The Purity and Priority of Private Law†

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1. How law is like love

'Love,' writes Ernest Weinrib, 'is its own end.' It is a characteristically Aristotelian aphorism. But what exactly does it mean? Weinrib explains:

> We immediately recognize the absurdity of the suggestion that the point of love is to maximise efficiency by allowing for the experience of certain satisfactions while at the same time avoiding the transactions costs of repeated negotiation among the parties to the relationship. The very terms of the analysis belie the nature of what is being analysed. Explaining love in terms of extrinsic ends is necessarily a mistake, because love does not shine in our lives with the borrowed light of an extrinsic end.[1]

Unfortunately, this passage does not really make things much clearer. It manages to collapse at least three distinct thoughts about the value of love. In the first place, there is the idea conveyed in the first sentence that the value of love is *non-instrumental*. That is to say, it is value to be found in the activity of loving itself rather than in the (actual or expected) consequences of that activity, such as saved costs or satisfied desires. Secondly,

† A review of Ernest Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press 1995) [hereafter '*IPL*'] and Alan Brudner, *The Unity of the Common Law* (Berkeley, Calif.: University of California Press 1995) [hereafter '*UCL*'].

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1 *IPL*, 6.

there is the stronger idea that the value of love is *non-derivative*, that it does not 'borrow' its value from any 'extrinsic end'. If that is right then love is not valuable (non-instrumentally) as a mode of self-expression any more than it is valuable (instrumentally) as a means of self-advancement. For either way, love's contribution to some further ideal beyond itself needs to be cited in explaining why love is valuable. Finally there is the idea, captured in the deliberately hackneyed image of love 'shining in our lives', that the value of love is *motivationally non-transparent*. That is to say, whatever the source or foundation of love's value, that value depends on the fact that loving activities are pursued for the sake of love itself, and not for what we usually call an 'ulterior motive'.

Love certainly exhibits the last feature, motivational non-transparency, and exhibits it in a particularly pure form. Even mixed motives, e.g. reasons of love mixed with reasons of convenience or reasons of compassion, necessarily drain value from loving relationships *qua* loving. You may think that this claim gives credence to an absurdly romantic view of love. But that is so only if an absurdly romantic interpretation is given to the expression 'reasons of love'. A theme of much romantic literature is the quest for purity in love. Is it alright, in love, to act for the sake of a beloved's well-being? Is it compatible with one's love to act with the aim that one's love be requited? How about seeking the sheer joy of time spent in each other's company? On one familiar literary view of love, none of this is good enough. One is not acting for the sake of love unless one eliminates mere contingencies such as the identity of the beloved, her feelings, her whereabouts, etc. With such contingencies eliminated, all one is left with is the very *idea* of love. To act for the sake of love is therefore to act purely for the sake of this idea. The fatuousness of this philosophical position, and the vanity of those who act on its inspiration, hardly needs spelling out.[2] To act for the sake of love is, in fact, to act for precisely the kind of concrete, mundane reasons I just mentioned. It is to act for the sake of the well-being of the object

[2] Byron famously, if misogynistically, conveyed the vanity: 'In her first passion woman loves her lover, / In all the others all she loves is love.' *Don Juan*, III.iii.

of one's love, to act with the aim that one's love be returned, to act for the sake of enjoying time together. That is because the wish that the object of one's love fare well, that he return one's love, that he be in one's company are all constituents of the attitude of love.[3] Of course, one does not act for the sake of love *whenever* one acts for the sake of another's well-being, etc. The other components of the attitude, including its affective and cognitive components, must also be present and operational. But the key point remains that a parent who saves her child from drowning does not damage her loving relationship *qua* loving by saving her child for her child's own sake. Saving her child for her child's own sake, loving her child as she does, just is acting for the sake of love. The claim that love exhibits the feature of motivational non-transparency in a particularly pure form should not be construed, therefore, as a plea for a return to the silly romantic ideal of pure love.

Nevertheless, from the claim that the value of love is motivationally non-transparent it is tempting to conclude that the value of love must also be non-derivative. For surely if part of the value of love lay beyond it in e.g. its consequences for the perpetuation of the species or its role in expressing our spontaneity in a world dominated by regimentation, then it would be no worse to love for those reasons, or at any rate partly for those reasons, than to love purely for love's sake? This is unfortunately a non-sequitur. That *x* is a reason for ϕing does not entail that there is a reason to ϕ-for-the-reason-that-*x*. Nor does it even entail that ϕing-for-the-reason-that-*x* is alright, permissible, acceptable. It entails the latter, to be sure, when other things are equal. But other things are rarely equal, and many values, love prominent among them, regulate our motivational access to further considerations which nevertheless contribute to the value of our actions. Love is valuable for many reasons: for the stability it brings to the lives of children, for the excitement it lends to humdrum lives, for the literature in which it serves as the central theme, for the refinement of self-identity that comes of close identification with another, and so forth. But to love

[3] For a fine discussion, see Mark Fisher, *Personal Love* (London 1990).

even partly for the sake of stability or excitement or inspiration or self-identity is self-defeating. It is love weakened or even, in extreme cases, lost.

The importance of this can be illustrated by thinking of the role of third parties to loving relationships. Imagine you are a parent or friend looking on as a teenage romance blossoms.[4] You have some influence over the parties to the relationship. Should you encourage it or discourage it? Perhaps it will bring pleasure to the kids involved, teach them important things about growing up, form a central plank of their newly-emerging independent identities, help them through impending exams, etc. Perhaps, on the other hand, it will soon end in tears, one of the parties will be messed around by the other, important opportunities for expanded horizons will be missed in the meantime, etc. Invariably teenage romances have incommensurable pros and cons, so you will be left ambivalent. But be that as it may, there are bound to be some reasons in favour of the love which it is alright for you to act on but which cannot motivate the youngsters themselves. You may encourage the love as a solution to their obvious loneliness or as a way of getting them out of your hair. These are among the things which make their love valuable. But if the youngsters were to be motivated by the same things that would defeat the object of the exercise. Indeed even your encouragement, in such a situation, has to be carefully tailored so as not to interfere with the motivations of the parties to the love. If they end up persisting with the relationship because they want to please you, for example, then that also detracts from its value *qua* loving relationship. If the love is to go on successfully, to put it another way, it must go on in the illusion of its own rational self-sufficiency. This is what we are getting at when we say that 'love is blind'. The suggestion is not that love is an irrational phenomenon. On the contrary, love, like all other activities, is rationally answerable to all the various considerations, instrumental and non-instrumental, which

[4] I assume here that teenage romance constitutes or involves one form of love. I chose it lest anybody should stoop to complaining that loving relationships are nobody's business but that of the parties to them. However I stress that the feature I am discussing is a feature of all forms of love, including sexual love, parent-child love, buddy-love, the love of God, etc.

militate in favour of it and against it. It is only that one cannot be a successful participant in love if one acts on these considerations willy nilly. There are many reasons for love which are available for others, but not for lovers, to act on.

What has any of this to do with the law? It is Weinrib who makes the connection. Just like love, he says, private law is its own end. Or, as he also puts it:

> Private law is to be grasped only from within and not as the juridical manifestation of a set of extrinsic purposes. If we *must* express this intelligibility in terms of purpose, the only thing to be said is that the purpose of private law is to be private law.[5]

One key aim of Weinrib's beautifully structured and eminently readable book *The Idea of Private Law* is to show that this last proposition is not the 'hopelessly unilluminating tautology' that it looks like at first.[6] That, in my view, he achieves with flair. He eliminates any hint of tautology by showing that private law includes, apart from its distinctive doctrines, certain characteristic kinds of reasons which can animate and justify the development of its doctrines from within. Thus the development of private law can be for reasons which are themselves specifically private law reasons, something which systematically releases us from the tyranny of seeking out extra-legal reasons for private law decisions. But this much, surely, is already well known to all private lawyers. Lawyers devote much of their working lives to making peculiarly legal arguments in favour of new legal developments. That is what litigation in the higher courts, at any rate, is mainly about. To add that private lawyers before private law courts make private law arguments, not public law arguments, will not come as much of a surprise in any legal system which recognises the distinction between private law and public law in the first place, since that is normally the main point of the distinction. And nobody, I hope, would ever think any of this tautological. So if this is all that is meant by private law having 'the purpose of being itself', then one may wonder what all the fuss is about.

[5] *IPL*, 5.

[6] *IPL*, 5.

