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Introduction

It has been said of Martin Buber that the fundamental insight underlying all of his thought is that "primary reality lies neither in the subject nor the object, ie, in the poles of the relation, but in the relation itself."[1] A similar distinction between the poles of a relation and the relation itself—and a similar claim that the poles can be understood only through the relation between them—is the theme of this book. For Buber, the relation in question was the dialogic I–Thou relation, in which the related entities realize themselves by confronting each other as ends in themselves. The relationship with which this book deals is that of parties linked through the norms of private law, and thus through the possibility that one may be found liable to the other.

The theme of this book may seem very distant from Buber's concerns. Unlike the warm self-realization of the I–Thou relation and the encounter with God as the eternal Thou, private law is a domain of contested claims and institutional coercion. Insistence on one's rights under private law is often, as Hegel put it, "a fitting accompaniment of a cold heart and restricted sympathies."[2] Yet, though private law gives rise to a different kind of relationship than those that Buber postulated, its relational character is nonetheless crucial to its operation and intelligibility. A finding of liability always relates a particular plaintiff to a particular defendant. Moreover, in sophisticated legal systems liability is supported by reasons that attempt to set out (not always

[1] Manfred Vogel, "The Concept of Responsibility in the Thought of Martin Buber," (1970) 63 Harv. Theological Rev. 159.

[2] Hegel's *Philosophy of Right*, tr. T. M. Knox (1952), s. 37R.

felicitously, of course) why the norm being applied is fair to both parties and how it participates in an ensemble of norms that treats their relationship as a coherent normative unit. Given the relational nature of liability, these reasons must themselves be relational. And given the aspiration to fairness and coherence, the reasons must treat the parties as equal persons whom the law does not subject to normatively arbitrary demands. Accordingly, private law gives rise to a question that parallels the issues that animated Buber: what does it mean for private law to be expressive of a relationship in which plaintiff and defendant each stand to the other as ends in themselves?

Corrective justice is the term given to the relational structure of reasoning in private law. This term has a venerable history, having first been formulated by Aristotle and then continuously discussed and refined in the two and a half millennia since.[3] It conceptualizes the parties as the active and passive poles of the same injustice (as the doer and the sufferer of injury in Aristotle's account). It directs us, accordingly, to normative considerations that pertain not to either (or even to each) of the poles taken on its own, but to the relationship as such.

The material in this book presents what these relationally normative considerations are and how they work across various bases of liability. Over the last few decades corrective justice has become well entrenched in the theory of tort law. In this book, however, the theoretical issues raised by tort law, though present, are not dominant. The book includes treatment of the areas of contract law, unjust enrichment, restitution, and the law of remedies. It also explores the significance of corrective justice for the comparative study of law (using a specific set of issues from Jewish law), for legal education, and for considering the connection between property and the state's obligation to the poor. It thus presents corrective justice as crucial to understanding both the normative character and the intellectual significance of the phenomenon of liability in its many forms.

The key to the structure of reasoning denoted by corrective justice is, as I shall argue in the opening chapter, the idea of correlativity. Under this idea the reasons for liability treat the parties' relationship as a bipolar unit in which each party's normative position is intelligible only in the light of the other's. The significance of correlatively structured reasoning is that the justification for regarding something as an injustice, and consequently for holding the defendant liable to the

[3] Izhak Englard, *Corrective and Distributive Justice: From Aristotle to Modern Times* (2009).

plaintiff, is the same from both sides. Because such reasoning deals with the relationship as such and not with its poles considered independently, it simultaneously explains both why the plaintiff wins and why the defendant loses.

The advantages of viewing private law as actualizing this structure of reasoning are many. First, because the structure focuses on the relationship between the parties rather than on the parties taken separately, it is fair to both of them. Considerations unilaterally favorable or unfavorable to either of the parties play no role. Neither party can, accordingly, rightly complain of being sacrificed to forward the interests of the other. Indeed, reasoning within this structure does not refer to their individual interests as such, but rather to the relational implications of their interaction. Second, the reasoning is not composed of a hodgepodge of considerations applying to the parties individually and then somehow traded off against one another. Rather it is directed toward treating the relationship as a unified whole, thereby producing reasons that coherently interlock with one another. Third, these virtues of fairness and coherence provide a standpoint for criticism that is internal to the relationship and can therefore not be dismissed as irrelevant to the controversy between the parties or beyond the institutional competence of the court. Fourth, because any sophisticated legal system aspires to the fair and coherent treatment of the disputes before it, this standpoint for criticism is internal to the law, in the sense of being fully consonant with the law's own aspirations and with the doctrinal and institutional arrangements that reflect those aspirations.

