State Support for the Poor under the Order of Equal Freedom?

On the Missing Link between Kantian Private Law and the Modern State[*]

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I. UNDERSTANDING PRIVATE LAW AS CORRECTIVE JUSTICE

Any project in private-law theory must start with an idea about its subject, e.g. with the question: "What is private law?" On a fundamental level, two answers are possible. The first is that explaining private law is not different from explaining law in general. There is nothing special about private law. To be sure, it is a definable area of law, namely the area that is characterized by legal rules that constitute and regulate rights and obligations between private persons. But similar to any other area of law, the rules in the area of private law serve to regulate behavior for certain purposes. And similar to any other area of law, it is up to legitimate public authorities to determine the relevant purposes to be served, and to specify the rules by which one is to achieve or to come closer to the relevant purposes. This is the standard view on private law. The contrasting answer is that private law is fundamentally different from other areas of law.[1] The difference is that private law, in contrast to the other areas of law, follows no purpose; in Ernest Weinrib's words: the "purpose of private law is simply to be private law."[2]

The argument that leads to such a radical or at least surprising conclusion can be stated as follows. Private law's characteristic as a corpus of legal rules that deals with rights and obligations between private persons becomes vivid in the event of litigation. A plaintiff claims something from a defendant. If the plaintiff is right, then both plaintiff and defendant are locked in a legal relationship. This legal relationship, firmly established by a ruling of the court, must be justified.

Such a justification must contain, at least at first sight, two parts. The first part is the burden for the defendant; the second part is the benefit for the plaintiff. The justificatory requirement is to give reasons for both. Most scholars in private-law theory think it sufficient to provide a justification for

[*] Earlier versions of this paper were presented at a seminar on private-law theory hosted by Hanoch Dagan and Avihey Dorfman at Tel Aviv University in March 2013 and at a workshop on Kant's doctrine of right hosted by James Conant and Sebastian Rödl at Leipzig University in July 2013.

[1] ERNEST WEINRIB, The Idea of Private Law (1995); ERNEST WEINRIB, Corrective Justice (2012).

[2] WEINRIB, The Idea of Private Law (note 1), 21.

the burden to the defendant and an independent justification for the benefit to the plaintiff.[3] Take the example of tort law. According to tort law, someone who has destroyed foreign property negligently (*fahrlässig*) owes damages (*Schadensersatz*) to the owner of the destroyed object. The damages due are the defendant's burden and the plaintiff's benefit. Most theorists think that deterrence of negligent behavior would justify the defendant's burden, and the need for compensation would justify the plaintiff's benefit. Such a two-fold justificatory approach, however, usually fails. In the case of tort law, any one-sided justification would be over-inclusive. The justification of deterrence would also justify burdening someone acting negligently, even if, luckily enough, the action did not result in an accident. Conversely, the justification of compensation would also justify benefiting an instance of suffering damages if damage was caused by another person's non-negligent action.

This problem of justificatory over-inclusiveness cannot be countered by suggesting that tort law results from a combination of the two independent justifications, either.[4] The suggestion is that tort law could be explained as follows: that it provides compensation only if deterrence is required, and that it deters only whenever there is need for compensation. But this is not coherent. Such a combination thesis would require further justification why one rationale (compensation) should be restricted by the other (deterrence), and vice versa. If such a further justificatory attempt is made at all in academic literature, it offers rather mysterious speculation about efficiency[5]; speculation which is neither empirically proven nor does it seem actually provable. Moreover, such speculation has never played any significant role in historical justificatory practice, when the relevant rules, e.g. rules on the tort of negligence, were articulated by courts or adopted by a legislator.

The failure of the twofold approach to justification drives the argument toward the alternative. The alternative is that the justification of the burden to the defendant and the benefit to the plaintiff must be justified employing a single and unified justification. The burden and the benefit in a private legal relationship must be explained in just a single justificatory step. Taking the example of tort law again, the justification must provide for a normative connection between the plaintiff and the defendant. On the basis of this normative connection, burden and benefit are explained in terms of something which the defendant owes to the plaintiff, and which therefore, as a matter of logical necessity, can be claimed by the plaintiff from the defendant.

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[3] The argument presented follows MARTIN STONE, *The Significance of Doing and Suffering*, *in* Philosophy and the Law of Torts (Gerald Postema ed., 2001), 139 ff.

[4] Stone, op. cit., 149 f.

[5] WILLIAM LANDES & RICHARD POSNER, *The Private Enforcement of Law*, 4 Journal of Legal Studies 1 (1975).

A rather abstract version of such a justification is that, originally, the plaintiff holds a right in the object which has been destroyed by the defendant. It is a right against everybody, including the defendant, not to use the object without the plaintiff's consent, which includes not involving it, not even negligently, into one's own purposes of action. It is a right of the plaintiff against the defendant, with a correlative duty of the defendant against the plaintiff. If the defendant destroys the object in action which is purposive but negligent with regard to the object, he infringes on the plaintiff's right. Such infringement must be corrected. The defendant must restore the plaintiff's position, i.e. the position which is identical or comes closest to the plaintiff's hypothetical position, provided the infringement had not occurred. In this abstract version, the idea of right and correlative duty between the parties provides the form which the justification of the private legal relationship must take. It is this form of justification which is constitutive for an understanding of private law in terms of corrective justice. It is constitutive for the corrective-justice approach to the intellectual enterprise of understanding private law.

II. THE JUSTIFICATION OF THE RIGHT OF PRIVATE PROPERTY

The corrective justice approach raises a further question. If the attempt to understand private law has just ended with the idea of right (and correlative duty), this question is: "What is a private right?" One possible answer to this question is descriptive: in private law, there is a right to bodily integrity, there are property rights, there are contractual rights, there are rights of retransfer of unjust enrichment, et cetera. But, of course, this descriptive answer does not operate on the level of understanding. The answer required by theoretical inquiry must also explain why these private rights exist. The answer has to illuminate why private law includes exactly those private rights that it actually does include, and why it does not include fewer or different ones. In other words, the further question about the nature of private rights asks for a justification of the particular private rights which are included in private law. One approach assumes that only a single idea is needed to explain the several and distinct rights in private law. This approach will be discussed and rejected in the next section (1.). Then, the account will be refined by way of example concerning the justification of property rights, which is also the subject matter for the remaining part of the paper (2.).

1. The Positive-Law Thesis

The all-in-one answer goes as follows: private rights are created by public authorities, either by courts or by a legislator. The creation of private rights serves public purposes, just as any other creation of rights does. In consequence, each and every private right can be explained by reference to the justification that actually has been or could have been provided by the creating authority.

From the perspective of private-law theory, however, it does not really matter which particular justification actually has been provided or could have been provided. The particular justification is beyond the conceptual and justificatory realm of private law. All that private law and its understanding have to deal with is the presence of private rights. From the perspective of private-law theory, private rights are a given, they enter private law from the outside.

This position has been named the positive-law thesis.[6] It resembles, and in no way by coincidence, very much the first answer given to the first question above, about what private law actually is. There is only one difference. The positive-law thesis accepts that private law is subject to the form of corrective justice. It accepts that private law is constituted by normative connections which require a unified justification of the defendant's burden and the plaintiff's benefit. But the justification is given and already ends with the observation that the normative connection consists of a right of the plaintiff against the defendant that entails a correlative duty of the defendant as against the plaintiff. But the existence of such correlative rights is justified with regard to public purposes. So the small detour via corrective justice and correlativity notwithstanding, it remains true that private law serves public purposes. The only concession is that in the particular case of private law, public purposes are realized in the form of correlative rights and duties, which includes that the public purpose must be able to justify the plaintiff's right as a right against the defendant.

At this point, the positive-law thesis exposes an explanatory gap. The account does not provide the means for understanding why there is such a correlative form. It makes it a rather mysterious matter how and why – from the perspective of reason, not of historiography – the corrective form of private law came into the world at all. Not only legal theorists, even some renowned legal philosophers seem to think that this matter, mysterious as it stands, would need no further normative, but at best sociological illumination.[7] As a result, the positive-law thesis refers to a conceptual realm beyond private law for the justification of the content of private-law rights. But from this outside realm, no illumination can come as to the very form of private law, for which right and correlative duty are the constitutive features. The positive-law thesis accepts the form of private law, but it leaves the form unexplained.

There is, however, one version of the positive-law thesis that tries to tackle the challenge to illuminate the corrective form. It is the version that suggests a distributive foundation for it.[8] It is helpful to present this version at this point in order to demonstrate by way of example what kind of illumination is missing in the standard account of the positive-law thesis.

