

This article is the text of an introductory address presented at the Faculty of Law on 23 October 2009 in celebration of Professor Ernest Weinrib's receiving the 2009 Killam Prize, Canada's most distinguished annual award for outstanding scholarly achievement. It offers a very personal interpretation of the contributions that Weinrib has made to private-law scholarship over the last thirty years and is organized around three closely related questions that he has addressed in his work: What is a theory? What is a theory of law? and What is a theory of private law? His answers to these different questions land Weinrib in three different worlds – the world of the university, the world of the law school, and the world of legal practice – but it is Weinrib's special contribution as a legal philosopher to have brought all three much closer together.

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This is a wonderful occasion. We are all here to celebrate the career of someone who has a very special place in the Faculty of Law at the University of Toronto. And last night, at a special dinner in his honour, a number of Ernie's colleagues and former students at the faculty took the time to tell him what he has meant to them personally and to all of us collectively, over the years – how he holds a very special place in our hearts and, frankly, a very firm grip on our minds as well.

But today, I want to think much more generally or broadly about Ernie's place in the world. Indeed, I want to think, and hopefully get you to think, about Ernie's place in *three different worlds*, worlds that sometimes seem far apart, but worlds that Ernie's scholarship has somehow managed to bring much closer together. Notice what I do not say: I do not say that he has united these three worlds into one so that the differences among them are lost to some homogenizing force that obliterates the special contributions of each. As we all know, that is never Ernie's way. Rather, his scholarship shows how each of these three worlds exercises a reciprocal and illuminating effect on the other two, or, as he has put it in

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a slightly different context, ‘as a mirror does on entering into a hall of mirrors.’¹

What are these three worlds that Ernie has brought so close together?² The first is the world of legal practice. This may come as a surprise to some; one might have thought that Ernie’s philosophical scholarship would be somewhat detached from the everyday activities that are so consciously governed by law, where, for example, a lawyer offers legal advice to a client or a judge determines the rights and duties of litigants. But, as I hope to demonstrate before I am finished today, it is precisely the fact that Ernie’s work *does* bring him into contact with this world of legal practice that makes him special as a legal philosopher.

Ernie’s second world is the world of the law school and the study of law. This may *seem* obvious enough; this is the world that provides Ernie with his most familiar backdrop, the world in which we see him every day. But that is to mistake Ernie’s occupation of any of these worlds as something geographical. It isn’t; Ernie’s occupation of these different worlds is intellectual. Ernie isn’t simply *at* the law school; he’s *of* the law school. Where all of us – students, faculty, staff, friends, visitors – can claim from time to time to be *at* the law school, only some enter the law school as a special intellectual space *qua law school*, and Ernie is one of those. This is not to say that others who are at the law school are not also engaged in serious intellectual activity there. But they don’t always occupy the special intellectual space *qua law school* that Ernie does, a point that relates, incidentally, to my earlier claim about Ernie’s coincidental intellectual occupation of the first world, the world of legal practice, a world, of course, in which he is seldom observed geographically. Now, admittedly, this must all sound a little mysterious. But bear with me; I hope to clarify the point before I’m done.

The third world that Ernie occupies is the world of university study. Indeed, it is in this context that I first heard Ernie speak of the distinction between being *at* some place and being *of* it. Ernie likes to say that the law school is not only *at* the University of Toronto, it is (or certainly should be) *of* it as well. What Ernie means by this is that our study of law here must be worthy of the university, an institution of higher learning committed to the study of ideas and our intellectual inheritance more generally. Ernie holds the rank of University Professor here at the University of Toronto, one of only thirty-eight such designated positions. That is

1 This phrasing of the idea comes from a paper that Ernie sent to me many years ago: Ernest J Weinrib, *The Law’s Self-Understanding* (1986) [unpublished] at 9. This wonderful paper seems never to have been submitted for publication, something that indicates the high personal standards that Ernie has always brought to his published work. If only there were a little more of this self-discipline around!

