

3-2007

## Can Law Survive Legal Education?

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### Recommended Citation

Ernest J. Weinrib, *Can Law Survive Legal Education?*, 60 *Vanderbilt Law Review* 401 (2019)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol60/iss2/5>

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# Can Law Survive Legal Education?

*Ernest J. Weinrib\**

I.	THREE ACTIVITIES.....	401
II.	DISJUNCTION: THE ROLE OF INSTRUMENTALIST ANALYSIS.....	406
	A. <i>The Example of Economic Analysis</i> .....	406
	B. <i>The Dynamic of Instrumentalism</i> .....	410
III.	OVERCOMING THE DISJUNCTION.....	415
	A. <i>The Character of Private Law</i> .....	415
	B. <i>The Stages of Elucidation</i> .....	417
	C. <i>Legal Education</i> .....	425
IV.	THE INTERDISCIPLINARY TURN.....	428
V.	CONCLUSION.....	437

## I. THREE ACTIVITIES

Legal education exists at the confluence of three activities: the practice of law, the enterprise of understanding that practice, and the study of law's possible understandings within the context of a university. The first of these, the practice of law, consists of the activities consciously governed by law, including, for example, lawyers giving legal advice, citizens contemplating the legality of prospective actions, legislators creating law within the limits of their jurisdiction, and judges determining the rights and duties of litigants. It thus comprehends the entire field of legal institutions, legal doctrine, and legal interaction. The second activity, the enterprise of understanding law, refers to the elucidation of the character of this practice. This enterprise seeks to determine the extent to which the practice's various characteristics can be grasped as exhibiting, through the coherence of their interrelationships, some generically determinate character. The third activity, university study, requires that the student's reflections about law be appropriate to an institution devoted to caring for the intellectual inheritance—the stock of ideas,

images, beliefs, skills and modes of thinking—that compose the world's civilization.<sup>1</sup>

These three activities exercise a reciprocal effect on one another. On the one hand, the practice of law supplies the materials that are to be understood through university study. On the other hand, that practice is transformed by the very enterprise of articulating understandings of it. Scholars are not merely the passive recipients of the law's materials. Rather, their understandings influence the practice by making practitioners conscious of the possibilities that are implicit in it.<sup>2</sup> When these understandings originate in the universities and are thus invested with the authority of prestigious institutions of learning, the practice of law itself can become either (at best) more aware of law's distinct voice in the conversation of civilized humanity or (worse) more prone to succumb to prevailing academic orthodoxies.

The central challenge that has faced legal education since it was wrested from the legal profession and lodged in the universities<sup>3</sup> has been how to integrate the three activities. The relation between the practice and the university study of law has proved particularly problematic. One influential critique of legal education laments the growing disjunction between them:

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1. MICHAEL OAKESHOTT, *The Study of 'Politics' in a University: An Essay in Appropriateness*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 184, 187-94 (new and expanded ed., 1991) (1962). As will be apparent, Michael Oakeshott's work has significantly influenced my remarks in this essay.

2. The classic statement of this is Friedrich Carl von Savigny's comments on the Roman jurists:

[T]he action of the jurists, appears at first sight a dependent one, receiving its materials from without. However, by their giving to the materials so presented a scientific form which strives to disclose and perfect the unity dwelling in them, there arises a new organic life which shapes and reacts upon the materials themselves, so that from science as such, a new sort of generation of law incessantly proceeds.

FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 37-38 (William Holloway trans., 1867).

3. In Canada this happened relatively recently. The decisive event was the defection of three of Canada's leading law professors (Cecil A. Wright, Bora Laskin, and John Willis) from the law school operated by the Law Society of Upper Canada and their establishing the modern Faculty of Law at the University of Toronto in 1949. Within a decade, the Law Society of Upper Canada surrendered control of legal education to the universities by recognizing that graduation from a university faculty of law qualified the graduate to enter the profession without penalty. For a description of this "revolution" in Canadian legal education, see C. IAN KYER AND JEROME E. BICKENBACH, *THE FIERCEST DEBATE: CECIL A. WRIGHT, THE BENCHERS, AND LEGAL EDUCATION IN ONTARIO 1923-1957* (1987). For a recent discussion, see R.C.B. Risk, *My Continuing Legal Education*, 55 U. TORONTO L.J. 313 (2005).

The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use. . . . But many law schools—especially the so-called “elite” ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy. . . . [I]f law schools continue to stray from their principal mission of *professional* scholarship and training, the disjunction between legal education and the legal profession will grow and society will be the worse for it.<sup>4</sup>

Formulated in these terms, the critique forcefully indicates what its author thinks is at stake. The practice of law and its university study as currently constituted are regarded as competitors, such that the university’s preoccupation with “theory” operates “at the expense of” practical professional concerns. The proper function of the university study of law, according to this critique, is to produce scholarly work for the professional consumption of those engaged in the practice of law. The diagnosis, in effect, is that the practice of law is effaced through university study, and the remedy suggested is that the latter be recalled to its “principal mission” of being useful to the former.

This criticism has, I think, a truth that should be recognized, though my version of this truth is perhaps not what its author intended. A disjunction between the practice of law and its university study would indeed be disquieting. This is not, however, because the disjunction would be a disservice to the legal profession (though it might be), but rather because it would be a disservice to the university itself.

The university exists as a locus for the study of law not for the sake of the legal profession, but because law is a component of the intellectual inheritance of civilization. The “principal mission” of university study is to care for and develop this inheritance. That the legal profession should benefit from this through the university’s graduates and its ideas is all to the good. Moreover, it is both desirable and necessary that those who are most intimately connected with and conscious of the workings of law should support its study within the university—thus manifesting a commitment to the idea that law is integral to civilized modes of thinking and living. But criticism of the university study of law should come from a standpoint *internal* to university activity itself. Accordingly, the disjunction between legal education and the legal profession is troubling only if it represents a failure on the university’s own terms.

The disjunction would be such a failure in the following sense. University study of any kind must have a definite object; it must be

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4. Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34, 41 (1992). Judge Edwards’s views are extensively discussed in Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993).

the study of something. Law is a phenomenon that exists only through a set of legal doctrines, institutions and juristic activities. The university study of law can therefore be nothing other than the study of the practice of law. Accordingly, legal education is inevitably concerned with the activity of "judges, legislators, and practitioners," not in order to produce scholarship that they "can use" (though, if they can legitimately use it, so much the better), but in order to reflect upon the meaning and intelligibility of their activity. A disjunction between the practice of law and the university study of law is troubling because it suggests that the university study of law actually has no object, that is, that it is the study of nothing, similar to the zoological study of unicorns. Such study would be a failing from the university's standpoint, quite apart from its uselessness to the legal profession.

But what does it mean to say that the university study of law is disjointed from the practice of law? The answer lies in how these two activities conceptualize the character of law. If the university study of law expressly or implicitly attributes to law a different character than that which is presupposed in the practice of law, then one cannot say that the practice of law is the object of university study. Under those conditions, the practice of law and the university study of law would be activities lacking a common interest; the law that the latter studied would not be the same as the law that the former practiced.

Thus, the difference between the two activities of practice and university study has to be mediated through the third activity, that of understanding the law. For only when that understanding is common to the law as practiced and as studied is there no disjunction between legal education and the practice of law.

So formulated, the issue raised by the supposed disjunction between the legal profession and legal education turns out to be primarily one of legal theory rather than one of straightforward sociological observation. Of course, what is discussed in a university differs from what is discussed in a law office or a judges' conference. What might link the two is a conception of how law is to be understood. Those participating in university life as students, teachers, and scholars regard law as a significant component of civilization's intellectual inheritance and attempt to think through the features implicit in the practice of law that make that practice worthy of academic attention. The process of identifying these features and thinking them through requires reference, implicitly or explicitly, to some understanding of what the practice of law is. This is an exercise in legal theory, because legal theory consists of nothing but a self-conscious examination of the range of possible understandings of law. And so the critic who blames the disjunction on too much "abstract

theory” necessarily, if ironically, issues an appeal for further theorizing.

In this Article, I wish to present more concretely this abstractly formulated notion of disjunction. My focus is on the way that this disjunction arises in the university study of private law. A justification for this focus is that private law, as the enduring bedrock of legal education, is a primary vehicle for the transmission of conceptions of legal understanding. More importantly, the simplicity and the restricted scope of the relationship between the parties allow the disjunction and its implications to be set out with particular clarity. Part II of this Article suggests that prevailing instrumentalist approaches within the legal academy, exemplified by (but not confined to) certain versions of the economic analysis of law, systemically distort legal practice. This distortion effaces the characteristic concepts of private law, ignores the direct relationship between the parties, and assimilates private law into public law. In these respects, economic analysis fails to comprehend private law as the distinctive kind of normative phenomenon that it is.

My purpose in making these observations is not to criticize economic analysis in particular, but to point to a structural problem that accompanies an assumption—that law is to be explained instrumentally—that is widely popular in the academic treatment of law and that yet separates the university study of law from law’s practice. Economic analysis thus merely provides the paradigmatic example of an instrumentalism that emerges from a distinctly academic enterprise but that mischaracterizes the legal practice it purports to explain. In Part III, I will sketch a different mode of legal understanding that both respects legal practice and affirms private law as a component of our intellectual inheritance that is worth studying in its own terms. Finally, in Part IV, I will trace the implications of this mode of understanding for the interdisciplinary turn that is a conspicuous feature of contemporary legal education.