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[6] DENNIS KLIMCHUK, *On the Autonomy of Corrective Justice*, 23 Oxford Journal of Legal Studies 49 (2003), 61.
[7] JÜRGEN HABERMAS, Between Facts and Norms (1996), Chap. 3.
[8] JAMES GORDLEY, Foundations of Private Law. Property, Tort, Contract, Unjust Enrichment (2007), e.g. 12 f.

The attempt starts along the lines of the positive-law thesis stating that private rights are created for purposes beyond private law's conceptual realm.[9] But whatever their justification, it is suggested that, moreover, the distribution of private rights across society is determined by democratic politics, and the political determination is, in substance, guided by concerns of distributive justice. Against this background, the form of corrective justice in private law can be explained as a mechanism to secure the relevance of political decisions on the distribution of rights. Political (re-)distribution shall not be undermined by private interaction. So, whatever may justify a certain right with regard to its content, it is the independent idea of securing the relevance of the political sphere that implies the corrective form of such a right.

One major problem with this position is, that, as a matter of fact, private rights are not (re-)distributed by the political process. They are acquired in the forms provided by private law, most importantly by first possession on the one hand and contractual consent on the other. Neither contractual rights nor property rights are ever subject to political redistribution. There are, of course, incidents of takings of private property (*Enteignungen*). Takings, however, do not serve to address an unjust distribution of property rights, but to enable public authorities to fulfill their public obligations. But again, in the given context, it is not so much the failure of a distributive foundation of corrective justice which is of particular concern. The attempt of distributive foundation is interesting because it confirms the explanatory gap which is left by the positive-law thesis.[10]

2. The Justification of the Right of Private Property

This objection to the positive-law thesis is committed to delivering an answer for the justification of private rights that does not let correlativity go unexplained. In principle, the question requires an

[9] Id. at 9 ff. for property, 293 ff. for contract.

[10] It is perhaps worth noting that, from this perspective that insists on an explanation of the corrective form of private law in general, it does not help if the positive-law thesis is enriched by positive accounts of one or more justifications, from the realm beyond private law, which can be given for the content of this or that particular private right. (According to my understanding, Hanoch Dagan's work is a prime example for this approach; see his HANOCH DAGAN, *The Distributive Foundation of Private Law*, 98 Michigan Law Review (1999)) Such an explanatory strategy intended to provide a positive account of the content of private rights cannot bridge the gap left with regard to their correlative form. Certainly, there might be examples where a positive account could indeed justify the instantiation of a public purpose by private right and correlative duty. But such positive accounts concerning particular rights could not provide an illumination of correlativity as the general form of private law. Lacking such an account, the explanatory strategy cannot rule out that the justification of a private right from the realm beyond private law would recommend deviating from the corrective form. If, in turn, such deviation is not even meant to be ruled out, then correlativity is present in private law only incidentally. Hence, this explanatory strategy would actually end up with a denial of what it was intended to illuminate, namely correlativity as the form of private law.

illumination of each kind of private right, including private property, contractual rights, and rights from unjust enrichment. As mentioned before, the following account is restricted to property.[11]

It should be clear now from the above that any justification of property that offers an independent purpose which would be served by the creation of the right of property as a legal institution cannot succeed. For a justification of this type would again amount to a version of the positive-law thesis. Take the example of the law-and-economics approach, which argues that the institution of property serves to increase efficiency and thereby wealth. In this account, efficiency and wealth function as independent purposes. These purposes cannot explain why property takes on the form of rights and correlative duties in a way that the infringement of a property right is subject to the principle of corrective justice. Therefore, adherents of the law-and-economics approach deny, consistently from their perspective, the relevance of corrective justice.[12] The same applies to any other justification of property if presented as serving independent purposes. What is needed instead is an intrinsic justification of property, i.e. a justification which remains internal to the realm of private law.

a. A Lockean Argument

An example of such an internal kind of justification that does not invoke an independent purpose is Locke's[13] or at least a certain version of his argument[14]. In this version, the intrinsic justification of the right to bodily integrity is presupposed. Then, it is argued in a first step that the right to bodily integrity would imply that one has a right to one's labor. The argument continues that if one mixes one's labor with an external object, then the object becomes one's own, just as one's body and laboor are one's own. As a result, private property amounts to nothing else than the right to bodily integrity. Given that bodily integrity is intrinsically justified, the same must be true of the right of private property.

The details of the Lockean argument need no further examination, nor is it relevant to ask for the intrinsic justification of bodily integrity. In theoretical discourse about the foundation of property, it seems rather settled that the Lockean idea that "mixing one's labor with an external object" could warrant the institution of property is fundamentally flawed. First, the argument cannot explain why "mixing one's labor with an external object," i.e. an object which does not belong to the laborer, should result in a property right. The expenditure of labor could also count as a deplorable loss of

[11] For contractual rights, see ARTHUR RIPSTEIN, Force and Freedom. Kant's Legal and Political Philosophy (2009), 57 ff. (64 f.); for unjust enrichment, see WEINRIB, Corrective Justice (note 1), 185 ff.

[12] Posner once made the strong claim that law and economics were needed to articulate the idea of corrective justice, which he thought to be an empty concept (RICHARD POSNER, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 Journal of Legal Studies 187 (1981).

[13] John Locke, Two Treatises of Government [1690], Oxford: OUP 1967, §§ 27-35.

[14] JEREMY WALDRON, The Right to Private Property (1988), 137 ff. (171-191).

efforts. Second, the account is actually not able to justify property, but rather legal protection of direct possession. Thus the Lockean argument, although it is intrinsic to private law as it does not refer to external purposes, can be dropped.

b. Kant's Argument: The Idea of Equal Freedom

The alternative account of an intrinsic justification starts with the idea of equal freedom.[15] It is most important to grasp, right at the beginning, the particular content of this idea in the justificatory context of private rights. Freedom, in this context, means being one's own master in relation to others. The relational nature of freedom is decisive for the conclusiveness of the justificatory project.

The essential other-relatedness of the idea of freedom needs a little further elaboration. The idea thus conceived is established on the presupposition that human beings are purposive beings. It is under this aspect of purposiveness that human beings are all equal. It is true that human beings have rather different physical appearances and that they pursue very different purposes. Under this aspect, human beings are unequal. But they are basically equal with reference to their abstract purposiveness.[16] The idea of purposiveness includes that it is exercised in action. Human beings act, and in acting they pursue purposes. Then, being one's own master means that, in acting, one is pursuing one's own purposes. One is not serving the purposes of anyone else. In other words: being one's own master implies independence from any other person's exercise of purposiveness.

The first consequence of this idea of freedom as independence is that nobody can, in entirety, belong to anyone else in such a way that a thing can indeed belong to someone as his property. Belonging to someone else as if one were a thing would be a case of slavery, and a slave is not his own master. A slave is, legally speaking, not allowed to pursue his own purposes but is determined to serve as a means for his master's purposes. Being one's own master therefore automatically implies prohibition of slavery. The second consequence of the relational idea of freedom is the right to bodily integrity. The body is the physical manifestation of human beings, and they act through it. Just as nobody is supposed to belong to anyone else as if they were a thing, nobody is supposed to make their body, not even parts of it, available for anyone else's purposes, not even for the shortest period of time, without his or her consent. This applies to both intentional and unintentional uses. To give an example for intentional use: no one is allowed to use another person's body as a pillow. To give an example for unintentional use, where another person's body is not needed but is drawn into

[15] The following account is based on WEINRIB, Corrective Justice (note 1), 9-37 and RIPSTEIN, Force and Freedom (note 11).

[16] This leads to the severe problem of what moral status is to be assigned to newborn babies and the mentally seriously disabled (see THOMAS GUTMANN, *Würde und Autonomie. Überlegungen zur Kantischen Tradition*, 15 Jahrbuch für Wissenschaft und Ethik 5 (2010))

someone's action: no one is allowed to overrun another person's body to be first in line at the box office. When having one's body used without consent by someone else for that person's purposes, the human being whose body is used is not his own master. He does not act through his body according to his own purposes; rather, his body serves someone else's purposes.

Having established the idea of freedom as being one's own master in the sense of independence from others' purposiveness, and the right to bodily integrity which necessarily comes with it, the justification of property can follow suit: in order to pursue their purposes, human beings can use things, i.e. external objects in the world. In other words, external objects can serve as means for exercising purposiveness. In contrast to the case of human beings, who must not serve as means, there exists, from the viewpoint of equal freedom, neither a prohibition nor any restriction of the use of external objects in the course of pursuing purposes. From this point of view, there is no reason to restrict the purposive use of things. With this move, however, it is probably not entirely clear what the use of things entails. It is not entirely clear whether the argument requires private property or only legal protection of direct possession (*unmittelbarer Besitz*).

