Canadian Journal of Law & Jurisprudence 2025, 1-15

 doi: 10.1017/cjlj.2025.10046

Symposium: *Reciprocal Freedom*

Orthodox Private Law and Social Subordination

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Abstract

In *Reciprocal Freedom*, Weinrib offers a neat and powerful explanation of the relationship between private law, corrective justice, public law, and distributive justice. In the Kantian view, private law and corrective justice are conceptually prior to public law and distributive justice. The primary function of public law is to publicly determine and enforce private rights. Institutions of distributive justice are required to legitimize a system of private rights that creates the possibility of subordination. In this comment, I argue that *Reciprocal Freedom* is a justification for what I will call 'orthodox private law' that, because it neglects the place of distributive justice within private law, fails to secure genuine independence for all persons.

Keywords: *Weinrib; distributive justice; personal independence; social subordination; poverty; self-respect; private law and public policy*

1. Introduction

In *Reciprocal Freedom*, Ernest Weinrib presents a view of how private law fits within the legal order as a whole.[1] Following Kant, the book offers a neat and powerful explanation of the relationship between private law, corrective justice, and public law, on the one hand, and private law and distributive justice, on the other. In the Kantian view, private law and corrective justice are conceptually prior to public law and distributive justice. The primary function of public law is to publicly determine and enforce private rights.[2] Institutions of distributive justice are required to legitimize a system of private rights that creates the possibility of subordination.

In this paper, I aim to raise some doubts about the Kantian view developed by Weinrib. Firstly, I will argue that it fails to recognise the importance of distributive justice within private law to ensure genuine independence for all persons. Secondly, I will explain that private law can be blind to social inequalities but

1. See Ernest J Weinrib, *Reciprocal Freedom: Public Law and Public Right* (Oxford University Press, 2022) at viii.
2. *Ibid* at 69.

cannot remain neutral from the distributive point of view. Thirdly, I maintain that the theory offers too narrow a view of the scope of distributive justice.[3] Distributive justice has its own independent domain and is not triggered merely by the need to prevent subordination that might arise from the normal operation of private law. Finally, I will show that a deeper understanding of poverty requires that it be addressed jointly through public law redistributive programmes and private law policies.

2. The relationship between private law and distributive justice (in a nutshell)

The story begins with the simple idea that we all have an innate right to freedom. This means that each person's freedom must co-exist with the freedom of everyone else. Legal rights regulate how people can exercise their freedom in a respectful manner. When rights are respected, individuals can pursue their own goals without being constrained by the will of others.[4] Normative independence derives from the idea that all persons are self-determining agents: People's lives are the result of their own will and not the will of others.

The most immediate expression of self-determined agency is the right to one's body. The right to one's body is innate in the sense that it does not depend on any act of acquisition or claim before others.[5] Other rights, such as ownership or the right to contractual performance, are external to the person; they are acquired, and they come into existence only after a civil society is established. In a state of nature, the only right that governs interactions is the right to bodily integrity. As long as I do not touch your body, I commit no wrong to you.[6]

The state of nature is an extremely unstable world, in which sophisticated plans cannot be carried out. Suppose Olympia wishes to take some apples from a tree and keep them for a few days. As there are no property rights, Cleo could take all the apples Olympia leaves on the table (and the table too!) without violating Olympia's rights. The only thing that Cleo is forbidden to do is to grab the apple that Olympia is holding.[7] If Cleo did that, she would interfere with Olympia's body, because in order to take the apple out of her hand, she would have to move Olympia's fingers against her will. The innate right to one's body ensures reciprocity but not much freedom.

Therefore, the move toward 'the civil condition' is the obvious step forward. In the civil condition, legal institutions recognize other private rights, including ownership. Now the owner has absolute control over the owned thing and can exclude others from it without being in physical contact with the object. Taking initial control of a thing with the intention to exclude others has a different

3. *Ibid* at 94-116.
4. *Ibid* at 31-32.
5. *Ibid* at 33.
6. *Ibid* at 101.
7. *Ibid* at 50.

https://doi.org/10.1017/cjlj.2025.10046 Published online by Cambridge University Press

meaning in the civil condition. Whereas in the state of nature this was a brute fact—a unilateral imposition on others without any normative effect—in the civil condition it is a legitimate acquisition that takes place *within a system of rights* whose function is to secure reciprocal freedom.[8]

