

They were an extraordinary two weeks. They were spent in Toronto offering an intensive course on a subject of great importance to both our nations – feminism. The subject was also a new one for me. The students and faculty reacted to my hesitant speculations with a remarkable combination of engagement and disbelief, forcing me to re-examine my position on a number of issues, almost on a daily basis. Those two weeks were also a tribute to the dean's organizational capacities, which are, as all the world knows, nothing short of amazing. He managed to keep every moment of my visit filled – starting with breakfasts downtown, lunches with faculty from other departments of the university, conversations with students after class, night-time tours of the ethnic restaurants of the city, and then two hours of lectures a day, preceded, of course, by hours and hours of preparation (which many regarded as a just and proper punishment, given the length of the reading assignments).

One day I was determined to free myself from the dean's grasp and at last assert my independence. I secretly returned to the Windsor Arms Hotel late one afternoon for tea. I was with Ernest Weinrib, a member of the Law Faculty and a close friend. He had visited Yale a few years ago and was kind enough to participate in my seminar there. Knowing no limits to the obligations of friendship, he also sat through all my lectures here. Our conversation that afternoon started with the substantive issue I had been struggling with moments before in class – the legality of the maternity leave statute involved in the *Cal Fed* case¹ – and the blue-pencilling remedy proposed by some members of the class. But soon the discussion shifted from the women's movement to a subject we had talked about before, namely, the nature of adjudication. The title and ostensible subject of my

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† This is the text of the Cecil A. Wright Lecture delivered before the Law Faculty of the University of Toronto on 29 March 1987. It is meant as a tribute to the special relationship between our two schools, and, even more, to the remarkable intellectual whose work is the principal subject of this paper and the lecture. I have drawn from conversations with my colleague Anthony Kronman, and from the seminar we taught together in the spring of 1987 entitled 'The Tyranny of Kant.' I also wish to express my gratitude to Madeline Morris and Lawrence Douglas, two members of that seminar, for their valuable research assistance.

¹ *California Federal Savings & Loan Assn. v. Guerra*, 107 S.Ct. 683 (1987). This decision was announced on 13 January 1987, during the course.

course was 'What Is Freedom?' but I seemed, so Weinrib remarked, to be answering, at least implicitly, another question altogether: 'What Is Law?'

I suspected that in saying this, Weinrib was not being entirely friendly, for, as I well knew, he did not share the concept of adjudication that was implicit in my analysis of the feminist movement. In fact, as I knew from previous exchanges (one of which had occurred in public at a legal theory workshop at Toronto in the fall of 1985, when I gave a paper on free speech),² he viewed my ideas about adjudication as some form of American madness. In my hands, adjudication and the doctrine that it produced was not law, but, as he put it at that workshop, a mish-mash of functionalism, lacking the special 'unity' and 'intelligibility' (to use his favourite terms) that belong to law alone.

Tea-time conversation can, however, become a little clubby, and I began to notice that some of the lines of division had become blurred. We didn't push the disagreement too far that afternoon. But on the very last day of my visit, Weinrib gave a lecture that left no doubt as to his basic stance. The occasion was a student-organized conference on tort reform, and Weinrib used it once again to present, with a certain measure of elegance and drama, his model of adjudication – the theory of corrective justice – in the context of tort litigation. Torts is his field, and in fact most of his work applies the corrective justice model to torts.³ It seemed clear to me, however, that his conception of adjudication was not in any way confined to torts; corrective justice was the standard for all types of litigation, including the special brand of constitutional litigation that was the subject of my lectures.

It also seemed clear to me from that talk, and from all that I knew about him, that the differences between us had nothing to do with our political or moral commitments, whether they be about torts, distributive justice, or feminism. For reasons that either are specific to my teaching style or might derive from my theory of adjudication, I wear my moral and political commitments on my sleeve. Weinrib's moral and political commitments never enter his classroom or his articles, and thus remain something of a mystery to his students and readers. I can assure you, however, that his devotion to the feminist cause, and the egalitarianism that underlies it, is as strong and unequivocal as anyone's. Ernest Weinrib is a friend, in the best meaning of that word: he is a person I not only like but also respect and admire. What divided us was not our political or moral commitments, but rather our view of law.

² That paper later became 'Why the State?' (1987) 100 *Harv. LR* 781.

