

Symposium: *Reciprocal Freedom*

Abstraction and Determination in Weinrib's *Reciprocal Freedom*: The Dynamics of Backward-Looking and Forward-Looking Deliberation in Judging

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Abstract

The recognition of the particular in law is crucial, and any good lawyer or judge should be able to correctly establish the potential instantiation of the abstract into the particular. This is the arduous task of the so-called ‘determination’. In his influential new book, *Reciprocal Freedom*, Ernest Weinrib elucidates the dynamic relationship of transforming the abstract into a determination. As is usual in his writings, Weinrib shows a perceptive, nuanced, and insightful position on the nature of private law. Nevertheless, I maintain that determination can only occur through the application of practical reason—a deliberative process that aligns with the valuable and the good, rather than solely focussing on the right and the dutiful. In grappling with Weinrib’s masterful work, I thus argue that the fundamental premise of his view is ‘the separation of rights and values’, and I aim to debunk this presupposition.

Keywords: *Weinrib; determination; rights; values; practical reason; Aristotle; corrective justice; private law theory; legal abstraction; particularity*

In the first chapter of *Reciprocal Freedom*, Weinrib expands on his conception of the internal structure of private law.¹ In his earlier work, *The Idea of Private Law*, Weinrib tells us that the Kantian correlativity thesis of rights and duties provides the ultimate normative structure of private law,² and therefore it is mirrored in doctrinal concepts—for example, duty of care, objective standard, remoteness of damage, and causation.³ The equality of corrective justice is the abstract equality of two persons *whose free will is presupposed*.

According to Weinrib, self-determining agency—namely, agency that reflects our capacity to choose our ends and deliberate on the means to achieve our ends—has a juridical manifestation which is the concept of ‘right’. ‘Right’ abstracts from

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

2. See Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, 2012) at 19.

3. *Ibid* at 11-12.

the *particular circumstances of the agent*.⁴ Law is a manifestation⁵ or embodiment⁶ of this normative structure.

According to the Kantian conception of external freedom, interaction between persons requires that the free choice of one person must be capable of coexisting with the freedom of another.⁷ The formal relation of will-to-will becomes the framework of correlativity of rights and duties. Weinrib extends this framework from contract, property, and criminal law to the law of tort, and he reaffirms that the nature of these acts is “externally recognizable” and *that motivation and internal practical reason play no role*.⁸

The Idea of Private Law establishes clearly the nature of the abstract correlativity and structural form that constitutes private law. In the first chapter of *Reciprocal Freedom*, Weinrib not only expands on the abstract correlativity of legal relationships but also delves into one of the most challenging and contentious aspects of the structural nature of private law: corrective justice. This chapter explains how we can make determinations from abstraction, and consequently, how judges can concretize the abstract structure of private law.

Weinrib asserts that there is one key move in our abstract understanding, one concept that is ‘higher’ than others, so to speak. This concept is the abstraction from the normative and institutional content, including doctrinal ideas, to arrive at the relationship of correlativity between the two parties in private law: the respective rights and duties. Thus, ‘correlativity’ is “*the barest . . . abstraction*.”⁹ This implies a bidirectional relationship between doctrinal and institutional concepts and the abstract relationship, as well as between the abstract relationship and the understanding that the doctrinal and institutional concepts are the concretization or realisation of this abstract relationship. The abstraction originates from the content of the legal relationship.¹⁰ This means that the abstraction is normative, as it defines the specific character of the interaction in terms of private law, separating the normativity of private law from other normativity, e.g., normativity of morality. Weinrib tells us:

In abstracting to correlativity as the structural idea underlying the private law relationship, corrective justice merely extends the tendency to abstraction that marks the activity of thinking within private law. Although the events that give rise to a private law relationship are particular—John Doe did such and such to Richard Roe—lawyers understand these events in terms (such as tort law’s

4. *Ibid* at 81.

5. *Ibid* at xvi.

6. *Ibid* at 104.

7. See Immanuel Kant, *The Metaphysics of Morals*, ed by Lara Denis, translated by Mary Gregor (Cambridge University Press, 2017) at 34-35 (6:237-38).

8. Weinrib, *supra* note 2 at 104. Weinrib points out: “Interaction between free wills engages the external aspect of practical reason, which requires that each actor treat the other’s personal and proprietary embodiments in a manner that does not violate their *formal equality* as free wills.” *Ibid* [emphasis added].