Part of the fuss is about this. I paraphrased Weinrib as claiming that the existence of specifically private law reasons can release us from the tyranny of seeking out reasons from other sources for private law decisions. But who exactly are the 'us' in this claim? Judges, to be sure, are included, as are the lawyers who appear before them. Legal reasoning is their stock-in-trade. But what about legislatures, law reform bodies, scholars, journalists, and members of the public? Can they also be so easily referred to the law's own distinctive reasons as adequate reasons for private law decisions? Can their further questions about the rationale for private law doctrines and decisions simply be brushed aside as proceeding from inappropriately extrinsic concerns, as questions that are already adequately dealt with by the law from within? Weinrib seems to think so, but if he does he is seriously misguided. The problem stems, once again, from Weinrib's failure to resolve the ambiguities in his claim that private law, like love, is its own end. Private law adjudication is certainly characterised, in part, by its motivational non-transparency. Judges are heavily restricted, in private law and public law alike, in the reasons that they may rely upon in arriving at their decisions. The success and value of their work *qua* judges, like the success and value of a lover's activities *qua* lover, depends crucially upon it. What does not follow, *pace* Weinrib, is that the value of a judge's work *qua* judge is non-derivative, or even non-instrumental. Perhaps a judge should not award tort damages for the sake of achieving, say, thinner and wider loss distribution. It does not follow that the fact that thinner and wider loss distribution will or may result lends nothing to the value of his awarding tort damages as he does. The reasons which judges *qua* judges may rely upon are not necessarily, or even imaginably, the only reasons in favour of and against their decisions. And like all other activities, private law decision-making is rationally answerable to all the various reasons which militate in favour of and against its decisions, and not only those to which the decision-maker herself is permitted to have motivational access. Accordingly, there are many reasons for judicial decisions which are available for others, but not for judges, to act upon. Legislatures may act on them in reforming the law, journalists may act on them in

attacking the law, even litigants may act on them in settling out of court. But judges, if they are to be true to their role as judges, can have no truck with them.

Weinrib is not satisfied with this simple picture, in which judges are bound to ignore many of the further reasons which would, apart from their judicial role, be relevant to their decision-making. He wants the rational self-sufficiency of private law to be a reality, not an illusion. His main anxiety seems to be that, otherwise, private law loses its status as a truly 'justificatory enterprise'.[7] But that anxiety reflects, I suspect, a deep mistake about the nature of justification. Justification, to use the current idiom, has both 'subjective' and 'objective' dimensions. No action is justified, to be sure, unless there are undefeated reasons in favour of it. That is the 'objective' side of the equation. But there is also a further requirement, constituting the 'subjective' side of the equation, of correlation between the undefeated reasons in favour of the action, on the one hand, and the reasons for which the agent acted, on the other. Legal theorists, particularly in the United States, have long been preoccupied with the problem that judicial reasoning so often seems to skirt round the really important reasons for and against some decision – the 'field of pain and death' as Robert Cover called it[8] – in favour of 'formal' legalistic considerations. The all-important justificatory correlation between the 'objective' and 'subjective' components of justification seems, in other words, to be missing in explicit judicial reasoning. This has led many theorists to ridicule, or simply lose interest in, what judges *give* as reasons, and to try to look behind this to the reasons that, supposedly, they really *have*. That often combines with an indiscriminate post-Freudian scepticism about people's abilities to *know*

[7] *IPL*, 207 (and passim). I am assuming that Weinrib means by this that the institution of private law is justified as well as justifying. It has been suggested to me that Weinrib may in fact hold that the institution of private law is unjustified except by its own (*ex hypothesi* unjustified) lights, and that his book should therefore be regarded not as a defence of the institution of private law but merely as an exploration of its perspective. It would come as a surprise to me if Weinrib were indeed to be so self-effacing about his enterprise, and from now on I simply ignore this possibility.

[8] 'Violence and the Word', *Yale Law Journal* 95 (1986), 1601.

their reasons, leading to the behaviourist view of judging which American 'legal realists' put into currency and on which 'the economic analysis of law', as well as some versions of 'critical legal studies', have capitalised. Quite reasonably, Weinrib wants to restore legal theory's positive interest in explicit legal reasoning, which he rightly regards as lying at the heart of the law's value. He therefore believes that he must restore the correlation, which the very nature of justification requires, between 'objective' and 'subjective', i.e. between the reasons in favour of judicial decisions and the reasons judges give for those decisions. This leads him into a position where he thinks he must deny that those reasons in favour of judicial decisions on which American legal realists and their intellectual heirs concentrated, reasons in the 'field of pain and death' around which the law skirts, are truly undefeated reasons in favour of those judicial decisions at all. Since they are admittedly missing from the 'subjective' side, to restore the justificatory equation in judicial reasoning he must also eliminate them from the 'objective' side. He must make them seem entirely beside the point.

But in this line of thought Weinrib unquestioningly accepts, as he should not, the American legal realists' own assumptions about the kind of correlation that is required between the 'subjective' and 'objective' sides of the justificatory equation. In fact only a very modest correlation is required: the truth is that an action (including an act of decision) is justified if the agent acts for *at least one* of the undefeated reasons in its favour.[9] There is no need for her to act on all of the undefeated reasons in its favour. Barring special circumstances, there is no need even for her to *know* of them: she may, depending on the situation, go for an undefeated reason out of instinct, habit, passion, professional training, etc., and her action need be none the less justified for that. Now often, as we have already noted, we have a narrow range of reasons to act on even where there is a broad range of reasons in favour of what we do. That is because some reasons are excluded – there are

[9] Here I summarise very briefly a view I have defended at length in 'Justifications and Reasons' in A.T.H. Smith and Andrew Simester (eds), *Harm and Culpability* (Oxford 1996).

further reasons not to act on those reasons – and excluded reasons are defeated reasons.[10] Thus by acting on those reasons we do not meet the condition that, in order to be justified, our action must be for at least one undefeated reason. Sometimes, where we face major decisions, certain relatively trivial reasons are excluded. If a doctor should operate on a dangerously ill patient, she should not do so for the sake of furthering her research into organ malfunction, even though the fact that her research into organ malfunction will be furthered is indeed one advantage (i.e. reason in favour of) the operation, which adds to its value. She should operate for the sake of saving the patient's life. But sometimes the exclusion of reasons works in the opposite direction. One should *only* act on certain apparently incidental reasons in favour of what one does and overlook some of the big issues. The big issues will hold one's decision up, reduce one's clarity, take one outside one's competence, inflame the conflict, make it harder for others to act on one's decision, invade important areas of personal autonomy, etc. This is, very roughly, the position of judges. Their reasoning holds its own as a 'justificatory enterprise' because (and to the extent that) they act on (one or more) undefeated reasons in favour of what they do.[11] The claim that there are many far more momentous reasons in favour of (and against) what they do, reasons which non-judges would be permitted and indeed expected to act on in following, using, enforcing, reforming and criticising the law, but which judges must ignore when they do the very same things, does not in itself cast any doubt on the justificatory force of judicial reasoning. By assuming that it does, Weinrib plays straight into the hands of his real and imaginary detractors in the American legal realist tradition.

[10] The key role in practical reasoning of exclusionary reasons was first systematically identified and explained by Joseph Raz in *Practical Reason and Norms* (London 1975; 2nd ed., Princeton 1990).

[11] I should emphasise here that the law regulates not only the availability of reasons but also their individuation, i.e. there may be variations between legal systems not only in what will count as one *undefeated* reason, but also in what will count as *one* undefeated reason.

2. Justice and purity

It may be objected that it is all very well to speak of judges acting on undefeated reasons, but that this obscures the fact that judicial reasons are not real reasons for the decision reached, so much as artificial ones contrived by the law itself. Surely the law is full of 'technicalities', and it is these that judges characteristically employ in their reasoning, not genuine considerations bearing, however modestly, on the merits of the case? That, you may say, is what the complaint of 'formalism' in judicial reasoning is really getting at, and why, in spite of what I just said, it points to a characteristic inadequacy in judicial justification. Perhaps so. But one of the great merits of Weinrib's book is that it shows how the 'formalistic' flavour of judicial reasoning can be explained without portraying legal reasoning in this way, as sheer artifice. Weinrib's view, with which I tend to agree, is that legal reasoning is a distinctive kind of moral reasoning. What Weinrib adds is that, so far as private law is concerned, its specialisation lies primarily in the form, and only secondarily in the content, of the moral reasons that it recognises. Which moral reasons are these? They are, claims Weinrib, moral reasons for a wrongdoer (as opposed to any other) to make reparation or restitution to the person she wronged, because she wronged him – also known as reasons of *corrective justice*.

In what sense are such reasons differentiated by form rather than content? Weinrib's thinking here becomes clearer if we begin by putting the idea of corrective justice alongside the contrasting idea of distributive justice. Reasons to alter or maintain people's positions relative to each other (as opposed to their positions taken one at a time) are reasons of justice. But there is more than one kind of relativity between people's positions. There is, as Aristotle said, the 'arithmetic' relativity of corrective justice as well as the 'geometric' relativity of distributive justice.[12] Reasons of corrective justice look back to some transaction between two parties, and are reasons to restore the parties' relative positions

[12] *Nichomachean Ethics* 1131^{a}10-1132^{b}20.

('arithmetically') to what they were before, or would have been apart from, that transaction. Reasons of distributive justice, on the other hand, are reasons why two or more people should be placed in certain relative positions *tout court*, i.e. why their aggregate advantages and disadvantages should be ('geometrically') divided in such-and-such proportions. Notice that, on these definitions, it is perfectly possible for reasons of distributive justice to look back to some transaction between two parties without turning into reasons of corrective justice in the process. Thus Robert Nozick's account of distributive justice cites as a reason for two people to be in a certain position relative to each other *tout court* that they reached that relative position exclusively by way of voluntary transactions between them.[13] If they did, then barring special circumstances that is distributively just. If not, then barring special circumstances that is distributively unjust. To this Nozick adds an account of corrective justice according to which, if a transaction was not voluntary, and the result was accordingly distributively unjust, then that is a reason for the losing party to be restored (so far as possible) to her previous position, at the expense of the gaining party.[14] Thus in Nozick's account, distributive injustice is what activates corrective justice; the principles of justice are, to that extent, seamless in their operations. But in principle it would be possible for distributive and corrective justice to interact in more complicated, and less seamless, ways. Thus there might be reasons of distributive justice for people to make transfers whenever others' needs are greater than theirs, but reasons of corrective justice for people to restore what they stole, whether or not they needed it more than the person they stole it from. Or there might be reasons of corrective justice for people to restore whatever they acquired by transactions where they exploited another's weak bargaining position, but reasons of distributive justice for them to have more when they deserve more, irrespective of how they may have obtained it. These possibilities nicely illustrate one sense in which

[13] This is the point of the famous Wilt Chamberlain example in *Anarchy, State, and Utopia* (New York 1974), 160–164.

