The Idea of Private Law

Ernest J Weinrib
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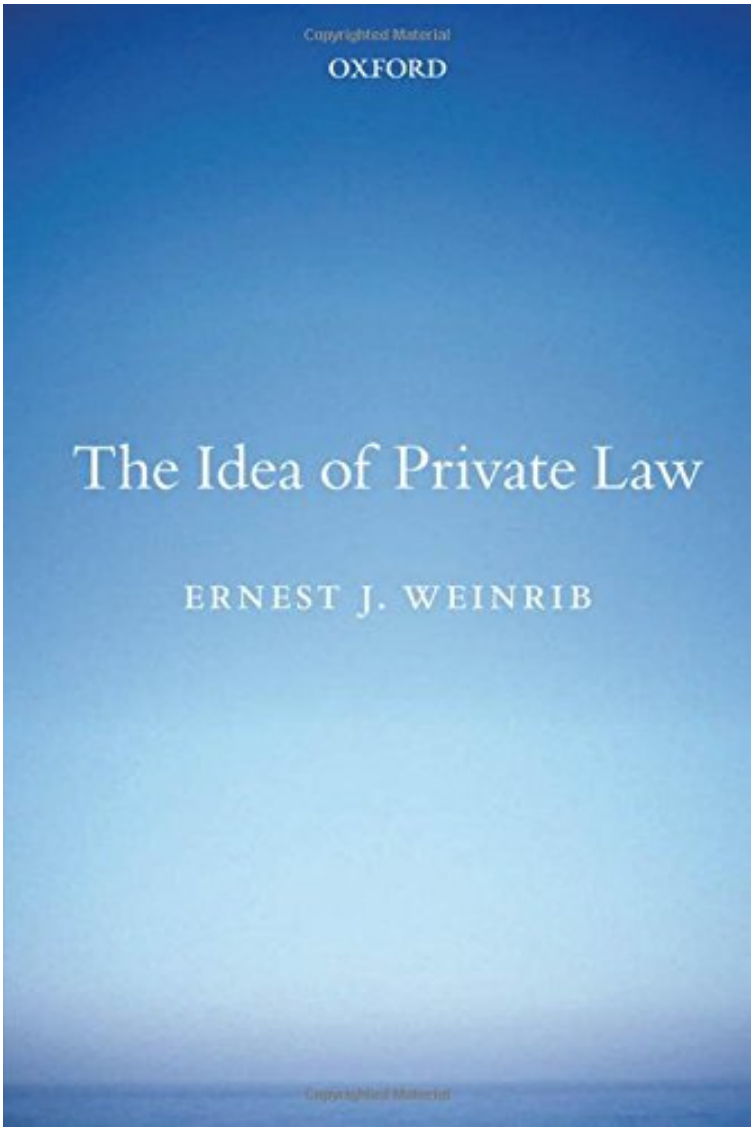

#1842084 in Books Oxford University Press 2012-12-05 2012-12-05Original language:EnglishPDF # 1 6.10 x .60 x 9.10l, .90 #File Name: 019966479X272 pages | File size: 30.Mb

Ernest J Weinrib : The Idea of Private Law before purchasing it in order to gage whether or not it would be worth my time, and all praised The Idea of Private Law:

11 of 11 people found the following review helpful. A case for the immanent rationality of private lawBy John S. RyanThis brilliant volume is one of the single most important works on legal philosophy written in recent years.A grand synthesis of Aristotle, Kant, and Hegel with undertones of Oakeshott, it's not easy to summarize. But here's a short (and inadequate) statement of Weinrib's thesis: private law is an immanently rational process of implementing corrective justice according to internal standards that cannot be reduced to something outside of the law itself; its aim