³ See generally E. Weinrib 'Toward a Moral Theory of Negligence Law' (1983) 2 *Law & Philosophy* 37; E. Weinrib 'The Insurance Justification and Private Law' (1985) 14 *Legal Studies* 681; E. Weinrib 'Liability law beyond justice' (letter to the editor) *New York Times* 16 May 1986.

In choosing this as the subject of the Cecil A. Wright Lecture, and the last in the series that began in January, I do not mean to make you parties to an idle debate between two academic friends. Something practical is at issue. Weinrib's theory of adjudication – the model of corrective justice – is not just an academic concoction, but appears to be firmly rooted in the legal culture of Canada and is offered as and often assumed by Canadians to be the standard by which the judicial process is to be governed and judged. Weinrib may give a certain philosophic depth to the model, but he is not alone in his attachment to it – so I found out one morning during my stay, when the dean took me downtown to have breakfast with Ian Scott, the attorney general of Ontario.

I was still half asleep, and yet I could not help being taken with Scott. He seemed to me to be a person of great vision and commitment – he had qualities that made me think of him as a Robert Kennedy of the North – but whenever he began to speak about adjudication and what could be done through the courts, he seemed to lapse back into an understanding of adjudication that seemed, quite frankly, more English than American, more private than public, more oriented toward automobile accidents than the pursuit of equality. His understanding of adjudication also seemed uniquely unsuited for the kind of constitutional litigation that was the principal subject of his concern and that will soon dominate the Canadian dockets. It was, alas, Weinrib's model of corrective justice.

I

I began my January lectures by drawing a distinction between two different ways of understanding equality. For what I called the allocative model, the paradigmatic situation is a competition among a limited number of persons. The governing rule restricts the criteria that could be used for choosing among the applicants. Adjudication is a public and coercive process by which a rejected applicant might enforce that norm and thus test the adequacy of the selection process actually used: In the context of employment discrimination, the principal question raised is whether the employer in fact made the choice among applicants for the job on the basis of sex. Under the alternative conception of equality, the one that I was advancing, the concern is not so much with the imperfections of the allocative process as with the subordination of women as a social group. Imperfections in the allocative process – the exclusion of women because they are women – of course plays an important role in the process of creating and perpetuating this relationship of subordination, but it is not the only factor. It is probably not even the most significant one. Instead, the key is those familiar social

institutions – motherhood, the market, or sexuality itself – that shape the pool of applicants and determine the qualities sought and the values placed on various qualities. It is those social institutions that create and maintain the hierarchical relationship that exists between men and women, and it is those institutions which, through adjudication, have to be judged and if necessary, reformed.

To give the second and more structural conception of equality specific content, let me return to the example that figured so prominently in my January lectures and that was the starting-point for the tea-time conversation at the Windsor Arms. The example involved a statute requiring employers to provide maternity leave. I assumed that the statute, by its very terms, is applicable only to women and that it requires employers to provide up to four months' leave. Furthermore, I assumed that this leave can be used for child care, and is not restricted to the period of recovery from the birth itself. I also imagined a suit, perhaps brought by some women's organization, attacking this statute on the ground that it violates the constitutional guarantee of equality. The charge is that the statute tends to reinforce the social norm that links the child-bearing and child-rearing functions, or that, as Dorothy Dinnerstein put it, ties the social divisions of labour to the biological one.⁴ The natural effect of the statute is to strengthen the assumption that a woman's place is in the home taking care of children, and it is this assumption, so it might be argued, that largely accounts for the exclusion of women from socially prestigious jobs, the creation of educational barriers, the values and forms of life prized in the public sphere, disparities in pay, and the kind of psychological oppression that Adrienne Rich described so movingly in the excerpt we read from her book.⁵

Confronted with such a claim, the function of the judge is to ascertain whether the maternity leave statute does have this objectionable effect, and, if it does, to fashion an appropriate remedy. At first I had assumed that the remedy could only be a decree invalidating the statute in its entirety, allowing and encouraging (though obviously not requiring) the legislature to enact a more comprehensive statute, one that provided child-care leave for both men and women. But following the suggestion of a number of students in the class, it now seems to me that, as part of the remedy, the court could use a constitutional blue pencil – that is, eliminate the limitation in the statute that confines the duty to provide leave for child care to women. Such a remedy need not be based on the view that the constitution's equal protection clause itself directly commands the legisla-

