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PRIVATE LIABILITY WITHOUT WRONGDOING

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Abstract

Rights-based theories of private law tend to be wrongs based and defendant focused. But many private law wrongs don't seem like genuine wrongs, at least when the background distribution of resources is unjust. A very poor person may, for example, be held legally liable for breaching a one-sided contract with a very rich person. When such a contract reflects and reproduces existing injustice, it is hard to view the poor person's breach of such a contract as a genuine wrong against the rich person. Conversely, some obvious moral wrongs don't generate legal liability. There is, for example, no private law duty of rescue in the absence of a prior relationship in many situations in which most would agree that there is a moral duty of rescue. Thus, private legal liability seems not to track moral wrongdoing in significant respects, raising the question what instead justifies such liability.

Instead of justifying private liability in terms of the defendant's wrongdoing, as corrective justice and civil recourse theorists do, we should seek a justification in terms of the plaintiff's moral permission to enforce her rights. Switching our gaze from the defendant's wrongdoing to the plaintiff's moral permission to enforce won't be normatively consequential if the plaintiff's moral permission to enforce her rights arises when and only when the defendant has wronged her. But, I argue, background injustice can drive a wedge between genuine wrongdoing and what a plaintiff is permitted to do to enforce her rights. By reconceptualizing private liability in terms of a plaintiff's moral permission to enforce her apparent rights, private law may be justified by the essential role it plays in constituting non-ideal political morality.

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Rights-based justifications of private law often appeal to corrective justice. When a defendant commits a tort or breaches a contract, he breaches a duty he owes to the plaintiff thereby wronging her, and so incurs a remedial obligation to, for example, pay damages to the plaintiff.[1] For those who think about morality in deontological terms, corrective justice is a natural framework to latch onto. If rights and duties govern moral relations between persons, then private law may best be seen as breathing legal life into those moral relations.

But many private law wrongs may not be genuine moral wrongs. It seems unlikely, for example, that an unjustly poor person who enters into a one-sided contract with an unjustly rich person morally wrongs the rich person if he breaches the contract. Consider a homeless man who agrees to pay a high rent to a landlord to get a roof over his head or a borrower in urgent need of money who borrows it from the bank at high interest rate. It is doubtful that the tenant and borrower morally wrong their contracting partners when they breach their agreements, if they are victims and their partners are beneficiaries of distributive injustice.[2] Yet, without more, the common law of contract will hold them to their deals and so find them

[1] See, e.g., Ernest J Weinrib, *The Idea of Private Law* (1995); Arthur Ripstein, *Private Wrongs* (2016); John Gardner, "What is Tort Law For? Part 1. The Place of Corrective Justice," (2011) 30 Law & Phil 1 at 22; Jules L Coleman, *The Practice of Principle* (2001) at 9, 36.

[2] Don't the tenant and borrower morally wrong their contracting partners by breaking morally valid promises? On the one hand, there is something seemingly incongruous about the idea that morality would condone exploitation by the unjustly rich of the circumstances of the unjustly poor. On the other hand, if morally valid exploitative agreements are not possible, then the unjustly poor cannot morally bind themselves to the unjustly rich on exploitative terms, even though doing so might be prudentially optimal for them given their circumstances. But notice that even if the unjustly poor cannot morally bind themselves to their contracting partners in this way, the legal system might nonetheless justifiably enforce morally invalid, exploitative agreements, if doing so would be instrumentally better from the standpoint of overall justice than leaving the poor without such mechanisms of commitment. Were the legal system to enforce such agreements on such grounds, the unjustly poor wouldn't owe performance to their exploiters. But they might owe it to the larger community, if their refusal to perform will undermine the community's efforts to make progress towards justice.

legally liable for breach of contract.[3] To successfully invalidate his deal, each would usually have to show that there was something about the bargaining process that prevented him from obtaining more equal terms—that "his bargaining power [was] grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."[4]

Thus, while the substantive one-sidedness of the deal is by no means irrelevant to a contract's validity, the court must be convinced that its one-sidedness was not intended by the disadvantaged party.[5] And while the impoverished circumstances of the disadvantaged party may be relevant to a court's analysis of his intent, the fact that going into the transaction he had much less than he is entitled to as a matter of distributive justice and the

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[3] *Lloyds Bank v Bundy*, [1975] 1 QB 326 at 336; See also *Restatement (Second) of Contracts* § 208 cmt a (1981) (factors relevant to the assessment of unconscionability "include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes"); ibid at cmt c ("Ordinarily … an unconscionable contract involves other factors as well as overall imbalance).

[4] *Lloyds Bank v Bundy,* supra note 3 at 339. See also Peter Benson, *Justice in Transactions* (2020) at 174 ("the principle of unconscionability . . . holds that parties who reasonably appear to be intending an exchange transaction are presumed, as between them, to intend to transact for equal value and . . . a serious disproportion in value between the promised performances, as measured against a competitive market price or some other appropriately reasonable standard, calls for an explanation.").

[5] See Benson, supra note 4 at 188-189 ("There is unconscionability . . . if enforcement of the transaction would unfairly enrich a party at the other's expense and the unfairness consists simply in a gross inadequacy of consideration that, given a party's value ignorance or inability to access equal value, cannot reasonably be explained on the basis of donative intent or assumption of risk."). Thus, usually, a demonstration of procedural unconscionability is necessary in order to invalidate a substantively unfair deal. Courts sometimes articulate this requirement in terms of a sliding scale: a strong showing of procedural unconscionability means that less substantive unconscionability is required and vice versa. *Gonski v Second Jud Dist Ct of Nev ex rel Washoe*, 245 P 3d 1164 at 1169 (Nev 2010); *Delta Funding Corp v Harris*, 912 A 2d 104 at 111 (NJ 2006); *Wis Auto Title Loans, Inc v Jones*, 714 NW 2d 155 at 165 (Wis 2006).

advantaged party more is not relevant to that analysis.[6] If an unjustly poor borrower is charged a higher interest rate by a lender than that same lender would charge an unjustly rich borrower, there is no problem of unconscionability, so long as the deal was comparable to other deals the poor borrower could have gotten in a reasonably competitive market that arose (or might have arisen) under those unjust conditions.[7] In other words, the status quo distribution of resources is not called into question when courts evaluate whether deals are not so unfair as to be unenforceable.[8]

Conversely, some apparent moral wrongs don't generate private legal liability. If I decline to rescue a stranger from danger at comparatively little cost to myself, I likely morally wrong the stranger. But under the common law the stranger typically won't be able to hold me legally liable for my failure.[9] Similarly, tort law imposes no general duty on me to use my property to serve the interests of others. My much poorer neighbor might

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[6] Benson, supra note 4 at 190 ("[T]he principle of unconscionability is nondistributive in character. … It does not aim to regulate starting positions and is consistent with the most extreme inequality of resources. Its effects are distributively neutral or arbitrary.").

[7] See Benson, supra note 4 at 184 ("a competitive market price is ordinarily fair to all transactors"); James Gordley & Hao Jiang, "Contract as Voluntary Commutative Justice," 2020 Mich St L Rev 725 (2020) (arguing that a competitive market is the correct benchmark for evaluating the substantive fairness of a transaction).

[8] As Peter Benson puts it: "transacting with persons with more limited or uncertain resources may expose those who do so to heightened risks of loss, and it is fully consistent with unconscionability that the latter parties insist on terms that compensate them appropriately for undertaking these risks. Hence the terms that the economically vulnerable can expect under this principle may only reflect and reproduce their disadvantageous positions in the distribution of wealth." Benson, supra note 4 at 190.