[14] Ibid., 152–153.

the classification of reasons in terms of justice may be regarded as 'formal'. There are many competing reasons which might in principle be cited as bases for arithmetic and geometric alteration or maintenance of people's relative positions. Some may be valid bases and others invalid. Some may disclose strong reasons for transfers, and others weak reasons. Some may apply to parents but not to governments, some may apply in liberal states but not in others, etc. All of this may form the subject matter of substantive moral debate. But before that debate come the prior questions of whether the reasons being cited are being cited as reasons to alter or maintain people's relative positions, and, if so, whether arithmetically or geometrically. Thus the classification of putative reasons as reasons of corrective justice or distributive justice can be regarded as a formality which is needed to ensure that the ensuing substantive debate, about the merits of particular distributions and corrections, is not conducted at cross-purposes.[15]

Weinrib captures many aspects of this formal distinction between corrective and distributive justice clearly and elegantly. In particular, he makes much of the important fact that, whereas reasons of distributive justice may be reasons to alter or maintain the relative positions of many parties at once, by their nature reasons of corrective justice can only deal with the relative positions of two parties at a time (which may of course be two groups, two nations, two families, etc. rather than two individuals). This feature Weinrib aptly describes as 'the bipolarity of corrective justice.'[16] But Weinrib sometimes seems to slip almost imperceptibly from the insightful proposition that corrective justice is necessarily bipolar to the quite different, and quite mistaken, suggestion that bipolar justice is necessarily

[15] Aristotle's point about forms of justice has often been misunderstood. We often read about Aristotelian 'principles of formal justice', which are contrasted with (allegedly more appealing) 'principles of substantive justice'. But Aristotle had no principles of formal justice. Aristotle merely analysed the various forms which principles of justice may take, viz. distributive, corrective, procedural, etc. No principle of justice is or could be *identical* with its form, since its form is by definition what is left of it once its substance is removed. Thus the idea of 'a principle of formal justice' is unintelligible, and cannot be contrasted with any other kind of principle of justice.

[16] *IPL*, 65.

corrective. He asserts, for example, that 'a violation of corrective justice involves one party's gain at another's expense'.[17] The word 'involves' here suggests that the gaining itself is partly constitutive of the corrective injustice. But if this were so then Nozick's account of distributive justice would have to be reclassified, at least in part, as an account of corrective justice.[18] For the key distributive injustice, on Nozick's account, is the involuntary transfer of holdings from one party to another, i.e. precisely one party's gaining at another's (involuntary) expense. To be sure, Nozickian corrective justice requires the *correction* of that transfer, but, *pace* Weinrib, it is Nozickian distributive justice, not Nozickian corrective justice, which proscribes the *making* of the transfer in the first place.

Weinrib's sleight of hand on this score becomes clearer if we examine his remark that 'the injustice that corrective justice corrects is essentially bipolar.'[19] Reading this quickly, one reads it as a reiteration of the illuminating observation that corrective justice itself is essentially bipolar. But it is in fact a much stronger claim. It is the claim that not only corrective justice, but also *the injustice which it corrects*, is essentially bipolar. And from this Weinrib means us to proceed to the conclusion that the injustice which corrective justice corrects, being bipolar, *is itself corrective injustice*. In Weinrib's own words, 'corrective justice serves a normative function: a transaction is required, on pain of rectification, to conform to its contours.'[20] But this position is obviously untenable. For it generates an infinite

[17] *IPL*, 63.

[18] Couldn't it be both? Weinrib has sometimes said that the fact of a transaction is neutral as between the two forms of justice, so that it could in principle be justified in either distributive or corrective ways. Quite so. But, as Weinrib also says, the *reasons* for the transaction cannot be neutral in this way, since the distinction between corrective and distributive justice is a distinction in point of reasoning. Nozickian reasons, i.e. reasons why people should remain in relative positions they reached entirely by way of voluntary transactions between them, thus cannot be classified as corrective unless, *pace* Nozick, they are no longer to be classified as distributive. See Weinrib, 'Why Legal Formalism?' in Robert P George (ed.), *Natural Law Theory* (Oxford 1992), at 353-5.

[19] *IPL*, 64.

[20] *IPL*, 76.

regress. As I already explained, reasons of corrective justice are reasons to restore the parties to the relative positions they were in before, or would have been in apart from, some transaction between them. Corrective injustice consists in action against such reasons. But if the transaction which gives rise to reasons of corrective justice must also itself count as a corrective injustice, then it too must have involved action against reasons to restore the parties to the relative positions they were in before, or would have been in apart from, some further transaction. And so on *ad infinitum*. The mistake which leads to this regress obviously lies in the idea that corrective justice only corrects corrective injustices. What we correct in corrective justice is, basically, some wrong we did.[21] That wrong may sometimes be a failure to correct some earlier wrong we (or somebody else) did, i.e. it may be some further corrective injustice. But it need not be. It may equally be a distributive injustice. Or it may not be an injustice at all, but an act of (say) sheer dishonesty or pure inconsiderateness, and wrongful for that reason alone.

Why does Weinrib expose himself to this regress objection by holding that corrective justice corrects only corrective injustice? It comes of the view he holds, and repeatedly reaffirms, that an adequate 'formalist' account of private law must bring out private law's 'coherence'. 'Among the three aspects of formal intelligibility,' he says, 'the aspect of unity is paramount.'[22] And, he adds, 'the unity of a juridical relationship lies in its coherence.'[23] Now the word 'coherence' is used, in everyday contexts, in more than one sense. Sometimes it just means 'intelligibility'. An incoherent complaint is simply an unintelligible

[21] In fact this proposition calls for a slight modification. Sometimes we correct, not a wrong, but what would be a wrong apart from our act of correcting it. That is the mode of corrective justice involved in e.g. compulsory purchase by government. C.f. Robert Goodin, 'Theories of Compensation', *Oxford Journal of Legal Studies* 9 (1989), 56, where this special kind of case is wrongly held to fill the whole horizon of (reparative) corrective justice: 'compensation serves to right *what would otherwise count as* wrongful injuries'.

[22] *IPL*, 29. The other two aspects are 'character' and 'kind'.

[23] *IPL*, 29.

one. But that cannot be Weinrib's meaning, since coherence is for him an aspect of *formal* intelligibility, i.e. it contributes to a special kind of intelligibility. In fact what Weinrib seems to mean by coherence in private law is this: that the form taken by part of private law must be the form taken by the whole of private law. If private law includes a principle of corrective justice, then its coherence, in the relevant sense, depends on all the principles of private law being principles of corrective justice. It means that, if the remedial framework of private law is a matter of corrective justice, then (in spite of the threat of regress) the wrongs which private law remedies must likewise be matters of corrective injustice, on pain of private law's incoherence. And why should we not leap to embrace the second horn of this supposed dilemma, and agree that private law is indeed incoherent? Weinrib's answer cannot easily be the one that many contemporary legal philosophers have proffered, that coherence in the law is morally valuable. For that would land private law with two aims – the aim of doing corrective justice and the aim of being coherent – and this conjunction of aims would threaten to introduce an incoherence among legal principles no less significant than the incoherence between principles of corrective and distributive justice that Weinrib wants to avoid. Thus Weinrib shuns the familiar moral arguments for legal coherence, instead offering a conceptual argument based on the very nature of justification:

> because coherence is essential for justification, the coherence of the private law relationship is indispensable to private law's being a justificatory enterprise … [this] arises from the nature of justification. A justification justifies: it has normative authority with respect to the material to which it applies. The point of adducing a justification is to allow that authority to govern whatever falls within its scope. Thus if a justification is to function as a justification, it must be permitted, as it were, to expand into the space that it naturally fills. Consequently, a justification sets its own limit. For an extrinsic factor to cut the justification short is normatively arbitrary.[24]

Or, as he reiterates the point:

> Private law is normatively inadequate if it is understood in terms of independent goals. Such goals are mutually frustrating. Each of them is limited not by the boundaries to which its justificatory

[24] *IPL*, 38–9.

authority entitles it, but by the competing presence in the same legal relationship of different goals. In this mixing of justifications, no single one of them occupies the entire area to which it applies. Thus none of them in fact functions as a justification. The consequence of incoherence is that private law ceases to be a justificatory enterprise.[25]

Given their pivotal importance, these passages are surprisingly obscure. They seem to focus on cases of justificatory overdetermination, i.e. cases in which any one of several reasons (or families of reasons) in favour of some action or practice is sufficient on its own to defeat the countervailing reasons. The result of combining such reasons (or families of reasons) in favour of the action or practice is then to use some or all of them to do less than the full justificatory work of which they are capable. But this is a somewhat special situation, which presupposes a rather weak case *against* whatever is being justified. Very often we do not have this luxury. We need to marshal all the reasons in favour of something in order to defeat the whole army of objections which are lined up against it. The problem is not that of letting considerations do less than the justificatory work of which they are capable, but of wishing that they could do more, and having to call in reinforcements when one realises they cannot.

