Reciprocal Freedom

Private Law and Public Right

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Preface

This book continues a decades-long exploration of the theory of private law. The lynchpin of this theory has been the idea of corrective justice, the pedigree of which goes back to Aristotle's account of justice. For Aristotle, corrective justice and distributive justice signified two different structures for one's relationships with others. Distributive justice divides a benefit or burden among any number of persons in accordance with some criterion of distribution. Corrective justice, in contrast, corrects injustices within the bipolar transactions that make up what we now think of as private law.

The first stage of this exploration on my part culminated in *The Idea of Private Law*.[1] That book developed Aristotle's comments on the bipolarity of corrective justice into an account of the distinctive notions of coherence and intelligibility that are in play in private law's determinations of liability. Reflecting the truism that the liability of a particular defendant is always a liability to a particular plaintiff, corrective justice takes the relationship between the parties to be the central and pervasive feature of liability. Accordingly, the explication of this feature is the fundamental task of a theory of private law. Within this relationship between plaintiff and defendant, the position of one party is always conditioned by the position of the other. Liability being a bipolar phenomenon, the theoretical analysis of it can therefore not come to rest at either pole. Accordingly, it is a mistake to explain liability by reference to considerations separately relevant to either of the parties (or even to both of them). Rather, if private law is to be coherent, the relational character of the reasons supporting liability has to match the relational structure of liability itself.

The Idea of Private Law was devoted to elucidating and connecting the components of the corrective justice approach. It articulated three such components: the legal formalism exhibited by the distinction between corrective and distributive justice; the correlativity of the parties' positions within the bipolar structure of corrective justice; and the robust Kantian conception of legal rights that provides corrective justice with its content. Using illustrative material drawn principally from the law of torts, the book melded these into an integrated framework from which emerged private law's distinctive conception of normative coherence.

The next stage in the exploration of this theory of private law was to extend the analysis beyond tort law to other branches of private law, as well as to other contexts in which the corrective justice approach might be illuminating. This was the

[1] EJ Weinrib, *The Idea of Private Law* (Harvard UP 1995, OUP 2012).

task of *Corrective Justice*.[2] That work presented a corrective justice analysis not only of the duty of care in negligence law, but also of remedies, gain-based damages, contracts, unjust enrichment, and property. Apart from addressing these familiar substantive legal topics, the book also deployed the corrective justice approach in other settings, such as the Jewish law of unjust enrichment and the activity of legal education within the modern university. The goal was to exhibit in concrete detail and in a variety of contexts private law's distinctive relational structure, its relational concepts, and its relational mode of reasoning.

Whereas these two books largely focused on the internal structure and operation of private law within the corrective justice approach, the present book proceeds in a different direction. Although it starts with the structure of the private law relationship, it moves gradually outwards to consider the situation of private law within the legal order as a whole. The previous books were about private law in itself; this one, as it unfolds, places private law in the larger world of law. Accordingly, the last half of the book deals with the state's role in forwarding distributive justice, with the horizontal application to private law of constitutional rights and values, and with the rule of law as an idea that governs every variety of state action, including both public law and private law. Anticipating this destination, the first half of the book introduces ideas that, while fully respecting the integrity of private law, prepare the ground for this outward movement. Thus, although it does not exhaust the theme, the book brings the theory of private law up to the border of public law, creating a vantage point from which to discern how private law fits within the broader legal landscape.

In exploring these issues, the book explicitly takes Kant's legal philosophy as its guide. The book's starting point in corrective justice postulates a content that matches the correlativity of the parties' situations in that form of justice. That content is found in Kant's conception of rights and their correlative obligations. Of course, an emphasis on rights is not unique to Kant. But what makes Kant's account of law particularly apposite to the relational character of corrective justice is that, perhaps more than any legal philosopher, he treats law as unremittingly relational. For Kant, this attention to the relational does not emerge merely as the consequence of rights that might have non-relational grounds; rather, it informs the very grounding of the rights themselves. Just as Aristotle characterized justice as directed 'towards another'[3] and specified corrective and distributive justice as different ways in which this other-directedness can be structured, so Kant takes legal philosophy to be concerned not with the normative status of a person's conduct considered on its own, but with the relationship of one person's action to another person's freedom. Moreover, Kant's work presents a comprehensive picture of the different kinds of legal relationship, whether between persons and other persons,

[2] EJ Weinrib, *Corrective Justice* (OUP 2012).
[3] Aristotle, *Nicomachean Ethics* V, 1129b27, 1130a4, 1130a13.

or between persons and their own states, or between one state and other states, or between persons of one state and a different state. These he connects to one another and to the normative ideas that underlie (and in his view must underlie) them. His account thus provides a normative map that describes the location of different legal configurations relative to one another and that explicates the single set of interconnected normative ideas that nourishes them all. He thereby both preserves the distinction between what we term private law and public law, and yet outlines the conceptual moves that connect the former to the latter.