⁴ Dinnerstein *The Mermaid and the Minotaur* (1976)

⁵ Adrienne Rich *Of Woman Born: Motherhood as Experience and Institution* (1976)

ture to enact such a statute (though that would itself be sufficient ground for blue-pencilling), but rather that this statute might well be enacted by the legislature if it were given another opportunity to do so and if it fully appreciated the nature of the constitutional defect entailed in its previous effort at lawmaking.⁶ Of course, this prophecy might turn out to be mistaken, but given the disabilities women face in the political process, it appears fair and appropriate, for a change, to cast the burden of inertia in their favour. The legislature could always repeal the statute if the court was wrong in its assumption about what the legislature would do the second time around.

I called this form of adjudication – which defined the evil in group terms (the subordination of women) and then sought to reform the institution responsible for this hierarchical relationship – ‘structural reform’; it was the natural corollary to the structural conception of equality. In my January lectures this notion was implicitly invoked in my discussion of feminism, but obviously it would extend to all forms of constitutional litigation. Indeed, like the structural conception of equality itself, this model of adjudication first emerged in the racial context and then was extended to reach all forms of state illegality.⁷ On the other hand, the natural setting of Weinrib’s corrective model is not constitutional law, but, as I already said, torts. The Windsor Arms conversation and one recent paper⁸ suggest an application to constitutional law, but for the most part Professor Weinrib has applied his theory to torts, always with the assumption that once its proper place could be secured in that field, it could become the model for all types of litigation.

The corrective model asks us to imagine two individuals who are going about their business, each pursuing his or her own goals and ambitions. A circumstance then arises which brings these individuals in contact with one another, so that the action of one injures or otherwise interferes with the activities of the other. A suit is brought by one individual against the other, and the task of the court is to determine whether the freedom of one individual unjustly interfered with the freedom of another. If it did, the court must then try to restore the relationship of equality that existed between the parties before the interaction.

It was Aristotle who introduced this notion of corrective justice, but his

6 See generally Siegel ‘Equal Protection Injury and Judicial Power to Rewrite Underinclusive Statutes’ (unpublished manuscript dated 28 September 1987). See also Miller ‘Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of *Heckler v. Matthews*’ (1985) 20 *Harv. CR-CLL Rev.* 79, and Caminker ‘A Norm-Based Remedial Model for Underinclusive Statutes’ (1986) 95 *Yale LJ* 1185.

7 Owen Fiss ‘Groups and the Equal Protection Clause’ (1976) 5 *Phil. & Pub. Affairs* 107; ‘The Forms of Justice’ (1979) 93 *Harv. LR* 1

8 E. Weinrib ‘Law as a Kantian Idea of Reason’ (1987) 87 *Col. LR* 472

account was radically incomplete. Although he described the duty of the court operating under the corrective model as one of restoring the pre-existing relationship of equality between the parties, he failed to explain in what sense it can be said that before the unfortunate interaction the two individuals were equal. We know they are unequal in strength, resources, social standing, etc. It is at this point that Weinrib turns to Kant, for he sees in Kant's work an idea that will allow a completion of the Aristotelian project.⁹ The idea is freedom.

For Kant, according to Weinrib, the freedom that we each have, and that makes us equal, is not the freedom to do what we want at any particular moment, a kind of empirical licence, but rather a capacity, which follows from our nature as rational beings, to transcend 'the immediacy of inclination'¹⁰ and thus to engage in moral reflection and choice. Although we each exist in some specific and concrete context, tied to our local attachments and committed to a wide variety of particular goals, and although we necessarily remain at any moment situated in some context, we also have the capacity to transcend our particular situation in the sense that we can reflect upon the content of our consciousness and choose a course of autonomous moral action.

It is this capacity to engage in moral choice that makes us equal and that is allegedly disturbed by the interaction or transaction that is the subject of the lawsuit before the court. According to Aristotle, the judicial task is to restore the equality that existed before the transaction; with the Kantian twist we can define the sense in which the parties before the court were equal and then conceive of the function of adjudication, and for that matter, law itself, as one of trying to harmonize the action of one with the freedom of another, where freedom is understood not in any ordinary empirical sense, but as a freedom of the will.¹¹

