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Symposium: *Reciprocal Freedom*

Defending the Juridical

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Abstract

Reciprocal Freedom: Private Law and Public Right is an account of how the law can coherently concretize 'the juridical', understood as the internal morality specific to legal relationships. The book elucidates the relationship between private law and the state, presenting the Kantian notion of reciprocal freedom as the normative idea implicit in a legal order in which private law occupies a distinctive place. Emphasizing that the juridical—as the morality specific to legal relationships—does not involve an appeal to morality at large, this article responds to critical comments about the correlative structure of corrective justice, the Kantian conception of ownership, and the book's treatment of distributive justice and of the rule of law. It also outlines the jurisprudentially fundamental difference between the scope of a right and the operation of a right, which lies at the heart of Kant's distinction between the state of nature and the civil condition.

Keywords: *Ernest Weinrib; the juridical; correlativity; ownership; state of nature; civil condition; corrective justice; distributive justice; Kant; rule of law; reciprocal freedom; Vincent v Lake Erie*

1. The Juridical

Reciprocal Freedom: Private Law and Public Right (henceforth *RF*) is an exposition of 'the juridical'—that is, of the internal morality specific to legal relations.[1] Etymologically, the juridical signifies that which is declaratory of what is right. The province of the juridical is the ensemble of moral considerations implicit in the norms of law and in the institutions that administer it. A theory of the juridical concerns itself with elucidating two interconnected possibilities: that of the fairness and coherence in the law's concepts and reasoning, and that of the justified exercise of public and coercive power by legal institutions.

The notion of the juridical bestrides the division between positive law and morality. On the one hand, the juridical becomes actual in social relations only through the positive law, which in turn provides a public (though not always an adequate) instantiation of what the juridical is about. On the other hand, the

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

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juridical is the morality distinctive to the understanding of law as a rationally intelligible enterprise comprehensible in its own terms. The focus of the juridical is on the characteristic concepts, reasoning, and institutions of a well-ordered legal system, attending to the internal fairness and coherence of legal concepts, the systematicity and integrity of the processes of legal reasoning, and the suitability of legal institutions to their public tasks of declaring, administering, and enforcing the law. Because the juridical is a special kind of morality, it excludes appeals to personal morality or to morality at large. These have their own standards, intelligible independently of the law, and incumbent through their own force and not that of the law. In contrast, the juridical can be understood and realized only in and through the law. From the standpoint of the juridical, the only relevant kind of morality is the morality implicit in legal concepts, integral to legal reasoning, or presupposed in the appropriate functioning of legal institutions.

RF explains how the law can coherently and systematically concretize the juridical, so understood. The book elucidates the relationship between private law and the state, presenting reciprocal freedom as the normative idea implicit in a legal order in which private law occupies a distinctive place. It develops a set of interconnected conceptions of corrective justice, rights, ownership, the role of legal institutions, distributive justice, the relationship of constitutional rights to private law, and the rule of law. In its elaboration of the thematic notion of reciprocal freedom, what connects the juridical aspects in these diverse topics is a particular kind of unity—namely, the unity of a conceptual sequence, in which each stage presupposes and complements the preceding one. Explicitly Kantian in inspiration, *RF* presents a non-instrumental account of law that is geared to the juridical character of the modern liberal state.

I am grateful to the commentators at the 'Symposium on Ernest Weinrib's *Reciprocal Freedom*' at Surrey for their interest in this book, for their engagement with its ideas, and for their challenges to its claims. Their comments address many of the book's large themes. My response proceeds issue by issue, in the order of their appearance in the book.

2. Correlativity

In corrective justice as I understand it, the correlative positioning of the parties to a private law transaction is the structuring principle of their relationship. The liability of the defendant is the law's response to an injustice done to the plaintiff. Because liability is a correlatively structured phenomenon—the liability of a particular defendant is always a liability to a particular plaintiff—the injustice between them (and, therefore, the reasons for treating what happened between them as an injustice) is also correlatively structured. Because of this, the reasons for correcting this injustice through a finding of liability should be correlatively structured as well. Thus, in specifying the nature of the injustice, the only normative factors to be considered significant are those that inform the relationship

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as a whole through their equal application to both parties. The reasons for liability should match the structure of liability.

RF highlights three features of this correlativity. First, correlativity is a structural and not a substantive conception. It concerns itself with the normative structure internal to the parties' relationship. It is not a substantive idea, setting out that which is independently desirable and then brought to bear on the relationship from the outside. As the starting point for a theory of private law, a structural idea has this advantage over a substantive one: Whereas a substantive idea can always be challenged for its relevance to private law, a structural idea cannot be challenged without challenging the very idea of private law itself. Second, correlativity is the most comprehensive abstraction distinctive to private law. It lies at the apex of a system of nested abstractions and determinations that operate at different levels of generality. Each abstraction regulates the determination below it, and the task of law is to formulate a determination that is plausibly attuned to the abstraction under which it falls. Third, the conformity of reasons for liability to the structure of correlativity is essential both to fairness as between the parties (because such reasons treat the parties as normative equals within their relationship) and to the coherence of legal argument (because such reasons cannot be based on a multiplicity of mutually independent considerations that deal with one or the other of the parties). Correlativity thereby has a regulative function that insists on the employment of concepts—namely, right and correlative obligation understood in Kantian terms—adequate to the correlative structure of relationships of private law.

For Professor Verónica Rodríguez-Blanco, this conception of corrective justice is unsatisfactory, because it sets up a backward-looking enquiry that abstracts rights from the values that figure in the practical reasoning of agents who aspire to 'live well'. Agents do this not by looking at rights in the abstract to assess the past, but by engaging in a forward-looking deliberation in the particular circumstances of specific actions. In support of this, Rodríguez-Blanco instances Lord Atkin's definition of the neighbour in *Donoghue v. Stevenson*: "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected *when I am directing my mind to the acts or omissions which are called in question*" (her emphasis).[2]

This criticism rests on a set of misapprehensions. Corrective justice, as I use the term (differing in this from other corrective justice theorists), refers to the correlative structure of reasoning that properly animates determinations of liability.[3] This structure of reasoning is indifferent to whether a judge or lawyer applies it to the past or whether an agent applies it to the future. The conformity of reasons to structure works in the same way in both situations. Moreover, in neither situation is the issue properly formulated as an enquiry into how a person is to live well. As noted above, the juridical is not co-extensive with morality at large.

2. *Donoghue v Stevenson,* [1932] UKHL 100, [1932] AC 562 at 580 [emphasis added] [*Donoghue*].
3. See Weinrib, *supra* note 1 at 3.

