

# ON THE IDEA OF UNDERSTANDING WEINRIB: WEINRIB AND KEATING ON BIPOLARITY, DUTY, AND THE NATURE OF NEGLIGENCE

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## I. INTRODUCTION

Since the second half of the twentieth century, theoretical conceptions of private law have been dominated by instrumentalism.<sup>1</sup> As a result, tort law has become an area of the law that is generally taught and widely understood to be a system of law that furthers independent social goals such as the deterrence of inefficient or otherwise improper behavior and compensation for losses generated by that behavior. Because these goals are external to the law itself and can thus be justified independently from the law, private law's purpose under instrumentalist rule has slowly begun to reflect these ends.<sup>2</sup> Consequently, because the purpose of law can no longer be understood except in the terms of something else, the study of law has grown progressively more dependent on interdisciplinary analysis to evaluate and discuss that something else and its relation to the law.<sup>3</sup>

Professor Ernest J. Weinrib, among other non-instrumentalist scholars, has argued against the apparent dominance of instrumentalism and the corresponding demise of tort law as an autonomous philosophical and theoretical structure.<sup>4</sup> He has constructed and advocated a particularly well-known and powerful, general, non-instrumental understanding of private law and applied that understanding to create a specific, equally influential non-instrumental theory of tort law.<sup>5</sup> In both, Weinrib strives to perfect a coherent, internally intelligible theory of the law anchored in normative force.<sup>6</sup> That is, Weinrib has attempted to build a conception of private law—and, consequently, of tort law—that is directly antithetical to current instrumentalist tastes: a unified theory of law that justifies the elements of

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<sup>1</sup> Ernest Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQ. L. 107, 108 (2001) [hereinafter Weinrib, *Correlativity*].

<sup>2</sup> See ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 6 (Harvard University Press 1995) [hereinafter WEINRIB, *PRIVATE LAW*].

<sup>3</sup> See *id.* at 15.

<sup>4</sup> See *id.* at 3–18. See generally Martin Stone, *On the Idea of Private Law*, 9 CAN. J. L. & JURIS 235 (1996); Dilan A. Esper & Gregory C. Keating, *Putting "Duty" in Its Place: A Reply To Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 101, 117, 1225, 1241 (2009).

<sup>5</sup> See generally WEINRIB, *PRIVATE LAW*, *supra* note 2.

<sup>6</sup> *Id.* at 11–14.

our existing law and its varied and often disparate conclusions from within law itself, and that generates, through its own internal structure, definitive normative force.<sup>7</sup>

At its heart, Weinrib's general theory of private law relies upon the bipolar nature of the legally relevant relationships in private law and a Kantian conception of personality from which a further crucial idea of correlativity is derived.<sup>8</sup> His theory focuses on the basic features of all private law claims: a particular plaintiff sues a particular defendant and, if successful, that particular defendant remedies the damages done to that particular plaintiff directly.<sup>9</sup> This relationship functions as a form of corrective justice built upon a foundation of Kantian equality and a system of correlative rights and duties.<sup>10</sup> Ultimately, Weinrib reaches the conclusion that the breaching of a duty by the defendant that results in a correlative infringement of a plaintiff's right starts the wheels of corrective justice turning and results in the remedy—generally damages—paid directly from defendant to plaintiff so as to restore the plaintiff to its rightful position.<sup>11</sup>

Weinrib's specific theory of tort law and negligence rests on what he considers to be the essential features of our existing tort system: the bipolar relationship binding plaintiff and defendant and the centrality of causation.<sup>12</sup> While the importance of the bipolar relationship is a direct application of his general thoughts on private law to the more specific realm of torts, he holds the centrality of causation to be essential to our conception of tort law. Simply put, causation is essential to our conception of tort law because "liability in tort law depends on the defendant's having inflicted harm on the plaintiff."<sup>13</sup> Once these two elements are taken together and run through Weinrib's philosophical wringer, they ultimately result in an understanding of negligence such that liability only attaches procedurally when a particular defendant causes a particular type of harm in violation of a duty of reasonable care owed to a particular plaintiff, and only attaches normatively where the harm caused by the defendant is wrongfully caused and the harm suffered by the plaintiff is wrongfully suffered.<sup>14</sup>

While the above mentioned summaries are without a doubt entirely too vague and for that reason quite incapable of doing Weinrib's philosophy justice, even at this simplistic level it does not require much in the way of mental labor to perceive an apparent tension between Weinrib's general theory of private law and his specific theory of tort law and negligence. In the general theory of private law, a damages remedy follows a defendant's

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<sup>7</sup> *Id.* at 8–11.

<sup>8</sup> Weinrib, *Correlativity*, *supra* note 1, at 107.

<sup>9</sup> Ernest Weinrib, *Causation and Wrongdoing*, 63 CHI-KENT L. REV. 407, 410 (1987) [hereinafter Weinrib, *Causation*].

<sup>10</sup> Ariel Porat, *Questioning the Idea of Correlativity in Weinrib's Theory of Corrective Justice*, 2 THEORETICAL INQ. L. 161, 161 (2001).

<sup>11</sup> WEINRIB, PRIVATE LAW, *supra* note 2, at 26.

<sup>12</sup> Ernest Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 494 (1989) [hereinafter Weinrib, *Tort Law*].

<sup>13</sup> *Id.*

<sup>14</sup> *See generally id.*

breach of duty that results in a correlative harm to the plaintiff.<sup>15</sup> In the specific theory of tort law a damages remedy follows a defendant's breach of duty that results in a correlative harm to the plaintiff, only where the defendant acts wrongfully enough and where the plaintiff suffers wrongfully enough within the context of their bipolar relationship.<sup>16</sup> There are a certain number of plaintiffs who deserve compensation under the general theory but who do not deserve compensation under the specific theory. Whereas in the private law theory we are only concerned with a harm suffered by the plaintiff at the hands of the defendant, within the bounds of the specific theory a certain number of plaintiffs are being denied recovery against that harm simply because they did not suffer their harm wrongfully enough.

Upon initial inspection this tension might not seem like any tension at all. Private law and tort law are two different levels of abstraction upon the law; they are not the same thing and as such should obviously be expected to have differing results in certain scenarios. Indeed, we might recall the bull's eye patterned diagram so familiar to students in their first year of law school wherein a very small circle inscribed "tort law" sits within a larger circle inscribed "private law." There are necessarily points that fall within the circle of private law but that do not fall within the circle of tort law. Furthermore, we might understand that Weinrib views tort law as fundamentally concerned with torts as moral wrongs. Given that a tort is a wrong, it makes a certain amount of sense that a theory of tort law would bar recovery if the facts did not generate a situation wrongful enough to merit a remedy. Similarly, a general theory of private law could not coherently contain elements of wrongfulness given that certain claims under the broader scope of private law, such as breach of contract or trespass, are not necessarily such moral claims. The problem with this tension, however, does not lay with a mere concern over how certain claims are categorized or why either theory, taken independently, does or does not grant recovery in a given situation. The problem with this tension is that some claims that merit recovery under the general theory do not merit any recovery at all when slotted into the specific theory despite the lack of change in the relevant fact pattern. Winners under the general theory may lose everything when they are slotted into the specific theory despite the fact that the specific theory is an application of the general theory. Granted, however, that even this restatement is not without its rationalizations and justifications, it is ultimately not the exact contours of my above stated tension that are at issue. I have merely offered it as an illustration of the general uneasiness with which the two theories sit together. Applying the recent works of Gregory C. Keating, I posit that the uncomfortable fit between these two theories is indicative of greater problems at the heart of Weinrib's philosophy stemming from his particular requirements of bipolarity.

I will argue that negligence is not to be understood in the strongly, personally relational way that Weinrib asserts. Noting the distinction

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<sup>15</sup> WEINRIB, *PRIVATE LAW*, *supra* note 2, at 125–26.