Questions, of course, can be raised about the metaphysical underpinnings of Kant's theory. Many have questioned whether the hypothesized freedom exists, or whether the bearer of this freedom, some non-empirical entity called the 'noumenal self,' is an intelligible idea. But my concern is of a different nature; it is more jurisprudential than philosophical. I want to bracket my doubts regarding the validity of the Kantian metaphysics, and instead ask whether such a metaphysical position is useful for developing a theory of adjudication or law. To begin that task, I should make explicit and underscore the various ways in which the model of corrective justice – the model of adjudication founded on the Kantian idea of freedom – differs from the structural one, as exemplified by my

9 E. Weinrib 'Corrective Justice as Abstraction' (unpublished paper; principally at 35–41)

10 Weinrib, *supra* note 8, 482

11 *Ibid.* 487

analysis of the feminist challenge to the maternity leave statute. The corrective model advanced by Weinrib differs from my own in that it is individualistic in its conception of party structure; transactional in its understanding of causation; and reparative in its approach to remedies.

INDIVIDUALISTIC PARTY STRUCTURE

In contrast to the corrective model, which is decidedly individualistic, the structural suit focuses on sociological entities. In the case of the maternity leave statute, the entity that seeks the protection of the court – the plaintiff – is a social group (women), and the agency that threatens the well-being of that group is the state. Such sociological entities are, of course, composed of individuals and must be represented by particular individuals, but these entities are not reducible to the people who speak on their behalf or to any other particular individual who might be included within them. Nor can the individualistic party structure of the corrective model be modified so as to account for this sociological orientation simply by substituting social entities for the two individuals who are, under the corrective model, treated as the contending parties. I say this because the individualism of the corrective model is not gratuitous; it is integral to the claim that victim and perpetrator stood in a relation of equality before the interaction, despite the obvious empirical differences between the two (differences in wealth, education, strength, etc.) The relationship of equality can be said to exist only between noumenal, not empirical, selves, and whatever intelligibility the idea of a noumenal self might have when we speak of individuals, it has no meaning when applied to sociological entities.

TRANSACTIONAL CAUSATION

The corrective model focuses on a discrete or discontinuous historical event, a 'transaction' or 'interaction,' which has specific temporal and geographic co-ordinates. It is this interaction that is said to disturb the relationship of equality that exists between individuals and that must be remedied. The focus of the structural model is not on some discrete transaction but instead on social networks and institutions, which, in a continuous and diffuse manner, shape our attitudes, expectations, behaviour, and norms, and then are shaped and reinforced by them. While the corrective model is concerned with some isolated act of exclusion – say, the specific interaction between an employer and a woman (the individual rejected) – the structural lawsuit addresses the entire network of social arrangements that account for the disfavoured position of the women in the market and seeks to assess the role of the state in maintaining those arrangements. What, it asks, are the social

forces that place the responsibility for child care primarily or exclusively on women? What effect will the structure have on those forces? Cutting into the larger causal network so as to isolate a distinct occurrence (such as the denial by an employer of the application for child-care leave by a father) and then focusing on that 'transaction' or 'interaction' might, as a purely logical matter, be possible. But such a strategy would contradict the underlying ambition of the structural model, which is to redirect our attention away from some isolated occurrence and toward examining the overall effect of the statute on the institution of motherhood and the role that institution plays in the subordination of women.

RESTORATIVE REMEDIES

The end of a lawsuit is, of course, justice. This is true whether we speak in corrective or structural terms. There is, however, an important difference in how justice is achieved under each model. In the corrective one, the judge seeks through the award of damages or the infliction of punishment to restore the relationship of equality that existed between the parties before the unfortunate interaction. Sometimes the corrective judge might issue an injunction to prevent an anticipated wrong, but that is more exceptional, and in any event in such cases the anticipated wrong is defined in terms of the past. The defendant must not be allowed to act in a way that disturbs the relationship of equality that once existed between the plaintiff and defendant and that the plaintiff seeks to preserve. In the corrective context, justice is done when the relationship of equality – the status quo ante – is restored or preserved. In the structural context, however, justice is more forward-looking. The remedy that is exceptional in the corrective model – the injunction – here becomes favoured, and is used by the judiciary to bring social reality into conformity with a social ideal. In the feminist context, and in other forms of civil rights litigation, that particular ideal is 'equality,' but there is no necessary connection between justice and equality (and that is why I avoid the Aristotelian typology, which views 'distributive justice' as the only alternative to 'corrective justice'). Equality stands as but an example – an important but non-exhaustive example – of a larger category of social aspirations that are rendered authoritative by the law and against which social reality is to be measured. In feminist litigation, equality is the ideal that the judiciary seeks to actualize; in other cases it might be religious liberty, free speech, or personal safety. Moreover, even when equality is the ideal to be actualized, in the structural suit it refers not to a relationship between two individuals (the parties to the lawsuit), as it does in the corrective context, but rather to a state of affairs not yet in being – a projected or imagined view of the world, which the court embraces and seeks, through the use of its coercive power, to bring into being.

