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Book Notes: Corrective Justice, by Ernest J. Weinrib

Book Note

CORRECTIVE JUSTICE, by Ernest J Weinrib¹

ANTHONY R SANGIULIANO

AS THE SUPREME COURT OF CANADA has recently proclaimed,² the philosophical idea of corrective justice constitutes private law's indigenous normative structure, and it guides judges' practical reasoning when they adjudicate disputes over interpersonal liability. It is a venerable idea, first articulated by Aristotle³ and later elaborated by Immanuel Kant⁴ and G.W.F. Hegel.⁵

Ernest Weinrib's methodological articulation of the meaning and content of corrective justice in *The Idea of Private Law*⁶ has strongly influenced the development of private law theory, particularly tort law theory.⁷ In his new book, Weinrib displays the rich theoretical resources that corrective justice offers for theorizing about matters of recent legal and academic debate. The book is not limited to the horizon of tort law, exploring other private law causes of action and selected topics in public law.

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1. (Oxford: Oxford University Press, 2012) 343 pages.
 2. See *Clements v Clements*, 2012 SCC 32, [2012] 2 SCR 181 at para 7.
 3. Aristotle, *Nicomachean Ethics*, ed, translated by Roger Crisp (Cambridge: Cambridge University Press, 2000) at 87-88 [Book V, ch 4, 1132a-b].
 4. Immanuel Kant, *The Metaphysics of Morals*, ed, translated by Mary Gregor, in *The Works of Immanuel Kant: Practical Philosophy* (Cambridge: Cambridge University Press, 1996) 353 at 401-52 [6:245-6:308].
 5. GWF Hegel, *Elements of the Philosophy of Right*, ed Allen W Wood, translated by HB Nesbit (Cambridge: Cambridge University Press, 1991) at 67-72 [§§ 34-40].
 6. (Harvard: Harvard University Press, 1995).
 7. See e.g. Arthur Ripstein, "Editor's Note" (2011) 61:2 UTLJ i; Bruce Chapman, "Ernie's Three Worlds" (2011) 61:2 UTLJ 179; John Gardner, "What is Tort Law For? Part 1. The Place of Corrective Justice" (2011) 30:1 L & Phil 1 at 1-6. Weinrib's work has, of course, not been without its detractors. See e.g. Allan C Hutchinson, "The Importance of not Being Ernest" (1989) 34:2 McGill LJ 233.

In chapter one, Weinrib explains that corrective justice is the ideal that underpins all private law claims by a plaintiff against a defendant. It is a juridical ideal; it abstracts the distinctive normative structure intrinsic to the plaintiff-defendant relationship from its unification under private law. Weinrib thus opposes those who treat private law as an instrument for attaining social goals—such as economic efficiency—the desirability of which is extrinsic to the plaintiff-defendant relationship.

According to the juridical conception of corrective justice, private law regards the parties to a lawsuit as active and passive poles of the same injustice. The injustice consists in a disruption of the parties' equality, whereby each party has what is rightfully his or hers. It is rectified when a remedy corrects the plaintiff's deficiency by depleting the defendant's excess. The correlativity in the plaintiff-defendant relationship entails that each party's normative situation is relevant only in relation to that of the other. Hence, for the parties to be treated fairly by a judge, practical reasons unilaterally applicable to only one party—such as its deep pockets or insurability against loss—are irrelevant.

In chapter two, Weinrib shows that corrective justice clarifies the "general conception of relations giving rise to a duty of care" outlined by Lord Atkin in *Donoghue v Stevenson*⁸ and that the landmark tort cases disclose judicial attempts to articulate this ideal. He argues that the Supreme Court of Canada's⁹ current approach to the concept of a duty of care disintegrates Lord Atkin's "general conception" by introducing policy considerations into the analysis that either apply unilaterally to plaintiff or defendant or advance a value that is external to the plaintiff-defendant relationship. Chapter three is about remedies. Weinrib argues that private law injustices should be understood as normative reasons for remedies, rather than as causative events of which remedies are consequences. Chapter four extends this argument to restitutionary remedies for gain-based damages.

In chapter five, Weinrib distinguishes between *in rem* rights and *in personam* rights to defend the proposition, famously repudiated by Fuller and Perdue,¹⁰ that the standard measure of damages for contractual breach is the expectation measure. He also criticizes the Court's recent approval of punitive damage awards for contractual breach.¹¹ The reasoning that informs such awards is deficient because it incorporates considerations unilaterally applicable to the defendant, *i.e.*, the

8. [1932] AC 563 (HL) at 580.

9. See *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 357.

10. LL Fuller & William R Perdue Jr, "The Reliance Interest in Contract Damages" (1937) 46:1 Yale LJ 1.

11. See *Whiten v Pilot Insurance Co*, 2002 SCC 18, [2002] 1 SCR 595.

social disapproval of the defendant's conduct, rather than considerations that embrace the parties' relationship as a whole. In chapter six, Weinrib advances a novel theory of unjust enrichment, a dynamic area of private law that has recently attracted scholars' sustained attention.¹²

The final chapters show how corrective justice applies to areas other than private law. Chapter seven discusses the doctrine of unrequested improvements in Jewish law. Chapter eight defends a Kantian approach to property law and redistributive taxation. Chapter nine explores the disjunction in modern legal education between the study of law as a practical enterprise in support of the legal profession and the study of law as an academic enterprise based on the model of university education.

While Weinrib's writing exhibits the rigour of philosophical inquiry, it is also notable for the imagery it invokes; he uses helpful spatial metaphors to illustrate how the elements of the plaintiff-defendant relationship interlock through law to form a symmetrical, integrated unit. His book is a sterling example of how philosophical argumentation can be effectively combined with doctrinal analysis. It thus has an audience in philosophers and lawyers alike.

12. See *e.g.* Jennifer M Nadler, "What Right Does Unjust Enrichment Law Protect?" (2008) 28:2 Oxford J Legal Stud 245; Zoë Sinel, "Through Thick and Thin: The Place of Corrective Justice in Unjust Enrichment" (2011) 31:3 Oxford J Legal Stud 551.