

## THE RESPONSIBILITY OF COMMON LAW SCHOLARSHIP: A CASE STUDY

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# THE RESPONSIBILITY OF COMMON LAW SCHOLARSHIP: A CASE STUDY

Derek McKEE\*

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## INTRODUCTION

Legal scholarship in the common law world generally takes forms other than that of “*la doctrine*.” While some common lawyers have attempted to provide systematic, comprehensive accounts of certain areas of law (normally in the form of treatises), these are not considered sources of law in their own right. Nevertheless, common law scholarship has an influence on judges and legislators, and common law scholars play key roles as educators. For these reasons, the responsibility of legal scholarship is as important a question for common lawyers as it is for civilians.

This article explores the idea of responsible legal scholarship in the common law world through a case study of the work of Ernest Weinrib, professor of law at the University of Toronto. Weinrib is one of the founders of a scholarly movement which has sought, since the 1970s, to explain private law in terms of corrective justice. Weinrib’s account of private law, which takes tort law as its primary focus, combines the concept of corrective justice with a Kantian notion of right.<sup>1</sup> In his research as well as his teaching, Weinrib has combined learned philosophical reflection with close reading of common law cases.

However, Weinrib and his collaborators have often been accused of irresponsibility. Weinrib’s corrective-justice-based, Kantian approach has led him to argue that distributive justice as well as instrumental “policy” concerns are irrelevant to private law. Critics have therefore accused Weinrib of a wilful blindness towards the law’s social consequences. Weinrib has generally rejected this line of critique. For him, concerns about distributive justice as well as instrumental policy goals belong to the sphere of public law rather than private law.

Nevertheless, a second line of critique, whose origins can be traced back to the American legal realists of the early twentieth century, emphasizes the role of state institutions in interpreting and

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1. Ernest J. WEINRIB, *The Idea of Private Law*, Oxford, Oxford University Press, 2012.

enforcing private law. This line of critique implies that private law is not autonomous from public law. This second line of critique has presented a greater challenge for Weinrib. If public and private law cannot be tightly separated, the attempt to purge private law of all instrumental and distributive concerns may be unsustainable. Indeed, in his recent writings, Weinrib has offered certain concessions vis-à-vis this second line of critique.<sup>2</sup>

However, Weinrib has also defended himself against charges of irresponsibility through a particular vision of legal scholarship. Weinrib's non-instrumentalist account of private law is accompanied by a non-instrumentalist account of legal scholarship. Weinrib suggests that the task of legal scholars (at least with respect to private law) is to help elucidate law's underlying forms. Weinrib presents his theory as an account of the underlying structure of positive law. He also uses this theory as a basis from which to critique certain aspects of the positive law. Nevertheless, Weinrib would say that it is a mistake for legal scholars to be preoccupied with the substantive impact of their ideas.

In return, however, Canadian courts have had an ambivalent relationship with Weinrib's theories. Weinrib's theories have clearly had an impact on the development of private law in Canada, as attested by a significant number of judicial citations. Nevertheless, Canadian courts have not embraced all aspects of Weinrib's theory. In essence, while endorsing Weinrib's account of private law as a system of corrective justice, Canadian courts have rejected Weinrib's attempt to explain private law in terms of Kantian right.

These developments demonstrate that in the common law, state institutions (here, courts) play a crucial role in ensuring the responsibility of legal scholarship. While legal scholars are free to engage in philosophical speculation, judges are also free to pick and choose the scholarly writings that interest them. Judges are likely to ignore scholarship whose concerns seem too remote from the institutional realities in which they work. The responsibility of legal scholarship is therefore the function of a complex institutional matrix rather than a property of the work itself.

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2. Ernest J. WEINRIB, "Private Law and Public Right", (2011) 61 *U.T.L.J.* 191.

## 1. “*La Doctrine*” in the Common Law?

Before proceeding with the main argument, one might ask whether it is appropriate to talk about “*la doctrine*” in the common law context. In their book on *doctrine* in France, Philippe Jestaz and Christophe Jamin argue that this concept is only applicable in civil law countries.<sup>3</sup> Jestaz and Jamin acknowledge that scholarly or learned reflection plays a role in almost all legal systems, including common law systems.<sup>4</sup> Nevertheless, they note that the concept of *doctrine* in France and other continental European countries contains certain special features. In these systems, *doctrine* is considered an authoritative source of law in its own right, and not merely a learned commentary on other sources.<sup>5</sup> Moreover, *doctrine* is understood as a collective enterprise, engaging the community of legal scholars in an effort to provide a systematic understanding of the law.<sup>6</sup>

Jestaz and Jamin trace this understanding of *doctrine* to a particular set of circumstances around the end of the nineteenth and the beginning of the twentieth century.<sup>7</sup> Although Jestaz and Jamin focus on France, they suggest that parallel developments occurred in other civil law countries. Prior to the late nineteenth century, note Jestaz and Jamin, jurists had a near-monopoly on scholarly thinking about “the social.” But the rise of the social sciences toward the end of the nineteenth century threatened to knock legal scholars off this pedestal. Under threat from the newcomers, French legal scholars such as François Gény asserted the *scientific* nature of legal scholarship. Their aim was to develop a legal science that would be responsive to society but autonomous from the social sciences. In the process, such scholars also claimed for *doctrine* the status of a source of law (thus leading Jestaz and Jamin to describe *doctrine* as a “self-proclaimed” legal source). According to Jestaz and Jamin, a number of qualities of French *doctrine* can be traced to this process of self-definition: its systematic quality, its emphasis on textual sources rather than empirical research, its attention to clarity and to the well-chosen example, its minimal use of abstract concepts, and so on.<sup>8</sup>

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3. Philippe JESTAZ and Christophe JAMIN, *La Doctrine*, Paris, Dalloz, 2004, pp. 5 and 11.

4. *Ibid.*, pp. 4-5.

5. *Ibid.*, pp. 5-6.

6. *Ibid.*

7. *Ibid.*, p. 8.

8. *Ibid.*, pp. 9 and 173.

Jestaz and Jamin note that the self-proclamation of *doctrine* in France was contemporaneous with upheavals in legal thought in the United States. U.S. legal thought in the late nineteenth century had been dominated by what Duncan Kennedy has called “classical legal thought.”<sup>9</sup> This style of thought combined different elements, including economic liberalism (expressed through concepts such as private property and freedom of contract) and a belief in the moral virtue of positive law. In addition, jurists such as Christopher Columbus Langdell, dean of Harvard Law School from 1870 to 1895, had argued that law is a science in which correct legal conclusions could be deduced from general principles.<sup>10</sup> This deductive aspect of classical legal thought was subsequently referred to as “formalism.”<sup>11</sup>

At the end of the nineteenth century and the beginning of the twentieth century, U.S. jurists such as Oliver Wendell Holmes, Jr. and Roscoe Pound worried that classical legal thought had lost touch with social reality. However, unlike their contemporaries in France, Holmes and Pound embraced the notion that law should be responsive to (and in some cases subordinate to) the social sciences. “For the rational study of the law,” wrote Holmes, “the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”<sup>12</sup> Holmes and Pound’s successors, the legal realists of the 1920s and 30s, launched a program of interdisciplinary collaboration between legal scholars and social scientists.<sup>13</sup>

While legal realism rapidly fragmented as an intellectual movement, many of its basic ideas, including its insistence on the relevance of social scientific knowledge (as a basis for “policy” arguments), became part of the “common sense” of U.S. lawyers and legal academics from the 1930s onwards.<sup>14</sup> From the United States,

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9. Duncan KENNEDY, “Toward an historical understanding of legal consciousness: The case of classical legal thought in America, 1850-1940”, (1980) 3 *Research in Law and Sociology* 3.

