

*In Kant's philosophy of law "public right" refers to the condition in which public institutions guarantee rights. This lecture deals with the relationship between public right and the rights of private law. In accordance with corrective justice, private law links the parties to a transaction bilaterally, so that they are subject to correlatively structured bases of liability. In contrast, public right is omnilateral, linking everyone to everyone else. Two normative ideas inform public right: publicness (that public institutions secure everyone's rights on the basis of reasons that can be known and acknowledged by all) and systematicity (that the norms and institutions of law form a systematic whole). In standard cases public right makes no difference to a private law controversy except to add the dimensions of publicness and systematicity. In some circumstances, however, public right alters the principle on which a court resolves a controversy, without, however, changing the structure and content of the private-law right itself. Kant himself pointed out that publicness can have this effect, as he illustrated in his discussion of market overt. Systematicity operates similarly, sometimes extending and sometimes narrowing the effect of the plaintiff's right. For instance, the tort of inducing breach of contract expands the effect of the promisee's right by securing it against everyone. On the other hand, the privilege to preserve property, exemplified in the controversial case of *Vincent v Lake Erie*, narrows the effect of the plaintiff's right by subjecting it to conditions that justify its infringement. The effect of public right is to make right holders reciprocally determining participants in the legal system, thereby transforming private law into a community of rights.*

**Keywords:** theory of private law/Kant's philosophy of law/public right/market overt/inducing breach of contract/*Vincent v Lake Erie*/justification

### 1 *The framework*

Private law is a publicly rightful set of norms that governs the legal relations between parties. My lecture on this occasion deals with the connection between two aspects of this characterization of private law. The first is the conception of the relationship between the parties and the kinds of reasons for liability that are appropriate to that relationship.

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† This is a public lecture given at the University of Toronto in October 2009, on the occasion of the author's receipt of the Killam Prize for the Social Sciences for 2009, awarded by the Canada Council for the Arts. I would like to thank participants in workshops at the University of Toronto, the Buchmann Faculty of Law of Tel Aviv University, and the Radzyner School of Law of the Interdisciplinary Center Herzliya for their helpful comments. In addition, I am particularly indebted to Lisa Austin, Peter Benson, Dennis Klimchuk, Jason Neyers, Arthur Ripstein, Robert Stevens, Lorraine Weinrib, Jacob Weinrib, and Sara Weinrib.

The second is the notion of public rightfulness that is evidenced in the law's public institutions of adjudication and enforcement. Any sophisticated system of private law brings these two aspects together. Yet, in the remarkable proliferation of theoretical scholarship about private law over the last several decades, little has been said of the connection between them.

I want address this issue within the framework of four ideas that have long been important to my understanding of private law. Of these four ideas, the first pair deals with the structure and content of the private-law relationship, and the second pair with the nature and limits of private law theory.

The first idea is that fair and coherent reasons for liability are correlative in structure in that they treat each party's position as the mirror image of the other's. This correlativity reflects the defining structural feature of liability itself: that liability of a particular defendant is always a liability to a particular plaintiff. Correlatively structured reasons focus not on either party separately from the other but on the relationship between them as doer and sufferer of the same injustice. The injustice is the same for both parties because the reasons for considering something an injustice as between them are normatively significant for the relationship as a whole. Such reasons are fair to both because they treat the parties as equals within the relationship; considerations relevant to only one of them do not determine the legal consequences for both. Such reasons are also coherent because they reflect the parties' relationship as such, rather than referring to a hodge-podge of factors (such as the defendant's deep pocket or the plaintiff's need) that apply to each party separately. Consequently, arguments that seek to have the law achieve goals external to the parties' relationship – whether instrumental, distributive, or economic – are all structurally inconsistent with fair and coherent determinations of liability. In contrast to such goal-oriented arguments, correlatively structured reasons are inherently 'juridical,' because the parties are viewed as participants in a legal relationship organized by the principle of its own internal fairness and coherence.

The second idea is that rights and their correlative duties provide the content for private law's correlatively structured reasoning. By their very nature right and duty are correlative concepts. Every private-law right implies that others are under a duty not to infringe it; similarly, in private law, no duty stands free of its corresponding right. Right and duty are correlated when the plaintiff's right is the basis of the defendant's duty and, conversely, when the scope of that duty includes the kind of right-infringement that the plaintiff suffered. Under those circumstances, the reasons that justify the vindication of the plaintiff's right are the same as the reasons that justify the existence of the defendant's duty.

Presupposed in the rights and duties of private law is the conception of the person as a free being who has the capacity to set his or her own purposes. The exercise of one's rights (for example, by acquisition, alienation, or use) is the exercise of this capacity. Similarly, subjection to a duty is unintelligible in the absence of this capacity. In light of this conception of the person, rights and their correlative duties function as the juridical markers of the freedom of the parties in relation to each other.

The third idea is that the activity of theorizing about private law involves not the construction of a utopia but the understanding of an ongoing normative practice. In the most highly developed versions of this practice, those entrusted with authority over its elaboration have striven, of course not always with success, to work out the fair and coherent terms on which persons ought to interact with each other. The theory of private law takes this material as its starting point and enquires into its structure, its presuppositions, and the internal connections among its most pervasive features. The aim is to identify the most abstract unifying conceptions implicit in the law's doctrinal and institutional arrangements and to enquire into the rationality that inheres in the law's processes.

In this effort, the contemporary theorist need not start from scratch. One may avail oneself of the history of philosophic reflection, whose leading figures provide exemplars for one's own efforts to, as Kant put it, 'exercise the talent of reason.'<sup>1</sup> These figures may point the contemporary theorist of private law in the direction of certain ideas whose structure they have presented with extraordinary clarity and whose implications they have explored with extraordinary profundity. For example, the first two ideas that I mentioned above – the significance of correlativity as a structural feature of reasoning about liability and the role of rights in providing the content of correlatively structured reasoning – are drawn from Aristotle and Kant, respectively. Aristotle attached the term 'corrective justice' to the operations of law that are structured by the correlativity of the parties' positions as doer and sufferer of the same injustice. Kant was, perhaps, the greatest expositor of the systemic significance of rights as expressions of human freedom.