Time is not on the side of the structural model, but the world is. Contemporary social reality is not individualistic. Today our well-being is decisively linked to the status and behaviour of social groups and organizations, and it is entirely to the credit of the structural model that it recognizes this fact. A similar point can be made about the structural model's rejection of a transactional conception of causation: what the structural model offers is far more realistic, because the social reality we know is constructed and maintained not on the basis of particular transactions, but through social networks and institutions. I also believe that the structural model more faithfully accords with the self-understanding of judges. Faced with a challenge to a maternity leave statute, few judges I know would understand their task as one of re-establishing a relationship of equality that existed between two individuals. (Mention of 'noumenal beings' would only bring a smile to their faces.) They would instead insist that their task is to ascertain whether the legislature has enacted a measure that is consistent with the constitutional ideal of equality, or whether, as charged, that statute will perpetuate and aggravate the hierarchical relationship that now exists between men and women.

Granted, the corrective model is in closer accord than the structural one with the traditional binary or bipolar party structure of adjudication, which places the plaintiff in an antagonistic relationship with the defendant and imagines one (the defendant) as the doer and the other (the plaintiff) as the sufferer. But this is not a decisive reason for favouring the corrective model. For one thing, many familiar rules governing party structure, such as those specifying who can be a defendant or plaintiff, have a role to play in the structural model, although that role derives from instrumental considerations. The structural model may require that the plaintiff group be injured in fact, or that the defendant state agency be the perpetrator of that particular injury, not because the court's task is to restore the relationship that previously existed between these parties, but rather to make sure that there is a full and adequate development of the facts and the law. Under the corrective model, traditional standing rules are expressive of the substantive definition of the judicial task; under the structural model, these same rules can be seen as attempts to capture and harness private motivation to serve public purposes.

Second, as a social practice, the binary party structure assumed by the corrective model seems to be a thing of the past. Because the injured party is not some particular individual but a social group, and because groups do not, in the ordinary use of the term, speak, we typically find in a contemporary litigation a large number of people presenting themselves as representatives of the group on whose behalf the judicial power is

invoked. Some women want the statute invalidated; others insist that it should be upheld on a theory that either sees child care as a woman's responsibility or sees the leave statute as a means of facilitating the participation of women in the economy; still others argue that the under-inclusiveness of the statute should be remedied by blue-pencilling. The same process of disintegration and realignment typically occurs, so to speak, on the other side of the lawsuit. The perpetrator, typically a large-scale social organization, is likely to embody a wide array of interests which will be presented and advanced by many persons.

All of this suggests to me that the structural model more nearly accords with existing social practices in the court and in the world, but it also seems true that the debate between Professor Weinrib and myself will not be resolved on the basis of which model is more realistic. Realism is not the test. Weinrib does not offer the corrective model as a more adequate description of reality, but as a normative ideal. For Aristotle, it was a descriptive category – a way of characterizing existing practices and institutions – but once it became, at the hands of Weinrib, part of the Kantian project, the corrective model acquired a more prescriptive character. The structural model might more nearly accord with, or describe, existing practices, in constitutional cases or even in torts, but it is entirely open to Weinrib and his followers to condemn existing litigative practices as 'illegitimate' precisely because they deviate from the model. In fact, on numerous occasions Weinrib has done just that. At one workshop at Yale, he startled the audience when he dismissed almost all of American tort law as one big colossal mistake.

To cope with this kind of critique, we must, of course, ask why corrective justice is the normative ideal – why is it the standard by which we should measure existing legal practices? There are two rather obvious answers to this question, but it is important to understand at the outset that Weinrib is too philosophically sophisticated to be tempted by either. One line of argument prefers the corrective model on the theory that it more nearly accords with the competency of the judiciary; the other sees it as more conducive to the good.