The civil condition, however, solves the problems of the state of nature but creates new challenges. In Weinrib's words:

> The existence of property in the civil condition introduces the possibility of accumulation, and with it the possibility of subordination for those whose sphere of action is confined to what is left over. For some of them, what is left over may be insufficient for making one's way in the world on one's own. Indeed, their very survival may be dependent on the compassion or generosity of others.[9]

The possibility of *systematic* dependence elicits another set of institutions aimed at neutralizing these negative effects on reciprocal freedom. The system of private rights can be legitimate only if the conditions of independence are restored through mechanisms of distributive justice. In this way, "institutions of distributive justice ... preserve reciprocal freedom in the face of threats to it that arise from the systemic operation of private law itself."[10]

These distributive mechanisms are entirely independent of private law.[11] Distributive considerations, Weinrib argues, cannot be channelled through private law because they are not correlatively structured.[12] Need or financial ability to contribute are unilateral considerations. Therefore, any attempt to introduce redistribution in private law interactions will lead to incoherent and unfair results.[13] The 'why me?' question from the contributor will not receive a plausible answer. Unilateral considerations do not link particular plaintiffs to particular defendants. Achilles's need cannot justify taking specifically *from* Hector. Hector's financial capacity does not ground a transfer *specifically to* Achilles. The only way to link one to another is by pointing out what one party has done and what the other has correlatively suffered in their interaction.[14] Coherence and fairness require that private interactions be governed by private rights, and that the risks of subordination derived from the *normal operation* of private law be addressed by institutions of distributive justice. In this way, Weinrib justifies what I will call 'orthodox private law', with robust individual rights, as recognized in the nineteenth-century civil codes in countries of the continental European tradition.

These are the main aspects of the Kantian view developed by Weinrib on which I will focus.

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8. *Ibid* at 62.
9. *Ibid* at 103.
10. *Ibid* at 208.
11. *Ibid* at 181.
12. *Ibid* at 109.
13. *Ibid* at 8.
14. See Ernest J Weinrib, "The Monsanto Lectures: Understanding Tort Law" (1989) 23:3 Val U L Rev 485 at 514-15.

https://doi.org/10.1017/cjlj.2025.10046 Published online by Cambridge University Press

3. Guaranteeing true independence

Let me begin with the idea that institutions of distributive justice can legitimize orthodox private law, which is unconcerned with distributive issues. To what extent do redistributive mechanisms guarantee the principle of independence?

Weinrib seems to think that the principle of independence is fulfilled when no person is subject to the will of another as a consequence of the normative scheme that allows, among other things, for unlimited accumulation. This form of independence is *interpersonal*. Redistribution through public law solves this problem, because once redistributive mechanisms are established, no one is left at the mercy or altruism of others. However, as Dagan noted, these mechanisms do not eliminate dependency, because the beneficiaries of redistributive programmes become dependent on the state bureaucracy.[15] Redistributive programmes therefore only transform interpersonal dependency into *social dependency*. The beneficiaries of public aid are subject to the collective will, which falls within the realm of politics.

Weinrib explicitly rejects this objection. The argument is that the state is under an *obligation* to reverse the subordination created by private law. Correlatively, the beneficiaries of redistributive schemes are not begging for charity, but rather exercising their *right* to be supported in the face of the systemic inequities they suffer. In contrast, interpersonal dependency is characterized by the fact that the person in need has no legitimate claim against another person and is therefore factually dependent on the goodwill of others. The state's duty to help the poor is in turn the mirror image of the right to be helped. Beneficiaries of redistribution are not subordinated to the state because the state is under an *obligation* to them and, therefore, cannot choose not to provide the necessary assistance.[16]

I will argue that the reasons Weinrib gives for rejecting the social dependence argument are unsound. Even assuming that state activity is highly regulated and constrained by the rule of law, and that the state has no other will than to promote public ends,[17] it is nevertheless problematic that determining the nature and extent of public support for those excluded by orthodox private law is an eminently political matter. As Weinrib explains in *The Idea of Private Law*:

> The choice of distributive program is therefore *political in its nature*. A distribution must distribute something and it must distribute it to particular persons according to a criterion that embodies a particular purpose, to be chosen from the many available purposes. Distributive justice implies that a political authority must define and particularize the scope or criterion of any scheme of distribution. The purpose of a specific distribution is not elaborated from within distributive justice, but must be authoritatively incorporated into the schedule of collective aims. Until then, this distribution is merely one of the inventory of possible distributions.[18]