If restricted to justifying legal protection of direct possession, the argument would not have progressed further than the right to bodily integrity would have. After all, pushing someone out of direct possession necessarily involves an infringement of the possessor's right to bodily integrity.[17] But the argument does extend to private property[18]: Under a legal regime which is restricted to protection of direct possession, a thing which is not in someone's direct possession at a certain point in time cannot serve anyone's purposes. It would not represent a means for someone's purposes. It would wait for being taken into possession, only thereby being made a means for purposes. The point in the Kantian argument is that there is no valid reason to rule out the possibility that an external object serves as someone's means, even if he is not in direct possession of it. Of course, one might put forward reasons to prohibit the institution of private property. But such reasons are not valid in the Kantian perspective, because no such reason can be derived from the idea of equal freedom, where, once again, freedom means being one's own master and independence from others' purposiveness. No one is subjected to foreign purposes if external things can belong to someone also beyond direct possession and can therefore serve as means for that person's purposes. Everybody remains his own master, even if there are, from the non-owning individual's perspective, fewer things available to be made means for that individual's purposes than in a regime restricted to legal protection of direct possession.

[17] IMMANUEL KANT, Die Metaphysik der Sitten (1968 (1797)), 249 f.
[18] Id. at 245-257.

It is certainly true, as a consequence of the latter, that given the institution of property, an individual might have to give up a certain purpose because the necessary means are not available to him for the sole reason that they are someone else's property. But this incidence does not make that individual the slave of anyone else and does not subject his body to someone else's purposes. This finding remains true, even if the relevant purpose of the individual is the purpose of physical survival, even if the institution of property blocks someone from acquiring the means necessary for his survival. The idea of equal freedom turns on the abstract quality of purposiveness without any reference to specific purposes. It does not make a difference whether some purposes might originate from existential needs. Freedom is not realized by fulfilling needs, but by securing independence from others' purposiveness. Whether one is able, under the condition of freedom, to stay alive, is of no concern under the idea of equal freedom.

Having gone through the whole argument, it can be concluded: the right of private property does not contradict the idea of equal freedom. Given that the idea of equal freedom is all that counts in normative terms, the right to private property is justified in the light of that idea.

c. Equal freedom: Justification but no purpose

It might be helpful to state explicitly why this justification of the right of private property can count as intrinsic or internal and therefore as different in form from those that present property as an institution serving independent purposes. Ordinary parlance, of course, might invite one to say something like, "According to this account, the institution of private property serves the purpose of freedom." In this parlance, freedom appears as a purpose, and property is presented as being created to serve this purpose. Then, it must seem as if there were no difference to any other account of property presented above which desired to justify property as serving a (good) purpose.

But the phrasing in ordinary parlance, not objectionable as such, obscures the relevant conceptual point. In order to explain why, it seems easier to start with the example of slavery rather than property. Freedom means being one's own master, and therefore slavery is prohibited. The latter conclusion is a conceptual one. Slavery is not prohibited because prohibition would serve a conceptually independent purpose of freedom. Slavery is not prohibited because its prohibition is what freedom, as an independent purpose, recommends. On the contrary, slavery is prohibited because this is what freedom means. The idea of freedom is conceptually defined (at least) as the absence of slavery. The same applies with regard to the right to bodily integrity. Using a foreign body for one's own purposes is prohibited. It is prohibited not because that is what freedom, as an independent purpose, recommends. The use of a foreign body is prohibited because this is what freedom means. The idea of freedom is conceptually defined as the absence of using a body for

foreign purposes. The same applies to private property. Property is an application of the idea of equal freedom with regard to external things. Property does not serve a conceptually independent purpose of freedom. Property is what freedom means with regard to external things. The idea of freedom is conceptually defined as the presence of private property.

To present, in contrast, freedom as an independent purpose would make sense if freedom were intended to fulfill wishes or to pursue more demanding purposes. If understood in this way, the introduction of property and the possibility of accumulation combined with it could indeed serve the purpose of fulfilling more wishes or of pursuing more demanding purposes. If these were understood as freedom, private property would indeed serve freedom as a purpose. But as was stated at the outset of the argument, this is not the sense of freedom which delivers the rationale for an intrinsic justification of property. The relevant idea of freedom as independence from others' purposiveness is not a purpose served by private property. Freedom, in this sense, is not advanced or increased if the institution of property is created. On the contrary, in a world containing external things, freedom is either instantiated or not. If it is instantiated, private property is the conceptually necessary result.

In conclusion, it should be highlighted how the grounding of property in the idea of equal freedom succeeds in reflecting private law's correlativity.[19] It was said above that the idea of freedom as a relationship, as a relationship of independence, is crucial for the understanding of the justification of property. It is also the key to understanding the conceptual link to private law's correlativity. As was explained before, the right to bodily integrity and the right to use one's own property are conceptually derived from the idea of freedom. Both concepts share the relational structure of freedom. Because freedom means independence from others' purposes, what is conceptually derived from freedom also displays a relational structure. A right can imply a correlative duty because the idea of freedom which underlies it and which is instantiated by the right is itself essentially relational. If it was said above that freedom means the right to bodily integrity, then nothing of substance is added by saying that freedom means the duty to respect everyone else's bodily integrity. If it was said above that freedom means property, nothing of substance is added by saying that freedom means the duty to respect everyone else's property. The point here is that stating the relevant correlative duty of the private right of property is not derived from an independent source, maybe a presupposed and independently given concept of private rights, in other words, a source conceptually different from the justification of the right. The point is that freedom, as independence from others' purposiveness, means the right and the correlative duty to bodily integrity and to the external objects owned. In a nutshell: the correlativity of the private right

[19] See also WEINRIB, Corrective Justice (note 1), 25 f.

reflects the relational structure of its justification, which is the idea of equal freedom, understood as being one's own master in relation to others.

3. The Content of the Right of Private Property

The right of private property, understood as an instantiation of equal freedom, must comprise two characteristic features. They follow directly from the justification of the right. First, the idea of property, derived from the idea of equal freedom of purposive beings, implies a certain content of the right of property, which has been named (at least in the German language) the totality (*Totalität*) of property.[20] It was stated in the argument above that property makes external things available as means for someone's purposes. There is, under the aspect of equal freedom, no restriction of the purposes which might be pursued by free human beings. Human beings may pursue any purpose. Serving any purpose, however, implies that the external things serving as means in any purposive action must be usable in any way. Therefore, the right of private property is basically the right to make any use (*beliebiger Gebrauch*) of the object in question. And it should be noted, though not explained, that "any use" includes the entitlement to first occupation of unowned things, as well as the right to alienation, either through abandonment or through contract.

Second, the given justification of the right to private property neither included nor implied any difference with regard to the manifold types of external things. It applied to any object as opposed to human beings. Therefore, the justification of private property based on the idea of equal freedom with regard to external objects establishes that any external object can be an object of private property. Its form or essence, say as a table, as a house, or as a parcel of land, does not matter at all. This can be called the abstractness (*Abstraktheit*) of property.[21] So the concept of the right of property, if it is grounded in the idea of equal freedom, implies that the right of private property is instituted in totality and abstractness.

III. Regulation of Property: A Theoretical Challenge

1. The Legislator's Power to Regulate Property

But there is more than private law in the legal order of a modern state. No modern state instantiates property in pure accordance with its intrinsic justification without restriction, in its totality and abstractness. Property rights in particular are subject to intensive regulation. For illustrative

[20] Karl Wiegand, *Die Entwicklung des Sachenrechts im Verhältnis zum Schuldrecht*, 190 Archiv für die civilistische Praxis 112 (1990).