is to set right, insofar as possible, the relationship between the doer and the sufferer of a harm.The astute reader will already have noticed that Weinrib is at odds with "law and economics" -- and, sure enough, his short critiques of that field are devastatingly on target. The reviewer below who thinks Weinrib has ignored everything since Coase must not have been reading very carefully: in one sense, at least, Weinrib is concerned precisely to _rescue_ private law from the law-and-econ crowd, as well as from any other law-and-anything crowd who insists that law must be understood in terms of, and indeed reduced to, something else. His major claim is that it can't be.My own view, at least, is that Weinrib is entirely right on his main point: i.e., that private law has internal standards that can't be reduced to something external. In particular, private law seeks corrective justice and not "economic efficiency," at least insofar as the latter is understood as the maximization of total "wealth" at the possible expense of what would ordinarily be called justice. (And it certainly has no truck with the sort of mathematically-ratified injustice known to the world as "Kaldor-Hicks efficiency.")Weinrib's discussion of the famous Hand formula and his comparisons of U.S. with British common law on this topic are just wonderful. Between his theoretical work and Gary Schwartz's empirical analysis -- not to mention the criticisms of other writers like Richard Wright and Ronald Dworkin -- the Posner gang really should lie down and not get up again.However, as much as my philosophical sympathies are with Weinrib, I must disagree with a point or two. I'll take his treatment of negligence in tort law as my source of examples, since I just finished rereading that chapter last night.I am not, for example, overwhelmed by his discussion of the famous Palsgraf case. Weinrib takes J. Cardozo's side in this case and castigates J. Andrews's dissent for somehow missing the point of tort law. But even if this were true (and I don't think it is), what, exactly, would it show? That Andrews was just wrong? Or that tort law's immanent standards (on Weinrib's account thereof) are insufficient to deal with some cases with which tort law really ought to deal?If we can even sensibly ask this question -- and surely we can -- then it is not enough to insist on tort law's internal standards; those standards themselves may in turn require justification in terms of whatever it is that tort law _is_ founded on. (Not "reduction to," but "justification in terms of." I am not sure Weinrib always distinguishes these as carefully as he might.) True, Weinrib does maintain that private law is founded on the principles of corrective justice (and, by implication, that these principles are rationally apprehended). But he sometimes writes as though it just floats in a vacuum somewhere, blessedly free of commerce with any other human activities at which we might otherwise have to look in order to determine exactly what _is_ just under specific circumstances. (This is one of those Oakeshott-like undertones I mentioned. In my view Oakeshott, too, tended to overstate the degree to which any "mode of experience" can be isolated from the rest.)Moreover, some of Weinrib's arguments on specific points seem hard to tie in to his main thesis. For example, he opposes the use of "probabilistic causation" in tort law on the grounds that tort law deals only with normative harms, not with the "mere" increased risk of normative harms. But the argument is not forthcoming that placing someone at significantly increased risk is not _also_ a normative harm in its own right.And some such argument is badly needed, since knowledge that e.g. one has been subjected to an increased risk of cancer does seem to involve positive harm already even if one hasn't developed cancer yet. It is at least arguable that one has been harmed by one's present worry and distress (not to mention the relevant medical expenses involved in checking to make sure one _doesn't_ have cancer).If so, then Weinrib's own regime can take account of "probabilistic causation" very easily, and indeed should do so rather than reject it outright. I agree with Weinrib (contra some other recent writers) that tort law ought not to throw out the concept of "causation" entirely; I'm just not persuaded that this point takes him as far as he seems to want to go. It appears to me that his theoretical foundations could be invoked as easily to justify as to eliminate some of the innovations he might prefer to dispose of.What is most helpful in this volume, then, is Weinrib's careful insistence that private law _is_ immanently rational and possesses coherent internal standards that are not reducible to something in some other field. But what seems to be missing is an account of why private law has just exactly those internal standards Weinrib says it has, and why it shouldn't recognize any others even if it can be shown that it can do so coherently.At any rate, Weinrib's work is brilliant from beginning to end. My comparatively minor disagreements with particular points and sub-points should not obscure my major agreements with much of his overall approach.1 of 1 people found the following review helpful. Excellent secondary literatureBy malcontentaFirst of all, just to impress you with how good this book is: This is my first review ever. After I spent several hours with it in the library, I went home to tell you how much fun I had. I just had to.This book is marvelous.It is very thorough though never repetitive.It is very well structured.It is very well written. I'm not a native speaker, but having a lot of experience with English texts I found this a very reasonable niveau.About the content: I wrote several theses on Kant's legal philosophy and the relation between "Rechtslehre" and "Sittenlehre", and this might well be the best overview I ever read. I had to figure this all out bit by bit, and every time Weinrib presented an argument, I was very content with what and how. Every time I formed an objection in my mind, he brought the right argument. If you're interested in legal philosophy or Kant's practical philosophy, I strongly recommend this. Weinrib's explanations are brilliant.Weinrib, his sphere and his reading of Kant is very popular with the strongly analytical trend of our Department. If you're looking for further sources in that direction, his bibliography is also a treasure chest.At last, I would like to point out that the bad reviews you can read here criticise Weinrib's book for something he can't be criticised for as he's doing it with full awareness. The person who wrote that this theory is way out of date didn't read the book properly, for then she would have understood that law can't be explained by