My goal in this Article is a modest one. It is easy to read critiques of present legal education as exhortations to exclude, either through curricular change or appointment policy, certain kinds of currently entrenched enquiry.<sup>5</sup> My argument here, however, is not about what to exclude but what to include. By exploring the supposed disjunction between practice and university study, and by suggesting how to overcome that disjunction, I want to point to a conception of the core of legal education, at least for private law, that links the three

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5. This is, for instance, the way Sandy Levinson reads Judge Edwards’ critique as stated in Sanford Levinson, *Judge Edwards’ Indictment of “Impractical” Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010 (1993).

activities. This in no way denies the insights of other ways of thinking about law. Inasmuch as they are about law, however, those insights presuppose—and therefore are ancillary to—an understanding of law that is not disjointed from the practice of law. Thus, my focus is on what legal education should necessarily deal with, whatever else it deals with.

## II. DISJUNCTION: THE ROLE OF INSTRUMENTALIST ANALYSIS

### *A. The Example of Economic Analysis*

To see the sort of disjunction that I have in mind, consider the notion, popular among expositors of the economic analysis of law, that economic efficiency is the key to understanding tort doctrine. The basic assumption of this approach is that a defendant should be liable for failing to guard against an accident only when the cost of precautions is less than the probable cost of the accident. From the economic standpoint, the goal of the liability rules of private law is to provide incentives for cost-justified precautions. Ambitious claims have been made on behalf of this mode of analysis: Economic ideas have been said to reveal the inner nature,<sup>6</sup> implicit design,<sup>7</sup> and unifying perspective<sup>8</sup> for tort law.

This approach constitutes a notable attempt to link the university study of law to the practice of law. On the one hand it draws on the insights of economics, the academic discipline that provides a systematic understanding of what Hegel called “the infinitely complex criss-cross movements of reciprocal production and exchange.”<sup>9</sup> On the other hand, it deploys this discipline to explain leading doctrines in the practice of tort law. The vast academic literature that this attention to economic efficiency has inspired is one of the most impressive achievements of contemporary legal scholarship.

One would have thought that an approach that purports to reveal the inner nature of tort law would be particularly illuminating about the concepts that pertain to tort law. Negligence liability, for instance, involves a conjunction of legal concepts, such as duty, proximate cause, factual cause, and the standard of reasonable care.

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6. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 361 (1990).

7. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* vii (1987).

8. RICHARD A. POSNER, *TORT LAW: CASES AND ECONOMIC ANALYSIS* 2 (1982).

9. G.W.F. HEGEL, *THE PHILOSOPHY OF RIGHT* § 201 (T.M. Knox trans., Oxford University Press 1967) (1820).

Such concepts are fundamental to our understanding of tort liability because they structure the thinking of those who participate in the practice. Through such concepts, tort law discloses its *own* normative character, thereby indicating the terms in which it is to be understood. Revealing the inner nature of such concepts would (one would expect) disclose how they function or should function within the reasoning of those engaged in legal practice. Among the issues that would then be addressed are: What are the conditions that call each of these concepts into play? How are they related to each other and do they form a coherent set? What is the relationship between the abstract formulations of these concepts and the institutional processes of adjudication that particularize them for specific cases? And are these concepts suitable vehicles for the normative considerations that justify or can justify the determination of liability? Attention to these issues would involve taking the concepts seriously as objects worth explicating in their own terms, with a view to examining whether they have or could have the significance that tort law ascribes to them when it orients legal practice, as manifested in the reasoning of lawyers and judges, along their lines.

In fact, economic analysis does the opposite. When economic analysis is presented as the key to understanding tort law, the point of the analysis is not to take the fundamental concepts seriously as concepts used in legal practice, but to render them otiose. Economic analysis has its own stock of ideas that operate without reference to the legal concepts. The result is that ideas about economic efficiency replace rather than illuminate the legal concepts. Instead of functioning as vehicles of thought, the legal concepts are at most labels pinned to conclusions once economic analysis has done all the work.

Consider two instances, causation and intention. Causation plays a central role in determinations of liability as a matter of legal practice. For the economic analysis of tort law, however, causation turns out to be an idea “that can largely be dispensed with.”<sup>10</sup> Given that the purpose of tort law is thought to be the promotion of efficiency, the defendant will be held liable—and thus deemed to be the cause of an injury—when such liability will promote the efficient allocation of resources to safety. Thus, cause does not mark the law’s concern for the transitivity of the relationship between the defendant’s conduct and the plaintiff’s injury, but functions merely as the label that is attached to the conclusion of a cost-benefit analysis. Because both parties might have taken precautions, the task for economic analysis is to determine not whether the defendant caused the

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10. LANDES & POSNER, *supra* note 7, at 229.

plaintiff's injury in the conventional legal sense, but which of them could have avoided the accident more cheaply.

Similarly dispensable is the concept of intention.<sup>11</sup> For the economic analyst, intention refers not (as it does in the law itself) to the actor's purpose with reference to a wrongful consequence, but the connection between the probability of harm and the ease with which the actor could have avoided it. What "establishes a clear-cut economic basis for condemning a distinct form of misconduct" is not the wrongfulness of making another's injury the object of one's conduct but instead the injurer's low cost of avoidance relative to the social benefits of the injurer's activity.<sup>12</sup>

The economic analysis, in other words, produces a disjunction between the significance of tort concepts for legal practice and their significance for academic study. While purporting to offer an account of legal practice—indeed, while claiming to reveal its inner nature—the economic approach instead effaces the very concepts that constitute legal reasoning when determining liability within that practice. In presenting its analysis of concepts like causation and intent, the economic analyst aims not to illuminate those ideas in their own terms, but to make them disappear in the face of the analytic power of economic efficiency. Economic analysis thereby offers a theory that negates rather than explains the concepts supposedly being analysed. The deficiency of this form of scholarship lies not in its presenting nothing about legal practice that "judges, legislators, and practitioners can use,"<sup>13</sup> but in its presenting nothing about legal practice at all.

There is a second respect in which economic analysis does not reflect legal practice. Through the process of litigation, the practice of law directly links the particular plaintiff to the particular defendant. Liability is thus a relational phenomenon in which the court responds to the wrong or injustice that the defendant has done to the plaintiff. This linkage assumes that the same reasons for liability apply simultaneously to both parties. In contrast, economic analysis does not treat the parties as directly connected. Rather, it views them each as subject to different incentives that somehow happen to be conjoined in a finding of liability. For economic analysis the point of liability is to induce the parties to take cost-justified precautions. These incentives, however, apply separately to each of them. Awarding damages against a defendant provides defendants with an incentive to act efficiently, "[b]ut that the damages are paid *to the plaintiff* is, from the economic

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11. *Id.*

12. *Id.* at 153.

13. Edwards, *supra* note 4, at 34.

standpoint, a detail.”<sup>14</sup> The plaintiff’s receipt of the damage award reflects a different group of incentives (such as the need to induce enforcement of the norm and to prevent prospective victims from preempting the precautions incumbent on actors)<sup>15</sup> that do not in themselves entail taking the money from the actual defendant. Both parties are thereby involved in the damage award, but for separate reasons. Efficiency might as easily be served by two different funds, one that receives tort fines from inefficient actors, another that disburses the indicated inducements to victims. Instead of linking each party to the other, economic analysis ascribes the presence of both as to a combination of incentives independently applicable to each. Accordingly, liability is the consequence of one-sided considerations that somehow come together, rather than of relational considerations that treat the parties as belonging together because of what the defendant has done to the plaintiff.

This sundering of the parties’ relationship leads economic analysis to mischaracterize private law in a third way. The fundamental concepts that express the unity of the parties’ relationship make private law a distinctive mode of legal ordering, with its own discourse, its own internal organization, and its own normative presuppositions. Within the legal domain, the distinctiveness of private law allows it to be contrasted to public law. Private law normatively connects the parties directly to each other, not to the state. Although the state is present through the machinery of adjudication, the purpose of this machinery is merely to give authoritative expression to what the relationship between the parties requires. In contrast, public law is concerned with the forms and limits of the state’s exercise of power with respect to those who are subject to it. Whereas private law deals with the relationships between participants *in* the community, public law deals with the relationships between participants *and* the community as embodied in its official organs.

By denying the significance of fundamental concepts private law and negating the unity of the defendant-plaintiff relationship, economic analysis divests private law of the possibility of constituting a distinctive mode of legal ordering. From the economic standpoint, private law is to be understood as a judicially created and enforced regime for the taxation and regulation of inefficient activity.<sup>16</sup> Courts act as administrative tribunals that set norms for efficient behavior

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14. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 143 (2d ed. 1977) (emphasis in original).

15. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 192 (6th ed. 2003).

16. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 48-49, 51 (1972).

and exact fines when those norms are breached. The plaintiff's function in initiating a lawsuit is not to secure redress for wrongful injury but to claim a bounty for prosecuting inefficient economic activity. Economic analysis thus submerges the private nature of tort law in a public law of economic regulation.

Thus, the link that economic analysis posits between academic study and the practice of private law is vitiated by its mistaken characterization of that practice. Instead of illuminating private law, economic analysis discards its fundamental concepts, breaks apart its relationships, and subverts its private nature. The economic analysts are not so much concerned with understanding private law as with assessing the degree to which its rules coincide with what efficiency demands. Far from being the focus of their attention, private law is merely the foreign language into which economic discourse has somehow been translated.<sup>17</sup> The result is a profound disjunction between the economic analysis of law as a method of university study and the practice that is being studied.<sup>18</sup>

### *B. The Dynamic of Instrumentalism*

My point in making these comments is not to criticize economic analysis in particular. Rather, in contemporary legal education, economic analysis is paradigmatic of the instrumentalist structure of academic enquiry. What occasions the disjunction with legal practice is this instrumentalist structure, not economic analysis as such. Economic analysis is nothing but an instance of a more comprehensive dynamic.