My own work has been devoted to the fairly modest objective of demonstrating the importance of these previously ignored Aristotelian and Kantian ideas for understanding the structure and content of private law. My point in invoking Aristotle and Kant has not been to reconstruct the place of law within an Aristotelian conception of ethics or a Kantian metaphysics of practical reason. Rather, the task of legal

1 Immanuel Kant, *Critique of Pure Reason*, translated by Paul Guyer & Allen Wood (Cambridge: Cambridge University Press, 1998) at B866 [Kant, *Critique*].

theory, as I see it, is to bring to the surface the most pervasive ideas latent in law as a normative practice. The greatest thinkers are relevant to this conception of legal theory only because, and to the extent that, they provide insights helpful to the understanding of law in its own terms.

In this lecture on public right, I continue along these lines. As I will explain in a moment, public right is a Kantian notion that illuminates the relationship between legal norms and legal institutions. My intention is to draw out – or at least begin to draw out – the implications of this notion for private law.

This brings me to the fourth idea. The account that I shall offer of public right is subject to the inevitable limitations on the scope of any theoretical account of legal norms. The theorist is not a philosopher-king in academic robes who can work theoretical abstractions into a complete, definitive, and determinate code of law. Rather, a theory of private law is concerned with the conceptual structure and the normative presuppositions of the phenomenon of liability. Its function is to orient us in the conceptual space of the possible reasons for liability by identifying the kinds of reasons that are properly available and by showing how reasons of those kinds can come together in a fair and coherent system of liability.<sup>2</sup> The high level of abstraction at which such a theory works provides a comparatively uncluttered view of the fairness and coherence that the law itself is striving to achieve. It thereby provides the law with an internal perspective of evaluation and criticism. Theoretical reflection, however, cannot supplant the activity of lawyers in specifying the full range of legal norms or in applying them to particular cases. Different legal systems organize themselves differently and have different histories and different mechanisms of decision. The diversity of their legal materials expresses the diverse ways in which the different legal systems strive for fairness and coherence. Accordingly, every sophisticated legal culture has a body of legal knowledge that is specific to it as well as its specific techniques for applying and developing the law. It also has lawyers who are versed in this knowledge and skilled in these techniques. In carrying out these activities, lawyers are not theorists. Nor do whatever theoretical insights theorists have qualify them to act as lawyers. The conceptual space within which theory orients us cannot, itself, be expected to supply the specific norms required to fill that space.

These four ideas – correlativity, rights, the role of Aristotelian and Kantian ideas, and the scope of legal theory – frame my use of Kant's conception of public right. I now turn to that conception.

2 This is an adaptation of Rawls's formulation of the role of orientation in political philosophy; see John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001) at 3.

II *Public right*

Kant's legal philosophy distinguishes between the rights that a person might have against others as a matter of justice and the public institutions that guarantee those rights. Rights are moral capacities for putting others under correlative obligations. The normative function of rights is to demarcate areas of freedom for the right-holder that can coexist with the freedom of those whom rights place under an obligation. Among these rights are the standard rights of private law to bodily integrity, to property, and to contractual performance. Without providing a full account of Kant's complex and often obscure argument about these rights, I want to underline the one point that matters for present purposes. The content of the rights, the mode of acquiring rights to property and contractual performance, the consequent duties that the various rights impose on others, and the internal logic by which property rights are good against the whole world (*in rem*) and contract rights are good only against the parties to the contract (*in personam*) all emerge from an analysis of how the action of one person can be consistent with the equal freedom of another. Rights can be at least provisionally understood in abstraction from the judgment of any public institution, such as a court, about violations of these rights in particular circumstances. This is because, in securing rights, the operation of public institutions presupposes the normative validity of the rights that they secure.<sup>3</sup>

Kant calls this imagined condition of rights without institutions the 'state of nature' or 'private right.' The state of nature is a device for exhibiting the range of rights whose structure and content are normatively intelligible even apart from the public institutions that make them effective. In contrast, 'public right' refers to a condition in which public institutions actualize and guarantee these rights.

Kant posits the state of nature in order to show that public right is necessary to cure its inadequacies. Although the rights in the state of nature are correlatively structured in order to be fair to both parties, the absence of a public mechanism of correction means that the interpretation and enforcement of these rights is left to the unilateral will of the stronger party. The institution of publicly authorized courts for dealing with legal controversies resolves this contradiction. As between the litigants, the court is both disinterested and impartial. It is disinterested in that it has no stake that aligns it with either of the

3 Immanuel Kant, *The Metaphysics of Morals*, in Mary J Gregor, ed and trans, *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* (Cambridge, UK: University of Cambridge Press, 1996) at 6:256. Page citations are to volume 6 of the Prussian Academy edition of Kant's works, upon which Gregor's translation is based [Kant, *Metaphysics*].

parties. It is impartial in that it brings to bear a normative perspective under which the justifications for liability embrace the relationship as a whole rather than either of the parties separately. As a result, members of society not only *have* rights but can also *enjoy* them.<sup>4</sup>

Under public right, the state operating through the courts becomes involved in the resolution of the controversy. The state's status, however, differs from that of the two litigants. The latter are linked to each other through a particular legal transaction. The state, in contrast, links not only these litigants but all its members to one another through the legal system that all share. The relationship between the litigating parties is bilateral, linking the plaintiff to the defendant; the relationship among members of the state is omnilateral, linking everyone to everyone else. Both the bilateral relationship between the parties and the omnilateral relationship among members of the state have their respective normative dimensions. For the bilateral relationship, the normative dimension consists in the parties' subjection to the correlatively structured bases of liability. For the omnilateral relationship, the normative dimension consists in every member's subjection to the state's lawful authority as it acts in the name of the citizenry as a whole. In adjudication, a court combines these two dimensions by projecting its own omnilateral authority onto the parties' bilateral relationship. The court thereby extends the significance of its decision beyond the specific dispute, making it a norm for all members of the state.