<sup>16</sup> Weinrib, *Tort Law*, *supra* note 12, at 513–15.

between rights in personam and rights in rem, I will argue that it is Weinrib's strongly relational, in personam conception of negligence, the direct result of his notions of bipolarity and correlativity in private law, which generates the aforementioned tension between Weinrib's two theories as well as several other problems within Weinrib's philosophical structure of negligence law. The result of Weinrib's conception of duty in the strongly relational, in personam fashion is the collapse of the distinct elements of a negligence claim. His conception ultimately misunderstands duty by itself, blurs the line between duty and breach, and, in blurring the line between duty and breach, swallows proximate cause entirely. With these elements collapsed, Weinrib's theory loses considerable functionality as well as justificatory force in the face of claims for negligent infliction of emotional distress ("NIED").

In explicating these arguments, I will begin with the crucial task of unpacking and elucidating Weinrib's theories so that the key functional elements are more readily accessible. Next, I will present my interpretation of Keating's understanding of negligence. I will then place both theories within the context of *Palsgraf v. Long Island R.R. Co.*<sup>17</sup> in order to fully demonstrate how they function in the context of the now famous fact pattern and its equally famous majority opinion. In the context of *Palsgraf*, I will then apply Keating's arguments to Weinrib's theory and, in doing so, detail the aforementioned negative consequences of Weinrib's strongly relational conception of duty. Finally, I will then follow up Keating's line of argument and discuss the relative inability of Weinrib's theory to justify the court decisions relating to NIED in bystander cases and those relating to the mishandling of corpses.

## II. BIPOLARITY AND DUTY IN WEINRIB

### A. GENERAL THEORY OF PRIVATE LAW

Weinrib's theories rely on a strong, personal concept of bipolarity. He derives this concept from observations made regarding private law generally.<sup>18</sup> Weinrib observes that, procedurally, in all private law claims, a particular plaintiff makes claims against a particular defendant regarding a harm done.<sup>19</sup> Similarly, he observes that, given various substantive doctrines of private law, "requirements such as the causation of harm attest to the dependence of the plaintiff's claim on a [harm] suffered at the defendant's hand."<sup>20</sup> Finally, he notes that private law claims that are successful require the particular defendant who caused the harm to provide a remedy directly to the particular plaintiff that was harmed by the defendant's behavior.<sup>21</sup> Thus, taken together, he concludes that the essential structure of all private law relationships is bipolar such that a particular plaintiff sues a particular defendant for a particular harm done to the

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<sup>17</sup> *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (NY 1928).

<sup>18</sup> WEINRIB, PRIVATE LAW, *supra* note 2, at 18–19.

<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Id.* at 1–2.

<sup>21</sup> *Id.* at 10.

plaintiff by the defendant, where, if successful, the result is that the defendant provides directly from his own pocket a remedy for the harm he caused the plaintiff.<sup>22</sup> Weinrib's theory of private law is largely an attempt at justifying this form of relationship without resorting to instrumental means.<sup>23</sup> He ultimately relies on three distinct but related concepts to do so: corrective justice, Kantian personality, and normative correlativity.

### 1. *Corrective Justice*

Weinrib argues that corrective justice is the form of private law.<sup>24</sup> He asserts that corrective justice provides the underlying framework of the bipolar relationship inherent in private law relationships. More specifically, he relies on Aristotle's conception of corrective justice as "the unifying structure that renders private law relationships immanently intelligible."<sup>25</sup>

Aristotle's account of corrective justice is the earliest and, according to Weinrib, the definitive statement of private law relationships.<sup>26</sup> Aristotle observed that "justice is effected by the direct transfer of resources from one party to the other," and that the resources transferred represent both the plaintiff's harm and the defendant's act that caused the harm.<sup>27</sup> Thus, Aristotle's conception of the private law relationship is to be understood such that the harm and the direct transfer of resources that undoes that harm constitute "a single nexus of activity and passivity where actor and victim are defined in relation to each other."<sup>28</sup>

Aristotle's corrective justice functions in transactions between individuals, and, like much of Aristotle's philosophy, functions in quantitative terms.<sup>29</sup> It starts from a baseline of initial equality with each individual, whether a willing or unwilling party to the transaction, controlling what rightfully belongs to that individual.<sup>30</sup> Corrective justice is required when a quantity that rightfully belongs to one party is subsequently illegitimately possessed by the other party and, as a result, must be shifted back to the rightful owner.<sup>31</sup> Corrective justice is thus ultimately concerned with incidents wherein one party gains at the other's expense.<sup>32</sup>

It is this aspect of Aristotle's conception of corrective justice, which results in the understanding relevant to private law that the actor's infliction of harm and the victim's suffering of harm, as well as the individual agents themselves, are linked together in a single, coherent bipolar relationship. Because the actor has gained what the victim lost, simply removing the actor's gain or restoring the victim's loss is an insufficient remedy.<sup>33</sup> Were

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<sup>22</sup> *See id.*

<sup>23</sup> *Id.* at 11.

<sup>24</sup> *Id.* at 14.

<sup>25</sup> *Id.* at 15, 19.

<sup>26</sup> *Id.* at 56.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 58–63.

<sup>30</sup> *Id.* at 62–63.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 63.

<sup>33</sup> *Id.*

the actor's gain removed, the victim would still be at a loss relative to the initial baseline of equality.<sup>34</sup> Similarly, were the victim's loss removed, the actor would still reap a gain relative to the initial baseline of equality.<sup>35</sup> Thus, unjust gain and loss are not independent changes in status ascribed to the agents as individuals.<sup>36</sup> They cannot justly be addressed on a separate basis and must be addressed as a single, undivided unit. Therefore, corrective justice and private law relationships require a direct transfer of resources from the actor-defendant to the victim-plaintiff.<sup>37</sup>

Taken by itself, however, this foundational understanding of private law's form is insufficient for Weinrib's purposes. While it adequately captures the basic structure of private law relationships, it is inherently lacking a functional normative element.<sup>38</sup> That is, while Aristotle's account gives Weinrib a strong procedural description of private law relationships, it lacks the strong normative element that Weinrib requires to serve as the foundation of his non-instrumentalist theory.

Aristotle rests the normative force of his conception on the initial equality of the parties and the subsequent illegitimate deviation from that starting point.<sup>39</sup> Aristotle himself, however, does not discuss this initial equality in any type of clear detail.<sup>40</sup> The extent of his discussion is an opaque passage that reads in translation:

Whether a worthy person has taken something from an unworthy person or vice versa, makes no difference nor whether a worthy or worthless person has committed adultery; but the law looks to the difference in the harm alone, and it treats them as equals, if the one commits and the other suffers injustice, and if the one has inflicted harm and the other has suffered harm.<sup>41</sup>

Weinrib reasons that this sentence references three crucial elements of corrective justice: first, that corrective justice functions without regard to social rank or moral character; second, that it regards the transacting parties as equals; and third, that it "focuses on the immediate relationship of doer to sufferer."<sup>42</sup> In order to make the equality element of Aristotle's theory carry the normative weight of Weinrib's theory, Weinrib must address a form of equality that is integrated "with corrective justice's abstraction from particularity and with the correlativity of doing and suffering."<sup>43</sup> He does so through the structure of Kantian personality within Kant's concept of the right.<sup>44</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 63.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 76.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 77.

<sup>41</sup> *Id.* at 77 (quoting ARISTOTLE, NICHOMACHEAN ETHICS 1132a2–1132a6 (Martin Ostwald trans., Macmillan Publishing Co. 1962)).

<sup>42</sup> *Id.* at 81.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

## 2. *Kantian Personality*

Kant's concept understands right as the result or "juridical manifestation" of self-determining agency.<sup>45</sup> Self-determining agency was understood in part by Kant to be the ability of an agent to will consequences into reality without being controlled by the influence of the particular circumstances of that agent's situation.<sup>46</sup> Therefore, because this ability partly defines self-determining agency under Kant's concept of the right, each self-determining agent is equal with regard to this ability of free choice.<sup>47</sup> That is, every self-determining agent (a self-determining agent being the only subject with which agency law would be validly concerned) is equal to every other self-determining agent with regard to his or her ability to will consequences into being, but without regard to his or her particular circumstances. Instead of his circumstances determining consequences, according to Kant, a self-determining agent has access to practical reason to will consequences into reality.<sup>48</sup> Practical reason is the self-determining agent's ability to will consequences as the result of a causality of concepts which, because the result is the mere consequence of a causal chain, allows the agent to function in harmony with the categorical imperative.<sup>49</sup> Taken together, free choice and practical reason comprise Kant's conception of freedom of the will.<sup>50</sup>

Free will and external relationships, relationships of the sort that corrective justice is concerned with, are combined under the concept of right. Right is "the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom."<sup>51</sup> According to Weinrib, Kant is able to derive his own understanding of private law from this principle, and Weinrib relies on this derivation to trace the normative character of private law forward into our institutionalized practice. For the purposes of this discussion, however, we are ultimately concerned only with the most fundamental normative supports of Weinrib's theory. Thus, while Weinrib's analysis and integration of Kant's derivation is key to justifying the application of Weinrib's theory of private law, my analysis here will focus only on the starting point of Weinrib's argument. That starting point is similarly derived from the concept of right.