15. See Hanoch Dagan, *Property: Values and Institutions* (Oxford University Press, 2011) at 65-66.
16. See Weinrib, *supra* note 1 at 108, 150.
17. *Ibid* at 108.
18. Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) at 211 [emphasis added].

https://doi.org/10.1017/cjlj.2025.10046 Published online by Cambridge University Press

In this sense, it is clear that the right to public assistance is correlative to a duty to merely seek *some redistribution* to alleviate the negative effects of orthodox private law. We can assume that whatever the nature of the programme implemented, at least the necessary means of subsistence must be provided. Of course, this does not have to be limited to biological subsistence. The notion of distributive justice used here is a formal one, not a substantive one, so the level of social provision could be much higher.[19] However, the extent of redistribution is decided in the political arena by the legislator and the various administrations.

In the real world, welfare programmes are the result of a compromise between different political forces, and they tend to vary with the vicissitudes of government dynamics. In democratic countries, the healthy alternation of rulers and policy makers implies that the fate of the destitute is subject to changing ideology. Redistributive policies are also highly conditioned by the availability of resources to finance the various programmes at any given time. Seen in this light, the danger of interpersonal dependency has not yet been averted. Those excluded by orthodox private law are dependent on the changing political mood in the community in terms of the type of assistance provided and the definition of the threshold for a decent life.

Weinrib himself concedes this to some extent, although his Kantian conception of politics is much more idealised.[20] But even in an idealised conception, politics does not determine a single answer to the problem of social exclusion and poverty. One of the possible outcomes is that the excluded are left without sufficient support, making the social contract *rationally unacceptable*. People could not consent to a set of private law rules that entails the risk that the aggregate of legitimate actions of others will deprive them of all freedom and suppress their capacity for self-determination.[21] Interpersonal dependence affects self-determination in a straightforward way, but so does social dependence because the person is subject to—anchored to—the whims of politics.

In contrast, redistributive private law rules tend to be far more stable. While it is widely acknowledged that most welfare programs are subject to the discretion of the current administration, private law rules demand a much deeper and broader political consensus for change. A review of the history of civil codes in continental law countries illustrates this point. Take the Civil Code of Argentina, for example: It was originally enacted in 1869, underwent a major reform in 1968, and was ultimately replaced in 2015. Despite these changes, which were well spaced in time, the evolution of its rules maintained a consistent direction, unlike the fluctuating nature of welfare programs in Argentina. This pattern is not unique to Argentina's legal experience. The reason for this stability is that lawmakers understand that private law cannot be frequently altered

19. See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009) at 284.
20. See Weinrib, *supra* note 1 at 111-13.
21. See Ripstein, *supra* note 19 at 273-75, 277, 286.

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without undermining its essential function of providing a fair and reliable framework for respectful interaction with others.

A second, and perhaps more important, aspect that should be emphasised is that dependence on state aid undermines the social bases of self-respect, which is one of the primary goods listed by Rawls in his theory of justice.[22] As is well known, primary goods are useful for any life plan, so every rational person would like to have a fair share of them. Self-respect has two important dimensions. The first is the person's sense of their own value, their conviction that their conception of the good and their personal projects are worth carrying out.[23] The second is the person's confidence in their ability to realise their intentions. Without self-respect, Rawls argues, everything becomes vain and empty. Self-respect in itself is not a primary good, but the social bases that make it possible are.[24]

To understand the relationship between social dependence and the social bases of self-respect, we should reflect on who, according to orthodox private law, are the recipients of redistributive aid. Basically, they are the losers of the acquisitive-cumulative competition, and also those who have never had a real opportunity to compete for the acquisition and accumulation of resources because they are descended from people who are already excluded by the normal functioning of private law. Although social mobility is not impossible, it is well known that it can be highly improbable.[25]

Be that as it may, becoming dependent on social welfare after being deprived of all means by the normal operation of orthodox private law brings with it an additional sense of incapacity or failure that is also socially perceived. Not only do those on welfare notice that they have lost in the acquisitive-cumulative competition with those with whom they have interacted, but others perceive this as well. An empirical study conducted some time ago in the United States confirmed something that is to be expected after a minimal exercise in empathy: Welfare recipients often suffer from anxiety and embarrassment when they apply for public assistance.[26] It is striking that even if the poor are exercising a right, sociologically it is *a right that no one exercises with pride*, but rather in the most surreptitious of ways.[27]