The instrumentalism of economic analysis consists in the interpretation of tort law as forwarding the goal of economic efficiency. As the disjunction just described indicates, the normative attractiveness of this goal—what makes it worthy of being considered a goal that tort law should forward—does not arise out of the law itself, by reflection, for instance on the fundamental concepts of tort law or on the nature of the relationship between the parties. Rather,

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17. For law as the translation of economic principle, see LANDES & POSNER, *supra* note 7, at 23; POSNER, *supra* note 6, at 361.

18. Economic analysis may lodge itself within the practice through the influence of economic scholarship on judges, who then apply it in their judgments. Compare the observations of von Savigny, *supra* note 2. To the extent that this occurs, the disjunction between academic study and legal practice is lessened. However, in its stead a different and ultimately more serious problem arises. Because economic analysis cannot coherently reflect the character of the law, its entry into legal practice sets up irresolvable tensions between the law's fundamental concepts and relational structure, on the one hand, and the economic analysis on the other. Thus, the disjunction between academic study and legal practice is displaced by a disjunction internal to the legal practice, between the economic analysis and the practice's concepts and structure.

this goal thought to be desirable independently of tort law and is then given to tort law from the outside. Tort law is only an instrument in the goal's promotion.

Economic efficiency is merely one of the goals that modern scholarship has proposed. These goals come in many varieties, ranging from the general, such as promoting communal responsibility<sup>19</sup> or basic aspects of the good<sup>20</sup> to the more specific, such as alleviating injury.<sup>21</sup> All such goals base their appeal on some conception of human welfare that is considered desirable independently of the law and that the law should therefore strive to forward.

A consequence of focussing on independently desirable goals is that private law is only indirectly implicated in the instrumentalist inquiry. The instrumentalist starts by looking past private law to a catalogue of favored social goals. Private law matters only to the extent that it forwards or frustrates these goals. What the instrumentalist proposes is not so much an understanding of private law as an understanding of social goals. The disjunction of legal education from legal practice is simply the difference between these two projects in understanding.

Regardless of the goal it advances, an instrumentalist analysis of private law mischaracterizes its object in the same way that economic analysis does. An instrumentalist approach makes three errors. First, it imports outside goals for immanent concepts of private law. Second, it ignores the relationship between a plaintiff and a defendant. Third, it wrongly converts all private law into public law.

Instrumentalist approaches substitute for the concepts of private law the outside notions that are appropriate for the promotion of the preferred goal. Instead of working out the meaning of the applicable legal concepts in particular situations, as legal practice requires, the instrumentalist specifies the mechanisms through which the social goal might be forwarded in different circumstances. Because the really important work is done by the apparatus of instrumental reasoning, the law's invocation of the standard legal concepts is regarded as a mere ritual,<sup>22</sup> a veil to be pierced by clear-headed

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19. Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1480-1502 (1986).

20. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 59-75 (1979).

21. Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 785-88 (1967).

22. Jerome Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645, 653 (1931).

analysis,<sup>23</sup> or even as a salutary obfuscation that itself has instrumental value.<sup>24</sup>

Second, within instrumentalist analysis the plaintiff and defendant are not directly related to each other, because no independently desirable goal is congruent with such a relationship. The goals are considered elements of the social good, and therefore are concerned with the overall benefit, however construed, to society as a whole, not with the relationship between two particular parties. Instead of linking the plaintiff to the defendant who has wronged her, instrumentalist analysis groups each party with those who are, from the standpoint of the goal in question, similarly situated. For example, the alleviation of injury, when considered as a goal of tort law, connects the injured party not to the particular person who has wrongfully caused the injury, but to other injured persons who have a like claim on the distribution of society's resources. Analysis in terms of a goal thus breaks apart the relationship between the parties, in order to apply the appropriate goal to each of them. The result is that reading an independently desirable goal back into private law creates a dissonance between the parties' nexus as a matter of legal practice and the goal's indifference to this nexus within the instrumentalist understanding of law. When university study accepts the instrumentalist understanding and develops it, this dissonance appears as a disjunction between university study and legal practice.

Third, for the instrumentalist, all law is public law. The favored goals must be selected by the state and inscribed into a schedule of collectively approved aims. The various method of elaborating the community's purposes—adjudication, legislation, administrative regulation, and so on—are merely the species of the generically single activity of making the goals a legal reality. The singling out of a particular goal from among all the possible goals, the balancing of one goal against competing goals, and the positing of the means for promoting the chosen goals require legislation by political authority. Norms of private law are therefore considered the product of legislative acts, even when formulated through the adjudicative process.<sup>25</sup> Instrumentalism thereby dissolves the very idea of private law as a distinctive mode of legal ordering. Private law turns out to be nothing but public law in disguise.<sup>26</sup>

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23. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809-12 (1935).

24. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 107 (1975).

25. Oliver Wendell Holmes, Jr., *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 3 (1894).

26. Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 1 (1959).

These three features of instrumentalist analysis are intimately connected. The legal concepts (such as causation and intent) are the apparatus that the law has elaborated to treat the relationship between the parties as a single normative unit. The process of determining a defendant's liability by working through these concepts is what stamps private law as a distinctive kind of normative ordering. The concepts, the relational unity, and distinctiveness of its form of legal ordering are thus the mutually entailed aspects of private law as a legal practice. Instrumental analysis distances itself from all of these when it distances itself from any of them.

To the extent that contemporary legal education revolves around instrumental understandings, it inevitably separates itself from private law as a legal practice. Economic analysis is simply exemplary in this respect. Those who, out of skepticism about or antagonism toward economic efficiency as a goal, think that legal education should center on different goals, contribute to this disjunction no less than do the economic analysts themselves. The disjunction is the consequence not of one particular goal or set of goals rather than another, but of the very orientation toward goals.

In the face of this disjunction between the instrumentalist understanding and the legal practice, two responses are tempting. Each of these responses leaves the disjunction intact, while submerging one or the other of the disjoined activities.

The first response is embodied in academic work that expressly disconnects the university study of law from legal practice. In private law this work takes the form of "decoupling" the position of the plaintiff from that of the defendant. One suggestion, for example, is that the defendant should pay more and the plaintiff should receive less than the compensatory amount, with the difference going to cover the state's administrative costs.<sup>27</sup> Another example is the suggestion that efficient incentives would be best achieved by arranging that contract damages be awarded to a third party rather than to the victim of the breach.<sup>28</sup> Such decoupling embraces the disjunction by foregoing the aspiration to see the university study of law as an endeavor to understand the practice of law. In terms of instrumentalist scholarship, proposals of this sort represent an advance over the more traditional project of explaining the law. They are based on the recognition that the relationship between the parties constricts the free play of instrumentalist reasoning. Once one unravels the parties' relationship, the limits of legal scholarship are

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27. A. Mitchell Polinsky and Yeon-Koo Che, *Decoupling Liability: Optimal Incentives for Care and Litigation*, 22 RAND J. ECON. 562, 562 (1991).

28. Robert D. Cooter and Ariel Porat, *Anti-Insurance*, 31 J. LEGAL STUD. 203, 204 (2002).

set not by the law as an object of the enquiry, but by the imagination, ingenuity and brilliance—all amply present—of the scholars themselves. This allows a more consistent presentation of the kind of instrumentalism favored by the particular scholar. But there is also a parallel disadvantage. Having severed the link to legal practice, these proposals seem to be nothing more than dreamy exercises in instrumentalist utopianism, far removed from the hard-headed contact with the real world that instrumentalists like to profess.

The second response goes in the opposite direction by emphasizing the primacy of legal practice. This response is exemplified in the call, mentioned earlier, for university study to adhere to its “principal mission” of professional training by producing scholarship that can be used by legal practitioners.<sup>29</sup> Offered in the name of overcoming the disjunction between legal practice and university study, the suggestion merely subordinates the latter to the former, raising the question of why this “mission” would require university study at all rather than a more direct system of professional training and apprenticeship. After all, on this conception, what are law professors except legal practitioners with more leisure and lower salaries? By connecting the university study of law with the demands of legal practice rather than with the purposes of the university, the suggestion dismisses the significance of any understanding of law that is not coterminous with legal practice itself. In effect, the university study of law is regarded merely as a parasite on the practice of law.

These two responses are the consequence of viewing law in instrumentalist terms. Instead of attempting to overcome the disjunction between university study and legal practice that instrumentalism creates, the responses cut the Gordian knot by accentuating one element and disregarding the other. The decoupling view has a strong notion of the university study of law, which, however, turns out to be not about law but about the possible artifacts of instrumental reasoning. In contrast, the parasitic view is attentive to legal practice but, given the open-endedness of instrumentalist analysis, sees little value in university study beyond what can be used by legal practitioners. In their separate ways each responds to the problem of disjunction by giving up on it.

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29. Edwards, *supra* note 4, at 41.