10. Lawrence M. FRIEDMAN, *A History of American Law*, New York, Simon & Schuster, 1985, p. 612-620.

11. David KENNEDY and William W. FISHER (dir.), *The Canon of American Legal Thought*, Princeton, Princeton University Press, 2006, pp. 8-10.

12. Oliver Wendell HOLMES, Jr. “The Path of the Law”, (1897) 1-4 *Boston Law School Magazine* 1, 11.

13. William TWINING, *Karl Llewellyn and The Realist Movement*, London, Weidenfeld and Nicolson, 1973.

14. D. KENNEDY and W.W. FISHER, *supra*, note 11, pp. 10-12.

such ideas also spread to other parts of the common law world, including English Canada.<sup>15</sup> Moreover, while U.S. scholars and lawyers continued to write textbooks and treatises aiming to systematize the law, such work was devalued in comparison to interdisciplinary theoretical and empirical research with an emphasis on originality. Jestaz and Jamin suggest that these developments turned the United States into an “anti-model” for French legal scholars determined to maintain the autonomy of *la doctrine*.<sup>16</sup>

Weinrib’s work, like much other common law scholarship, fits awkwardly with the notion of *doctrine*. In his books and articles, Weinrib has not attempted to synthesize and systematize the rules of positive law. Such work is left to the textbook and treatise writers. Instead, Weinrib has sought to explain the overall conceptual structure of private law in terms of ideas derived from Aristotle and Kant. This work reflects an original scholarly vision rather than a consensus within the academic community. And it is highly theoretical. In the French context, Jestaz and Jamin suggest that the notion of *doctrine* has difficulty accommodating theoretical writing on such issues as law’s sources, purposes, history, or methodology, or its relationship with other disciplines.<sup>17</sup> It would seem difficult to assimilate Weinrib’s work to the notion of *doctrine* for the same reasons.

However, Weinrib’s work is perhaps closer to *doctrine* than that of many other common law scholars. Like the French scholars discussed by Jestaz and Jamin, Weinrib has used official legal sources (in Weinrib’s case, the decisions of common law courts) as a basis for identifying principles and developing general theories. He has then used these principles and theories as a basis for criticizing inconsistent rules of positive law. In doing so, Weinrib has positioned himself in opposition to American legal realism and the turn to interdisciplinarity in North American legal scholarship.<sup>18</sup> Moreover, Weinrib identifies his approach to legal scholarship as a kind of “formalism,” because it is concerned with the forms of justice and the way they are expressed through law.<sup>19</sup> And like many civilians, Weinrib cites

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15. R.C.B. RISK et al., *A History of Canadian Legal Thought: Collected Essays*, Toronto, University of Toronto Press, 2006, pp. 341-399.

16. P. JESTAZ and C. JAMIN, *supra*, note 3, pp. 296-301.

17. *Ibid.*, pp. 213-215.

18. Ernest J. WEINRIB, *Corrective Justice*, Oxford, Oxford University Press, 2012, pp. 323-332.

19. E.J. WEINRIB, *supra*, note 1.



the Roman jurists as his model for legal scholarship.<sup>20</sup> (It may be worth noting that Weinrib holds a doctorate in Classics from Harvard University, and that his first teaching appointment at the University of Toronto was in the Classics department.)

## 2. Weinrib's Legal Theory

Weinrib's ideas provide a case study of a corrective justice-based theory of private law, or what some have called a "neoformalist" approach. A number of common law scholars can be said to embody such an approach.<sup>21</sup> I have chosen to focus on Weinrib because he is a senior figure in the Canadian academy and the most prominent representative of such an approach in Canada.<sup>22</sup> I have also chosen to focus on tort law, which has been Weinrib's main area of research, although he has also written on other areas of private law, such as unjust enrichment.

Over the course of more than four decades, Weinrib has proposed a theory of private law based on the notions of corrective justice and Kantian right. Weinrib offers this theory as both an explanation of the existing rules of private law as well as a justification for the state's coercive role. Weinrib has also critiqued certain rules and principles of private law that are inconsistent with the theory. Weinrib's critics have accused him of irresponsibility, of ignoring the social consequences of private law rules that are enacted and enforced by state institutions. In his defence, Weinrib has invoked another kind of responsibility, claiming the virtues of philosophical abstraction and keeping his distance from legal practice.

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20. E.J. WEINRIB, *supra*, note 18, p. 298.

21. Barbara H. Fried lists the following names: "Jules Coleman, Ernest Weinrib, Dennis Patterson, Peter Benson, Stephen A. Smith, Daniel Markovits, John Goldberg and Benjamin Zipursky": Barbara H. FRIED, "The Limits of a Nonconsequentialist Approach to Torts", (2012) 18 *Legal Theory* 231, 235. Other notable members of this group would include Allan Beever and Robert Stevens.

22. When the Canada Council awarded Weinrib its prestigious Killam prize in 2009, it cited Weinrib as "Canada's pre-eminent legal theorist": CANADA COUNCIL, *Canada Council for the Arts announces 2009 Killam Prize*, May 11, 2009, [Online], <[canadacouncil.ca/council/news-room/news/2009/canada-council-for-the-arts-announces-2009-killam-prizes](http://canadacouncil.ca/council/news-room/news/2009/canada-council-for-the-arts-announces-2009-killam-prizes)>.

### **2.1. Corrective Justice and Kantian Right**

Weinrib set out the key elements of his legal theory in his book *The Idea of Private Law*, originally published in 1995.<sup>23</sup> In this work, Weinrib argues that private law can be best understood as an expression of corrective justice. The notion of corrective justice of course comes from Aristotle, who, in his *Nicomachean Ethics*, distinguishes between corrective and distributive justice. Distributive justice involves the distribution of some good (or bad) among any number of parties in proportion to some criterion. Corrective justice, however, necessarily involves two parties, one of whom has wronged the other or gained at the other's expense: a doer and a sufferer. The point of corrective justice is to rectify this injustice as between the parties, to restore a prior equilibrium.

Weinrib explains that the bipolar structure of private law corresponds to this abstract form of corrective justice. A private lawsuit involves a particular plaintiff and a particular defendant; one party has wronged the other; this is what connects the parties and entitles one of them to receive a remedy from the other. This correspondence leads Weinrib to argue that corrective justice provides a coherent theoretical framework for explaining and justifying the rules of private law.

