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Symposium: *Reciprocal Freedom*

From Private to Public Right:
Resizing Correlativity and Systematicity

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Abstract

This essay on Ernest Weinrib's *Reciprocal Freedom* argues that his conceptions of correlativity and systematicity are at odds. Correlativity as he conceives it is inexplicably all-encompassing; it does not track the complexity of interpersonal fairness in either morality or law. Correlativity can be understood as a formal constraint or as a requirement of mutual justification. We do not have reason to treat it as the animating principle that shapes private law. Weinrib's own concept of systematicity helps us to see why a system of private law that is oriented primarily to vindicating correlativity will always come up short. Systematicity requires that private law work in harmony with the rest of the legal system to promote the principles of justice to which our political community is committed. Systematicity is more demanding than Weinrib allows. The ex post and ad hoc process by which private right is acclimated to public right, in Weinrib's account, will not suffice to realize systematicity.

Keywords: *Ernest Weinrib; correlativity; systematicity*

Ernest Weinrib's account of private law takes as its starting point that private law has its own internal logic. His prior work has been primarily concerned with elucidating that logic. Now, *Reciprocal Freedom* helps us to better understand how corrective justice relates to other legal principles, and one important dimension of that task is drawing the boundaries around private law reasoning more precisely.[1] For those of us who have worried that Weinrib's account of private law is too insular, a detailed account of how private right is transformed into public right is just what we need. The account Weinrib offers is characteristically cogent and bears his trademark analytic elegance. However, I will argue that Weinrib is too stingy with regard to the significance that he allows civil society and politics have for the content of private law.

I will focus on two aspects of his account of public right that impede the systematicity that Weinrib himself endorses as an important value in private law. First, I will suggest that the conceptual sequence in which private law sets rights and obligations between individuals, which are only then specified and modified

1. See Ernest J Weinrib, *Reciprocal Freedom: Private Law and Public Right* (Oxford University Press, 2022).

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in discrete ways by courts in the civil condition, implies that the basic structure of rights is not informed by even those public purposes that Weinrib admits as relevant. Fully realizing systematicity requires reconceiving the conceptual sequence. Instead of treating the internal logic of private right as a default from which particular kinds of public reasons permit deviation, systemic aspirations, or consistency with public values, properly inform the basic structure of bilateral rights and obligations. Allowing systemic purposes their due weight requires downsizing the idea of correlativity with which Weinrib begins.

Second, but relatedly, Weinrib conceives of the process by which courts in civil society give determinate content to private law concepts too narrowly to realize the demands of systematicity. Weinrib's idea of systematicity is attractive; the realization of reciprocal freedom surely requires that legal rules operate in a coordinated fashion with attention to their cumulative effect on everyone's freedom. But the demands of systematicity run deeper and are more expansive than Weinrib allows. While his idea of reciprocal freedom invokes the liberal ideals of moral equality and independence, his account of systematicity is not informed by the robust implications of equality or adequate to deliver the conditions of self-determination. The aim of private law in a liberal regime is to achieve, or at least make possible, reciprocal freedom. Securing reciprocal freedom only within the confines of private law is a different aim that is ultimately incoherent—or at least, unmotivated.

I. Conceptual Sequence

Weinrib's sequencing from private right to public right is not intended to capture any historical chronology, but instead reflects his view that private law's essential purposes—already coherent (if unrealized) in the state of nature—set the content of private right. The content is then merely modified on the margin to accommodate the demands of publicity and systematicity. Thus, underlying the sequencing is a fundamental claim about the purpose of private law. Here, I question that claim and point out its limiting consequences for the substance of public right.

I turn first to the relation between purpose and content. The core idea that private law has a distinctive normative purpose and that any satisfying account of private law must account for its defining features in a non-arbitrary way has been one of Weinrib's many important contributions. Many of us have long been persuaded that the bilateral structure of claims in private law meaningfully reflects bilateral rights and obligations, and is not just a convenient or historically accidental method of pursuing various public purposes. However, just because private law has a correlative normative structure, it does not follow that our task in theory is to identify the conception of rights that is most meaningfully expressive of that structure. Correlativity can be a necessary property of rights and obligations in private law without it being the animating principle that motivates any particular scheme of right. In fact, correlativity blown up into such a controlling purpose is really one substantive conception of what people owe each other that is not yet grounded in any moral principle.

