Book Review

Corrective Justice, by Ernest J. Weinrib. Oxford: Oxford University Press, 2012. Pp. x + 352. H/b £31.99.

Ernest Weinrib's important and welcome *Corrective Justice* extends and refines ideas and arguments previously presented in his groundbreaking *The Idea of Private Law* (Cambridge, Massachusetts: Harvard University Press, 1995) — which, happily, has been re-issued in a second edition by Oxford University Press. *Corrective Justice* collects nine papers, some of which have been previously published, and many of which have been substantially reworked since their initial appearance; it also includes an illuminating introduction and conclusion. Among the topics discussed in *Corrective Justice* are the concepts of correlativity and personality; the duty of care in negligence law; private law remedies; unjust enrichment; poverty and property in Kant's theory of law; and the relationship between law and legal education. Sophistication, erudition, and ingenuity shine through the collection, which is surely essential reading for all scholars working in private law theory and, as I will argue, for many working in general jurisprudence as well.

As its title suggests, *Corrective Justice* is about corrective justice, understood by Weinrib as 'the relational structure of reasoning in private law' that 'conceptualizes the parties as the active and passive poles of the same injustice' (p. 2). At times Weinrib presents corrective justice as an obvious truism, as when he says, in a somewhat deflationary tone, that corrective justice is 'nothing more than a theoretical account of the obvious normative link between the parties within a regime of liability' (p. 228). But the version of corrective justice presented by Weinrib is nuanced and complex. On Weinrib's view corrective justice is at bottom a theory of reasons, and two concepts embody this idea: those of correlativity and personality. Correlativity comes from Aristotle; personality, in the particular sense in which Weinrib understands it, from Kant. Correlativity is reflected most clearly in the idea that a defendant's liability is always liability to a particular plaintiff, and that 'from the occurrence of the injustice to its rectification, each party's position is normatively significant only through the position of the other, which is the mirror image of it' (p. 17). The core concepts implicit in this structure are correlative rights and duties: to say that X has a right against Y is to say that Y is under a duty to X. This correlative structure is found, for example, in negligence law's requirement of a duty of care, for as

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Cardozo J. said in *Palsgraf v Long Island Railway Co.*, 248 N.Y. 339, 162 N.E. 99 at 100, 'the risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or others within the range of apprehension'. Personality, on the other hand, 'is the abstraction that captures the conception of the person presupposed in the justifications appropriate to the doer-sufferer relationship' (p. 25). And the conception of the person thereby presupposed is one according to which individuals are capable of purposive action, but where the law is indifferent between purposes chosen, privileging no purpose in particular.

This is an attractive package, and in *Corrective Justice* Weinrib applies it with great skill to a number of puzzles and problems in private law. But far from being a summary of the views of Aristotle and Kant on justice, *Corrective Justice* constitutes an extended argument for, and defence of, a particular way of understanding the reasoning that is characteristic of private law. As a formalist about private law reasoning (on which see Ch. 2 of *The Idea of Private Law*), Weinrib looks to the structure of private law liability to reveal the nature of the norms that govern such liability. As noted above, liability in private law is always bilateral, relating a particular defendant to a particular plaintiff. So if an account of such liability is a theory of reasons, it follows that any reasons for thinking that a defendant has committed a wrong must at the same time be reasons for thinking that the plaintiff has been wronged by the defendant. To be sure, a corrective justice remedy seeks to undo the injustice suffered by the plaintiff at the defendant's hand, but corrective justice is about more than this: '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' (p. 4). And again, the norms in question concern the reasons for thinking that liability ought to be imposed on a given defendant for a wrong suffered by a particular plaintiff. These reasons are relevant at both the liability and compensation stages. So, for example, in negligence law a defendant is liable for a prohibited outcome only if the reasons for thinking that the defendant's actions were risky included that particular kind of harm; and compensation will be appropriate only if the reasons for thinking that the defendant ought to offer compensation of a particular sort are at the same time reasons for thinking that the plaintiff is entitled to that form of compensation. This is why Weinrib argues that punitive damages are inconsistent with the law of contract. Punitive damages are unilateral — a defendant is required to pay damages, but the plaintiff is not entitled to them — and so 'institutionally misplaced in private law' (p. 182).

The main stumbling block for a corrective justice understanding of private law surely remains the nature of liability in unjust enrichment. 'Unjust enrichment' describes the form of liability that arises when a defendant is unjustly enriched at a plaintiff's expense, as when Jones mistakenly deposits