Two normative ideas inform Kant's conception of public right. The first of these – the central core of what we conceive as the rule of law – is publicness. Being omnilateral, public right secures the rights of all through norms capable of being known and acknowledged by all. Free and equal persons could not be bound by a principle of action that depended on its being concealed from them. Such a principle could not possibly express their freedom. Free persons must know what is legally permitted if they are to enjoy their rights. Nor could it express their equality. Concealment prevents assurance that the state is respecting each and every person as an end, rather than merely manipulating them, or some of them, as means. Accordingly, state institutions are public not merely because their actions secure everyone's rights through norms binding on everyone but also because their reasons for action are capable of being made public to and acknowledged by everyone. Because the idea that legal norms be publicly knowable applies to all norms, regardless of their content, one may think of publicness as the formal aspect of the omnilaterality of public right.

4 Ibid at 6:306.

The second idea informing public right is systematicity. This is the substantive aspect of the omnilaterality of public right because it bears on the relation of the norms to one another, to the institutions from which they arise, and to the legal community whose members are all subject to them.<sup>5</sup> Kant defines public right as ‘a system of laws for a people, that is, a multitude of human beings ... which, because they affect one another need a rightful condition under a will uniting them ... so that they may enjoy what is laid down as right.’<sup>6</sup> Public right is a unifying idea that has its own integrating conception of a people, of its laws, and of its institutions. ‘A people’ is a multitude of human beings who are related to one another by virtue of belonging to the same commonwealth. The interacting persons are, accordingly, not an aggregate of individuals but members of a political unit that expresses a united will through a system of laws that are binding on everyone. The legislature, executive, and judiciary perform the functions that respectively actualize this united will: formulating the laws, carrying them out, and awarding each person what is due under them. The laws, in turn, are not a collection of discrete dooms but a systematic union of norms. Taken in its entirety, public right is a whole that embraces and systematically connects the interacting persons, the terms on which they interact, and the institutions that determine and enforce those terms.

The adjudication of liability manifests both publicness and systematicity. First, a court exercises its authority in a public manner by exhibiting justifications for liability that are accessible to public reason. Juridical concepts, such as property and contract, form the basis for a process of reasoning that is open to all and that is applied to factual evidence which, on reasonable investigation, can be openly produced and made patent to all. Opacity or secrecy at any point is a legitimate ground for criticism or requires special justification.

Second, the court’s decision partakes of the systematicity of the entire legal order. This has both an institutional and a doctrinal aspect. The institutional aspect arises from the differentiation among the legislative, executive, and adjudicative functions of the state and, thus, among the various institutions that serve these different functions. Public right requires a court to conform to this system of co-ordinate institutions by acting within its competence as an adjudicative body and by not usurping

5 In public right, systematicity reflects omnilaterality. The rights in the state of nature are also systematic, but in a different way: they express the kinds of relationships that one person can have bilaterally with another, in accordance with the Kantian categories of the understanding that deal with relations; see Jacob Weinrib, ‘What Can Kant Teach Us about Legal Classification?’ (2010) 23 Can JL & Jur 203. The systematicity of public right expresses the relationship that everyone has omnilaterally with everyone else.

6 Kant, *Metaphysics*, supra note 3 at 6:311.



the role of other state institutions. The doctrinal aspect is that the reasoning of any decision forms part of a coherent pattern of reasoning across decisions. Although the court decides as between two particular parties, the significance of its decision is not confined to those parties alone. The principle of the decision is binding on everyone and, therefore, has to cohere with the entire ensemble of similarly binding decisions.

The public and systematic qualities of public right are closely connected, as pertaining respectively to the form and content of public right. Consequently, a deficiency in one is usually associated with a deficiency in the other. If a decision is reached through a process of reasoning not open to all, there is no assurance that the decision is within the adjudicative competence of the court or forms part of a coherent pattern of reasoning across judicial decisions. Conversely, decisions beyond the court's institutional competence do not evince the distinctive kind of public reasoning characteristic of the adjudicative process; nor are they based on evidence available to judges or within their institutional capacity to access and to assess. Similarly, a decision that is inconsistent with other decisions leaves opaque the real basis on which disputes of that sort are adjudicated.

In standard cases, public right seamlessly develops the correlatively structured rights and duties of the state of nature. Within the institutional context of the court, those rights and duties as well as the principles that are used to articulate their meaning in particular circumstances constitute a domain of public reason. Moreover, these rights and principles participate in the legal order's systematicity. Institutionally, they are within the court's adjudicative competence because they deal with justice between the parties rather than with distributive issues requiring political action. Doctrinally, they form a coherent pattern of reasoning because the correlative structure that informs them operates not only within any given relationship but also across relationships, thereby providing a common structure for all the grounds of liability. The effect of public right is not to submerge private law in politics but to allow its range of rights to be enjoyed through the operation of public institutions. In the standard case, the Kantian conception of public right makes no difference to the internal logic of the controversy except to add the dimensions of publicness and systematicity.

### III *'A common fault of experts on right'*

Nonetheless, Kant insists that the idea of public right can, on occasion, require a court to adopt a principle inconceivable in the state of nature. When facts crucial to the transaction are not publicly ascertainable, an opposition arises between the inner logic of the parties' rights, on the one hand, and the public character of the parties' interaction



and of the court's consequent decision, on the other. To such situations, two contrasting perspectives, each normatively valid, apply; one is concerned with what is right in itself as a matter of private right, the other with what is publicly right. The latter prevails because rights cannot be enjoyed beyond the capacity of a court to adjudicate specific cases through a public process that deals with the publicly ascertainable aspects of the parties' interaction.