According to the concept of right, "all that is in question is . . . whether the action of one of the two parties can be united with the freedom of the other in accordance with a universal law."<sup>52</sup> Thus, the concept of right is concerned with bipolar relationships and the relationship of one agent's harmful actions and the other agent's resultant suffering.<sup>53</sup> That is, because

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 90.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 90–91.

<sup>50</sup> *Id.* at 91.

<sup>51</sup> *Id.* at 95 (quoting IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 56 (Mary Gregor trans., Cambridge University Press 1991)).

<sup>52</sup> *Id.* at 98.

<sup>53</sup> *Id.*

the self-determining agents involved are equal in regards to their free wills, any action taken in the course of freedom by one must be consistent with the freedom of the other.<sup>54</sup>

Thus, Kantian personality acts to fill in the gaps of Aristotle's theory of corrective justice and lends normative support suitable to withstand the weight of Weinrib's own, larger theory. Recalling Aristotle's sentence regarding the normative aspect of his own theory: given the integration of Kantian personality, corrective justice is able to function without regard to social rank or moral character because the self-determining agents involved in the relevant relationships are necessarily capable of abstracting themselves and their behavior from such concerns; the integration of Kantian personality results in the recognition of the transacting parties as equal free willing beings; and finally, given the resultant concept of right, Kantian personality provides normative support for corrective justice to be concerned with the immediate relationship of doer and sufferer.

### 3. *Correlativity*

The third key aspect of Weinrib's theory relates to the inner workings of his Aristotelian structure of corrective justice and the integration of Kantian right. Aristotle's form of corrective justice is dependent on the correlativity of gains and losses between the parties to a transaction.<sup>55</sup> Weinrib argues that these gains and losses are to be understood as normative gains and losses, as opposed to factual ones, and that, as such, the correlativity of normative gain and loss can be understood as a correlativity of Kantian rights and duties.<sup>56</sup>

Weinrib makes a distinction between factual and normative gains and losses. A factual gain or loss is a change in a person's holdings relative to what that person holds immediately prior to the gain or loss.<sup>57</sup> Thus, an increase in a person's immediate holdings is a factual gain and a decrease in a person's immediate holdings is a factual loss.<sup>58</sup> In contrast, a normative gain or loss occurs in the context of the norms of corrective justice.<sup>59</sup> "In their normative aspect, gains and losses involve a comparison between what one has and what one should have through the operation of those norms."<sup>60</sup> Thus, a normative gain is affected when one of the transacting parties ends up with more than they should have under those norms, and a normative loss is effected when one of the transacting parties ends up with less than they should have under the operation of those norms.<sup>61</sup> The difference is essentially one of baselines.<sup>62</sup> A factual gain or loss is measured against the preexisting condition of the agent's immediate

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 114.

<sup>56</sup> *Id.* at 115.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 18–19.

<sup>60</sup> *Id.* at 115.

<sup>61</sup> *Id.* at 115–16.

<sup>62</sup> *Id.* at 116.



holdings.<sup>63</sup> A normative gain or loss is measured against that agent's due within the relationship.<sup>64</sup>

Corrective justice requires a correlativity of normative gain and normative loss.<sup>65</sup> To trigger the remedial consequences of corrective justice, a transaction must be able to be regarded as generating a surplus for the defendant and a deficit for the plaintiff relative to their due according to the norms of corrective justice.<sup>66</sup> As a result, liability for a loss in the plaintiff's holdings is not based on a parallel and equal gain in the defendant's holdings.<sup>67</sup> That type of relationship would result from a correlativity of factual gains and losses.<sup>68</sup> Instead, a correlativity of normative gain and loss focuses on the defendant having unjustly inflicted that loss; the defendant having received more than the norms of corrective justice would allow in a transaction with the plaintiff.<sup>69</sup> Similarly, "the plaintiff recovers the defendant's gain not when the plaintiff has suffered merely a factual loss but when the defendant's enrichment represents an injustice to the plaintiff."<sup>70</sup>

According to Weinrib, in order to satisfy correlativity the considerations at work in a scheme of Aristotelian corrective justice with the integration of Kantian personality must be "unifying, bipolar, and expressive of transactional equality."<sup>71</sup> They must be unifying in that for a normative loss and gain to be correlative, the same norm must be the baseline for both.<sup>72</sup> They must be bipolar in the sense that, "because one party's normative gain is the other's normative loss," they must exactly link two parties in a relationship.<sup>73</sup> Finally, they must express transactional equality in that they accord a preferential position to neither the party receiving the gain nor the party suffering the loss.<sup>74</sup>

Kantian right applied to the corrective justice of private law satisfies these requirements of correlativity.<sup>75</sup> Kant's principle that "one person's action be united with the other's freedom in accordance with practical reason" treats the relationship between the parties at issue as unified, bipolar, and transactionally equal.<sup>76</sup> Unity is present because the concept of

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 115.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 120.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 122.

<sup>76</sup> *Id.* It is worth noting that Weinrib's conclusion with regard to the ubiquitous presence of bipolarity in private law necessarily following from Kant's philosophy is not uncontroversial. Given Kant's writings related to the social contract, it can be argued that Kantian philosophy actually leads more validly to a multi-polar form of private law. Because of the nature of people as free and equal beings, no one person's will can bind any other person's will. Only the general will of the (united) people can form law capable of binding individuals. In order to create private law doctrines that apply from one particular party to another particular party, in tort for example, the general will would first have to establish a more general institution of tort law. In creating the institution of tort law, it can be argued, the general will would have to bind everyone to everybody else with regard to the primary rights and duties of tort law before permitting individual torts. At the very least, we see in this argument the potential in Kant's

the right connects the relationship of the parties and the juridical structures bearing upon it.<sup>77</sup> Bipolarity is present because of the focus on the connection between the doer of harm and the sufferer of harm.<sup>78</sup> Transactional equality is present given the equal moral standing Kantian right accords the interacting parties.<sup>79</sup>

Weinrib identifies the specific form of correlativity within the structures and derivations of Kantian right as that of right and duty.<sup>80</sup> As previously mentioned, Kantian right requires that one agent's actions be consistent with the other's freedom. Under Kantian philosophy, every agent has a set of rights implicit in their inherent freedom.<sup>81</sup> According to Weinrib's interpretation of Kant, "an act is consistent with another's freedom when it is compatible with," and thus non-violative of that other person's rights.<sup>82</sup> Consequently, every agent has a correlative set of duties prohibiting that agent from violating those rights implicit in every other agent's freedom. Therefore, under Kantian right, every agent is accorded a set of rights enabling that agent to act freely but obligated by way of correlative duties to not act under that freedom so as to violate the rights of other agents.<sup>83</sup>

Plaintiff and defendant are thus linked in a bipolar relationship through a right on the plaintiff's part, and a corresponding duty on the defendant's part. The right represents the moral position of the plaintiff, while the duty represents the moral position of the defendant. Plaintiff and defendant, and right and duty, are thus locked together in a procedural and normative embrace of a bipolar relationship because "the content of the right is the object of the duty."<sup>84</sup> Weinrib articulates the ultimate consequence of this conclusion as functioning so that:

The defendant realizes a normative gain through action that violates a duty correlative to the plaintiff's right; liability causes the disgorgement of this gain. The plaintiff realizes a normative loss when the infringed right is within the scope of the duty violated; liability causes the reparation of this infringement. Since the normative gain is morally correlative to the normative loss, disgorgement of the gain takes the form of reparation of the loss. And because of the mutual moral reference of the infringement of the right and the breach of the duty, the amount of the gain is necessarily identical to the amount of the loss. Hence the transfer of a single sum annuls both the defendant's normative gain and the plaintiff's normative loss.<sup>85</sup>

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philosophy for multi-polar relationships in private law through the institution of a system of tort law. While this line of argument is intriguing and has the potential to destabilize the theoretical structure of Weinrib's argument, it is ultimately beyond the scope of this note. *See generally* IMMANUEL KANT, BASIC WRITINGS OF KANT 419 (Allen W. Wood ed., Modern Library pbk. ed., 2001).

