

The Public Nature of Private Property

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1.1 Introduction

The idea that private law is a distinct normative category is not self-evidently true. One might think that it is a useful shorthand, or a pragmatic category, that brings together tort, contract, property and unjust enrichment for useful comparisons, but not one that can sustain a general principled distinction from other areas of law that we might call “public.” And critics have launched various arguments that (to the extent that the distinctiveness claim involves insulating the private law from the “public” ends of political community, however these might be conceived) the claim is both descriptively false and normatively undesirable. The so-called autonomy of the private law can easily align with a conservative account of the autonomy of the self-regulating market, and its claims to be free of political regulation.

However, the idea that private law is a distinct normative category is also not self-evidently false. What the critical views often disregard is the important focus that the distinctiveness claims brings to questions of what I would call legal architecture – legal doctrine and the relationships between legal doctrines. The label “private law” points us to useful structural features of the legal areas it marks out for comparison, and many have claimed that these structures call for an “internal” perspective and cannot be fully understood (or even understood at all) if only looked at in relation to the external “public” ends that they might be thought to achieve.

In this chapter I examine one prominent version of the distinctiveness claim – the corrective justice position as expounded by Ernest Weinrib – and discuss it in relation to private property. By private property I mean the idea of private ownership and its associated doctrines. According to

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Weinrib's view, corrective justice characterizes private law and distributive justice characterizes public law. But Weinrib's account also adds, as a secondary matter, a public dimension to private law adjudication. This is what he calls the "omnilateral" perspective, which ensures that the interpretation and enforcement of private rights are public. My argument is that Weinrib's account of the priority of the structure of corrective justice over the omnilaterality of public institutions gets things backwards in relation to private property. The basic structure of property is not correlativity, but omnilaterality. Property is public through and through.

But this does not mean that ownership, or the rest of property law, is a matter of distributive justice rather than corrective justice. In focusing on these forms of justice as providing the distinction between "private" and "public" law we risk ignoring the fact that *both* are connected by being "law" and that law is inherently public. The publicness of property is not about justice at all, but about the nature of law and the formal properties of law. Ownership is a *legal* relation between persons in relation to things. Its further relationship to various ideas of justice is secondary and, I will argue, it can (but does not necessarily) point toward both corrective and distributive justice considerations. The extent to which these are taken up are constrained by ideas of law and not the other way around.

I then draw several implications from this account. First, I agree that there is a formal structure to private property but that this is best understood through the idea of law and omnilaterality, rather than through the forms of justice. Second, law is intrinsically related to justice. Although this does not necessarily lead to any particular form of justice it does lead to a legal concern for the avoidance of injustice. Third, both legislation and the "public policy" considerations that might be drawn from it are not marginal to the core of private property, but central to it in a variety of ways.

1.2 The Corrective Justice Account

Weinrib's basic corrective justice account of private law is familiar to many private law theorists.¹ I will only briefly provide its main contours here in order to highlight both how Weinrib understands the relationship between correlativity and omnilaterality, and how he understands the relationship between adjudication and legislation. His account places both omnilaterality and legislation on the periphery of private law, which, I will argue, provides a distorted view of private property. Although I shall

¹ See Weinrib 1995, 2012.

here focus on Weinrib's account, the critique to follow has, I think, wider application – it should raise questions for any account of property which limits property's normative significance to corrective, or commutative, justice accounts of private law.