An illustration of this that Kant discusses is the doctrine, familiar to the common law as well, that a sale in market overt transfers title even if the vendor has no title to give. Market overt operates as follows. It is a commonplace of the law of property that only a person who has title to a thing could transfer that title: *nemo dat quod non habet*. Assume, however, that the thing is sold by a thief or a borrower who has no right to sell it. Under the doctrine of market overt, a purchaser for value without notice of the vendor's defective title could retain the thing even against the true owner, provided that the purchase occurred in an open market.

Kant's analysis of this notoriously problematic situation is that the two opposing notions – that one cannot transfer what one does not have and that the purchaser in an open market can acquire a title that the vendor does not have – are both valid, but from different points of view. The first notion accords with what is intrinsically right, as a matter of reason, when one focuses on property as a juridical category in abstraction from the institutions of public right. Because property signifies that the owner has a right against the whole world, ownership cannot be affected by a putative sale by a non-owner to a purchaser, however innocent. The second notion, however, reflects the publicness requirement of public right. If the law insisted that a vendor have good title, a purchaser would have to verify the entire chain of title – an investigation that 'would go on to infinity in an ascending series.'<sup>7</sup> Because such verification is effectively impossible, a legal system that required it would be unable to fulfil a primary function of public right: to guarantee secure acquisition. Instead, public right contents itself with allowing transfer by a non-owner to confer title on an innocent purchaser if the transaction satisfies the conditions of publicness present in an open and publicly regulated market. Through its public quality, an open market both creates a mechanism for securing the purchaser's acquisition and provides an opportunity for identifying the goods as misappropriated by the seller. By having recourse to the doctrine of market overt, a judge determines ownership on the basis of what is publicly ascertainable, with the result that 'what is

7 Kant, *Metaphysics*, supra note 3 at 6:301.

*in itself* a right against a person, *when brought before a court*, holds as a right to a thing.<sup>8</sup>

In offering this analysis of market overt, Kant is not proposing a rule. Historically, the idea of market overt has existed in many variations.<sup>9</sup> A legal system that employs this idea would have to decide on its specific contours, based on (among other factors) whether the publicness of an open market gave a reasonable opportunity for unmasking the infirmity of the seller's title. One such decision would have to specify what constitutes a market overt. Before the abolition of market overt in England, for example, every shop within the City of London qualified as a market overt with respect to the kind of goods that it normally sold,<sup>10</sup> whereas, under the German civil code, market overt is largely restricted to goods sold at a public auction.<sup>11</sup> Another such decision would concern special conditions applying to special kinds of goods. Kant takes the stolen horse as paradigmatic. English law, in contrast, made special provisions for horses because their mobility allowed them to be spirited away to markets far beyond the scrutiny of true owners or of their neighbours. Or perhaps, as under modern conditions, where market overt has been abolished, the geographic diffusion of the market and the ease and impersonality of transactions make the idea of market overt inapposite. Kant's justification for market overt does not predetermine any of these decisions. Rather, it points out the existence of a distinctive normative space informed by publicness, and it situates that space within the entire domain of normative considerations applicable to the transaction between the parties. How a particular system of positive law fills or ought to fill this space is another matter.

What, then, is the relation between what is right in itself and what is publicly right? What is publicly right provides the court with a new principle of decision based on the omnilateral standpoint of a public institution. It does not, however, transform what is right in itself. Public right, Kant remarks cryptically, 'contains no further or other duties of human beings among themselves than can be conceived [in private right]; the matter of private right is the same for both.'<sup>12</sup> The matter of private right refers to the various kinds of rights that one can have in external things. For Kant, there are three such kinds of rights: property rights, rights to contractual performance, and rights with respect to household relationships. Each of these kinds of rights has its distinctive normative nature, in accordance with which the internal logic of the

8 Ibid at 6:302 [emphasis in original].

9 Daniel E Murray, 'Sale in Market Overt' (1960) 9 ICLQ 24.

10 Peter M Smith, 'Valediction to Market Overt' (1997) 41 Am J Legal Hist 225 at 242.

11 Murray, *supra* note 9 at 48.

12 Kant, *Metaphysics*, *supra* note 3 at 6:306.

right and its correlative duty operate. Public right does not change this internal logic. Indeed, mistaking considerations of publicness for what is right in itself, Kant alleges, is 'a common fault of experts on right',<sup>13</sup> that is, of persons conversant with the positive law who lack a true understanding of its normative foundations.<sup>14</sup>

Since Kant's time, the prevalence of realism and instrumentalism in legal studies has made this 'common fault of experts on right' even more appealing. The legal realist ascribes decisive importance to the point at which the legal dispute makes contact with the coercive apparatus of the state. In Karl Llewellyn's famous words, '[L]aw is what officials do about disputes'.<sup>15</sup> Realists are of the view, therefore, that one cannot think of a right aside from the way the court enforces it. From the fact that considerations of publicness determine the principle of decision in a given case, a realist would conclude that those considerations are constitutive of the right itself. In contrast, Kant's view is that neither law as a normative practice nor the process of adjudication would make sense unless the legal categories applicable to the dispute were already immanent in the interaction of the parties as self-determining beings and were, therefore, available for the court when the case came before it. Publicness merely adds what is necessary for the court to function as a public institution, even to the extent of changing the decision, but publicness does not transform the nature of the underlying right.

As for the instrumentalists, the contrast with Kant goes both to structure and to content. From the structural standpoint, Kant understands law as a sequence of ideas in which one first identifies the concept of freedom that pertains to law, then works out the various rights expressive of this freedom in the conceptual space of the state of nature, and finally posits the public institutions necessary for the enjoyment of the rights. The stages of the sequence comprise a conceptual ordering that articulates, in a progressively more adequate form, the conditions under which the freedom of one person can coexist with the freedom of others. Instrumentalists, in contrast, have difficulties with sequenced ideas. Once the underlying goal or combination of goals is posited, there seems little reason to deny it general scope. Accordingly, if the law's publicness is considered instrumentally valuable in the service of some goal, that goal would also be the relevant to the analysis of such fundamental concepts as property and contract.