Weinrib further elaborates this theory by adding Kant's notion of right. As Weinrib notes, Aristotle's theory of corrective justice assumes the equality of the parties, but fails to specify in what respect they are equal.<sup>24</sup> Weinrib proposes that the parties to private litigation can best be seen as self-determining agents in keeping with the Kantian notion of right. Private law should therefore be elaborated as a set of rules that enable these agents to pursue their own projects without encroaching on one another's freedom to act.

Combining the concept of corrective justice with Kantian right, Weinrib argues that private law must have a correlative structure. Kantian self-determining agency can be expressed in terms of rights; Kantian agents may exercise their rights but are obligated to refrain from interfering with others' rights.<sup>25</sup> The social world therefore consists of a web of correlative rights and duties. A tortfeasor is

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23. E.J. WEINRIB, *supra*, note 1.

24. *Ibid.*, pp. 76-80.

25. *Ibid.*, pp. 122-123.

one who has breached a duty and has therefore (by definition) violated another's right.<sup>26</sup> Weinrib identifies two kinds of rights as relevant to private law: first, the right to bodily integrity, and second, rights to "external objects of the will," including property and contractual performance.<sup>27</sup>

Weinrib suggests that many standard features of contemporary tort law, and not just its bipolar structure, can be explained and justified in terms of corrective justice and Kantian right. For example, these concepts can help explain why liability in tort law is generally based on fault, and why fault is assessed according to an objective standard.<sup>28</sup> Holding actors liable for the accidents they cause in the absence of fault would, for Weinrib, unduly restrict their freedom. Weinrib also argues that certain areas of "strict liability" in the common law – vicarious liability and liability for abnormally dangerous activities – can in fact be seen as consistent with a fault requirement.<sup>29</sup> Weinrib uses the same reasoning to explain the common law's reluctance to impose tort liability for omissions (except in special circumstances).<sup>30</sup>

Weinrib also suggests that these concepts help account for the common law rule that there can only be liability in negligence where the defendant had a duty of care toward the plaintiff. (The common law is of course quite different in this regard from the civil law, which imposes liability for fault causing injury to "another."<sup>31</sup>) Weinrib argues that foreseeability of harm necessarily implies the foreseeability of harm to a particular set of potential victims, and not simply to the world at large. Weinrib endorses the reasoning of Cardozo J. in *Palsgraf v. Long Island Railroad*, to the effect that "The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation; it is risk to another or to others within the range of apprehension."<sup>32</sup>

Weinrib contrasts his theory with functionalist or instrumentalist theories that present private law as a means of advancing

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26. *Ibid.*, p. 125.

27. *Ibid.*, p. 128.

28. *Ibid.*, pp. 171-183.

29. *Ibid.*, pp. 184-190.

30. *Ibid.*, pp. 153-154.

31. *Civil Code of Québec*, L.Q. 1991, c. 64, art. 1457.

32. *Palsgraf v. Long Island Railroad* (1928), 162 N.E. 99 (N.Y.C.A.).

certain policy goals.<sup>33</sup> Weinrib rejects all policy goals that one might graft onto private law. In particular, Weinrib rejects the goals of compensation and deterrence, which are commonly invoked to explain and justify liability in tort law.<sup>34</sup> Weinrib acknowledges the social value of compensation for accident victims and of deterrence of dangerous conduct. But he notes that these goals depart from the bipolar logic of corrective justice. Accident victims have a need for compensation regardless of whether their injuries were caused by torts. Compensation is all about the plaintiff; it has nothing to do with the defendant. Likewise, it makes sense to deter dangerous conduct regardless of whether the danger actually results in an injury. Deterrence is all about the defendant; it has nothing to do with the plaintiff.

Weinrib also denies that distributive justice has a place in private law. He argues that corrective justice and distributive justice are fundamentally distinct, and that they cannot be mixed without rendering private law incoherent: “When a corrective justification is mixed with a distributive one, each necessarily undermines the justificatory force of the other.”<sup>35</sup> Unlike corrective justice, Weinrib argues, distributive justice is inherently political, and thus belongs to the sphere of public law.<sup>36</sup>

In response, some critics have accused Weinrib of being aloof to the social consequences of his ideas, or even of having a hidden conservative political agenda.<sup>37</sup> Insisting on the formal equality of plaintiff and defendant is all very well in theory, such critics have charged, but in practice, plaintiffs and defendants seldom appear in court on an equal footing. In tort lawsuits on topics such as defective products or medical malpractice, there are important differences in the parties’ abilities to press their claims. In the aggregate, banishing all policy questions from private law seems likely to have regressive consequences. Critics have taken Weinrib to task for failing to face up to these consequences: In the words of Allan Hutchinson, “[t]he flight to philosophical abstraction is an escape from democratic responsibility.”<sup>38</sup>

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33. E.J. WEINRIB, *supra*, note 1, pp. 3-8.

34. *Ibid.*, pp. 39-42.

35. *Ibid.*, p. 73.

36. *Ibid.*, pp. 210-214.

37. See for example Allan C. HUTCHINSON, “The Importance of Not Being Ernest”, (1989) 34 *R.D. McGill* 233.

38. *Ibid.*, p. 262.

Weinrib has responded to such critics in a number of ways. In response to instrumental concerns, Weinrib makes it clear that his concern is not with the consequences but with the theoretical coherence of private law.<sup>39</sup> He argues that the justification for private law depends on its theoretical coherence, structured in terms of the bipolar relationship between plaintiff and defendant. Since compensation and deterrence each deal with only one side of the equation, they distort this bipolar structure and render tort law illegitimate.<sup>40</sup> If compensation or deterrence is the main goal, Weinrib suggests, other institutions – insurance funds or regulatory authorities – would be more appropriate.<sup>41</sup> In response to distributive concerns, Weinrib has acknowledged that his theory may have regressive distributive consequences. He admits that the Kantian insistence on property rights as a foundation of private law makes Kant's theory "consistent with the utmost inequality."<sup>42</sup> Nevertheless, Weinrib assigns distributive concerns to the category of public law; he makes a Kantian argument for progressive taxation.<sup>43</sup>

Weinrib's main preoccupation in *The Idea of Private Law* is to demonstrate that the concepts of corrective justice and Kantian right are immanent in private law – and tort law in particular. For this reason, his theory may appear to be apologetic, a justification of the status quo. However, Weinrib's theory also has a critical function. Weinrib has not only sought to explain and justify existing rules; he has also taken issue with rules of positive law that are inconsistent with the overall structure of corrective justice.