<sup>77</sup> WEINRIB, PRIVATE LAW, *supra* note 2, at 122.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 122–23.

<sup>84</sup> *Id.* at 123.

<sup>85</sup> *Id.* at 125–26.

This functions as the articulated essence of Weinrib's understanding of private law, for the essential summation of the aforementioned procedural and normative elements are at the heart of his theory. We will now turn our attention to the specific theory of our discussion: Weinrib's conception of negligence. Here we will see how Weinrib applies the elements at the heart of his understanding of private law to a specific theory of negligence.

## B. SPECIFIC THEORY OF NEGLIGENCE

### 1. Normative Structure

Whereas Weinrib's general non-instrumental theory of private law relies on concepts of bipolarity and Kantian personality, his specific understanding of negligence relies on the concepts of bipolarity and causation. When taken in the context of being an application of his general non-instrumental theory, however, Weinrib's concept of causation appears to function as both the traditional notion of causation necessary to any discussion of negligence law as well as a convenient structure housing the normative, and indeed Kantian, machinery of Weinrib's specific theory. For Weinrib, "causation refers to a sequence stretching from the defendant's act to the plaintiff's injury."<sup>86</sup> It is a bridge, both normatively and factually, between defendant's act and plaintiff's injury.<sup>87</sup> It is a bridge wherein "defendant's act is understood from the standpoint of its potential for injuring the plaintiff, and the injury for which the plaintiff recovers is a materialization of that potential."<sup>88</sup> In this way, according to Weinrib, causation unites, in a single unbroken process, the defendant and the plaintiff as doer and sufferer of the same harm.<sup>89</sup>

Doing and suffering are thus necessarily correlative in negligence actions given Weinrib's conception of causation. Wrongful doing and suffering are only understood through the bipolar relationship, which they necessarily establish together.<sup>90</sup> A wrongful doing that results in no suffering does not fall in the purview of a negligence claim.<sup>91</sup> Similarly, negligence is not concerned with suffering that is not the result of some wrongful doing.<sup>92</sup> For this reason, doing and suffering must be taken as one normative unit and any "justificatory consideration" must pertain to both the doing and suffering of the harm.<sup>93</sup>

Because doing and suffering are necessarily correlative, and because any justificatory consideration must pertain to both the doing of the harm by the defendant and the suffering of the harm by the plaintiff, negligence must have a normative structure that reflects these considerations.<sup>94</sup> As argued in his general theory, Weinrib again concludes that a normative correlative structure is captured by a system of rights of duties. As such, the

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<sup>86</sup> Weinrib, *Tort Law*, *supra* note 12, at 512.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*; Weinrib, *Correlativity*, *supra* note 1, at 107.

<sup>90</sup> Weinrib, *Tort Law*, *supra* note 12, at 512.

<sup>91</sup> *Id.* See also WEINRIB, PRIVATE LAW *supra* note 2, at 159–164.

<sup>92</sup> Weinrib, *Tort Law*, *supra* note 12, at 512.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

plaintiff has a right against the defendant that is directly correlative to a duty held by the defendant to the plaintiff.<sup>95</sup>

Because negligence claims are normatively rooted in a system of correlative rights and duties, a breach of that duty by the defendant that results in the plaintiff's injury is a simultaneous violation of the plaintiff's right.<sup>96</sup> Thus, given Weinrib's Kantian ethics, the tortious action, the doing of an act that breached the duty of the defendant that resulted in the plaintiff's suffering, is a moral wrong. The resultant claim is not representative of an instrumentalist calculation or an economic consequence of behavior in the public interest, it is the result of a wrong done by one specific party to another specific party. It is because a wrong was done to the plaintiff that the plaintiff can sue to have the wrong made right. The plaintiff is simply one who was harmed by the defendant's wrongful act.<sup>97</sup>

Because the plaintiff was harmed by the defendant's wrongful act, the plaintiff is entitled to a remedy from the defendant.<sup>98</sup> The remedy represents a quantification of the wrong done by the defendant and suffered by the plaintiff.<sup>99</sup> Because the defendant and plaintiff are doer and sufferer of the same harm, and are "mutually dependent constituents of a single relationship," the payment of damages should be transferred directly from defendant to plaintiff in a line parallel in direction and quantity to the harm.<sup>100</sup>

The application of Weinrib's normative foundation of private law to the structure of negligence law is thus a rather simple and direct transfer despite the emphasis placed on causation instead of personality. It is through the defendant having caused the harm suffered by the plaintiff that the defendant and plaintiff are locked in a bipolar relationship as the doer and sufferer of the same harm. This relationship is given normative weight due to the correlative nature of the defendant's act and the plaintiff's harm, and the corresponding breach of defendant's duty and violation of plaintiff's right. Because plaintiff suffered a wrong at the hands of the defendant, the defendant is obligated to provide a remedy representative of the normative harm done directly to the plaintiff. Indeed, from this perspective, we see how negligence aligns itself with private law. Their basic normative skeletons are substantially similar if not wholly identical.

## 2. *Procedural Structure*

Given that Weinrib has set out to provide a workable, non-instrumental account of negligence, he must fix the existing procedural concepts of a negligence claim to his already explicated normative skeleton. He argues that these procedural elements, when taken together and considered in light of their interrelations, reflect the aforementioned progression from "the

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* See also Weinrib, *Causation*, *supra* note 9, at 416.

<sup>97</sup> Weinrib, *Tort Law*, *supra* note 12, at 513. See also *id.* at 415–16.

<sup>98</sup> *Id.* at 513.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

defendant's performance of an action to the plaintiff's suffering of an injury" as a single, unified normative phenomenon.<sup>101</sup>

The act requirement reflects on a basic level the Kantian heart beating in the chest of Weinrib's philosophy. The act element illustrates the sort of doing that is relevant to negligent doings of harm.<sup>102</sup> The act requirement both presumes and reflects the freedom of the will that inheres in the Kantian personality ascribed to agents. Therefore, corrective justice in the form of a negligence claim is only triggered as a consequence of a volitional act made by a self-determining agent that impinges on the freedom of another self-determining agent in violation of universal law.<sup>103</sup>

The requirement of misfeasance illuminates the relationship of doing and suffering. A defendant is only liable for what his act has wrongfully caused to happen to a plaintiff, and not for what he has simply failed to do for a plaintiff.<sup>104</sup> The defendant must actively have participated in the creation of the risk that materialized in the harm suffered by the plaintiff.<sup>105</sup> Negligence is concerned only when the plaintiff's suffering results from a risk creation implicit in the defendant's act.<sup>106</sup> This reflects the normative characteristic of negligence regarding the correlativity of doing and suffering.<sup>107</sup> An act that does not cause a plaintiff's injury does not therefore result in a negative judgment for the defendant.<sup>108</sup> Similarly, suffering not caused by an act of the defendant does not therefore result in a positive judgment for the plaintiff.<sup>109</sup>

Factual causation links the defendant's misfeasance to the plaintiff's suffering.<sup>110</sup> While misfeasance looks to the defendant's act in terms of its creating a potential for harm, factual causation looks to defendant's act in terms of its actually producing the harm in question.<sup>111</sup> Factual causation traces the injury from its putative state, as mere risk resulting from the defendant's action, through to its culmination as harm suffered by the plaintiff. Thus, factual causation and misfeasance together establish a procedural and normative bond between the doer and sufferer.