2 These three worlds track the confluence of three activities where, Ernie has argued, legal education is properly to be found; see Ernest J Weinrib, ‘Can Law Survive Legal Education?’ (2007) 60 Vand L Rev 401.

evidence enough for the claim that Ernie is *of* the University and not just *of* the law school. But Ernie is also the Cecil A Wright Professor of Law at the law school and, as anyone who is familiar with the history of the Faculty of Law will already know, the name 'Caesar' Wright is synonymous with the solid establishment of the modern law school, not only as a professional school of law, but also as an integral department within the university.³ So Ernie's credentials speak loudly to the fact that, not only is he *of* the university as a University Professor, he is also *of* the university as a law professor committed to the study of law from a standpoint internal to the very nature of university study itself.

How is it that Ernie brings these three different worlds into close relation to one another? The only way to find a proper answer to that question is by immersing oneself in Ernie's scholarly writing over the last three or four decades. You probably won't have time for that this afternoon before Ernie's talk. But maybe I can offer a few guideposts for your undertaking that heady exercise at some future date by suggesting now that Ernie's scholarship over the years has addressed three closely related questions. Further, the answer to each one of these three related questions lands differently, albeit in close intellectual proximity to the others, in one of Ernie's three different worlds.

The first question, and the one that engages most directly the world of the university and the study of ideas most generally, is 'What is a theory?', That is, what is it to have a theory or understanding of *anything*? The second question is 'What is a theory of law?' Not surprisingly, this is the question that most directly engages Ernie's second world, the world of the law school. And the third question, the one for which the answer is most relevant to the world of legal practice, is 'What is a theory of private law?' or, even more specifically (since so much of Ernie's scholarship has focused here), 'What is a theory of tort law?'

So three questions for three worlds, but the reason for thinking that there might be a way (Ernie's way) to provide for an intellectual integration of the three worlds is, perhaps, a little clearer now. These three questions form a unity in that the later questions presuppose the earlier ones and the earlier ones, in seeking out a given subject matter as their intelligible object, naturally lead us on to the later ones.

Let us take each question in turn.

The first question, 'What is it to have a theory or understanding of *anything*?' – a question that finds its home most comfortably in the world of the university – admits of two possible approaches. One of these approaches is exemplified, and self-consciously advanced, by the

3 For a detailed account of the shaping of the modern law school and Cecil A. Wright's role within it, see C Ian Kyer & Jerome Bichenbach, *The Fiercest Debate* (Toronto: Osgoode Society, 1987).

late Robert Nozick, the Harvard philosopher, in his book *Anarchy, State and Utopia*.⁴ In this book, Nozick attempts to provide an account of the political state, where such an account, Nozick argues, can only justify a minimal state, a state where there exists only minimal regulations and no real redistributive taxation, a political state that libertarians might like. I will come back to the content of Nozick's account in a moment, but for now, I want to emphasize the method that Nozick so self-consciously employs for explaining, or understanding, the political realm. Nozick begins his book with a discussion of state-of-nature theory, that is, with a pre-political account of human existence in a state of nature, which is to say a state without politics. This is no accident of political philosophy or fashion. For Nozick, the best way to understand or explain something is from the outside, or externally, and that is exactly what state-of-nature theory, as a *pre*-political theory, promises to provide. Of this form of explanation he says,

[T]he illumination of the explanation will vary directly with the independent glow of the nonpolitical starting point . . . and with the distance, real or apparent, of the starting point from its political result. The more fundamental the starting point . . . and the less close it is or seems to its result (the less political or statelike it looks), the better. It would not increase understanding to reach the state from an arbitrary and otherwise unimportant starting point, obviously adjacent to it from the start.⁵

So, for Nozick, the best way to understand or theorize something is from the outside. It is as if this external and distant view of the subject matter provides some sort of perspective on it that one would not otherwise have from the inside or from a position too close or adjacent to it.