[9] Dan B Dobbs, Paul T Hayden & Ellen M Bublick, *The Law of Torts*, 2d ed (2011) at 405 ("Absent special relationships or particular circumstances or actions, a defendant is not liable in tort for a pure failure to act for the plaintiff's benefit."); *Jackson v City of Joliet*, 715 F 2d 1200 at 1202 (7th Cir 1983) ("Now there is of course no general common law duty to rescue a stranger in distress even if the rescue can be accomplished at no cost to the rescuer."). Several states have, however, enacted statutes subjecting persons to criminal liability for failures to provide assistance to those in peril or to report crimes. E.g., Vt Stat Ann tit 12 § 519 (1967); Wash Rev Code Ann § 9.69.100(1) (West 1987).

strongly prefer that I not build an addition to my hotel because it will interfere with her view of the ocean and greatly reduce the value of her property. But she has no private right against my building the addition.[10]

In short, tort law doesn't ordinarily require me to use my person or property to benefit another, and contract law doesn't ordinarily require me to help my contracting partner by releasing him from duties he owes me under our legally valid contract. I am generally entitled to do as I wish with my property or person and insist on contractual performance, even when others appear to have a compelling claim grounded in justice that I do otherwise. Private law establishes rights against misfeasance—rights against others using their entitlements in ways that compromises our own entitlements—not general rights against nonfeasance. Strangers are generally not duty bound to use their entitlements in ways that others would like them to, even when those preferences have a compelling basis in justice.

It seems, therefore, that there isn't a straightforward mapping from wrongdoing—even wrongdoing grounded in injustice—to legal liability. But if wrongdoing isn't the driver of private legal liability, what is? Here I argue that when persons' legal entitlements don't correspond to just entitlements because of background injustice, a defendant's private liability to a plaintiff may nevertheless be justified in terms of the plaintiff's moral permission to enforce her rights against the defendant. This is because the moral permission to enforce depends not on the plaintiff's true moral rights having been infringed or threatened, but on her having a reasonable belief that they have been. Therefore, her permission can encompass a range of situations—those in which her legal rights are being threatened and she has a reasonable basis for treating her legal entitlements as just entitlements—in which the defendant hasn't actually threatened or infringed her moral rights—because her legal rights don't in fact correspond to moral rights even though they reasonably appear to.

This doesn't mean that anything goes. The polity must be doing a good enough job at realizing justice to supply the plaintiff with such a reasonable

[10] *Fontainebleau Hotel Corp v Forty-Five Twenty-Five, Inc*, 114 So 2d 357 (App Fla 1959); see also *Letts v Kessler*, 42 N E 765 (Ohio 1896) (no liability for building a neighboring fence that deprived the plaintiff's windows of light and air); Ripstein, supra note 1 at 53 ("Tort duties restrict the ways in which each person can use his or her means; they do not require anyone to use his or her means in the way best suited to some other person's ability to use his or her means in a preferred way.").

basis. When injustice is too obvious or widespread neither a justification grounded in the defendant's wrongdoing nor a justification that appeals to the plaintiff's moral permission to enforce her apparent rights will work. But the polity need not actually be realizing justice for a justification grounded in the moral permission to enforce to get off the ground.

There is something superficially jarring about the idea that a person might permissibly act against another based only on a reasonable belief that the other has infringed her rights. But if it is not possible for a potential right holder to know for sure what her true rights are because the underlying problem of justice is an epistemically complex one, then requiring that she have knowledge of her rights as a predicate to protecting herself is overly demanding. Reasonableness here is thus to be assessed relative to the epistemic position of the right holder when it comes to figuring out the demands of justice.

The conception of the relationship between private rights and justice that I offer here departs significantly from that of corrective justice theorists in the Kantian tradition. Even in the face of the apparent conflict with morality and justice suggested by the examples above, these theorists insist that private law is about enforcing rights and remedying wrongs.[11] Private law, they contend, is about doing a particular kind of justice—corrective justice—that is distinct from and independent of the justice of the larger distribution of benefits and burdens.[12] Private law, in other words, is centrally concerned with the protection of persons' rightful means, whatever they happen to be, not with furthering persons' needs or ends or promoting substantive equality.[13] Private law thus instantiates a particular kind of

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[11] Leading Kantian theorists of corrective justice include Arthur Ripstein and Ernst Weinrib. For statements of their views, see Ripstein, supra note 1, and Weinrib, supra note 1. By contrast, Jules Coleman and Stephen Perry articulate more remedy-centric conceptions of corrective justice that are compatible with more agnosticism about the content of the wrongs that private law remedies. Coleman, supra note 1 at 31-34; Stephen R Perry, "Responsibility for Outcomes, Risk and the Law of Torts" in Gerald J Postema, ed, *Philosophy and the Law of Torts* (Cambridge: 2009) 72.

[12] Ernest J Weinrib, *Corrective Justice* (2012) at 18-19, 296; Arthur Ripstein, "Civil Recourse and Separation of Wrongs and Remedies," (2011) 39 Fla St UL Rev 163 at 199; Ripstein, supra note 1 at 43.

[13] Benson, supra note 4 at 454; Ripstein, supra note 12 at 173.

formal freedom—freedom as independence—according to which agents are free to do as they wish with their means unshackled by obligations to serve particular persons' needs and purposes.[14]

To fully justify institutions of private law in these terms, we need to justify the priority accorded to this formal freedom to do what we want with our means over the substantive freedom to satisfy our needs and realize our ends. It may be true that everyone ought to be recognized as a being who is free to set her own morally permissible ends. But honoring a person's capacity to use the means that she happens to have to pursue her freely chosen ends doesn't entail that she has the means to realize those ends. Why not instead give primacy to ensuring that each has an equal ability to pursue her freely chosen ends? Perhaps this should be the job of other institutions—in particular, public institutions of taxation and transfer. But what if those institutions aren't doing their job? To satisfactorily vindicate the Kantian conception of private law as a justificatory theory, corrective justice theorists must show how their emphasis on formal freedom is compatible with justice writ large under non-ideal conditions.[15]

My aim in this paper is not to show that the Kantians cannot meet this challenge. Instead, I offer an alternative way forward that starts from the assumption that justice is a singular ideal—not one that can be compartmentalized into distributive and corrective components.[16] A defense of this assumption is beyond the scope of the paper, but it has enough plausibility to constitute a reasonable starting point.[17] I simply assume that at the

[14] The principle of independence as Ripstein formulates it is the "moral idea that no person is in charge of another." Ripstein, supra note 1 at 6.

[15] For an ingenious attempt to do so, see Benson, supra note 4 at 448-476.

[16] I therefore also reject the idea defended by Andrew Gold that there is a further distinct domain of justice, redressive justice, that governs when a right holder, or someone acting on her behalf, can force another to redress an infringement of her rights. See Andrew Gold, *The Right of Redress* (2020) especially ch. 2.

[17] For direct challenges to the independence thesis, see Peter Cane, "Distributive Justice and Tort Law," (2001) NZL Rev 401; Hanoch Dagan, "The Distributive Foundations of Corrective Justice," (1999) 98 Mich L Rev 138; Richard L. Lippke, "Torts, Corrective Justice, and Distributive Justice," (1999) 5 Legal Theory 149; Dan Priel, *The Impossibility of Independent Corrective Justice* [unpublished]; Hillel Steiner, "Corrective Rights," in Mark McBride, ed, *New Essays on the Nature of Rights* (2017) 215. For further arguments that considerations of distributive justice are relevant to the normative evaluation of private law, see Aditi Bagchi, "Distributive Justice

fundamental level justice entails some configuration of moral rights and duties that fairly distributes benefits and burdens among persons. Figuring out exactly what such a configuration looks like is an immensely complex normative task. But that complexity isn't a problem for my conception of private law. On the contrary, the existence of normative uncertainty about justice lends plausibility to my approach. For it all but guarantees that even a reasonably well-functioning polity won't perfectly realize justice, and that therefore persons' legal rights generally won't perfectly correspond to their moral rights—the rights that justice assigns to them. Thus, requiring that a plaintiff actually be wronged as a condition of her standing on her legal rights is overly demanding.