### III. OVERCOMING THE DISJUNCTION

#### A. *The Character of Private Law*

In this Part I want to sketch a possible solution to the problem of disjunction. In the previous Part I argued that, so far as private law is concerned, the disjunction between the university study of law and the practice of law is a consequence of the instrumentalist framework that dominates contemporary legal studies. The instrumentalist framework subjects private law to analyses that inevitably mischaracterize it. Instrumentalist approaches efface the concepts of private law, fail to connect the parties directly to each other, and assimilate private law to public law. Accordingly, a solution to the problem of disjunction involves rethinking the assumptions that create it.

Two mutually reinforcing moves are involved. Negatively, the instrumentalist framework is to be rejected, since it is the infelicity of this framework that generates the problem to begin with. Positively, the organizing concepts of private law, the direct relationship between the parties and the distinctiveness of private law as a mode of legal ordering must be understood as the indicia of the specific character of private law. The primary task of the university study of private law—what it should do, whatever else it does—is to enquire into this character. By so doing, university study both maintains its continuity with the legal practice, which is its starting point, and yet goes beyond that practice to disclose its implicit structural and normative ideas.

Central to the elucidation of the character of private law is the assumption that private law is (or at least aspires to be) a normatively coherent practice that can accordingly yield a coherent understanding. Under this assumption the organizing concepts of private law are harmoniously connected both to one another and to the institutional structure of private law litigation. This assumption is a necessary starting point for several reasons. First, only on the assumption of the coherence of legal practice can one make sense of the endeavour to regard private law as a systematically intelligible body of knowledge that can be amenable to university study. Otherwise, private law would be assumed to be nothing but a piled aggregate of propositions that together had no specifiable character. Second, coherence is an internal value and aspiration of the private law itself, being integral to its reasoning and discourse. Thus, the assumption of coherence is not only a methodological postulate of university study but also a pervasive premise of legal practice and therefore itself part of the character of the practice. Third, the practice of private law is a

normative phenomenon, where the disposition of one person's claim against another has to be justified through the use of public reason. The process of justification presupposes that the private law's entire apparatus of justification is internally coherent, for if elements of that apparatus pulled in different directions, then it could not function to justify anything.

The character of private law provides the general framework for understanding it as a coherent normative phenomenon. Specification of this character arises by a process of scholarly reflection on, and generalization from, the law's particular arrangements (its doctrines, its institutional structure, its ensemble of concepts, its methods of reasoning, and so on). However, the character of private law is not composed simply of the sum total of these arrangements. Some of these arrangements may achieve that character only imperfectly or deficiently, because they may not accord with the practice viewed as a coherent whole. Whether the positive law's treatment of a particular problem bears out the assumption of coherence is a contingent matter. Where it does not, the character of private law then provides the standpoint, internal to private law as a whole, from which to criticize the particular legal arrangement. Character is thus an ideal construct that makes the particulars of the practice of private law intelligible in the light of the practice's most general and pervasive features. Understood in terms of its character, private law is "a unity of particularity and genericity."<sup>30</sup>

The task of specifying the character of private law belongs to the university study of law, but it is rooted in legal practice. Unless university study takes legal practice seriously, the enquiry into its character would, of course, be self-stultifying. No disjunction exists between the character and the practice of private law. Even when some particular arrangement of private law is thought to be deficient in the light of the law's character, the criticism that emerges is consonant with the law's self-critical commitment to "work itself pure,"<sup>31</sup> because it expresses the law's own striving for internal coherence. The character of private law is implicit in its practice, but scholarly reflection brings it into focus, defines and refines it, and presents legal doctrine as its expression. Indeed, any treatment of private law, whether in the classroom or in the academic literature, that focuses on the requirements of coherence helps elucidate the character of private law.

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30. MICHAEL OAKESHOTT, *ON HUMAN CONDUCT* 5 (1975).

31. Lord Mansfield's famous phrase in *Omychund v. Barker*, (1744) 26 Eng. Rep. 15, 23 (K.B.).

The most ambitious efforts to specify the character of private law are necessarily exercises in “abstract theory.”<sup>32</sup> The theorist strives to render what is implicit in the law as explicit as possible. To do this one must have recourse not only to legal material but also to conceptualizations, to the philosophical literature, and to modes of discourse and analysis that, while treating the practice of law seriously in its own terms, are not themselves part of that practice. This exercise in theorizing has to be abstract, in that it abstracts from the brute particularities of legal practice to the more general standpoint inherent in the specification of the law’s character. One might even say that the more abstract the better, because the goal is to formulate the most general framework possible. However, throughout this project of specifying the character of private law, continuity with legal practice is always maintained, because otherwise the character specified would not be the character of anything. In this context, abstract theory is the friend of legal practice, not its competitor.

### *B. The Stages of Elucidation*

The elucidation of the character of private law has three stages: attending to the legal practice, eliciting its inner structure, and enquiring into that structure’s normative presuppositions.<sup>33</sup>

The first stage, attending to the legal practice, anchors the elucidation of the law’s character in the practice’s features. As is evidenced by the operations of those who engage in it with a mastery of its concepts and procedures, the practice of private law is, at least to some extent, an intelligible activity. Disclosure of the character of private law is intended to render what is incipiently intelligible about private law even more intelligible. This exercise requires that one take notice of the justificatory and institutional apparatus of private law, so that its features are the subject and the starting point for a more general account.

Although the character of private law is an ideal construct, its elucidation does not involve the imagining of a utopia. The practice of private law is taken as the given object of enquiry, and it is viewed as it views itself: as a specific kind of normative order that governs human interactions according to its own distinctive yet coherent conceptions of fairness and rationality. Subject to confirmation at subsequent stages, the arrangements of private law can provisionally

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32. Edwards, *supra* note 4, at 34.

33. See OAKESHOTT, *supra* note 30, at 1-31 (presenting Oakeshott’s suggestive account of the engagement of understanding).

be regarded as the indicia, however indistinct, incomplete, or inadequately articulated, of the kind of normative order that they constitute. The task is not to excogitate a new and perhaps even superior kind of normative order, but to disclose the character of this one.

Of especial significance are the concepts of private law and the institutional linkage of the parties as plaintiff and defendant. Because elucidating the character of private law involves specifying the most general framework for understanding it, particular attention should be paid to aspects of private law that are already general. Every application of private law presupposes a legal institution that directly links a particular plaintiff and a particular defendant. Of course, one can have a normative order in which this linkage is absent, for example, where injury is dealt with by payment from a state fund; whatever its merits, such a normative order is not a form of private law. Also general, but having a scope that is more local, are the concepts of private law. These are the ideas through which the law requires us to organize our thinking about issues of liability. In specifying the character of private law, we do not seek, as does the instrumentalist, to show that these concepts are otiose, but to understand their role within a coherent conception of liability. Do these concepts, and other determinants of liability, sustain private law's claim to an internally coherent rationality, or must they be adjusted, abandoned or supplemented for the sake of that rationality?

To deal with these questions we must move to a second stage in the elucidation of the character of private law. The second stage seeks to bring out the inner *structure* of the arrangements of private law. Because we are treating private law as a normative phenomenon, our particular interest is in the structure of the considerations that justify liability. The legal concepts and the other determinants of liability are the vehicles for these considerations. The second stage inquires whether these considerations have a uniform general shape. For if they do, that shape would reveal the character of the law in which these considerations are decisive.

Crucial to the disclosure of this structure is the institutional nexus between plaintiff and defendant. Private law works through an adjudicative mechanism by which the plaintiff sues the defendant and, if successful, is given an award of damages or other relief that the defendant must satisfy. As just noted, this direct linkage between plaintiff and defendant is the most pervasive feature of private law. If private law is to be understood as a normatively coherent practice, the justification for liability in any particular case has to reflect the structure of this linkage. The institutional framework for the litigation attests to the fact that the point of liability is to remedy an injustice

between the particular parties. Accordingly, the reason for considering the defendant to have done an injustice to plaintiff can be coherent only if it evinces the same direct link as is present in the institutional framework. Justification within private law is thus the expression of a bipolar normativeness that directly links the particular parties within this institutional framework.

The structure of this bipolar normativeness is one of correlativity, as is evident from the very nature of liability. The determination of liability is a judgement that the defendant and the plaintiff are mutually related as the doer and sufferer, respectively, of the same injustice. To say that the defendant has been found liable to the plaintiff is not to point to two separate injustices, one committed by the defendant and the other suffered by the plaintiff. Rather, it is to say that the parties have interacted in and through a single injustice that the defendant has done to the plaintiff. Within this correlatively structured injustice the defendant occupies the active and the plaintiff the passive pole. The finding of liability maintains this correlative structure but reverses the poles, so that the plaintiff is now entitled to demand, and the defendant obligated to satisfy, the remedy that repairs the injustice.

As the most general description of the structure of the parties' interaction, correlativity marks the character of private law as a distinctive normative order. No justification that does not participate in this character can find a coherent place within private law. Correlativity accordingly excludes considerations, no matter how appealing, that focus unilaterally on one or the other of the parties (for example, the depth of the defendant's pocket or the plaintiff's insurability against injury). Such one-sidedness was the defect, noted in the previous section, of instrumentalist approaches, which break apart the relationship between the parties by invoking social goals that operate on one or the other of them and on persons who are similarly situated.

To the extent that they are coherent, the legal concepts relevant to any particular basis of liability also partake of this correlativity. Such concepts are the markers of a framework of normative reasoning that operates relationally to connect two particular parties as the doer and the sufferer of an injustice. Moreover, such concepts are fair to both parties because they look to the relationship between them rather than to the position of either party considered in isolation from the other. Although the idea of correlativity is an abstractly theoretical construct of scholarship and not an explicit component of the practice of private law, it nonetheless informs the concepts that expressly are components of that practice. This is the consequence of the conjunction of private law's internal

striving for coherence and correlativity's being the abstract representation of that coherence. The role of the concepts is to entrench the correlativity of the parties' situation into the reasoning and discourse of private law. The doing and the suffering of the same injustice is a single normative sequence that preserves its unity while moving from one party to the other. The legal concepts pertaining to each type of injustice are the devices through which legal practice presents and integrates the moments of that sequence.