Ernie's view of an appropriate understanding of some subject matter is the exact opposite of this. To try to understand something entirely from the outside is, for Ernie, to try to understand what something *is* in terms of what it *is not*. It is, by way of the *explanans* or explanation, to do a kind of conceptual violence to the *explanandum* or thing to be explained. A subject matter understood externally is not so much understood as transformed.⁶

Indeed, it might be even worse than that. For, as Ernie recognizes explicitly, there is an inherent incompleteness in the method of external explanation, something that dooms it from the start.⁷ For suppose some

4 Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974) at 6–9.

5 *Ibid* at 7 [emphasis added].

6 See Ernest J Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale LJ* 949 at 961 [Weinrib, 'Legal Formalism'], characterizing an external understanding of some subject matter as akin to 'a foreign occupation that serves its own interests.'

7 *Ibid* at 963.

phenomenon A is to be explained externally by way of some external factors or phenomena B; how, then, are we to understand B? Presumably externally as well; that is, under the guise of factors or phenomena C. Which themselves, one guesses, are also to be externally explained. And so on. Somewhere along this regress, if it is not to be infinite, we must stop. But, having stopped, if we now have an explanation, that must be because this last explanation is itself grounded, not externally, but internally. So an internal explanation must be possible (and fundamental) after all, and one begins to wonder if, beyond mere dogmatic assertion, there was any reason not to attempt such an internal explanation from the very beginning, that is, at A. The other possibility, of course, is that we have ended up with no explanation at all because we have ended only with an explanation that, because it has no external or internal explanation of its own, is itself unexplained. This is hardly a satisfactory state of affairs.

Instead, Ernie would have us explain or understand something from the inside. This is to understand something in terms of what it is, not in terms of what it isn't. *You have to admit that this does sound a bit more promising.* But now you will worry, with Nozick, that to provide an understanding of subject matter A as A, or in terms of A, is not to provide much understanding of it at all. Certainly, there does not seem to be much 'perspective' here; indeed, such an explanation seems perilously close to being circular.

But, for complex phenomena, the circle need not be so tight. A subject matter worthy of university study is likely to have many component parts which a good internal explanation, or coherence theory, can render intelligible. So some part A of the subject matter might be explained in terms of some other part B of that subject matter, and that part B might in turn be explained by some further part C. Now, if C is in its turn explained by A, or if (more likely) each part A, B, or C is simultaneously explained by all the other parts, as parts of a single whole or (as Ernie puts it) 'a self-contained circle of mutual reference and support,'⁸ then we have an internal explanation of our subject matter that neither leads to an infinite regress nor explains what something is in terms of what it isn't. It is also, incidentally, a method of explanation with a hefty intellectual pedigree, being the method of theorizing a subject matter that traces a thoughtful line from Aristotle through Aquinas to Kant and Hegel.

I need to move on to Ernie's other two questions, but before doing so I want to say something about Nozick's account of the minimal state. Those political theorists who have not much liked where Nozick's theory has

8 Ernest J Weinrib, 'The Jurisprudence of Legal Formalism' (1993) 16 Harv JL & Pub Pol'y 583 at 593 [Weinrib, 'Jurisprudence'].

ended up and who would support a more developed state that is committed to redistribution and a thicker sense of community have often tended to locate the problem in Nozick's method of theorizing. Begin with the state of nature or (as Nozick does elsewhere⁹) with an account of Robinson Crusoes, each living in isolation from one another on separate islands, and why should we be surprised that Nozick ends up with something that is so minimally political?¹⁰ To get to the political, one must begin with the political, the argument might go. So here, too, is an argument, one offered up by the political theorist, that might worry about the inadequacies of an external explanation, that is, of explaining what something is in terms of what is isn't.