According to Weinrib, "the requirement that the actor exercise reasonable care provides the normative standard distinctive to negligence law[;] . . . [it is] the norm implicit in the doing and suffering of harm."<sup>112</sup> As a normative consequence of Weinrib's bipolar structure, any norm implicit in the doing and suffering of harm must grant standing to both poles of the relationship and must similarly reflect the correlativity of the doing and suffering of each pole.<sup>113</sup> The traditional requirement of

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<sup>101</sup> *Id.* at 515.

<sup>102</sup> *Id.* at 516.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 517. See also Weinrib, *Causation*, *supra* note 9, at 432.

<sup>106</sup> Weinrib, *Tort Law*, *supra* note 12, at 517.

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> See *id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 517–518.

<sup>113</sup> *Id.* at 518; Kenneth W. Simmons, *Justification in Private Law*, 81 CORNELL L. REV. 698, 713 (1996) (book review).

reasonable care satisfies both of these normative requirements of Weinrib's theory. It satisfies the first normative requirement because it is concerned primarily with a level of risk. It takes into account both poles of the relevant relationship, because it strikes a balance between the defendant's right to engage in behavior even if it generates some risk, and plaintiff's right to be free from risk of injury.<sup>114</sup> This balance is traditionally struck such that a defendant must use care sufficient to prevent substantial risk to potential plaintiffs where substantial risk is understood to be the product of the likelihood of the occurrence of an injury and the seriousness of that injury should it occur.<sup>115</sup> By delineating this certain minimum level of care that immunizes the defendant from liability for any resultant harm, it ultimately describes a level of risk that defendant can rightfully impose on the plaintiff. Consequently, any level of risk imposed that is greater than that level is a wrong perpetrated in violation of the plaintiff's right. Reasonable care satisfies the second normative requirement by providing an objective standard that is expressive "of the equal status of the parties as correlative doer and sufferer."<sup>116</sup> Were the standard more subjective, subjective enough to allow a defendant to successfully plead that he had done the best a person of his relative abilities or characteristics could in exercising care, it would allow the defendant to unilaterally define the relationship and its outcome.<sup>117</sup> It would be a standard that would ignore the plaintiff and fail to treat the bipolar relationship as a single normative unit.

Proximate cause and duty "link the wrongfulness of the defendant's unreasonable risk-creation with the wrongfulness of the plaintiff's suffering."<sup>118</sup> A defendant acts wrongfully when he fails to act in accordance with the standard of reasonable care and creates a substantial risk to a plaintiff. A plaintiff suffers wrongfully when that wrongfully imposed risk materializes.<sup>119</sup> "Proximate cause and duty express the requirement that, for the defendant to be liable, the wrongfulness of the defendant's risk-creation must be correlative to the wrongfulness of the plaintiff's injury."<sup>120</sup> Duty focuses on the class of persons affected by the defendant's negligence, determining the class of persons with regard to which the defendant was held to a standard of reasonable care in his actions to begin with and whether the plaintiff belonged to that class. Proximate cause focuses on the type of injury resulting from the negligence and whether that injury was a foreseeable consequence of the defendant's act.<sup>121</sup> Duty ensures that the harm to this particular plaintiff was wrongful, while proximate cause ensures that this particular harm done in this particular way was wrongful to that plaintiff. Weinrib himself notes that "[s]ince one cannot characterize the class of persons affected by the risk apart from the

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<sup>114</sup> See Weinrib, *Tort Law*, *supra* note 12, at 518.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 519.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 518.

<sup>119</sup> *Id.*; Weinrib, *Causation*, *supra* note 9, at 441.

<sup>120</sup> Weinrib, *Tort Law*, *supra* note 12, at 521.

<sup>121</sup> Weinrib, *Causation*, *supra* note 9, at 441.

kind of accident or injury that they might suffer, and vice versa, the two questions are frequently interchangeable.”<sup>122</sup>

Weinrib’s strong, personal conception of bipolarity carries over from his more theoretical musings about private law to his specific theory of negligence. In regards to private law, Weinrib observes that in all such claims, a particular plaintiff makes claims against a particular defendant regarding a harm done. This relationship is made manifest in negligence as a result of the normative and procedural structures of the law. Normatively, the essential elements of bipolarity and causation assure that a particular plaintiff is locked in the normative embrace of a particular defendant as a result of that particular defendant having wronged the particular plaintiff. Procedurally, we see that the concepts underlying negligence claims trace that specific defendant’s performance of an action to the specific plaintiff’s suffering of an injury. Furthermore, the elements of duty and proximate cause function so as to ensure that only a specific type of plaintiff who suffers a specific type of injury may recover from this particular defendant. Therefore, according to Weinrib, a negligence claim arises when a particular defendant engages in a particular act that wrongs a particular defendant who was within a particular class and who suffered a particular harm. Thus, Weinrib’s theory of negligence embodies strong, personal conceptions of bipolarity.

### III. BIPOLARITY AND DUTY IN KEATING

#### A. NORMATIVE STRUCTURE

In direct opposition to Weinrib’s idea that negligence is a strongly personal relationship between two specific individuals, Keating posits an understanding of negligence as a more abstract wrong: one that is weak and general. According to Keating, negligence is simply “a failure to show sufficient regard for an indefinite plurality of unknown persons who might come to grief from one’s carelessness.”<sup>123</sup> In this sense embodies rights and duties held in rem as opposed to Weinrib’s conception of negligence as a relationship in personam. For Keating, negligence is “multital;” it is a relationship that exists or potentially exists in identical form between an indefinite number of parties.<sup>124</sup> For Weinrib, negligence remains a “paucital” relationship that obtains only between a definite, exclusive number of parties.<sup>125</sup> Their conceptions differ, however, only in regard to primary rights in negligence. Primary rights are rights relating to conduct.<sup>126</sup> Remedial rights, by contrast, are rights that come into play once a primary right has been violated. The duty to exercise reasonable care, for example, is a primary right.<sup>127</sup> The right to adjudication as a result of a

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<sup>122</sup> Weinrib, *Tort Law*, *supra* note 12, at 521.

<sup>123</sup> Esper & Keating, *supra* note 4, at 1241.

<sup>124</sup> Arthur L. Corbin, *Foreword to* WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 13–14 (Walter Wheeler Cook ed., The Lawbook Exchange, Ltd. 2005) (7th prtg. 1919).

<sup>125</sup> *Id.*

<sup>126</sup> Esper & Keating, *supra* note 4, at 1254 n.89.

<sup>127</sup> *Id.*

violation of that right is itself a remedial right. Both Weinrib and Keating agree that the remedial right to the adjudication of negligence claims is a right in personam.<sup>128</sup> They differ in regard to their conception of the primary rights and duties relating to negligence. It is ultimately through Keating's arguments as to the in rem nature of primary rights and duties of negligence that the problem with Weinrib's conceptions, indeed even the tension between his two theories, becomes illuminated.

Keating's arguments understand negligence as the result of a negative relational duty that does not require an inquiry into the relationship between the parties involved. Negligence, as the consequence of a duty of reasonable care, is indisputably relational in the sense that it obtains between people. It is similarly uncontroversial that the relationship is a negative one, insofar as it prohibits wrongdoing between parties.<sup>129</sup> According to Keating, however, it does not necessarily follow from this basic understanding of negligence that it also only obtains as a unique consequence of the details characterizing the relationship between the defendant and plaintiff.<sup>130</sup> The duty of reasonable care, and thus negligence, is relational but "it is also general in . . . its formulation and its operation."<sup>131</sup> It is general because, given Kantian roots similar to Weinrib's, all agents are each accorded the same basic value as human beings and all agents share a powerful interest in the safety and integrity of their persons.<sup>132</sup> Thus, "everyone owes everyone else the obligation . . . not to endanger one another."<sup>133</sup> Therefore, negligence, as the duty of reasonable care, is relational only in a weak, general sense and should not depend on the details of the relationship between the parties, for agents are always obligated to exercise reasonable care in relation to one another.