The goal of this book, then, is to exhibit how this reasoning works with reference to the common law, to criticize examples of legal doctrine that fail to adhere to the corrective justice structure, and to draw out the implications of this structure for such activities as legal education and comparative law. Thematic is the idea that reasoning within private law features a distinctive mode of legal thinking and discourse that reflects the relational nature of liability.

Corrective justice illuminates the structure of legal reasoning by working back to the content of private law from the adjudicative and remedial features of liability. Adjudication involves a claim by a particular plaintiff against a particular defendant. If the plaintiff succeeds, the remedy awarded requires the defendant to pay damages or give specific relief to the plaintiff. Both the adjudicative and the remedial stages of the parties' controversy thus link them in a bipolar relationship. Corrective justice is the theoretical notion through which the

implications of this adjudicative and remedial bipolarity are discerned in the structure of the norms. The underlying contention is that unless the norms that define the injustice themselves have a bipolar structure, the practice of correcting this injustice through bipolar adjudicative and remedial processes would make no sense. Properly understood, therefore, corrective justice is not exclusively about the remedy's role in rectifying what the plaintiff has suffered at the defendant's hands. Rather, it is also about the structure of norms that such bipolar rectification presupposes.

The structure of corrective justice bears on the content of the reasoning in private law through two mutually complementary movements of thought. The first is the negative idea that corrective justice disqualifies any reasoning inconsistent with its relational structure. Excluded on this ground are considerations, such as a party's deep pocket or insurability against loss, that refer to the position of only one of the parties. Similarly excluded are instrumental considerations such as the promotion of economic efficiency, for although these may refer to both of the parties, they relate the two parties not to each other but to the goal that both parties serve.

The positive idea complementary to this is that reasoning about liability operates through concepts that are themselves correlative. At the point of liability, the relevant correlative concepts are those of right and correlative duty. In private law every right implies that others are under a duty not to infringe it, and no duty stands free of its corresponding right. As I argue in the opening chapter, what is presupposed in the rights and duties of private law is the conception of the person as a free being who has the capacity of setting his or her own purposes. In the light of this conception of the person, rights and their correlative duties function as the juridical markers of the freedom of the parties in relation to each other.

Much of the book is devoted to explicating the way in which rights so conceived figure in various legal contexts. This involves relating the highly abstract conceptual apparatus of corrective justice to the detailed exposition of legal doctrine. The point of blending theory and doctrine in this manner is to show that corrective justice, far from being an empty formal category as some have asserted, provides a distinctive approach to controversial issues across the whole range of liability.

The book's exploration of corrective justice proceeds largely by illustration rather than by the methodical unfolding of corrective

justice's nature and implications. Except for the theoretical handling of the concepts of correlativity and personality in chapter 1, the book describes a series of particular problems and issues, and then brings corrective justice to bear on them.[4] Because the aim of the present book is to display the resources that a theory of corrective justice brings to the treatment of specific issues, it seemed appropriate simply to move from issue to issue, and then to draw some of the themes together in the Conclusion. Almost all the issues discussed here have been matters of legal or academic debate over the last decades. To that extent, the book attempts to formulate the contribution that an ancient idea may make to reflection about current controversies.

By connecting rights and their correlative duties to the freedom of self-determining activity, the book presents an unmistakably Kantian picture of private law. It should, accordingly, occasion no surprise that the book makes reference to Kant's ideas. However, because Kant is so formidable a figure and his vocabulary so forbidding, it might be helpful to specify the limited purpose for which Kant is invoked.

Despite reference to Kant's ideas of private law in these pages, the book pays no attention to Kant's own paramount philosophical ambition of expounding the metaphysics of legal obligation. Kant's treatment of the basic categories of private law comes in his work *The Doctrine of Right*, which is the first part of his *Metaphysics of Morals*. Metaphysics for Kant comprehends "all that can be known a priori,"—that is, independently of experience; the metaphysics of morals "contains the principles which in an a priori fashion determine and make necessary all our actions."[5] *The Doctrine of Right*, accordingly, is an exposition of the principles of interaction between free beings that hold a priori. However important Kant's metaphysical claim about law might be to students of his philosophy, it is of no interest to lawyers and plays no role in the exposition of corrective justice in this book.

The use to which this book puts Kant's ideas is juridical, not metaphysical. Kant is of interest because of the light he casts on the basic concepts of contemporary private law. Kant's writing powerfully elucidates what it means to think of private law systematically in terms of rights. These rights are not merely conclusions attached to the operations of positive law, but features of interaction that, by virtue of their

[4] A methodical exposition of the theory of corrective justice can be found in my previous book, *The Idea of Private Law* (1995).