The first line of argument presupposes a view of judicial competence that is unproven and untested. At first glance it may seem easier for a court to deal with specific transactions than with social networks; it may also seem easier for a judge to deal with individuals rather than groups. But other aspects of the corrective model, such as the remedy, are likely to prove baffling to a court. It is assumed that the judicial task is to restore the relationship of equality that previously existed between the parties, but since this is an equality between noumenal beings, it is difficult to know precisely and concretely what might restore that equality (or for that

matter even disturb it). What are the external, formal conditions of free choice? Moreover, even assuming, for the purposes of discussion, that the judicial task is easier under the corrective model because of its individualistic and transactional character, it does not at all follow that the inquiries called for by the structural model are beyond the competence of the judiciary. Those inquiries might be hard, perhaps much harder than those called for by the corrective model, but that does not place them beyond the competence of the court. A difficult task can still be competently performed, and indeed may be worth the extra effort given the social good that it might produce.

To defend the corrective model as a normative ideal on the ground that it is more conducive to the good is also problematic. It requires postulating some view of the good or otherwise specifying some ideal state of affairs to be achieved. It also requires some proof that the model of corrective justice is more likely than the structural one to lead to that desired state of affairs. Since this is not a line of argument Weinrib pursues, or that any Kantian is likely to pursue, it is hard for me to understand what conception of the good might, in fact, lead to this preference for the corrective model. In any event, no matter what conception of the good is advanced in defence of the corrective model (maybe it is social harmony, or freedom understood in some ordinary empirical sense), it would always be open to me or anyone else defending the structural model either to deny *that* conception of the good or to contest the assumed instrumental connection between corrective justice and that end.

What draws Weinrib, and maybe others, to the corrective model as a normative ideal is not, in my view, a theory of judicial competency, or even a theory about the good, but something else altogether – a desire to achieve a very special kind of autonomy for the law.¹² There must, of course, be a starting-point or ultimate aspiration for law that stands, so to speak, outside any legal model. In this instance, it is the Kantian notion of freedom: the capacity to detach ourselves from circumstances and impulse to engage in free moral choice. But once that initial premise is in place, all else follows. Legal doctrine can be seen as but an unfolding of the idea of freedom, with adjudication as the process by which the external conditions of the free will are maintained and preserved. So conceived, law would have a self-contained or autonomous quality, which Weinrib once tried to capture by saying – to an amazed seminar of mine – that the end of tort law is tort law.

I share with Professor Weinrib the ambitions for a law that is

¹² E. Weinrib 'The Intelligibility of the Rule of Law' in A. Hutchinson and P. Monahan (eds) *The Rule of Law: Ideal or Ideology* (Toronto: Carswell 1987)

autonomous¹³ – maybe that is what made the Windsor Arms tea so absorbing to me. The issue, however, concerns the nature of that autonomy. On the one hand, we can both agree that law would not be law if it were simply the instrument of various interest groups of society, no matter how they might be defined (capitalists, manufacturers, the ruling class, consumers, women, men, etc.). On the other hand, a belief in the law's autonomy does not require tort law to have no other end than tort law. The end of tort law could be compensation, or alternatively deterrence, and yet still have the kind of autonomy we properly expect of the law. Similarly, the search for an autonomous law does not require that the end of constitutional litigation be constitutional litigation. The end could be, and in fact is, to interpret the values embodied in the constitution, including sexual equality, and to bring social reality into conformity with those values. This may yield a kind of autonomy that is different from the one contemplated by Weinrib, but it is all that law requires.

In all of Weinrib's work, as in Kant's, there is a pronounced disdain for instrumental judgments,¹⁴ and this hostility toward instrumentalism may underlie Weinrib's conception of law's autonomy. He wants a law that is free of all instrumental judgments and the contingencies and dependencies such judgments invariably entail. I readily acknowledge that structural reform will not satisfy this Kantian desire; although structural reform entails an exercise of substantive rationality, inasmuch as it requires the court to reflect upon the meaning of equality (or any other social ideal that might be implicated), the commitment to transform reality so as to bring it into conformity with these ideals will require the court to make instrumental judgments. The judge's duty is to engender a change in practical reality, and to do that he or she must design a plan of action, a social blueprint, and then anticipate the likely reaction to that plan. And to assist in these decisions and judgments, the judge confronted with a complex case is likely to seek expert advice from those versed in disciplines other than the law. This is instrumental activity pure and simple, but it is not in any way confined to structural reform. It is intrinsic to any enterprise or institution that seeks to make a difference in people's lives and therefore must interact with the social, political, and economic environment in which these people live. To demand of the law an autonomy that prohibits judges from engaging in instrumental judgments of this character is to