Once we take as given that persons' legal rights generally diverge from their moral rights because of distributive injustice, we will need to appeal to something other than justice to justify an institution like private law that protects persons' legal rights against interference by other private persons in the way that private law does. I believe that we can find a solution by reorienting our focus away from a defendant's possible wrongdoing and towards the plaintiff's moral permission to stand on her rights. Given pervasive and intractable uncertainty about justice, a defendant who infringes a plaintiff's legal rights isn't necessarily morally wronging her, because her legal rights may not correspond to her just entitlements. But we should not conclude from this divergence that the plaintiff is disabled from protecting herself against possible infringements of her moral rights. Instead, we should relax the standard, requiring only that she have a reasonable belief that she has been wronged. Then, so long as there is normative uncertainty about what her true moral rights are, and she has a reasonable basis for treating her legal rights as genuine moral rights, she may be morally permitted to enforce her legal rights against a defendant who has infringed them. Private law may then be justified insofar as it institutionalizes this moral permission.

On this alternative conception, private legal liability isn't properly directed towards ensuring that justice is done. Rather, given uncertainty that makes it difficult for reasonable people to determine the content of their

and Contract," in Gregory Klass, George Letsas & Prince Saprai, eds, *Philosophical Foundations of Contract Law* (2014) 193; Gregory Keating, "Distributive and Corrective Justice in the Tort Law of Accidents," (2000) 74 S Cal L Rev 193; Tsachi Keren-Paz, "Egalitarianism as Justification," (2003) 4 Theor Inq L 275.

true moral rights, private law is justified when it reflects the moral considerations that govern a plaintiff's actions when she uses it to stand on her legal rights in the face of normative uncertainty about justice. In short, we should look at private law through the lens of enforcement in the face of normative uncertainty about justice rather than correction. Crucially, given uncertainty about whether a defendant's infringement of the plaintiff's legal rights corresponds to a genuine wrong, the plaintiff's permission to enforce her rights, and the defendant's resulting liability, will depend on factors that transcend the defendant's wrongdoing. In particular, it will be important that the plaintiff's ability to hold the defendant to account be limited by standards that are reasonably accessible to private parties. This means that the boundaries of the defendant's liability to the plaintiff may exceed or fall short of the boundaries of his moral wrongdoing. Contra corrective justice theories, the defendant's actual wrongdoing is neither necessary nor sufficient for liability.[18]

Although this conception imposes some constraints on the way in which persons' private legal rights ought to be defined, it leaves the nature and distribution of persons' entitlements—and therefore much of property law and contract law—underdetermined. Indeed, one of the theory's advantages is that it can explain why persons may enforce their legal rights despite injustice in the underlying distribution of benefits and burdens. To put the point slightly differently, the theory is about the normative considerations that govern a plaintiff's permission to hold a defendant accountable. These normative considerations ought to shape to some extent the legal rights that parties have. But those legal rights ought also to be shaped by other relevant normative considerations. For example, contract law is in part about enabling people to build cooperative relationships with others, an aim external to the theory that should shape how contractual rights get defined. My limited claim is that contractual rights ought also to be shaped by considerations that govern the permission of parties to enforce their rights when cooperative relationships break down.

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[18] The significance my theory places on normative uncertainty about justice makes it distinct from those of others such as Andrew Gold and Sandy Steel that also put the moral permission to enforce one's rights front and center. Andrew Gold, "A Theory of Redressive Justice," (2014) 64 UTLJ 159; Gold, supra note 16; Sandy Steel, "Defensive and Remedial Liability" in Paul Miller & John Oberdiek, eds, *Oxford Studies in Private Law Theory Volume II* (forthcoming).

My main aim is normative rather than descriptive—to argue that the plaintiff's moral permission to stand on her rights is a superior justificatory basis for determining the bounds of private legal liability than a defendant's wrongdoing. Thus, a lack of fit with the doctrinal landscape is not fatal to the theory. But, of course, the significance of a normative theory of law depends in part on the extent to which it can justify actual legal institutions. A secondary aim is thus to argue that a focus on this moral permission sheds illuminating light on private law doctrine.

There are several affinities between my theory and civil recourse theory. Most importantly, civil recourse theory also prioritizes the perspective of the plaintiff.[19] And civil recourse theory's main proponents, John Goldberg and Benjamin Zipursky, have suggested that the justification for a system of civil recourse may be "rooted in the natural privilege of individuals to respond to the mistreatment of others."[20] But my focus on the plaintiff's perspective is more single-minded. For Goldberg and Zipursky insist that wrongs lie at the center of tort law, whereas a central conclusion of my argument is that private legal liability ought not to track moral liability, at least when there is background distributive injustice.[21] And, whereas Goldberg and Zipursky seek in the first instance to provide a parsimonious account of the essential structure and concepts of tort law,[22] I come at the

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[19] John CP Goldberg & Benjamin C Zipursky, *Recognizing Wrongs* (2020) at 162-63; Benjamin C Zipursky, "Rights, Wrongs, and Recourse in the Law of Torts," (1998) 51 Vand L Rev 1 at 82; Benjamin C Zipursky, "Civil Recourse and the Plurality of Wrongs: Why Torts are Different," (2014) NZL Rev 145 at 146 [hereinafter Zipursky, Plurality of Wrongs].

[20] John CP Goldberg & Benjamin C Zipursky, "Tort Law and Responsibility," in John Oberdiek, ed, *Philosophical Foundations of the Law of Torts* (2014) 17 at 27-28. See also Benjamin C Zipursky, "Substantive Standing, Civil Recourse, and Corrective Justice," (2001) 39 Fla St UL Rev 299 at 332. In a similar vein, Andrew Gold suggests that private law may be understood as a "substitute for a wronged party's right to rectify or prevent violations of her primary moral rights" in a civil society where self-help is often prohibited. Andrew Gold, "A Moral Rights Theory of Private Law," (2011) 52 Wm & Mary L Rev 1873 at 1878-79.

[21] Goldberg & Zipursky, supra note 19; John CP Goldberg & Benjamin C Zipursky, "Torts as Wrongs," (2010) 88 Tex L Rev 917; Zipursky, Plurality of Wrongs, supra note 19 at 146-47.

[22] E.g., Goldberg & Zipursky, supra note 19, at 233 ("the wrongs of tort are 'constructions' (or 'reconstructions') of injurious wrongs explicitly or implicitly

problem from the opposite direction. Rather than first developing a theory of the legal landscape and then asking what values it may serve, I begin with the morality that governs what private parties may do to enforce their rights and ask to what extent it might justify something resembling our institutions of private law.

Perhaps most importantly, in contrast to other leading theorists of private law, I seek a justification of private law that can be directly located in a larger non-ideal theory of deontological political morality. When someone's private rights have been infringed, we have departed from ideal justice, and so we must confront a question of non-ideal theory directly: what may we do to respond to the injustice? This is true even when the background conditions against which the infringement took place are just. But the need to situate our theory of private law in a non-ideal theory of political morality becomes more acute still when the background conditions are unjust, such that a legal rights infringement won't necessarily correspond to a rights infringement at the moral level.

One final remark before I begin. The notion of moral wrongdoing that I employ is a thin one. A defendant morally wrongs the plaintiff when he breaches a duty of justice that he owes her by infringing her rights. Comparatively innocent behavior—like breaching a morally valid contract as a result of accidentally overcommitting oneself—can result in breach of such a duty. Conversely, comparatively culpable behavior—like driving recklessly but fortuitously failing to injure anyone—may not result in any breach of such a duty. In this respect, my conception of wrongdoing tracks the conception that Arthur Ripstein deploys in his corrective justice account of private law (though contra Ripstein I deny that private legal wrongs are necessarily infringements of moral rights).[23]

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recognized in doctrine and in social norms"); Goldberg & Zipursky, supra note 21, at 953-71.

[23] A wrong for Ripstein "consists in the inconsistency of the defendant's act with the plaintiff's right." See Ripstein, supra note 1 at 87. For discussion of the ways in which wrongdoing in this sense is unrelated to notions of culpability or blameworthiness, see ibid at 15-17, 84, 87, 117-19, 143-45. Goldberg and Zipursky also employ a thin notion of wrongdoing. Goldberg & Zipursky, supra note 19 at 189-190; John CP Goldberg, "Inexcusable Wrongs," (2015) 103 Cal L Rev 467 at 501-505; John CP Goldberg & Benjamin C Zipursky, "Tort Law and Moral Luck," (2007) Cornell L Rev 92 at 1149-1163.

