are significant. If the innocently enriched party does disgorge the benefit, it seems that the wrong is entirely righted; for the wrong consists only in unjustly retaining the gain. On the other hand, if the wrongfully enriched party disgorges the benefit, the wrong is only righted in the sense that compensation might be the best possible remedy; but the world is still worse off for the enrichment. The innocent and wrongful enrichment cases correspond to strict tort liability and to damage liability for an act of negligence, respectively. The wrong in strict liability consists only in engaging in the activity without paying for its costs. In other words, paying its costs rights the wrong. However, paying compensation for negligence does not right the wrong of negligence.<sup>108</sup>

Thus, Weinrib's analysis of normative gain and normative loss is quite problematic. The motivation for Weinrib's analysis here is understandable—he wishes to dispel the notion that the Aristotelian conception of corrective justice requires that the injurer obtain a factual gain identical to the factual loss suffered by the victim. But the analysis rests on an unresolved ambiguity and has some troubling implications.

## VIII

### RIGHT AND DUTY: "ARTICULATED UNITY" OR "ANALYTIC REFLEXES"?

To understand better why Weinrib develops this confusing set of concepts, we need to examine a related argument. Weinrib pursued the distinction between factual and normative gain (and loss) to underscore that private law, including tort and unjust enrichment, requires normative correlativity, not factual correlativity. But that

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<sup>106</sup> For a discussion of Weinrib's explanation, see *supra* notes 73-87 and accompanying text.

<sup>107</sup> PRIVATE LAW, *supra* note 2, at 140.

<sup>108</sup> See COLEMAN, *supra* note 1, at 188-91; Simons, *Jules Coleman and Corrective Justice*, *supra* note 34, at 868-69, 876-77.

normative correlativity must, he insists, be of a special *type*.<sup>109</sup> The victim's right cannot, according to Weinrib, be simply an "analytic reflex" of the injurer's duty, nor can the injurer's duty simply be an "analytic reflex" of the victim's right. "If right were the reflex of duty, justificatory considerations pertaining to the defendant alone would be decisive for the relationship as a whole."<sup>110</sup> The right cannot simply be derived from the duty, or the duty from the right. Rather, the victim's right and the injurer's duty must be an "articulated unity."

As examples of the "analytic reflex" approach that he finds unacceptable, Weinrib refers to arguments for strict liability or for a subjective negligence standard.<sup>111</sup> "[S]trict liability has right without duty, the subjective standard has duty without right."<sup>112</sup> I will focus here on Weinrib's objection to strict liability. Specifically, Weinrib asserts that "strict liability protects the plaintiff's rights without allowing room for an intelligible conception of the defendant's duty," for the defendant's duty in strict liability is not operative at the time of the defendant's act, but only later, once we discover whether the defendant has harmed the plaintiff.<sup>113</sup>

This argument is weak. Weinrib might substantively prefer a fault-based conception of duty operative at the time of action, and he might have good reasons for that preference. But there is nothing unintelligible about a conception of duty that is conditional: the defendant is obliged to pay just in case he causes harm to the victim. Indeed, Weinrib seems to support a similarly conditional conception of duty in the distinct context of unjust enrichment: it might only be

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<sup>109</sup> The first part of Weinrib's argument here is that the justifications at work in corrective justice must be unifying (i.e., the same norm must be the baseline for both normative gain and loss), must be bipolar (linking only two parties) and must express transactional equality (preferring neither party to the transaction). PRIVATE LAW, *supra* note 2, at 122-23. Weinrib then aptly criticizes norms such as the victim's need for compensation or the social value of deterring the injurer as inconsistent with these conditions. However, as suggested above, one could properly criticize such norms for inconsistency with a different, and much less restrictive, set of conditions—they do not genuinely support a personal right of the victim against the injurer.

<sup>110</sup> *Id.* at 124.