But it is worth noticing some of the details about Nozick's minimal state. He ends up offering an account of what he calls 'justice in acquisition,' 'justice in transfer,' and 'justice in rectification.'¹¹ He might as well have offered his theory as an account of the three private law subjects of, respectively, property, contract, and torts. So the political theorist's criticism that Nozick's external theory provides for an impoverished account of politics and the state is really reducible to a criticism that *the law*, or at least *private law*, offers an impoverished account of politics and the state. And that certainly seems as if it must be true. Politics and law are simply different phenomena, and an understanding appropriate to each (for Ernie an internal understanding) would not properly attempt to see one exclusively in light of the other.¹²

This provides for a nice segue into Ernie's second question, the question that finds its proper place in the law school, that location in the university where the focus is on the study of law and legal interactions in particular: 'What is a theory of law?' My last remarks suggest it will not be a political theory (or, at least, not without some significant refinements as to what that might mean). For now the method of theorizing begins to look more clear: we need to look for some distinctive attributes of law, attributes that constitute law as something with its own character,

9 Nozick, *supra* note 4 at 185.

10 See, e.g., Thomas A Spragens, Jr, 'The Limits of Libertarianism' in Amitai Etzioni, ed, *The Essential Communitarian Reader* (Lanham, MD: Rowman and Littlefield, 1998) at 32.

11 Nozick, *supra* note 4 at 150–3.

12 The critical legal studies movement, which was active in the 1980s, could be pretty much defined by its rejection of any possible distinction between law and politics; see, e.g., the essays in David Kairys, ed, *The Politics of Law* (New York: Pantheon Books, 1982). One could read Weinrib, 'Legal Formalism,' *supra* note 6 at 952, as having been written partly in response to this idea. Also, see the careful attention he gives to Roberto Unger's influential, 'The Critical Legal Studies Movement' (1983) 96 *Harv L Rev* 561, in Ernest J Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) at 23–4 [Weinrib, *Idea*], where, in response to a tripartite organization of the issues provided by Unger, he begins his defence of the distinction between law and politics.

attributes that set law apart from other things we know to be different and that (because we know this) are subjects for study elsewhere in the university, like politics, ethics, history, and economics. This is not to say that these other subjects cannot offer insights *about* the law (for example, what historical or psychological forces might best explain how legal actors behave, or whether what we observe happening in the law, or in a particular court, reflects ethical considerations), but to the extent that these are insights *about* the law, they presuppose the intelligibility of a subject matter – law – with respect to which they offer these insights; that is, they presuppose a theory of law.

Now, I cannot possibly (and not just for lack of time) catalogue here the distinctive attributes of law that Ernie would identify as constituting it as a separate subject matter worthy of its own theoretical study at a university.¹³ However, we do know that because we are looking for a set of attributes worthy of a *theory*, the set will be a unified or coherent set, expressive of a single complex. So let me move directly up to this level and suggest what Ernie sees as that complex of ideas that sets law apart as a subject. Here's a possibility: law attends to the relations that exist between persons as a normative matter (or as a matter of justification).¹⁴ This may sound a bit lame, but there is already a good deal in it once we parse out its three components. That law attends to *the relations* between persons, for example, already sets it apart from ethics, which attends much more to the internal states of mind of a person, something that can vary for the person without varying that person's relations to others. But law is concerned not so much with what (inside) you meant to do but rather with what you did, or the public significance (or meaning) of what you did, as an external matter, that is, in relation to another.

Of course, what you did is something not simply to be perceived but rather to be understood, as the phrase 'public significance' suggests. This much follows from law's attending to the relations between persons *as a normative matter* (or as a matter of justification). I might have said 'as a matter of equality'; that wouldn't be wrong, but it

13 However, those with the time to track this down will want to consult Ernest J Weinrib, 'Law as a Kantian Idea of Reason' (1987) 87 Colum L Rev 472 [Weinrib, 'Law as a Kantian Idea']. This is not an easy read, but some of the same insights on law can be gained in a more accessible way if one begins with the early chapters of *The Idea of Private Law* and reads through to chapter four on 'Kantian Right,' the most difficult part of the book but one that follows ineluctably, and on a path of ever-increasing abstraction, from a subject matter that one can grasp more easily and directly in the first three chapters; see Weinrib, *Idea*, supra note 12.