According to Weinrib, “[p]rivate law is a publicly rightful set of norms that governs the legal relations between parties.”² This is further split into two sets of ideas – the norms associated with the legal relations between parties and the norms associated with “public rightfulness.” The latter refers to “law’s public institutions of adjudication and enforcement.”³ The first refers to the relations that are fully intelligible apart from these public institutions – with philosophical state of nature stories understood as heuristic devices that can help illuminate such relations.⁴

It is this first aspect, the normative relations between parties, which is characterized by corrective justice. Corrective justice looks to the relationship between two parties – the plaintiff and defendant – as the doer and sufferer of the same injustice, and is bipolar. In contrast, distributive justice looks to the relationship between more than two parties in terms of some distributive criterion. As Weinrib argues, “in principle no limit exists for the number of persons who can be compared and among whom something can be divided.”⁵ Similarly, corrective justice and distributive justice are concerned with different understandings, or facets, of equality. Corrective justice seeks to restore “the notional equality with which the parties enter into the transaction.” In contrast, distributive justice is concerned with proportional equality, “in which all participants in the distribution receive their shares according to their respective merits under the criterion in question.”⁶ When dealing with private law liability, according to Weinrib, it is the role of the courts to do corrective justice, not distributive justice. Distributive justice lies in the realm of political judgment, and is for the legislature. The legislature may even decide to do away with private law in a particular area and replace it with something else, like a public insurance scheme for accidents instead of tort law. However, what neither institution should do is mix forms.

This is not to say that corrective justice theorists like Weinrib deny the place of distributive justice within a just legal system. Weinrib even concedes that the systematic operation of private law rights, and in particular

² Weinrib 2011.

³ Weinrib 2011, p. 192.

⁴ Weinrib 2011, p. 195.

⁵ Weinrib 2012, p. 19.

⁶ Weinrib 2012, p. 16.

private property, can lead to conditions of dependency for some individuals.⁷ This generates a duty on the state to mitigate these circumstances of dependency but does not, for Weinrib, mean that private law should incorporate any concern for such dependency. As he argues, “The distributive considerations cannot be backed up into the corrective justice stage, because those considerations are not correlatively structured and therefore cannot fairly and coherently figure within private law.”⁸ Distributive justice is the realm of legislation and administration, not private law adjudication.

Corrective justice is a structural, not substantive principle. To fill in the substantive nature of private law liability, Weinrib takes up Kant’s analysis of rights as deriving “from an analysis of how the action of one person can be consistent with the equal freedom of another.”⁹

To this basic picture, Weinrib adds the dimension of “public right.” The problem with the state of nature, which Weinrib takes to illuminate the nature of private law norms, lies with the “interpretation and enforcement” of private law’s correlative rights. Without public institutions, the problem of unilateralism looms large.¹⁰ But through the courts, the state becomes related to the litigants in a manner quite different from the bilateral relationship of plaintiff and defendant. As Weinrib outlines, “the relationship among members of the state is omnilateral, linking everyone to everyone else.”¹¹ In adjudication, the court combines both the omnilateral and bilateral dimensions “by projecting its own omnilateral authority onto the parties’ bilateral relationship” and in doing so making its judgment a norm for all citizens.¹² In the standard case, according to Weinrib, public right merely adds the dimensions of publicness and systematicity to private law, allowing private law to be expressed through public institutions but leaving the internal logic of private law otherwise intact.¹³ In fact, to think that one cannot think about a right outside the public institutions that enforce it is to make what Kant calls “a common fault of experts on right.”¹⁴

Occasionally, however, public right can modify the basic private law relationships through the demands of publicity and systematicity. When it does this, “the judgment of public right should vary the result that would

⁷ Weinrib, “Distributive Justice” on file with author. See also Weinrib 2012, p. 263.

⁸ Weinrib 2012, p. 25.

⁹ Weinrib 2011, p. 195. See also Ripstein 2009.

¹⁰ Weinrib 2011, p. 195.

¹¹ Weinrib 2011, p. 196.

¹² Weinrib 2011.

¹³ Weinrib 2011, p. 198.

¹⁴ Weinrib 2011, p. 201, citing Kant 1996, 6: p. 297.

follow from the internal logic of the basic categories only to the extent necessary to achieve publicness.”¹⁵ Weinrib makes a similar claim with respect to systematicity – there are times when this can operate to modify private right but only to the extent necessary to achieve systematicity.