<sup>111</sup> As another example of the unacceptable "analytic reflex" approach, Weinrib refers to Charles Fried's theory of contract as promise. "The fact that the promisor is duty-bound to bestow a promised benefit is not in itself a manifestation of the promisee's freedom. In bestowing the benefit, the promisor is not honoring the promisee's right to it but is merely fulfilling a self-regarding duty of consistency over time." *Id.* at 124-25 n.11. But Fried need only emphasize that the promisor's duty is neither diffuse, owed to the world at large, nor merely self-regarding. Rather, a promise to an identified promisee creates a focused duty. Other aspects of the law of contract, such as reliance and consideration, define the precise legal scope of that duty. Contrary to Weinrib's assertion, *id.* at 50-53, the promisee is not simply a random individual who happens to take on the role of enforcing the promisor's moral virtue.

<sup>112</sup> *Id.* at 178.

<sup>113</sup> *Id.* at 179.

in hindsight, not foresight, that we are able to determine whether the party has received a benefit which he must, in justice, disgorge. (The innocent recipient of a mistaken distribution of funds might have breached no antecedent duty in obtaining those funds.)<sup>114</sup>

Moreover, even the fault-based conception of corrective justice that Weinrib favors creates a problem similar to strict liability: how can the injurer's specific duty to pay damages to the victim depend on the fortuity of whether the breach of duty (negligence) happens to injure the victim? If the strict liability duty must be "operative" when the defendant acts, and not simply when the act results in harm, how can Weinrib justify limiting negligence damage remedies to liability for actual harm? With both strict liability and negligence, we can antecedently characterize the type of conduct that will result in liability *if* harm occurs. (In *Vincent*, for example, the boatowner is liable only if his vessel damages the dock; otherwise, he is privileged to trespass.)

In the end, Weinrib's objection to viewing right as the "analytic reflex" of a duty or vice versa really seems to be an objection to a substantive definition of the right or duty that improperly violates the transactional equality of the parties.<sup>115</sup> For, as a logical matter, it is not problematic to view right as the "analytic reflex" of duty in the sense of being a logical correlative of duty. Duty and right can indeed be defined in a "reflexive" way, so long as the right is carefully specified as holding against an identified class of persons and the duty is specified as holding with respect to an identified class of victims. Perhaps Weinrib is really objecting here to an extremely *diffuse* definition of right or duty.<sup>116</sup> For example, "every person who suffers has a right of compensation" would surely be an excessively diffuse definition of a right, for it does not identify a class of relevant injurers who owe a duty. Similarly, declaring that "every person who could avoid causing social harm has a duty to do so" would, I agree, be an excessively diffuse definition of a duty, for it does not identify a class of relevant victims who have the right of compensation. But a strict liability rule—"every person who causes harm to another has a duty to that person to pay compensation"—is not excessively diffuse, even though

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<sup>114</sup> As Weinrib explains:

Unilateral transfers, such as mistaken payments, that are not the product of a donative intent are juridically ineffective, regardless of the absence of wrongdoing by the donee. . . .

In such circumstances, *the enrichment itself* represents something that is rightfully the plaintiff's. Because *its retention* by the defendant is an infringement of the plaintiff's right, the defendant has a duty to restore it to the plaintiff.

*Id.* at 141 (footnote omitted; emphasis added).

<sup>115</sup> *Id.* at 178-79.

<sup>116</sup> See, e.g., *id.* at 125 ("[T]he plaintiff's right must be the ground of the defendant's duty, and the scope of the duty must include the kind of right-infringement that the plaintiff suffered.").

the right of the victim is the analytic reflex of the duty (in the sense of being its logical correlative). If the duty that this rule creates is unacceptable, then it is for some other reason.<sup>117</sup>

## IX

### A DIFFERENT APPROACH TO JUSTIFICATION IN PRIVATE LAW

Let me now briefly suggest a different and more modest approach to justification in private law. As suggested at the outset, this approach preserves much of Weinrib's argument yet seems much less vulnerable to criticism. Three aspects of this approach deserve attention. First, a more modest approach emphasizes the rights-based nature of private law. Second, it permits pluralistic grounds or justifications for the scope of rights. Third, it does not treat morality as "external" to legal justification, but instead accepts the teachings of moral theory insofar as those teachings support the distinctive role and structure of legal rights.