Negligence law provides an instance of how this works.<sup>34</sup> The sequence begins with the defendant's creation of an unreasonable risk, which the law handles through the concept of breach of the standard of reasonable care. The sequence ends with the materialization of risk into injury to the plaintiff, which the law handles through concept of factual causation. The two termini of this sequence are linked by the concepts of duty and proximate cause, which keep the plaintiff and the plaintiff's injury, respectively, within the risk by reason of which the defendant's action is negligent. Duty and proximate cause are thus integrating concepts that ensure that the risk that materialized in the plaintiff's injury is the same as the risk that the defendant unreasonably created. In this way the concepts form an ensemble that gives legal expression to the parties' correlative situation with respect to the injustice of unreasonable risk creation.

This treatment of legal concepts can be readily contrasted with that of economic analysis. Recall the examples of causation and intention mentioned in Part II. Under the economic approach, factual causation is largely dispensable, to be replaced by a cost-benefit analysis. In contrast, when understood as a feature of tort law's character, factual causation is simply what it purports to be: the concept that deals with the materialization of risk into actual injury. A similar observation can be made about intention. Instead of being twisted (as economic analysis suggests) into a reference to the connection between the high probability of harm and the ease of avoidance, intention is, again, just what it purports to be: the concept that makes the execution of the defendant's purpose the link between the plaintiff's injury and the defendant's conduct. Both causation and intention are concepts that belong to private law's bipolar normativeness. Each of them has a single normative significance for both parties, and each is an element in an integrated sequence that directly connects what the defendant has wrongly done to what the plaintiff has wrongly suffered. Whereas economic analysis, having pulled the parties apart, is unable to take seriously the legal concepts

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34. Ernest J. Weinrib, *The Disintegration of Duty*, in *EXPLORING TORT LAW* 143 (M. Stuart Madden ed., 2005).

that normatively link them, the endeavor to specify the law's character allows these concepts to be understood in their own terms and to play a coherent role in the determination of liability.

The idea of correlativity illuminates not only the connection between concepts but also the substantive ingredients of liability. If the legal practice is to be understood as a coherent phenomenon, every normative aspect of the parties' relationship has to be understood under the notion of correlativity. As a general organizing feature of liability, correlativity requires the mind to adopt and maintain a special posture, or to be shifted, as it were, into a special normative gear,<sup>35</sup> to which every aspect of liability must conform. So far as its normative structure is concerned, the private law relationship is correlative all the way down.

The full significance of this is sometimes missed. Consider the notion that the plaintiff's "protected interest," by which is meant some significant aspect of the plaintiff's well-being, is a sufficient reason for holding the defendant to be under a duty. This is misleading. Within private law's correlative structure of reasoning, the plaintiff's well-being as such cannot justify a private law duty, because well-being refers to something about the plaintiff without having correlative significance for the defendant. Private law recognizes this when it refuses to impose an obligation to rescue even when the most significant aspect of another's well-being, his or her life, is endangered. For a correlative duty to be generated, well-being has to be the embodiment of some right of the plaintiff. A right differs from well-being as such in that a right is an intrinsically relational idea that immediately signifies the existence of a duty correlative to it. Well-being, in contrast, is a unilateral matter that bears on the person whose well-being is at stake without correlatively implicating any other particular person. Of course, the plaintiff's right might have the effect of safeguarding aspects of well-being, but what accounts for the correlative duty is the presence of the right, not the importance of the well-being.<sup>36</sup>

In this understanding of private law, rights are justificatory, not conclusory. Just as correlativity structures the justifications for liability generally, so rights, being inherently correlative, justify imposing liability on defendants who have breached their correlative obligations. A right is not a label attached to the conclusion of an

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35. The metaphors of posture and gear are adopted from the illuminating discussion of correlativity by Michael Thompson, *What is it to Wrong Someone? A Puzzle about Justice*, in *REASON AND VALUE* 333, 346 (R. J. Wallace et al eds., 2004).

36. For a discussion of some implications of this for tort doctrine, see Weinrib, *supra* note 34, at 157-64.

argument that justifies liability on the basis of one-sided considerations; no combination of one-sided considerations can produce a correlatively-structured justification. Rather, the plaintiff's right is integral to the reasoning that justifies the defendant's liability. This is not to say, of course that the plaintiff's right has to be defined afresh in every case; within an established system of law rights to such things as property, personal integrity, and contractual performance are taken for granted. But however the rights gain their validity, they are ingredients in the justification for liability, not labels attached once liability is determined on other grounds.

Accordingly, the injustice that triggers liability is an inconsistency with the plaintiff's right that is imputable to the defendant. This inconsistency may arise in a variety of ways, such as through the defendant's commission of a tort, violation of a contract, breach of a fiduciary obligation, or the retention of a benefit that is rightfully the plaintiff's under the principle of unjust enrichment. Correlativity then requires that the legal concepts through which liability is worked out give expression both to the existence of the plaintiff's right and to an injustice correlative to that right. If the injustice imputable to the defendant is not correlative to the plaintiff's right (for example, if the defendant is negligent toward A but injures B),<sup>37</sup> no liability arises.

Understood in terms of the correlativity of the parties' positions, private law is a system of rights and of the duties correlative to them. Such an understanding maintains continuity with the practice of law. Both the understanding and the practice treat rights seriously, not as superfluous proxies for instrumentalist considerations, but as genuinely normative determinants of liability.

But, one might ask, what exactly are these rights, where do they "come from," how are they distinguished from aspects of human well-being, and how is *their* normative character to be understood? Such questions point to a third stage in the understanding of private law. This stage builds on the other two, the attention to legal practice and the specification of correlativity as the most general structuring idea immanent in that practice. At the third stage one enquires into the normative presuppositions of correlativity and of the notion of rights that emerges from it.

In structuring the interaction between doer and sufferer, correlativity presupposes an abstract conception of the interacting parties. Within this conception the parties are viewed as exercising the capacity for purposive action, whatever might be their particular purposes. No particular purpose, no matter how morally laudable (for

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37. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

example, rescuing another from mortal danger), is normatively necessary. Similarly, the resources that are available for the realization of anyone's particular purposes are irrelevant, as is the virtuousness or viciousness of either party's disposition. All that matters for the interaction is that the particular purposes of the interacting parties be expressions of purposive capacity.

This is not to deny, of course, that persons have particular purposes; it would be senseless to think of a capacity unless it could be exercised. Rather, the particular purposes are viewed as legally significant only because they are expressions of this capacity. In the natural right tradition of legal philosophy, this conception of the capacity for purposiveness without regard to particular purposes is known as personality.<sup>38</sup> Personality is to the actor what correlativity is to the interaction: the most general normative conception immanent in being a party to a private law relationship. Because personality is the presupposition of correlativity, personality and correlativity are complementary conceptions formulated from the perspective of the actor and the interaction, respectively.<sup>39</sup>

Because one person's exercise of this capacity can produce effects on another, juridical relationships of doer and sufferer arise. For the doer, this capacity for purposive action is the condition for the ascription of responsibility for such effects, and thus for the duties that private law imposes. For the sufferer, this capacity is the basis for rights, which are nothing but the juridical manifestations either of exercises of this capacity (as in the case of rights to property or contractual performance) or of the physical organism in which it is embodied (as in the case of the right to personal integrity). Because private law is not concerned with particular purposes however laudable, it imposes no positive duties. Instead, it anchors itself in the rights of the plaintiff and imposes negative duties of non-interference with those rights. This regime of rights and their correlative duties is the juridical framework for each purposive being to act consistently with the freedom of every other purposive being. In this way private law holds the interaction of purposive beings to what is normatively implicit in their capacity for purposiveness.

Personality illuminates the normative standpoint specific to private law, including its mutually entailed conceptions of freedom and equality. In articulating the juridical implications of the parties' purposive capacity, private law treats the parties as endowed with

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38. See HEGEL, *supra* note 9, §§ 34-40.

39. For a fuller treatment of the relationship between correlativity and personality, see Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, in *THEORETICAL INQUIRIES IN LAW* 107, 113-126 (2001).

self-determining freedom. The regime of rights and correlative duties is a system of negative freedom, with one's rights demarcating spheres of freedom for the right-holder and limits on freedom for others. Within this regime the parties are formal equals, because when they are conceived as purposive beings without regard to their specific purposes, the sources of substantive inequality, such as differentials in wealth or virtue, become irrelevant. Thus the parties are equal, in that they are both treated as the loci of self-determining freedom; and they are free, in that neither is subordinated to the unilateral purposiveness of the other. Seen in the light of this normative standpoint, the practice of private law involves the continual elaboration and refinement of how personality and its attendant notions of freedom and equality figure in particular determinations of liability.

It might be objected that, given their abstractness and formality, these conceptions of freedom and equality are not very robust or appealing. However, this objection, even if it were true, is irrelevant. The issue is not whether these conceptions are appealing but whether they are immanent in private law. Recall that the three stages outlined here have been presented in order to specify the character of legal practice. The point is not to work out the most attractive conceptions of freedom or equality as if we were constructing a utopia from the ground up, but to derive the most general framework for understanding private law from the structure and presuppositions of its legal relationships. If the progression from the practice of private law to correlativity and then to personality is sound, then the conceptions of freedom and equality that emerge are those that are presupposed in the practice.