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In the very paragraph quoted by Rodríguez-Blanco, Lord Atkin famously insisted on the distinction between a moral code and legal rules, and between the biblical injunction to love one's neighbour and the more restrictive legal prohibition against injuring one's neighbour. Nor do abstraction and determination travel in different compartments. As *RF* is at pains to point out, the two are in constant interplay up and down the ladder of generality and particularity.[4] Indeed, the very sentence of *Donoghue* that Rodríguez-Blanco emphasizes is taken from the most abstract part of Lord Atkin's judgment ("Who, then, in law is my neighbour?") rather from his consideration of the significance for this specific case of the fact that the bottle could not be inspected before its contents were consumed.[5]

Professor Aditi Bagchi has a different objection to my emphasis on the structural role of correlativity. "[J]ust 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 may be a "necessary property" without being the "animating principle." In other words, correlativity is a structure that does not have a structuring function. Bagchi claims that when treated as controlling, correlativity is really a substantive conception not yet grounded in any moral principle. The implications about the content of private law that the book draws from correlativity "must come from some separate, unnamed, and undefended principle." Despite the argument in the book that correlativity embodies a conception both of fairness between the parties and of coherence in legal argument, Bagchi regards the book's attention to the conceptual consequences of correlativity as "unmotivated." And so it is, if one assumes (as she does) that the only legitimate form of motivation is reference to a separate substantive principle. Even though the book announces in its opening pages that the distinctiveness of its approach to the theory of private law is that it starts with structure, not substance, Bagchi assumes that there must be some unidentified and undefended substantive principle lurking somewhere in the vicinity. She accordingly criticizes the book for failing to identify and defend the motivating substantive principle that, on the book's argument, does not exist.

A merit of Bagchi's comment is her frankness in declaring my argument from correlativity to Kantian right "pretty unattractive" because it is "evocative of the kind of deep-seated individualism from which liberal egalitarians spent a couple of generations trying to extricate themselves." In this vein she ascribes to *RF* the idea that private law champions freedom within private relations "separate from the society in which those relationships are situated." For me, it would not be a matter of regret if the book failed to confirm a reader's ideological precommitments. However, an assessment of the place of individualism within Kantian right should be made with due regard for the nature of Kant's public right as the juridical expression of a totality not reducible to a sum of individuals. This is reflected in the astute observation of the German constitutional court (cited approvingly in

4. See *ibid* at 4-8.

5. *Donoghue*, *supra* note 2 at 580. For *Donoghue* as an exemplary case of corrective justice, see Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012) at 38-42.

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RF) in a strikingly Kantian judgment, that the relevant freedom is not "that of an isolated and sovereign individual, but rather … that of an individual who is based in and bound to the community."[6]

In the second part of her comment, Bagchi deals with "the demands of systematicity." Does systematicity require that all the values of a legal order be simultaneously present in every one of its parts, or are they relevant in a sequenced way, as *RF* maintains? The former claim—the omnipresence of everything in everything—would have as one of its effects the erasure of the distinction between corrective and distributive justice—a consequence that Bagchi would not lament. In contrast, *RF* regards conceptual sequencing as essential to the coherence of legal relationships and to the understanding of a rights-based legal order. During her argument, Bagchi makes statements that do not fully recognize the influence of later stages of the sequence on the available pool of conceptual resources. She suggests, contrary to what *RF* expressly says, that *RF* opposes "statutory interventions that meddle too much with private law principles."[7] She admonishes that "[a]uthorities charged with filling out private law rules … need to understand their task as a vindication of broader political commitments manifest in the political system of which they are a part," while she ignores the sizeable portion of the book that explores the connection between private law and constitutional rights in a rights-based polity.[8] Despite these missteps, Bagchi's criticisms underline the importance of the question at issue between us, which I (but probably not she) would phrase as: Does what Rawls termed 'unity by appropriate sequence' provide a necessary and suitable way of conceptualizing the juridical unity of the legal order?[9]

I will return to aspects of sequencing below in section 4 and section 5.

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6. Weinrib, *supra* note 1 at 122, citing BVerfGE 45, 187 (1977) at para 145.

7. *Contra* Weinrib, *supra* note 1 at 112-15.

8. As *RF* makes clear, there are several versions of horizontality, and each has a different relationship to traditional private law. In its most capacious version, horizontality is not part of traditional private law at all; it is rather a branch of constitutional law appropriate to (and often found in) the kind of modern constitutional order that understands human dignity in Kantian terms and treats it as its highest public value (see *ibid* at ch 7). This version of horizontality is an implication not of private law, but of the constitutional order in which every exercise of legal power, including by the judiciary, must respect and protect the inviolability of human dignity (see *ibid* at 143). (Failure to realize that this capacious version of horizontality derives from the constitution, not from the corrective justice conception of private law, is one of several serious misconceptions in the review essay on *RF* by Brudner: see Alan Brudner, "The Rise and Fall of Private Law", Book Review of *Reciprocal Freedom: Private Law and Public Right* by Ernest J Weinrib (2024) 37:1 Can JL & Jur 323. See also the text accompanying note 18.) This constitutional imperative requires courts to have recourse, for instance, to a process of so-called 'balancing' that is not present in traditional private law but that also differs from the balancing used in the judicial review of legislative and administrative action (see Weinrib, *supra* note 1 at 173-80). Hence, chapter 7 concludes that this version of horizontality "belongs not to constitutional law *simpliciter*, but to a special branch of it: private constitutional law" (*ibid* at 180). A principal issue for this chapter is the extent to which this application of constitutional norms and values can conform to the presuppositions and structure of the private law relationship.

9. See John Rawls, *Political Liberalism* (Columbia University Press, 1993) at 259ff. On the significance of sequencing for Kant's legal philosophy, see Martin Jay Stone & Rafeeq Hasan, "What Is Provisional Right?" (2022) 131:1 Philosophical Rev 51.

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3. Ownership

The Kantian account of ownership plays a central role in *RF*. The book first introduces it to show how Kant integrates the claim-right to exclusivity and the liberty to use, resulting in what amounts to a Blackstonian conception of ownership as a "sole and despotic dominion ... over the external things of the world."[10] Kant's broader argument is then that this conception of ownership both necessitates and is necessary for the transition from the state of nature to the civil condition.