Furthermore, those who have been on welfare for a long time often suffer from depression and lack of hope for the future. They feel trapped by the welfare system. However, this is true not only for chronic benefit recipients. Most welfare recipients have the feeling of being doubly dependent. On one hand, they cannot help feeling that they are living at the expense of others; that they are dependent

22. See John Rawls, *Political Liberalism* (Columbia University Press, 1993) at 181.
23. See John Rawls, *A Theory of Justice* (Oxford University Press, 1999) at 386.
24. *Ibid*. See also Rawls, *supra* note 22 at 318-19.
25. On the well-known difficulties for social mobility, see "The Global Social Mobility Report 2020: Equality, Opportunity and a New Economic Imperative" (January 2020), online (pdf): *World Economic Forum* www3.weforum.org/docs/Global_Social_Mobility_Report.pdf.
26. See Mark R Rank, *Living on the Edge: The Realities of Welfare in America* (Columbia University Press, 1994) at 138-39.
27. Recipients of food stamps, for example, exchanged their stamps in a distant supermarket so as not to be seen by their neighbours. See *ibid* at 130, 138-39.

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on the money that comes from the taxes that other citizens pay. On the other hand, the aid granted is usually linked to the fulfilment of certain conditions that interfere with the beneficiaries' lives and thus with their autonomy. They must do exactly what is required of them when the public authorities say so.[28]

In addition, being on welfare is stigmatizing. The literature on poverty is forceful in this regard. In general, poor people are perceived as lacking motivation, skills, and good judgement, because it is assumed that their situation is largely a consequence of their bad decisions. This perception affects interpersonal relationships in very specific ways: Two-thirds of the interviewed stated that they were treated differently when it was known that they were welfare recipients.[29] Sometimes they were also victims of hostile attitudes. Unfortunately, this should not surprise us. Stereotypes permeate even those who are stereotyped: 90% of the interviewed had a negative opinion of the rest of their fellow benefit recipients.[30] They thought that their poverty was fundamentally due to their bad decisions and lack of effort, although they were much more self-indulgent. They attributed their own need to apply for social assistance to factors beyond their complete control, such as family problems, illnesses, and so on.[31]

All this should sound quite elementary, as it does not take much insight to realise that people who become mere recipients of social assistance financed by the contribution of the rest of the community lose their self-esteem. However, in defence of the orthodox view, it could be argued that these effects of the functioning of welfare systems are contingent, so the objection I am raising is not a principled one. We could design a better social welfare system that avoids stigmatization, for example, by introducing very discreet application procedures and transfer mechanisms. On the other hand, private law rules can also be stigmatizing when the spotlight is on vulnerable groups, such as women, the elderly, low-income individuals, people with disabilities, illiterate consumers, and so on.[32]

As for the first counterargument, the features of welfare systems are contingent indeed, but universally invariable. The most important aspect of the objection, however, is that orthodox private law, which regularly excludes and creates poverty, condemns the most disadvantaged to a *passive role* in a scheme of social cooperation that is deeply divisive. On one side are those who earn their own living and contribute to society as taxpayers, while on the other are those who receive assistance from the common pool. That the benefits of public programmes are a right and not an exercise in collective charity is little consolation to those who depend on them, as they are deprived of the leading role in their own

28. See *ibid* at 130-31, 135.
29. *Ibid* at 137.
30. *Ibid* at 142.
31. See *ibid* at 128-30, 142.
32. For an analysis of this problem in consumer law, see María Guadalupe Martínez Alles, "Reducing inequality in consumer transactions: the significance of aggravated vulnerabilities" in Kevin E Davis & Mariana Pargendler, eds, *Legal Heterodoxy in the Global South* (Cambridge University Press, 2025) ch 3.

https://doi.org/10.1017/cjlj.2025.10046 Published online by Cambridge University Press

lives. Consequently, the parties in the original position would seek to avoid—at all costs—the social conditions that lead to the loss of self-respect.[33]

Regarding the second counterargument, private law can certainly be stigmatizing. However, most rules that currently perform redistributive functions in various legal systems are not. Higher standards of care, duties to provide full information to consumers, non-disclaimable warranties in sales contracts or leases, and strict liabilities, among others, do not convey any negative or demeaning messages. They seem to merely establish fair terms of interaction among equals in specific contexts, and the redistribution operates subtly enough to avoid stigmatization.