One major target of Weinrib's critiques has been contemporary Canadian and British courts' approach to determining the existence of a duty of care in negligence. To begin with, Weinrib takes issue with these approaches for their recognition of a duty to avoid interference with diverse interests. While a duty of care usually means a duty to avoid causing physical harm to persons or property, courts have sometimes recognized a duty to avoid interfering with economic interests, even in the absence of physical harm. Weinrib argues that courts should impose a duty of care on the defendant only where the plaintiff has a corresponding *right*: normally the right to personal integrity or property.<sup>44</sup>

39. E.J. WEINRIB, *supra*, note 1, pp. 12-14.

40. *Ibid.*, pp. 29-46.

41. *Ibid.*, pp. 41-42.

42. *Ibid.*, p. 132.

43. E.J. WEINRIB, *supra*, note 18, pp. 263-296.

44. E.J. WEINRIB, *supra*, note 18, pp. 48-58.

Weinrib has also criticized the use of policy factors in determining the existence of a duty of care. In *Anns*, the House of Lords stated that the duty of care should depend on “proximity” between the plaintiff and the defendant, but added that courts could consider whether there were other factors militating against the recognition of a duty of care.<sup>45</sup> In *Cooper v. Hobart*, the Supreme Court of Canada modified this test, expanding the role of policy factors.<sup>46</sup> The *Anns/Cooper* test involves two stages. The first stage (also referred to as the existence of a *prima facie* duty of care) has two sub-stages: foreseeability and proximity. With regard to foreseeability, the court is meant to ask, “was the harm that occurred the reasonably foreseeable consequence of the defendant’s act?”<sup>47</sup> In terms of proximity, the court considers the relationship between the parties, and whether it would be “just and fair” to impose a duty of care having regard to this relationship.<sup>48</sup> In this analysis, the court may consider policy factors having to do with the relationship between the parties, such as the possibility of conflicting duties.<sup>49</sup> If the court finds a duty of care, it can proceed to the second stage, where it will consider whether, despite the existence of foreseeability and proximity, there are other grounds for refusing to impose a duty of care, such as potential effects on other legal obligations, on the legal system, or on society in general.<sup>50</sup> From Weinrib’s perspective, such policy-oriented reasoning represents a breakdown of the correlative logic of tort law. Weinrib describes the *Anns/Cooper* test as a “ramshackle enquiry, composed of mutually alien parts.”<sup>51</sup>

In place of the *Anns/Cooper* test, Weinrib champions an approach to duty of care reminiscent of that put forward in older cases such as *Palsgraf v. Long Island Railroad*<sup>52</sup>, *Wagon Mound (No. 1)*<sup>53</sup> and *Hughes v. Lord Advocate*<sup>54</sup>, in which the foreseeability of a particular type of injury to a particular class of plaintiff is determinative of duty of care. Weinrib explains these conclusions in Kantian terms: if negligence is understood as failing to take care in such a way

45. *Anns v. London Merton Borough Council*, [1977] 2 All E.R. 492.

46. *Cooper c. Hobart*, [2001] 3 R.C.S. 537.

47. *Ibid.*, para. 30.

48. *Ibid.*, para. 34.

49. *Ibid.*, paras. 30, 31, 44.

50. *Ibid.*, para. 37.

51. E.J. WEINRIB, *supra*, note 18, p. 63.

52. *Palsgraf v. Long Island Railroad*, *supra*, note 32.

53. *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.*, [1961] A.C. 388, [1961] 1 All E.R. 404.

54. *Hughes v. Lord Advocate*, [1963] A.C. 837, [1963] 1 All E.R. 705.

as to violate others' rights, it can only be wrongful *in relation to* those whose rights might be foreseeably violated. Carelessness that is not foreseeably harmful to someone is not wrongful toward that person. It is just an unlucky accident, and it would be inappropriate to impose legal liability under such circumstances.<sup>55</sup>

## **2.2. Private Law and State Institutions**

The private law Weinrib discusses is official, state law. It is interpreted by judges and enforced by state officials. Weinrib's understanding of state law is derived from Kant's. In his recent writings, Weinrib has explained the role of the state in terms of Kant's notion of "public right." For Kant, the rights and duties of private law arise independently of the state; they would also exist in a hypothetical state of nature.<sup>56</sup> However, in the state of nature, there are no enforcement mechanisms, and therefore a danger that some will violate the rights of others. The state (and public right) is needed in order to enforce rights and duties and to ensure that they will be respected.<sup>57</sup> For Kant, the existence of a *legal* right or duty – as opposed to an ethical principle – necessarily justifies its enforcement through state coercion.<sup>58</sup>

For Weinrib, the state's role in enforcing private law is justified by the internal logic of corrective justice rather than by reference to any other social values or goals.<sup>59</sup> Borrowing a phrase from Aristotle, Weinrib imagines judges as "justice ensouled," impartial arbiters charged with articulating the meaning of corrective justice in a particular situation.<sup>60</sup> By eschewing considerations external to the relationship between the parties, Weinrib argues that judges can exercise a role that is public but nonetheless apolitical.<sup>61</sup>

This aspect of Weinrib's theory has also come under attack. Critiques of the autonomy of private law are not new. Various versions of this critique can be found in the work of the American legal realists and other progressive legal thinkers of the early twentieth century. These thinkers took issue with the legal orthodoxy of the

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55. E.J. WEINRIB, *supra*, note 1, p. 164.

56. Ernest J. WEINRIB, *supra*, note 2, pp. 191, 195.

57. E.J. WEINRIB, *supra*, note 18, p. 277; E.J. WEINRIB, *supra*, note 56, pp. 195-196.

58. E.J. WEINRIB, *supra*, note 18, pp. 266-267.

59. E.J. WEINRIB, *supra*, note 1, pp. 42-44 and 208.

60. *Ibid.*, p. 218.

61. *Ibid.*, pp. 204-231.

late 19th century, which had invoked private law concepts such as “private property” and “freedom of contract” as arguments against government regulation.<sup>62</sup> In response, these thinkers began to analyze and dissect such concepts. For example, Wesley Newcomb Hohfeld’s theory of “jural correlatives” posited that the existence of a right necessarily implied the existence of a corresponding duty.<sup>63</sup> One corollary of this conclusion was that there was nothing natural or inevitable about “rights”: rights and duties were essentially on the same footing.<sup>64</sup> Morris Cohen made this critique explicit, arguing that, given the state’s role in establishing and enforcing it, private law was essentially a form of public law.<sup>65</sup>

In recent years, other scholars have taken up these critiques, albeit in a more nuanced form. For example, Hanoch Dagan notes that the recognition of property rights in contemporary law is value-laden and often highly contested.<sup>66</sup> What counts as a property right, rather than some other kind of economic interest, is not always clear.<sup>67</sup> Peter Cane notes that in practice, rights often conflict with one another, and courts must decide which right takes priority.<sup>68</sup> It is ultimately up to courts and other state institutions to define the contours and the content of rights. The recognition of the state’s role in defining rights undermines the claim that these can serve as an autonomous and apolitical bedrock for private law.