[5] Immanuel Kant, *Critique of Pure Reason*, tr. Norman Kemp Smith (1929), A841, B869.

content, impose obligations on others that are both normatively justified as markers of reciprocal freedom and legitimately enforceable by legal institutions. In developing his account of these rights, Kant also erects a barrier against widespread but questionable assumptions that are still current today. Among these are the still oft-repeated dogmas that, because rights (especially property rights) presuppose a distribution, corrective justice ultimately rests on a distributive foundation, or that promisees of contractual performance do not have a juridical entitlement to expectation damages. Of particular importance for this book's treatment of contract law and unjust enrichment is Kant's explanation of the legally well-entrenched distinction between *in rem* and *in personam* rights. The most explicitly Kantian chapter is the interpretive effort in chapter 8 to unravel Kant's conceptions of property and public support for the poor. The chapter attempts to explain as clearly as possible the non-distributive foundation of property in Kant's thought and the connection between property and redistribution. It fits into the overall theme of this book by presenting an account of property that conforms to corrective justice and by situating corrective justice within the legal order as a whole. This interpretive chapter aside, the book makes use of Kantian material only to the extent that it casts light on particular problems in understanding private law and can be formulated without reliance on Kant's metaphysical conceptions.

At the end of the day, one might ask: understood as the actualization of corrective justice, what purpose or purposes does private law serve? The answer to this question depends, of course, on what the question means.

One possibility is that the question seeks to determine whether private law (or not insignificant parts of it) should be replaced by distributive schemes like worker's compensation or no-fault automobile insurance. In other words, can private law be justified against alternative legal arrangements? When the question is understood in this way, two broad points should be noted. First, the corrective justice approach to private law, taken on its own, implies nothing about this issue one way or the other, because the acceptance of corrective justice does not entail rejection of distributive justice. These two forms of justice are different ways of ordering legal relations. Accordingly, a given slice of social life, such as workplace injuries or automobile accidents can be coherently treated under either form of justice. One can consistently affirm that, so long as a given class of injuries falls under private law, it

should be dealt with in accordance with the coherent conception of private law that corrective justice provides, and yet believe that those injuries would be better dealt with through a distributive scheme. Second, the choice between the two forms of justice for dealing with particular injuries involves consideration of the role of both corrective justice and distributive justice within a contextually rich account of the legal character of the state. The issue between corrective and distributive justice cannot be determined on the basis of corrective justice alone, for no comparison is possible if only one of the comparanda is in view. All that a corrective justice approach to private law can do on its own is to show the infirmity of the argument that private law should be replaced because it is inevitably incoherent.[6] That is something, but is not dispositive of the question as a whole. Revealing the inadequacy of one argument does not preclude the existence of other and perhaps better ones. And yet no progress on this issue from a theoretical perspective can be made at all unless the relational nature of private law is properly appreciated.

A second possibility is that the question about the purpose of private law is directed to private law in itself, rather than to the choice between private law and what might replace it. Then the answer from the corrective justice perspective is straightforward. The point of private law is to subject the interactions between one person and another to a system of coherent norms that is fair to both. It does this by viewing the parties as free beings who interact with each other as holders of rights (to physical integrity, to property, to contractual performance, and so on) that are the juridical manifestations of their freedom. These rights are secured through the adjudicative and remedial processes of coercive legal institutions operating in accordance with corrective justice's relational conception of public reason.

Conceived in this way, private law is an inherently normative phenomenon. The corrective justice approach seeks to work out (or to understand how the law works out) the principles, concepts, and rules suitable to the relationship between the parties that the adjudicative and remedial processes presuppose. In exhibiting the structure for this enterprise, corrective justice indicates the distinct kind of practical reasoning that supports fair and coherent determinations of liability. Because the law itself strives to treat the relationship between the

[6] Marc A. Franklin, "Replacing the Negligence Lottery: Compensation and Selective Reimbursement," (1967) 53 Va. L. Rev. 774.

parties fairly and coherently, it is worth taking the reasoning present in the legal material seriously on its own terms. As will be apparent from this book, this is not to say that every reason that courts offer actually conforms to corrective justice. Rather, it indicates the structure that legal reasoning has to have if that reasoning is to work out the implications of the private law's own institutional character and normative aspirations. That is why, as I put it years ago in words that scandalized some readers, "the purpose of private law is to be private law."[7]

[7] Ernest J. Weinrib, *The Idea of Private Law* (1995), 5.