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The substantive conception of interpersonal fairness that Weinrib deems to follow inexorably from the principle of correlativity turns out to be pretty unattractive. So narrowly conceived, correlativity is evocative of the kind of deep-seated individualism from which liberal egalitarians spent a couple of generations trying to extricate themselves.[2] Weinrib writes that, in ascertaining principles of liability, "no consideration is admissible that is unilaterally applicable, for good or ill, to one of the parties."[3] One could understand this to mean that no consideration could be relevant that would not be relevant if it applied to the other. But Weinrib seems to understand it to mean that no consideration can be relevant if it in fact does not apply to the other, including considerations of social or economic status. The perverse result is that asymmetries of status are deemed irrelevant to the justice of the parties' transaction.

Weinrib cannot use the distinction between hypothetical and actual asymmetries to explain how he draws the boundary around permissible considerations. Why is the fact that each player could have been subject to a dramatic, unforeseen change in circumstance relevant to their duty to perform, as contract law in every jurisdiction seems to hold? Weinrib would presumably say that it is because such an implied condition is implicit in both parties' obligation at the outset, limiting the corresponding entitlements of the other parties. But, of course, the material dynamics of the change have changed *in fact* for only one of the parties. Weinrib would be less sympathetic, it appears, if the change in circumstance is one that could only have befallen one of the parties because it is the result of some feature of their starting economic position. For example, if one party cannot pay rent because they lose their job, Weinrib appears to take the position that it would be unfair to require the landlord to accommodate in some way; it would be an imposition that would deny the landlord equal standing with the tenant. I do not question the result here—we might have myriad reasons for allowing landlords recourse for breach when misfortune renders tenants unable to pay—but the correlativity of right does not explain it. Weinrib's principle turns on the level of generality at which correlativity applies. While in the scenario above, the tenant's vulnerability to loss of employment and inability to pay might be one-sided, vulnerability to misfortune in a more general way is not one-sided but a general feature of the human condition.

The same point can be made in the context of tort as well. It is well-accepted that plaintiffs whose losses are greater than those of a typical victim are entitled to full recovery (the so-called eggshell-skull rule), asymmetric though their vulnerability may be. Why does accommodation of vulnerability become improper when the vulnerability is the result of socio-economic status? While Weinrib appears to accept the familiar rule that a plaintiff with underlying medical conditions collects full recovery costs, I speculate that he would not think that a plaintiff that is statistically more likely to react with either suspicion or deference

2. See e.g. John Rawls, *A Theory of Justice* (Belknap Press, 1971) at 54-107 (rejecting formal individualism in favor of egalitarian distributive principle).
3. Weinrib, *supra* note 1 at 9.

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to authority as a result of a history of racial discrimination should be entitled to more detailed notice requirements before they are presented with medical choices. Here too, my quibble is not with the result—we may have good reasons for allowing atypical recovery without requiring that people interact differently with each other on the basis of race—but again, correlativity does not supply us with the best justification for our rules. The general requirement that considerations apply to both sides does not tell us that any particular kind of consideration ought to bear on the analysis of excuse or recovery or standard of care; Weinrib's confidence that social and economic considerations are irrelevant must come from some separate, unnamed, and undefended principle.

We can think differently about correlativity. Correlativity, as Weinrib himself encourages us to see it in a more general way, is a matter of reciprocity. In the context of contract, the demand for reciprocity manifests most obviously in the requirement of mutuality. Mutuality is technically a formal and thin requirement, requiring only the presence of some obligation or forfeiture (i.e., consideration). But mutuality can be understood in a more robust sense to require mutual benefit, and that principle can be used to fill out any number of contract doctrines, including the duty of good faith and the rule of interpretation. Reciprocity as mutuality understands contract to be a mechanism of cooperation for mutual benefit. In tort law, too, we can understand reciprocity to require that people abide by rules that facilitate social cooperation and make collective life work for each of us.

Correlativity as a legal feature minimally describes the bilateral character of legal entitlements and obligations in private law. We can go further—but not as far as Weinrib—to say that correlativity captures why individuals are entitled to justifications for rules that bind them individually, and why those justifications should address them as individuals. Public justification should be of the kind that they can be reasonably expected to find compelling. It is not enough that a given rule accrues benefits to others—those benefits must be linked to the viability of institutions about which individual parties can be expected to care because those institutions generate entitlements and benefits for them even as they impose obligations and other burdens.