Once one recognizes the role of state institutions in defining the basic concepts of private law, it is difficult to deny the relevance of instrumental or distributive concerns. For example, Dagan and other critics note that courts adjudicating private law disputes seek not only to achieve corrective justice between the parties, but also to set a precedent for future cases.<sup>69</sup> In tort law, judges’ reasons help to

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62. The classic example of this orthodox approach is *Lochner v. New York* (1905), 198 U.S. 45.

63. Wesley Newcomb HOHFELD and Walter WHEELER COOK, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, New Haven, Yale University Press, 1919.

64. Morton J. HORWITZ, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*, Oxford, Oxford University Press, 1992, p. 155.

65. Morris R. COHEN, “Property and Sovereignty”, (1927) 13 *Cornell L.Q.* 8.

66. Hanoch DAGAN, *Reconstructing American Legal Realism & Rethinking Private Law Theory*, Oxford, Oxford University Press, 2013, p. 108.

67. Cf. *International News Service v. Associated Press* (1918), 248 U.S. 215.

68. Peter CANE, “Rights in Private Law”, in Donal NOLAN and Andrew ROBERTSON (dir.), *Rights and Private Law*, Oxford, Hart Publishing, 2011, p. 35, at page 49.

69. H. DAGAN, *supra*, note 66, pp. 112-113.



elaborate notions such as reasonableness and due care. As Barbara Fried writes,

[o]ur tort system is not simply engaged in *ex post* corrective justice via compensation; it is engaged in *ex ante* risk regulation as well, via the standards of due care it generates to determine liability for negligence in the first place.<sup>70</sup>

It is difficult to see how consequentialist policy considerations (including issues of compensation and deterrence) can be entirely banished from such a process.

On the basis of such observations, Dagan has offered a theory of private law that combines corrective justice with other social values. Dagan notes that the boundary between public and private law is not always clear, making it difficult to maintain a strict separation between them and between distributive and corrective justice.<sup>71</sup> Dagan illustrates this point by discussing several areas of private law where, he argues, distributive concerns, informed by social values, have a legitimate role to play: the division of marital property; the measure of monetary remedies for interference with property rights; and the question of whether there should be limits on the rights of owners to exclude others from their property.<sup>72</sup>

In recent writings, Weinrib has conceded that the “public” nature of public right has certain implications for private law. The fact that private law is enforced by the state legal system brings with it certain normative requirements: notably the requirements of publicness and systematicity.<sup>73</sup> Publicness refers to the requirement that laws and judicial decisions be published and explained. Systematicity refers to the aspiration of coherence across the different branches of the legal system.

Weinrib gives examples of situations where the rules of private law might be altered through these public requirements. One of these is the rule of “market overt”: the rule that a third party who innocently purchases property from someone who lacked title (such as a thief or a borrower) obtains valid title as against the original owner, provided that the sale is conducted in the public market-

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70. B.H. FRIED, *supra*, note 21, p. 238.

71. H. DAGAN, *supra*, note 66, p. 114.

72. *Ibid.*, pp. 115-127.

73. E.J. WEINRIB, *supra*, note 2.

place. Weinrib acknowledges that this situation presents private law with a dilemma: should the law protect the rights of the original owner or those of the innocent purchaser? Following Kant, Weinrib solves the dilemma with an appeal to publicness. He explains that public right is meant to provide an assurance that property will be protected, subject to a requirement of publicity; this principle inclines in favour of the innocent (but public) purchaser.<sup>74</sup> Weinrib appeals to similar reasoning to explain other rules of private law, such as the plaintiff's burden of proof (and the relaxation of the plaintiff's burden of proof of causation in cases where evidence of causation is difficult or impossible to obtain).<sup>75</sup>

However, Weinrib is careful to distinguish this line of reasoning from instrumentalist accounts of the same rules. For example, he categorically rejects Blackstone's justification for "market overt" – the idea that securing the purchaser's title is necessary in order to encourage commerce.<sup>76</sup> From a Kantian perspective, Blackstone's argument amounts to an inadmissible instrumentalization of private law. Public right is meant to ensure the proper implementation of the rights and duties of private law, not to reorient these rights and duties toward some external goal.

Weinrib also alludes to other ways in which the requirements of publicness and systematicity could legitimately intrude on the purity of private law.<sup>77</sup> For example, he endorses statutory illegality (*ex turpi causa*) as a defence to a contract action. He also endorses the principle that murderers should not be allowed to inherit from their victims.<sup>78</sup> Weinrib even goes so far as to acknowledge that the democratic and egalitarian values of the *Canadian Charter of Rights and Freedoms* may have a role to play in private law.

These concessions are unlikely to satisfy Weinrib's critics. Once one recognizes the interconnectedness of public and private law, it may be difficult to maintain private law's conceptual purity. The fact that private law is issued and interpreted by state institutions does not necessarily mean that private law can be reduced to public law or that private law should be instrumentalized in service

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74. *Ibid.*, pp. 199-200.

75. *Ibid.*, p. 210.

76. *Ibid.*, p. 202.

77. *Ibid.*, pp. 210-211.

78. *Riggs v. Palmer* (1899), 22 N.E. 188 (NYCA).

of public policy goals. But it does make it harder to wholly exclude instrumental or distributive concerns from private law.

### **2.3. Weinrib on Legal Scholarship and Legal Education**

Weinrib has also discussed the relationship between his theory and positive law in his writings on legal scholarship and legal education. In these writings, Weinrib has made explicit his aspiration of providing an internal account of positive law (or of “legal practice”). However, Weinrib has also appealed to the virtues of abstraction and presented his theory as an expression of philosophical principle. In this way, Weinrib has sought to present his scholarship as responsible, albeit responsible to a set of values or ideas rather than in terms of social consequences.

Weinrib’s Kantian legal philosophy is accompanied by a particular understanding of the role of legal scholarship. In some of his writings, Weinrib has maintained that legal scholarship (or what he calls “the enterprise of understanding law”<sup>79</sup>) must be intimately connected to the practice of law. He identifies legal practice as the starting point, or as the source of raw materials, for the study of law in the university.<sup>80</sup> For Weinrib, scholarly inquiry about law begins with careful attention to legal practice, “treating the practice of law seriously in its own terms.”<sup>81</sup>

Weinrib criticizes instrumentalist approaches to legal scholarship – especially the economic analysis of law – for failing to take legal practice seriously on its own terms. As Weinrib notes, economic analysts of law, such as Ronald Coase, have tried to explain legal concepts in terms of economic efficiency.<sup>82</sup> According to Weinrib, such approaches in effect replace legal concepts with economic analysis; they have nothing to say about law itself.<sup>83</sup>

Nevertheless, Weinrib’s legal scholarship moves quickly from practice to theory. He suggests that the university study of law is meant to abstract from legal practice in order to develop a general theory, “the more abstract the better.”<sup>84</sup> He suggests that, from its

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79. E.J. WEINRIB, *supra*, note 18, p. 297.

80. *Ibid.*, pp. 297, 311, 314.

81. *Ibid.*, p. 313.

82. *Ibid.*, p. 303.

83. *Ibid.*, p. 304.