In his thoughtful and provocative comment, Dr. Stephen Bero queries two fundamental features of this account. "The first is how it is that acquired rights to external things are possible in the first place; the second is why, once the possibility of acquired rights is established, the form that they take should be that of a traditional right of ownership, rather than ... a more limited right to use." These queries, one may add, must be considered from the standpoint of Kant's universal principle of right, that an action is rightful if it can co-exist with everyone's freedom in accordance with a universal law. An implication of this principle is that action is wrongful if (that is, *only* if) it is inconsistent with someone else's freedom. The only rightful restriction on a person's action is another's freedom.

In dealing with the first query—can a thing be the object of a right?— Bero regards as overblown Kant's assertion (which *RF* reiterates) that a negative answer would make freedom self-contradictory. He regards as sufficient a second formulation in *RF* (also drawn from Kant) that "[b]ecause things are usable, they can be the objects of rights that are distinct from a person's innate right."[11] The picture, he says, is that "it is simply freedom's nature to extend as far as it can—indeed, why wouldn't it?" Acquired rights are possible not because the opposite would be a contradiction, but because there is no reason that such rights cannot be possible.

On this view, all that Kant's argument needs is the observation that freedom has an internal impulse of self-extension, just as (I suppose) the great chess strategist Aron Nimzowitsch observed that passed pawns have a "lust to expand."[12] This characteristic of freedom, Bero claims, allows us to dispense with talk of a contradiction. But even if freedom has an extendible nature, how does this nature become endowed with normative significance? The sole normative principle in sight is the universal principle of right. Once that principle is invoked, however, the contradiction that Bero wants to dispense with inevitably re-appears. The universal principle of right asserts that one person's action can be limited only by another's freedom. If we deny the possibility of acquired right, we are asserting the contrary principle that one person's action can also be limited by a thing—that is, by something that is not free. To maintain both of these mutually inconsistent principles is indeed to make freedom self-contradictory. On Kant's argument,

10. William Blackstone, *The Oxford Edition of Blackstone: Commentaries on the Laws of England Book II: Of the Rights of Things*, ed by Simon Stern (Oxford University Press, 2016) at 1.
11. Weinrib, *supra* note 1 at 56-57.
12. Aron Nimzowitsch, *My System* (Quality Chess, 2007) at 75.

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acquired right is possible because the denial that a thing can be the object of a right contradicts the implication of the universal principle of right that one's action can be limited only by another's freedom. It turns out that it is the normative significance of this contradiction that is decisive, not merely the extendible nature of freedom.

Bero's treatment of his second query—of what kind of right can a thing be the object?—follows from his treatment of the first. Having satisfied himself that a thing can be the object of a right distinct from a person's innate right, he asks: What is the minimal form distinct from the innate right that an acquired right can take? His answer is that a person can have a Hohfeldian privilege to use things even against the claimed ownership rights of others. By virtue of this privilege, a thing would be the object of a right distinct from a person's innate right. Thus, the desideratum he draws from my second formulation in *RF* would be satisfied.

As Bero notes, at the Surrey conference I denied that my second formulation in *RF* differed substantively from my first one. That is because both formulations operate by reference to the universal principle of right. Because Bero's analysis does not incorporate that principle, his treatment of his second query shares the defect of his treatment of his first.

Once one keeps in mind the universal principle of right, to the effect that only freedom (which things do not have) can restrict action, then the argument needs the maximal conception of the right to things, not the minimal conception. Action is restricted by something other than freedom to the extent that the right to things falls short of that maximal conception. Bero's Hohfeldian privilege to use things does not include an entitlement to store and accumulate things, to sell them or give them as gifts, to be compensated for wrongful damage that reduces their value, and so on. Those are incidents of ownership conceived in Blackstonian terms as a sole and exclusive dominion. Anything less would allow things to restrict the freedom of persons with respect to them, in violation of the universal principle of right.

Moreover, the privilege to use that Bero postulates is peculiar. Kant's argument for ownership addresses the problem of how the principle of right can apply beyond the scope of the innate right, which, by prohibiting interference with the user's body, allows for a thing's use without making the thing the object of a right. Bero contends that his privilege makes a thing the object of a right, because the person exercising the privilege is free from the ownership claims of others. This is odd, because—and this is the point of Bero's whole argument—the possibility of ownership has not yet been established. The exercise of the privilege is thereby insulated from the application of a legal category that does not (and for all we know, cannot) exist. On Bero's argument, the privilege he postulates is either redundant in shielding use from an interference that cannot occur, or (if the reference to another's claim of ownership is dropped) is indistinguishable from use by virtue of one's innate right alone. On neither of these alternatives does Bero's suggestion solve the problem that Kant identified.

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4. The State of Nature/The Civil Condition

The employment in *RF* of Kant's conception of the state of nature and the transition to the civil condition—a significant instance of the book's sequenced argument—attracted the attention of several of the commentors: Professor Claudio Michelon, Professor Diego Papayannis, and Professor Sandy Steel. Michelon offers an illuminating explication of that transition as a way of locating the limit for considerations about private law that are acceptable on Kantian grounds. Papyannis and Steel express serious reservations about the moral plausibility of the state of nature.

Michelon's comment is a meditation on the movement from the state of nature to the civil condition. What is the point of this "thought experiment" (as he calls it)? How might the normativity of the state of nature "endure in" or "shape" the civil condition? Michelon helpfully suggests three ways that are not mutually exclusive: (i) an entire right identified in the state of nature might carry over; (ii) properties of rights might be identified in the state of nature, even if the specific entitlements to those rights could not exist in the civil condition; and (iii) the whole point of private law as an autonomy-preserving system might be identified, as a result of which some of the kinds of reasons that bear on rights might be excluded in the civil condition. Michelon is especially interested in the third way, because he correctly sees that—counter to his prior belief and to the views of certain critics of my position—it expands the availability to private law of non-bilateral (I would say 'omnilateral') considerations. This, he thinks, is *RF*'s most notable contribution, and he wonders about the kinds of considerations, not autonomy-preserving, that still seem to remain excluded.

Without addressing his remaining perplexity (which would take us beyond the issues dealt with in *RF* and require much more space than I have here), I want to offer an expansive gloss on the second of his points. To do this, I move away from Kant's text for the moment and refer to a distinction familiar in modern law (though not with my terminology), to which *RF* frequently refers. This is the distinction between the scope of a right and the operation of a right.