The rest of the article is organized as follows. Part I considers the nature of a potential plaintiff's moral permission to enforce her rights, focusing in particular on how uncertainty about the content of those rights shapes that permission. Part II sets out my main claim—that private law can be justified as instantiating this moral permission. Part III explores implications of the theory. Part IV discusses the relationship of the theory to other prominent theories of private law. Part V concludes.

I. THE MORAL PERMISSION TO ENFORCE

My central claim is that private legal liability ought to reflect the moral considerations that limit what private parties may do to enforce their rights against one another rather than mirroring the underlying rights themselves. What exactly are those moral considerations?

To get a grip on this question, let's begin by considering what private persons are morally permitted to do to actual or apparent wrongdoers in circumstances in which a state enforcement mechanism is lacking or unable to protect them. From there, we may be able to figure out what changes when we introduce such an enforcement system. There are, of course, salient differences between extralegal acts of self-help and self-defense and private legal enforcement of rights. But, as I will argue, they are not morally fundamental. When we stand on our rights within or without the legal system, we burden others, including apparent wrongdoers, and there are moral limits on the burdens we may place on others even when our rights may be at stake.

A. Enforcement of Rights without the State

Enforcement of rights can take on a variety of forms. Rights can be protected prospectively by taking measures designed to minimize rights infringements or prevent them from occurring. They can also be enforced after the fact by measures that induce infringers to redress their infringements. Sometimes mild measures are all that is required as when the actual or threatened infringement is not serious and wasn't intended or the infringer is motivated to redress harm he has caused. In the case of an inadvertent trespass, for example, a simple reminder may be enough to prevent the trespass from occurring. After the fact, it might be enough to ensure that the trespasser acknowledges what he has done thereby affirming the status of the property owner. More substantial measures such as threats of harm or forced compensation of the right holder may be needed when the right holder has been or will be harmed by the actual or potential infringement or the infringer has profited from it or the affront to the status of the right holder is serious.

Evaluating the permissibility of such measures from a deontological standpoint requires us to look in the first instance to the right that is or at least appears to be under attack. Rights, it is usually supposed, not only give rise to primary duties to refrain from acting in certain ways and secondary duties to redress infringements of those primary duties, they also justify others taking certain actions to protect the right holder from breaches of those duties.[24] What exactly do a person's rights license her (and others) to do to the duty bearer in response to actual or threatened infringements?

Let's begin by asking what a person is permitted to do in the absence of a state enforcement apparatus that is willing and able to intervene on her behalf. The scenarios I have in mind range from state of nature scenarios in which a state is entirely lacking to scenarios in which state institutions exist but are unwilling or unable to protect her rights. Legal privileges of self-help often exist in the latter scenarios, giving a right holder who engages in prima facie impermissible conduct against her attacker a defense to legal liability.[25] In all such scenarios, there are moral constraints on what the

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[24] See Jonathan Quong, *The Morality of Defensive Force* (2020) at 6-7 ("the common purpose of [justified acts of defensive force] is to defend people's rightful entitlements—to enable people to defend what is rightfully theirs as determined by the appropriate principle of social or distributive justice").

[25] The legal privileges of self-defense and defense of property require that the threatened infringement of the defensive agent's rights to her person or property be imminent. Douglas Ivor Brandon, Melinda Lee Cooper, Jeremy H Greshin & Alvin Louis Harris, "Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society," (1984) 37 Vand L Rev 845 at 855, 861. The privilege to abate a nuisance may be justified by inadequacies of judicial alternatives. Ibid at 870 and note 144. The historical justification of the privilege of recapture of property stemmed from the weight the law placed on physical possession as a determinant of ownership and the inadequacy of legal remedies for dispossession. Courts historically considered physical possession the main determinant of ownership, they would rarely compel the return of the property, awarding damages instead, and the length of the judicial process meant that there would be extended period during which the owner would suffer a deprivation of his property. Ibid at 863. It is less clear that the continuation of the privilege under contemporary law

right holder can do to enforce her rights. These constraints make the permissibility of enforcement depend on the nature of the actual or threatened infringement and the surrounding circumstances.

To begin with, the availability of alternative courses of action that would enable the right holder to adequately protect herself renders courses of action that would impose greater burdens on her attacker impermissible. Enforcement of rights is, in other words, subject to a "necessity constraint."[26] If someone is about to infringe a person's rights absentmindedly, for example, it will usually suffice for her to simply alert the potential infringer to what is about to transpire, rendering the use of any degree of force impermissible. The law also imposes such limits on legal privileges to protect one's person and one's property. The privilege of self-defense, for example, only covers the use of an amount of force that is reasonably necessary to ward off an attack on one's person.[27]

There are also moral limits on the amount of necessary force that a person may use to enforce her rights. Persons aren't morally permitted to enforce their rights when doing so would impose too great a burden on the infringing party given the severity of the actual or potential infringement. This is often referred to as the "proportionality constraint."[28] Thus, for example, it isn't morally permissible to kill a person who is only threatening

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can be justified in these terms. Ibid at 865. Because legal privileges of self-help are defeasible to a final determination by a court, it is misleading to describe them as extralegal. Zoë Sinel, "De-Ciphering Self-Help," (2017) 67 UTLJ 31 at 64.

[26] Jeff McMahan, "Proportionality and Necessity in Jus in Bello," in Seth Lazar & Helen Frowe, eds, *The Oxford Handbook of Ethics of War* (2016) 418 at 418. See also Gold, supra note 16 at 51 (arguing that necessity constrains what a victim may permissibly do in response to a theft).

[27] *Restatement (Second) of Torts* § 70 (1965). Similarly, the privilege to use force to prevent an intrusion upon property depends on the right holder reasonably believing that such force is necessary to do so. Ibid at § 77 cmt g & § 81. And only necessary force may be used to abate a nuisance and only after the tortfeasor has failed to heed a request from the abater where it is practical and worthwhile to do so. Ibid at § 201 & cmt o. See also ibid at § 88 cmt b (the privilege of recapture of land must, where practical and worthwhile, follow a request to the other to give up possession).

[28] McMahan, supra note 26 at 418. See also Gold, supra note 16 at 52 (arguing that proportionality constrains what a promisee may do in response to a breach of contract).

to stamp on one's foot even if this is the only way to stop him. Legal privileges of self-help are similarly limited, covering the use of only "reasonable force."[29]

Finally, and most importantly for present purposes, in situations where self-help is morally permissible there may be uncertainty about the existence and nature of a threat or infringement. This uncertainty may shape the permissibility of actions that a right holder takes in response. In this vein, legal privileges of self-defense extend to persons who hold reasonable but mistaken beliefs that their rights are being threatened.[30]

Some contend that at the moral level the reasonableness of a defensive agent's mistaken belief can excuse but cannot justify aggressive action that she takes against her apparent aggressor as a result of holding the belief.[31] On this view, she acts impermissibly when she acts on a reasonable but mistaken belief, though she isn't culpable for doing so. This suggests that tort law, as an area of law that is generally hostile to excuses,[32] has made a mistake in extending the privilege of self-defense to reasonable but mistaken beliefs,[33] or at least that we must appeal to reasons that go beyond the right holder's moral permission if we are to justify the legal privilege without appealing to an excuse.[34]

But making the moral permissibility of a right holder's action against an attacker hinge on the correctness of her belief seems inconsistent with our judgments about wrongful conduct in other contexts. When, for example, a person accidentally injures another because he is reasonably ignorant

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[29] *Restatement (Second) of Torts* § 63-68 (1965) (self-defense against threats to the person); ibid at § 77, 79-80 (defense against threats to own property); ibid at § 201(1)(b) (entry on land to abate a nuisance must be made "at a reasonable time and in a reasonable manner"); ibid at § 88 cmt b (the privilege of recapture of land covers only reasonable force that is "not intended or likely to cause death or serious bodily harm").

[30] Page Keeton & William Lloyd Prosser, *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 125; *Restatement (Second) of Torts* § 63-68 (1965).

[31] Kaila Draper, "Defense," (2009) 145 Phil Stud 69 at 74; Sinel, supra note 25 at 56 & n 66.