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<sup>117</sup> Weinrib's discussion of the famous case *Spur Indus. v. Del E. Webb Co.*, 494 P.2d 700 (Ariz. 1970), suggests a similarly narrow conception of the type of rights that private law can legitimately recognize. The *Spur* court granted a real-estate developer an injunction after finding that smells from a nearby cattle feedlot created a nuisance. The court granted the injunction on the condition that the developer compensate the feedlot owner for the damage that the injunction would cause the owner. Weinrib objects that the *Spur* court attended to welfare rather than rights, and ignored the Kantian perspective whereby a victim of wrongdoing is entitled to a full remedy. PRIVATE LAW, *supra* note 2, at 132 n.22. *Spur* is indeed a controversial case, but its remedial solution can be defended within a rights-based theory. In the Calabresi/Melamed framework, both parties in *Spur* have "rights." See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1116-21 (1972). The developer has a right which is protected by a conditional property rule (i.e., the developer is entitled to an injunction, provided it pays compensation), while the feedlot owner has a right protected by a liability rule but not by a property rule (i.e., the owner is not entitled to continue its activities, but it is entitled to compensation).

To be sure, a party who must pay for the privilege of obtaining an injunction has a much weaker right than one who may obtain an unconditional injunction. If we believe that the enjoined feedlot operator is an unconditional wrongdoer, then the solution in *Spur* is unacceptable. However, the very point of *Spur* is to permit a more creative, flexible definition of a property right, one sensitive to the competing equities. Fairness might support the unusual remedy granted in *Spur* because the feedlot owner's wrongdoing is not unconditional, and the developer also bears significant responsibility for contributing to the harm. The developer had purchased land near the feedlot with full knowledge of the feedlot. As the court explained:

It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.

Having brought people to the nuisance to the foreseeable detriment of *Spur*, Webb must indemnify *Spur* for a reasonable amount of the cost of moving or shutting down.

494 P.2d at 708. Although Calabresi and Melamed give an economic interpretation of this category of rights, the court's own explanation is consistent with principles of corrective justice.



First, Weinrib is correct to emphasize that private law is rights-based. Legal concepts are not simply proxies for extrinsic goals such as deterrence of inefficient conduct, compensation of victims, or retributive blame. Rather, they are relevant to "the assertion of right by the plaintiff in response to a wrong suffered at the hands of the defendant."<sup>118</sup> In particular, the bipolar structure of most of private law is significant, for it reflects the correlativity of the victim's right and the injurer's duty. Private law rights and duties are *strongly* correlative: the victim's right is that the injurer act in a particular way or provide a particular type of remedy; the injurer's duty is owed to a particular victim or group of victims. By contrast, public law rights and duties are weakly correlative: a citizen might have a right to welfare, or to a degree of state protection from injury, yet it might be indeterminate who owes the duty.<sup>119</sup>

Second, Weinrib's monism is unacceptable. As a descriptive matter, judges routinely employ pluralistic justifications for legal doctrines. As a normative matter, this practice is both perfectly defensible and consistent with the distinctive structure and role of legal rights in private law. The legitimacy of pluralistic justification in law and morality is a broad topic that I cannot explore here.<sup>120</sup> Nonetheless, it is worth emphasizing that pluralism is consistent with the correlativity of private law rights and duties. For example, a judge might properly consider a multiplicity of normative factors in assessing whether an injurer owes an affirmative duty to a victim (e.g., whether the injurer has caused the harm or peril, even innocently; whether the injurer is a professional with special responsibilities; and whether the victim has reasonably relied on the injurer's actions).<sup>121</sup> Each of these factors respects the basic structural feature of tort law: that a victim sues in his own right for a wrong committed by the injurer. Moreover, the

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<sup>118</sup> PRIVATE LAW, *supra* note 2, at 147.

<sup>119</sup> For different accounts of this latter point, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, 169-77 (1977); JEREMY WALDRON, *Liberal Rights: Two Sides of the Coin*, in LIBERAL RIGHTS 1, 25 (1993); JEREMY WALDRON, *Rights in Conflict*, in LIBERAL RIGHTS, *supra*, at 203, 213-15. Although some might dispute the point, I believe that the concept of rights and duty are *logically* correlative, but this is only to say that a right implies that a corresponding duty exists, even if the holder of that right is unspecified (and conversely for the implication of a duty). The logical correlation still permits significant variation in the scope and strength of rights and duties.