Such a conception of correlativity does not exhaust interpersonal fairness broadly conceived, or even the legal conception of interpersonal fairness that properly informs private law. That is, understanding correlativity to require interpersonal justification by reference to mutual interests does not mean that social aims cannot be part of the (nonfiction!) story that we tell to justify legal rules. In fact, in the ordinary course of justification, we can expect the availability of eviction or damages as recovery to take into account the consequences for others operating in the same market or participating in the same social practice. Those consequences for others, which must be assessed in light of our political commitments about what kind of society we want (including but not limited to the kind of society we regard as just), inform what rights and obligations any two people hold against each other. Because choices around liability and remedy are ultimately political, every society makes those choices in their positive law; any

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attempt to elucidate private law principles in a given society must make reference to the positive law that reflects those choices.

Weinrib rejects the idea that positive law could supply the content of private rights. He asserts that correlativity does not start with the rights of positive law but goes all the way down into the composition of the rights themselves. From a formal perspective, it is not clear why positive rights should not supply content, or why correlativity has to go all the way down into the composition of rights themselves. Not every necessary feature of a social practice determines the content of that practice. The all-encompassing nature of correlativity in Weinrib's account seems to follow from the fact that private right precedes public right; it does not justify that chronology.

And yet I agree with Weinrib that grounding correlative rights in private law in positive law fails to provide a normative account of what private law is trying to do. In raising my second objection, I will suggest that understanding systematicity as an affirmative purpose rather than a constraint could offer alternative normative grounding. But my immediate point is that elevating correlativity to an animating purpose is not only unmotivated, it also hinders systematicity properly understood. Taking the starting point for public right to be the pre-civil conception of each of the five ideas already present in the state of nature implies that what people owe each other in a civil society is fundamentally the same as what they might owe each other outside of it, with some changes to account for institutional requirements and capabilities.[4] It implicitly rejects the idea that civil society introduces new rights and obligations that are held not just against the state but against fellow citizens. While some of these are collective in nature, on an alternative view that Weinrib effectively precludes, individuals relate to each other differently as well. There are positive obligations that would not exist but for the cooperative social project of civil society. Just as there are ways of treating strangers that are impermissible vis-á-vis friends and family, there are ways of treating others in a hypothetical state of nature that are not permissible vis-á-vis members of a common political community. All of this is ruled out on Weinrib's account, because the conceptual sequence of private before public right is ostensibly compelled by the animating purpose of correlativity.

Two examples from contract illustrate the limitations implied by Weinrib's conceptual sequence. The first is Weinrib's own example of tortious interferences with contract. Weinrib finds the tort prima facie puzzling from the standpoint of private right because parties should only be able to create duties to each other through their agreement (not new duties owed to the parties by others). But he accounts for the duty of noninterference by others by way of the public function of making everyone secure in their rights against everyone else. He argues that treating contracts as juridical objects for everyone advances this purpose.[5]

4. See *ibid* at 68-69.
5. See *ibid* at 81.

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Weinrib's account is interesting to a contract scholar in part because it is almost exactly the opposite of a more familiar way of thinking about contract and tortious interference with it. Typically, we expect a moralistic account of contract will regard it as wrongful to breach contract and therefore wrongful to induce breach.[6] By contrast, a public (especially legal-economic) perspective emphasizes that the would-be tortious interferer might value the goods or services in question more highly than the original buyer, or can provide them at lower cost than the original seller.[7] Thus, we tend to think that the public interest in competition and optimal resource allocation makes the idea of tortious interference problematic.

A different approach avoids a pitched battle between private morality and public interest. We would do better to see that the public interests at stake inform the obligations of contracting parties to begin with. They inform both how courts read the obligations that parties assumed in contract—that is, how they are interpreted (not just in the context of interpreting ambiguous terms but also in the context of imputing default terms like 'excuses' and 'remedies')—and also what kinds of obligations courts are prepared to enforce. Thus, in this context, the fact that we are potentially collectively worse off for walling contracting parties off from interference by third parties is a reason both to imply a default that they have not intended to create the kinds of obligations that would render interference wrongful, and to hold that they do not even have the capacity to do so. There is no successful account of contractual promise or agreement that explains why the state should be involved one way or the other without referencing some kind of public purpose—whether it be the interest in promoting or supporting a certain conception of the liberal person, or something more traditionally instrumental, such as wealth generation. Of course, the moral obligation to keep promises is not similarly dependent on the civil condition and perhaps not similarly shaped by public purposes. But we are missing an account from Weinrib of why the state should enforce promises just because they are morally binding on parties in the pre-civil condition, or at least why they create a right of performance that the state should recognize and enforce.