This distinction is most explicit in modern constitutional jurisprudence, where rights are guaranteed subject to justified limits. The analysis of whether legislation passes constitutional muster is a two-staged process. The first stage deals with whether the impugned legislation falls within the scope of a constitutional right, and therefore infringes the right. If it does, a second stage asks whether this infringement is justified by the significance of another right or of the values underlying the right-protecting system considered as a whole. These two stages are juridically distinct. Each stage has its own set of criteria: The first stage looks to whether the impugned legislation falls within the purpose of the allegedly infringed right, whereas the second stage looks to the public purpose, suitability, necessity, and proportionality of the infringement. Moreover, each stage places the burden of proof on a different party: The applicant must show that the alleged infringement fell within the purpose of the right; the state must show that the infringement was justified. The result of running the stages together would be

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juridical chaos. There would also be a rationally irresolvable problem of great practical significance: whether the first stage was being assimilated to the second so that rights were broad in scope but unmanageably contingent in their effects, or whether the second was being assimilated to the first, so that rights were narrowly specified but inflexibly operative.[13] In the terminology of *RF*, the first stage deals with the scope of the right, the second with the operation of the right within the entire system of rights. One might say that the first stage identifies constitutional law's juridical components, whereas the second stage scrutinizes its juridical ecology. The conceptual difference between the two stages in the constitutional context shows that situating an issue under the rubric of scope or of operation does not involve a mere verbal shuffle.

One theme of *RF* is that this distinction is general to the law, not restricted to the modern constitutional context. It figures in private law as well. Indeed, the distinction is implicit in the oldest jurisprudential puzzle of private law in the Western philosophical tradition, the puzzle of the withheld sword.

Readers of Plato's *Republic* will recall that in its opening pages Socrates, in discussing with the old gentleman Cephalus the justice of returning another's property, asked whether one should return a borrowed sword if its owner had since gone mad.[14] The question caused Cephalus to leave the conversation almost immediately, but subsequently it was repeatedly taken up by the medieval scholastics. The influential theologian Luis de Molina invoked this example to explain what it means to say that contravening a right without legitimate cause does wrong to the right-holder.[15] He explained that, conversely, no wrong is done if a legitimate case exists for contravening the right, instancing the refusal to return a sword because of the danger created by the owner's supervening madness. That refusal is a contravention of the owner's right, but because it is for a legitimate cause, it neither destroys the right considered in itself ('*nec tollit facultatem illam in se spectatam esse ius illius*') nor does it do the owner wrong. The owner's right to the return of the sword remains intact, but that right is not operative in the particular circumstances of his madness. Earlier, Domingo de Soto had made the same point by saying that "it is not the law that changed but the circumstances."[16]

In the terminology of *RF,* one would say that the sword was and remained within the *scope* of the owner's property right, but that the danger posed by the owner's madness limited the *operation* of that right. This limit expressed the relationship between the owner's right and the rights of others, and it accommodated the former to the latter. This did not mean that the borrower had now

13. On the dynamics of these problems, see Jacob Weinrib, *The Impasse of Constitutional Rights* (Cambridge University Press, 2025).
14. See Plato, *Respublica*, ed by SR Slings (Oxford University Press, 2003) Book I, 331c.
15. See Luis de Molina, *De Iustitia et Iure/Über Gerechtigkeit und Recht*, *Teil I*, ed by Matthias Kaufmann & Danaë Simmermacher (Frommann-Holzboog, 2019) at 100 (Tract II, Disp I).
16. "[*M*]*utatio haec non tam in lege fit quam in rebus ipsis*." Domingo de Soto, *De Iustitia et Iur*e in *The School of Salamanca, A Digital Collection of Sources*, online: https://id.salamanca.school/texts/W0011 at 36 (I, q 4, a 5).

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become the owner, and that he could subject the sword to his despotic use. 'Who owned what' remained the same as before. The owner's right to the sword was restricted in its operation without any modification of the right's scope. The restriction, in turn, had to remain suitable, necessary, and proportional to the circumstances that justified it.

Now to return to Kant. In establishing omnilateral legal relationships, the civil condition serves several functions. One of these is the creation of institutions that lay down, administer, and coercively enforce the polity's norms. Another is to provide a framework within which the rights of the state of nature persist and are actualized. Michelon's comment helpfully formulates the ways in which this persistence works.

Carrying forward the spirit of his comment, I suggest (as *RF* indicates) that one aspect of the difference between the state of nature and the civil condition is that the state of nature deals with scope of rights—or more precisely, with the identity, scope, and formation of acquired rights—and the civil condition with the operation of rights. The state of nature deals with the rights considered on their own: How many of these rights are there (Kant's answer is four—the innate right and the three acquired rights of ownership, contractual performance, and status, corresponding to the categories of substance, causality, and community); what they are rights to; and how the nature of each kind of acquired right shapes, at least in outline, the mode of its acquisition. The holders of each of these rights are bilaterally connected to the bearers of a corresponding obligation. In contrast, the civil condition deals with the operation of these rights within the system of rights considered as a whole. Being omnilateral rather than bilateral, that system has normative dimensions of its own, namely publicness and systematicity. The rights of the state of nature are conceivable apart from the civil condition, but they can be enjoyed as the normative sites of reciprocal freedom only within it. In other words, the civil condition is the condition of the possibility of actualizing acquired rights.[17] Because of this, any inconsistency between the bilateral scope of rights and the omnilateral operation of rights must be resolved in favour of the latter. This is why (to take the example mentioned by Michelon) the rules of *market overt* prevail against the basic principle of property law that one cannot give what one does not have.

Kant insists that the 'matter of private law'—that is, the three categories of acquired right conceivable in the state of nature—persist into the civil condition. Of course, this must be so. For once one sees that the civil condition is concerned with the operation of rights and not their scope, there is no reason for their scope to be affected—to the contrary, the operation of rights presupposes that the identity and the scope of rights continue as they were, just as was the case in Molina's treatment of the withheld sword. If the rights did not survive, the analysis of their operation would be a vain exercise, and all that could be actualized would be the juridical chaos of conclusions shifting on sand. Nor, as noted, can the difference

17. See Stone & Hasan, *supra* note 9.

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between scope and operation be dismissed as a verbal shuffle, given the conceptual difference between them. Michelon mentions in passing, without adopting, the suggestion that the acquired rights of the state of nature disappear without residue in the civil condition, so that for Kant the domain of acquired right is nothing but the exercise of unmitigated public power.[18] As is apparent from my remarks in this section, that suggestion is interpretively and conceptually untenable.

With this picture of the relation between the state of nature and the civil condition in mind, I want to turn to the comments of Steel and Papayannis. In this connection, I reiterate that the state of nature does not model personal morality or morality at large. Rather, as a construct about the realm of the juridical, it is a device for enquiring into the legal concepts that are conceivable pre-institutionally as a matter of right—that is, as being consistent with the idea that a person's action must co-exist with the freedom of others. Its function is to exhibit interpersonal rights considered on their own, without reference to the omnilateral and institutional framework of the civil condition.