## B. PROCEDURAL STRUCTURE

Given that Keating understands negligence as an abstract wrong and the corresponding obligation to use reasonable care as particularly pervasive, he argues that the procedural concepts underlying negligence claims ought to reflect these characteristics, and that they should facilitate judgments in line with this understanding. He argues that each element is distinct and performs a relatively simple yet unique role in determining whether liability attaches in the context of any given fact pattern.

The duty element serves to address whether the obligation to use reasonable care exists.<sup>134</sup> Given that all agents share the same intrinsic value as human beings and an interest in preserving their bodily integrity, the duty to use reasonable care extends from everyone to everyone else.<sup>135</sup> It is triggered by taking action that presents a reasonably foreseeable risk of harm to anyone.<sup>136</sup> Thus, anytime an agent wishes to take any action that

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1249.

<sup>130</sup> *Id.* at 1242.

<sup>131</sup> *Id.* at 1243.

<sup>132</sup> *Id.* at 1242.

<sup>133</sup> *Id.* at 1243.

<sup>134</sup> *Id.* at 1254.

<sup>135</sup> *Id.* at 1255.

<sup>136</sup> *Id.*



would create a reasonably foreseeable risk of harm to any other agent, she must use reasonable care in her action to prevent that harm from materializing.

The breach element serves to determine whether a defendant exercised reasonable care in light of all foreseeable risks bearing on the conduct at issue.<sup>137</sup> This determination is made, according to Keating, by calculating all of the risks to all of the people who were previously determined to have been owed a duty.<sup>138</sup> The defendant, in accordance with his duty, must have acted with reasonable care so far as to simultaneously protect the interests of all those who were owed a duty.<sup>139</sup> If the defendant's action was wrong and failed to adequately protect the interest of any particular person to whom he owed a duty, a breach has occurred with regard to everyone to whom he owed the duty because the entire calculation guiding the defendant was in error. The duty to use reasonable care with regard to protecting everyone's interests was breached, not just the duty towards the individual with whom the defendant's action was incorrect in light of all the foreseeable risks.<sup>140</sup>

The element of proximate cause is concerned with the extent of liability that attaches to the defendant's action.<sup>141</sup> If a duty was breached, the question as to whether any particular individual affected by that breach can recover against the defendant is a matter of proximate cause.<sup>142</sup> It is important to note that even when the harm suffered by the plaintiff is unexpected—when it was not one of the reasonably foreseeable risks that triggered the duty to that plaintiff in the first place—the question remains one of proximate cause and not duty.<sup>143</sup> The question is one that is concerned with the extent of liability for an action that occurred in violation of an obligation to use reasonable care; it does not call into question the existence of that obligation.

Thus, Keating understands negligence to be an abstract concept characterized by a negative, minimally relational duty extending between an indefinite number of parties. He argues that negligence claims of this sort work through simple and distinct elements assigned to determine the existence of a duty, whether that duty was breached, and whether liability attaches to that breach. Taken together, these arguments offer a simple, non-instrumental, Kantian understanding of negligence that rivals Weinrib's own. More importantly, particularly when taken in the context of the historic *Palsgraf* decision, this elegant conception of negligence shines light on the cracks in the massive edifice that is Weinrib's theory.

#### IV. THE CRUCIBLE: *PALSGRAF V. LONG ISLAND R.R. CO.*

*Palsgraf v. Long Island R.R. Co.* is a landmark case in the history of tort law. It is the leading United States decision on the duty of care in

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<sup>137</sup> *Id.* at 1258.

<sup>138</sup> *Id.* at 1256–57.

<sup>139</sup> *See id.*

<sup>140</sup> *Id.* at 1257.

<sup>141</sup> *Id.* at 1258.

<sup>142</sup> *See id.* at 1257.

<sup>143</sup> *See id.* at 1255.

negligence actions.<sup>144</sup> Curiously, in the eyes of many, it is also a leading decision on proximate cause.<sup>145</sup> Despite, or perhaps due to, Justice Cardozo's legendary rhetoric in the majority opinion, the holding of *Palsgraf* is confusing as it pertains to the relationship between the duty of care and proximate cause. As a result of both the confusion and the importance of the decision, *Palsgraf* has become important to scholarship tending towards the discussion of both duty of care and proximate cause. It has become an obstacle or an asset that all competing theories of tort law must eventually come to terms with. For purposes of this discussion, *Palsgraf* will serve as both an example and a crucible of sorts. I will use the facts and decision in *Palsgraf* to demonstrate how both Weinrib's and Keating's understandings of negligence operate in more practical detail than I have up to this point. However, once both are placed in the context of *Palsgraf* and their intimate functional details are exposed, I will point out the weakness in Weinrib's understanding in comparison to Keating's arguments.

In *Palsgraf*, the plaintiff, Helen Palsgraf, was standing on defendant, Long Island Railroad Company's, platform after buying a ticket.<sup>146</sup> A train, which was not Mrs. Palsgraf's, pulled into the station and two men ran to catch it.<sup>147</sup> The men reached the train as it began to pull away from the platform; nonetheless, one man was able to jump aboard "without mishap."<sup>148</sup> The other man, who was carrying a small package wrapped in newspaper, jumped aboard but appeared "unsteady as if about to fall."<sup>149</sup> Noticing this precarious passenger, a guard on the platform pushed him from behind while, a guard on the train simultaneously attempted to pull him in.<sup>150</sup> As a result of this agitation, the passenger's package "was dislodged" and fell onto the tracks.<sup>151</sup> The package happened to contain fireworks which exploded when they hit the tracks.<sup>152</sup> The resultant blast threw down scales at the other end of the platform, many feet away, which, in falling, injured the plaintiff.<sup>153</sup> The jury found that the defendant had been negligent in both pulling the train away from the platform with the train's doors open and in attempting to hoist the passenger with the parcel on to the train.<sup>154</sup> Justice Cardozo famously concluded that Mrs. Palsgraf could not recover because "[t]he conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in relation to the plaintiff, standing far away."<sup>155</sup> He clarified that to be

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<sup>144</sup> WEINRIB, PRIVATE LAW, *supra* note 2, at 159.

<sup>145</sup> Esper & Keating, *supra* note 4, at 1262, n.102. See HENDERSON ET AL., THE TORTS PROCESS XV (7th ed. 2007).

<sup>146</sup> *Palsgraf*, 162 N.E. 99 (NY 1928).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Palsgraf*, 162 N.E. 99 (NY 1928).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Esper & Keating, *supra* note 4, at 1258.

<sup>155</sup> *Palsgraf*, 162 N.E. at 99.

successful a plaintiff must sue “in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.”<sup>156</sup>

#### A. KEATING AND *PALSGRAF*

The application of Keating’s theory to the facts of *Palsgraf* is a simple and uncomplicated exercise. The defendant owed a duty of care to every passenger on the train and to every person standing on the platform, including Mrs. Palsgraf. According to Keating’s theory, a defendant owes a duty to use reasonable care to everyone once he takes action that presents a reasonably foreseeable risk of harm to anyone.<sup>157</sup> Thus, the defendant’s duty to use reasonable care would have been triggered not just because Mrs. Palsgraf was a paying customer, but surely because, among other things, the very act of operating a train—a train being a very large, very powerful piece of complicated and dangerous machinery intended to operate in extremely close proximity to large numbers of people—was sufficient to trigger a duty of reasonable care on the part of the defendant.<sup>158</sup> There was a breach because the railroad employees failed to use reasonable care in light of all of the foreseeable risks connected to their conduct when they left the station with the train doors open, and when they tried to pull and push the passenger on board. The railroad employees “had to make a judgment about the overall risks of several competing courses of action and choose one.”<sup>159</sup> However, the one they chose was, according to the jury, negligent. The railroad’s judgment was faulty with regard to the entire calculation, and with regard to everyone whose interest was or should have been included in that calculation.<sup>160</sup> Thus, because a breach did occur, there was a breach to Mrs. Palsgraf. The risk of fireworks exploding and the ensuing damage resulting in injury, however, was surely not one of the foreseeable risks that triggered the defendant’s duty. As such, it cannot be said that the defendant’s negligence proximately caused Mrs. Palsgraf’s injury. Consequently, it cannot be said that defendant’s liability should extend to that injury.