The understanding of private law elucidated through these three stages differs sharply from the instrumentalist conception discussed earlier. The instrumentalist conception starts by specifying goals that are desirable apart from private law and then examines private law in their light. As a consequence, the instrumentalist misconstrues the law's concepts, cuts the direct relationship of the parties, and subsumes private law under public law. Having started outside private law, the instrumentalist does not succeed in re-entering it. The result is a disjunction between instrumentalist scholarship—including the kind of legal education it inspires—and the legal practice that is its subject matter. In the elucidation of the character of private law, no such disjunction appears. The process of elucidation starts from within private law and then considers its legal concepts on their own terms. The direct connection between plaintiff and defendant, far from being the embarrassment that it is for the instrumentalist, is the manifestation of the correlativity that

structures the justifications for liability. In this conception, private law is categorically different from public law. Private law can therefore be understood as the juridical realization of a bipolar normativity in which one purposive being is directly related to another through a system of rights and their correlative duties.

When private law is understood in terms of its ideal character, no disjunction exists between two of the three activities with which we began, the practice of law and the enterprise of understanding that practice. The two activities are continuous without being congruent. They are continuous, because the understanding of law is elucidated through reflection on the structure and presuppositions of the practice of private law. They are not congruent, however, because the activity of understanding private law requires a theoretical effort that works out, according to its own methods and idiom, the most general conceptual framework immanent in the practice. The ingredients of that conception, correlativity and personality, deal with legal practice in its own terms, but they are not themselves explicit in that practice. Rather, they are the theoretical constructs that illuminate the character of private law.

### *C. Legal Education*

Turning now to the third of our initial three activities, one can see why private law, understood in this way, is suitable for university study. The purpose of university study is to care for the intellectual inheritance of civilized life. Private law is a significant and distinctive part of that inheritance. Private law is the ongoing attempt, actualized through society's legal institutions, to submit the direct interaction of one person with another to a system of reason. It involves an immense collective intellectual effort carried out over centuries and in different jurisdictions, featuring failures as well as successes, mistaken diversions as well as majestic triumphs. Its distinctiveness as a normative ordering lies in its correlative structuring the parties' relationship, which makes the morality of private law categorically different from that of either personal ethics or political action. Private law is thus the forum for a special mode of thinking, which it is the function of university to impart.

In the enterprise of legal education, the university study and the professional training perform complementary functions, but each has its own focus. Professional training produces familiarity with the present operation of private law, developing skills based on particular legal materials and suitable to particular demands. University study, however, imparts (or should impart) a sense of the intelligibility of private law as a whole. Its interest is not in particular legal materials

but in the mode of thinking that has produced them. Or, more accurately, its interest is in particular legal materials not for the information that they convey but for their exemplification of correlatively structured thinking, reasoning, and discourse.

As part of the university study of law, then, legal education is the process by which students of the law are initiated into a world composed of this correlatively structured mode of reasoning. Such reasoning is something students learn by engaging in it, that is, by being exposed to and discussing paradigms of it and by being provided with opportunities to develop their skills at it. This requires serious focus on legal doctrine not merely as a collection of rules or as a checklist for lawyers' dealings with particular situations, but as the crystallization of the distinctive mode of reasoning that directly links the defendant's conduct to the plaintiff's entitlement.

Several facets of this engagement with the law are particularly important. One is attention to the interrelation of the organizing concepts within a given basis of liability, and to the question of whether these concepts, as presented by the positive law, form a coherent set, that is, whether they adequately realize the legal relationship's correlative structure. Another is developing an appreciation of the casuistic reasoning that gives those concepts specific meaning in the rich variety of particular circumstances. A third is the exploration of the relationship between content and process, between the substantive considerations that justify liability, and the adjudicative context in which these considerations are assessed.

In this enterprise the theoretical constructs of correlativity and personality play a background role. They bring to the surface the character of the practice, so one can be aware of the nature of coherent legal discourse. The practice, however, proceeds in its own terms. Just as the practice of law carries on without explicit reference to these constructs, so students must learn to formulate arguments about liability without invoking them. The general conceptual structure of private law cannot serve as a substitute for considering the legal material itself. Correlativity and personality reflect the character of private law reasoning in general, so far as that reasoning is coherent, but it cannot generate a complete legal code to be mechanically applied in particular cases. All that the theoretical constructs can do—and it is enough that they do so—is orient us toward the requirements of justificatory coherence, and thus assist in eliminating considerations that are incompatible with it.<sup>40</sup>

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40. On orientation as a role of theory, compare the remarks of John Rawls about political philosophy:

Because the ideas of correlativity and personality are general and abstract, different systems of private law can manifest them in different ways. Although correlativity and personality are the stable theoretical constructs implicit in any regime of private law that values and aspires to its own justificatory coherence, they can have a variable content that is relative to a society's particular tradition of positive law, to the history of its legal responses to given problems, to the shared social understandings that obtain at a given time and place. Accordingly, the comparative study of law across different jurisdictions and historical periods has a natural place within this conception of legal education.<sup>41</sup> Because legal education so conceived focuses on legal practice as a culture of justification, comparative study involves the comparison not of differing legal doctrines across systems, but of the justifications offered for differing doctrines, of the conceptual structures into which such justifications fit, and of the adequacy of these conceptual structures to the underlying ideas of correlativity and personality. Such study can create awareness of the possible latitude for actualizing the constructs of correlativity and personality within legal practice, and thus of the particularities and contingencies of one's own legal system. It also allows for an appreciation of the persistence of correlativity and personality in the structure of different legal systems, and thus of the existence of a distinctive mode of normative reasoning that transcends the

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[I]t belongs to reason and reflection (both theoretical and practical) to orient us in the (conceptual) space, say, of all possible ends, individual and associational, political and social. Political philosophy, as a work of reason, does this by specifying principles to identify reasonable and rational ends, and by showing how those ends can cohere within a well-articulated conception of a just and reasonable society.

JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 3 (2001). In this vein one might say with respect to private law that legal theory orients us in the conceptual space of all possible justifications for liability. It does this by specifying the constructs of correlativity and personality in order to identify the appropriate kind of justifications and by showing how justifications of that kind can cohere within a well-articulated conception of private law.

41. The importance of comparative legal studies has long been asserted, as is evident from the following observations of James Bradley Thayer:

[I]t has been wisely said that if a man would know any one thing, he must know more than one. And so our system of law must be compared with others; its characteristics only come out when this is done.... If any one would remind himself of the flood of light that may come from such comparisons, let him recall the brilliant work of Pollock's predecessor at Oxford, Sir Henry Maine, in his great book on Ancient Law. That is the best use of Roman law for us, as a mirror to reflect light upon our own, a tool to unlock its secrets....

Of the value of such comparative studies, and the immense power to lift different subjects of our law into a clear and animating light, no competent person who has once profited by them can ever doubt.

James Bradley Thayer, *The Teaching of English Law at Universities*, 9 HARV. L. REV. 169, 177-78 (1895).

particularities of different systems of private law and that constitutes the condition for the possibility of productive comparison among them.

Correlativity and personality can also move from the background to the foreground. When this occurs, the focus shifts from legal practice to legal philosophy. Correlativity and personality are then used to connect private law as a normative phenomenon to the corpus of legal and political philosophy. Particularly relevant is the history of reflection about correlativity that begins with Aristotle's treatment of corrective justice<sup>42</sup> and culminates in the accounts of natural right formulated by Kant and Hegel.<sup>43</sup> These texts can then become the vehicle for considering further regressions from personality as a presupposition of correlativity to what is presupposed in the notion of personality itself. They thereby present an opportunity to deepen one's understanding of private law by opening up a further series of questions about its normative foundations, its relationship with other kinds of normative phenomena, and its place within more comprehensive philosophical systems.

What I have suggested in this Part with respect to private law is a conception of legal education that remains rooted in the practice of law while focusing on the most general conceptual framework implicit in it. This conception is incompatible with the instrumental approaches to law that now enjoy primacy. It replaces the instrumentalist emphasis on independently justifiable goals with attention to the internal structure of legal relations and to what must be presupposed if legal relations are to be normatively coherent. Its enquiry is internal in every respect. It is internal to the law in that it purports to make sense of legal thinking in its own terms. In its focus on coherence, it enquires into the internal relationship among the components of an integrated justificatory structure. And in specifying the character of private law, it identifies theoretical constructs that are internally related to one another and to private law. It thereby brings together the three activities of the practice, the understanding, and the university study of private law, so that law can indeed survive legal education.

#### IV. THE INTERDISCIPLINARY TURN

In this final Part, I explore the implications of this paper's understanding of private law for interdisciplinary study. The rise of interdisciplinary scholarship has been perhaps the most dramatic development in legal education over the last generation. In place of

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42. ARISTOTLE, *NICOMACHEAN ETHICS* V, 1131b25-1132b20 (2002).

43. HEGEL, *supra* note 9; IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (1996).

the previous emphasis on cases and doctrine, a new paradigm of scholarship and teaching has arisen, which brilliantly mobilizes the insights of other disciplines—economics, literature, and philosophy are among the favorites—to the analysis of legal material. Of course, the use of these disciplines can be consistent with the character of private law. In the previous Section I suggested that philosophical issues readily emerge from the elucidation of this character, while cautioning that these issues deal with the presuppositions of legal discourse without being explicitly part of it. However, much of the current interdisciplinary interest is not based on such elucidation of the law's character, but is nonetheless rooted in the aspiration to weave the study of law into the intellectual fabric of university life.<sup>44</sup> How does this kind of interdisciplinary work relate to legal education that places the law's ideal character at its core?