Accordingly, when Papayannis asserts that my description of the state of nature is "normatively implausible" and inconsistent with "respectful coexistence," I can agree with him if by "normative" he refers to morality at large. That, however, is irrelevant to the state of nature as a juridical construct. The state of nature is concerned not with respectful but with rightful coexistence. Accordingly, the point of the state of nature is not to elucidate what is moral in general but to present the rights that one person has against another. Papayannis gives the hypothetical example of a person who in the state of nature hoards scarce resources, with the result that a destitute person starves to death. The hoarder has been morally despicable (I agree) in lessening the resources available to the person starving—that is, in changing the context within which the destitute person lives—but has not acted in a way that infringed on any of that person's rights. From the standpoint of the rights as between the parties, Papayannis's hypothetical treats a nonfeasance as a misfeasance. The lesson he draws from this is reminiscent of the famous dictum ascribed to Saint Ambrose: "Feed the person dying of hunger; if you did not feed him, you killed him."[19] But Kant's state of nature is no place for saints.

A similar observation can be made about Steel's comment. His comment is complex, wide-ranging, and suggestive, but I will focus for now on his analysis of the issues raised by situations like that in *Vincent v. Lake Erie*.[20] That case permitted the defendant's boat to remain at the plaintiff's dock during a storm, while requiring the defendant to pay for the resulting damage to it. *RF* explained the case by reference to the civil condition. In accordance with the distinction between the scope and the operation of a right, the book's analysis leaves intact

18. See Alan Brudner, "Private Law and Kantian Right" (2011) 61:2 UTLJ 279 at 305. The suggestion is reiterated now with great vehemence in Brudner, *supra* note 8.
19. *Decretum* of Gratian, Part 1: D 86 c 21.
20. 109 Minn 456, 124 NW 221 (Minn 1910) [*Vincent*].

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the scope of the dock owner's property right (hence, the compensation for the damage to the dock), but adjusts the operation of that right in necessitous circumstances (hence, the permissibility of keeping the endangered boat attached to it).

Steel suggests that the privilege to use another's property under conditions of necessity properly reflects general moral considerations that are pre-institutional, rather than the juridically-systematising implications of the civil condition. Steel asks us to consider a variant of the case, "in which I need to shelter on your dock momentarily in order to protect my life."[21] In this variant, the dock owner's property right is set against another's bodily right, rather than another's property right. However, this change does not affect the structure of the problem, which remains one of elucidating the conceptual mechanism through which the dock owner's property right is not fully operative—a problem all the more striking in a legal system in which, as Steel notes, one is not generally obligated to assist another. Indeed, Steel's hypothetical is not essentially different from the instance of the borrowed sword, mentioned above, which the scholastic philosophers treated as the paradigmatic example of a property norm that remained intact although its operation was limited in particular circumstances.

Steel's own answer to the problem confirms that limiting the operation of the property right is the central theoretical issue:

> The wrongfulness [of dislodging the person sheltering on the dock] is explained by the infringement of the other person's bodily right, and the fact that the other's use is necessary and proportionate in order to avoid (serious) damage to their body. . . . More generally, it is the substantive content, or object, of the relevant rights, along with considerations of necessity and proportionality, which fundamentally determine the permissibility of action in these kinds of circumstances.

To which I say, "Bravo!" The invocation of ideas like necessity and proportionality to bring one right into a practical concordance with the existence of another right is precisely what *RF* expounds. What is mysterious about Steel's comment is why he thinks that this quintessentially juridical method for limiting the operation of a property right in particular circumstances is in any sense "pre-institutional," or that it reflects "general moral" concepts rather than the sequential application of specifically juridical ones.

Steel thinks that he has reached normative bedrock when he can discern aspects of a general morality. In contrast, the approach in *RF* is to seek reasons within the domain of the juridical, where legal categories are in play and morality at large has no purchase. The Kantian response to his hypothetical is sequential: So far as the scope of the dock owner's right to property is concerned, the dock owner has entitlement to be free from the intruder, but the operation of that right within a system of rights means that the intruder cannot be dislodged, because then the effect of the owner's right on the intruder's right would be disproportionate to the effect of the intruder's right on the owner's. This response makes no reference to freestanding ideas of general morality. Instead, it situates both the

21. Steel properly adduces *Depue v Flatau*, 100 Minn 299 (1907).

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initial privilege and the compensation for its injurious effects within the juridical structure of rights and their systematization.

As for the duty to compensate in the *Vincent* case, *RF* ties this to the requirement—again, most conspicuous in modern constitutional cases—that a justified limit on a right should affect that right no more than is necessary. The duty to compensate is, thus, a component of the systematic operation of rights in the civil condition. In contrast, Steel supplements his basic moral fact with an independent principle that persons under no duty to benefit another should not have to bear the burden of the resulting damage to "their own right-protected resources." This is a reasonable principle.[22] I nonetheless wonder why the absence of a duty to benefit should matter, given that the damage to one's "right-protected resources" was suffered for the sake of another. It is interesting to note, for what it is worth, that Jewish law has an extensive duty to rescue, and yet as the law developed, it imposed a duty to make good the rescuer's losses.[23] To put it graphically but anachronistically (and to ignore the didactic point being made in the scriptural parable), Jesus's good Samaritan would, under Jewish law, have been both obligated to assist the man who fell among thieves and entitled to claim from him reimbursement for the expense of the bandages and the inn.[24] Similarly, the *Vincent* opinion itself refers to the medieval theologians who held that someone who takes another's goods to relieve extreme necessity must, when able, make restitution for what was taken. The reason given for this in the theological literature is that, although in conditions of extreme necessity the original communality of goods revives for purposes of use, "everything is not in common with respect to ownership."[25] In this context, where the person in need was permitted to take another's goods, the owner was also obliged by precept (that is, on pain of mortal sin) to offer the relief.[26] Accordingly, Steel's insistence on the absence of a duty to benefit may, perhaps unnecessarily, obscure the cardinal importance of the benefactor's rights with respect to the required compensation. In any case, the approach proposed in *RF*, with its systematically sequential elaboration of the scope and operation of the plaintiff's right, obviates the need to excogitate an independent principle about compensation in these circumstances.

22. I once thought something similar, that *Vincent* was to be explained by the law of unjust enrichment: see Ernest J Weinrib, *The Idea of Private Law*, (Oxford University Press, 2012) at 196-203. That route seems to me now to be excessively circuitous.