Now given all the obvious costs and difficulties of private law adjudication as a response to harmful wrongdoing, and the relatively cheap and easy surrogates which have been suggested (and in some countries partially implemented), it strikes me as highly unlikely that private law adjudication can claim the luxury of justificatory overdetermination. It thus seems much more likely that the reasons of corrective justice which militate in favour of private law adjudication as we know it need all the help they can get in preserving the case for the institution and its practices. Weinrib's assumption to the contrary stems, as before, from his failure to appreciate the relationship between the 'subjective' and the 'objective' aspects of justification. From the fact that many reasons are needed to defeat the case against some action, it does not follow that the action must be performed *for* all of those reasons. It is enough if it is performed for one or other of the

[25] *IPL*, 42.

undefeated reasons in favour of it. Overlooking this, one may think that, if it is justificatorily adequate that a judge acts for reasons of corrective justice and ignores all other reasons then it must be the case that the reasons of corrective justice alone are sufficient by themselves to defeat the countervailing reasons, and that the use of other kinds of reasons to buttress them can only be preventing the reasons of corrective justice from filling the logical space that they 'naturally fill'. But that is another non-sequitur, which mistakenly transforms virtually all cases of justification into cases of justificatory overdetermination, and wrongly makes it seem as if any combining of reasons must weaken, rather than strengthen, the case for whatever the reasons are supposed to support. Accordingly, Weinrib's case for coherence in private law adjudication is misconceived. That being so, we have no reason to deny that recognising the importance of corrective justice considerations in justifying judicial responses to civil wrongdoing is perfectly compatible with the recognition that the civil wrongs themselves need not be corrective injustices, but could be distributive injustices, or, for that matter, not injustices at all.

3. Law before ethics?

Weinrib's concern with coherence spills over from his account of the form of private law principles to his account, in the subsequent chapters, of their content. Here he invokes Kant's Categorical Imperative, which, he claims, differentiates all the sound principles of corrective justice which he finds at the heart of private law from the various unsound rival principles of corrective justice (and other principles) which have been advocated from time to time by allegedly wayward judges, legislators, and legal commentators. Actually, there is more than a little equivocation in what Weinrib says on this score. Sometimes he talks as if principles of justice not based on the Kantian doctrine could not *by definition* be principles of corrective justice, so that the idea of an 'unsound rival principle of corrective justice' would be a contradiction in terms: grasping the very *idea* of corrective justice entails

acceptance of the Kantian doctrine. One can see why Weinrib would find the thought of such a tight conceptual relation between the Aristotelian form and the Kantian content comforting, since it would instantly provide him with a strong defence against the potentially damaging accusation that the conjunction of the Kantian content with the Aristotelian form, even if morally sound, is conceptually sufficiently arbitrary to cast doubt on the coherence, in Weinrib's own terms, of the resulting package. On the other hand, if it were true that the very idea of corrective justice presupposes the Kantian doctrine, then the claim that 'corrective justice' denotes a *form* of justice, which seems to be the claim at the heart of Weinrib's professed 'formalism', would no longer make sense. For there would now only be one possible principle of corrective justice, viz. the sound Kantian principle, and considerations of form would lose their independent role in the argument. Accordingly, I will assume that Weinrib means the relationship between the Aristotelian form and the Kantian content to be evaluative rather than conceptual, i.e. that in his view (i) there can be principles of corrective justice which meet the formal test for being part of private law without sharing its Kantian basis, but (ii) all of these principles are unsound and should be removed or repelled from private law.

Orientated in this way, the Kantian doctrine plays two complementary roles in the content of Weinrib's ideally coherent private law. First, it is supposed to explain why those who wrong others must, in private law, make reparation or restitution to those they wronged, i.e. why there are any sound principles of corrective justice in the law at all. Second, it is meant to explain why certain actions count as wrongful in private law so as to activate the case for reparation or restitution. These two issues must, here as before, be kept clearly distinct. Even if it is true that the wrongs of private law are Kantian wrongs – more of which later – that does not resolve the well-known mystery of how reparation or restitution may serve to *correct* them. In an attempt to relate the two issues to each other without confusing them, Weinrib introduces his defence of 'correlativity', in which the 'normative gain' made by the defendant in violating the plaintiff's rights is exactly the

mirror of the 'normative loss' involved in making reparation or restitution.[26] That I find an unsatisfyingly incomplete answer, since it leaves unresolved the fundamental mystery of why those who make normative gains from others should (as Weinrib puts it) 'disgorge' them to those others correlatively. Why isn't this impulse to 'disgorge' just irrational crying over spilt milk on both sides? The Categorical Imperative by itself does not resolve this: it does not explain how, once I have violated the Imperative by manifesting disrespect for another's rational will, my manifesting respect for that same rational will in some further 'correlative' action, even one making essential reference to my earlier offence, somehow serves to put things right again. To provide the missing link here an account of the symbolic or expressive force of actions of reparation and restitution is required. The primary question is not, what do such actions encourage or occasion or induce? The primary question, if we want to understand how we can right our wrongs by reparation or restitution, is what do such actions *mean*? Unfortunately, however, Weinrib devotes only nine lines to the role of social meaning in supporting sound principles of corrective justice, and they are far from sufficient to reveal how the act of 'disgorging' is supposed to serve its symbolic or expressive moral function.[27] In particular, they do not establish that the social meaning of an action of reparation or restitution is indeed the one on which a distinctively Kantian account of sound principles of corrective justice depends, viz. that reparation or restitution symbolises or expresses morally sensitive restoration of *respect* for the other's *rational will*, as distinct from, say, morally sensitive reaffirmation of concern for their future prospects, or morally sensitive evocation of sympathy with the passions that were aroused in them by being wronged.

Now Weinrib's relative lack of attention to this issue of social meaning both reflects and is reflected in what I regard (in common with many other critics of his work) as his false idealisation of law in general, and private law in particular. For Weinrib, principles of

[26] *IPL*, 115–20.

[27] *IPL*, 104.

corrective justice are fundamentally juridical, and assure 'the autonomy of private law', not only from politics but also from ethics. Here Weinrib owes less to Kant that he imagines. Weinrib claims (in the Rawlsian idiom) that Kant made 'the right prior to the good'.[28] In a sense that is perfectly true. Kant believed that we should insist on action in conformity with the Categorical Imperative even among those who, owing to debasement of their rational wills, fail to act for the sake of the Categorical Imperative. Better, thought Kant, that those with debased wills should not enjoy the privilege of impinging upon the less debased wills of the rest of us. Thus the possession of Kantian virtue was not a precondition of subjection to the Kantian law. The right, in this sense, takes priority. But Weinrib gives a different gloss to the slogan that the right is prior to the good. For him it means, as it sometimes meant to Rawls but I am sure never meant to Kant, that the value of the right does not *derive* from the value of the good.[29] And this, Weinrib claims, 'gives law its conceptually self-contained nature and invalidates the importation into legal analysis of considerations drawn from ethics.'[30] Thus, in Weinrib's mind, the idea that legal reasoning is a distinctive kind of moral reasoning (which I endorsed above) transmutes into the quite different idea that legal reasoning is a distinctive kind of moral reasoning which does not derive its force or even take its cue from moral reasoning apart from the law.

[28] *IPL,* 110, citing Rawls, *Political Liberalism* (New York 1993), 173.

[29] In attributing the Rawlsian view to Kant, Weinrib relies on the fact that the *Rechtslehre* (doctrine of law) precedes the *Tugendlehre* (doctrine of virtue) in Kant's work *The Metaphysics of Morals* (trans. Mary Gregor, Cambridge 1996). He fails to record the much more telling fact that *The Metaphysics of Morals* depends for all its value-claims on the earlier *Groundwork of the Metaphysic of Morals* (trans. H.J. Paton, New York 1964) in which Kant sets out his highly monistic and perfectionist theory of value. This is an account in which the rational will is elevated to the only non-derivative good, a good from which *both* law (external legislation) *and* virtue (internal legislation) derive their value. In Kant's own terms, the *Groundwork* is his 'critical' study of morality, whereas *The Metaphysics of Morals* is a matter of 'doctrinal' application: see Kant, *The Critique of Judgment* (trans. J.C. Meredith, Oxford 1952), 7.

[30] *IPL*, 110.