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money into Smith's bank account (in which case Smith would be unjustly enriched at the expense of Jones). Weinrib has discussed this issue before and returns to the topic again in chapter six of *Corrective Justice*. The central problems for corrective justice analyses of liability in unjust enrichment derive from the timing of such liability, and from the fact that liability in unjust enrichment can be acquired in the absence of fault. Liability in unjust enrichment is strict, since the defendant need not have done anything wrong (indeed, the defendant need not have done anything at all) and arises as soon as the disputed transfer occurs — as soon, for example, as the money mistakenly transferred by Jones appears in Smith's bank account. And this makes obvious problems for a view according to which liability in private law arises only when defendant and plaintiff are doer and sufferer of the same wrong. Weinrib faces this issue squarely by proposing a novel account of what it means to accept a benefit. But many readers will remain sceptical. Weinrib says that, in the context of unjust enrichment, the acceptance 'is of the transfer whose subject matter is the benefit, not of the benefit standing alone, for it is the transfer that links the parties to each other. Thus, even when the acceptance comes after the benefit's receipt, its effect is retrospective to the time of the receipt' (p. 209). This is based on the idea that acceptance can be imputed to a defendant: 'acceptance is imputed when the law can reasonably regard the beneficial transfer as something that forwards or accords with the defendant's projects' (p. 208). But one might wonder whether this resolves the problem, given that it seems to involve a kind of legal fiction, viz., that even though the defendant was unaware of the transfer of the disputed benefit, the law will treat her as having accepted the transfer at the moment of transfer. The law of quasi-contract appears to have been replaced with a law of quasi-acceptance.

But *Corrective Justice* goes beyond private law theory in at least two ways. One way in which it does this is by showing what a pure but non-positivist theory of private law might look like. Kelsen, for example, like many legal theorists before and after him, assumed that a theory of law shorn of all non-legal concepts must of necessity be a positivist theory of law. After all, what would a pure theory of law be if not a positivist one? Weinrib's arguments in *Corrective Justice* challenge this view. Taking his cue from Kant's *Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996), where the Doctrine of Right is separated from the Doctrine of Virtue, Weinrib argues that while the reasoning that characterizes private law is normative, it is a form of reasoning that is juridical rather than ethical. It is normative because it deals with obligations in the form of rights and duties; but it is juridical insofar as the rights and duties it is concerned with are legal. The result is a theory of law that strives to be free of non-juridical concepts, while also being normative through and through. What Weinrib offers in *Corrective Justice* is thus 'purity without positivism' (p. 343).

These remarks connect to a second organizing idea. In articulating and defending his version of corrective justice, and in challenging the claim that a

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pure theory of law must be positivist, Weinrib relies on the idea that private law is characterized by a form of reasoning that is 'marked by the structure of correlativity and informed by the presupposition of personality' (p. 332). More generally, Weinrib presents a common law argument in the traditional and historical sense of the term. According to this tradition, legal principles are uncovered through reflection on particular cases, which manifest a form of reason that runs through them. This is in part what it means to say that reason is immanent in the law. By way of illustration, Weinrib quotes Coke's reply to the claim made by James I that because law is based on reason he was as qualified as any judge to opine about legal matters. Said Coke:

> [T]rue it was that, God has endowed His Majesty with excellent science and great endowment of nature; but His Majesty was not learned in the laws of his realm of England … and causes are not to be decided by natural reason but by the artificial reason and judgment of the law, which law is an art which requires long study and experience, before that a man can attain to a cognizance of it (Sir Edward Coke, 'Prohibitions del Roy' (1607) 77 Eng. Rep. 1342, 1343 (K.B.)).

Corrective Justice therefore belongs to a long line of thinking exemplified by the writings of Coke, Blackstone, and Hale, and famously opposed by Bentham, according to which there is something about 'artificial' legal reasoning in general, and private law reasoning in particular, that sets it apart from various forms of 'natural' reasoning. Weinrib's approach is based on the idea that, in order to properly understand private law, we must begin from the position that private law is a coherent normative phenomenon with its own immanent rationality. This influences, among other things, his analysis of the centrality of private law to legal education, and his criticism of various 'law and X' movements that seek to understand private law using concepts extrinsic to it.

Finally, what of Weinrib's oft-cited claim that private law has no purpose except to be private law? It should be clear, after reading *Corrective Justice*, what that claim does, and what it does not, amount to. In his introduction to *Corrective Justice* Weinrib considers the query: What purpose or purposes does private law serve? He distinguishes two ways to understand this question. One way involves asking whether our current system of private law is the best of all possible societal arrangements, and on this issue corrective justice is largely silent. Corrective justice says nothing about whether it would be a mistake to replace negligence law, say, with a universal insurance scheme for automobile accidents. Perhaps this would be, all things considered, a better way to arrange things, as Weinrib acknowledges. What corrective justice does show, in his view, is that arguments for this conclusion based on the idea that private law is incoherent must fail.

A different way to understand the question, however, is the following: What justifies the institution of private law that we currently have? Here Weinrib's answer is more nuanced and interesting. In his view the point of private law is 'to subject the interactions between one person and another to a

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system of coherent norms that is fair to both' (p. 7). Corrective justice seeks to understand what such a system of norms might look like, and what the core concepts and principles of such a system might be. Thus understood, the goal of private law is to work out 'its own institutional character and normative aspirations' (p. 8). On this view, private law seeks to understand itself in and on its own terms, and this is what it means to say that the purpose of private law is to be private law.

In *Corrective Justice*, Weinrib continues to build a compelling case that the character and aspirations of private law are best understood as manifestations of a normative ideal that is sensitive to the structure of private law reasoning and liability, and that 'works backward from the doctrines and institutions of private law to the most pervasive abstractions in it' (p. 26). In my view it is a wonderful book.

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