23. See Ernest J Weinrib, "Rescue and Restitution" (1990) 2 Svara: J Philosophy & Judaism 59.

24. See English Standard Version Bible (2001), Luke 10:30-37.

25. Domingo de Soto, *supra* note 16 at 366 (IV, q 7, a 1) citing Adrian, *Quaestiones de sacramentis in quartum Sententiarum librum*, 4 *de restitutione* (1516). For a detailed treatment of this issue in the theological literature of the sixteenth century, see Ernest J Weinrib, *The Least of my Brethren: Domingo de Soto on Poverty and Property* (University of Toronto Press, forthcoming).

26. See Domingo de Soto, "Commentary on Aquinas *Summa Theologiae* II, ii, q 32 (On Almsgiving)" in Karl Deuringer, *Probleme der Caritas in der Schule von Salamanca* (Herder, 1959) at 143-54.

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5. Distributive Justice

The focus of Professor Papayannis's challenging and multi-faceted comment is *RF*'s treatment of distributive justice. His target is threefold: (a) the defectiveness of achieving distributive justice through social welfare programs, (b) the exclusion of distributive justice from private law, and (c) the extent to which the justification for distributive justice applies (this last point is also noted by Professor Steel).

(a) The argument in *RF* is that the correlativity of the private law relationship excludes considerations of distributive justice as a matter of coherence and interparty fairness. Nonetheless, a state devoted to the actualization of reciprocal freedom must work toward distributive justice to minimize the dependencies that might arise within the civil condition. Because they address the systemic manifestations of dependency rather that allegations of unjust treatment by individuals, programs of distributive justice are the province of the state's legislative and administrative branches, not of judges deciding issues of liability. In contrast to courts, legislatures have the institutional competence to assess the full range of possible distributions, to articulate the details of the preferred distribution, to provide for its funding, and to set up the agencies that administer it. Legislatures can also be held accountable through the democratic process for how they address systemic social problems and for how they manage the distributive machinery.

Papayannis's dissatisfaction with this arises from the imperfect and politically contingent way in which social welfare programs alleviate or ameliorate dependency. He points to the scarcity of resources, the whims of politics, the passive role of the poor in the receipt of social assistance, and the lack of consensus on what poverty is and what is the best policy for dealing with it. Above all, he is concerned with the stigmatizing effect of the welfare system, and with the inability of social assistance programs to guarantee the poor the social bases of their self-respect.

If dehumanization in the welfare processes is the problem, one would think that the solution would be to modify those processes to lessen this dehumanization. Welfare processes might then be brought more into line with their purposes as mechanisms that minimize dependency. Papayannis's argument does not take this path, because it would not eliminate the passive role of the disadvantaged within deeply divisive systems of social assistance. Instead, Papayannis favors infusing private law with redistributive considerations, because redistribution through private law involves "implicit transfers" that are "tacit, silent, or discrete." This has the "enormous advantage" of not entailing stigmatization, triggering anxiety, or attaching shame. One might surmise that Papayannis is of the view that entanglement in the travails of litigation is somehow more benign toward the poor than exposure to the indignities of the welfare system (for instance, that injured employees would be better off being restricted to the torts system than submitting claims for entitlement under workers' compensation or other insurance programs). In fact, Papayannis's conclusion is more modest than what follows from his argument. He is willing to leave the welfare system in

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place while developing private law for distributive ends. This, however, renders his solution unresponsive to his problem.

(b) In criticizing the exclusion of distributive justice from *RF*'s conception of private law, Papayannis notes: "In private law litigation, courts *mostly* do corrective justice. Distributive justice is applied, among other considerations, at the legislative stage" (his emphasis). The legislative stage to which Papayannis is here referring is the necessity for the adjudicator of a private law dispute to create a new rule when the legal material already contained in the positive law runs out. His claim is that on such occasions, corrective justice is unavailable and distributive considerations (among others) can legitimately be invoked.

Papayannis claims that private law has a distributive character, because all private law rules have distributive effects. By this he means that the decision-maker's choice of a particular rule produces a different set of holdings than would have resulted from the choice of a different rule. Given this, it makes no sense, in his view, to categorically exclude distributive concerns. That would be "to ignore one of the most important implications of the decision at hand." Corrective justice applies only where the rules are settled, where the distributive considerations, among others, are already baked into the parties' rights and duties as set out in the positive law. Thus, instead of being a juridical concept that treats the relationship between the parties as the site of coherent reasoning and inter-party fairness (as it is in *RF*), Papyannis's corrective justice reflects the rights and duties that the positive law has established for whatever reasons. Accordingly, when a gap in the positive law compels judges to engage in the legislative creation of a new rule, then the distributive character of rule-creation justifies recourse to considerations of distributive justice.

The problem with Papayannis's argument is that his use of the word 'distributive' is equivocal. If the distributive effects of legal rules are to justify recourse to distributive justice in creating the rule, the word 'distributive' must have the same meaning all the way through the argument. But this is not the case. With reference to the distributive character of a private law rule, 'distributive' means 'affecting people's holdings compared to an alternative rule'; with reference to distributive justice, 'distributive' means 'employing considerations of a certain sort in articulating the rule'.[27] The former use of 'distributive' is too broad to settle a controversy about the relevance of the latter. This is because—and this point is as old as Aristotle's contrast between corrective and distributive justice—distributive justice is not the only way of thinking about justice in holdings.[28] Consequently, one cannot argue from what Papayannis calls the 'distributive effect' of a legal rule to a distributive justification for it. Nor is it correct to say that in ignoring distributive considerations, the corrective justice approach "ignore[s] one of the most important implications"—namely, that it has a

27. *Cf* Robert Nozick: "the term 're-distributive' applies to types of *reasons* for an arrangement, rather than to an arrangement itself." Robert Nozick, *Anarchy, State, and Utopia* (Blackwell, 1974) at 27 [emphasis in original].

28. See Weinrib, *supra* note 22 at 58-63.

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distributive effect. Rather, corrective justice handles that distributive effect (that is, the rule's effect on holdings, as compared to the effect of a different rule) in accordance with its own criteria: It considers which of the alternative rules is supported by reasons that match the bipolar structure of the parties' relationship and that are therefore coherent and fair as between them. This is how corrective justice has the 'distributive effect' of admitting one rule rather than another while excluding considerations of distributive justice. In other words, what Papayannis calls the 'distributive effect' of a rule is an idea that is neutral as between corrective justice and distributive justice. His supposed link between distributive effect and distributive justice is an illusion based on the shifting meanings of 'distributive'.