9. Weinrib, *supra* note 1 at 4 [emphasis added].

10. *Ibid* at 5.

notions of cause, duty of care, and fault) that abstract from the particularity of the occurrence.¹¹

The recognition of the particular is crucial, and any good lawyer and judge should be able to correctly establish the potential instantiation of the abstract into the particular. This is the task of the so-called 'determination'. We now need an explanation of how this is possible. According to Weinrib, the dynamic relationship of making the abstract a determination is through two different forms. First, the "determination may instantiate the abstraction *under which it falls and to which it is accordingly subordinate*."¹² The second form occurs when the particular or determination is part of a larger set of abstractions. For example, to determine whether the defendant has exposed the plaintiff to unreasonable risks, we need to resort to other abstractions—that is, duty of care, proximate cause, and factual cause.¹³ In both cases, "*the determinations specify the abstractions, and the abstractions regulate the determinations*."¹⁴

My worry, however, is that these two forms of explaining the dynamic between abstraction and determination emulate theoretical reasoning too closely, rather than genuine practical judgement or practical reasoning.

Engaging with particulars as acts of instantiations raises questions about where the exercise of practical reason lies and how it differs from a theoretical deduction process of general laws or abstract concepts to particulars. For example, my parrot, Panchita, is an instantiation of the concept 'parrot', and I do not need practical reason to determine this. Additionally, we can locate the concept 'parrot' within more abstract concepts, similar to the concept 'bird', which in turn can be found within a more abstract concept, namely 'animal'. In the example, the interplay of determination and abstraction operates through my engagement with theoretical concepts such as 'parrot', 'bird', and 'animal'.

But there is a substantive and normative difference between our engagement with theoretical judgements and the way we exercise practical deliberation and judgement—either in the forward-looking perspective, i.e., when, as a citizen or judge, we are trying to answer the question of 'What shall I do?'; or in the backward-looking perspective, when we are trying to determine the correlativity relationship, i.e., the right that has been violated and the corresponding duty of the defendant.

I will argue that determination can only be achieved through practical reason, which necessitates forward-looking deliberation. This deliberation focuses on what is valuable and good, rather than solely on what is right and dutiful. I will demonstrate this in an indirect manner by arguing that the fundamental premise of Weinrib's view in *Reciprocal Freedom* is 'the separation of rights and values'.

I aim to debunk this presupposition and argue, first, that both citizens and judges need to grasp the values embedded in the law in our 'doing' and in

11. *Ibid.*

12. *Ibid.* [emphasis added].

13. *Ibid.* at 6.

14. *Ibid.* [emphasis added].

our engagement with the law. This does not imply that these values are external, nor does it render the internal logic of private law unintelligible. Second, I will show that, when viewed from the forward-looking perspective of the citizen or the judge, there is no stark separation of rights and values. When engaging in decisions, judges attribute liability based on the plaintiff's rights and the defendant's duties; they take the backward-looking standpoint. However, in private law, judges advance values that play the role of proleptic thoughts, i.e., descriptions and re-descriptions of values, in the practical reasoning of the citizens.¹⁵ In this way, the interplay between determination and abstraction takes on a truly practical character; that is, the judge must comprehend how the particular embodies the good and what is valuable in order to guide the citizens' actions in a forward-looking manner. On the other hand, the judge must also use these descriptions of value to ascertain the content and nature of the legal relationship, especially the rights and duties involved in the attribution of liability in private law, which in turn informs the judges' backward-looking reasoning.

Let me explain. From a backward-looking perspective, the judge attributes the actions and the resulting suffering to the plaintiff's rights and the defendant's duties. In this attribution, the judge utilizes a wide range of doctrinal concepts to assign liability in cases of negligence. However, as an agent who has not yet caused the injury or damage, the citizen faces the question, 'What shall I do?' Citizens must determine the answer to this question before taking action. Consequently, they engage with substandard or narrow deliberation, but also with aspirational deliberation. If the Aristotelian model of deliberation is sound, then from the forward-looking standpoint, citizens cannot grasp the values of their actions, cannot determine the *what* in terms of the *how*, and cannot avoid or recognize an aspirational point *unless* they determine the basic components of their action, i.e., features 'a₁' and 'a₂' as components of 'a', 'b₁' and 'b₂' as components of 'b', 'a' and 'b' to achieve 'X', and finally, 'X' in order to achieve the end, 'Y'.¹⁶ One must also transform one's emotions and desires in light of one's descriptions and thoughts about the indeterminate aim or end of 'living well'. I contend that the judge and citizen do not present the forward-looking viewpoint of one's action and potential avoidance of harm or injury as an abstract right, duty, principle, or rule. However, this does not preclude formulating it as such, but rather necessitates settling the question, 'What shall I do?' first. This means that there is an internal logic in private law, but it is neither reductive nor closed. From a backward-looking perspective, the judge will consider values that only the forward-looking perspective can learn and grasp. This new understanding of

15. For an exposition of proleptic blame and thoughts, see Bernard Williams, "Internal reasons and the obscurity of blame" in *Making sense of humanity and other philosophical papers* (Cambridge University Press, 1995) 35. See also Verónica Rodríguez-Blanco, *Responsibility for Negligence in Ethics and Law: Aspiration, Perspectives, and Civic Maturity* (Oxford University Press, 2025) at ch 9.