<sup>120</sup> For one account, see JOHN KEKES, THE MORALITY OF PLURALISM (1993). Kekes counts a number of important contemporary philosophers as pluralists, including Stuart Hampshire, Thomas Nagel, Martha Nussbaum, John Rawls, and Bernard Williams. *Id.* at 12. See also Raz, *supra* note 1, at 328 ("The virtues that it is of the essence of law that it should possess, like the virtues of people, may form an irreducible plurality."). For a critique of Weinrib's anti-pluralism similar to mine, see Perry, *Professor Weinrib's Formalism*, *supra* note 1, at 608-19.

<sup>121</sup> KEETON ET AL., *supra* note 24, § 56 & n.44 (when injurer innocently causes harm); *id.* § 56 & nn.22-24 (when injurer is held to professional standards); *id.* § 56 & n.70 (when victim relies on injurer's actions).

pluralistic nature of such a justification does not mean that the justification must be consequentialist.<sup>122</sup> Weinrib might have a legitimate concern that some advocates of pluralistic justification also endorse an instrumental approach to law that obscures law's distinctive normative structure. But the connection is not a necessary one.<sup>123</sup>

In a very limited sense, Weinrib is a pluralist. He is at pains to emphasize that corrective justice does not fully specify the details of legal doctrine. Legal doctrine, Weinrib believes, is significantly underdetermined.<sup>124</sup> For example, he suggests that both respondeat superior (a partial strict liability doctrine) and employer liability only for personal fault might satisfy corrective justice.<sup>125</sup> Thus, Weinrib's theory turns out to accommodate a significant variety of legal doctrines.

This feature of Weinrib's theory is striking. If his account of corrective justice cannot explain the choice between strict liability and fault liability, if it cannot specify in much detail the degree of risk that suffices for negligence liability,<sup>126</sup> if it must rely on virtually unguided judicial discretion to explain the scope of proximate cause,<sup>127</sup> then judges need not give a legitimate moral justification for many of the important choices they make. Ironically, the effect of a theoretically stringent corrective justice account that seriously underdetermines legal doctrine might be to encourage courts to rely on precisely the type of external goals (such as deterrence or compensation) that Weinrib believes should be excluded from legal justification. It would be far better to acknowledge a greater multiplicity of normative considerations that properly bear on justification.

<sup>122</sup> That is, it is tempting to conclude that any balancing of factors must be consequentialist, since deontological norms are often understood to be absolute and exceptionless. But this conclusion does not follow. Deontological and other nonconsequentialist approaches can consider a variety of factors without degenerating into consequentialism. John Rawls's lexical ordering of his principles of justice is, perhaps, the best illustration of my point. For further discussion of how a deontological approach is consistent with balancing, see Simons, *Deontology, Negligence, Tort, and Crime*, *supra* note 18.

<sup>123</sup> Weinrib asserts that the only ways to justify private law through such independent goals as compensation and deterrence are (1) to relate the two goals to a more comprehensive one such as utility maximization, or (2) to decry tort law as morally arbitrary. PRIVATE LAW, *supra* note 2, at 41. Indeed, Weinrib goes so far as to say that "[p]rivate law is normatively inadequate if it is understood in terms of independent goals." *Id.* at 42. But this approach ignores the possibility of structured (e.g., lexical) consideration of normative factors consistent with the rights-orientation of private law. Weinrib is correct, however, that the particular goals of deterrence and compensation cannot alone explain a rights-oriented theory of tort law.

<sup>124</sup> According to Weinrib, a given doctrine of private law need only be adequate to corrective justice; it need not be deduced from corrective justice. And a doctrine is "adequate" when its justification conforms to the structure of corrective justice. More than one doctrine might satisfy this test. *Id.* at 228.

<sup>125</sup> *Id.* at 228 n.37.

<sup>126</sup> *Id.* at 222.