With respect to content, the contrast with Kant can be illustrated by supposing how an instrumentalist might approach the doctrine of

13 Ibid at 6:297.

14 Ibid at 6:229.

15 Karl N Llewellyn, *The Bramble Bush: Our Law and Its Study*, revised ed (New York: Oceana, 1951) at 12.

market overt. Blackstone observed that, without a doctrine of market overt, 'all commerce between man and man must soon be at an end.'<sup>16</sup> From this, one might readily infer that the point of the doctrine is to facilitate commercial activity. Then, because the doctrine applies to contracts for the sale of property, one might conclude that the facilitation of commercial activity is also the goal that justifies the protection that the law affords to property and contract.

From the Kantian perspective, this line of reasoning confuses the consequences of the law with its justification. The facilitation of commercial activity, not being a correlatively structured consideration (as corrective justice requires), is a poor justification for property and contract. Under the Kantian approach, rights in property and contract are the juridical markers of equal reciprocal freedom. Nor is the economic account of the doctrine of market overt satisfactory from the Kantian perspective. The normative significance of the doctrine is not the economic goal that it serves but the condition of publicness that it exemplifies in accordance with what public right requires.

The idea that 'the matter of private right' remains unaffected by an opposing judgment responsive to the need for publicness has two implications. First, judgments from the standpoint of public right do not justify a revision in the basic categories of private right, such as property and contract, despite the inconsistency of these judgments with the internal logic of those categories. Such a revision would undermine that internal logic by introducing considerations that do not pertain to it. Second, because the judgment about publicness supervenes upon legal categories that remain intact and continue to structure the relationship between the parties, the judgment should bear the imprint of the category to the extent possible. Far from opening the door to a wide-ranging instrumentalism at odds with the nature of private law, the judgment of public right should vary the result that would follow from the internal logic of the basic categories only to the extent necessary to achieve publicness. In market overt, for instance, the doctrine should not effect an absolute transfer of title to the purchaser (as was the case under English law) but should allow the true owner to regain title by reimbursing the purchaser for the price paid (as in Jewish law<sup>17</sup> and many continental systems<sup>18</sup>). The true owner would then have the power to reassert the ownership that was never properly terminated of an object that has sentimental value to

16 William Blackstone, *Commentaries on the Laws of England* (Oxford, UK: University of Oxford Press, 1825) vol 2 at 449.

17 Rabbi Yosef Karo, *Shulchan Aruch* at 356.1.

18 Murray, *supra* note 9.

her or that turns out to have a greater value than was reflected in the price.<sup>19</sup>

#### IV *The effect of systematicity*

Kant's discussion of the 'common fault of experts on right'<sup>20</sup> is devoted to demonstrating that the publicness requirement of public right can transform the principle of decision while leaving the internal logic of the right unaffected. Turning now to the other aspect of public right, the systematicity of law, I want to suggest (although Kant did not advert to this) that systematicity can have a similar effect.

The basic idea is this: the driving impulse of the Kantian approach to law is to present the sum of the conditions under which the freedom of one person can coexist with the freedom of everyone else. Kant unfolds this sum of conditions by moving through a series of conceptual stages. The first stage of this series features the innate right to freedom that all persons have by virtue of their humanity. The second stage introduces the kinds of private rights that one can acquire, such as rights to property and contractual performance. The third stage, that of public right, integrates these rights into a public and systematic totality of persons, norms, and institutions, thereby moving from bilateral relationships, in which each right (as well as its correlative duty) stands on its own, to the omnilateral relationship among members of a state, in which the rights and correlative duties become constituents of a comprehensive whole. Thus, the elucidation of the sum of conditions under which everyone's freedom coexists culminates in public right.

Accordingly, Kant neither begins nor ends with a collection of specific rights. Although he regards rights as juridical manifestations of freedom and therefore as necessary for a free society, his broader intention is to explore the totality – what one might call (to use a term from German constitutional jurisprudence) the 'objective normative order' – into which rights fit. This means that the specific rights that arise in the

19 This was the solution reached by the Supreme Court of Israel in the fascinating case of *Cnaan v The United States Government* 57(2) PD 632 (2003). The defendant had purchased a painting at a flea market. The painting turned out to have been the work of a distinguished Israeli artist that had been stolen while on tour. Even though the Israeli sales legislation gave unencumbered title to the purchaser in an open market, the majority of the Court held that the true owner could trace its property into the vendor's power to rescind due to mutual mistake. Accordingly, the Court concluded that no sale had taken place and that, therefore, the market overt rule was inapplicable. It, nonetheless, required the true owner to reimburse the purchase price to the purchaser and to compensate the purchaser for the expenses incurred in investigating the painting's provenance.

20 Cited at note 13, *supra*.

state of nature may not exhaust the normative space comprising this totality. Although a person enters public right with, and continues to hold, the kinds of rights postulated for the state of nature, those rights now operate within a public and systematic framework that has supplementary requirements of its own. We have already seen that this is explicitly the case with respect to the publicness aspect of public right. My suggestion is that it is also the case with respect to the systematicity aspect.

This supplementation may, relative to the rights available in the state of nature, either extend or narrow the effect of a right of the plaintiff. I give an example of each.

#### A INDUCING BREACH OF CONTRACT

My example of extending the effect of the plaintiff's right is the tort of inducing breach of contract. Its apparent inconsistency with the nature of contract has made this tort a long-standing puzzle to legal commentators. A contract links two parties through a consensually assumed set of mutual rights and obligations. The effect of the tort of inducing breach of contract is to extend to the rest of the world the obligation to respect the contract. The tort thereby 'inexplicably convert[s] the in personam right created by the law of contract into an in rem right for purposes of tort law.'<sup>21</sup> This conversion leads some to regard the cause of action as 'quasi-proprietary'<sup>22</sup> and even to read the characteristics of property back into the contractual right.<sup>23</sup> These moves mask the difficulty by having recourse to an unilluminating label or compound it by importing the uncertainty about the tort into the contract itself.