The popularity of interdisciplinary scholarship is a natural outgrowth of the instrumentalist approach to private law. As evidenced by its cavalier treatment of the fundamental legal concepts, the instrumentalist approach denies that the content of private law arises indigenously in accordance with the correlative structure of its legal relationships. Rather, the law is merely the passive receptacle of whatever goals are to be imposed on it from the outside. The study of law, accordingly, is not an autonomous body of learning, but an empty shell dependent on non-legal disciplines for the validation of the proposed goals. Hence the proliferation of rich interdisciplinary interests in "Law and . . .," with the vital element in the pairing being invariably the non-legal one. Law provides only the authoritative form into which the conclusions of non-legal thinking are translated. Law is considered to have no meaning except that which it absorbs from other disciplines and enquiries. Indeed the capacity to funnel insights about law so conceived through alien concepts and terminology is considered the mark of scholarly detachment and sophistication.

The paradoxical consequence of this basis for interdisciplinary scholarship is that the interdisciplinary turn is actually an illusion. For academic work to be truly *interdisciplinary*, it must engage more than one discipline. Law, however, is regarded not as a discipline in its own right with something of its own to contribute to the interdisciplinary enterprise, but merely as a context for projects from other disciplines. The resulting study is nothing but the application of a particular non-legal discipline to examples drawn from the law. The economic analysis of law, for instance, then turns out to involve not an enlarged study of law but a restricted study of economics. Given that the legal side lacks intellectual resources of its own, what motivates

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44. See MENACHEM MAUTNER, ON LEGAL EDUCATION (2002) (Hebrew).

the interdisciplinary scholar is interest in the non-legal discipline. As was once observed about the parallel phenomenon in literary studies, [a] scholar with a special interest in . . . economics expresses that interest by the rhetorical device of putting his favorite study into a causal relationship with whatever interests him less. Such a method gives one the illusion of explaining one's subject while studying it, thus wasting no time.<sup>45</sup>

The recognition that private law embodies a distinctive mode of thinking is both a prerequisite of interdisciplinary work about private law and a determinant of that work's nature. It is a prerequisite because without it reference to the insights of another discipline is reductive rather than interdisciplinary; the other discipline is invoked to show that the law, at the most, reflects a deformed version of those insights. It is a determinant of the nature of interdisciplinary work because that work, of whatever kind it is, has to allow private law the independent space entailed by that recognition. Interdisciplinary work can then not be conceived as the construction of a repository of homogeneous knowledge, because such homogeneity is inconsistent with the distinctiveness of the legal mode of thinking. Rather, knowledge has to be regarded as pluralistic, that is, as organized into categorically different kinds of enquiry each of which (including the study of law) has its distinct character.

Within the university law school, the point of interdisciplinary study is to present different perspectives for the understanding of the transactions governed by the law. Each of these perspectives has its own validity, rests on its own presuppositions, and operates within its own disciplinary boundaries. A medical misadventure, for example, may raise not only issues of liability, but also issues of economics, of sociology, of political science, of psychology, and so on. Within a law school the legal perspective has of course a certain contextual primacy, because, whatever else it does, a law school must impart to its students a sense of the distinctiveness of the law as a mode of normative discourse. This distinctiveness excludes other perspectives, but does not deny their authority within their own spheres. Indeed, exposure to these other perspectives plays an important role for the study of law for several reasons. First, the very contrast between legal and non-legal modes of enquiry casts light on the law's distinctive structure and presuppositions (as the law does on theirs). Second, the contrast reveals the place of law as an intellectual enterprise among other such enterprises, and that civilized life requires the co-operation and mutual respect of all of these. Third, an awareness of the contrast induces an appreciation of the limits of law, and thus a proper sense of

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45. NORTHROP FRYE, *ANATOMY OF CRITICISM* 6 (1957).

humility: although the law governs all of life, the person who is learned in the law is not therefore omniscient.

Accordingly, one can view the interdisciplinary study of law as creating an academic conversation with different disciplinary voices.<sup>46</sup> The object of this conversation is not to have one voice suppress any of the others but to maintain the individuality of each. When every voice contributes the insight that derives from its own distinctive activity, the conversation can enlarge the understanding of its participants.

It is not always easy to maintain the line between respectful attention to a different voice and hearing that voice as a deformed version of one's own. Consider, for example, the most celebrated and influential piece of interdisciplinary legal scholarship of the twentieth century, Ronald Coase's treatment of social cost.<sup>47</sup> Coase's article deals with what he calls "a technical problem of economic analysis"<sup>48</sup> regarding the harmful effects of one's actions on others. In the exposition of his analysis he uses classic court judgments dealing with the law of private nuisance. It is worth pausing on how he views the relationship between his economic argument and the judicial illustrations.

On the one hand, Coase is admirably sensitive to the difference between economic and legal analysis. The economic problem is how to maximize the value of production.<sup>49</sup> The legal problem is how to determine liability. Coase insists, rightly, that this difference should not confuse economists about the nature of their problem.<sup>50</sup> "The reasoning employed by courts in determining legal rights," he observes, "will often seem strange to an economist because many of the factors on which the decision turns are to an economist irrelevant."<sup>51</sup> In deciding the economic problem, certain legal considerations are "about as relevant as the colour of the judge's eyes."<sup>52</sup> Economists do one thing and judges do another. Therefore, economists should not take their cue from how judges deal with the external effects of the defendant's actions.

On the other hand, Coase does not think that the converse obtains. Although the economists should not be influenced by the judges, he thinks it desirable for judges, because their decisions directly influence economic activity, to take the economic analysis into

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46. For the metaphor of a conversation, see OAKESHOTT, *supra* note 1, at 195-96; MICHAEL OAKESHOTT, *THE VOICE OF LIBERAL LEARNING* 109 (Liberty Fund Inc. 2001) (1989).

47. See Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960).

48. OAKESHOTT, *supra* note 1, at 1.

49. *Id.* at 15.

50. *Id.* at 9.

51. *Id.* at 15.

52. *Id.*

account.<sup>53</sup> His assumption is that although the economist's problem is different from the judge's, the judge's problem is not all that different from the economist's. He takes it for granted that the law of nuisance has no character of its own beyond the influence it exerts on economic activity, and that it therefore should be animated by properly formulated economic considerations. Of course, *qua* economist Coase has no reason to be alert to (let alone, to explore) the distinctiveness of the legal mode of thinking in matters of private law. However, the consequence of his justifiable preoccupation with his "technical problem of economic analysis"<sup>54</sup> is that he reads the cases as containing renditions, often inadequate, of the economic argument.

In *Bryant v. Lefever*,<sup>55</sup> for example, the defendants extended upward the wall that ran beside the plaintiff's chimneys, with the result that when the plaintiff lit a fire in any of his rooms, the smoke could not clear but came back into the plaintiff's house. What attracts Coase's attention is not the court's ultimate judgment in favor of the defendant (in the absence, as here, of transactions costs, the parties would bargain toward the efficient result whatever the court decided) but rather the court's misapprehension of the causal relationship between the parties' activities. In dismissing the plaintiff's claim, the court held that, although the defendant's erection of the wall materially interfered with the plaintiff's comfort and thus constituted a nuisance, the nuisance was caused not by the defendant's act but by the plaintiff's lighting of the fires. Criticizing this crucial element in the court's analysis, Coase observes that it was "fairly clear" that both parties caused the smoke nuisance, because "[g]iven the fires, there would have been no smoke without the wall; given the wall, there would have been no smoke without the fires."<sup>56</sup> Accordingly, "*both* were responsible and accordingly *both* should be forced to include the loss of the amenity due to smoke as a cost of deciding whether to continue the activity which gives rise to the smoke"—which in fact is what would happen because of the possibility of costless bargaining. The court made the mistake of assuming that the wall was "the given factor,"<sup>57</sup> thus transforming the parties' joint causation into the self-infliction of harm by the plaintiff.

This criticism ignores the juridical quality of the court's reasoning. The court's task is to determine liability within a system of rights and correlative duties. These rights and duties establish the

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53. *Id.* at 19.

54. *Id.* at 1.

55. *Bryant v. Lefever*, [1879] 4 C.P.D. 172 (Eng.).

56. Coase, *supra* note 47, at 13.

57. *Id.*

baseline from which to determine the direction in which causation moves. Causation is, accordingly, not a natural phenomenon that reflects the fact that the smoke was the result of the combination of the defendant's wall and the plaintiff's fire lighting. Nor is it an economic conclusion geared to the maximization of the value of production in accordance with what Coase calls "the beauties of a smoothly operating pricing system."<sup>58</sup> Rather, causation functions here within an argument about the imputation of liability. Liability requires that the defendants' action have been inconsistent with the rights of the plaintiff and not merely the exercise of one of their own rights. Here by extending the wall upwards, the defendants did nothing but occupy the space that they owned. The legitimacy of occupying space that one owns is inseparable from the right involved in ownership. It therefore does not constitute a wrong that can be imputed to the defendants. Moreover, because the plaintiff's harm was the consequence of the smoke's failure to clear the defendants' building, the plaintiff was wronged only if he had a right to the space over the defendants' property required for clearance. That space, however, belonged to the defendants and was not subject to any right of way in favor of the plaintiff. Of course, the plaintiff was harmed by the defendants' action in the sense that he was worse off than before the wall was built. However, in view of the configuration of rights in this situation, the plaintiff was not wronged.