For Weinrib, then, the idea of “public rightfulness” that is part of private law is not at all an idea of distributive justice, but a response to the problem of unilateralism in the interpretation and enforcement of private rights. The omnilateral perspective that is relevant to private law, in a kind of second-stage analysis, involves the ideas of publicity and systematicity, not distribution of benefits.

There are three conclusions regarding private property and public values that one can draw from this account. First, as a private law doctrine property should be conceived in terms of the correlativity that is at the heart of corrective justice and this can be understood independently of the public institutions needed to interpret and enforce it. Second, these public institutions bring a public perspective to bear when engaged in interpretation and enforcement and in doing so bring an additional set of public norms. These norms can occasionally modify the basic corrective justice picture of property but only at the margins as a second step. Third, adjudication through courts is the central institutional structure for private law whereas legislation is the central institutional structure for public law. Although statutes can figure in the private law, they do so at the margins. Moreover, distributive justice should be accomplished through legislation and not by private law adjudication.

In what follows I argue that this basic picture is wrong on all three counts. The idea of omnilaterality is actually *central* to understanding property. It is the use of correlative-based liability (such as the tort of trespass) that is secondary to the basic omnilateral structure of ownership. Second, it is this omnilateral perspective that can show how some distributive justice concerns can sometimes legitimately factor into private law adjudication. Third, legislation is central rather than marginal to an understanding of private property, and can also serve as the basis for bringing “public policy” norms into private law adjudication.

1.3 What’s Justice Got to Do with It?

The basic problem with the corrective justice account of private law, when applied to private property, is that it attempts to shoehorn ownership into

¹⁵ Weinrib 2011, p. 202.

a bilateral relationship. Such an account is unable to account for the central features of ownership, such as its general and impersonal nature. It also inverts the relationship between law and justice: ownership does not primarily participate in a form of justice (corrective justice) that is then made consistent with the demands of a legal system's public institutions (the role of omnilaterality) but instead is primarily a legal relation that is then oriented toward justice (in many different forms, including corrective justice).

It bears noting that the corrective justice account outlined is defended as one that takes the practice of law as we find it and then “enquires into its structure, its presuppositions, and the internal connections among its more pervasive features” in order to determine what conceptions are implicit in the practice that reveal the law as a unified and rational practice.¹⁶ However, the practice of private property as we find it shows that its structure and presuppositions are not well illuminated through the idea of bilaterality.

Consider the foundational doctrine of possession in the common law. That things be owned, rather than unowned, and that the rules be clear on the ground so as to prevent disorderliness and violence, are clear themes that run through judicial reasoning about possession. This is not a matter of bilateral relations or corrective justice. But it also is not about distributive justice. Instead, this is about protecting the security of possession in order to safeguard public order and civil peace.¹⁷ This is also the case when courts are asked to find exceptions to legal rules protecting possession. It is not ideas of fairness between parties that courts advert to, but very basic law and order concerns.¹⁸

We can contrast being subject to law with being subject to violence. As Robin West points out, one important role of law is the prevention of private violence and private law is an important means of accomplishing this.¹⁹ So we might think of private property as a regime of law, rather than violence, in relation to how individuals interact regarding places and things. There are many different possible forms for a regime of law regarding places and things and they can be distinguished through how they deal with the question of authority in relation to places and things. Private property is one way of dealing with authority. It grants “private” authority in relation to places and things, in contrast to other more “public” forms of authority, but it still does so within a framework of law.

¹⁶ Weinrib 2011, p. 193.

¹⁷ Emerich 2014, p. 30.

¹⁸ See e.g., *London Borough of Southwark v. William*, [1971] 2 All ER 175.

¹⁹ West 2001.

Private in this sense does not mean pre-institutional. Nor does it imply any kind of conceptual priority of this form of authority over others: it is descriptive rather than normative. The question of authority over places and things can, and has been, answered in many different ways and private ownership is simply one form of answer. We do not need to determine whether it is the best answer, or even a justifiable answer in any particular context, to understand the way in which it provides an answer.