The central insight of Kant's account is that law is necessary for the actualization of reciprocal freedom, that is, for the existence of a totality of social relations in which each person's freedom co-exists with everyone else's. The rights to personal integrity, property, and contractual performance—which Kant groups under the term 'private right' as legal categories conceivable in a state of nature—as well as the institutional apparatus of public and coercively enforced norms in a civil condition—Kant's 'public right'—are integral to this freedom. The notion of public right is crucial both to the existence of a system of private law and to the transition from private law to what lies beyond.

The present book retraces this movement in the context of contemporary legal and jurisprudential issues. The argument proceeds in a sequence of stages, each of which is complemented by, and presupposed in, the one that follows. After beginning with the correlative structure of the private law relationship (Chapter 1), the argument moves to the Kantian notion of rights and their correlative obligations. As markers of reciprocal freedom, these rights and obligations make up the content of private law's correlatively structured relationships. The Kantian conception of a right normatively unifies, with respect to the object of the right, the different categories of jural entitlement subsequently articulated by Hohfeld (Chapter 2). Illustrating this connection between Kant and Hohfeld is the right to ownership, the Kantian justification for which provides the ground for bringing together the Hohfeldian liberty to use and the Hohfeldian claim-right to exclusivity. When conceived in Kantian terms, ownership in turn necessitates the systematicity and the public institutions that are present in a condition of public right (Chapter 3). Public right then, in its turn, affects what reciprocal freedom requires. It elicits adjustments in the operation of the concepts of private right to reflect their public character in a functioning system of law (Chapter 4). It insists on the legislative maintenance of the independence of persons through distributive justice (Chapter 5). It authorizes the consideration of constitutional values in private law controversies (Chapters 6 and 7). And finally, through the application of the rule of law, it secures the constitutive aspects of a polity committed to the actualization of reciprocal freedom (Chapter 8).[4]

[4] The topics of these last four chapters are salient in contemporary discussions of law, but they do not, of course, even come close to forming a complete catalogue of the circumstances in which the theoretical connection between private law and public law might be profitably explored.

Throughout these explorations of the theory of private law, from the first book to the present one, four ideas have consistently been in play. Of these, the first pair deals with the structure and content of the private law relationship, and the second pair with the nature and limits of private law theory.

The first idea is that fair and coherent reasons for liability are correlative in structure in that they treat each party's position as the mirror image of the other's. Correlatively structured reasons focus not on either party separately from the other but on the relationship between them as doer and sufferer of the same injustice. Such reasons are fair to both, because they treat the parties as equals within the relationship; considerations relevant to only one of them do not determine the legal consequences for both. Such reasons are also coherent because they reflect the parties' relationship as such, rather than referring to a hodge-podge of factors (such as the defendant's deep pocket or the plaintiff's need) that apply to each party separately. Consequently, arguments that seek to have private law achieve goals external to the parties' relationship—whether utilitarian, distributive, or economic—are all structurally inconsistent with fair and coherent determinations of liability. In contrast to such goal-oriented arguments, correlatively structured reasons treat the parties as participants in a legal relationship organized by the principle of its own internal fairness and coherence.

The second idea is that rights and their correlative obligations provide the content for private law's correlatively structured reasoning. By their very nature right and obligation are correlative concepts. Every private law right implies that others are under an obligation not to infringe it; similarly, in private law, no obligation stands free of its corresponding right. Presupposed in the rights and obligations of private law is the conception of the person as a free being who has the capacity to set his or her own purposes. In light of this conception of the person, rights and their correlative obligations function as the juridical markers of the equal and reciprocal freedom of the parties in relation to each other.

The third idea is that the activity of theorizing about private law involves not the construction of a utopia but the understanding of an ongoing normative practice. In the most highly developed versions of this practice, those entrusted with authority over its elaboration have striven, of course not always with success and never without dispute, to work out the fair and coherent terms on which persons ought to interact with each other. The theory of private law takes this material as its starting point and enquires into its structure, its presuppositions, and the internal connections among its most pervasive features. The aim is to identify the most abstract unifying conceptions implicit in the law's doctrinal and institutional arrangements and to enquire into the rationality that inheres in the law's processes.