[21] In German scholarship, *Totalität* and *Abstraktheit* are sometimes presented as synonyms. Here, the two are presented as two distinct aspects in order to reflect the aspect of "any use" on the one hand and the aspect of applying to "any external object" on the other.

purposes, I refer here to the German legal order. The relevant provision is Article 14 of the German Basic Law (*Grundgesetz*) (GBL). Translated into English, it reads as follows:

> (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
>
> (2) Property entails obligations. Its use shall also serve the public good.
>
> (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

German scholarship has long been occupied with a lively discussion about the logical relationship between the first and the second sentences of Section 1. The discussion circles around the question of what exactly is guaranteed with regard to property according to the first sentence, if the "content" of property is to be determined by legislation ("the laws") according to the second sentence.[22] For the current purpose, this discussion is without relevance. All that matters here is a concept of regulation which represents the power to limit the right of property. To understand the power to limit presupposes a clear idea about the content of the right to property. Positivists cannot know, and this is what provokes their trouble with understanding the first sentence of Article 14 Section 1 GBL. But the Kantian non-positivist justification of property has also revealed the most general content of the right of property, namely to make any use of it, including alienation. Hence, each piece of legislation which restricts any use of a thing, as unimportant as it may seem in a particular case, represents a case of regulation within the meaning of Article 14 Section 1 Sentence 2 GBL.

Regulation of property must serve the public good. To state this requirement is, according to prevailing opinion, the only valid legal meaning of Section 2, even though it features the famous words "*Eigentum verpflichtet.*" The most important aspect of regulation is that it is an *aliud* to expropriation. Article 14 GBL draws a sharp line between expropriation on the one hand (Section 3) and regulation on the other (Section 1). While expropriation according to Section 3 requires fair compensation, whereby fairness usually requires compensation at market value, regulation to serve the public good goes without compensation. Expropriation applies only where public authorities must acquire things (mostly: land) as owners to fulfill public responsibilities, e.g. the provision of infrastructure. If things are not acquired, but only regulated, so that the private owner remains the owner, this cannot be expropriation. This leads to the effect that German ordinary courts

[22] Walter Leisner, Eigentum, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts 2010, § 173 (301-392).

(*ordentliche Gerichte*) are not in the position to sanction the legislator for a regulation of property by declaring it a "regulatory taking" which would require compensation even if the legislator did not provide for it. At least at first glance, the concept of "regulatory taking" has no application in constitutional protection of property rights in the German constitution.

This does not mean that the discretion of the legislator to regulate property is not restricted at all. In a nutshell, the concerns of the public good must be balanced against the proprietor's private interests. Citing the German Federal Constitutional Court (*Bundesverfassungsgericht*), it is the "legislator's task to find a just balance between public and private concerns"[23]. In this context, the principle of proportionality serves as a negative baseline[24] in the sense that a disproportionate regulation, by definition, cannot represent a just balance of interests. If the legislator goes too far, then the Constitutional Court will declare the regulation as unconstitutional and void. In this context, however, a small residuum of "regulatory taking" survives, though it is called "definition of content requiring compensation" (*ausgleichspflichtige Inhaltsbestimmung*): in some cases the legislator can avoid the annulment, namely if the regulation comes with compensation for proprietors who are severely burdened and whose burden is significantly heavier than the burden for other proprietors affected.[25]

2. A Contradiction of the Idea of Equal Freedom?

To repeat the message from Article 14 Section 1 and Section 2 GBL: the legislator is allowed to regulate property. Any regulation must represent a fair balance of private and public interests. This power to regulate property is, so I will argue, a theoretical challenge to the justification of private property based on the idea of equal freedom presented above. It is a theoretical challenge to property's intrinsic justification. Given that this intrinsic justification is what carries the corrective form of private law, the challenge might also touch upon the explication of correlativity as the form of private law. So if the challenge exists, and if it cannot be mastered, the consequences are far-reaching and go to the core of our understanding of private law as corrective justice.

The last claim needs further elaboration. Given that limiting regulation of the right of private property stands in theoretical contradiction to the justification of the right of property – it will be explained in a moment why this might be the case – this finding could, on the one hand, be taken as

[23] Bundesverfassungsgericht (BVerfG), ruling of July 15, 1981, in: BVerfGE 58, 300 (*Nassauskiesung*).
[24] BVerfG, ibid.
[25] BVerfG, ruling of July 14, 1981, BVerfGE 58, 137 (*Pflichtexemplar*). Marginalizing the concept of "regulatory taking" was one major achievement of the Federal Constitutional Court against strong opposition from the ordinary courts. Until today it is argued in German legal academia whether the doctrine of "definition of content requiring compensation" could and should gain more ground, re-approaching the concept of regulatory taking. The subject is taken up below *sub* 3b.

a strong objection to the legislator's regulatory power. In this way, the intrinsic justification of property would be taken as a theoretical challenge to the legislative regulation of property. But the present argument intends to take things up the other way around. Legislative power to regulate property is an essential of the modern – i.e. democratic and capitalist, and therefore welfare – state. If the intrinsic justification of property cannot deal with the legislator's regulatory power, then there must be something wrong with the justification and with the theory of which it is an essential part. Such a finding, however, would not touch upon the insight developed in the first sections, which was, first, that private law is subject to the form of corrective justice, and second, that the intrinsic justification of the right of property is the only one to carry the corrective form. Now, if it turned out that the intrinsic justification of the right of property can actually not be reconciled with the modern state's power to regulate property, this would not result in an objection against the justification of property nor an objection against the understanding of private law as subject to the form of corrective justice. Instead, the argument would have to be turned into a rather fundamental criticism of private law.

After this assertion of what is at stake in reconciling the justification of property with the legislator's power to regulate property, it is time to explain why the latter is indeed a theoretical challenge to the former. To put it rather simply: the challenge is that the intrinsic justification seems to provide no room for, and more specifically, to exclude any regulation of property. In other words: no regulation of property can be justified in terms provided by the justification of property. In particular, no restrictions of property are inherent to the intrinsic justification of property which merely need to be determined and articulated in legislation. For we have seen that the intrinsic justification provides the basis for the right of property in its totality and abstractness, where totality means any use and abstractness includes any external object as a potential object of property.

To elaborate, it is helpful to go back to the substance of the justification. It was said that denying the institution of property would be against the idea of equal freedom. Without property, usable external objects which are not in direct possession by anyone could not serve as means for someone's purposes. Such a state of things could not be justified with regard to the idea of equal freedom and would therefore stand in contradiction to it. Given that the idea of equal freedom is the only one of normative relevance, a denial of the institution of property turns out to be illegitimate. What is true about the denial of the institution of property as such applies likewise to a denial of the application of property to a certain class of objects, e.g. land. In this case, some usable objects, namely land, could not serve as means for someone's purpose. This cannot be justified with regard to the idea of equal freedom; it is therefore illegitimate. Furthermore, what applies to the denial of property applies to different uses of property as well. Imagine that the right to alienation were cut

off from the right of property by legislative regulation. Property owners could make still some use of the objects which are theirs, but not any use. Like before, such a state of affairs could not be justified with regard to the idea of equal freedom; it is therefore illegitimate. And finally, it makes, of course, no difference if both kinds of restrictions are combined, i.e. where a restriction of use applies only to a certain class of external objects.

So the challenge is to give an answer to the following question: How can legislative power to regulate property be reconciled with the justification of the right of property based on the idea of equal freedom, which represents the right as necessarily total and abstract?

3. Three Attempts

Three models can be identified as answers to this question. The first and the second are conceptually easy, the third is conceptually demanding.

a. Balancing Equal Freedom with the Public Good?

Above, it was explained that, under German constitutional law, the legislator may regulate property, but that according to Article 14 Section 1, 2 GBL any regulation must represent a fair balance between private interests and the public good. From the preceding, it should be clear that in the context of the given justificatory project, the talk about private "interests" is misplaced. The justification is about rights, and a right is not an instrument for effectuating an interest. However, the doctrinal requirement to balance private interests with the public good can be translated into the language of rights. The claim is, then, that the public good which is served by the regulation must be balanced against the realization of equal freedom, realized through the legal institution of the right of property. A regulation of property is constitutionally valid if it is a result of a fair balancing of equal freedom and the relevant public good.

This first model for reconciling legislative regulation of property with the justification of property is conceptually easy. It sheds no conceptual light either on the justification of the right of property or on its regulation for the public good. The model just relies on the idea, or actually better: on the metaphor, of balancing. As a general matter, the concept of balancing has sometimes been attacked from rather different perspectives[26], and it has been defended even more often.[27] This debate is of no concern in the present context. For the sake of the argument, it is accepted that balancing

[26] See e.g. HELMUT RIDDER, *Verfassungsrecht oder Staatsrecht? Die Realverfassung(en) des deutschen Nationalstaats auf dem Prüfstand der Demokratie*, *in* Helmut Ridder. Gesammelte Schriften (Dieter Deiseroth, et al. eds., 1988); WALTER LEISNER, Der Abwägungsstaat: Verhältnismäßigkeit als Gerechtigkeit? (1997); KARL-HEINZ LADEUR, Kritik der Abwägung in der Grundrechtsdogmatik. Plädoyer für eine Erneuerung der liberalen Grundrechtstheorie (2004).