(c) *RF*'s account of distributive justice emphasizes the connection between distributive programs and the dependencies that arise in the civil condition from the operation of private law. Papayannis and Steel note that contemporary distributive programs also deal with what one may call the 'natural dependencies' that arise from physical disabilities or natural events unconnected to the civil condition. Does the Kantian justification of distributive justice extend to these programs?

Before addressing this important question, let me first briefly recapitulate the *RF* account. Not uncommonly, modern states deal with specific slices of societal life by establishing a distributive program to replace, adjust, or modify the application to them of private law. Workers' compensation, the regulation of residential tenancies, the law of labour relations, automobile injuries compensation, and the more generalized accident compensation arrangements in New Zealand are familiar examples of this. Interactions are thereby removed from governance by corrective justice, and subjected, in whole or in part, to distributive justice, even to the extent of abolishing private law *pro tanto*. Proponents of these distributive arrangements sometimes justify them by the claim that private law sets up an incoherent lottery for both claimants and defendants.[29] Corrective justice rejects that claim. But in defending private law against the charges of necessary incoherence, is corrective justice also committed to the existence of private law in its full range, unaffected by distributive alternatives?

RF answers this question in the negative. The underlying theme of Kantian legal thought is the non-subordination of any person to the choices of anyone else. This is evident both in the universal principle of right (that the action of one person must be capable of co-existing with the freedom of another) and in the subjective right that immediately corresponds to that principle (the innate right held by all persons by virtue of their existence, of being independent of the constraints of another's will).

In the bipolar world of the state of nature, where acquisition of external things cannot take place, the principal function of innate right is to proscribe interferences with the physical integrity of others, thus safeguarding for each of them the

29. See Weinrib, *supra* note 1 at 114.

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power to act in accordance with their own wills, so far as their relations with others are concerned. Because the subordination of another consists only in the violation of another's innate right, the state of nature provides a conception of rightful relations in which, in the absence of such violations, the interacting parties are fully non-subordinate to one another. Although exiguous, the state of nature is a domain of reciprocal freedom. Indeed, otherwise it would not provide a sure guide to the existence and scope of private law rights.

The transition from the state of nature to the civil condition brings the establishment of systemically omnilateral relations and the possibility of acquiring external things. It also creates a new potential for the subordination of one person to another through the accumulation of property and the consequent exploitation of superiorities in social power. This new kind of subordination (or the apprehension of it) can effectively constrain the will of others, even if the norms of corrective justice are scrupulously observed. However, the universal principle of right—which mandates the non-subordination of any person to the choices of anyone else—continues to be a valid requirement of a rightful legal order, applicable now not only to the bilateral relationships of corrective justice but to the omnilateral character of the civil condition. As an implication of this principle, the state has a duty to alleviate or prevent (to the extent possible) the kinds of dependency facilitated by the very existence of the civil condition. Modern liberal polities recognize this more capacious application of innate right under the rubric of 'human dignity', a term that encompasses the maintenance of the capacity to make one's way in the world despite the dependencies to which the civil condition can give rise. Programs of distributive justice are the contingent responses to the specific kinds of dependencies to which the members of a given state have been or might be exposed.

Distributive justice so understood is incumbent on the state rather than on any particular person. The civil condition allows the accumulation of property; no individual commits a compensable wrong simply by engaging in that process. The prospect of dependency is the result of the systemic legitimacy of acquisition rather than of the appropriative acts of any acquirer. The systemic threat that the civil condition poses to reciprocal non-subordination is addressed by collectively instituting distributive programs through state action. (This merely restates from the Kantian perspective the reason that considerations of distributive justice are misplaced in private law.) Moreover, because the alleviation of dependency is the work of the civil condition and thus of the commonwealth as a community, the measures that the state takes toward this end should reflect the polity's stage of economic development and be adequate not only for individuals' physical needs but for the maintenance of a minimum of participation in societal life.[30]

In developing this conception of distributive justice, *RF* focusses on dependencies that arise from the civil condition. This reflects the book's thematic interest in the connection between private law and the rest of the legal order.

30. See e.g. the Social Minimum Case of the German Federal Constitutional Court: BVerfGE 125, 175-260—Hartz IV (FCC 2010).

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Nonetheless, when Papayannis and Steel point to dependencies not resultant from the system of private rights and question whether *RF*'s attention to the civil condition unduly limits distributive justice, they raise an important issue of principle.[31]

To show how natural dependency connects with the picture presented in *RF*, one must recur to the skeletal components of the Kantian position that *RF* develops. Within that Kantian framework, programs of distributive justice have two prerequisites, one referring to the fact of dependency, the other to the juridical status of dependency. The first of these prerequisites is the existence of disparities of resources or of abilities that produce dependency or the danger of dependency. The second is that the person at risk of dependency is situated in a juridical context in which the dependency registers as juridically significant. This latter prerequisite signals the difference between the state of nature, where dependencies resulting from a disparity in resources or abilities do not register as juridically significant, and the civil condition, where they do.

In the state of nature, the only recognized inconsistencies with the universal principle of right are acts of misfeasance that impair another's physical integrity. The legal category of property is conceivable as being consistent with the universal principle of right, but property cannot be actualized through acquisition in the absence of the omnilateral legal relationships that characterize the civil condition.[32] Accordingly, persons relate to each other not through things but only through the avoidance of doing a wrong to another's body. There is no disparity of external resources between persons, because external resources are no one's entitlement in the state of nature. Similarly, a dependency that results from a disparity in abilities does not register as juridically significant because in each person's bipolar relationships with others, one is under a duty not to wrong but not under a duty to assist. Thus, even if a tall person can reach an apple that a shorter person cannot, the tall person does no wrong in eating that apple even if the shorter person starves.[33]

This situation changes in the civil condition. Persons are now related to things that can be acquired and accumulated, and from which others can be excluded. Disparities in resources are now possible. Moreover, persons are related not only bilaterally to each other, but also omnilaterally through a state that is juridically under a duty to work toward the fullest possible realization of reciprocal freedom. This duty renders dependency a systemic problem that always registers as juridically significant in the civil condition.

Accordingly, the civil condition gives rise to dependency in two senses. First, the civil condition creates the juridical significance of social and economic dependency as a situation to be ameliorated, even if that dependency itself

31. Professor Martin Stone raised the same issue in his contribution to a symposium on *RF* held at the University of Toronto in December 2022. I am grateful to Stone for an extended conversation about this on that occasion.
32. See Weinrib, *supra* note 1 at 61-64.
33. See *ibid* at 101-02.