84. *Ibid.*, p. 313.

starting point in practice, legal scholarship can reveal the underlying structure of this practice (in the case of private law, a structure based on correlativity between plaintiff and defendant) as well as its normative presuppositions (in the case of private law, a Kantian notion of personality).<sup>85</sup>

In other writings, Weinrib has paid particular attention to the enterprise of legal *theory*. (He appears to distinguish legal theory from the study of law in general.) The role of the legal theorist, for Weinrib, is to elucidate the essential structures of reasoning and principle underlying the law.<sup>86</sup> According to this understanding, legal theory should begin with abstract universals: the “starting point” for private law theory must be “the fair and coherent terms on which persons ought to interact with each other.”<sup>87</sup> Private law rights can be “at least provisionally” understood in abstraction from their expression in official legal sources.<sup>88</sup> By working out these principles, the legal theorist can provide “a comparatively uncluttered view of the fairness and coherence that the law itself is striving to achieve.”<sup>89</sup>

Such abstraction helps explain the divergence between Weinrib’s theory and contemporary developments in the common law (for example, with regard to the role of policy factors in the duty of care analysis). Indeed, this divergence has led some critics to argue that Weinrib’s theory cannot be considered an internal account of positive law sources. Peter Cane, for example, has suggested that one can assess Weinrib’s theory according to the four criteria proposed by Stephen Smith. Smith has suggested that legal theories may be assessed in terms of “fit” (“whether they fit the data” – i.e., the rules of positive law – “they are trying to explain”<sup>90</sup>); coherence; morality; and transparency (the extent to which the theory tracks legal actors’ own understandings of what they are doing).<sup>91</sup> Seen from this perspective, Weinrib’s theory appears to possess a great deal of morality and coherence, but only a moderate degree of transparency, and quite a weak level of fit.<sup>92</sup> Indeed, Cane

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85. *Ibid.*, pp. 313-319.

86. E.J. WEINRIB, *supra*, note 2, pp. 193-194.

87. *Ibid.*, p. 193.

88. *Ibid.*, p. 195.

89. *Ibid.*, p. 194.

90. Stephen A. SMITH, *Contract Theory*, Oxford, Clarendon Press, 2004, p. 7.

91. *Ibid.*, pp. 24-25.

92. P. CANE, *supra*, note 68, pp. 38-39.

argues that the insistence on the protection of individual rights and the denial of the relevance of policy considerations is not an interpretation of the internal logic of private law but rather an imposition upon private law of an external set of values.<sup>93</sup>

Despite such critiques, Weinrib has insisted on the importance of abstract principles. This insistence on abstract principles has helped Weinrib to defend himself against his critics' charges of irresponsibility. Weinrib has maintained a scholarly distance from legal practice – indeed, a refusal to conceive of legal scholarship in consequentialist terms.

This insistence on abstract principles has come to the fore in Weinrib's writings on legal education. Despite his attention to legal practice, Weinrib rejects the argument that legal education should emphasize professional training. Weinrib argues that law is worthy of study in a university because it is part of the intellectual heritage of civilization.<sup>94</sup> University legal education is not meant to be “useful” to the legal profession – if it happens to be useful, so much the better.<sup>95</sup> Rather, university legal education is meant to make practitioners (and others) aware of law's underlying principles and possibilities.<sup>96</sup> In the case of private law, it is meant to show how private law expresses the notions of correlativity and personality.

This tension between grounded principles and abstract universals is replicated in Weinrib's views on legal history and comparative law. Weinrib acknowledges the diversity and the historical contingency of legal practice. Weinrib sees this diversity as providing a wealth of raw data for legal scholarship. He also notes that comparison among legal systems can often help draw the key features of a particular system into sharper focus.<sup>97</sup> For this reason, Weinrib wholeheartedly endorses a role for comparative law in legal education.<sup>98</sup> However, Weinrib insists that legal diversity and contingency is without consequence for his theory of private law. He is confident that local variations are relatively minor, and that the underlying structure he has identified (based on correlativity and personality) is transcendent and universal.<sup>99</sup>

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93. *Ibid.*, p. 51.

94. E.J. WEINRIB, *supra*, note 18, p. 297.

95. *Ibid.*, p. 299.

96. *Ibid.*, p. 298.

97. *Ibid.*, p. 321, note 37.

98. *Ibid.*, pp. 321-322.

99. *Ibid.*, p. 321.

Despite his appeals to abstraction, Weinrib rejects any suggestion that his theory is utopian, or that its goal is to work out a complete, universal legal code.<sup>100</sup> He insists that official legal sources are relevant to legal theory, and that legal theory remains engaged with legal practice. The official sources of state-based law are of interest to the legal scholar as a repository of ideas about the law; they help demonstrate how the abstract values of justice can be expressed in different social and institutional contexts.<sup>101</sup> Moreover, lawyers and judges are needed to work out the precise details of the application of corrective justice in different situations. In doing so, lawyers and judges also participate (more or less successfully) in the pursuit of fairness and coherence.<sup>102</sup> The legal theorist does not purport to have all the answers, but he or she can help orient lawyers and judges in this pursuit.<sup>103</sup> For Weinrib, the internal coherence of private law is an aspiration. Weinrib expresses hope that this aspiration might be realized – that the law might “work itself pure.”<sup>104</sup>

Weinrib’s relationship with the positive law is therefore complex and ambivalent. On one hand, Weinrib has been deeply engaged in the analysis and critique of official legal sources, and has insisted that the state has a crucial role to play in private law. On the other hand, Weinrib has insisted on the primacy of certain philosophical ideas, and he has kept his distance from state institutions themselves, focusing his energy on purely scholarly activity. This academic withdrawal has been part of his defence against accusations of irresponsibility.

### 3. Weinrib’s Influence on Positive Law

The work of Weinrib and other scholars of a corrective-justice-oriented and rights-based approach to private law represents a considerable intellectual achievement. Such work has also achieved significant prestige within the legal academy. Nevertheless, the influence of these ideas on positive law, at least in Canada, has so far been limited. The ambivalence of Weinrib toward positive law has been mirrored by courts’ ambivalence toward his ideas. The limited

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100. E.J. WEINRIB, *supra*, note 2, pp. 193-194.

101. *Ibid.*, p. 194.

102. *Ibid.*, p. 193.

103. *Ibid.*, p. 194.

104. E.J. WEINRIB, *supra*, note 1, p. 13, paraphrasing *Omychund v. Barker* (1744), 26 Eng. Rep. 15.

reception of Weinrib's work by Canadian courts shows that the responsibility of legal scholarship may depend on the overall institutional complex in which it is produced.

Measuring the influence of a particular thinker or a set of ideas raises methodological challenges. Ideas can have an influence directly or indirectly, explicitly or implicitly, consciously or unconsciously. Ideas can be ignored for generations before resurfacing to widespread acclaim.<sup>105</sup> Given limits of time and energy, my ambitions in this article are more modest. I examine cases in which Canadian courts have explicitly cited Weinrib's work. I also consider the extent to which recent developments in Canadian tort law are consistent with Weinrib's approach.