In sum, I believe Weinrib's story is only reasonably plausible under a very rudimentary concept of poverty that neglects the complexity of its various dimensions. True, the definition of poverty is a source of great controversy. Government programmes take different conceptions of poverty as a starting point for setting their targets, developing their policies, and evaluating their success.[34] The specialized literature also suffers from the same deficiency. There is no consensus on what poverty is and how to measure it.[35] However, we can agree that the lack of certain basic goods, such as food and housing, does not exhaust the relevant concept of poverty.[36]

Indeed, material deprivation is *only one* of the dimensions of poverty. If we want to approach the problem from an economic point of view, we should focus on the lack of those goods that are necessary to achieve a certain standard of living which is socially defined as 'decent'. But poverty also has a moral dimension of crucial importance, related to the social bases of self-respect. To the extent that redistributive programmes and social assistance are unable to guarantee the social bases of self-respect for the poor, any "social policy that fails to take into account the moral dimension of poverty runs the risk of failure."[37]

If my argument is sound so far, it means that orthodox private law should be rejected in favour of a private law system that incorporates distributive considerations to prevent social exclusion as far as possible.[38] From the Kantian perspective, the problem with this suggestion is perhaps that it is inconsistent with an essential feature of the state of nature that should be preserved in the civil condition.

4. The state of nature

In the state of nature, persons are inviolable. Their actions can be constrained only by the rights (not the needs or the will) of others. Since, to use

33. See Rawls, *supra* note 22 at 318; Rawls, *supra* note 23 at 386.
34. See William K Bellinger, *The Economic Analysis of Public Policy* (Routledge, 2007) at ch 14.
35. See e.g. Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford University Press, 1981) at ch 2.
36. *Ibid.*
37. Paulette Dieterlen, *Poverty: A Philosophical Approach* (Brill, 2005) at 39.
38. For the many ways in which private law can contribute to distributive goals, see Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate, 2007).

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Ripstein's aphorism, no person is in charge of another, "you can never require another person to do anything for you."[39] In the state of nature, Cleo could take all the apples on the tree, driving Olympia to starvation, but this does not violate any of Olympia's rights. Cleo cannot be constrained by Olympia's will or interests. This normative conception of how persons stand with regard to one another should not change in the civil condition. Restrictions on freedom merely for the benefit of others are therefore not warranted.

Nevertheless, I consider Weinrib's description of the state of nature normatively implausible. Certainly, the fact that Olympia will starve to death if Cleo takes all the apples from the tree, combined with the fact that Cleo cannot eat all the apples before they rot, is a reason not to take them. In the absence of other countervailing reasons, it is an undefeated reason. If Cleo takes all the apples, she worsens Olympia's factual situation without benefiting herself. This is an unreasonable action. In fact, relying on Kantian tenets, it can be argued that the disproportionate appropriation of scarce resources violates the categorical imperative, since it is not an exercise of liberty available to all.[40] So, if Cleo takes all the apples, she would be doing something *wrong*. And if it is wrong, it is surely *because* of the dire consequences her actions will have on Olympia's well-being.[41] I am not claiming that any action that adversely affects another person's well-being is a wrong to that person. Not all interests are protected with rights, or to the same extent. Olympia's right not to be left without resources merely for the pleasure of it is based on the protection of her well-being. Once we assert Olympia's right, Cleo's action is a wrong to Olympia if, and only if, it violates her right.

Therefore, just as Olympia has an innate right to her body that prevents Cleo from touching her without consent, I think it is reasonable to extend that right to actions that bring about her death. Denying this seems entirely inconsistent with Olympia's innate right to freedom. And if Olympia has this right, then Cleo has a duty not to bring about her death. Consequently, by taking all the apples from the tree, Cleo wrongs Olympia. This does not mean that Cleo may only take the apples she needs to survive or that she cannot take more than the number left for others.[42] Rather, the point is that even in the state of nature, *respectful coexistence* requires more than not touching others without consent.

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39. Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016) at 33.

40. See Pablo Gilabert, "Kant and the Claims of the Poor" (2010) 81:2 Philosophy & Phenomenological Research 382 at 407-08; Hillel Steiner, "Corrective Rights" in Mark McBride, ed, *New Essays on the Nature of Rights* (Hart, 2017) 215 at 225. See also Immanuel Kant, *Groundwork of the Metaphysics of Morals*, revised ed by Mary Gregor & Jens Timmerman (Cambridge University Press, 1998) at 31 [4:420-21].