[27] The leading German authority is ROBERT ALEXY, Theorie der Grundrechte (1986), 134 ff.

provides an adequate understanding of how conflicts between principles, values, or purposes must be settled in legislation and/or adjudication. What is of concern in the present context is the more specific question whether the concept of balancing can be presented as an answer to the theoretical challenge that comes with the regulation of property.

This is actually doubtful. The right of property has been founded exclusively on the idea of equal freedom. It is from this justification that the right of property receives its characteristic features as total and abstract. The theoretical challenge was to explain how any regulatory restriction to the right of property can be reconciled with the justification of the right as necessarily total and abstract. Simply stating that the right of property can be balanced with concerns for the public good does not provide an answer. Such a statement merely affirms the claim that the right of property can indeed be subjected to regulation for the public good. Claiming that the right of property can be balanced against the public good is just the same as claiming that the right of property can be regulated with regard to the public good. The only difference is that the former gives some normative guidance for the legislator's discretion, namely not to regulate arbitrarily, but to balance. But submitting an action (regulation) to normative guidance (balancing) does not provide justification for the action.

It turns out that the attempt to take recourse to the metaphor of balancing allows no more than a rephrasing of the original question. Rephrased, the question reads: how is it possible to reconcile legislative power to balance the public good with the right of property (instead of: to regulate the right of property) on the one hand with the intrinsic justification of property based on an idea of equal freedom on the other? But the rephrasing entails no answer. Any answer employing the idea of "balancing" would require that additional justificatory support were given for the claim that the idea of equal freedom can be subject to balancing at all.

b. Compensating Regulation as Taking?

A second attempt could revitalize the concept of regulatory taking. It could be argued that any regulation of the right of property is to be considered taking, to be precise, partial taking. Underlying this is presenting the right of private property as a "bundle of rights" which includes all particular uses a thing could be subject to in action. Regulation on the part of the legislator simply means that one or more of the manifold rights in the property bundle are taken from it. Based on this understanding of the right of property, the point is that it cannot be justified that only the taking of the whole bundle of rights would need to be compensated. The taking of rights singled out from the bundle would also require compensation. There is, according to such a view, no reason to assume the whole bundle as something qualitatively different from the sum of the rights it consists of. And

there is likewise no justification for compensatíng the taking of the whole bundle and not the taking of single rights from the bundle.[28]

This general view could also be taken to serve as an answer to our challenge. The argument would read in synthesis: regulation is a type of expropriation. If the right of private property can be reconciled with expropriation, then it is reconciled with regulation as well. Yet equating regulation with expropriation means that any regulation is subject to compensation, with the effect that the state must pay for any regulation which diminishes the market value of the affected property right.

This second attempt to meet the challenge that comes with the legislator's power to regulate the right of property does not succeed, either, for two independent reasons. The first is that it defers the justification of regulation to the justification of expropriation. But it is not obvious, either, that expropriation can be justified against the intrinsic justification of private property, though this subject matter was not put into focus for this paper. According to the constitution, expropriation is possible "for the public good," as is regulation. By way of deferral, the second attempt, just as the first, sheds no light on the concept of the "public good." But the concern was how to reconcile the legislator's power to regulate, and, as it turns out now, also its power to expropriate, with the justification of private property as instantiation of equal freedom, even if we know that both are permitted for the public good only. If it must be assumed that the power to regulate or to expropriate cannot be reconciled with the justification of private property, then it does not help to claim or to acknowledge that both kinds of public acts require compensation.

Moreover, it is fundamentally mistaken to present regulation as partial taking. The justification of the right of property as the instantiation of the idea of equal freedom alone shows why. From the perspective of equal freedom, property is not one, perhaps rather important, form of wealth. Instead, property creates means for purposive action. Property makes external things a person's means for purposive action, just as the body is also a means for purposive action. Restricting the use of property by regulation is, under this perspective of equal freedom in action, just the same as a restriction on using one's body, which is a restriction of the general freedom of action (*allgemeine Handlungsfreiheit*). With regard to freedom of action, however, it is clear that no compensation is due if certain acts, certain uses of the body, become prohibited by legislation. If the legislator prohibits women selling surrogate motherhood – not a regulation of property, but a restriction of the general freedom to act – the women wishing to sell are not compensated for the loss. It makes no

[28] For American takings law, Richard Epstein articulates this view rather clearly: "In dealing with land, the state cannot take the north ten acres for free so long as it leaves you with the south ten acres. The same is true with the rights of disposition and use. Keep the maxim 'the more it takes, the more it pays', and all is well" RICHARD A. EPSTEIN, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 Econ Journal Watch 223 (2011), 233.

difference whether the restriction involves an external thing which is someone's means and therefore takes the form of regulation. It could only make a difference if the constitutional protection of the right of property were misinterpreted as a protection of acquired wealth. But there is no path from the understanding of property as a requirement of equal freedom to a constitutional protection of wealth.

The result: the theoretical challenge of the legislator's power to regulate property cannot be met by a claim for compensation. The theoretical problem is with the legislator's power as such.

c. Sustaining an Order of Equal Freedom

The Kantian alternative would aim to make room for the regulation of property while at the same time keeping the idea of equal freedom in its position as a basis. The necessity for such an alternative in the Kantian framework can be depicted as follows: Kant's puzzle in his philosophy of law was to understand how the law's coerciveness could be reconciled with freedom.[29] His first answer regarding private law was that coercive law was the necessary condition for establishing an order of equal freedom for all. Turning to public law, the same idea also was meant to justify public law institutions which serve to make the rules of private law binding, i.e. legislative determination, juridical adjudication, and executive enforcement of private law. However, the problem of coerciveness recurs with all other areas of public law. Such areas also feature coerciveness, but public law cannot be legitimized by its being part of the public institutionalization of private law.

According to Kant, the answer must nevertheless be the same: coerciveness of public law can be reconciled with freedom if and only if the relevant law serves to sustain the order of equal freedom.[30] To sustain such order is the only legitimate function of the state and its coercive law. This function provides the state with powers which are essentially public in the sense that no private person could ever have them. Private law requires public authority, which is the state, to become effective. This normative foundation for the state to come into existence, however, at the same time represents a strict limitation on the exercise of its power: state power, via public law, is not to be used for any purpose other than sustaining private law's order of equal freedom. This normative restriction of state power is to be reflected in the understanding of the public good. In a nutshell: there is only one public good, and that is to sustain the order of equal freedom. By way of example, Kant explicitly names the creation of distinctively public spaces, including public roads, support of the

[29] RIPSTEIN, Force and Freedom (note 11), 52 ff.
[30] Id. at , 232 ff.

poor, the guarantee of formal equality of opportunity, the power to punish, and the power to tax citizens, in order to be able to fulfill all of its public tasks and duties.[31]

It is perhaps worth highlighting again the difference between a Kantian answer and the answer that invokes the concept of balancing. The latter, as such, includes no theory about the legitimacy and limitation of state power, and consequently no restriction of the idea of the public good. All that the model suggests is that the order of equal freedom can be balanced, both in a logical and in a normative sense, with other – allegedly public – purposes. Certainly, the model of balancing could have some role in the framework of a substantial theory of the public good. The point here is that such a theory is not inherent to the concept of balancing. The Kantian answer, in turn, provides a demanding requirement for purposes if they are to be considered public, namely sustaining the order of equal freedom. This answer determinative of the idea of the public good implies, moreover, a decisive rejection of the idea that the order of equal freedom could be balanced at all.[32] The public good does not feature as a concurring and incommensurable value or aim that might require an act of balancing. By way of relating the public good in functional terms to the order of equal freedom, neither the public good nor the order of equal freedom is subject to balancing.

The remaining part of the paper will examine whether the Kantian idea of the public good succeeds in reconciling the regulation of property, which is essential for the modern state, with the intrinsic justification of property. The examination will use the example of the state's duty to support the poor. From an intuitive approach, this must be a hard case. First, the phenomenon of poverty, by definition, affects only part of a society, the support of which is therefore perhaps not easy to represent as a requirement of an order of equal freedom. Second, poverty is neither something external to the order of equal freedom, like foreign aggression, nor an accidental result of private interaction. Poverty rather results necessarily from the smooth functioning of private law, i.e. from the order of equal freedom itself.