[32] Goldberg, supra note 23 at 467.

[33] Sinel, supra note 25 at 57.

[34] See Goldberg, supra note 23 at 492 (arguing that the privilege extends more broadly to ensure that it covers all cases of genuinely justified self-defense).

of pertinent facts, we don't necessarily deem his action wrongful. Suppose, for example, that a person driving exceedingly carefully and attentively nonetheless hits a child when the child suddenly and unexpectedly runs out into the road. Had he known everything that was happening in the vicinity at the time he was driving past, he could have predicted that this would happen, in which case it would have been wrongful for him to run over the child. But if he couldn't possibly have known the relevant facts, we likely wouldn't deem him negligent given that he was driving very carefully. Much of what makes an activity like driving risky is that we don't know in advance facts that would enable us to predict what will materialize. Our judgment that the driver wasn't at fault because he took reasonable care thus turns in part on our judgment that he couldn't have reasonably known that the risk would materialize.

Of course, what will count as a reasonable belief depends on the circumstances, and it may be that the beliefs of someone who is intentionally imposing harm on another—including someone who is engaging in aggressive defense of their own person in the face of an imminent attack— must surmount a higher epistemic threshold than those of someone who is engaging in a commonplace but risky activity like driving.[35] But, even in cases in which an agent intends to harm another in order to defend herself, making the justification for her action hinge on her being correct about relevant facts when she otherwise acts reasonably is overly demanding. It strikes the wrong balance between her interests and the interests of her apparent attacker when there is significant uncertainty about relevant facts that she cannot easily resolve without risking succumbing to the attack—at least when it is not her fault that she faces this uncertainty. It will make the

[35] Zoë Sinel argues that there is tension between tort law's privilege of self-defense, which gives a defendant who has committed a prima facie battery a defense to liability where she had a reasonable but mistaken belief that the plaintiff was imminently, and the law of trespass, which denies a defendant who trespasses on the plaintiff's property or chattels an analogous defense when she reasonably believes that the property or chattels belong to the defendant. Sinel, supra note 25 at 57. But in the trespass scenario, the defendant generally isn't in a situation in which the consequences of failing to act would result in serious harm to her person were her reasonable belief turn out to be correct. Thus, it makes sense that the law holds her to a higher epistemic standard than it does the defendant who believes that she is under attack.

morally conscientious person who seeks to guarantee that she doesn't wrong another reluctant to ever defend herself in a manner that threatens an apparent attacker's rights for fear of doing something wrong. I conclude that the reasonable but mistaken right holder acts permissibly when she acts in defense of her rights against an apparent infringer in the light of a false but reasonable belief that he is threatening her rights.[36]

B. Uncertainty about Justice

Figuring out what justice requires is an immensely complicated task. If, therefore, there is substantial normative uncertainty about the content of the correct principles of justice and thus about what moral rights we have, we have further reasons to doubt that the moral permissibility of an act a person takes to enforce her (apparent) rights depends on her having a correct belief that her rights have been infringed or are under attack. This is because a right holder may not easily be able to determine the content of her rights in the face of such uncertainty, even if she has unlimited time to fully apprise herself of the relevant facts about the conduct of her apparent aggressor.

In contrast to the paradigmatic case of self-defense described above where the right holder seems to be under imminent attack but there is uncertainty about her apparent attacker's conduct, it isn't the urgency of her situation that makes it overly demanding to require that her beliefs about the apparent threat or infringement be correct. It is rather the complexity of a deep normative problem—a problem that she likely couldn't definitively resolve even if she spent a lifetime thinking about it and had access to all relevant facts. Even reasonable people in an ideal liberal democratic society will disagree about justice.[37] If even reasonable people will disagree about

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[36] This conclusion aligns with Benjamin Zipursky's claim that an erroneous but reasonable belief that defensive force was immediately necessary to avoid death or grievous bodily harm can justify and not merely excuse an abused woman's killing of her husband when she finds herself in an abusive and dominating relationship. Benjamin C Zipursky, "Self-Defense, Domination, and the Social Contract," (1996) 57 U Pitt L Rev 579.

[37] John Rawls, *Political Liberalism* (1993) at liv ("Reasonable political conceptions of justice do not always lead to the same conclusion, nor do citizens holding the same conception always agree on particular issues."). See also Ronald Dworkin, *Law's Empire* (1986) at 178 (in a pluralistic society "different people hold different views about moral issues that they all treat as of great importance"); Jeremy Waldron,

what rights they have, making a person's permission to enforce her rights hinge on the truth about her moral rights looks overly demanding. This suggests that a person's moral permission to enforce her rights against an apparent infringer depends not on the latter threatening or infringing her rights, but on the existence of reasonable grounds for her to treat him as if he is a wrongdoer.

Given the argument developed thus far, what will count as a reasonable basis for responding to her apparent infringer in this way will depend on the circumstances. The epistemic burden she faces will be higher, all things equal, the greater the costs she is likely to inflict on him as a result of enforcing her rights. It will also depend on the burdens that she will incur if she must be sure of the truth before responding to the attack. When ascertaining the truth would be safe and straightforward, she must be sure of her rights to justify enforcement of them. But when ascertaining the truth will be difficult or impossible even given a lot of time, as will often be the case when it comes to figuring out the content of her just entitlements, a false belief about her rights that is nonetheless rational given her evidence absent further investigation is more likely to suffice.

II. PRIVATE LAW

If my argument in Part I is correct, then at least in the absence of a state that is ready and willing to protect a private party's moral rights, a right holder only needs to have a reasonable basis for believing that her rights have been infringed in order to act against an apparent infringer. Given uncertainty about the content of justice, this means that she only needs a reasonable basis to suppose that the putative right that she perceives to be under attack constitutes a genuine moral right—that it embodies genuine claims of justice. But what counts as a reasonable basis will depend on the circumstances—in particular, it will depend on how intractable the normative uncertainty is for the right holder to resolve and the costs she will incur should she spend time trying to more accurately resolve it. For by enforcing her apparent rights, the right holder imposes costs on her apparent infringer. Unless she has good grounds for believing that he is infringing genuine

Law and Disagreement (1999) at 1-4 (emphasizing the importance of philosophical reflection on pervasive disagreements about justice).

moral rights that are commensurate with the risk that she thereby imposes on him, her act is at best reckless and therefore unjustified.

What does any of this have to do with private law? Thus far I have been assuming that there is no appropriately constituted state that is willing and able to protect the right holder. Circumstances are different when such an entity exists and has made a legal process for enforcing her claims available to her. Yet, as I will now argue, while the shape of the right holder's moral permission changes in response to these different circumstances, the deeper principles underlying the permission remain the same. I conclude that under conditions of moderate background injustice private law can be justified as instantiating a right holder's private moral permission to enforce her rights.

A. Uncertainty about Justice and the State

Beyond its role in the enforcement of private rights, the state plays an important allocative role—determining the content of persons' legal rights and the mechanisms of acquisition and transfer through property law and contract law and, more indirectly, the institutions of taxation and transfer. The state should, of course, strive to make these allocative decisions justly. Corruption of the political process may ensure that the state gets nowhere near that ideal. And pervasive uncertainty about justice means that even a state that isn't at the mercy of corrupting forces is unlikely to perfectly realize justice. But a well-functioning state is nonetheless well situated relative to private parties to resolve much normative uncertainty about justice.