41. See Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, 1994) at 259.

42. In this sense, the argument is less demanding than the famous Lockean proviso for legitimate acquisition, according to which the acquirer must ensure that "there is enough, and as good, left in common for others." John Locke, *Second Treatise of Government*, ed by CB MacPherson (Hackett, 1980) at 19.

https://doi.org/10.1017/cjlj.2025.10046 Published online by Cambridge University Press

If the scope of freedom of action is already limited in the state of nature, rights may be restricted in the civil condition if a more robust version of the right would cause social harm, i.e., exclusion and social dependence of the most disadvantaged.

5. The limited role of distributive justice

Another important issue is the minor role Weinrib assigns to distributive justice. As in the civil condition the new private rights create the possibility of systematic dependence, private law cannot be legitimate unless distributive justice institutions prevent subordination. Now, I wonder how other redistributive actions can be justified. If a child born blind cannot care for themself, arguably they deserve some kind of assistance to assure their independence. But their subordination is not a systematic consequence of private law. It is a natural misfortune. Why does distributive justice give the child any claim against the state?

True, the state must guarantee the independence of all. But in the Kantian picture, the state starts by implementing a strong set of private rights, and only then introduces distributive justice *to mitigate the detrimental effects of their normal operation*. At this point, it is not clear how the Kantian view could extend the scope of distributive justice to fit conventional wisdom and our current practices in all liberal societies, which recognize the legitimacy of distributive justice institutions beyond the need to reverse the subordination created by private law. The description of the state of nature, where nothing can be demanded of anyone for the benefit of others, entails that no taxation is warranted if not (1) to finance public institutions that determine and enforce private law, and (2) to implement redistributive mechanisms to address the dependences *created by private law itself*.

This shows that the Kantian picture drawn by Weinrib is not committed to mitigating poverty in general, but only to mitigating poverty arising from private law, which again shows a narrow understanding of poverty and why it is a social problem, regardless of its source.

6. The distributive character of private law

Finally, I would like to discuss how private law rules can include distributive considerations if, as Weinrib rightly points out, these are not correlatively structured.[43] First, it is worth noting that the design of a private law system requires a variety of choices. In tort law, for example, we must decide whether fault or strict liability applies to different activities; what events qualify as legally recognized harm; what standard of care applies in each situation; what defences are allowed; what the consequences of a successful defence are; how the scope of liability is

43. See Weinrib, *supra* note 1 at 159.

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defined; how liability is apportioned among various tortfeasors; whether vicarious liability applies in certain cases; and what remedies are available, among other things. Each of these decisions presents multiple alternatives. The orthodox view maintains that any configuration consistent with interpersonal justice must preserve *formal equality* between the parties; however, other scholars disagree, and argue that interpersonal (or relational) justice requires reciprocal respect for self-determination and *substantive equality*.[44] Beyond this debate, it is crucial to note that alternative configurations of private law also bring about different distributive and social effects. Each of the possible rules distributes rights and duties between the parties, and the operation of these rules leads to a regular redistribution of income over time. Consider, for instance, a rule that imposes a duty to provide full information to consumers of financial services. This rule might be required by substantive equality—and I believe it is—but it also implicitly transfers resources from one party to the other, as consumers receive information for free that would cost money in the absence of the rule. The rule predictably and measurably changes the distributive pattern over time. That said, the fact that this and *all* private law rules have significant distributive effects does not prevent them from generating relationships mediated by correlative rights and duties.[45]

Given this, does it really make sense to claim that distributive concerns are excluded from the debate? On what basis should we decide the relevant rule when we are asked to ignore one of the most important implications of the decision at hand? I am not suggesting that the only relevant considerations are distributive. Other considerations may be crucial. My point is that distributive considerations cannot be disregarded without a compelling reason that outweighs them. Of course, the fact that a redistributive private law rule is incompatible with reciprocal self-determination and substantive equality *can be* such a reason in certain cases. Distributive considerations are not indefeasible, though they are always pertinent. As many authors have shown, the argument can be supported by a theoretical reconstruction according to which private law is part of the basic structure of society and thus the proper object of distributive justice.[46] Unfortunately, I do not have enough space here to develop this idea.