¹³ See Owen Fiss 'Objectivity and Interpretation' (1982) 34 *Stan. LR* 739; 'Conventionalism' (1985) 58 *So. Cal. LR* 177. My efforts to achieve an autonomy for the law are criticized by Judge Posner in his Wright Lecture, 'Conventionalism: The Key to Law as an Autonomous Discipline?' delivered on 18 November 1987, to be published in (1988) 38 *UTLJ* (forthcoming).

¹⁴ E. Weinrib 'Utilitarianism, Economics, and Legal Theory' (1980) 30 *UTLJ* 307. See generally Kant *Foundations of the Metaphysics of Morals* translated by L. Beck (1969).

make it a practical irrelevance. Indeed, despite what Weinrib says, even under the corrective model there is no escape from instrumental judgments. The judge seeking corrective justice must not only reflect upon and come to understand the relationship that exists between the parties, and give substance and context to the idea of freedom; he or she must also generate norms that preserve that relationship of equality. Does that relationship require the defence of contributory negligence? Does it require a five-thousand-dollar judgment or a five-million-dollar one? Instrumental considerations will play a role in answering these questions – they are endemic to all forms of law.

Aside from this hopeless search for a law that is free from instrumental judgments, the kind of autonomy Weinrib demands might be seen as proceeding from an interest in self-containment, in maintaining a unity between the end and the means of the lawsuit. In the corrective suit, that unity presumably is found in the relationship between the parties, because it is that relationship which both generates the suit and is said to be the subject of the suit. With the structural suit, in contrast, the values it seeks to further are extrinsic, in the sense that they are distinct from, or stand outside of, the relationship between the parties. These values belong to the public. To fault the structural suit on this ground, however, not only presupposes a conception of autonomy that takes a physical metaphor one step too far (equating autonomy with separateness), but misidentifies the true subject of the lawsuit. I would say that the subject of a lawsuit is not the relationship between the parties, but rather the public values or social ideals that are to be interpreted and actualized by it; and, if that is so, there is no discontinuity between object and subject in the structural suit. True, the court is dependent on the initiatives of private parties to bring to its attention specific threats to public values, but this dependence is only another instance of instrumentalism – using private parties for public purposes.

For these reasons, I do not believe there is an important difference between the structural and the corrective model if the concern be instrumentalism or even the unity between the subject and object of a lawsuit. Both entail instrumental judgments; both can be defined or redefined to create a unity between subject and object (if that be important). One difference does, however, emerge between the two models when they are analysed in terms of still another value or consideration that might inform Weinrib's demand for an autonomous law – a certain universalism. To understand how the corrective model is more likely than the structural one to achieve this universality, one must note the difference in values furthered by the two. Recall that the corrective model is supposed to further freedom in the Kantian sense, while the structural

suit seeks to further public values such as sexual equality and free speech, or, moving to torts, compensation and deterrence, etc. Weinrib's point is not that one value is 'better' or 'worthier' than another – that freedom is 'better' or 'worthier' than equality or any other public value. Rather, the difference lies in their scope. The Kantian freedom – that capacity to engage in moral choice detached from context – is said to be possessed by all rational beings, at all times and all places. Sexual equality might be desirable and a value that many of us (including Weinrib) are deeply committed to; it might even be highly valued by both our nations and entrenched in our constitutions and in that sense public. But it remains geographically and temporally confined to the persons who happen to hold those values or the communities that happen to be committed to those constitutions. Today, sexual equality is a public value of America and Canada, but not of Iran. Feminist litigation of the type I am imagining is possible in one context, but not in another. The same may be true of a law of torts that is dedicated to deterrence or even to compensation.

Accepting the Kantian metaphysics, as I have said I would, there may be no way of getting around this difference. Corrective justice, as conceived by Weinrib, implies no particular conception of the good; the value it seeks to further is the presupposition of all human institutions. Corrective justice might thus be able to achieve an emphatic universalism of a trans-historical or transcultural character, while structural reform is limited by the constitutional or political or social context that shapes and informs the public values or social ideals that it seeks to further. But, of course, that is as it must be and should be. I believe with Weinrib that law cannot be the instrument of any partisan interest within a society, but I do not understand why it must be burdened with the transhistorical or transcultural – the global – ambitions that Weinrib attributes to it. Law is the institution of a particular society, and must by necessity reflect the values and constitutional structure of that society. To aspire for a more universal scope is to confuse philosophy and law.