Treating private right as antecedent to public right presupposes that private moral obligation in a pre-civil condition is fundamentally the same as in a civil society and that private moral obligation grounds public right. Justifying those assumptions requires a more detailed account of particular moral obligations than Weinrib offers. While there are probably some obligations for which these assumptions hold true, there are others for which they are implausible. While some of the reasons for keeping promises on an island inhabited by two also apply between people in civil society, some of the considerations that inform

6. See Clark A Remington, "Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer" (1999) 47:1 Buff L Rev 645 at 646.

7. For a discussion of the legal economic view of tortious interference, see Fred S McChesney, "Tortious Interference with Contract Versus 'Efficient' Breach: Theory and Empirical Evidence" (1999) 28:1 Oxford J Leg Stud 131.

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the morality of commercial promises are 'new'—and they may depend further on specific contextual features, such as the competitiveness of the market or the purchasing power of the typical buyer. If private right is not wholly displaced, it is at least radically transformed by civil society; indeed, it transforms with the particular civil society in which it operates. Referencing the practical demands of that society in the course of justifying private right roots the latter in the spirit of public justification that all law requires.

In the case of tortious interference, justification rooted in—or at least responsive to—public right offers a more intuitive account of not only the fact that there is a tort of tortious interference but also the fact that we now regard it as problematic and therefore very narrowly drawn. Even though the justification for the doctrine of tortious interference is not the most compelling, it is not surprising that Weinrib chooses to discuss a doctrine on the periphery of contract, and one that many scholars wish to see die. If the existence of the tort of tortious interference with contract is at odds with the private right logic of contract, it is a small blemish on the picture. All the better if it can be accounted for by reference to the movement to public right, but this movement has not introduced any important shift in the underlying normative structure of contract. The effects of Weinrib's conceptual sequence and its problematic implications are more evident in the context of more core contract doctrines.

Consider the rules of interpretation. I take it that Weinrib would understand parties in contract to be bound by the objective content of their agreements (as would almost everyone else today). Where terms are ambiguous, courts aspiring to do this ask what the most reasonable interpretation of those terms would be. This is often understood to be about what meaning it is most reasonable to think that the parties intended. But if we have reason to assume (perhaps as a regulative matter, not empirically) that contracting parties behaved reasonably and in compliance with soft legal norms operating in the background, then asking what meaning the parties intended also requires asking what it would have been reasonable for them to mean in light of their background obligations to each other *outside of and before contract*. In fact, courts do impute default terms consistent with this understanding of 'reasonableness'.[8]

This way of understanding the task of interpretation is intuitive if courts delegate parties with authority to set the terms of their transactions for a variety of good and quite fundamental reasons that have to do with what kind of civil society they wish to constitute thereby. However, if we think contract gives rise to private right in the naturalistic manner of Weinrib's account, then public norms—even ones that Weinrib would endorse, such as norms favoring mutuality or against unjust enrichment—cannot infuse interpretation as suggested above. Instead, the role of public norms is limited to the doctrine of public policy, and they are relevant only in exceptional cases to ban particular kinds of contract terms.

8. For a more detailed defense of this approach, see Aditi Bagchi, "Interpreting Contracts in a Regulatory State" (2019) 54:1 USF L Rev 35.

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All of this is to say that Weinrib's conceptual sequencing restricts too much what public right can be. And it does so without justifying its premise, i.e., that correlativity is not just an essential feature but the animating principle of private law.

II. Demands of Systematicity

We can understand the limitations of conceptual sequencing as exacting a normative cost in Weinrib's own terms. His helpful concept of systematicity captures the value of law operating as a coherent normative system. But inviting public right to the table only after private right has ordered makes it hard to vindicate certain public purposes. A second important way in which Weinrib's account of public right falls short of the aspiration to systematicity has to do with his account of how the state in the civil condition, especially the court, gives content to private right. He variously refers to this process as determination, specification, or interpretation.

As discussed in section I, these terms seem to envision that courts are taking private right as their starting point and filling in what they need to make a workable system. Weinrib allows that some rights might have to be adjusted because of the limits of legal institutions; others might expand because of the new capacities of a central state and the kinds of freedom it can realize for all. In Weinrib's view, systematicity operates as a constraint on private right that requires it to bend for the sake of consistency. But systematicity requires more than clips and patches. It requires adoption of a common moral purpose across the legal system.