Weinrib, of course, rejects this interpretation. All the previously mentioned choices are a logical consequence of the fact that "corrective justice is necessarily indeterminate."[47] But this determination cannot include distributive justice considerations because they do not fit the bilateral, one-to-one structure of the relationship between the parties. According to this view, the determination of corrective justice "involves specifying the meaning of corrective justice for a

44. See e.g. Hanoch Dagan & Avihay Dorfman, *Relational Justice: A Theory of Private Law* (Oxford University Press, 2024) at 39ff.
45. See Steiner, *supra* note 40 at 226-27.
46. See Kevin A Kordana & David H Tabachnick, "Rawls and Contract Law" (2005) 73:3 Geo Wash L Rev 598; Samuel Scheffler, "Distributive Justice, the Basic Structure and the Place of Private Law" (2015) 35:2 Oxford J Leg Stud 213; Gregory C Keating, *Reasonableness and Risk: Right and Responsibility in the Law of Torts* (Oxford University Press, 2022) at 81-83.
47. Weinrib, *supra* note 1 at 17.

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given legal relationship in which the parties are viewed as the correlatively situated with respect to a supposed injustice as between them."[48]

But how can we determine the rights that parties have in their relationship just by looking at their relationship? Concepts such as innate right or human dignity will not suffice, not only because they are too vague for this purpose, but also because they only take us back to the ideas that the freedom of each person must co-exist with the freedom of all others, and that every person should be treated as being of intrinsic worth.[49] Since corrective justice is essentially indeterminate, it is not surprising that recourse to one of its basic concepts (innate right) is not helpful in determining it. In my view, the suggestion that concepts such as human dignity or reciprocal freedom is all we need to determine the content of private rights hides the political nature of the choice we face as a society.

Perhaps Weinrib's rejection of the distributive character of private law assumes that what is being suggested is that *litigation* is a way to advance goals of distributive justice *on a case-by-case basis*. According to Weinrib, courts "deal with justice between the parties rather than with distributive issues requiring political decision."[50] The limitations inherent in the judicial process, confined to the facts of the case at hand, make private law adjudication ill-suited to promoting distributive justice.[51]

I agree with Weinrib. In private law litigation, courts *mostly* do corrective justice. Distributive justice is applied, among other considerations, at the legislative stage, where private rights are established to govern private interactions. When there is a legal gap, a normative inconsistency, or a conceptual indeterminacy that needs to be addressed, then courts are compelled to create new law to decide the case, just as the legislator does. In doing so, judges should consider the distributive effects of their ruling, for the same reasons as before. There is nothing odd in claiming that corrective justice is the norm that requires agents to treat each other with respect, fulfilling the duties that are correlative to the other party's rights, and at the same that the content of these rights—as with any right—depends on public considerations, which include (but are not limited to) the social and distributive effects of the system of rights that the courts will enforce. In a routine case, then, judges assert the rights of the parties, and the only relevant grounds are those relating to what one has done and the other has suffered in the interaction.[52] But when the legal material runs out, distributive considerations, among others, come into play to create new rules. This creation is logically necessary for the internal consistency of the reasoning that grounds the decision in those cases. Of course, those rules do not become private law rules unless they are followed by other judges in the future, but this is another matter.

Let me conclude this section by noting that the judicial exercise of distributive justice is not subject to the same scarcity constraints as redistribution by public

48. *Ibid* at 111.
49. *Ibid* at 121-22.
50. *Ibid* at 74.
51. *Ibid* at 112, 152.
52. *Ibid* at 10-11. See also Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012) at 16; Weinrib, *supra* note 18 at 63-66.

https://doi.org/10.1017/cjlj.2025.10046 Published online by Cambridge University Press

institutions. Indeed, crafting rules that prevent social inequalities or promote fairness through the aggregate of private interactions does not imply shifting tax money to the disadvantaged, but rather giving them more freedom and protection from private abuse. This does not require special funding from the state. The same is true for private law rules created at the legislative stage. Private law's distribution of rights and its silent *re*distribution of resources contributes to a more stable social background, against which people can engage in a variety of respectful (hence, peaceful), productive, and mutually beneficial exchanges, relationships, and shared experiences, without which the freedom and ultimately the quality of life of all persons would be severely limited.

7. Final remarks

In this final section, I would like to complete the argument presented above. Poverty is too complex a phenomenon to be addressed only through redistributive mechanisms that are external to private law. This solution would be problematic for two reasons: (1) it is doubtful that social welfare programmes can be fully effective without the contribution of private law to poverty reduction; and (2) it is unacceptable as a matter of principle.