The comparative advantage of such a state in this regard is obvious when the uncertainty has its origin in metaphysical indeterminacy about the content of justice—when there are multiple possible configurations of rights that would realize justice, such that the realization of justice requires coordination on one of them. This is because coordination is something that by its nature is difficult for individuals to achieve acting on their own. It is likely that justice is to some extent metaphysically indeterminate. There will be multiple ways of distributing resources equally when resources are divisible and fungible. Further indeterminacy will exist if competing considerations of justice are incommensurable, such that there are multiple ways of resolving conflicts among them that are indifferent from the standpoint of overall justice.[38]

A well-functioning state will also have a comparative advantage when it comes to obtaining the community-wide information required to figure out what any given principle concretely entails in practice. This is because the relevant information will be easier for a centralized authority to obtain than it will for private persons as a general matter.[39]

Finally, an appropriately constituted state has a comparative advantage when it comes to epistemic normative uncertainty about the true principles of justice—uncertainty that arises because it is difficult to figure out what those principles are. When there is epistemic uncertainty about justice, disagreement about justice is likely to ensue. This makes it important to have democratic procedures in place that ensure that the principles that get implemented reflect the reasonable input of all, both because and insofar as more representative procedures may be more likely to arrive at the truth and because of the intrinsic importance of each of us having an equal say in the determination of collective outcomes.[40]

Yet the comparative advantage of the state over private parties doesn't extend to every question of justice. A well-functioning state will usually have the comparative advantage when it comes to systemic considerations of justice that govern relations among persons qua members of the polity. But this comparative advantage doesn't obviously extend to more local considerations of justice that govern persons' particular relationships with

[38] In Kantian political theory, the state is needed to resolve such indeterminacy—indeterminacy that is "normative rather than empirical or epistemic." Arthur Ripstein, *Force and Freedom* (2009) at 169-173.

[39] Benson, supra note 4 at 455 ("given the nature and role of principles aiming to ensure fair background conditions over time, the systemic, unavoidably complex, and long-term nature of the factors that must be considered for this purpose cannot be feasibly known and readily followed by individual transactors in their circumscribed local situations or ascertained and assessed by courts in their adjudicative role"); Rawls, supra note 37 at 267-268 (explaining why individual persons cannot easily realize systemic justice through their private transactions).

[40] Thomas Christiano, "The Authority of Democracy," (2004) 12 J Pol Phil 266 (arguing that democratic institutions secure persons' fundamental interests in having an equal say in the processes of collective decision making, an interest that arises given background conditions of universal fallibility and disagreement).

others—familial, social, contractual, collegial and the like. There will be significant dimensions of fairness and flourishing that arise in such local contexts that private parties will generally be better situated than the state to evaluate. There may also be compelling intrinsic reasons sounding in autonomy and equality that favor resolution of such questions of justice at the local level.

B. Implications for the Moral Permission to Enforce

These asymmetries between the state and private parties have implications for understanding what private parties are morally permitted do to one another in the name of enforcing their rights. Consider first the implications of metaphysical indeterminacy about justice. Where the state has resolved the indeterminacy by choosing from the eligible set a configuration of entitlements that realizes justice pursuant to a legitimate process, private parties may stand on the rights that the state has endowed them with. Insofar as the state has failed to do so, rights are indeterminate, but persons may be permitted to act on beliefs about their possible rights that are compatible with all reasonable possible resolutions of the systemic indeterminacy.

When it comes to the state's resolutions of epistemic normative uncertainty about systemic justice, private parties may have a reasonable basis to defer to the state's determinations of what is rightfully theirs. It must not be obvious to them that they are beneficiaries of systemic injustice. But so long as the state has determined persons' legal rights in a way that is sufficiently attentive to considerations of systemic justice, private parties have a reasonable basis to defer to those determinations.

It will be important that the content of their legal rights is straightforward for private parties to ascertain given the epistemic constraints that they are operating under. In particular, they must be able to know the content of their legal rights without themselves having to resolve questions of systemic justice that are relatively inaccessible to them as private parties. So long as they can do this, and they have a reasonable basis to treat their entitlements as just entitlements, they are morally permitted to treat them as such when interacting with others, even if justice in fact prescribes a different distribution of resources.

When it comes to normative uncertainty about justice that private parties are better situated than the state to resolve, by contrast, private parties no longer have reason to defer to the state's resolution of such uncertainty in their interactions with other private parties. Thus, it will be important that the state define persons' legal rights in a way that facilitates local resolution of such questions.

C. Private Rights of Action

A striking feature of private law institutions is their empowerment of private parties to initiate and pursue claims against those who they claim have infringed their legal rights. To legally vindicate one of her private legal rights, a plaintiff must initiate a lawsuit against the defendant and convince the court that the defendant has committed a legally recognized wrong against her. If the plaintiff succeeds, the result is a judgment against the defendant ordering him to take some action to remedy the legal wrong. The plaintiff is free to withdraw her claim at any time during the proceedings and settle the matter with the defendant. If she does so, that is the end of the matter. It is thus on her to see it to the end in order to receive a judgment from the court ordering a remedy. Thus, while the state is involved in the enforcement of private legal rights, enforcement always occurs at the behest of the plaintiff.[41]

This, moreover, is the way that the plaintiff usually must proceed in order to protect herself. Legal privileges of self-help are limited. They generally arise only in circumstances in which it would be especially burdensome to the right holder to be forced to seek recourse through the legal system instead. Thus, ordinarily the legal system requires right holders to litigate their claims if they want to vindicate their private rights themselves.

Superficially at least then, it appears that private law institutions don't aim directly at ensuring that justice is done but instead seek to empower victims to enforce their claims against wrongdoers while ensuring that such enforcement occurs via legal channels. Is, then, an appeal to the plaintiff's moral permission the best way of justifying this institutional structure? The argument advanced thus far suggests that it is if two conditions hold: (i) private parties have a reasonable basis for treating their private legal rights as genuine moral entitlements; and (ii) private legal institutions ensure that legal claims get resolved in a procedurally fair way—protecting defendants from the overreach that could result from good faith efforts of self-help that plaintiffs would need to engage in order to protect themselves in the

[41] John Gardner, *From Personal Life to Private Law* (2018) at 200; John CP Goldberg & Benjamin C Zipursky, "Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette," (2013) 88 Ind LJ 569 at 572.

absence of a private legal system. I now explain the significance of each condition in turn.

i. Reasonable Basis

If, contra the Kantians, corrective justice cannot be insulated from considerations of distributive justice, then private liability likely doesn't reflect persons' moral rights when there is systemic injustice in the distribution of legal entitlements. The argument developed thus far suggests that it may nonetheless instantiate a plaintiff's moral permission to enforce her apparent rights. Because of the comparative advantage of the state relative to private parties in realizing systemic justice, the state's determinations of private parties' rights need not be correct for it to be permissible for the plaintiff to enforce her legal rights against the defendant. All that is required is that the plaintiff have a reasonable basis to treat her rights as genuine rights. When this condition is satisfied, a person is morally permitted to treat her legal rights as genuine rights even though the state is imperfectly realizing systemic justice.

In short, by locating a justification of private law in a plaintiff's moral permission to enforce her apparent rights rather than in the rights themselves, it looks like we can justify private law in rights-based terms under non-ideal conditions without supposing with the Kantians that there are separate, irreducible domains of justice. But the justification is necessarily a qualified one. Private parties must have a reasonable basis to defer to the state's determinations. It thus must be reasonably apparent to them that the state is doing a good enough job at realizing justice. A transparent failure on the part of the state to secure minimally fair background conditions will not justify institutions of private law that protects the resulting legal entitlements.

Making the moral permission to enforce central has a further justificatory advantage over the Kantian account. Even if we assume with the Kantians that justice is compartmentalized into corrective and distributive components such that private legal liability may reflect genuine rights despite background distributive injustice, it doesn't obviously follow that private law must delegate control over enforcement of private rights to right holders. At first glance, it may seem that the simple fact that it is the plaintiff's right that is at stake entails (presumptively at least) that the plaintiff should have the power to decide whether or not to seek redress when it is infringed.[42] But this isn't as obvious as first appears. The infringement of the plaintiff's legal rights is, according to Kantian corrective justice theorists, an injustice. If that is the case, then the defendant surely has an enforceable duty to correct the injustice prior to and independent of the initiation of any action by the plaintiff. Why then doesn't the state have a duty to enforce those corrective duties of the defendant, even over the plaintiff's objections? Were the state to enforce those duties directly, it would by the corrective justice theorist's own lights be doing justice. It isn't clear why such direct enforcement by the state is ruled out.[43]

My conception has more resources to explain why enforcement must occur at the behest of the right holder. On my conception enforcing the right isn't necessarily doing justice between the parties. It is rather enforcing a reasonable attempt to specify what justice between the parties demands—an attempt that, given its provisional nature, may reasonably be open to some further negotiation between the plaintiff and the defendant in the light of considerations of justice that are peculiar to their particular relationship. For, as we have seen, the state's comparative advantage when it comes to figuring out what justice requires only extends so far. The state is better situated than private parties to establish a just baseline distribution of entitlements. But the parties will have a better appreciation of the more local considerations of justice that regulate their relationship. And so the plaintiff should have the power to let things go or otherwise reasonably settle any ensuing dispute with the defendant in the light of her and the defendant's mutual understanding of what justice between them requires, so long as the

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[42] Ripstein, supra note 1 at 271-72. Similarly, moral philosophers often assume that third parties may not intervene to defend a right holder, if the right holder rejects such intervention. Jeff McMahan, "Humanitarian Intervention, Consent, and Proportionality," in N Ann David, Richard Kershen & Jeff McMahan, eds, *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover* (2011) 44; Cecile Fabre, "Permissible Rescue Killings," (2009) 199 Proceedings of the Aristotelian Society 149 at 159; Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (2011) at 295.