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originates in a natural disability or catastrophe that would have affected a person's life even apart from the civil condition. Secondly, the operation of the laws and institutions of the civil condition, especially the legitimacy of accumulating private property and other means of social power, can create a disparity of resources that effectively subordinates some to others. This latter kind of disparity—the focus in *RF*—is especially pertinent to an examination of the relationship between private law and the state. However, it is not the origin of the dependency that is decisive but its actual or anticipated existence, because dependency as such is what engages the duty of the state to mitigate it to the degree possible. In the civil condition understood as a juridical construct, the system of rights relates all to all through a polity in which human dignity—the contemporary analogue of Kant's innate right—is the fundamental legal concept for the realization of reciprocal freedom. In that context, dependency—whether natural or arising from the civil condition—becomes an issue that the state must address.

6. The Rule of Law

During the examination of the rule of law in its final chapter, *RF* discusses whether the insistence of the rule of law on non-retroactivity applies to private law adjudication—even though, when courts innovate, litigants are held to a norm of which they had no specific notice when the impugned conduct occurred. Non-retroactivity is an obvious feature of the rule of law in the legislative context, and yet seems to be inapplicable to innovative private law adjudication.

RF nonetheless proposes that private law adjudication can be seen as complying with the non-retroactivity aspect of the rule of law, if one attends to the fundamental difference between legislation and adjudication. "The rule of law should be understood in a way that reflects the different kinds of law, whether legislatively or adjudicatively created, to which it applies."[34] Legislation creates law *ex nihilo*, so that a legislated rule governs actions only prospectively, that is, only after it has come into existence. In contrast, adjudication creates law out of pre-existing legal materials known to the parties or their legal advisors. When courts innovate, the parties have had notice, not of the specific rule to which their past conduct will be held, but of the legal materials out of which that rule would be crafted. The rule may be new, but the materials out of which it was created are not. Because those materials had legal force and were available for the parties' assessment when the impugned acts occurred, the parties have no basis for complaining that the new rule unfairly surprised them. Legislation has no parallel to this. In private law adjudication, "the rule of law is, among other things, the rule of legal reasoning, applicable to the character of a court's deliberation no less than to its conclusion."[35]

34. *Ibid* at 202

35. *Ibid* at 205. This treatment of private law adjudication is closely related to the argument that private law is a series of determinations and abstractions stretching from the specific court decision back to the correlative structure of the parties' relationship (*ibid* at ch 1).

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In his incisive comment, Professor John Oberdiek alleges that *RF* underplays the significance of judicial choice in elaborating a novel rule. The outcome of judicial choice—even if morally justifiable—is not inevitable; and until the choice is made and officially promulgated, a rule is not authoritative. In his view, *RF* wrongly assumes that the rule announced by an innovative court exists prior to its announcement, as if the outcome was foreordained by the pre-existing legal materials.

This criticism seems to me to miss the mark. It ascribes to me a view that I do not hold, a version of the fiction (expressly abjured in *RF*) that judges discover what the law always was.[36] *RF* fully recognizes that court decisions feature exercises of choice (or as *RF* puts it, exercises of 'judgment') that may vary from system to system or from period to period.[37] Moreover, Oberdiek places emphasis on the operation of the rule of law from the moment at which rules are authoritatively announced, whereas *RF* aims to displace the rule of law in adjudicative contexts from a focus on rules to a focus on the reasoning about rules. If we pick up the text of Oberdiek's example, the great case of *MacPherson v. Buick*,[38] and ask what in that text counts as 'law' for purposes of the rule of law, Oberdiek would point to the rule that decided the case for the plaintiff, whereas I would point to the reasoning contained in the entire text. The consequence is that Oberdiek thinks that the role of judicial choice in the formulation of a judicial rule—which has legal effect only once that choice is made—underwrites the problematic nature of the rule of law for private-law adjudication, whereas *RF* claims that the supposed problem is an illusion resulting from the assimilation of adjudicative rulemaking to legislative rulemaking.

I suspect that this difference between us can be traced to different assumptions about the nature of law: I regard law as a juridical enterprise, whereas Oberdiek regards it as a positivistic one. In his view, Justice Cardozo in *MacPherson* had to choose from a set of moral considerations that were nonlegal until the moment when his choice about them became authoritative. In contrast, as indicated in section 1, the juridical spans the positive law and the morality that is distinctive to legal norms and institutions. From this standpoint, Justice Cardozo's opinion in *MacPherso*n is an exercise in marshalling the pertinent juridical materials, including the process of reasoning itself, to produce the case's specific legal rule.

For purposes of the rule of law, Oberdiek distinguishes private law adjudication from legislation in a different way than does *RF*. Unlike *RF*, he points not to their different modes of creation but to their different modes of application. On the one hand, legislation and adjudication both lead to rules that come into being at a certain point in time; the retroactive application of a rule to conduct that occurred prior to that point in time is in principle inconsistent with the rule of law. On the other hand, retroactive application is unavoidable for adjudication, because the judgment regularly governs a transaction that antedated it. Because

36. See *ibid* at 202.
37. See *ibid* at 17-18.
38. 217 NY 382, 111 N 1050 (Ct App 1916) [*MacPherson*].

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'*ought* implies *can*', the impossibility of non-retroactive application absolves adjudication from a requirement that the rule of law otherwise imposes. Hence, he concludes that the retroactivity of private law adjudication "gives us reason to lament the fact that a central case of law-making cannot maximally abide by the rule of law, insofar as adjudication cannot but be retroactive."

However, this cannot quite be the end of the story for Oberdiek. One who truly laments this fact should favor doing something about it. To this end proponents of prospective overruling claim that the retroactive effect of adjudication can be limited or eliminated.[39] Prospective overruling has been proposed in different forms, but all aim at least at reducing the retroactive effect of judgments. This would allow adjudicative rules to be treated more like legislative ones, with the result that both kinds of rules would, to the extent possible, be subject to the imperative on non-retroactivity under the rule of law. If one believes that rules should not apply retroactively but that for private law adjudication '*ought* implies *can*', then the possibility of creating more space for the *can* should at the least be on the agenda, with a consideration of the merits and demerits of the different strategies through which innovative adjudication is given prospective effect only. In contrast, *RF* treats prospective overruling as the solution to a non-existent problem.

As noted, Oberdiek's comment goes to the heart of the difference between *RF*'s juridical view of law and other views. The same can be said for the other comments. That makes it incumbent on me once more to express my gratitude and appreciation to all the participants in this symposium for fruitfully pursuing their respective lines of enquiry into the positions that *RF* expounds.

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39. See Weinrib, *supra* note 1 at 203-04.

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