IV. A HARD CASE: THE STATE'S DUTY "TO SUPPORT THE POOR"

1. Reframing the Subject: Housing for the Poor

A duty of the state to support the poor does not necessarily entail the regulation of property. State support of the poor requires, first and foremost, taxation and redistribution, and taxation does not represent a regulation of property. Certainly, it might be said that both intervene in the results of private interaction. But the mode of intervention is rather different. Taxation reduces wealth which

[31] KANT, Die Metaphysik der Sitten (note 17), 318 ff.
[32] RIPSTEIN, Force and Freedom (note 11), 237 f.

results from acquisition; regulation restricts the right to use acquired property. Taxation does not change the content of the essential right of property, namely the right to any use, including alienation. It does not even touch on the right to the property's value.[33] In the usual case, taxes do not refer to any particular property item. But the same is even true in the case of property taxes.[34] Even if a highly valuable property item is taxed, then the item's value remains untouched. Property tax is not a percentage taken from the item's value. One has to pay taxes simply because one holds such a valuable item. Thus, not even property taxes are a regulation of the right of property.

Yet the subject matter of the argument can be reframed so that it is still about the state's duty to support the poor. But the relevant duty can hardly be fulfilled with monetary redistribution and must be fulfilled with regulatory means. Provision of housing for the poor fits this argument very well. On the one hand, it can be taken for granted that a poor person's basic needs include a roof over his head. On the other hand, the current housing shortage shows that in order to provide housing for the poor, public authorities must not focus exclusively on redistributive instruments such as housing vouchers. They have to take measures which regulate the use of property in land. To give an example, developers in metropolitan cities such as New York or Chicago are obliged by the relevant housing authorities to provide a considerable part of their developments to tenants with low and subsidized incomes.

2. The Argument: Poverty as Dependence

According to Ernest Weinrib's version[35], the argument starts off with the claim that physical self-preservation is one of the purposes which human beings pursue. As a human purpose, self-preservation is enabled through private law, given that private law is an order of equal freedom among purposive beings, which is meant to secure the pursuit of any purpose in line with everybody else's purposiveness. More precisely, the particular purpose of self-preservation depends on the right to bodily integrity. The right to bodily integrity is necessary in order to have and consume the external things which are necessary to avoid starving. Due to the right to bodily integrity, whenever someone gets his hands on something to drink or eat, no one else can force him not to consume it. In this sense, the private right to bodily integrity is the precondition for making physical self-preservation one's purpose.

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[33] On the right to value inherent to property, see: WEINRIB, Corrective Justice (note 1), 190 ff.

[34] A different stance is taken by the 2nd Senate of the BVerfG, ruling of January 18, 2006, in: BVerfGE 115, 97 (*Halbteilungsgrundsatz*). The 1st Senate still holds to the view reported in the text: BVerfG, BVerfGE 95, 267 (*Altschulden*).

[35] WEINRIB, Corrective Justice (note 1), 263-296. For Arthur Ripstein's version: RIPSTEIN, Force and Freedom note 11), 267 ff. A particularity of Ripstein's argument is discussed below, text accompanying n. 44.

Now imagine a private-law order which would not include the right of property, but only the right to bodily integrity which is restricted, as was explained above, to legal protection of direct possession of external objects. Under this order, no one has a right to external objects. No one can impose an obligation to anyone else not to use a certain external object for his self-preservation if he is not in direct possession of it. Weinrib concludes that in the context of such a limited order of private rights "my survival cannot directly be affected by the actions of others," and that "I am … able to act on my own and without dependence on others for my continued existence," and that "no one's survival is dependent on anyone else's actions."[36]

The situation changes when the private-law order acknowledges the right of property. The right of property allows and enables endless accumulation. It will therefore happen (and has happened quite often in history) that a person is not able to preserve his life because what he needs is someone else's property. Subject to this order including the right of property, the poor become dependent on the charity of the wealthy. To cite Weinrib again: "The legitimation of the ownership of external things produces a juridical regime in which the survival of one person may be dependent on how others dispose of what is rightfully theirs."[37] As a result, although the right of property creates an order of equal freedom, it also creates a risk of dependence. And this is the problem that can only be solved by the state's duty to support the poor. In fulfilling its duty, the state relieves the poor from the dependence which comes with the right of property.

For Weinrib, the comparison of the state of affairs with the right of property and the state of affairs without it is highly relevant. It is of eminent importance that the right of property brings a loss of independence compared to the previous phase where no property rights existed.[38] The reason is that the transition between the two orders represents the transition from the state of nature to the civil condition. Entering the civil condition requires a social contract which must be acceptable for everybody. It is not acceptable if the perfection of an order of equal freedom comes with a formerly unknown form of dependence. Given Weinrib's emphasis on the comparison, it must be assumed that if the dependence were also pertinent under the state of nature, then the state's duty would not emerge.

Against this backdrop, it seems necessary to place a first caveat. It is simply not true that it could never happen in a private-law order which does not acknowledge the right of property that someone's self-preservation would never depend on someone else's actions. This can indeed be the

[36] All quotes are from WEINRIB, Corrective Justice (note 1), at 282.
[37] Id. at 283.
[38] Id. at 283 f.

case.[39] However, the argument might not depend on this aspect. It could be remedied by saying that in the one case, the case of a private-law order without the right of property, dependence might occur, but it is incidental. In the other case, the case of a private-law order with the right of property, dependence is structural, given that the right of property enables endless accumulation. It is only with endless accumulation that the problem of poverty emerges. Without accumulation, starving remains possible, but it would not result from poverty. Poverty by some presupposes wealth by others.[40] Existential need due to the course of nature is incidental, while poverty is structural. Solely under the right of property, poverty emerges as a structural feature of social reproduction. Similarly, solely under the right of property, dependence on the actions of others amounts to a structural feature of the private-law order. With the institutionalization of the right of property, the structural independence of all human beings from the actions of others is lost.

This minor correction notwithstanding, the argument cannot stop at this point. Certainly, it will be sound convincing for most readers that having one's physical existence depend on the actions of others is undesirable. But the challenge was to understand why it is necessary to generally avoid such dependence in order to sustain an order of equal freedom. Hence, it must be explained why such dependence is inconsistent with the idea of equal freedom. Two elements in Weinrib's account are in place to sustain this explanatory task. The first element has already been introduced by understanding existential need, under private law, as a problem of dependence. The point of such understanding is that existential need is not the risk of starving to death. This may happen due to the course of nature as well. The problem is starving to death even though someone else is, not by coincidence but for structural reasons, in the position to hold the means that would prevent it. In this sense, existential need, conceived as structural dependence, is relational. Existential need represents a certain relationship between two human beings, a relationship of dependence.

But in order to conclude the argument, it is still not enough to expose the relational character of existential need. A further step is required. Otherwise, the argument would likewise apply to other needs and wishes: Under the right of property, it happens that not everybody has a car to drive. If someone with no car wishes to have one and to drive it, he is dependent on the action of others. Also in this case, the dependence is relational. If it is not to be assumed that the state has the duty to

[39] Imagine two families living in an area with barren soil. It so happens that the first family still holds some food and, to dramatize a bit, even more than they need for their own survival, in a container with a wooden slab on top. The other family has no provisions for reasons beyond their control. One family member always sits on the wooden slab. There is, hence, no other way to get the food than to push that family member off of the slab, thereby infringing his right to bodily integrity. In this situation, the second family can only survive if the first decides to share with them. The physical survival of the second family is dependent on the action of the first, even though private property is not in place yet.

[40] See GEORG WILHELM FRIEDRICH HEGEL, Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse. Werke 7 (1986 (1821)), §§ 243 f.

provide for cars for everybody, then it must be explained what makes the normative difference between existential need and any simple wish. And the normative difference must not be suggested by appealing to moral intuitions. The difference has to be explained in terms of the idea of equal freedom.

In my understanding of Weinrib's account, the missing step is to be delivered when Weinrib points to the fact that human beings exercise their freedom through their bodies.[41] This requires that the body is alive. In this simple sense, preserving the living body is the natural precondition for exercising freedom. This insight, however, cannot be taken to justify a duty for the state to preserve one's physical existence as such. All human beings have to die one day. It is pointless to claim as a precondition for an order of equal freedom that all human beings must stay alive. The idea of human freedom cannot make eternal life a precondition. In other words: the living body is a precondition for an individual to exercise his freedom. But to keep manifold bodies alive is no precondition for an order of freedom of human beings who are going to die one way or another.