This analysis of cases reveals that Weinrib has had some influence on Canadian positive law, but that his influence has also had its limits. In brief, Canadian courts have endorsed the corrective justice elements of Weinrib's theory, but they have been less receptive to his attempts to explain private law in terms of Kantian right.

A clear example of Weinrib's influence can be seen in *Hall v. Hebert*.<sup>106</sup> In this 1993 case, the Supreme Court of Canada narrowed and qualified the application of the principle of *ex turpi causa non oritur actio* in tort law. This principle, which was originally applied in contracts cases, barred plaintiffs from recovering where their loss resulted from their own illegal activity.<sup>107</sup> The same principle had also been applied in the tort law context.

In *Hall v. Hebert*, the Supreme Court dealt with the aftermath of a drunk driving incident. Hall and Hebert had both been drinking. Unable to start his car, Hebert allowed Hall to drive; Hall lost control of the car, crashed it, and was injured. Hall sued Hebert, alleging that Hebert had been negligent in allowing him to drive. Hebert invoked the *ex turpi causa* principle, arguing that Hall should not be allowed to recover because he himself had been driving under the influence.

McLachlin J. (as she was then), writing for a majority of the Court, refused to apply the *ex turpi causa* principle. She held that *ex turpi causa* should only apply in cases where it is necessary to pro-

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105. P. JESTAZ and C. JAMIN, *supra*, note 3, pp. 234-235.

106. *Hall v. Hebert*, [1993] 2 S.C.R. 159.

107. Ernest J. WEINRIB, "Illegality as a Tort Defence", (1976) 26 *U.T.L.J.* 28.

protect the integrity of the legal system.<sup>108</sup> In particular, it is appropriate to apply the principle to prevent people from profiting from their own wrongdoing. For example, the *ex turpi causa* principle would prevent a plaintiff from claiming damages for loss of income with regard to income derived from an illegal activity. Conversely, *ex turpi causa* should not normally prevent a plaintiff from recovering damages for physical injury, because such damages merely restore the plaintiff to his or her prior state; the plaintiff does not *profit* from such damages.<sup>109</sup>

In this analysis, McLachlin J. cited Weinrib at length. She based her conclusions on the overall structure of tort law, which she described in terms of “justice between the parties.”<sup>110</sup> She noted that the *ex turpi causa* principle was based on extrinsic policy factors (i.e., discouraging illegal activity), rather than on the relationship between the parties. It was therefore appropriate, in McLachlin’s view, to restrict the application of this principle and to assign it a distinct stage in the reasoning process.<sup>111</sup>

The Court had an opportunity to apply the more restrictive *ex turpi causa* principle in the 2008 *Zastowny* case.<sup>112</sup> *Zastowny* had been sexually assaulted by a prison official while in prison. After his release, he became addicted to heroin, committed more crimes, and spent 12 of the next 15 years in prison. He later sued the government of British Columbia (as vicariously liable) for the sexual assaults, claiming damages for loss of income for his subsequent imprisonment. Rothstein J. applied the principle of *ex turpi causa* to deny this recovery. Rothstein J. held that to allow an inmate to recover damages for lost income for time spent behind bars would create a conflict between criminal law and tort law and an incoherence in the overall justice system. In reaching this conclusion, Rothstein J. cited Weinrib (albeit only indirectly).

In 2002, Weinrib was again cited by the Supreme Court, although this time in a dissenting opinion. *Whiten v. Pilot Insurance* arose from an insurance company’s abusive tactics toward a policyholder.<sup>113</sup> The plaintiff had lost her home in a fire, and should have

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108. *Hall v. Hebert*, *supra*, note 106, p. 176.

109. *Ibid.*, pp. 176-177, 180.

110. *Ibid.*, p. 182.

111. *Ibid.*

112. *British Columbia v. Zastowny*, [2008] 1 S.C.R. 27, 2008 SCC 4.

113. *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18.



been entitled to insurance. But the insurer refused to pay, and made trumped-up allegations of arson, attempting to squeeze the plaintiff and her family into an unfavourable settlement. An outraged jury ordered the insurer to pay the plaintiff \$1 million in punitive damages. Binnie J., writing for a majority of the Supreme Court, upheld this award. (Binnie J. characterized the issue as a matter of contract law, in particular an insurer's breach of its duty of good faith and fair dealing.) But LeBel J., dissenting, and characterizing the issue as a tort matter, would have endorsed a reduced award of punitive damages, partly because such damages are based on policy considerations extrinsic to the relationship between the parties. Citing Weinrib, LeBel J. wrote, "Given the relational nature of the wrong committed by this defendant against the plaintiff, the remedies chosen by the court must remain consistent with this basic characteristic. The defendant must pay damages to the plaintiff in order to undo, inasmuch as can be done, the wrong caused."<sup>114</sup> LeBel J. concluded that "punitive damages do not fit easily into [this] overall scheme."<sup>115</sup>

Judges of the Supreme Court of Canada have also cited Weinrib's ideas in two more recent cases. But in both of these cases, it is unclear to just what extent Weinrib's ideas affected the outcome. One of these cases was *Clements v. Clements*.<sup>116</sup> This case, which arose from a motorcycle accident, has become the leading case on causation in tort. The Court used this case to reaffirm the primacy of the "but-for" test and to stipulate that it should only be relaxed in special circumstances. The Court also emphasized that that causation analysis should be guided by "common sense."<sup>117</sup> In the process, McLachlin C.J., writing for the majority, endorsed Weinrib's idea that tort law is based on corrective justice, structured according to correlativity between plaintiff and defendant.<sup>118</sup>

The other recent mention of Weinrib was in Abella J.'s dissenting opinion in *Kazemi Estate v. Islamic Republic of Iran*, a case about the limits of state immunity.<sup>119</sup> Zahra Kazemi was tortured in prison

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114. *Ibid.*, para. 154.

115. *Ibid.*, para. 156.

116. *Clements v. Clements*, [2012] 2 S.C.R. 181, 2012 SCC 32.

117. Shantona CHAUDHURY, "Causation in the Law of Negligence: Where Are We Now? Where Are We Going? *Clements v. Clements*; *Ediger v. Johnston*", (2012) 40 *The Advocates' Quarterly* 257.

118. *Clements v. Clements*, *supra*, note 116, para. 7.