The Kantian explanation of this tort draws on the omnilateral significance of public right.<sup>24</sup> In the state of nature, a contract binds only those who are parties to it, creating a right to performance in the promisee and placing the promisor under a correlative duty. No one, however, can have the assurance that his or her rights will be respected. Moreover, in the absence of such assurance, one cannot be relied upon to carry out one's own contracts, for to treat one's own contracts as binding without the assurance that everyone does likewise would be to subordinate oneself to the will of others. Public right cures the ineffectiveness of contractual rights in the state of nature by creating a system of omnilateral assurance through institutions of adjudication and enforcement that

21 Jason W Neyers, 'The Economic Torts as Corrective Justice' (2009) 17 *Torts Law Journal* 162 at 164.

22 *Zhu v Treasurer of New South Wales*, [2004] HCA 56.

23 Richard A Epstein, 'Inducement of Breach of Contract as a Problem of Ostensible Ownership' (1987) 16 *J Legal Stud* 1.

24 B Sharon Byrd & Joachim Hruschka, 'Kant on "Why Must I Keep my Promise?"' (2006) 81 *Chicago-Kent L Rev* 47 at 68–71. My formulation of the Kantian argument is based on Kant, *Metaphysics*, *supra* note 3 at 6:255–6.

represent the general will of all. This system of omnilateral assurance, of course, requires that courts hold the contracting parties to their obligations. But, because public right relates each person to every other person through the system of laws that all share, it also requires more. When everyone is united under a system of laws that assures the rights of all, everyone is obligated to respect everyone else's contractual rights. Because a court operates under the authority of public right, it is not merely a private arbitrator of a private arrangement between the promisor and the promisee. Rather, it has the public function of making everyone secure in her rights against everyone else. This function would be unfulfilled if parties external to the contract could procure violations of another's contractual rights at their will. Accordingly, whereas, in the state of nature, the parties to a contract are not secure even against each other, public right makes their rights secure against everyone by attaching liability not only to a breach of contract by the other contracting party but also to the procuring by third parties of such a breach. Thus, public right makes the contract a juridical object for everyone, thereby creating a system of reciprocal assurance that relates all to all.

From this Kantian explanation, one can readily understand why liability for interfering with the contract is based on intent and excludes negligence.<sup>25</sup> The point of the tort is to provide assurance to a contracting party that no one, not even a stranger to the contract, may act inconsistently with the recognition of the contract's juridical significance. Essential to the Kantian conception of this wrong is that persons who commit it act on the implicit principle that they are free to disrespect contracts to which they are not parties. Liability responds to the wrong in order to provide the assurance that no one, whether a party to the contract or not, can regard another's contractual right as a nullity. Hence, the tort requires knowledge of the contract's existence and an intention to interfere with its performance because one cannot regard as a nullity something that one does not know exists and that one's action does not target. Mere negligence with regard to the benefits that would accrue to another under a contract does not imply a refusal to treat the contract as an object of respect.

This explanation of the tort of inducing breach of contract has two similarities to Kant's treatment of market overt. First, the additional layer of analysis that reflects the omnilaterality of public right leaves intact the normative connection between contract and *in personam* rights. The explanation thereby obviates the need to read proprietary notions back into the category of contract in order to provide a basis for the apparently *in rem* character of the tort. Indeed, to do so is to

25 But compare Neyers, *supra* note 21 at 174.



commit the 'common fault of experts on right'<sup>26</sup> that Kant noted in his observations on publicness.

Second, the explanation bases itself on the requirements of a system of rights, not on the commercial advantages that might flow from protecting contracts against third parties. Economic analysts of law have discussed whether and under what conditions the tort of inducing breach of contract contributes to economic efficiency, especially in light of the apparent tension between this tort and the efficient breaches of contract that they think the law should facilitate.<sup>27</sup> From the Kantian perspective, nothing about the normative foundation of the tort hinges on this issue. Rather, the tort is a juridical reflection of the systematicity of law as a juridical phenomenon.

#### B THE PRIVILEGE TO PRESERVE PROPERTY

My example of narrowing the effect of the plaintiff's right is the privilege that attends the use of another's property to preserve one's own. In the common law, the two most famous cases involve boats that are moored at docks in a storm. In the first of these cases, the court held that the dock owner must tolerate what would otherwise be a trespass; he could not, relying on the exclusivity of his property right, prevent the boat from remaining moored during the storm.<sup>28</sup> In the second of these cases, the court held that, although the crew acted reasonably in keeping the boat attached to the dock, the owner of the boat was nonetheless liable for the damage to the dock caused by the boat's pounding against it.<sup>29</sup> These cases have occasioned much commentary, including suggestions that the liability for damage to the dock has radical implications for the fault-based nature of tort law or for the divide between misfeasance and nonfeasance. In contrast, I suggest that the privilege arises as a matter of public right in the Kantian sense, leaving the underlying nature of tort liability unaffected.

The question of whether one can damage another's property to preserve one's own has an ancient history. The classic instance mentioned in writings of the Roman jurists was whether, in order to save one's house from a spreading fire, one could create a firebreak by tearing down a neighbouring house. Roman jurists split on this issue.<sup>30</sup> One position was that warding off a fire was no defence to a tort action. Another position was that a private person could tear down a neighbouring house

26 Cited at note 13, *supra*.

27 Fred S McChesney, 'Tortious Interference with Contract vs 'Efficient' Breach: Theory and Empirical Evidence' (1999) 28 J Legal Stud 131.