16. For a complete explanation of this point, see Verónica Rodríguez-Blanco, "Ways to Inhabit the Deliberative-Aspirational Point of View: Practical Reason and Objective Goods" (2022) 67:2 *Am J Juris* 293.

values will enhance the application of doctrinal concepts in the backward-looking perspective, while also contributing to the determination of the abstract correlativity of the legal relationship. To illustrate this, let us analyse a landmark case of negligence law.

In the case of *Donoghue v. Stevenson*,¹⁷ Mrs. May Donoghue went to a café where her friend ordered an ice-cream and a bottle of ginger beer. They were supplied by the shopkeeper who poured the ginger beer over the ice-cream. Mrs. Donoghue ate part of the ice-cream and, as she finished pouring the rest of the ginger beer, a decomposed snail floated out of the bottle. As a result of consuming part of the liquid, Mrs. Donoghue contracted a serious illness. The bottle was dark glass, so its contents could not have been determined by inspection. Mrs. Donoghue initiated an action for negligence against the manufacturer, who had produced a drink for the general consumption of the public. The presence of the snail rendered the product dangerous and harmful, and the plaintiff alleged that it was the duty of the manufacturer to avoid producing harmful and dangerous products.

The facts and circumstances of the case provide a concrete particularity to the value of physical integrity. The aim of the judges' reasoning is to determine the specific content of the plaintiff's rights, but they also have a forward-looking perspective. If their decision is to guide the citizens, the judges must advance values manifested in particularities and must be provided with appealing descriptions of values for the guidance of the citizens' actions.

In *Donoghue v. Stevenson*, Lord Atkin states:

But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—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*.¹⁸

In these passages, Lord Atkin is stating that there is a duty to avoid acts or omissions which would likely harm others, to the extent that "I ought reasonably to have them in contemplation." Lord Atkin establishes a general principle that "you must not injure your neighbour." This doctrinal duty is abstract. However, the specific circumstances and facts of the case, as well as the judge's descriptions and re-descriptions, give it a unique particularity and determination. As agents, the judges apply their knowledge and grasp of values to guide the citizen (as Lord

17. *Donoghue v Stevenson*, [1932] UKHL 100, [1932] AC 562.

18. *Ibid* at 580 [emphasis added].

Atkin states in the cited text, “*I am directing my mind to the acts or omissions which are called in question*”). In order to provide guidance to the citizen, the judge engages in the question, ‘What shall I do?’. Simultaneously, the judge must examine the case’s correlative legal relationship to ascertain the violation of the plaintiff’s right and the breach of the defendant’s duty. These attributions are sound and possible only if the judge understands the values at stake and can grasp their complexity from a forward-looking perspective.

Lord Atkin re-describes the facts of the case and the values at stake. The judge presents the realisability of specific values as a description from the forward-looking perspective of the citizen. The judge asks the citizen manufacturing a drink to consider the value of attentiveness and care in producing an article of food. This is articulated as follows:

A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House.¹⁹

The issue is now not only between Mr. Stevenson, the manufacturer, and Mrs. Donoghue, but between *any* manufacturer and *any* consumer. We ask the manufacturer to take into account the consumer’s inability to inspect the bottle before purchasing it. The attribution is based on the consumer’s rights and the manufacturer’s duty, but the engagement, realisability, and determination of these abstract rights and duties are based on values, necessitating sound deliberation and the exercise of judges’ and citizens’ practical reasoning.

One could argue that the concepts of rights and duties hold significant power and appeal within the framework of corrective justice. Furthermore, as Rawls demonstrated, the right is prior to the good.²⁰

Kant’s external freedom establishes the constraints and the normative force of our deliberations and conduct. The attention is not on our wrongful conduct but on the wrong committed to others, i.e., undermining others’ equality and autonomy. Weinrib concentrates on the backward-looking perspective of juridical thinking, which attributes liability for the wrongs committed.²¹ The normative justification is the defendant’s autonomy, and we do not need to establish the content of the deprived victim’s autonomous choice. Similar to right and duty, we abstract the notion of autonomy from the citizens, their values, their deliberations, and their response to the question, ‘What shall I do?’. Corrective justice

19. *Ibid* at 582.