14 The reader will not find this particular encapsulation of Ernie's view anywhere in his articles or books. Both this encapsulation and the paragraphs expanding on it which follow in the text offer a deliberately cryptic and somewhat personal summary of the arguments that Ernie offers in Weinrib, 'Law as a Kantian Idea,' supra note 13.

wouldn't add much either. For once we attend in law to the relations between persons as a normative matter, then we attend to those relations for all persons (and only persons) wherever they are (equally).

Now relations *between persons* can either be immediate, that is, *qua persons*, or non-immediate, that is, as mediated by the sorts of persons they are. (Any other sort of mediation takes us beyond a relation between persons as such.) Using the notion of equality, we could say that persons can relate equally to one another either immediately, *qua persons*, or non-immediately, that is, as the sorts of persons they are. So when law attends to the relations between persons as a normative matter, it can attend to them in either one or the other of these two ways.¹⁵

No amount of detailed empirical observation of a car collision at the corner of Bloor Street and Avenue Road will reveal in which way the law *should* attend to this relation between persons as a normative matter. But if law attends to the immediate relation between the two drivers *as persons*, then their equal relationship (or relationship as a normative matter) must attend only to what defines them as persons. For Ernie this will be the (equal) capacity of each for agency; that is, the capacity of each as purposive beings (or persons) to act in the world and thereby come into relationship with one another by way of a transaction. Acting in the world in a way that is consistent with equal agency or the equality of persons *qua persons* requires no special response from law attending to that relation as a normative matter. But acting in the world that is inconsistent with equal agency or the equality of persons *qua persons* requires law to restore the relation as a normative matter. This, for Ernie, is the stuff of corrective justice.

Talk of corrective justice will, as many here will already know, take us to Ernie's third question, 'What is a theory of private law?' or 'What is a theory of tort law?' And so one can see how naturally and easily the right questions bring us from one of Ernie's worlds into another. But before we make this final step, I want to emphasize that Ernie's account of law already has contained within it the beginnings of an account of public law as well.

For recall the second way in which persons can relate to one another, that is, as mediated by the sorts of persons they are. This is the stuff of distributive justice. If we need a slogan (and to get the feel of a distribution), we might say, 'From each person according to his X, to each person according to her Y' (where X and Y name different possible attributes of persons and so identify the sorts of persons they are). So, for example, on observing that earlier car collision at the corner of Bloor

15 See Weinrib, 'Legal Formalism,' *supra* note 6 at 979–80.

Street and Avenue Road, we could, as a normative matter, treat these relations between persons in a non-immediate way, that is, not in virtue of their equal agency or *qua persons*, but in virtue of the sorts of persons they are. Which attributes would inform our distribution? Here's one candidate: 'From each according to his wrongdoing, to each according to her wrongfully caused injury.' This might sound like the stuff of corrective justice (indeed, the Yale legal theorist, Jules Coleman, famously thought so in some early work on the annulment of wrongful gains and losses, until Ernie set him right), but it isn't, since it is a content that really reflects the form of a distribution and does not arise immediately (that is, without some independent selection of these attributes as a political matter) out of the transaction between persons as such.¹⁶ Here's another candidate for a distributive slogan: 'From each according to his wealth, to each according to her medical need.' Now there is not even the suggestion of a transaction that might link the parties as a matter of corrective justice, although this candidate for a distributive scheme is no more or less distributive in form than the first.

How is it that we choose between such schemes? Can law do that *qua law*? The answer is 'no.' Unlike for corrective justice, where the normative content can be distilled from the corrective justice form purely as a matter of law and adjudication, for the distributive justice form, a court of justice needs the criteria for the distribution to be legislated *ex ante* as a political act determining a collective purpose. So here (within the scope of what law attends to as a normative matter) there is a prior role for politics.¹⁷ Does that make public law political? Not really. Again, *qua law*, what the court does (say, under judicial review of the workings of a legislative or administrative law scheme) is police the *form* of distributive justice, ensuring that persons are being properly (equally) related to one another under that scheme; that is, that each person is being treated as an equal for the sort of person they are (where the relevant sort of person for the purposes of the distribution has been identified as a political matter). Such a job for the courts, so long as the courts do not second guess the distributive justice criteria under the scheme, is purely legal, not political.¹⁸

16 Jules Coleman's most complete statement of the annulment thesis is in Jules Coleman, 'Tort Law and the Demands of Corrective Justice' (1992) 67 Ind LJ 349. He has since conceded that such a conception of justice is essentially distributive rather than corrective; see Jules Coleman, *Risks and Wrongs* (Cambridge, UK: Cambridge University Press, 1992) at 312.