<sup>127</sup> *Id.*

To be sure, Weinrib is correct that some indeterminacy does not fatally flaw a legal theory.<sup>128</sup> An able judge engages in an “articulated judgment” in light of precedent, professional role, and appropriate process;<sup>129</sup> she does not mechanically derive detailed norms from more general ones. Still, one would expect a justifying theory of law to give considerable guidance to lawmakers. Yet Weinrib concedes a significant amount of indeterminacy.<sup>130</sup> Moreover, much of his analysis appears to be significantly less determinate than he believes.<sup>131</sup> If this is true, then his analysis sets out only the most minimal acceptable framework of private law. Paradoxically, his radically indeterminate analysis might then permit, as a practical necessity, just the type of nonlegal, political justifications of legal results that he abjures. A better general strategy is to develop a richer set of substantive corrective justice principles that more fully determine the content of private law.

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128 Moreover, Weinrib emphasizes that the autonomy of his own legal theory rests not on its determinacy but on its ability to provide a coherent justification of private law. *Id.* at 223.

129 *See id.* at 223-24.

130 Weinrib asserts that corrective justice is “determinate” in the important sense of being categorically distinguishable from distributive justice. *Id.* at 226. These two forms of justice, he points out, exhibit the different ways in which relations between persons are external; such external “modes of normativeness are distinguishable from the moral excellences, such as love and virtue, that are internal to the agent.” *Id.* at 227. This, however, provides an extremely weak sense of determinacy, and identifying corrective justice as a distinct category is a far cry from deducing action-guiding legal doctrines from the concept of corrective justice.

131 I find Weinrib’s attempts to derive a number of tort doctrines from the doer/sufferer relationship unpersuasive. For example, he asserts that corrective justice supports the distinction between misfeasance and nonfeasance, because “[t]he plaintiff’s unilateral need for assistance, no matter how urgent, falls outside the relationship of doing and suffering.” *Id.* at 153-54. But Weinrib’s characterization of the basic corrective justice paradigm as “doing and suffering” begs the question—why is the relationship of “power and vulnerability” not eligible as an interpretation of corrective justice? *See supra* notes 54-56 and accompanying text.

Another example is Weinrib’s attempt to justify a “harm within the risk” or reasonable foresight criterion of proximate cause. Weinrib claims that this criterion is preferable to the directness test, because it integrates the concepts of negligence and proximate cause by employing the single idea of unreasonable risk. Weinrib’s argument is unpersuasive. It implies that the proximate cause criterion for intentional torts should be a narrow one: whether the defendant intended to create a harm in the relevant category. (Actually, the law probably imposes *looser* proximate cause restrictions for intentional torts. *See* RESTATEMENT (SECOND) OF TORTS § § 430, 870 (1979)). *See also* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 512 (6th ed. 1995) (“How does Seavey’s argument [that the reasons for creating liability should limit it] apply when a theory of strict liability is adopted?”).

Indeed, given a reasonable definition of negligence and an insistence on factual cause, corrective justice may not require any proximate cause limitations at all. *Cf.* *Petition of Kinsman Transit Co.*, 338 F.2d 708, 725 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965) (arguing that if the more foreseeable risks are sufficiently weighty to render the defendant’s disregard of them negligent, then “the existence of a less likely additional risk that the very forces against whose action he was required to guard would produce other and greater damage than could have been reasonably anticipated should inculcate him further rather than limit his liability.”).

For example, it would be much more desirable if such principles could justify a choice between the American and the English rule of negligence. If they cannot, then in practice a court might justify the choice in terms of loss-spreading, compensation, deterrence, or some other goal that Weinrib would reject.

Third, Weinrib has a remarkably narrow view of the types of justifications that are appropriate to private law. Weinrib considers not only economics but also morality to be an "external," and therefore inadmissible, goal.<sup>132</sup> Of course, Weinrib does recognize the normativity of law, but he characterizes that normativity as "internal" to legal relations in a narrow sense. He essentially stipulates that agency, free will, and causation are the only elements that define this normativity.<sup>133</sup>

An alternative approach is more ecumenical, accepting the teachings of moral theory insofar as those teachings support the distinctive role and structure of legal rights. Of course, moral rights and moral norms cannot be directly translated into legal rights. And Weinrib is correct to warn against the tendency of some modern theorists to see law as intelligible only when viewed through the lens of some other discipline, such as economics, political theory, psychology, or even morality.<sup>134</sup> A legal theory is indeed inadequate if it amounts to no more than taking the results of cases and finding morally attractive purposes that fit those results.<sup>135</sup>