119. *Kazemi (Estate) v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176, 2014 SCC 62.

in Iran and died in hospital from her injuries. Her estate sought to recover against Iran, its head of state, and two government officials who had been involved in her death. The majority of the Supreme Court of Canada threw out these claims, applying the principle of state immunity. Abella J. dissenting, would have allowed the claim to proceed against the individual officials, creating an exception to state immunity for cases of torture. And like McLachlin C.J. in *Clements*, Abella J. cited Weinrib in her reasons, endorsing the notion that tort law is structured according to the principle of corrective justice.<sup>120</sup>

However, in neither *Clements* nor *Kazemi Estate* was there much at stake for a corrective-justice-based theory. The factual causation test in *Clements* is compatible with a corrective-justice-based theory of tort law, but it is equally compatible with other theories. Weinrib has himself called *Clements* an “incompletely successful” attempt by the Supreme Court to clarify its approach.<sup>121</sup> And *Kazemi Estate*, while a tort case, essentially dealt with questions of state immunity; tort law merely provided the context for a set of debates about sovereignty and human rights. It is also worth noting that in both of these cases (as in *Hall*, *Zastowny*, and *Whiten*), the Supreme Court endorsed the corrective justice aspect of Weinrib’s theory without making reference to his appeals to Kantian right.

There are other recent cases in which lower courts have simply rejected Weinrib’s ideas or not taken them seriously. A case in point is the 2012 Ontario Superior Court of Justice decision in *Mandeville v. Manufacturers Life Insurance Company*.<sup>122</sup> This case involved a class action by Barbadian holders of insurance policies originally issued by Manufacturers Life. At the time the policies were issued, Manufacturers Life was structured as a mutual company. Under this structure, it issued no shares; the directors of the company were instead accountable to participating policyholders. However, in the late 1990s, taking advantage of federal regulatory changes, Manufacturers Life “demutualized,” transforming itself once again into a joint-stock company. As part of the demutualization, Manufacturers Life paid out a one-time dividend of \$9 billion to its policy holders. The Barbadian policy holders received no share in this divi-

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120. *Ibid.*, para. 189.

121. Ernest J. WEINRIB, “Causal Uncertainty”, (2016) 36 *Oxford Journal of Legal Studies* 135, 136.

122. *Mandeville et al. v. Manufacturers Life Insurance Company*, 2012 ONSC 4316.

dend, however, because in 1996, Manufacturers Life had sold off its Barbadian business to a local company. At the time of the sale, executives of Manufacturers Life were clearly contemplating demutualization, but they did not say this to the Canadian or Barbadian regulators who approved the sale.

The plaintiffs in *Mandeville* argued that Manufacturers Life had a duty of care to protect their interests in the event of a demutualization, and that this duty of care was breached. Applying the *Anns/Cooper* test, Newbould J. of the Ontario Superior Court of Justice held that the plaintiffs had succeeded in establishing foreseeability but that they had failed to establish proximity, because the interest that they sought to have protected – their share in a dividend in the event of a future demutualization – was a function of the applicable regulatory regime.<sup>123</sup> The Court of Appeal for Ontario confirmed this holding, adding that the interest that the policyholders sought to protect was an extremely tenuous one, given that it was subject to extinguishment through a regulatory process.<sup>124</sup>

The defendants had asked the courts to go even farther, however. Not only did they argue that the plaintiffs' interests were tenuous; citing Weinrib, they also argued that a duty of care only arose where legal *rights* were at stake.<sup>125</sup> The plaintiffs, for their part, contended that the violation of rights was not required and that "harm" or "injury" was sufficient.<sup>126</sup> However, they were sufficiently worried by the defendants' rights-based argument that they invested considerable effort in characterizing policyholders as the "owners" of the insurance company, holding a kind of property right.<sup>127</sup>

While the plaintiffs lost on other grounds, they need not have worried about the defendants' attempt to reframe Canadian tort law in terms of a Kantian rights-based theory. In his analysis,

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123. *Ibid.*, paras. 201-213.

124. *Mandeville v. The Manufacturers Life Insurance Company*, 2014 ONCA 417, paras. 183-193.

125. *Mandeville et al. v. Manufacturers Life Insurance Company*, *supra*, note 122, paras. 157-158.

126. *Ibid.*, paras. 155-156.

127. *Ibid.*, paras. 169-172 and 282-304. Newbould J. dismissed this argument, holding that whether the plaintiffs were "owners" of the company was beside the point, given that their interests had been extinguished through a valid regulatory process. He nevertheless took the proprietary nature of the relationship into account in his proximity analysis: para. 172.

Newbould J. rejected out of hand the notion that tort law only protects rights. In support of this proposition, he cited a descriptive passage in Weinrib's article in which Weinrib acknowledges that the *Anns* test focuses on losses (rather than violations of rights) and incorporates policy factors. Newbould J. relegates Weinrib's criticisms of the *Anns* test to a footnote.<sup>128</sup> On the whole, it seems that Newbould J. does not take Weinrib's ideas seriously.

Newbould J.'s approach in this regard reflected mainstream Canadian judicial opinion. Indeed, in the ten years since the appearance of Weinrib's critical article on duty of care, the Supreme Court of Canada has continued to develop the *Anns/Cooper* test, including its use of policy factors. While the Court has made some minor adjustments,<sup>129</sup> the development of the law in this area shows little signs of Weinrib's influence.

The reception of Weinrib's ideas by Canadian courts has thus been mixed. Courts have enthusiastically embraced Weinrib's idea that tort law is about corrective justice, and in some cases (notably *Hall v. Hebert*<sup>130</sup>) they have even reformed the rules of positive law to bring it more in line with these principles. But with regard to other aspects of tort law, notably with respect to the test for determining the existence of a duty of care, courts have stubbornly insisted on the relevance of policy factors and refused to endorse a rights-based theory.

How can one explain Canadian courts' resistance to Weinrib's theory? One explanation, impossible to discount, is that the theory is simply too philosophical and too difficult for busy judges – except perhaps for those who have previously had time to master it in an academic setting. However, it also seems likely that courts' selectiveness has to do with a sense of institutional responsibility: a responsibility toward the parties and toward other individuals and groups who are likely to be affected by developments in private law. Some judges may share Weinrib's concern that contemporary private law lacks an internally coherent justificatory structure. Nevertheless, their institutional role forces them to seek its justification

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128. *Ibid.*, para. 159.

129. *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18; *Hill v. Regional Police Services Board Hamilton-Wentworth*, [2007] 3 S.C.R. 129, 2007 SCC 41.

130. *Supra*, note 106.

elsewhere: in parties' decisions to have recourse to the courts and in the courts' legitimacy as part of the institutional framework of a democratic society.

## **CONCLUSION**

In keeping with the theme of "*la responsabilité de la doctrine*," one might ask to what extent the legal scholar (or the legal theorist) has a responsibility to stay faithful to the sources of positive law. Weinrib's scholarship shows that scholars can make an important contribution to the legal system by keeping a certain distance. Instead of trying to explain and justify all of the rules of positive law, Weinrib's work offers us a vision of what private law *could* be if it were perfectly coherent and moral.

However, it should not be surprising that courts have adopted an "*à la carte*" approach to this type of scholarship. The selectiveness of Canadian courts towards Weinrib's theory lends weight to the critique put forward by Dagan and others, to the effect that private law is not wholly autonomous from public law, and that the two cannot be categorically separated. It also suggests that Weinrib's concept of scholarly responsibility, which privileges ideas and principles, must be complemented by an institutional framework in which decision makers pay attention to practical consequences.