Although private property is about private authority, it remains fundamentally a legal relation. To adopt Weinrib's Kantian terminology, meant to characterize the public perspective brought about by entry into a civil condition, it is omnilateral. If a bilateral relationship is between two individuals, an omnilateral relationship is a relationship that connects everyone to everyone else. Private property is not bilateral but is a way of connecting everyone to everyone else.

Consider this in the context of the standard trilogy of basic core ownership entitlements: the right to exclusive control, the privilege to use the thing owned, and the power to alienate. The right to exclusive control looks bilateral, in that it is most often vindicated through trespass liability rules that connect a plaintiff and a defendant in the way corrective justice theorists describe as the basic form of private law liability. However, property theorists clearly and correctly point out that ownership is characterized by a generality and impersonality that requires explanation.²⁰ An owner has a right against the trespasser but there is nothing special about that owner being a particular individual; the trespasser owes an obligation to whom-ever the owner happens to be and does not need to know anything about that owner. There is also nothing special about the particular trespasser's obligation to "keep off" – this is an obligation held by everyone who is not the owner of the land. So even though there is a bilateral relation between a plaintiff and a defendant, it is more accurate to characterize this relationship in general terms. We could say that the owner (whoever that might be) has a right against the nonowner (everyone else).

This generality and impersonality is the reason that alienability is possible. If obligations are owed to the owner *qua* owner then it does not matter who the particular owner is. Different people may become owners without changing the normative position of the others who owe these obligations. This, in turn, generates some of the distinctive doctrines of private property. For example, restrictive covenants are obligations between owners that bind owners *qua* owners – which is why they can "run with the

²⁰ Penner 2000, p. 23; Merrill and Smith 2001b.

land” and obligate subsequent purchasers who were not party to the original agreement. For a valid restrictive covenant, there is nothing about the identity of a particular owner that is relevant to understand the obligation imposed. Or take the case of adverse possession. The clock for a successful adverse possession claim is not reset when the owner sells the disputed land to another purchaser because the particular identity of the owner is entirely irrelevant to the relationship between the owner (whoever that might be) and the adverse possessor.

An owner’s privilege to use property is also general rather than the expression of a particular individual’s subjective will. There is no legal protection for my desire to make a specific use of my property. I can keep others from using my property through the law of trespass. I can protect my specific uses against interference from my neighbor’s specific uses through the law of nuisance but that simply expresses the need to protect and accommodate each individual’s privilege to use property in general.

The generality and impersonality of ownership is due to the fact that it is an omnilateral relation, linking everyone to everyone else. In recent work, Weinrib partially agrees with this. He argues that ownership can be understood independently of the civil condition but that *acquisition* depends on the move from the state of nature to the civil condition.²¹ That is, property can be thought about in the state of nature in terms of the correlative structure of corrective justice but nobody can actually have any property until we enter a civil condition; the omnilateral perspective is needed to make my possession the ground of an obligation held by all others. It is difficult to see how this is true if the basic structure of ownership as a claim between an owner and all non-owners is unavailable without the very kind of systematicity that Weinrib claims only comes with the move to a civil condition. However, even if the Kantian story holds that it is only acquisition that depends upon the omnilateral perspective, this leaves so much of private property doctrine on the other side of bilateral relations that it calls into question the claim that corrective justice best describes the law as we find it.