[43] This is a point that civil recourse theorists have pressed against corrective justice theory. E.g., Goldberg & Zipursky, supra note 19 at 162. For further development of this critique, see Rebecca Stone, "Who has the Power to Enforce Private Rights?" in Paul Miller & John Oberdiek, eds, *Oxford Studies in Private Law Theory Volume II* (forthcoming).

defendant's wrong isn't so obviously egregious that no reasonable person could fail to view it as an injustice. This in turn entails that third parties including the state should leave decisions about enforcement to the plaintiff, at least when it comes to infringements of the plaintiff's rights that, given prevailing epistemic normative uncertainty, are only arguable injustices and so subject to revision in the light of the parties' own understanding of their relationship.[44]

ii. Procedural Fairness

Even if the state should play only a supporting role in enforcement efforts that must be spearheaded by the plaintiff, the existence of legal institutions that play such a role while also providing defendants with procedural protections will alter what a right holder may permissibly do to enforce her rights. This is because it will cease to be necessary for the right holder to use extralegal mechanisms that pose a risk of harm to others to the extent that she can avail herself of such legal processes instead. Thus, acts of self-help that would have been permissible in the absence of procedurally adequate legal channels may cease to be so. Indeed, precisely because this is so, there may be a collective duty to provide persons with a legal mechanism for enforcing their rights.[45]

Some forceful acts of self-help will remain morally permissible despite the existence of a well-functioning legal system, and the legal system ought

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[44] I develop the argument sketched in this paragraph in greater detail in Stone, supra note 43.

[45] Goldberg and Zipursky have made suggestions along these lines in defending their civil recourse theory. E.g. Goldberg & Zipursky, supra note 19 at 123. But see Sandy Steel, "On the Moral Necessity of Tort Law: The Fairness Argument," (2021) 41 Oxford J Legal Stud 192 (doubting the existence of a collective duty to provide anything more than a limited form of tort law). I suggest that we should go further by viewing private rights of action as the legal instantiation of the right holder's moral permission to enforce her rights. I don't think that this commits me to a Lockean version of natural rights theory as Goldberg and Zipursky suggest that it might. Goldberg & Zipursky, supra note 19 at 120-121. For the questions of justice that, on my view, ultimately ground permissions to enforce, are often questions that are best resolved by the state rather than private persons. Thus, the state, in supplying a right holder with a reasonable basis for believing that she has certain rights, expands the set of rights that she may permissibly enforce beyond those that she would be permitted to enforce in the state of nature.

to recognize them as such. For example, someone who reasonably believes that she faces an imminent threat of serious physical harm should be permitted to use force to defend herself without facing the prospect of legal liability, given that litigation of her claim after the fact is likely to fail adequately to vindicate her rights.[46]

But when a legal right holder is threatened with harm that isn't imminent, recourse to the legal system is more likely to be effective, making resort to forceful self-help impermissible. For similar reasons, when wrongful conduct has already occurred, and the right holder is seeking vindication of her rights after the fact, the availability of a well-functioning system of private law would ordinarily obligate the plaintiff to enforce her rights through litigation rather than self-help.[47]

Thus, in a well-functioning legal system, legal institutions will define the mechanisms that right holders must ordinarily use to vindicate their rights, but avenues of forceful self-help will be legally recognized as permissible alternatives when pursuing a legal claim would be unlikely to vindicate a person's rights. Often this will mean that a right holder must use the legal process to vindicate rights that have already been infringed with privileges of self-help confined to situations in which their rights have not yet been infringed but are under imminent threat. But any such distinction is a contingent rather than a deep one. Private litigation can sometimes be effectively used to prevent a future rights infringement.[48] And self-help is morally permissible after the fact if the legal system doesn't provide an avenue to adequately remedy the infringement.[49]

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[46] As is true of the positive law of self-defense. See W Page Keeton, Dan B Dobbs, Robert E Keeton & David G Owen, *Prosser and Keeton on the Law of Torts* 125 (5th ed 1984).

[47] The positive law generally requires right holders to resort to litigation rather than self-help when litigation would adequately vindicate their rights. See supra note 25.

[48] Injunctive relief is, for example, generally available to restrain a recurring or ongoing trespass. Dan B Dobbs, *Law of Remedies: Damages, Equity, Restitution* (1993) ch. 5. In cases of anticipatory breach of contract, the act ordered by an order of specific performance might be identical to the act of performance.

[49] The privilege of recapture is a self-help remedy that can be invoked after a rights infringement has occurred that was historically justified by the inadequacy of the legal remedy for dispossession. See supra note 25.

In short, the fundamental moral considerations that justify private rights of action and privileges of self-help are the same. They are the considerations that give rise to and shape the right holder's moral permission to enforce her rights. How they play out depends on the circumstances. After the fact, for example, there is rarely the imminent need to act that there sometimes is before the fact. But that just means that the shape of the right holder's moral permission should reflect the relative lack of imminence.[50]

D. Private Litigation and Uncertainty about Justice

Thus far I have argued that private law can be justified as instantiating a plaintiff's moral permission to enforce her rights, so long as the legal system is functioning well enough to ensure that she has a reasonable basis for treating her legal rights as genuine rights and she vindicates her legal rights in a procedurally fair fashion. Under these conditions, she may use the machinery of private law to hold the defendant legally liable without demonstrating that he has in fact wronged her. It is sufficient for her to show that he has infringed her legal rights.

But shouldn't an innocent defendant be able to defend himself by showing that although he has infringed the plaintiff's legal rights, he hasn't infringed her moral rights, thereby depriving the plaintiff of a reasonable basis for believing that he has in fact wronged her? If a procedurally fair legal system must allow the defendant to do this, it may start to look like private litigation is in fact centrally about whether a defendant has in fact wronged the plaintiff.

Recall, however, that a central plank of my argument is that the state has a comparative advantage when it comes to resolving uncertainty about systemic considerations of justice. So long as the ultimate question of wrongdoing depends on such considerations, the defendant, as a private party, typically won't be able to undermine the determination of justice that is embodied in the plaintiff's legal rights. Precisely because it is reasonable for a plaintiff to treat her legal rights as moral rights, it will be hard for the defendant to undermine that reasonable basis in litigation. The relevant considerations are by their nature relatively inaccessible to private parties, whichever side of the litigation they stand on.

But this raises a deeper question: why confine liability to the impoverished standpoint of private actors? Given the state's involvement in the

[50] Sandy Steel offers further defense of this claim in Steel, supra note 18.

process of enforcement and its superior vantage point, why not make private litigation centrally concerned with resolving the ultimate question of justice between the parties? Why, in other words, does private litigation simply ask whether the parties' private legal rights have been infringed—rights that on my conception reflect the state's merely provisional attempts to specify rights that the plaintiff may reasonably defer to in the face of uncertainty about justice—rather than litigating the underlying question of justice directly?