As for the effectiveness of redistribution in improving the situation of poor people, it does not depend only on the alignment of other public law rules, such as tax law, with the redistributive goals. It also depends on the consistency of private law rules with the maintenance of a fair background of social justice. It is naïve to believe that redistributive public policies can be effective if they are not accompanied by private law rules that are concerned with distribution. If Cleo receives a benefit—let us say a minimum income because of her poverty—but the rules of contract law allow Olympia to impose unfair conditions on Cleo, a significant part of that subsidy would end up directly in Olympia's pockets. The benefits of the redistributive policy would inevitably be diluted, and the final distribution of resources would be regressive. The subsidy can only be effective if the rules of private law impose certain limits on, among other things, freedom of contract. Subordination can hardly be prevented by public law redistribution alone. Independence requires a greater restriction of private rights, especially with regard to property and contractual powers. Independence is better served by preventing private law from causing social harm than by allowing any distribution to come up and then relying on public law to (belatedly and imperfectly) mitigate that harm.

But the orthodox view of poverty is also unacceptable, because it fails the social contract test. Under ideal deliberative conditions, orthodox private law would be rejected as a means of regulating interactions between free and equal persons. Much more plausible is a private law system that incorporates distributive considerations in determining the rights of the parties to prevent poverty by developing a framework of interaction that makes systematic dependence less likely. As we saw in the last section, unlike social welfare programmes, redistribution in private law is tacit, silent, or discreet, through implicit transfers. This has the enormous advantage that rules of this kind do not entail stigmatization and therefore do not trigger anxiety or attach shame.

https://doi.org/10.1017/cjlj.2025.10046 Published online by Cambridge University Press

If the arguments I have put forward are convincing, then *ex post* redistributive mitigation of poverty through public law mechanisms does not justify orthodox private law that puts the weakest at the mercy of the privileged. This would be tantamount to expecting those impoverished by orthodox private law to accept their social subordination so that the rest of the citizens can enjoy a system of robust private rights that allows for the unlimited appropriation of scarce resources. As noted earlier, the prospects of ending up in a position of dependency preclude this institutional arrangement from being acceptable under ideal conditions. More than that, it is paradoxical—and therefore dubious as the best representation of Kantian thought—that the suggestion of orthodox private law shares the structure of consequentialist reasoning: A minority given by the least advantaged members of society is sacrificed for the greater benefit of the rest.

In this sense, social welfare programmes are not enough to prevent the instrumentalization of the most unfortunate. Between eliminating all assistance to the poor and providing only redistributive assistance through public law policies, the first option is certainly the worst, but both alternatives are far from ideal. Only if we properly understand the phenomenon of poverty can we see why an adequate social response cannot be based exclusively on public law mechanisms. The capacity of private law to promote equality should be taken into account by policy makers. This means paying attention to the distributive and redistributive consequences of private law rules and the ways in which their norms promote or, on the contrary, undermine the prospects of the most disadvantaged or stigmatized groups. The possible symbolic effects of private law institutions and court decisions also play a role in this regard. The fact that a different design of private law is likely to improve the *status quo* is a reason to implement it, and it would be a mistake to exclude it from shaping public policy without further argument than the almost dogmatic insistence that private law is exhausted in terms of achieving corrective justice.

In short, a society that ignores the phenomenon of poverty, caused in part by its public and private law institutions, is manifestly unjust to those affected. Social welfare programmes are essential to alleviate the situation of the worst off. However, I have tried to show why this cannot be the only response of the state. Given that social assistance still entails a kind of social subordination and—depending on the context—different degrees of stigmatization, the public law solution remains suboptimal on its own, and is therefore rationally unacceptable as an institutional arrangement between free and equal persons who want to form a community—a civil society—in perpetuity.[53]

Acknowledgements: With the support of Research Project PID2023-152057NB-I00, Ministry of Science and Innovation (Spain). I am grateful to Felipe Jiménez, Gregory Keating, Henry Reyes Garcés, and the anonymous reviewer for their thoughtful comments.

53. See Immanuel Kant, *The Metaphysics of Morals*, translated & ed by Mary Gregor (Cambridge University Press, 1996) at 136 [6:326].

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https://doi.org/10.1017/cjlj.2025.10046 Published online by Cambridge University Press