It follows, of course, that for Weinrib considerations of corrective justice, which pervade private law reasoning, cannot be 'drawn from ethics'. Principles of corrective justice must have their natural home in the law, not in extra-legal contexts. And indeed Weinrib believes exactly this. He believes – and this time he owes less to Aristotle than he imagines – that principles of corrective justice naturally go hand-in-hand with the whole juridical package of independent and disinterested judges, bipartisan procedures, authoritative judgments, etc.[31] Reliance on principles of corrective justice in the law is therefore reliance on them in their primary and ideal setting, with all their appropriate trappings and accessories in place. Reliance upon them outside the law is, in turn, both derivative and second-best, since the relevant trappings and accessories are missing. In matters of corrective justice, to put it another way, ethics draws on law rather than law drawing on ethics. But a moment's attention to the social meaning of reparative and restitutionary actions, even if we assume it to be a suitably Kantian meaning, reveals this to be a most implausible view. For Kant as for the rest of us, such actions express the wrongdoer's morally sensitive attitude to her wrongs most unequivocally when they are spontaneous actions, undertaken immediately in the wake of wrongdoing and because of that wrongdoing. Failing that, e.g. where the fact of wrongdoing is in dispute, the next best alternative is for the parties to settle their differences, and for reparation or restitution to be made, where due, ungrudgingly even though not spontaneously. The legal implementation of corrective justice is, on this account, very much a third-best. One is normally forced to sue only for that reparation or restitution which the wrongdoer begrudges, and so any payment made by the wrongdoer (or on her behalf) at the end of or during the litigation is stripped of much of the social meaning which justifies the moral principles of corrective justice by which people should make reparation or restitution for their wrongs in the first place. It is true that the complex regalia and ritual of the courtroom serves to introduce new symbolisms of various kinds. By having one's day in court, and seeing one's case

[31] *IPL*, e.g. at 107.

through the majestic processes of the law, one substitutes the social meaning of anonymous official vindication for the social meaning of spontaneous and ungrudging acts of reparation and restitution. That is why the legal enforcement of principles of corrective justice is not entirely self-defeating, and also why the regalia and ritual of the common law, its wigs and gavels and Latin maxims, should not be ridiculed as pointless anachronism. But the very fact that the law needs to provide such contrived substitute social meanings demonstrates, to my mind, that it is a place of last, or at any rate very late, resort in matters of corrective justice. Far from ideal, it is the place for doing corrective justice when the time for doing the best (spontaneous, ungrudging, unsupervised, undetached) corrective justice is over. Far from being non-derivative of ethics, therefore, modern private law builds its special institutionalised implementation of corrective justice on the foundations of the ordinary corrective justice, which, quite apart from anything that the law may say, we have reason to do whenever we wrong another. If this is right, then Weinrib errs not only in his plea for the purity of private law, but also in his plea for its priority: for the justice which is arguably the law's first virtue is (as Kant and Aristotle both recognised) but a regrettably necessary institutional implementation of the justice which is one virtue, among others, of ordinary human beings going about their ordinary non-institutionalised business.

4. Towards a more inclusive unity

Hot on the heels of *The Idea of Private Law*, and traversing very closely related themes, comes Alan Brudner's book *The Unity of the Common Law*. Brudner rightly takes Weinrib and other 'formalists' to task for their faith in the autonomy of private law, its supposed ability to maintain a rational self-sufficiency quite independent of ethics as well as politics. Brudner's critique of Weinrib takes as it starting point Hegel's early critique of Kant:

> For the young Hegel … the truth of private law is contrasted with the way in which private law appears to those involved in its everyday application. It appears to be independent of the priority of the good; its essential nature, however, is not this appearance but rather its subordination to the

good. … [B]ecause its true nature lies outside itself, its own self-understanding as an autonomous formation ordered to the atomistic person is error and illusion.[32]

Here you will detect more than an intimation of the position I outlined above, according to which legal reasoning, like love, proceeds in the illusion of its own rational self-sufficiency. But Brudner fights shy of this conclusion, which he thinks demotes private law to 'the superficial play of appearances.'[33] Instead he follows the development of Hegel's thought to what he regards as a more searching critique in later work, which

claims to unite two apparently contradictory theoretical stances towards its object; it claims to unite a cognitive surrender to the law's internal standpoint as complete as any ethical positivism with a critical perspective on that standpoint as radical as any utopian idealism. … The fundamental insight is that the common good requires a private law wherein the good's primacy is surrendered in order that it might be confirmed as the good through the free recognition of radically independent selves. The common good requires the viewpoint of the atomistic self for its own validation, just as the individual's distinctive worth presupposes the standpoint of the good from which the necessity of individualism is revealed. … Both viewpoints are mutually complementary aspects of the whole.… I shall call [this whole] dialogic community.[34]

Now what, essentially, does this add to the simpler view attributed to the young Hegel? One thing it adds is that the illusion of legal reasoning's rational self-sufficiency is a *logically necessary* illusion, and hence an illusion *without* error. In the language which Weinrib and Brudner prefer: the good itself dictates that the right not be pursued for the sake of the good. But this much is easy to explain without departing from what I already said. Justice, like love, is blind; in love and justice, reason requires the exclusion of reasons; there are considerations which, as a lover or judge, one may not act upon, considerations which may nevertheless lend their value to what one does in loving or judging, and which may therefore be used (or even needed) to defend one's role as lover or judge. One of the most

[32] *UCL*, 12–13.

[33] *UCL*, 13.

[34] *UCL*, 10 and 17

surprising and infuriating features of Brudner's book is how much of a meal he makes of this simple phenomenon of motivational non-transparency, which he feels compelled to season liberally with mind-bending metaphysics and convoluted turns of phrase. I think he labours over it primarily because he tries to interpret it, with Hegel, not as a motivational phenomenon but as a matter of 'apparently contradictory theoretical stances'. To be sure, if one holds that the right is prior to the good, then (barring any change of sense or level or discursive context) one cannot also hold that the good is prior to the right without being plunged into a theoretical crisis, calling for extraordinary metaphysical measures like the one which Brudner labels 'dialogic community'. But the explanation of judging calls for no such emergency measures, because (if we must use this odd and dangerous language of disembodied 'good' and 'right') the claim that the good is prior to the right in the sense that the value of the right derives from that of the good is not in any tension with the claim that the right is prior to the good in the quite different sense that the right loses (some of) its value if pursued for the sake of (some) goods from which that value derives. Both of these priorities belong straightforwardly and obviously to a single *theoretical* standpoint, even though the latter priority explains, from within that single theoretical standpoint, the possibility of specialised *motivational* standpoints such as that involved in sound judicial reasoning which does justice according to law.

Such reconstruction of practical problems as theoretical problems, I would go so far as to say, is Brudner's trademark. Take, for example, conflicts among reasons for action which reflect conflicts among ultimate (i.e. non-derivative) values. The way to understand such practical conflicts, Brudner seems to think, is to search for the different systems of thought which would explain the existence of the different ultimate values in question, and thus the different reasons they generate. And the way to resolve the practical conflict between these reasons and thus adequately justify one's action or practice is, in turn, to provide some philosophical reconciliation of the counterposed philosophies in which the conflicting ultimate values were supposedly embedded. The mature Hegelian view is said to

have achieved this reconciliation so far as the main competing modern philosophies of the common law are concerned. Thus the upshot of 'dialogic community' is supposedly

> that the common law is (inherently, though more or less imperfectly in fact) a unity not only of diverse doctrines but of diverse doctrinal *systems*. This unity of subunities constitutes the good order and justice of the common law and reveals injustice as the hypertrophic extension of some constituent principle, such as formal liberty, the general happiness, or positive freedom. In exhibiting the common law's inherent unity, I believe I have vindicated the rule of law against the prevalent view that the common law is inescapably torn by ideological conflict.[35]

Here Brudner sides with Weinrib in elevating coherence to the essence of justification. True, he finds the coherence of Weinrib's own system illusory, in that it 'absolutises' one sub-system ('Kantian right') at the expense of another sub-system or group of sub-systems ('welfare', 'the [common] good') on which its own coherence ultimately depends.[36] Thus Weinrib's assumption that private law's coherence turns on private law's autonomy is rejected in favour of a view which rests private law's (continuing) coherence on the (progressive) erosion of private law's autonomy.[37] But the claim that justification depends on coherence is held constant through all this, and the enemy is a common one for Weinrib and Brudner alike: the prevalence of 'ideological conflict' which would, both Weinrib and Brudner apparently agree, tear the common law apart.

[35] *UCL*, 261–2.

[36] *UCL*, 170.

[37] The parenthetical words are needed because Brudner sometimes presents his thesis, in Hegelian idiom, as an historical one about the development of the law. Originally, he sometimes suggests, private law took its coherence from its self-understanding as autonomous; but as time went on a 'new' private law came to depend for its coherence on its internal recognition of the old model's partiality. Weinrib's main failure accordingly becomes a failure to move with the times. Thus: 'Legal thought can *remain* within the framework of formal right ... only as long as it does not synthesise the formal will and its embodiment in a *new* conception of the of the foundation. *Once it does so*, the framework of formal right is transcended' (*UCL* 168, emphasis added). I will henceforth ignore this temporal dimension of Brudner's thesis, as it seems to me to reflect, not only a bizarre view of moral change, but also a naive view of pre-twentieth century (and pre-modern) tort law.