Therefore, the aspect of physical existence as a precondition to exercise freedom becomes problematic from an equal freedom perspective if and only if it is combined with a situation of dependence from others. Existential need, conceived as a natural precondition to exercise one's freedom, becomes inconsistent with equal freedom if its satisfaction depends on others. This is what draws the line between simple wishes on the one hand and the normative irrelevance of death as such. If one is dependent on others to drive a car, this dependence involves no physical precondition to exercise one's freedom. And vice versa, natural death at the end of a human life involves no dependence from anyone else who would hold means to prevent it.

That is, according to my understanding, Weinrib's argument in a nutshell. It is most welcome because the argument contradicts the radical opinion that redistribution is not a legitimate task of the state at all.[42] Weinrib's counterclaim is that at least the support of the poor is not only a legitimate public purpose, but a necessary condition for the legitimacy of private law itself. But whether welcome or not for its impact on political discourse, the question here is whether the argument really succeeds in meeting the theoretical challenge to reconcile the power to regulate property to support the poor with the justification of private property.

3. The Failure of the Argument on its own Terms

The argument's core is the relational understanding of existential need if it results from poverty: satisfaction of existential need is the natural precondition for exercising one's freedom; in the case of

[41] Id. at , 282 f.
[42] ROBERT NOZICK, Anarchy, State, and Utopia (1974), 149-182.

poverty, the satisfaction of existential needs is dependent on others. For the poor, the exercise of freedom becomes dependent on particular exercises of freedom by the rich. This contradicts the idea of equal freedom.

Or so it appears, at least. For the argument actually contains a conceptual mistake. In the final analysis, the argument exploits an equivocation of "dependence." To elaborate: the case that the natural precondition for exercising one's freedom is dependent on the action of others is not equivalent to the case where one person's exercise of freedom would interfere with another person's exercise of freedom. An example of the latter is a hypothetical situation where the right to bodily integrity is not protected at all or protected only for some, say, the nobility. In this situation, a person could use what is another person's belonging for his own purposes. The foreign body would become a means of the other person. In this situation, the exercise of freedom by one becomes incompatible with the freedom of the other, if freedom is to be conceived as equal freedom. Inconsistency with equal freedom arises when someone is not barred from using a foreign body. Inconsistency with equal freedom arises when someone is allowed to make a foreign body a means for his own purposes. Inconsistency of this kind does not arise with regard to poverty. Poverty does not allow someone to use a foreign body for his own purposes. Poverty does not allow the rich to use the body of the poor. Conversely, a poor person can still use what is his, his body and his things, if it happens that he still has some, like a pair of trousers or a shirt. The use of what belongs to him, innately or by acquisition, is not restricted by poverty.

Weinrib tries to bring the case of poverty closer to an inconsistency with equal freedom by raising what could come naturally for the individual suffering from poverty. Weinrib says: "My continued existence may thus become dependent on the goodwill or sufferance of others to whom I might then have to subordinate myself, making myself into a means for their ends, perhaps becoming their bondsman or slave".[43] But instead of rebutting the above criticism, the quote gives further support to it, as it explicitly reaffirms the difference on which the criticism insists: it is being a bondsman or slave that makes someone the means for somebody else's purposes. Only being a bondsman or slave is incompatible with equal freedom. The problem with poverty might indeed be that it could lead into bondage. But this risk of forcing someone into bondage which comes with poverty does not make poverty identical or normatively equivalent to bondage. The poor person is not a slave. He still enjoys his right to equal freedom. With this difference clear in mind, it is not necessary to support the poor in order to prevent them from giving up their freedom and becoming bondsmen. It simply requires banning bondage. And this is a key achievement of private law from the start.

[43] WEINRIB, Corrective Justice (note 1), 283.

Arthur Ripstein, in his related version of the argument, seems to avoid the objection of equivocation. Because he pushes things even further: Weinrib only suggests that poverty might lead into slavery. Ripstein argues that the dependence of the poor is indeed equivalent to the dependence of the slave. Ripstein writes: "The problem [with poverty, F.R.] is not that some particular purpose depends on the choices of others, but that the pursuit of any purpose does. If all purposiveness depends on the grace of others, the dependent person is in the juridical position of a slave or a serf."[44] Both slaves and the poor depend, for their existence, on the grace of others, the grace of the slaveholder in the one case and the grace of the rich in the other. Given that slavery is inconsistent with equal freedom, and given that poverty and slavery are both characterized by dependence on the grace of others, then poverty must be inconsistent with equal freedom as well.

Or so it appears, at least. For this version of the argument contains a similar logical mistake. The conclusion would be convincing if the dependence on the grace of others for one's existence were what made slavery inconsistent with equal freedom. But this is not true. The inconsistency comes from the slave being a means for the purposes of the slaveholder. Being an object-like means to the slaveholder's purposes includes that the slaveholder might even take the slave's life. So indeed, the slave's existence depends on the actions and purposes of his slaveholder. And the poor person's existence also depends on the actions and purposes of the rich, that is: every rich person. But in the case of the poor person, the dependence is not a result of the poor being a means to the rich. It is the consequence of the poor not having sufficient means of his own. Dependence on others that is due to a human being's status as a thing is inconsistent with the idea of equal freedom. Dependence on others which is due to the lack of means sufficient for self-preservation is not.

Turning to Weinrib again, it must be noted that he seems well aware of the above criticism. He confronts it directly by asking whether his justification of the state's duty to support the poor would not stand against Kant's claim that need is irrelevant to the concept of right.[45] Weinrib's response is that Kant's claim of the irrelevance of need was situated in a different logical context, namely in the context of rights that one person claims against another, that is, in the context of rights with corresponding duties. Only from this viewpoint of rights and corresponding duties is need irrelevant. And fully in line with this claim about the irrelevance of need, not even existential need, poverty does not give rise to a private right of the poor against the rich. It only gives rise to a duty of the state to provide support.

Weinrib's answer seems to suggest that one could take the viewpoint of rights at one point in time, but switch to another viewpoint at another. But this is not possible. That private rights and duties

[44] RIPSTEIN, Force and Freedom (note 11), 281.
[45] WEINRIB, Corrective Justice (note 1), 288 f.

ignore need, even existential need, is not a consequence of choice of viewpoint. In Kant, it is substantively founded. It is founded by the Universal Principle of Right according to which "[a]ny action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of each can coexist with everyone's freedom in accordance with a universal law."[46] It is rephrased shortly thereafter as: "Thus the universal law of right, so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law." What is presented as a viewpoint in Weinrib's account is grounded in the idea of equal freedom. Because the law is about creating an order of equal freedom, it must consist of equal rights which determine what belongs to whom. Those equal rights have no room for need. If this is the essential task of law, we cannot leave it behind us as a viewpoint. The original challenge was to ask for a justification for the state's duty to support the poor from the perspective or viewpoint of equal freedom. Weinrib's response is that, in order to justify the state's duty to support the poor, we must leave this viewpoint. It should be clear now that this is no response to the challenge. It is an acknowledgement that it cannot be met.

V. PRIVATE LAW'S ASSERTION OF *RATIONAL* INSTEAD OF *HUMAN* EXISTENCE

It has been demonstrated that private law, based as it is on the idea of equal freedom, is not capable of integrating even the most existential needs of human beings into its normative logic. This is not only true of the rules of private law itself. It also holds for the rules of public law, subject to the condition that the idea of equal freedom is equally determinative not only for private law, but also for the idea of legitimate purpose of public law. Making the source of this deficit explicit will probably seem trivial at this stage. The source is that the equal freedom, as it lies at the justificatory center of private law, is the equal freedom of beings which are able to act in an external world on the basis of their purposes. It is equal freedom of purposive beings, and in this sense of rational beings. For rational beings, all that private law is determined to provide for is that rational beings can exercise their purposiveness, thereby respecting the equal purposiveness of any other rational being. And all that public law is determined to provide for, for rational beings, is the establishment and maintenance of such an order guaranteeing equal purposiveness.

This representation of the subject of equal freedom as rational beings misses the corporeality of our existence. It does not matter, for private law, that the subjects of equal freedom are not only rational beings but also beings with a human body. It is a body which must be in exchange with nature – air, water, and nourishment – and which dies without such exchange. Of course, private law does not ignore the existence of the body. The existence of the body is reflected in the right to bodily integrity

[46] KANT, Die Metaphysik der Sitten (note 17), § 2 – English translation taken from Mary Gregor.

which, as we have seen, is a relevant step in the whole enterprise of understanding private law, including the right of property. But as it stands, the body is not part of the rational being's essence. Instead, the rational being happens to have a body rather incidentally. The innate right to bodily integrity follows from the idea of equal freedom of purposive beings only due to the fact, as such incidental, that the human form of rational beings involves a body which serves as the being's first instrument for exercising purposiveness. The normative relevance of the body is the result of its incidental instrumental role for the rational being's purposiveness. It is not the result of its being an essential part of the subject of equal freedom.