#### B. WEINRIB AND *PALSGRAF*

Weinrib employs his theory to interpret and defend Justice Cardozo’s majority opinion. He argues that a wrong was committed because the defendant was in fact negligent towards the passenger with the parcel. He also acknowledges that this wrongdoing caused Mrs. Palsgraf’s injury. He concludes, however, that “since the prospect of her injury was not what made the defendant’s act wrongful, no wrong was done to her.”<sup>161</sup> In other words, in acting to pull away with the train doors open and in pushing the passengers aboard, the defendant created a substantial, and thus wrongful, risk with regard to the man carrying the parcel, but an insubstantial, and thus not wrongful, risk of harming Mrs. Palsgraf. It just so happened that

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<sup>156</sup> *Id.* at 100.

<sup>157</sup> Esper & Keating, *supra* note 4, at 1255.

<sup>158</sup> *See id.* at 1260 n.100.

<sup>159</sup> *Id.* at 1256.

<sup>160</sup> *Id.* at 1257.

<sup>161</sup> Weinrib, *Tort Law*, *supra* note 12, at 520.

the insubstantial risk to Mrs. Palsgraf manifested alongside the substantial risk to the man with the parcel. Since this insubstantial risk was not wrongful, its materialization was not a wrong unto the plaintiff. The defendant did act so as to generate a wrongful harm, but the plaintiff, Mrs. Palsgraf, had not suffered that same harm wrongfully. As a result, the doer and sufferer were not linked correlatively.<sup>162</sup> Only the passenger who was carrying the parcel, maybe only the parcel itself, and the defendant were correlatively linked in a bipolar relationship as doer and sufferer of the same harm.

At the heart of Weinrib's understanding of *Palsgraf* is that no duty to Mrs. Palsgraf was breached. Weinrib agrees with Cardozo in stating that a wrongful act creates a general risk: a risk of a certain type of injury to a certain class of people.<sup>163</sup> Once the harm materializes, duty addresses the question of whether the person affected was within that foreseeable class, while proximate cause addresses the question of whether the harm inflicted was in that class of foreseeable harms.<sup>164</sup> Here, in pulling away from the station with the train doors open and in pushing the passenger aboard, the class of people put at risk consisted of the late passengers and not Mrs. Palsgraf. Similarly, even if a duty was found to be owed to Mrs. Palsgraf purely on the grounds that she was a paying customer, who would thus be owed a general duty, the fact that the parcel was wrapped in paper meant the explosion was not a foreseeable event. Thus, the defendant was only negligent in pushing the man with the parcel through the open train door but not negligent towards Mrs. Palsgraf.<sup>165</sup> The duty breached was not one owed to Mrs. Palsgraf; thus, there was no wrong done to Mrs. Palsgraf.

### C. KEATING APPLIED TO WEINRIB IN *PALSGRAF*

Because Weinrib's theory, as depicted in *Palsgraf*, essentially attempts to interpret Cardozo's opinion and personalize duty by basing his argument in the idea of a correlative nature inherent in a valid bipolar negligence relationship, arguments made by Keating, that were originally leveled at Professors Goldberg and Zipursky, apply with nearly equal strength to Weinrib. Keating argues that personalizing duty in this way misunderstands duty itself, blurs the line between duty and breach as distinct elements, and swallows the element of proximate cause entirely.

Personalizing duty results in a general misunderstanding of duty. Duty, according to Keating, is not some sort of "master concept" at the heart of negligence; it is merely the first element in a claim and "a nonissue almost all of the time."<sup>166</sup> Duty addresses the existence of an obligation "and—when risk of physical harm is at issue—duty ordinarily exists."<sup>167</sup> To support this claim Keating not only relies on the Kantian arguments mentioned above, but also points to the origins of the duty element in the history of negligence law. Duty, he argues, was always intended to be about

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<sup>162</sup> *See id.*

<sup>163</sup> Weinrib, *Causation*, *supra* note 9, at 441.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 440.

<sup>166</sup> Esper & Keating, *supra* note 4, at 1253.

<sup>167</sup> *Id.* at 1254.

a general duty to use reasonable care.<sup>168</sup> Personalizing duty results in confusion as to the importance of duty to the overall claim. Conceiving of duty in this way, where one must consider who owes what duties to whom and when, supports an idea that duty, due to its importance in controlling who can sue whom for what and when, ought to reappear and intersect with the other elements of negligence.

In particular, this misunderstanding of the role of duty leads to an intersection between duty and breach, and, consequently, a general breakdown of any clearly defined boundary separating the two elements.<sup>169</sup> If duty and breach are distinct elements, then duty should present a question as to whether the defendant had a legal obligation to take reasonable care in his actions, while breach determines whether or not the defendant did in fact take reasonable care in the act at issue. When duty is personalized, the duty element does in fact determine whether the defendant was under a legal obligation to conform to a certain kind of conduct. However, duty reappears in the discussion of breach in order to determine whether that duty in regards to a specific plaintiff was violated. Breach is no longer concerned with whether the duty of reasonable care established by way of the immediately preceding element was violated, but is instead concerned with whether the duty of reasonable care established, was established with regard to this particular plaintiff and whether that particular duty of care was violated. As separate elements, the issue as to whether a duty existed should have been settled before moving on to the element of breach. There should be a boundary such that questions as to duty should not reassert themselves in subsequent discussions relating to other elements of the claim. Personalizing duty in this way destroys any such boundary between duty and breach.

Not only does personalizing duty destroy the boundary between duty and breach in this way, it similarly erodes the boundary between duty and proximate cause.<sup>170</sup> Questions of proximate cause ought to deal with issues as to whether a plaintiff can recover given the way in which she was injured; that is, whether the injury that resulted was a manifestation of one of the foreseeable risks that triggered the duty of reasonable care in the first place. A question of proximate cause is a question as to whether the defendant is liable for the type of harm that resulted from their action. It is not a question as to whether the defendant is liable because it breached a duty with regard to this particular plaintiff. Again, the question as to whether a duty was breached should have been settled before the issue of proximate cause was reached. By resurrecting the concepts of duty and breach to settle the issue as to the extent of the defendant's liability, the personalization of duty swallows the concept of proximate cause entirely.

Weinrib's understanding of negligence law personalizes duty in this way such that his theory misunderstands and misuses the elements of a typical negligence claim to the point that the justificatory power of his

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<sup>168</sup> *Id.* See generally *id.* at 1254 n.90 (showing that Oliver Wendell Holmes intended duty to be "of all the world to all the world").

<sup>169</sup> *See id.* at 1252.

<sup>170</sup> *Id.* at 1253.

theory suffers. Weinrib personalizes the duty to exercise reasonable care intentionally. Central to both his general theory of private law and his specific theory of negligence law is the essential form of the bipolar relationship. In this bipolar relationship a particular plaintiff and a particular defendant must be linked correlatively as doer and sufferer of the same harm.<sup>171</sup> Thus, the requirement of bipolarity must treat the primary rights and duties of negligence as in personam because the primary negligence relationship can only obtain exclusively between a particular defendant and a particular plaintiff. Therefore, any duty of reasonable care, any breach of that duty, and any harm that proximately results from that breach are only relevant in regard to the personal relationship between the plaintiff and defendant. Duty is personal because negligence is personal. For Weinrib, the fundamental question is whether *this* plaintiff can recover from *this* defendant. This entails asking whether *this* defendant owed *this* plaintiff a particular duty, and whether *this* defendant breached *that* duty with regard to *this* plaintiff. For this reason the above mentioned confusion as to the distinct elements of a negligence claim apply to Weinrib's theory.

However, this kind of overlapping and blurry conception of negligence may be just what Weinrib intended to create. He does, after all, consider negligence to be an intrinsic form of legal ordering. That is, a type of legal ordering wherein its "aspects are intelligible only through the integrated whole that they form as an ensemble."<sup>172</sup> We might take this statement to mean that every element of negligence is to be connected to every other element in this kind of intimate, boundary-less way. However, this does not explain why duty becomes the dominant element that reoccurs through the discussion of the other elements. Moreover, if it was indeed Weinrib's intent to create this kind of amorphous structure of intimately related and barely distinguishable concepts, it does even less to explain why cases brought under his theory of negligence are more often than not won or lost on the duty element alone.