Why should it be thought so obvious that ideological conflict, more than any other practical conflict, would 'tear the law apart'? What, for these purposes, *is* 'ideological conflict'? The expression has many possible applications, most of which are only very loosely related to one another. But in contemporary legal philosophy 'ideological conflict' has, I think, come to mean conflict between ultimate values each of which, by claiming its own monopoly, necessarily denies the value of the other. It means that conflict is elevated to the status of 'fundamental contradiction', as adherents of the critical legal studies movement were once wont to put it. For example, on one interpretation (which according to some contemporary Marxists was Marx's own interpretation) the conflict between ultimate Marxist and liberal ideals is 'ideological' in precisely this sense: to assert the ultimate value of personal autonomy is necessarily to deny the ultimate value of self-realisation through labour, and vice versa.[38] Now the more one interprets ultimate value conflicts as ideological in this sense, the more one tends to regard more mundane, derivative value conflicts as conflicts between incompatible systems of moral or political thought. It then becomes tempting, as much work in critical legal studies demonstrated, to think of all sorts of everyday dilemmas as manifestations of some unbridgeable chasm between fundamentally different but comprehensive ways of conceiving and rationalising the world – conflict of theories rather than simple conflict of reasons for action. Brudner's reaction to this temptation, painstakingly and often brilliantly worked out, is that the chasm between (some) such 'ideologies' is bridgeable at a deeper level in the working-out of 'dialogic community'. But what made this difficult manoeuvre necessary, it seems to me, was giving too much credence to the idea that the relevant conflict was ideological in the

[38] This is not the only interpretation of the Marxist-liberal conflict. My own view is that both self-realisation through labour and personal autonomy are sound non-derivative moral ideals, both of which continue to exert their conflicting appeal, but each of which may have a stronger claim than the other depending on contingencies of time and place. To defend this view requires a wedge to be driven between derivativeness and conditionality, a task which obviously cannot be attempted here. Suffice it to say that if the Marxist-liberal conflict can still be described as 'ideological' on my interpretation of it, ideological conflict is nothing for lawyers to be especially afraid of.

first place, and thus allowing into the picture precisely the kind of chasm between systems of thought or 'theories' for which some fantastic metaphysical bridge is needed. To my mind, this is just another case, like Weinrib's ready acquiescence in the preposterous American Legal Realist view of justification, of dancing to the enemy's tune.

That Brudner apes his opponents by transforming 'the right' and 'the good' into ideologies, in the relevant sense, cannot be doubted. The real tell-tale sign in *The Unity of the Common Law* is the progressive amalgamation of many different cross-cutting axes of potential practical conflict into one grand overarching conflict. Thus the contrast between 'right' and 'good' is variously reconstructed as the contrast between non-instrumental and instrumental evaluation,[39] as the contrast between agency and welfare,[40] as the contrast between form and substance,[41] as the contrast between individual and community,[42] as the contrast between corrective and distributive justice,[43] as the contrast between private and public law,[44] as the contrast between adjudication and legislation,[45] as the contrast between law and equity,[46] and so on. None of these contrasts has, in reality, much to do with any of the others. Take, for example, the contrast between individual and community. Brudner labels his vision 'dialogic community', first and foremost, because of its amalgamation of what he calls 'communitarian' concerns within what he regards (I think mistakenly) as the historically individualistic framework of the common law. Now communitarians are people who value communities, who think that some aspects of the good life are irreducibly

[39] *UCL*, 22–3

[40] *UCL*, 215.

[41] *UCL*, 24.

[42] *UCL*, 17–8.

[43] *UCL*, 32–3.

[44] *UCL*, 32–3.

[45] *UCL*, 32–3.

[46] *UCL*, 136.

aspects of a common life. The really radical communitiarians are, indeed, anti-humanists who think that communities are of non-derivative value i.e. do not even take their value from the quality they lend to the lives of the people who live in them and/or beyond them. Most communitarians, however, are less radical, and regard the common good as humanistically valuable. What distinguishes such communitarians from individualists is that individualists regard the common good as instrumentally valuable, whereas communitarians think it non-instrumental, i.e. they think it lends value to people's lives in some ways other than merely by its actual or expected consequences for those lives. This means that communitarians regard communities as playing an intrinsic role in human flourishing. This brief account, to which I think Brudner himself is committed,[47] already shows that the individualist/communitarian distinction cannot map onto the others with which Brudner wants it to correspond. For a start, a communitarian view of law and legal reasoning has no particular propensity to instrumentalise these things, since it could regard law and legal reasoning as essential parts of, rather than a mere means to, the flourishing of any common life which is itself an essential part of, rather than a mere means to, human flourishing. Isn't this, indeed, what was always supposed to be 'common' about the common law?[48] Nor would a shift of focus from agency to welfare necessarily betoken a shift from individualism to communitarianism, since one could have an individualistic view of welfare (like that of contemporary economistically-minded utilitarians) or a communitarian view of agency (like that of Habermas's neo-Kantian 'communication ethics'). One could be a 'formal' communitarian in Brudner's sense, that is to say one for whom any community has intrinsic value irrespective of the quality of its ends, or one could be a 'substantive' individualist, who believes that human life is valuable only if spent in worthwhile pursuits, but that the wothwhileness of pursuits can always be explained without pointing to any

[47] See, for example, *UCL*, 17.

[48] For some illuminating reflections on this idea, see Joseph Raz, 'On the Nature of Law', *Archiv für Recht und Sozialphilosophie* 82 (1996), 1 at 9-12.

intrinsic value in the common good. And so on. We could repeat the exercise for many other of Brudner's conflated contrasts. Brudner might reply, I suppose, that his contrasts were only supposed to map onto each other when we restricted our attention to *sound* moral views and principles. Thus all sound accounts of agency are fundamentally individualistic, all sound accounts of distributive justice are fundamentally instrumental, all sound accounts of corrective justice are fundamentally formal, all sound accounts of public law are fundamentally communitarian, etc. But in that case Brudner is bootstrapping. For the only reasons he gives in his work for thinking that any of the possible moral principles that are not embraced in 'dialogic community' are unsound is that they are not embraced in 'dialogic community'. Their fatal flaw as moral views and principles is none other than that they do not happen to fit anywhere in the contrasting systems of thought or ideologies between which 'dialogic community' serves to build its bridge.[49] But these systems are, I contend, arbitrary attempts to order practical rationality's infinite but disordered resources. What Brudner fails to appreciate is that there are more valid reasons for action in the world than can in principle be known; thus there are more valid reasons than can ever be integrated into any system of thought; thus there are more valid reasons than there are reasons, conflicts between which could in principle be transcended by an ideal of intersystematic reconciliation and reunification along the lines of 'dialogic community'.

5. Tort law's duties

One distinction which Brudner does not collapse directly into his grand ideological contrast between (individual, corrective, formal, private, adjudicative) right and (common, distributive, substantive, public, legislative) good is the contrast between

[49] See also my discussion of Brudner's work (in collaboration with Jeremy Horder and Stephen Shute) in the introduction to the volume we edited, *Action and Value in Criminal Law* (Oxford 1994), in which chapter 5 of *UCL* first appeared.

strict liability and negligence liability in the law of torts. But he does relate the latter contrast interestingly to the former. As a mode of liability in the law of torts, Brudner explains, strict liability can represent an absolutisation *either* of the right at the expense of the good *or* of the good at the expense of the right. Strict liability in the tort of trespass represents the paradigm of right-absolutisation, catering as it does for the ideal of the inviolate and inviolable self-owner beloved of so-called possessive individualism.[50] The strict products liability lately introduced in some legal systems represents, by contrast, the paradigm of good-absolutisation, imposing the supposedly communitarian role of public welfare insurer or guarantor upon certain kinds of private as well as public undertakings.[51] In between the strict liability paradigms of trespass and products liability, according to Brudner, lies the *tertium quid* of negligence liability, which (one is not at all surprised to be told) is the mode of liability in private law systematically favoured by the reconciliatory ideal of 'dialogic community'.[52] The same point is also expressed by Brudner in terms of 'positive' and 'negative' duties, understood respectively as duties to act in certain ways and duties not to act in certain ways. The law of trespass is said to impose entirely negative duties, viz. duties of noninterference in body, land, chattels, etc. Modern forms of products liability, by contrast, impose upon producers sweeping positive duties to protect the well-being of people at large irrespective of any contractual relationship. Negligence liability, meanwhile, is portrayed as a natural fusion or integration of the negative and the positive, recognising positive duties to care for miscellaneous strangers under Lord Atkin's famous 'neighbour principle', but at the same time limiting recovery negatively by requiring, under the very same principle, a close transactional nexus between defendant and plaintiff in the form of an act by the one

[50] *UCL*, 177–9.

[51] *UCL*, 201.

[52] *UCL*, 188–200.

causing (which is to say not merely occasioning, nor merely rendering more likely) special damage to the other.[53]

Commenting on this aspect of Brudner's position, Weinrib takes issue with the suggestion of a positive dimension to negligence law.[54] The general duty of care under the neighbour principle represents, for Weinrib, not a qualification of or counterbalance to the purely negative duties generated by his system of 'Kantian right', but rather a straightforward implementation of them. Kantian right, Weinrib points out, is not the right of the isolated individual, but rather the right of an individual whose right is compatible with exactly the same right in others. While this leaves strict liability intact as a mode of liability for some purposes (e.g. for adjoining landowners disputing what Weinrib regards as private space), in public space the negligence standard is said to be the standard which allows the activities of each of us to accommodate, in equal measure, the activities of all others. Probably Weinrib is right to insist upon this Kantian rehabilitation of the negligence standard. But it seems to me that Brudner has the upper hand in his claim that the duties of negligence law are nevertheless best regarded as including an element of positive duty in precisely the sense that both he and Weinrib have in mind. Criminal lawyers sometimes complain that negligence cannot be a form of mens rea, since it is compatible with complete absence of mind, and an absent mind surely cannot be a guilty one. To this the answer is that failing to think can constitute a mens rea, in just the same way that failing to act can constitute an actus reus. For negligence liability, in tort law and criminal law alike, is liability which imposes a duty to pay attention, and a duty to pay attention is none other than a duty to engage in a certain kind of mental activity, i.e. a positive duty. Whether that is a legitimate imposition in tort law or criminal law falls to be decided in much the same way as that question falls to be decided regarding other duties to act,

[53] *UCL*, 200–1.