28 *Ploof v Putnam*, 81 Vt 471, 71 A 188 (1908).

29 *Vincent v Lake Erie Transportation Co*, 109 Minn 456, 124 NW 221 (1910).

30 Dig 43.24.7.4 (Ulpian); 9.2.49.1 (Ulpian).

only if the fire had already reached that house, so that the house was doomed to destruction in any case. A third position was that, even if the house was not doomed, no tort liability existed, on the ground that action done out of legitimate fear was not wrongful. Sifting through this diversity of opinion in the seventeenth century, the German legal thinker Samuel von Pufendorf reconceptualized the entire issue:

A necessity that touches our own property apparently allows one the permission to destroy or appropriate the property of another, but with the following restrictions: that the threatened loss to our property ... cannot be averted in any more convenient way; that we do not destroy another's article of greater value for one of our own of less value; that we make good the value of the article if it would not have been lost anyway ...<sup>31</sup>

Pufendorf's formulation was subsequently incorporated into the German Civil Code section on necessity:

The owner of a thing is not entitled to prohibit the interference of another person with the thing if the interference is necessary to avert a present danger and the threatened damage, compared to the damage arising to the owner from the interference, is disproportionately great. The owner may demand compensation for the damage incurred.<sup>32</sup>

The Pufendorf formulation, especially as restated in its modern German form, indicates the normative structure of the privilege of using another's property to preserve one's own. Pufendorf assumes that preserving the endangered thing is a proper purpose and that one is permitted to interfere with another's proprietary right in the execution of this purpose provided that the interference conforms to the criteria of necessity and proportionality. To a reader familiar with modern constitutional law, the relationship between the property right and the privilege is strikingly similar to the relationship between an entrenched constitutional right and a limitation of that right in accordance with a proportionality analysis. Pufendorf had, as it were, formulated a private-law version of the 'Oakes test'<sup>33</sup> for the justified limitation of the owner's proprietary right.

Once one conceives of the privilege in this way, the obligation to compensate for the damage done to the sacrificed property poses no problem. Necessity both animates and limits the justification. In order to preserve the endangered object, it is necessary that the defendant use the plaintiff's property, even to the extent of injuring it, if need be. It is not, however, necessary that the defendant be relieved of

31 Samuel von Pufendorf, *On the Law of Nature and Nations* (Oxford: Clarendon Press, 1934) at 2.6.8.

32 BGB 904.

33 *R v Oakes*, [1986] 1 SCR 103.

responsibility for the damage to the thing used. To leave the damage uncompensated would allow the defendant to leave a permanent mark on the plaintiff's property. This would be beyond the scope of the justification, which allows temporary use only to the extent necessary to preserve one's own property during the emergency. Moreover, in permitting a right to be infringed, a justification limits the right but does not negate it – indeed, if the justification did negate the right, justification and right would be incapable of coexisting within the same system of law. Under the privilege, the defendant commits no wrong in using the plaintiff's property for the justified purpose and therefore cannot be prevented from using it. Nonetheless, the property used remains the embodiment of the plaintiff's right. Accordingly, the defendant must pay for the damage done to the plaintiff's property through the defendant's use of it.<sup>34</sup>

In drawing attention to proportionality in constitutional law, I am, of course, not suggesting that private law somehow anticipatorily borrowed a principle from modern constitutional law. Rather, the possibility of justifying an infringement of a right arises in many contexts, including private law and constitutional law. Justification always signifies both that a right has been infringed (that is, that something occurred that needs to be justified) and that this infringement is, nonetheless, not wrongful in the circumstances (that is, that the infringement is justified and not merely excused). Accordingly, it would not be surprising to find that justifying arguments exhibit a common structure wherever they appear.

The difference between Pufendorf's formulation and modern constitutional law lies not in the structure of justification but in the legal complexity of the situations to which they respectively apply. Modern constitutional law has developed an explicit and sophisticated formulation of the structure of justified infringements of constitutional rights – that the infringing legislation be for a proper purpose, that it employ means suitable and necessary for this purpose, and that the benefit of achieving the purpose be proportionate to the effect on the infringed right. Pufendorf's formulation is a simpler version of this structure because it is addressing a simpler problem. Whereas the justification for infringing a constitutional right involves situating a statutory provision, which can have almost any content, within the entire constitutional order, Pufendorf's formulation has the narrow object of situating an infringement of a property right within a regime of property rights. The constitutional inquiry into proportionality is complex because one must compare, without any obvious common metric, the intensity of the legislation's interference in the right with the importance of

34 Compare Arthur Ripstein, 'Tort Law in a Liberal State,' online: (2007) 1:2 *Journal of Tort Law* 3 <<http://www.bepress.com/jtl/vol1/iss2/art3>>.

achieving the legislation's purpose. Under Pufendorf's formulation, the object preserved and the object sacrificed can readily be compared because value provides here, as it does always, the relational criterion for the quantitative comparison of different things.

The possibility of justifying the infringement of a right is a reflection of the systematicity of public right. By allowing specific rights to be limited through arguments that justify their infringement, the law reveals that it does not regard those rights as absolute. Rather, the law's concern is for the entire system of rights. Justifications work to adjust the effects of rights so that rights fit within the totality of conditions under which the freedom of all can coexist. This is the case in constitutional law, where rights are limited by principles underlying the constitutional order as a whole. In a much more modest way, it is also the case with Pufendorf's formulation. Understood in the light of Kant's conception of public right, Pufendorf's formulation treats the rightfulness of the attempt to preserve property as implicit in a system of property. In the state of nature, an owner's property right operates unidirectionally to allow the owner to prevent others from using the property. When considered as part of a system of property rights, however, an owner's property right is modulated by the presence of an adjacent property right. Pufendorf's formulation treats as justified an act that preserves to the extent possible the embodiments of both parties' property rights.