something external to it or reduced to something else, and that therefore the argument "Newest research in law and economics shows that..." will never be a counterargument for a formalistic approach to law.This book is amazing.2 of 13 people found the following review helpful. A good stuff for a poor theoryBy pigi@inrete.it P.G.Monateri, professor of LawThis book gathers a good amount of scholarship to purport the idea that the governing principles underlying private law doctrines are still the old principles of Aristotelian commutative and corrective justice. In so doing the author does not take into proper account the teachings of the last 40 years studies in Law and Economics showing how the issue of distributing a private cost cannot be handled in terms of the old corrective justice. Thus the book provides a foundation for private law which to-day is peculiarly outdated.

Nearly twenty years after its original publication, The Idea of Private Law is widely recognized as a seminal contribution to legal philosophy, and one of the leading attempts to explain and justify the moral foundations of private law. Rejecting the functionalism popular among legal scholars, Ernest Weinrib advances the provocative idea that private law is an autonomous and non-instrumental moral practice, with its own structure and rationality. Weinrib draws on Kant and Aristotle to set out an approach to private law that repudiates the identification of law with politics or economics. Weinrib argues that private law is to be understood not as a mechanism for promoting efficiency but as a juridical enterprise in which coherent public reason elaborates the norms implicit in the parties' interaction. Private law, Weinrib tells us, embodies a special morality that links the doer and the sufferer of harm. Weinrib elucidates the standpoint internal to this morality, in opposition to functionalists, who view private law as an instrument in the service of external and independently justifiable goals. After establishing the inadequacy of functionalist approaches, Weinrib traces the implications of the formalism he proposes for our ideas of the structure, coherence, and normative grounding of private law. Furthermore, the author shows how this formalism manifests itself in the leading doctrines of private law liability. Finally, he describes the public but non-political role of the courts in articulating the special morality of private law.This revised edition makes accessible one of the major works of modern legal theory. It includes a new introduction by the author, looking back at the work, its origins, and its aspirations.

"Ernest Weinrib's new book deserves our highest attention. No one who thinks seriously about the nature of private law can afford to ignore this work. In addition to providing a compelling account of the nature of private law, this book puts into serious question the leading contemporary accounts of the nature of law. In short, this is a book from which any student of law will learn much...No account of private law can be complete without addressing Weinrib's position." --Dennis Patterson (Modern Law)"Clearly and elegantly written. The debate that Weinrib engages is important and Weinrib's own position in the debate should be heard. He makes a significant contribution by arguing the importance of understanding tort law by reference to its own internal structure." --George P. Fletcher, School of Law, Columbia University"The Idea of Private Law presents a position about tort law which in my view is essential, and develops that position in a way that is both powerful and eloquent. Weinrib stands out among those who have analyzed tort law from a justice perspective. This is a brave and distinguished book." --Gary T. Schwartz, University of California, Los Angeles"The Idea of Private Law is a complex and stimulating book which deserves to be read by anyone interested in private law. Weinrib shows clearly why certain theories about the functions and justifications for private law are inadequate, and he causes the reader to think in new and fruitful ways about old problems." --Peter Cane, Oxford Journal of Legal Studies 1996About the AuthorA native of Toronto, Ernest Weinrib has a PhD from Harvard (1968) and a BA (1965) and a JD (1972) from the University of Toronto. He has been teaching law at the University of Toronto since 1972, and has been a visiting professor at the Yale Law School and at Tel Aviv University. He holds the rank of University Professor (the University of Toronto's highest honour) and is the Cecil A. Wright Professor of Law. His major works also include Corrective Justice (OUP 2012).