[54] 'Professor Brudner's Crisis', *Cardozo Law Review* 11 (1990), 549.

or positive duties, in those areas of law. If this is so, then we must conclude that Weinrib's rehabilitation of negligence liability as an implementation of Kantian right also brings to light the impossibility in principle of Weinrib's ambition to carve out a zone of Kantian right by distinguishing negative duties sharply from positive ones. And that in turn is a reminder of the futility of Weinrib's enterprise of trying to devise a doctrine of right which is independent of any doctrine of the good, a legal morality independent of the rest of morality. To the extent that Brudner's conceptualisation of negligence liability as a *tertium quid* targets this futility, his aim is true.

But at the same time, Brudner himself peddles a certain amount of disinformation concerning the significance of the distinction between negligence and strict liability. Consider, for example, the following passage:

> Under strict liability, one has no right to act in ways that happen to injure another. Since, however, all action carries the risk of such injury, strict liability means that I have a right that you be governed in all your actions by concern for my welfare, and you have the same right over me. No doubt there is a mutuality of care here; but it is the mutual care of extreme altruists who, because they claim no worth as independent selves, can neither give nor receive effective confirmation of worth and hence can require no valid right to care. By contrast, a fault [i.e. negligence] requirement establishes a reciprocity of care between selves.[55]

There is a damaging confusion right at the start of this passage. It does not follow from the fact that one has a duty not to injure others that one has any duty to show any concern for them at all. In principle it is perfectly possible to fulfil one's duty not to injure others fortuitously, i.e. without being in the least bit concerned about them, and without even trying to do one's duty. At most developing a concern for others and trying to do one's duty will improve one's *chances* of doing one's duty by not injuring them; but even this contingent link between trying and succeeding is often enough falsified by the complexity and unpredictability of the endeavour (just try trying to

[55] *UCL*, 190.

bring your children up to be well-balanced in adult life) or by the structure of the values involved (just try trying to fall in love). Indeed in this prising apart of trying and succeeding we see exactly the essential difference between liability dependent on negligence and strict liability. Liability dependent on negligence imposes a duty to try, with or without success.[56] Strict liability imposes a duty to succeed, with or without trying. A law which 'imposes upon you a duty to be governed in all your actions by concern for my welfare' thus imposes a very stern and absurdly sweeping form of negligence liability, and not a form of strict liability at all. This has important implications for Brudner's neat matrix of connections between the strict liability/negligence liability distinction and the positive duties/negative duties distinction. At one level, it is true, the duties imposed by negligence law are systematically more positive, in Brudner's sense, than those imposed by any strict form of liability. For the link between trying and paying attention is a logical one while the link between succeeding and paying attention is a contingent one; and thus, as I already accepted, liability dependent on negligence has a necessarily positive element to it which is missing from strict liability. But apart from this, the distinction between trying and succeeding, and hence the distinction between liability dependent upon negligence and strict liability, simply cuts across and does not relate to the positive/negative distinction. One may in principle have positive duties to try to provide assistance to needy strangers as well as positive duties to succeed in providing such assistance. Equally one may have negative duties to try to avoid causing injury as well as negative duties actually to avoid causing injury. Thus beyond the logical relationship between trying and paying attention, we find no systematic connection between the negligence/strict liability contrast and the positive duties/negative duties contrast. Accordingly Brudner is quite wrong to portray a shift

[56] Try as hard as the relevant negligence standard demands, not try as hard as one can. The test, in the terms so beloved of lawyers, is 'objective' rather than 'subjective'. See note 62 below.

away from negligence liability and towards strict liability as necessarily a shift towards a more comprehensively and thoroughly positive, and hence on his view ultimately self-abnegating, set of duties.

That being so, Brudner cannot rely on the argument from self-abnegation in resisting the displacement of liability dependent on negligence by a wider use of strict liability in the law of torts. What argument can he rely on instead? For many people nowadays, resistance to strict liability comes more or less consciously of the simple thought that there can in principle be no such thing as a duty to succeed, be it positive or negative. One popular argument is a broadly Kantian one against the possibility of 'moral luck'. Kant's original argument goes something like this: (a) the only source of moral value in our actions is the rational will; (b) the rational will infects not the whole of what we do but only that part of it which consists in our trying to do good; (c) doing one's duty is of moral value; thus (d) there can be no duty to succeed but only a duty to try.[57] You may assume that this argument would be unavailable to Brudner. For Brudner holds, in what he takes to be a Hegelian spirit, that the moral value of the rational will presupposes, as well as being presupposed by, the moral value of 'the objective realization' of the will in the world beyond it.[58] Does this not amount to a direct denial of premiss (a), and hence an attack on the whole moral luck argument? You may think so. And yet, once the misguided argument from self-abnegation has been stripped out, Brudner's case for liability dependent on negligence seems to be based on nothing more and nothing less than the Kantian moral luck argument. 'We have said,' he writes,

> that the person's end-status is confirmed through the care exercised on its behalf by another self. Yet this dependence on another's will would contradict rather than confirm the absolute worth of the person if it were dependence on an arbitrary will external and indifferent to its own … the person's dependence on another for self-confirmation is compatible with its absolute worth (and so

[57] *Groundwork of the Metaphysic of Morals*, above note 29, combining 62 and 68.

[58] *UCL*, e.g. 15.

with a right to care) if it is dependent only through the mediator of a common will ensuring that dependence on another is consonant with autonomy.[59]

This argument for the negligence standard includes the premisses that doing one's duty is of moral value (a 'confirmation' of the 'end-status' and 'absolute worth' of the person to whom the duty is owed as well as the person owing it), that this moral value is the moral value of the rational will (a will which is not 'an arbitrary will external and indifferent' to the wills of others), and that the value of this will manifests itself, not in successes at avoiding harms or bringing benefits, but in (more or less positive) attempts to do so ('the care exercised on … behalf' of one person by another). These premisses correspond to and capture, respectively, premisses (c), (a) and (b) of Kant's argument. But does Brudner modify or supplement the Kantian premisses enough to distinguish his argument from Kant's? I can see two respects in which he might claim to have done so.

First, Brudner may say that his argument is interpersonal, whereas Kant's makes no mention of anyone other than the agent whose will is in question. Thus, he may say, his argument takes us, as promised, out into the world beyond the will, while Kant's does not. But the fact that Kant's argument is framed in terms of a singular will ('the rational will') does not make it inapplicable to the many-person case. For Kant's idea of the rational will is famously self-referential, i.e. it is none other than the will which respects the will which respects the will which … and so on. That is the essence of the universalisation procedure at the heart of the Categorical Imperative.[60] The rational will, Kant argued, depends on nothing but itself. He did not mean that one person's rational will depends on nothing but that same person's rational will. He conceived of the rational will as agent-neutrally valuable, so that the ultimate rational importance of the rational will would remain constant, in each of our actions, irrespective of where in the world that rational will might

[59] *UCL*, 191.

[60] *Groundwork of the Metaphysic of Morals*, above note 29, 88.

be embodied, i.e. whether in ourselves or in others.[61] Indeed, Kant could readily have marked the agent-neutrality of the rational will's value exactly as Brudner does, by speaking of it as 'a common will'. Thus there is no hint of any modification to Kant's moral luck argument to be found in this aspect of Brudner's position.

Alternatively, Brudner could observe that for him duties need only be 'consonant' or 'compatible' with the value of the rational will, rather than dictated by it. This is a matter of no little importance for the success of Brudner's whole approach to negligence. In common with Weinrib, Brudner does not set much store by the distinction between, on the one hand, negligence as a condition of liability for various torts, crimes, and other legal wrongs, and, on the other hand, negligence as a specific tort in its own right. In their expectation of finding coherence in private law, Brudner and Weinrib both tend to think of the negligence standard and other elements of the tort of negligence as something of a package deal. The negligence standard, the relationship requirements, the causal elements, the damage specifications, the defences, etc. all belong together and stand or fall together.[62] The immediate problem in this pre-packaging is that the tort of negligence, as both Brudner and Weinrib clearly realise, does not impose a pure duty to try, i.e. a pure duty not to be negligent. It imposes a hybrid trying-succeeding duty, a duty not to *cause* certain kinds of damage *by* one's negligence. Thus one may defend a negligence action *either* by the plea that, although one did not succeed one tried as hard as the relevant negligence standard required one to try *or* by the plea that, although one did not try as hard as the relevant

[61] On the idea of agent-neutrality, see e.g. Samuel Scheffler, *The Rejection of Consequentialism* (Revised ed., Oxford 1994), ch. 1.