One can sum up what is problematic about Coase's criticism of the court as follows. For Coase the given factor in the court's analysis was the wall, because the wall made what is properly a cause of the smoke into a condition for ascribing causation only to the plaintiff's lighting of the fire. From the court's perspective, however, it would be more accurate to say that the given factor was not the wall itself, but the right to build it. The court's assumption was simply that within a coherent system of proprietary rights, one has the right to build on one's own property. Instead of viewing the court's decision as exemplifying a properly legal mode of analysis of the relationship between owners of adjoining properties, Coase reads it as a misstatement of the obviously reciprocal causation that should underlie the economist's attitude toward the maximization of the value of production.

Similar observations can be made about Coase's famous treatment of *Sturges v. Bridgman*.<sup>59</sup> The issue in that case was whether activity by the defendant that would otherwise constitute a nuisance escaped liability because it temporally preceded the use by

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58. *Id.*

59. *Sturges v. Bridgman*, [1879] 11 Ch.D. 852 (Eng.).

the plaintiff with which it interfered. The defendant was a confectioner who had been using the back section of his property for decades as a kitchen in which he pounded his meats. No problem arose as long as the adjoining property was used as a garden, because the noise did not inconvenience anyone. The plaintiff, however, was a physician who had recently built a consulting room on the site of the garden, and complained that the noise of the pounding interfered with his practice. The court held the defendant liable.

Coase singles out the court's statement that a different result would "produce a prejudicial effect upon the development of land for residential purposes."<sup>60</sup> He points out that so long as market transactions between the confectioner and the physician were costless, the court's decision could have no effect on the allocation of resources. If one party gained more from the continuation of his activity than the other lost from the cessation of his, the party that stood to gain more would strike a bargain that would allow him to continue even if he lost his case. "The judges' view that they were settling how land was to be used," Coase writes, "would be true only in the case in which the costs of carrying out the necessary market transactions exceeded the gain which might be achieved by any rearrangement of rights. . . . But of this the judges seem to have been unaware."<sup>61</sup>

Here, too, Coase is hearing in the court decision not the distinctive voice of legal discourse but an inferior version of his own economist's voice. Coase treats the court as attempting to achieve a certain economic goal (the development of residential housing) in ignorance of proper economic reasoning. If, however, one reads the judgment as a whole and views the offending sentence in its light, a different picture emerges. The court was concerned not with settling how the land was to be used, but with determining the conditions under which an action by the defendant could diminish a right of the plaintiff. The court's focus was juridical, not economic.

For the court, the problem with the confectioner's position was that it asserted a power unilaterally to restrict another's right. Under the law of nuisance the plaintiff had a right to the use and enjoyment of his property, but this right could not be vindicated in a court of law so long as his use and enjoyment was unaffected. While the property was being used as a garden, the physician (or his predecessor) had no cause of action in nuisance, because the noise from the confectioner's pounding did not inconvenience him. The confectioner's argument once the physician built the consulting room was that the physician had lost the right to complain of the nuisance. But how can one

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60. *Id.* at 866.

61. Coase, *supra* note 47, at 10.

person's right be extinguished by the unilateral acts of another? The confectioner might argue that the long history of meat pounding shows that the physician (or his predecessor) implicitly acquiesced in the confectioner's acquisition of an easement. As the court pointed out, however, one can acquiesce only in what one can prevent. Until the physician suffered an inconvenience that allowed him to sue in nuisance, he could not prevent the meat pounding, and therefore cannot be taken to have acquiesced in it.

What, then, is the significance of the court's reference to "the prejudicial effect upon the development of land for residential purposes," around which Coase's treatment of the case revolves?<sup>62</sup> The comment comes after the court considered a hypothetical case, which it rightly regarded as exactly analogical to the case at hand, of "a blacksmith's forge built away from all habitations but to which, in the course of time, habitations approach."<sup>63</sup> The court disqualified two possible treatments of this hypothetical case. On the one hand, it would be unreasonable to extend liability for nuisance to the period before the habitations approached because that would give the adjoining landowners a right to sue for an inconvenience that they have not yet, and may never, suffer. But, the court continued, "it would be on the other hand in an equal degree unjust, and, from a public point of view, inexpedient that the use and value of the joining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law gives no power to prevent."<sup>64</sup> This is the sentiment that the subsequent remark about the prejudicial effect on residential development encapsulates. It is not that the court necessarily thinks that the growth of the habitations mentioned in the hypothetical case is itself desirable: the court is not attempting to settle land use for a hypothetical case. What is unjust and inexpedient is that the owners of the land on which habitations might arise should have their rights prejudiced by actions of the blacksmith that they cannot physically interrupt or legally prevent. The "prejudicial effect on the development of land for residential purposes" is not that there will be too few residences, but that right of the hypothetical landowners to develop residences protected by the law of nuisance will be abridged by the blacksmith's unilateral activity.

Both *Bryant* and *Sturges* are exemplary displays of the mode of thinking distinctive to private law. Each case treats the alleged

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62. *Sturges*, [1879] 11 Ch.D. at 866.

63. *Id.* at 865.

64. *Id.*

injustice as one to which the parties must be correlatively situated as doer and sufferer. The doing and the suffering consist, respectively, in the infringement, and in being the victim of the infringement, of the right to use and enjoy one's property. This right represents a sphere of lawful freedom with which others are obligated not to interfere. The cases enquire into the meaning of this right in the specific circumstances of building up and of pre-existing activity by the defendant. In both cases the court's reasoning provides a sophisticated elaboration in legal terms of the relationship between the plaintiff's right and the defendant's action.

In contrast, Coase assumes that the courts are addressing issues of economic rather than juridical thinking. He reads the reference to causation in *Bryant* not as working out an imputation of liability against the background of the parties' rights, but as overlooking the obvious causal reciprocity that informs a proper economic analysis. Similarly, he reads the reference to the prejudicial effect on residential development in *Sturges* not as underlining the illegitimacy of the defendant's unilaterally restricting the plaintiff's right, but as failing to anticipate the bargaining that would take place when transactions are costless. In each case the court was not making an economic argument in ignorance of the economic consequences that Coase describes; it was making a legal argument about the connection between one person's rights and another person's will that Coase has misapprehended.

This misapprehension, of course, does not mean that Coase's brilliant article has no place in a university program of legal education. To the contrary, it should have a place of great honor as a masterful exhibition of the subtleties of the economic approach to situations that have attracted the law's interest. Both law and economics feature modes of thinking that present systematic and comprehensive understandings of human interaction. In the nuisance context economic thinking, as portrayed by Coase's analysis, is concerned with harms and costs, whereas legal thinking is concerned with rights and remedies. The contrast between these two modes of thinking is not only a matter of genuine intellectual significance in its own right, but also a considerable resource for imparting to students a sense of the character of private law. For we often begin to understand what something is by seeing what it is not.

If the interdisciplinary turn in legal education is to bear fruit, it must be supposed that law has an independent voice that can contribute to the conversation among the university's disciplines. Whatever else it does, legal education is charged with the task of inculcating in students the capacity to speak in this voice and to understand its distinctive character. In the conversation among

disciplines this voice is juxtaposed against other voices, so that the significance of each—its presuppositions, its organizing structures, its way of relating to the particulars of the world that all share—can be better appreciated. The idea of a conversation is not that one voice replaces or silences or dominates the others, but that each puts forth the ideas appropriate to it, humble in the awareness of its own limits and respectful of distinctiveness of others. For in a conversation, “[i]ts integration is not superimposed but springs from the quality of the voices which speak, and its value lies in the relics it leaves behind in the minds of those who participate.”<sup>65</sup>

## V. CONCLUSION

The central theme of this Article has been that private law is animated by a distinctive mode of thinking and discourse, marked by the structure of correlativity and informed by the presupposition of personality. Accordingly, with respect to private law, the university study of law, whatever else it does, has the task of engaging the student in this mode of thinking and discourse. The disjunction that critics of legal education have noted between university study and legal practice is the consequence of understanding law in instrumental terms and thereby obscuring the law’s distinctive character. One overcomes this disjunction by attending to the role of correlativity and personality in an understanding of private law that is faithful to the law’s conception of itself as a normative phenomenon that strives for justificatory coherence in the relationship between plaintiff and defendant.

That law embodies a distinctive mode of thinking and discourse is a venerable idea. One recalls Coke’s response to the assertion by James I that, because the law was founded upon reason, he as a person endowed with reason was as qualified to sit in judgment as were the judges. Coke replied with a ringing affirmation of the distinctiveness of reason in the legal context:

[T]rue it was that, God had endowed His Majesty with excellent science and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes . . . are not to be decided by natural reason but by the artificial reason and judgment of the law, which law is an art which requires long study and experience, before that a man can attain to cognizance of it.<sup>66</sup>

In the modern context universities have the responsibility of beginning the process of “long study and experience” that imparts “cognizance” of this “artificial reason and judgment.” This is a

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65. OAKESHOTT, *supra* note 46, at 110.

66. Prohibitions del Roy, (1607) 77 Eng. Rep. 1342, 1343 (K.B.).

responsibility in which recognition of the law's distinctive character converges with the university's calling to care for law as one of civilization's pre-eminent achievements.