Acknowledged for its instrumental role in purposive action, the human body is not perceived as a living organism. It is perceived as an instrument for purposiveness, in this respect similar to external things. Of course, there remains a difference between the body and an external thing. But the difference is not that the body is a living organism while external things are not (except for plants and animals). The difference as it is represented in private law is merely that the right to the human body is not acquired but innate and that it cannot be alienated. But again, this difference in the logic of right does not go back to the fact that the subject of equal freedom is a human being, i.e. the instantiation of the human life form. The difference is only due to the fact that the human case of rational beings happens to be bound to a physical body. Thus, the idea of equal freedom of purposive beings abstracts from the human condition of our purposiveness. Therefore the idea does not and cannot account for the aspect of the purposive being's and its body's being alive.

At least Weinrib and Ripstein would probably offer opposition at this point because in their argument, it is precisely the insistence that human purposiveness depends on a living body that gives rise to the state's duty to support the poor, so that the duty emerges out of the logic of private law. How can it be said, then, that this logic nevertheless ignores that human beings are alive? The reason is that they understand being alive merely as finitude, in the simple sense of ceasing to exist one day. Human life ends one day or another, and so does the rational purposiveness of human beings. Given that rational purposiveness ends anyway, neither death as such nor any particular cause of death gives rise to particular concern. Death from starving is considered relevant if, and only if, it comes with poverty.[47] For as we have seen, only then is the risk of dying of the particular cause of starvation considered as representing dependence. Without dependence, death from starvation would likewise be as irrelevant as any other cause of death, be it an accident, a disease, or old age.

But the point of the human body being alive, which is missing in the representation of human as rational beings in private law, is not the simple finitude as such. As said before, being alive includes

[47] See, again, WEINRIB, Corrective Justice (note 1) , 282 f.; RIPSTEIN, Force and Freedom (note 11), 280.

the idea of a living organism which, to live on, is reliant on continued exchange with nature. This leads to the point that the idea of human life includes the contrast of natural and unnatural death. The contrast between the two kinds of causes of death is expressed in the asymmetrical grammar of their relationship. If a human being does not die of unnatural causes, he must die of natural causes one day. The converse does not hold. Rather, if a human being does not die of natural causes, he must have died of unnatural causes before. This asymmetry implies that unnatural death can usually be prevented, while natural death cannot. (Of course, certain diseases are incurable and not preventable, but this might change in the future.) Moreover, the asymmetry is normatively loaded: human beings are not meant to die of unnatural causes. The idea of equal freedom of rational beings has no room for this normativity of the human life form. And this finally explains why the idea of equal freedom of rational beings cannot assign a normative role to existential human needs.

That human beings are not meant to die of unnatural causes not only implies a normative role for their most existential needs. This is only one side of the coin. The other side does not refer to the needs of the individual, but to the human species. Not only must every human being's basic needs be fulfilled every day, the human species as a whole requires that nature is able to provide for the basic needs of all, today and in the future. So given that private law does not represent the normative relevance of basic human needs, it cannot account for the human species' needs, either. In other words: private law cannot account for the protection of natural resources.[48]

The diagnosis of private law's deficit as failing to represent the subject of equal freedom as the human being is linked with a debate in metaphysics between Kant and Aristotle, and writers in their respective traditions, about the foundational category of morals. For Kantians, it is any rational life form, for Aristotelians it is the human life form.[49] Of course, this line cannot be developed further here. But this general debate could pave the way to expanding the criticism of private law just stated. As from an Aristotelian point of view, not only do basic human needs characterize the human life form. Another one is, for example, that the human being is a *zoon politicon*[50], a "political community-building being". From this point of view, the state is something more than just the public authority required to establish an order of equal freedom. It is there in order to realize the human life form, and this includes much more than the order of equal freedom. With this, the logical place is reached to start talking about values, about the values inherent to the human life form.

[48] Besides housing, the protection of natural resources is a further example where the realization of the public good requires the regulation of property and where it certainly cannot be restricted to taxation.
[49] MICHAEL THOMPSON, Life and Action. Elementary Structures of Practice and Practical Thought (2008)
[50] Aristotle, Politics, 1253a 1.

This final result may now sound very much like a nucleus of a value-instrumental theory of private law, quite similar in structure to any other instrumental theory of private law discussed above. But this is not true. The point that marks the difference between value instrumentalism and the account given in this paper is that, basically, the values to be derived from the human life form are actually not to be realized through private law rules. On the contrary, they must be realized against private law, against its basic structure and intrinsic justification. Moreover, value instrumentalism usually defers to collective decisions in order to define the relevant values in substance, it comes as a positive-law thesis based on values, rather than aims or interests, while in this account, the human life form is claimed as the source of values, independent of any procedure to make the values collectively binding through law.

VI. CONCLUSION

If the argument about private law's deficit is taken for granted, a further question will naturally arise: does the argument lead to a claim to abolish the right of property, given that it can account neither for the support of the poor nor for the survival of the human species?

The answer is to the negative. Any disappointment with this probably rests on a misunderstanding of the logic of the above argument. It seems worth repeating: The deficit of private law has been developed above against the presupposed legitimacy of the regulation of property enacted by modern constitutional states. It was shown that the idea of equal freedom cannot account for any regulation of property in order to support (housing for) the poor. Still holding to the heuristic claim of legitimacy of the ongoing regulatory practice of constitutional states, this result led to the identification of a deficit of private law, namely the failure to represent its subject as essentially human beings. Nothing in this argument contradicts the justification of the right of property as being required by the idea of equal freedom. The justification still holds. It deserves special emphasis that the argument did not criticize the idea of freedom. Particularly, and in opposition to what is frequently suggested, the argument did not criticize the idea of freedom as independence as "formal" in order to argue then for its completion with a "material" aspect of freedom.

What has actually been established in this paper, if anything, is that private law as instantiation of equal freedom of rational beings has a fundamental deficit. It ignores that the subjects of private law are not coincidentally, but essentially human beings. This deficit came to the fore on the basis of the hypothesis of the legitimacy of the modern constitutional state and its pertinent regulation of property. If we switch to the complementary viewpoint, the hypothesis of the deficit of private law, we can understand why private law and its underlying idea of equal freedom is normatively incomplete, which requires the state to deliver much more than merely sustaining the order of equal

freedom. [51] Of course: it seems worthwhile to consider whether private law's deficit could be alleviated by a radical reform of private law, establishing a private law which is not based on the idea of equal freedom of rational, but of human beings. But it is more than doubtful that such a private law is actually possible. The reasons cannot be explored here at length. At their core lies the reason is that private law, in its entirety, cannot be subject to the form of distributive justice. But this would be required in order to secure the basic needs of individual humans and the human species.

The rejection of this option of a new private law leads directly to the alternative that the deficit of private law must be alleviated by public law. However, if this is the primary result of the whole argument, the reader may think that it was much ado about nothing. It was Weinrib himself who claimed explicitly that the right of property brought private law to an impasse which could be solved only by public law.[52] But the underlying reasoning is very different. Weinrib thinks that public law can be developed out of the logic of private law. This has been proven false. Public law must be developed in tension and contradiction to the logic of private law. This difference has further implications. First, Weinrib's harmonious view commits him to defending the coherence of private law, also against the legislator. If the legislator decides to submit certain fields under the logic of private law, it is bound to adhere to its essential logic of corrective justice.[53] Against the backdrop of the deficit of private law, such requirement becomes much weaker, if it stands at all. Second, Weinrib's account is restricted to the duty to support the poor. Other aspects of human life might not be diminished in the transition from the state of nature to the civil condition.[54] Against the backdrop of the deficit of private law, the justificatory basis for public law includes every aspect of the human life form which is not reflected in rational agency.

[51] Peter Benson argues that by being embedded in the modern state (Benson says: civil society), private law (Benson's example is contract law) would turn into a common good that serves human needs and interests (PETER BENSON, *The Unity of Contract Law*, *in* The Theory of Contract Law (Peter Benson ed., 2001), 203). Benson refers to Hegel for further explanation (at n. 101).
[52] WEINRIB, Corrective Justice (note 1), 284.
[53] WEINRIB, The Idea of Private Law (note 1), 72 ff. and 228.
[54] See above Section V.2.