A more subtle approach, however, avoids these pitfalls. The moral "purposes" of tort law can be identified only from within the practice of law. They are justifications that judges and lawyers themselves give to the practice. Moreover, the translation of moral norms into legal rights must be extremely sensitive to the distinctive role of

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<sup>132</sup> PRIVATE LAW, *supra* note 2, at 49-50. Indeed, in distinguishing noninstrumental from instrumental accounts of law, Weinrib includes many moral as well as economic theories within the term "instrumental." See *id.* at 48-55, 112-13 (discussing Kantian virtue, Fried's contract as promise, and Fletcher on excuses). This characterization is misleading, since "instrumental" usually connotes a consequentialist form of reasoning, and these moral theories are hardly consequentialist.

<sup>133</sup> According to Weinrib, the moral force of private law derives "not from any ulterior good but from the inherently normative dimension of free and purposive action." PRIVATE LAW, *supra* note 2, at 207. Additionally, this normativeness is elaborated in private law only by reference to the correlativity of doing and suffering, not to any external value. Weinrib does offer some reasons for defining normativity in terms of these few elements, *id.* at 84-113, but the reasons are highly abstract and unlikely to persuade a nonbeliever. Moreover, it is difficult to see how even the general features of tort law can be derived from these few elements. The earlier part of this review noted some instances in which the derivation is problematic. See *supra* parts II-V.

<sup>134</sup> See PRIVATE LAW, *supra* note 2, at 17. See also *id.* at 146-47 ("[F]ormalism sees [legal concepts] as having the meaning that juristic thought supposes that they have," instead of translating them into an alien vocabulary, as economic analysis does.).

<sup>135</sup> *Id.* at 16.

legal rights and the distinctive nature of legal justification. Any simple-minded translation would ignore the need for caution before giving legal recognition to any and all violation of moral norms, in light of the coercive power of the state. The special institutional features of law also preclude any straightforward translation. Especially important here are "rule of law" requirements, such as the requirements that the definition of legal rights be intelligible to law enforcers and law subjects and that justifications be public. Moreover, the legitimacy of law requires that legal norms be adopted, interpreted, and enforced with appropriate consistency, fealty to the past, and concern for the future.<sup>136</sup>

At the same time, Weinrib's approach would impoverish legal justification. Moral rights and duties are often the very basis of legal rights and duties.<sup>137</sup> Moreover, Weinrib's approach would require legal actors to ignore any insights that moral theory might provide—e.g., in analyzing the act versus omission distinction and duties to aid; the nature of knowledge, intention, purpose, and other mental states; the fair attribution of blame; or moral and nonmoral responsibility for harm or for risking harm.<sup>138</sup> For example, the recent change in American product liability law from a negligence approach to a partial strict liability approach would apparently be illegitimate unless based on a new understanding of the free will of the interacting agents, since that is the only source of normativity for Weinrib. But the actual discourse of product liability case law contains discussion of the fairness of a manufacturer inflicting foreseeable harms on consumers when the manufacturer reaps benefits from the interaction.<sup>139</sup> It is an extraordinarily narrow view of corrective justice that would condemn

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<sup>136</sup> See RONALD DWORKIN, *LAW'S EMPIRE* (1986). As noted earlier, Weinrib does acknowledge that law should recognize excuses based on considerations that are not "internal" to the relationship, *supra* note 52. He reasons that in the case of excuse, law cannot be effective, so its coercive power should not be employed. *PRIVATE LAW*, *supra* note 2, at 109. This is an odd amendment to a theory whose morality is supposedly limited to the "internal" relationship of the parties. If it is now possible to amend Weinrib's narrow interpretation of corrective justice in light of the distinctive demands of legal coercion, why can we not amend legal doctrine in other, even more dramatic, ways? For example, why not accept a theory of strict liability if negligence liability would not effectively induce actors to conform to their duty to be nonnegligent?

<sup>137</sup> For a carefully articulated account of the relationship between moral and legal rights, see JOSEPH RAZ, *Legal Rights*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 238 (1994); JOSEPH RAZ, *On the Autonomy of Legal Reasoning*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 319 (1994).