20. See e.g. John Rawls, *A Theory of Justice* (Belknap Press, 1971) at 563.

21. See Weinrib, *supra* note 2 and the text accompanying *supra* note 9.

theorists give prevalence to juridical thinking and adhere to the separation of values and rights.

However, let us reconsider—through the lens of practical reasoning—how citizens engage with their rights and duties, and how they exercise autonomy in their actions. As agents, citizens engage in various activities, and their actions are characterized by their ability to deliberate from both narrow and aspirational perspectives. At first glance, it may appear that activities solely require technical or craft skills, with the standard of excellence being external to them. For example, the doctor cures the patient's cancer according to the external standard of a healthy body. Doctors take as their aim the elimination of the cancer cells from the patient's body. The external standard determines the success of their enterprise. By contrast, arguably, ethical deliberation requires an internal standard. The aims of 'living well' are indeterminate for the agent, and engagement with different values involves grasping the different aspects of specific values in particular circumstances. For instance, consider the case of a mother named Beatrice. She aims to discuss her daughter's physical health as well as the elusive concept of 'living well'. Beatrice engages with a variety of values, such as the need to practice a physical activity that develops harmony of mind and body while de-emphasising competitiveness. After deliberating and reflecting on whether gymnastics or ballet classes would be more beneficial for her daughter, Beatrice has gained a deeper understanding of the importance of her daughter's physical and spiritual health.

Values underpin both Beatrice's and the doctor's activities. The doctor's activity is a craft, and the standard of excellence is external. In Beatrice's example, she is actively engaged in living well and being a good mother, and the standard is indeterminate and internal to her actions and deliberations. But this contrast might seem artificial. The doctor also aspires to lead a fulfilling life, and becoming a good doctor is closely linked to becoming a good human being. To be a good doctor, they must also cultivate ethical virtues and values such as patience, compassion for their patients, and humility.

When we engage with ethical deliberation, we strive to identify the character and right description of each value, as well as its role in shaping the indeterminate aim of 'living well'. At first glance, rights and duties operate differently. Their character is adversarial. When I assert my right to respect for my security and my physical integrity, I am positing myself against another person. Citizens position themselves against other citizens within a political community: They demand respect for their rights, and private law's role is to uphold these basic rights, such as security and personal integrity. Similarly, if your actions result in an injury to me, for example, you have breached your duty of care towards me, and I have the right to seek a correction or reparation for the wrong caused. However, this description of the events—the doing, the injury, and the suffering—is abstract from the agent's deliberative- and forward-looking perspectives.

Let us return to the agent's forward-looking perspective, where they engage in activities rooted in values. Upon first examination, this engagement differs from the backward-looking perspective of the judge, who attributes legal liability

based on the grounding of rights and duties. Let us examine one key example to illuminate this point.

Example: The conductor of an orchestra

Let us imagine that you are a conductor of an orchestra and engage in settling the question, ‘What shall I do?’ in the context of preparing the orchestra for the next concert. While there is an external standard of excellence in musical performance, cultivating ethical values is also necessary to achieve the desired outcome of a good performance. For instance, the conductor must adapt daily practices to suit the needs and personalities of the musicians, occasionally relaxing the rigour to foster an imaginative understanding of the piece. Similarly, the conductor must see each musician as a person and try to respect their individuality and capacities. However, the conductor does not contemplate the rights of the performers, but rather engages and deliberates with the respective values—such as ethical and aesthetic values—in a way that manifests the grounding of the relationship as rights and duties in every action. This implies that the experiences and the temporal nature of the deliberation, both at the individual and at the collective level, shape the content of the performers’ rights and duties. The conductor does not respect the rights of the musicians in *the abstract*. The realisability of these rights and the adequate performance of the conductor’s duties are due to the conductor’s grasping the values, including the value of personhood, when the conductor aims to answer the question ‘What shall I do?’ and engages in substandard and aspirational deliberations.²²

The example illustrates my key point: The backward-looking perspective is in continuity with the forward-looking perspective. The specific values in the particular circumstances of the action provide the content for the realisation of rights and duties. Therefore, the forward-looking perspective regarding the deliberation of values takes precedence over the foundational and abstract notions of rights and duties.