In light of Keating's arguments as to the personalization of duty and the confusion that results, Weinrib's hitherto clear edifice of tort theory becomes a cloudy and confusing structure. It is unclear how useful this cloudy and confusing structure is. That is, if a theory of negligence law is intended to justify and guide negligence decisions and further theoretical scholarship, then it is unclear how a cloudy and confusing structure devoid of the traditional elemental boundaries of negligence law will be of much use to lawyers, judges, and scholars. While certainly the murkier a theory becomes the more intriguing it may become to certain scholars, the ultimate concern is that a theory with problems of this definitional sort runs the risk of simply becoming impractical.

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<sup>171</sup> E.g., Weinrib, *Correlativity*, *supra* note 1, at 107.

<sup>172</sup> Weinrib, *Tort Law*, *supra* note 12, at 495.

## V. FOLLOWING THE THREAD: JUSTIFICATORY FAILURES OF WEINRIB'S THEORY

In continuing to follow the clew laid down by Keating, it becomes apparent that, due to its strong level of personalization resulting from his in personam conception of negligence, Weinrib's theory is unable to account for many of the types of cases found in the body of law concerning claims of NIED.<sup>173</sup> Many successful claims for NIED involve a physical harm done to one party in breach of a duty of care by the defendant, but the plaintiff who is actually seeking to recover on the theory of emotional injury was not the one physically harmed. To adequately account for these cases a theory of negligence must permit recovery for a harm that results from the breach of a duty based on the foreseeability of a completely different harm. The theory must allow liability to extend beyond the manifestation of harm foreseen in generating the duty. Weinrib's theory cannot accomplish this due to the strict mechanics of the bipolar relationship. I will briefly explore this justificatory failure of Weinrib's philosophy by examining bystander cases and cases relating to the mishandling of corpses.

In both types of cases "duty exists independent of the prospect of emotional injury being negligently inflicted."<sup>174</sup> In bystander cases, the plaintiff, having necessarily been at the scene of the accident, is owed a duty because that plaintiff falls into the class of persons who could have been foreseeably injured by the defendant's negligent conduct that turned out to manifest in the injury or death of a closely situated loved one.<sup>175</sup> In cases related to the mishandling of corpses, the plaintiff is owed a duty of care as a result of the preexisting relationship between the plaintiff family and the defendant mortician.<sup>176</sup> The question is whether liability should extend to an emotional harm that results, in bystander cases, from the breach of a duty that arose to protect against physical harm to the plaintiff when that harm manifested in regards to the plaintiff's loved one, or, in corpse cases, to a breach of a duty to protect against the harmful and disrespectful treatment of the cherished cadaver of the plaintiff's loved one.

In cases where liability is found, it has often been justified on grounds other than corrective justice. It has been argued that liability attaches to these emotional harms simply because agents should bear the responsibility of their negligent conduct even as it pertains to harms done to persons other than those who were physically injured.<sup>177</sup> That is, the defendant who acted wrongly should be responsible for making right all of the harms that he negligently created. Thus, in certain cases such as these, the defendant's liability should be held to exceed the scope of his duty.

Weinrib cannot accommodate this justification or any justification that requires liability to exceed the scope of defendant's duty because such a move would violate the all-important requirement of correlativity that must

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<sup>173</sup> Esper & Keating, *supra* note 4, at 1264–70.

<sup>174</sup> *Id.* at 1265 (italics removed).

<sup>175</sup> *Id.* at 1264–65.

<sup>176</sup> *Id.* at 1265–66.

<sup>177</sup> See *Thing v. La Chusa*, 771 P.2d 814, 829 (Cal. 1989).

hold within the bipolar relationship of the parties.<sup>178</sup> Under Weinrib's theory, "the defendant's wrongdoing consists in creating the potentiality of a certain set of harmful consequences; the plaintiff recovers only if [his or her] injury is within that set."<sup>179</sup> Because we are concerned with the appropriateness of a type of harm, we are concerned with proximate cause in Weinrib's scheme. Given Weinrib's requirement of proximate cause, a defendant is only liable for harms manifesting out of the risks he created that made the act wrongful in the first place.<sup>180</sup> This type of liability stems from the requirement of correlativity. For correlativity to obtain between doing and suffering, a plaintiff and defendant must be bound together as doer and sufferer of the same harm.<sup>181</sup> If a plaintiff suffers a harm whose foreseeability was not what rendered the action wrongful, then the suffering of that harm was not wrongful due to a lack of proximate cause.<sup>182</sup> If the plaintiff does not suffer wrongfully, there is no correlativity binding the parties. Thus, if a bystander, put at risk of physical injury, suffers emotional harm as the result of the defendant's action that was wrongful only with regard to its imposition of an unreasonable risk of physical injury, the harm of emotional injury resulting from the death of a closely situated loved one was not within the scope of the risks imposed that made the defendant's conduct wrongful in the first place. Hence, the suffering of that emotional harm was not wrongful. Therefore, no correlativity exists between doing and suffering, and consequently, the defendant is not liable to the plaintiff for damages. The same holds true for cases relating to the mishandling of corpses. If a mortician is negligent in their treatment of a loved one's corpse, the emotional harm resulting from the mortician's mishandling of that corpse is outside the scope of the duty held by the mortician to ensure the appropriate physical treatment of the corpse.

## VI. CONCLUSION

Weinrib's philosophy results in a strongly personal, relational understanding of negligence. This characteristic of Weinrib's understanding of negligence stems from his broader conception of private law. Generally, in order for a plaintiff to succeed in a private law claim she must show the existence of a bipolar relationship between the parties characterized by correlative normative gains and losses as generated by a violation of the defendant's duty and a correlative infringement of the plaintiff's right. When this understanding is applied to negligence as a subset of private law claims, it results in a conception of negligence as a relationship in personam. The requirements of private law are so dependent on the personal relationship between the plaintiff and defendant that a specific theory of negligence must take a similar form.

Ultimately, the cracks or shortcomings in Weinrib's theory, and indeed the tension alluded to at the opening of this note, are related to this

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<sup>178</sup> See Weinrib, *Causation*, *supra* note 9, at 432.

<sup>179</sup> WEINRIB, *PRIVATE LAW*, *supra* note 2, at 159.

<sup>180</sup> Weinrib, *Causation*, *supra* note 9, at 416.

<sup>181</sup> Weinrib, *Correlativity*, *supra* note 1, at 107.

<sup>182</sup> See Weinrib, *Causation*, *supra* note 9, at 416.



understanding of negligence as a strongly personal type of relationship. To quote Keating, “[n]egligent risk imposition is not an affront to a particular person in the way that a punch in the nose or a knife in the back is.”<sup>183</sup> To conceive of it as such generates the types of problems discussed in this note, including a breakdown of the distinct elements of a negligence claim to the point that they are inseparable and of little use to a lawyer, judge, or scholar and an inability to account for NIED awards. Conceiving of it in this way, however, is not without some intellectual merit, and in the more abstract understanding of private law where this understanding is grounded, it even holds some weight. It makes sense in this more general level because in many types of private law claims, breach of contract and trespass, a personal and strongly relational concept holds up. These are claims that can be understood to be very dependent on the status and relationship of the agents involved, and these agents are often accorded specific rights in the context of their relationships with other people or with a prospective plaintiff. Weinrib’s theory provides an adequate non-instrumental argument for understanding how those rights were violated by the acts of a particular defendant and how that violation comes to be a wrong between the parties that results in a direct payment of damages from the particular defendant to the particular plaintiff. Similarly, we see that other distinctly personal, harms such as battery, are elegantly dealt with by Weinrib’s theories. The nature of negligence, however, is simply unlike these other claims. As such, because the requirement of bipolarity, and the requirement of correlativity that it entails, is logically shared between Weinrib’s two theories, it creates the tension between the two theories and the cracks in Weinrib’s understanding of negligence itself.

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<sup>183</sup> Esper & Keating, *supra* note 4, at 1254.