<sup>138</sup> More precisely, we would consider such moral arguments only to the extent that they bore on the "normativity" of law in the very narrow sense defined by Weinrib. See *supra* text accompanying note 130.

<sup>139</sup> See, e.g., *Greeman v. Yuba Power Products*, 377 P.2d 897 (Cal. 1963); *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

such discussion as an illegitimate transformation of a self-contained domain of law into the "external" realm of morality.<sup>140</sup>

By opening up the potential justifications of private law to a broader range of moral considerations, one avoids a deeper problem with Weinrib's approach. Recall that Weinrib professes to be agnostic about the relative social desirability of his purist version of tort law, on the one hand, and social insurance schemes, on the other. This agnosticism is puzzling. Even if one were to conclude (as I would not) that Weinrib's version is more coherent than the pluralist version just offered, one cannot decide whether his version is preferable without examining carefully the supposed benefits of a perfectly coherent version and comparing them to the benefits of a less coherent version that nevertheless serves a number of morally attractive purposes. The virtues of coherence would have to be extraordinarily great in order to justify Weinrib's confident conclusion that society should choose between Weinrib's purism and no-fault, rather than choose between his purism and a more pluralist version of corrective justice.<sup>141</sup>

Consider some concrete examples. American judicial innovations in strict product liability, market share damages, or loss of a chance are presumably the type of doctrinal changes that Weinrib finds lacking in coherent justification. But even if they fall short of an ideal of coherence—for example, if a strict product liability approach is inconsistent with the nature of the doer/sufferer relationship as well as with other aspects of tort law—it is hardly obvious that society would be better off with a general social insurance scheme. Some compromise of the purist version *within* the system of private law might be justifiable. In the end, unless Weinrib simply treasures conceptual purity for its own sake, he must place enormous *practical* value on conceptual clarity and consistency—e.g., in providing citizens with fair notice, or in assuring impartial decisionmaking. Unfortunately, the argument for this position is not forthcoming.<sup>142</sup>

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<sup>140</sup> The more accommodating approach would be much more congenial to other corrective justice theorists who share many of Weinrib's criticisms of instrumental approaches to tort law. Cf. COLEMAN, *supra* note 1, at 209-11; Perry, *The Moral Foundations of Tort Law*, *supra* note 1; Wright, *supra* note 1.

<sup>141</sup> Indeed, suppose it turned out that the only "coherent" account (on Weinrib's strong view of coherence) was normatively completely unacceptable. Why should the default be a political social insurance solution? Why not consider a compromised, and not fully coherent, version of corrective justice in private law?

<sup>142</sup> In his discussion of Kantian right, Weinrib describes the functions of public law (including what are typically understood as rule of law values) as external expressions and confirmations of free will. PRIVATE LAW, *supra* note 2, at 100-09. But Weinrib is here elucidating "the external actualization of the practical reason implicit in the interaction of self-determining agents," *id.* at 105; he is not defending the general social importance of rule of law virtues. In his conclusion, Weinrib speculates that private law can "exemplify the autonomy that we associate with the rule of law." *Id.* at 231. Unfortunately, he does not develop this thought.

## CONCLUSION

Ernest Weinrib is admirably obstinate. While liberals ridiculed critical legal scholars for attacking the straw person of formalism, Weinrib purported to put flesh and bones on the scarecrow. In his new book, he proudly and persistently celebrates the virtues of formalism over substantive principles. And Weinrib views the "internal" perspective of tort and other areas of private law as a concomitant of this formalist approach.<sup>143</sup>

The formalism that Weinrib purports to endorse can, however, be viewed in a more sympathetic light. It can be seen as a warning not to employ certain types of substantive justifications that are too disconnected from the structure of private law. Law is not simply politics. Nor is it simply an attractive set of moral principles that the state happens to enforce. Weinrib himself acknowledges the normativity of law, albeit in a very narrow domain. If he were to expand that domain as I have suggested, his theory might be viewed not as a curious thought experiment, but as a defensible and attractive conception of private law.

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<sup>143</sup> See, e.g., *id.* at 25.