[62] Thus Brudner too readily associates modern moves to 'strict liability' not only with the abandonment of the negligence standard but also with the abandonment of these various further elements of the tort of negligence, a hence a drift towards social insurance schemes. For myself I do not see any natural connection between dropping the negligence standard and dropping requirements of causation, special relationship etc.

negligence standard demanded, fortuitously one succeeded in avoiding bringing about the relevant kinds of damage. This may lead Brudner and Weinrib to assume that they could not make use of Kant's moral luck argument even if they wanted to, on the ground that the argument would support the availability of the former plea but rule out the availability of the latter, and thus any defence of the tort of negligence would necessarily be condemned to incoherence.

But I doubt whether this is right. It all depends on how one interprets Kant's moral luck argument, and in particular how one reads premiss (c). Modern Kantian scholarship tends towards the view that premiss (c) should be read in such a way that every duty must be such that it is possible to comply with it out of a rational will, even though some duties could be such that it is possible to comply with them from other motives as well (with corresponding sacrifice of non-derivative value pursuant to premiss (a), needless to say).[63] Indeed this accommodating interpretation of premiss (c) is absolutely essential if Kant is to be able to embrace within his thinking the very idea of a legal duty, which presupposes that some people, their rational wills lacking or lapsed, will need motives other than that of the rational will before they will do their duty. So in order to carve out a faithful doctrine of 'Kantian right' for the purposes of the law of torts, both Brudner and Weinrib need to give this accommodating interpretation to premiss (c). And as soon as this is accepted, any anxiety about the ability of the hybrid trying-succeeding duty in the tort of negligence to survive the moral luck argument fades away.[64] For of course it is perfectly possible to comply

[63] See, e.g., Barbara Herman 'Moral Deliberation and the Derivation of Duties' in her volume of essays *The Practice of Moral Judgment* (Cambridge, Mass. 1993) – and on my parenthetical proviso, see 'On the Value of Acting from the Motive of Duty', same volume.

[64] Cf. the various writers cited by Weinrib (*IPL*, 156). Their over-hasty invocations of the moral luck argument to attack the 'causing damage' aspect of the tort of negligence scare Weinrib into the equally over-hasty measure of consigning that argument to 'ethics, not right' – even though, as I just explained, the argument as these writers interpret it would rule out 'right' altogether. Note also that Kant's moral luck argument has no bite against the 'objectivity' of the negligence standard

with such a hybrid trying-succeeding duty by rational will alone. Trying (to the appropriate standard) is sufficient, even though not necessary, to do as the law of negligence demands. As I said already, one may comply with the law's hybrid duty *either* by fortuitously avoiding bringing about relevant damage without trying *or* by trying as hard as the relevant negligence standard demands, even though unsuccessfully. That being so, Brudner's indication that the duties of negligence law need only be 'consonant' or 'compatible' with the value of the rational will, and not necessarily dictated by it, can mark no departure from Kant's own argument.

So it appears that Brudner does rely, fairly and squarely, on the Kantian argument. This leaves us with the problem of how to reconcile such reliance with Brudner's apparent rejection of Kant's premiss (a). It is no answer for Brudner to say, with Weinrib, that private law must work with Kantian value alone, and shun all else as extra-legal corruption. It is not even enough for Brudner to say that, unlike Weinrib, he looks beyond Kant's theory of 'right' and delves into Kant's theory of 'good' as well. For 'dialogic community' was supposed to be an ideal of a legal regime in which Kantian value was (progressively) integrated with certain apparently contrasting evaluative perspectives. It was supposed to be a 'unity of subunities'. If that is so, surely premiss (a) simply cannot be accepted by Brudner? The solution to the puzzle emerges when we realise that, of the various subunities which 'dialogic community' integrates, the Kantian one has complete sovereignty over Brudner's doctrine of moral *agency*, even though not over his view of morality as a whole.

Let me explain. Premiss (a) of Kant's moral luck argument, as I rendered it, spoke of the moral value *in our actions*. Now as it happens Kant held that moral value could

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(which is not, in spite of what some lawyers tell us, a half-spoonful of strict liability). Kant's premiss (a) sets an objective standard, the standard of the rational will, so could scarcely be incompatible with such a standard in the law of negligence. To put it another way, Kant's argument works only against 'moral luck in the way one's actions turn out', not 'moral luck in the kind of person one is'. On this distinction, see Thomas Nagel, 'Moral Luck', in his collection *Mortal Questions* (Cambridge 1979).

only be in our actions. In particular, he refused to concede that the value in the consequences of our actions was moral value except insofar as those consequences were themselves further actions. This refusal came of his further premisses (i) that the only source of moral value *tout court* is the rational will and (ii) that our rational wills can only be manifested in our actions. But once one rejects (i), as Brudner certainly does, the Kantian restriction that moral value must be found in our actions rather than elsewhere loses its grip. And Brudner, like Hegel, takes full advantage of this. He introduces moral value elsewhere than in actions: in particular, 'welfare' and 'the common good', which are conceived throughout Brudner's book as sources of value in the consequences of actions, i.e. sources of value in the service of which actions are merely instrumental.[65] It means that Brudner's rejection of the Kantian premiss (i), that the only source of moral value *tout court* is the rational will does not in fact commit him, in spite of first appearances, to reject Kant's premiss (a) that the only source of moral value in our actions is the rational will. Premiss (i) is the Kantian premiss about morality as a whole. Premiss (a) is the Kantian doctrine about moral agency, which, for Kant, happens to exhaust morality as a whole. But once one rejects the idea that a doctrine of moral agency is exhaustive of morality, one may have (a) without (i). And then, like Brudner, one may help oneself to the moral luck argument even though one is no unreconstructed Kantian in one's wider moral views.

My own view, *pace* Brudner, is that the moral luck argument should be rejected, because premiss (a) should be rejected alongside premiss (i). Indeed I believe that the most damaging error in Kant's premiss (i) is the error which shows its face in premiss (a). To have a better account of morality, in other words, one needs to begin with a better account of moral agency than the Kantian one. Unfortunately, the possibility is not canvassed by Brudner. It is briefly canvassed by Weinrib, who, like

[65] See especially *UCL*, ch. 5, in which 'welfare' and 'the common good' are explicitly contrasted with 'agency'.

Brudner, bases his preference for negligence liability over strict liability on the Kantian doctrine of moral agency:

> In judging an action by its effects, strict liability treats the defendant's agency as an incoherent normative phenomenon. On the one hand, strict liability regards the effect as integral to the defendant's action (otherwise the defendant would not be liable); on the other hand, because the effect is not the outcome of culpability, its link to the defendant's action consists solely in its being an effect. … The agent is conceded a capacity for purposiveness that, when harm occurs, turns out to have been morally incapable of being exercised and therefore to have been no capacity at all.[66]

But this simply will not do. There is nothing 'incoherent' about views of moral agency different from the Kantian one, and Weinrib's argument to the contrary fails on three different counts. First, it is irrelevant to a doctrine of moral agency whether it takes moral agency beyond culpability, because a doctrine of moral agency is logically prior to a doctrine of moral culpability. The question of whether one's breach of duty was culpable presupposes an affirmative answer to the prior question of whether it was a breach of duty in the first place. Secondly, it cannot be true that the link between an effect and an action in the cases Weinrib has in mind consists 'solely in its being an effect', since, on Weinrib's own hypothesis, the effect is integral to the action, and thus is linked with it not only as an effect but also as a constituent. Thirdly, and most importantly, the claim that the capacity conceded to the agent and then denied is a capacity for purposiveness is question-begging. Precisely what we need, if we are to get beyond the Kantian limits, is an account of moral agency which recognises our capacities *other than* our capacity for purposiveness: an account in which we are authors of our accomplishments as well as pursuers of our purposes, in which we are conceived in terms of our successes and failures as well as our attempts and neglects, in which it is sometimes the achievement and not just the thought, or effort, that counts, and in which the problem of private law is not just the problem of how to make the will of one compatible with the will of others, but also the problem of how to co-ordinate those many aspects of our conflicting activities which are not reducible to the input of

[66] *IPL*, 181–2.

our wills at all. It is precisely such an enriched doctrine of moral agency, and not any kind of welfarism or communitarianism, which in my view gives rise to the really strong case for strict liability in many areas of private law, including the law of torts.[67] Dazzled by the facile instrumentalism of their adversaries in the 'law and economics' and 'critical legal studies' movements, and held hostage by their shared affection for the false ideal of 'coherence' in justification, both Weinrib and Brudner underestimate the argument for abandoning the popular but untenably narrow Kantian account of the moral agent in favour of a more Aristotelian account, in which moral luck is accepted as an essential and pervasive feature of the human predicament. In their otherwise triumphant and timely defences of judicial reasoning as a distinctive form of moral reasoning, this sweeping neglect of ordinary moral experience struck me as by far the greatest disappointment.

[67] Although not in the criminal law, where a further question of moral culpability does arise. Even in the criminal law, however, the same enriched doctrine of agency plays a role in defending certain forms of constructive liability: see my forthcoming essay 'The Long and Winding Road from Moral Agency to Criminal Liability' in R.A. Duff (ed.), *The Philosophy of Criminal Law* (Cambridge 1997).