17 Weinrib, 'Legal Formalism,' *supra* note 6 at 988–92.

18 *Ibid* at 986–8.

We are now in a position, finally, to address Ernie's third question, the one where Ernie shows himself to be most engaged with the world of legal practice. The third question is, of course, 'What is a theory of private law?' and I will be brief in my discussion of it, since this is the subject of his famous book *The Idea of Private Law* and, for many here, the level at which most of us are already familiar with Ernie's work. Also, the title for Ernie's talk today, 'Private Law and Public Right,' suggests he will spend some time on the matter himself.

Again, the internal theoretical method requires the identification of some essential characteristic of private law, something that makes it what it is and distinguishes it from what it's not. *Within* the legal realm (not the university more generally), this suggests that we look into how private law contrasts with public law. The defining aspect of private law, of course, is the institutional linkage between a particular plaintiff and a particular defendant. These two parties have an equal standing in the litigation that links them, and they are the only two parties that have this standing. These are familiar enough points for the practising lawyer or judge, and that Ernie begins in such a legally familiar place is precisely what allows him to move so comfortably around the world of legal practice.¹⁹

But it is what Ernie does with this familiar characterization of private law that sets his theorizing apart. For if this is the institutional arrangement to be understood, then it makes little sense (little *internal* sense) to think of private law as about the achievement of certain collective goals. The collectivity simply has no standing here to advance those sorts of arguments. Further, goals that might make sense from the point of view of *one* these two parties considered *separately* make no sense (again, no internal sense) of the fact that, in a private law action, they have been brought together.

This last insight has a powerfully corrosive effect on any of the economic analyses that a judge might be tempted to import into private law. For example, it might seem very sensible for tort law, as the law that deals with accidents, to set its sights, first, on deterrence, or the possibility of having fewer accidents, and, second, compensation, or the possibility of attending to the needs of those who are the victims of the accidents that we cannot effectively avoid. But, however sensible these two goals might be, Ernie shows that they cannot make sense of tort law and the private law connection between these two particular litigants.²⁰ The deterrence rationale focuses on the defendant and makes sense of why we

19 For a more elaborate discussion of the *indicia* of private law that give it its distinctive character and that are to be found within the everyday experience of lawyers, see Weinrib, *Idea*, *supra* note 12 at 8–11.

20 *Ibid* at 40–2.

might threaten to extract a payment from him to ensure that he and others like him are deterred from injuring others. But, as a goal, it makes little or no sense of why this payment must go to the plaintiff; it could equally go to the state as a fine. In this respect, it is only one side of a distributive scheme, the stuff of public or regulatory law: 'From each according to his need to be deterred,' with the other side of the distribution still unspecified. On the other hand, the compensation rationale focuses on the plaintiff, 'to each according to her injury-based needs,' but makes no sense of why this compensation needs to come from the defendant or why it waits on the fact that the defendant has committed a wrong. Indeed, each of these two goals, focused as they are on quite different considerations, sets an arbitrary limit on the other. As justifications, they strain against one another and cannot both be satisfied, at least simultaneously, within a private law action where what the defendant pays is what the plaintiff receives. As a consequence, neither operates as a justification for tort law, and law's essential enterprise as attending to the relations between persons *as a normative matter (or as a matter of justification)* is frustrated.²¹