Thus far, I have defended the idea of establishing rights and duties, the substance of which is determined by the agent’s deliberation. In essence, I propose that rights and duties are empty and formal. However, the agents’ deliberation process determines their realisability and manifestation. Rights and duties operate as a grounding at the abstract level, which is why they play a key role for judges, lawyers, and legal practitioners at the moment of adjudication. However, this does not imply that values and deliberation do not play a role in delineating the shape of our responsibilities and legal liabilities. Attributions of responsibility aim not only to correct the wrong but also to engage citizens in *recognizing potential wrongful conduct and avoiding it*. Liability judgements in law are

22. For a similar approach that aims to show how we might be able to combine the Kantian requirement of the categorical imperative as constraint of our intentional actions and practical reasoning, see Veronica Rodríguez-Blanco, “Dworkin’s Dignity Under the Lens of the Magician of Königsberg” in Salman Khurshid, Lokendra Malik & Veronica Rodríguez-Blanco, eds, *Dignity in the Legal and Political Philosophy of Ronald Dworkin* (Oxford University Press, 2018) ch 9.

not only a reaction to and protest against the injurer's actions or the plaintiff's actions, but they also serve as a warning and a guidance to future agents and citizens about engaging in activities that inherently involve values. These values also acquire content from agents' experiences and deliberation.

Now, the question arises as to how the law can integrate into the practical reasoning of agents and contribute to a forward-looking perspective. I have argued that the decisions of courts in private law mirror these complex, evolving values. In addition to mirroring the attributive juridical thinking of judges, lawyers, and legal practitioners, court decisions also advance *proleptic* thoughts as forms of value descriptions and re-descriptions, thereby engaging citizens in practical reasoning and recognizing an aspirational-deliberative perspective.

I argue that the law of negligence presents citizens with *proleptic* thoughts on values *qua* descriptions and re-descriptions with which to engage—i.e., unique ways of realising the values of security and physical integrity in the particular circumstances of specific actions. In doctrinal terms, we could say that the law of negligence invites citizens to consider their duty in the context of the specific reasonable person in the respective situation or role and the respective activity. According to our theoretical account, the law of negligence requires citizens to exercise their practical reasoning in specific ways that align with their values. For example, a doctor operating on a cancer patient must demonstrate diligence and care, carefully consider the treatment practices of their peers,²³ and consider the logic of their deliberations and decisions.²⁴ The citizen is presented with proleptic thoughts whose content is the realisation of values in specific ways, e.g., the health of the patient. On the other hand, the basis for proleptic thoughts is the rights and duties that judges will use in their attributive function. However, the abstract grounding of rights and duties does not contribute to a citizen's practical reasoning unless they are able to engage with the specific realisation of these values in their daily activities, and their actions reflect the specific content of the proleptic thought. In the case of *Donoghue v. Stevenson*, the manufacturer realises the value of consumer physical integrity through deliberation, ensuring the highest quality of inspection. Changes in practices are necessary, such as the implementation of transparent bottles for the manufacturer or retailer to inspect, the inclusion of product-specific warnings on packages, and more.

Reciprocal Freedom is an illuminating, thought-provoking, and rich monograph. As is usual in all his writings, Weinrib presents a perceptive, nuanced, and insightful position on the nature of private law. His new book invites us

23. In English law, the so-called Bolam test establishes that in the exercise of their professional skills, as with doctors, the person has not acted negligently if they have acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion. See *Bolam v Friern Hospital Management Committee*, [1957] 2 All ER 118 [1957] 1 WLR 582 (HC); *Montgomery v Lanarkshire Health Board*, [2015] UKSC 11.

24. The Bolitho case establishes that in applying the Bolam test, the practice needs to demonstrate that it is based on logic and was defensible. *Bolitho v City and Hackney Health Authority* [1998] AC 232, [1997] 3 WLR 1151 (HL).

to rethink our assumptions concerning the stark distinction between private and public laws. In this review, my focus has been on the role of forward-looking judgments and values in the dynamic of determination and abstraction in private law in order to problematise the right-duty pair as the core of the correlativity legal relationship brilliantly defended by Professor Weinrib.

Acknowledgements: I am grateful to the editorial team of the Canadian Journal of Law and Jurisprudence for their comments and suggestions. I express my gratitude to the University of Surrey Centre for Law and Philosophy for sponsoring a symposium where the authors presented their contributions. I am especially grateful to Prof. Weinrib for his participation and the authors for their insights on his work. I am also grateful to Margaret Martin and Zoë Sinel for their support on the project.

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