Authorities charged with filling out private law rules in a particular system through the process of specification need to understand their task as a vindication of broader political commitments manifest in the political system of which they are a part. Judges and regulators detailing and extrapolating rules have distinct roles: They will respond to different facts and offer different kinds of arguments for how their rules relate to existing commitments in the system. But neither may refuse to take into account a party's interests on the theory that these are only one individual's interests and do not concern the other. As discussed above, such a view of morality is implausible outside of law, and even more problematic as a legal principle among citizens in a political community. We are, in so many ways, enlisting each other to promote our various interests. Part of our mutual respect in a liberal order is that we enable each other to pursue our various projects just because they are mine and yours, and not because we embrace these projects as our own. Why would we think that our system, which does this in so many ways, from health care to national parks, would abandon this civic orientation in the domain of private law? We do not have to choose between interpreting private law in a way that gives it a distinctive and coherent purpose, on the one hand, and rejecting any link between that purpose and the rest of our legal order, on the other. Rejecting that link would fail to realize the value of systematicity.

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Systematicity is demanding because the normative principles of freedom and equality to which Weinrib links it are capacious. But corrective justice as he envisions it seems to turn on a very narrow conception of what he calls "normative equality";[9] it is an understanding of equality that is at odds with how liberalism today understands the principle of equality.[10] Liberalism in the thread of John Rawls requires that public institutions not only recognize equal claim to the basic bourgeois liberties but also justify material inequalities by reference to the interests of the most disadvantaged social groups. Because our legal system—in its entirety—is the bedrock of our basic structure, it is subject to the demands of Rawls' 'difference principle'.[11] Exactly what the difference principle requires, or how it is best operationalized, is outside the scope of the discussion here. But Weinrib does not allow private law to meet the demands of public justification to the extent he conceives private law on terms separate from the demands of public justice. Tugging on the ends of private law to make it fit the demands of justice, where its shape and size are set by reference to other purposes altogether, is a doomed exercise. Its basic contours must be cut to serve public purposes.

Weinrib would presumably reject the proposition that justice is an afterthought to his conception of private law. He would argue instead that private law serves corrective justice, and that the notion of equality—or perhaps the demands of equality—relevant in its sphere are different from those relevant to principles of public justice, including distributive justice. The problem is that there is no separate sphere of private law that could be governed by a sovereign principle of justice. Private law acts on a vast range of interactions between private individuals, including the all-important market transactions that determine who gets what and how much of it. If the idea that different sets of legal rules should be animated by different principles is plausible, it cannot be plausible that a *single* sphere of human activity—say, buying and selling widgets—is simultaneously subject to different rules that do not engage overlapping questions of justice.

Weinrib's important step in this book is to concede as much: Systematicity requires that the rules operate together to serve a coherent set of purposes. If it is incumbent on a liberal state that its legal system comply with the demands of moral equality by justifying material inequalities so that they serve the worst-off, those demands bear on private law as much as any other area of law. This does not imply that private law cannot justify economic inequality, let alone unequal outcomes in particular transactions; but it must justify them by reference to how its rules serve those apparently disadvantaged by them, not by invoking a separate conception of 'normative equality' that is ostensibly realized only within a free-floating private law, detached from the human interactions it must govern, together with what we call 'public law'.

9. Wienrib, *supra* note 1 at 21.
10. See Rawls, *supra* note 2.
11. *Ibid* at 75ff.

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Similarly, ensuring our actions are compatible with the freedom of others is far more demanding than Weinrib allows, because freedom takes more to realize than his understanding of private law seems to assume. In industrialized (or post-industrial) democracies, a far-flung welfare state shows we are committed to the proposition that freedom requires material resources and that sometimes others are obligated to support the material conditions of our freedom. It does not follow that in every transaction we may enlist the support of the random person who finds themself as our counterparty. But adjudicators and regulators in civil society choose what individual entitlements we collectively recognize, what recourse we collectively offer to individuals, and what excuses we collectively allow in response to individuated facts. Far from preordained by any pre-political private right, their choices are essentially political. When rule-makers choose the criteria by which we decide in particular cases who owes what to whom, their judgments should reflect our background political choices about what kind of freedom we recognize in our society—that is, what freedom requires and what we are entitled to expect from others to help each of us obtain it.