III

Professor Weinrib seeks a law that is, in almost all respects, radically autonomous – not dependent on some particular conception of the good, not dependent on the contingencies implicit in instrumental judgments, not dependent on cultural context and constitution. Weinrib promises that his law would have an 'inner intelligibility' or 'intellectual unity' whereby one element would be connected to another by reason alone. There is some question in my mind as to whether this stringent and, I would say,

strange form of autonomy can ever be achieved, even under the corrective model, but beyond that I fail to understand why it is even desired. It is not needed to ward off the attacks on the law that have for the last decade been launched by either the right (Law and Economics) or the left (Critical Legal Studies).¹⁵ To answer the right, and their program that reduces law to efficiency, one must only acknowledge the substantive elements in the law and deny that adjudication is no more than a series of instrumental or technical judgments as to how best to maximize the satisfaction of preferences. Adjudication is not *all* instrumental. To answer the left and their claim that law is politics, in the sectarian or partisan sense that is intended, we need not seek refuge in Weinrib's globalism. A society-by-society, era-by-era relativism is not the kind of relativism that would undermine the inherent worth and dignity of the law. Law must not serve the interest of some partisan groups in society, but no one thinks worse of the law because it is sensitive to a specific constitutional context, infused with instrumental judgments, and, as a discipline, not wholly self-contained. On the contrary.

The corrective model might, as Weinrib hopes, achieve an elegance and neatness that will always be slightly beyond the reach of the structural model – whether it be in the field of torts or in constitutional litigation – but the fact remains that any court system held to it would become an empty and trivial institution. The 'inner intelligibility' that Weinrib's model of corrective justice promises might be of great attraction to the scholastics and to others drawn to formal systems, but of no interest to anyone else, especially to those seeking justice. Just imagine having to depend on a court system devoted exclusively to the corrective model. The claims of the women's movement – or for that matter any social movement – would be forced to rely on a process that is individualistic in its conception of party structure; transactional in its conception of causation; and restorative, rather than reformative, in its remedial ambitions.

I opened my lectures in January by describing the great appeal that I found in feminism as a political and intellectual movement – its capacity to cast in a new and different light institutions and practices that once might have seemed ordinary and accepted. Feminism has a remarkable capacity to render problematic institutions that we take as 'natural' and 'normal.' In saying that, I had in mind familiar social institutions like motherhood, the market, and sexuality, which have been the principal foci of the feminist critique and which turned out to be the organizing themes of my January lectures. But now, after the Windsor Arms tea, and

15 Weinrib, *supra* note 8, 477–8; 'Enduring Passion' (1985) 94 *Yale LJ* 1825 (a review of Unger *Passion: An Essay on Personality*). For a fuller statement of my views, see 'The Death of the Law?' (1986) 72 *Cornell LR* 1.

after I have had time to reflect on that remarkable conversation, it seems that there is a fourth institution that must be added to that list – that of corrective justice, which, it now seems clearer to me than ever, is neither natural, nor normal, nor the standard by which all litigation should be judged. In fact, when the corrective model is looked at from the feminist perspective, far from being the standard, it strikes me as wholly anomalous and indeed counterproductive – not an aid but an impediment to the full vindication of the claims of sexual equality. It virtually bans women from the courthouse and remits them to the vicissitudes of politics, where they are likely to run up against the very structural impediments they are seeking to hurdle.

If this assessment is correct, and if the treatment of claims of sexual equality can be seen as representative of constitutional litigation in general, one can also see more clearly than ever that the corrective model commits the courts to a way of proceeding that would leave unfulfilled much of the promise contained in that recent and extraordinary moment in Canadian history – the formation of a Charter of Rights and Freedoms. The corrective model might yield a law that has the ‘inner intelligibility’ that Weinrib seeks and that we so admire in formal systems, but it would leave unfulfilled the deepest social aspirations of the law – to use reason to confront those who possess state power and to show them how that power might be used, and indeed must be used, to build a world that is worthy of the ideals that we hold in common.