If private property is primarily a legal relation then what is its relationship to different forms of justice, whether corrective justice, distributive justice, or some other conception of justice? We can understand many features of law quite independently of any notion of justice. For example, many discussions of the rule of law stress the formal principles of legality, perhaps given their most canonical expression by Lon Fuller: generality, publicity, non-retroactivity, clarity, noncontradiction, possibility of

²¹ See Weinrib, “Ownership” (on file with author).

compliance, stability, and congruence between official action and declared rule.²² Weinrib's account of omnilaterality – which I take to be another expression of the rule of law – emphasizes the idea of a relation of each to each as well as ideas of publicity and systematicity. Although many of these ideas look formal and empty of substance, most lawyers are familiar with the way in which seemingly formal and procedural requirements can yield substantive doctrines.²³

However, even if we start from a position that emphasizes the form(s) of law rather than the forms of justice, there is a very basic sense in which law and justice are intrinsically linked. As Waldron helpfully argues, law stands in the name of the public and is oriented to ideas of public good:

We recognize institutions as part of a legal system when they orient themselves in their public presence to the good of the community – in other words, to issues of justice and the common good that transcend the self-interest of the powerful. It strains our ordinary concept of law to apply it to norms that address matters of personal or partial concern, or to institutions that make no pretense to operate in the name of the whole community, presenting themselves as oriented instead to the benefit of the individuals who control them.²⁴

We could say that law is public in a much deeper sense than is sometimes acknowledged in rule of law discussions that emphasize the “publicity” requirement for legal norms. Law represents the public point of view in a very basic way and this must mean that it is not merely an instrument to any end but must be an instrument toward some end that is cognizable as “just.”

This need not commit anyone to take sides with a more natural law approach to the rule of law against a more positivist one. Raz famously argued that the rule of law was of only instrumental value – it made law good as an instrument but did not ensure the goodness of any ends achieved through law.²⁵ This is true in one sense, but deeply misleading. It is true in the sense that the basic idea of the rule of law does not require that law promote any particular view of the common good, or of justice, and so the rule of law will not ensure conformity with any such view. But this is misleading in the sense that it suggests that law is not concerned with justice. We should say instead that the rule of law demands that the law have such a public aim in general. And even if that means that the rule of law does not aim at any particular end of justice, it does imply that the

²² Fuller 1969.

²³ For and account of how this works with property law, see Austin 2014a.

²⁴ Waldron 2008.

²⁵ Raz 1977.

rule of law is concerned with avoiding injustice. This is consistent with an instrumental account of law – although it is also consistent with normative accounts of law as well – as the argument is that law might be a tool but it is one that must be used in the right way, which is a tool that promotes a public perspective.²⁶ The rule of law ensures that law remains an instrument of public, rather than private, authority.

Several important implications follow from taking the form of law as primary in understanding private property and the form of justice as secondary. First, a concern for avoiding injustice can lead courts to take into consideration factors that overlap with specific accounts of justice, including distributive justice. For example, private law in many of its core areas is about protecting an individual's ability to seek her private ends. There are many different accounts of why such practices might be thought consistent with some idea of justice or the common good. However, if this ability to seek one's own personal end becomes an instrument for the private domination of another then law ceases to be public in the deep sense outlined above. One can then condemn this as unjust from a legal perspective without needing to necessarily develop, or endorse, any particular view of justice. At the same time, such condemnation might be entirely consistent with a range of views regarding justice. There are many times that courts engage in considerations that thoughtful commentators point to as examples of courts endorsing views of justice and public policy that are really framed in this more negative sense of the avoidance of injustice.²⁷

Second, there might be many different ways in which an omnilateral perspective, linking each to each, can be realized in practice but different institutions will have different competencies. Consider the role of precedent, which Weinrib understands in omnilateral terms. Even if a court is considering the seeming bilateral relationship between a plaintiff and a defendant, it must also situate this relation within the cases that have come before and understand that any decision on the present facts must also function as a precedent for similarly situated plaintiffs and defendants in the future. The case, as law, connects all plaintiffs with all defendants in a general way – which is why we care about the cases even after the individual dispute is resolved with finality for the particular plaintiff and defendant. Even though a court is setting out the law for all other members of the state in this way, those individuals are not before the court. And

²⁶ Austin 2014b.

²⁷ Many of the examples of policy offered by Stephen Waddams in his book (Waddams 2011) have this feature.