Weinrib describes statutory interventions in private law as small incursions that do not interfere with its essential purpose. But one can also read his point as normative in the sense that he would warn against statutory interventions that meddle too much with private law principles. Two examples of regulatory regimes come to mind as going farther than his picture implies or recommends.

First, employment law overrides contract and tort with respect to many obligations between employees and employers. It does not treat them as symmetrical. It does not attempt to vindicate their reciprocal freedom vis-á-vis one another, that is, within the employment relationship; it attempts to vindicate reciprocal freedom across our society. It takes reciprocity as a systemic, albeit aspirational, feature of our political system. Imagine a rule that requires employers to give employees two-weeks' notice before termination but does not require employees to give any such notice to employers. I am not clear what Weinrib would have to say about such a rule, but I worry that the fact that the employees' interests motivate the asymmetrical notice requirement would doom it on his account of private law. Similar points can be made about other areas of regulation that presuppose vulnerability and social hierarchy, such as housing law and parts of consumer law. In the housing context, only the social context of housing regulation and the status and market imbalances between landlords and tenants can justify the asymmetrical regulations of residential leases and the ways in which those differ from regulation of commercial leases. Similarly, only a socially-informed view of how consumer markets work for different kinds of consumers across retail categories can explain or ever justify the patchwork of regulations that apply to consumer contracts. These inherently political rules are intended to make consumer contracts work for consumers and rightly do not treat their corporate counterparties as symmetrically situated bearers of private right. Importantly, the public pursuit of freedom and equality in these domains is not exceptional. It is central to what we are doing in these regulatory domains—specifying not what the state owes to citizens but what individuals owe to one another.

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Securities laws present a different kind of challenge. Many of their provisions, at least in the United States, appear to mimic rules on misrepresentation and fraud that are familiar from contract and tort. They govern transactions that would otherwise be subject to claims in common law contract or tort. But neither the regulations nor the judicial interpretation of those regulations is bound by common law principles of misrepresentation and fraud. That is because it is palpable that, although in many cases these regulations are specifying what sellers can say, they are not just being more specific about or interpreting what general rules of honesty in exchange require. They are regulating a market with enormous social consequences. But it would not be fair to say, either, that they are merely using private rights of action in this space to advance aggregate welfare ends. Plaintiffs who are granted claims against companies for violations of securities laws rightly understand themselves to have been wronged. But they understand themselves to have been wronged not just as buyers as such but as buyers in a particular kind of society, one in which we are encouraged to enter the securities market with confidence. When those expectations are betrayed, a buyer is in fact wronged. But it is not possible to understand the wrong, or to specify the circumstances of liability, without reference to the kind of society we want to be: not just a rich one, but one in which we invest with some fears but not others, in which we collectively decide—through politics—those risks that we will accept and those that we will not.

I am not making what Weinrib describes as the common error of conflating public right with positive law. The idea here is not that public right is nothing more than whatever laws we happen to adopt. Nevertheless, the public processes by which positive laws are set, especially in a democracy, properly inform the content of bilateral rights, both from the point of view of substantive justice between parties and from the vantage of public justification for the legal system and all its parts.

III. Conclusion

I conclude with a note on justification. Weinrib rejects the legal realist focus on the moment of coercion.[12] But while outcomes are not paramount—reasons are important too—it is nevertheless true that the fact that private law involves state coercion subjects it to demands of public justification. One way of assessing Weinrib's theory of corrective justice is to ask whether his account is satisfactory from that standpoint.

Public justification requires that private law serve reciprocal freedom in our political community, not just within its domain. It is as members of a public that we must justify the rules we impose on each other, including those of private law. In fact, it is not clear what it would mean to be free within private relationships, separate from the society in which those relationships are situated. It sounds like

12. See e.g. Weinrib, *supra* note 1 at 77ff.

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being free within one room in a big city. Weinrib is right that public right requires systematicity, or coherence with the legal system as a whole, to realize the overarching ambition of reciprocal freedom: This is among the most important points of *Reciprocal Freedom*. But because the spheres of activity governed by private law are not uniquely governed by private law, consistency with the commitments of the legal system requires harmony with the full ledger of background political-moral principles. Systematicity rightly conceived is breathtakingly broad and institutionally demanding to the point of impossibility; indeed, we might have institutional but not foundational moral reasons for pursuing it piecemeal. Systematicity is, in principle, inconsistent with the all-encompassing conception of correlativity with which Weinrib began in *The Idea of Private Law*.[13] To realize systematicity, the concept of correlativity must be scaled back.

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13. See Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995).

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