The idea that the justification covers an act with reference to the endangered property has several implications. First, the privilege is directed solely toward the preservation of property, not toward the creation of opportunities for gain. It may well be that the defendant can dramatically enhance the value of her property by temporarily encroaching on her neighbour's – for example, by placing a crane on it to facilitate the construction of a high-rise building. Such action is not protected by the privilege. Second, in order to be shielded by the justification, the act has to be performed for the justified purpose. The negligent destruction of another's property that turns out to save one's own is an unjustified wrong.<sup>35</sup> Third, the fact that the act is justified means that it is permissible, not obligatory. It is not obligatory on the owner of the saved property because he is as free to save his property or not, as he is to use it or not. Nor, a fortiori, is it obligatory on the owner of the sacrificed property. Because the act is permissible, the owner of the sacrificed property must abstain from preventing it but is under no affirmative duty to save the endangered property. Thus, the privilege conforms to the

35 Justinian's *Digest* (Dig 43.24.7.4 [Ulpian]) mentions tearing down a house when there was no fire but a fire subsequently arose that would have allowed the house to be torn down to create a firebreak. Labeo holds that one is liable for damage wrongfully caused because one evaluates '*non ex post facto sed in praesenti statu*'; *ibid*.

standard notion, evidenced in the distinction between misfeasance and nonfeasance, that private law postulates no obligatory ends.

As with the examples of inducing breach of contract and market overt, the privilege regarding the preservation of property is an example of the operation of public right to modify the principle of decision that would hold as a matter of private right. The logic of the concept of property gives the proprietor a right to exclude. As is the case with all justifications, the privilege formulated by Pufendorf does not affect the scope or basis of the underlying right. To see in the operation of the privilege a ground for reconsidering the fault-based nature of tort law or the divide between nonfeasance and misfeasance is to commit what Kant stigmatized as the 'common fault of experts on right.'<sup>36</sup>

## V Conclusion

In this lecture, I have presented a number of examples of the impact of public right on the standard rights and duties of private law. There are many such examples. On the publicness side, Kant himself enumerated several others from the law of his own day.<sup>37</sup> From a common law perspective, one might also include circumstances in which the plaintiff's burden of proof is relaxed, for instance, in cases of uncertainty about factual causation in tort law. Kant explicitly mentioned the plaintiff's burden of proof as an aspect of the defendant's innate right to be considered beyond reproach in the absence of an act that wrongs another. The basis of the plaintiff's burden is, therefore, anterior to the transition from the state of nature. In a manner reminiscent of Kant's remark about the common fault of experts on right, some modern scholars have reacted to the difficult cases of causal uncertainty by initiating a wholesale revision of tort law's conception of causation.<sup>38</sup> A more Kantian approach would seek to achieve a reasonable degree of public ascertainability while minimally impairing the conceptual integrity of tort law.

On the systematicity side, many further possible examples come to mind from widely disparate legal contexts. In this group, one should, perhaps, include the following: defences to defamation such as privilege and fair comment as well as other tort defences; statutory illegality as a defence to a contract action; doctrines, such as the barring of oppressive

36 Cited at note 13, *supra*.

37 These examples are that donative contracts are enforceable, that in a gratuitous bailment for the benefit of the bailee the risk of loss is on the bailor, that purchase breaks a lease, and that evidentiary oaths are considered probative for legal purposes.

38 The most thorough and interesting version of this is found in Ariel Porat & Alex Stein, *Tort Liability under Uncertainty* (Oxford: Oxford University Press, 2001).

remedies, that are the common-law analogues to civilian ideas of abuse of rights;<sup>39</sup> entitlements that transcend privity of contract, such as the right of a third party beneficiary to enforce a contract in order to effectuate the performance objectives of the contracting parties<sup>40</sup> or the right to enjoin a contracting party with notice of a previous contract from using property in a manner inconsistent with that contract;<sup>41</sup> certain kinds of invocations of public policy, such as preventing murderers from inheriting from their victims;<sup>42</sup> and the horizontal application of Charter values to private law.<sup>43</sup>

What, then, is the character of private law when subjected to the institutional guarantees of public right? In the Kantian view, those institutions are the products and representatives of the united will of all, which connects everyone to everyone else. The omnilaterality of this will not only grounds the authority and legitimacy of the court as well as of other public institutions; it also informs the court's view of how right holders are related. Under public right, the publicness and systematicity of the legal order as a whole may, in the appropriate circumstances, warrant the adjustment of one person's rights and freedoms because of the presence of someone else's. Right holders thereby become reciprocally determining participants in the legal system. The reciprocal determination of elements that exist independently of one another but are, nonetheless, combined together into a single whole is the essential feature of Kant's conception of community.<sup>44</sup> On the model of Kant's famous characterization of morality as forming a kingdom of ends,<sup>45</sup> one might regard public right as transforming private law into a community of rights.

39 Ernest J. Weinrib, 'Two Conceptions of Remedies' in Charles EF Rickett, ed, *Justifying Private Law Remedies* 3 at 27–31 (Portland, OR: Hart, 2008).

40 Melvin A Eisenberg, 'Third Party Beneficiaries' (1992) 92 Colum L Rev 1358.

41 *De Mattos v Gibson*, (1858) 45 ER 158 (CA); see Sarah Worthington, *Proprietary Interests in Commercial Transactions* (Oxford: Oxford University Press, 1998) at 101–19.

42 *Riggs v Palmer* 22 NE 188 (NY Ct App 1899).

43 Lorraine Weinrib and Ernest J Weinrib, 'Constitutional Values and Private Law in Canada' in Daniel Friedmann & Daphne Barak-Erez, eds, *Human Rights in Private Law* (Portland, OR: Hart, 2001) at 43.

44 Kant, *Critique*, supra note 1 at B111–3.

45 Immanuel Kant, *Groundwork of the Metaphysics of Morals*, in Mary J Gregor, ed and trans, *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* (Cambridge, UK: University of Cambridge Press, 1996) at 4:433.

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