As we know from Ernie's work, this does not mean that private law cannot be justified. But what is required is a normative understanding that simultaneously, and single-mindedly, embraces both the plaintiff and the defendant. For Ernie, tort law (or at least negligence law) is an instantiation of corrective justice, where persons are related immediately as persons, that is, as purposive beings with a capacity for agency. Small wonder, then, that law awaits a *transaction* that links the parties before offering a response. (Notice how we have an *explanans* that is already close to the *explanandum*.) Further, the significance of the defendant's (wrongful) doing lies in the possibility of causing the plaintiff to suffer, and the significance of the plaintiff's suffering is that it is the consequence (wrongful, not merely causal) of the defendant's doing. So the two parties are immediately linked under the same wrong.²²

This link also makes perfect sense of all those different relational moments in the tort action: a duty owed by the defendant to the plaintiff, a breach of the duty owed to that plaintiff, a cause-in-fact connection between the defendant's breach of the duty and the plaintiff's injury, and (lest cause-in-fact set in motion remote connections to possible plaintiffs outside the ambit of the defendant's wrong) a requirement of proximate causation.²³ These are, of

21 On the special tension that the economic conception of tort law brings to the idea of public justification, see Ernest J Weinrib, 'Why Legal Formalism' in Robert George, ed, *Natural Law Theory* (Oxford: Oxford University Press, 1992) 341 at 347.

22 Weinrib, 'Jurisprudence,' supra note 8 at 593.

23 For Weinrib's account of all these different elements of a successful negligence action, at a point in his book where he has begun his descent from high theory back into the

course, the moments of tort law that a negligence lawyer struggles with every day. However, in the work of many contemporary tort theorists, they either are unintelligible or are the recalcitrant details that get in the way of a good distributive justice analysis, the stuff of public law. But for Ernie, they are definitive of the private law phenomenon to be explained and understood.

Does this mean that Ernie is simply an apologist for the tort law that we happen to have, that his theory is an elaborate form of description with no power to prescribe change? No one who has read, in *The Idea of Private Law*, Ernie's powerful dissection and devastating critique of Justice Andrews's dissenting opinion in the famous *Palsgraf* case could possibly think that.²⁴ Ernie leaves no prisoners. After you have finished reading this analysis, you wonder how it was possible that anyone could ever have been tempted to label this as a 'powerful dissent.' Yet many have and there are constant returns within tort law to the Andrews mode of thinking. Indeed, our own home grown *Kamloops* case is probably an example.²⁵ But Ernie does not shy away from critique of such judicial results.²⁶ They are at odds with the demands of tort law's internal intelligibility, and that they still occur, even often, only attests, as Ernie sometimes says, to the frequency of the error.

So, three worlds, three questions . . . and this introduction is probably three times as long as it should have been. But, as I suggested at the outset, Ernie's magnificent array of scholarly articles and books over the last three decades or more are so compelling that they cannot help but get a firm grip on your mind. Certainly, it has been hard for me to escape their grasp in my overlong attempt here to offer some account of what they are about. I only hope that I have offered a roughly intelligible account that is not too far from its subject matter in Ernie's work. But there is only one Ernie, and no one else can really get that close, at least intellectually, to what he does. And we have him here today. So enough of what, from me, must inevitably be an external and inadequate summary; let's have these arguments from their source. Let's have Ernie himself speak to us about 'Private Law and Public Right.'

case law (compare Weinrib, 'Law as a Kantian Idea,' supra note 13), see his wonderful chapter 'Negligence Liability' in Weinrib, *Idea*, supra note 12 at 145–70.

24 Ibid at 159–67.

25 *Kamloops v Nielsen* (1984), 10 DLR (4th) 641 (SCC) was, of course, the occasion on which the Supreme Court of Canada adopted the so-called 'two stage test' for the determination of duty from the House of Lords case *Anns v Merton London Borough Council*, [1978] AC 728 HL (Eng). The two-stage test has since been repudiated by the House of Lords although it continues to be championed in our own Supreme Court.

26 For his criticism of *Kamloops* and its progeny, see Ernest J Weinrib 'The Disintegration of Duty' (2006) 31 *Advocates' Q* 212 at 233–45.