In this effort, the contemporary theorist need not start from scratch. One may avail oneself of the history of philosophical reflection, whose leading figures provide exemplars for one's own efforts, as Kant put it, to 'exercise the talent of reason'.[5]

[5] I Kant, *Critique of Pure Reason* (P Guyer and A Wood trs, CUP 1998) B866.

These figures may point the contemporary theorist of private law in the direction of certain ideas whose structure they have presented with extraordinary clarity and whose implications they have explored with extraordinary profundity. For example, the first two ideas that I mentioned above—the significance of correlativity as a structural feature of reasoning about liability and the role of rights in providing the content of correlatively structured reasoning—are drawn from Aristotle and Kant, respectively. Aristotle attached the term 'corrective justice' to the operations of law that are structured by the correlativity of the parties' positions as doer and sufferer of the same injustice. Kant was perhaps the greatest expositor of the systemic significance of rights as expressions of human freedom.

My own work has been devoted to the fairly modest objective of demonstrating the significance of these previously ignored Aristotelian and Kantian ideas for understanding the structure and content of private law. Although I think that it is important to be explicit about the relationship between one's own work in legal theory and the great figures of our philosophical tradition, my purpose in invoking Aristotle and (in the present work) especially Kant as extensively as I do has been quite circumscribed. I have not aimed to reconstruct the place of law within an Aristotelian conception of ethics or within a Kantian metaphysics of practical reason. The point is not, as has sometimes been mistakenly supposed, to present private law or any branch of it as giving effect to a comprehensive moral philosophy. Rather, the task of legal theory, as I see it, is to bring to the surface the most pervasive ideas latent in law as a normative practice. The greatest thinkers are relevant to this conception of legal theory only because, and to the extent that, they provide insights helpful to the understanding of law in its own terms.

In this book, I continue along these lines. Its principal difference from previous books is the attention it pays to the notion of public right that Kant deployed to illuminate the relationship between legal norms and legal institutions. My intention is to draw out the implications of this notion both for the theory of private law and for the connection between private law and other aspects of the legal order.

This brings me to the fourth idea. The account that I offer is subject to the inevitable limitations on the scope of any theoretical account of legal norms. The theorist is not a philosopher-king in academic robes who can work theoretical abstractions into a complete, definitive, and determinate code of law. Rather, a theory of private law is concerned with the conceptual structure and the normative presuppositions of the phenomenon of liability. Its function is to orient us in the conceptual space of the possible reasons for liability by identifying the kinds of reasons that are properly available and by showing how reasons of those kinds can come together in a fair and coherent system of liability.[6] Theoretical reflection, however, cannot

[6] This is an adaptation of Rawls' formulation of the role of orientation in political philosophy; see J Rawls, *Justice as Fairness: A Restatement* (Harvard UP 2001) 3.

supplant the activity of lawyers in specifying the full range of legal norms or in applying them to particular cases.

Different legal systems organize themselves differently and have different histories and different mechanisms of decision. The diversity of their legal materials expresses the diverse ways in which the different legal systems strive for fairness and coherence. Accordingly, every sophisticated legal culture has a body of legal knowledge that is specific to it, as well as its specific techniques for applying and developing the law. It also has lawyers who are versed in this knowledge and skilled in these techniques. In carrying out these activities, lawyers are not theorists. Nor do whatever theoretical insights theorists have qualify them to act as lawyers. The conceptual space within which theory orients us cannot, itself, be expected to supply all the specific norms required to fill that space. Indeed, this book's emphasis on the relation between the abstract representations of norms and their determinations by the positive law shows why that must be so.

Haunting the preface to every book is the question asked by the ancient historian Livy in the dactylic opening of the preface to his great history of Rome: '*Facturusne operae pretium sim* . . .'[7] Is this work going to be worthwhile? Livy's own answer was, 'I don't really know, and if I knew I wouldn't dare say'. In this Preface I have tried briefly to indicate the book's background, scope, theme, and animating ideas. The aspiration of the book is to exhibit reciprocal freedom as the normative idea pertinent to the legal order as a public and authoritative system in which private law occupies a distinctive place. To this end, the book presents an abstract, sequenced, and doctrinally informed argument along Kantian lines for understanding law as necessary to our co-existence as free beings. With reference to this book, the answer to Livy's question ultimately rests on whether the book's execution is worthy of this august aspiration. Of course, to make that determination is a matter for the judgment of each person who decides to read it.

[7] Titus Livius, *Ab Urbe Condita, praefatio.*