My answer is that if the power to enforce private rights is appropriately delegated to the right holder with the state playing a supporting role, then the legal process via which her rights get vindicated must be constrained by considerations that are reasonably accessible to private parties. A dispute between private parties is not a good mechanism for finding systemic facts, nor is it an appropriate venue for determining the normative relevance of those facts given that the latter depends on community-wide considerations. Thus, where such systematic considerations are in play, whether a plaintiff has a genuine moral entitlement that is being threatened by the defendant is not a question that should be settled by private litigation.

If private litigation was made to turn on such considerations, private plaintiffs would be put in the position of having to seek out the state's expertise on matters of systemic justice in order to enforce their rights. A plaintiff in a contracts suit, for example, wouldn't be able to determine whether her contract with the defendant was voidable on substantive unconscionability grounds until the state determined whether the terms had been distorted by systemic background injustice (unless such distortion was so egregious as to be transparent to private parties thus depriving of her of the reasonable basis she needs to permissibly enforce her rights in the first place). But if enforcement of a right is properly delegated to the right holder, it is unfair to saddle a private party with a collective failure to allocate entitlements justly. Parties often want to settle their disputes rather than take them through the entire litigation process for reasons specific to their own situation and their relationship with the other parties. Indeed, it is important that they be able to do so given their comparative advantage over the state when it comes to local questions of justice. Such settlements will be impeded the more likely it is that the resolution of the case will turn on considerations that are inaccessible to them.[51]

On the flip side, if certain allocative decisions are, given the state's comparative advantage, properly delegated to the collective, private parties should not be able to commandeer the state to make determinations of overall justice as a predicate to resolving their private disputes. Determining that a private transaction is infected by systemic injustice is likely to call into question the justice of the wider scheme and thus the legal entitlements of third parties. A forum designed to resolve a dispute between private parties isn't an appropriate forum for making such determinations.[52]

On my conception, then, private rights ought to be determined by two different kinds of state action. First, the state should shape private rights by allocating benefits and burdens and facilitating transfers of resources via the institutions of taxation and transfer and some of private law (especially property and contract). The justification for giving the state this role is that the underlying allocative questions depend in large part on systemic considerations of justice that state institutions are better positioned to resolve than private parties. Second, the state should give private parties the power to enforce their private legal rights in a manner that reflects their moral permission to enforce them. Because the enforcement apparatus rests on this moral permission, it should be faithful to the standpoint of private parties and their comparative inability to evaluate relevant systemic considerations. In this way, the contours of the moral permission shape the contours

[51] Of course, the state can sometimes implement clear rules that respond to background injustice in ways that will be transparent to parties before a dispute arises. Minimum wage laws and anti-usury laws might be thought of in such terms. Notice, however, that insofar as such attempts to prevent the exploitation of the worst off constitute attempts by the state to mitigate some of the worst effects of distributive injustice, their existence may signal to private parties who tend to be on the other side of such transactions that they don't have reasonable grounds to treat their legal entitlements as just entitlements, calling into question the extent to which they are in fact morally permitted to use private law to enforce their legal rights.

[52] Were such determinations made in the regular course of private litigation, the state would be forced to either correct those injustices at the behest of private parties or else leave them uncorrected despite a public proclamation of their injustice, which in turn would undermine the legitimacy of the larger scheme.

of private legal liability and so indirectly the contours of private legal rights, though only in part: the moral permission is compatible with many possible allocative and facilitative schemes.

III. IMPLICATIONS

My theory has several implications. Most significantly, it can explain why private liability is not best understood in terms of justice or wrongdoing at least when there is background injustice in the distribution of benefits and burdens. It also has several more specific implications for the shape of private law doctrine.

A. Partial Independence of Private Liability from Justice

The normative appeal of private law appears to depend, superficially at least, on the justice of the baseline distribution of benefits and burdens. If the baseline distribution is unjust, it isn't clear why the law should concern itself, as private law does, with eliminating disruptions from it. Why should an unjustly poor person have to compensate an unjustly rich person whom he negligently injured when the effect is to restore an unjust state of affairs?[53]

As we have seen, the Kantian corrective justice theorist responds to this challenge by insisting that corrective justice instantiates a form of justice that operates on a different plane from distributive justice—justice as independence. But suppose that justice cannot be compartmentalized in this way. How then can we justify private law's tendency to force defendants to compensate plaintiffs for entitlements that may not justly be theirs?

We might try to explain it via an appeal to an institutional division of labor. It simply isn't the job of private law to realize systemic justice. That is the job of the public institutions of taxation and transfer. Private law

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[53] Gardner, supra note 1 at 14-15 (describing the "perennial student objection to tort law" that "it cannot be correctively just to give back to the original holder what the original holder did not justly hold before the transaction that is being reversed"); Benjamin C Zipursky, "Civil Recourse, Not Corrective Justice," (2003) 91 Geo LJ 695 at 741 ("It is quite unclear why corrective justice is not subsidiary to, or at least constrained by, distributive justice; the justice of restoring a certain state of affairs would seem to depend on that state of affairs being just from a distributive point of view.").

operates piecemeal to correct wrongs that occur against this background.[54] But this response is unsatisfactory if our aim is to explain why the acts of private legal institutions are justified in the face of systemic injustice. When the public institutions are not doing their job, a system that corrects disturbances from the publicly created unjust baseline cannot be said to be doing justice.

If instead we view private law as instantiating the moral permission of right holders to enforce their rights, rather than as doing justice directly, it is easier to see how private law can be justified despite background injustice. This is because a plaintiff's permission to enforce her rights depends not on her rights having been infringed by the defendant, but on her having a reasonable basis to treat the defendant as if he has done so. Given that the state has a comparative advantage over private parties when it comes to evaluating systemic considerations of justice, the state's efforts to realize justice may supply her with such a reasonable basis despite failing to perfectly realize justice.

But can't we appeal to the same considerations to argue that private law does corrective justice in some sense, even when it operates against a backdrop of systemic injustice that the state has failed to rectify? As private parties, defendants and plaintiffs alike have reason to defer to the state's resolution of systemic questions of justice. Isn't there therefore a sense in which the unjustly poor defendant wrongs the unjustly rich plaintiff when he infringes her private legal rights? He has, we are assuming, reasonable grounds to treat her legal rights as moral rights. We might say that in this sense he has wronged her and that enforcement of her right against him is accordingly doing justice from the perspective of the parties.

I don't think that a move like this is available to one who contends that private law is about ensuring that justice is done. If the state has reason to believe that the persons' legal rights don't correspond to their just entitlements, an appeal to "justice from the perspective of the parties" cannot justify its enforcement of them.

Conceptualizing matters in terms of a plaintiff's moral permission to enforce her rights, by contrast, generates an affirmative reason for the state to take the standpoint of private parties seriously. If enforcement of private

[54] Peter Benson appeals to an institutional division of labor to situate his conception of transactional justice within a larger Rawlsian scheme. Benson, supra note 4 at 448-476.

rights is (within reasonable bounds) appropriately delegated to the right holder with the state playing only a supporting role, then private liability should reflect the contours of the plaintiff's moral permission and thus the plaintiff's standpoint. Thus, private legal rights need not correspond with either the plaintiff's or the defendant's views about what justice between them demands. All the plaintiff needs in order to render her enforcement of her legal rights permissible are reasonable grounds for treating her legal rights as just entitlements. This means, at minimum, that the state must be doing a good enough job of realizing systemic justice. But it doesn't mean that her legal rights must correspond to just entitlements.

Isn't there a procedural sense in which we might insist that private law is about wrongdoing on my conception? When, on the Kantian conception of corrective justice, a defendant infringes the plaintiff's omnilaterally determined private rights he imposes his particular will on her, contrary to the principle of independence. The Kantian's characterization of the defendant's wrong here has a resolutely procedural flavor. We might then identify an analogous procedural wrong associated with the infringement of private rights that is compatible with my conception—the wrong of disregarding the resolution of systemic questions of justice by entities with the requisite democratic credentials.

But it's not clear that any procedural wrong that may be lurking here amounts to genuine relational wrongdoing. For the independence of each against all isn't the foundational value on which private liability rests. The foundational value is instead substantive justice in the distribution of entitlements. Normative uncertainty about the content of substantive justice then generates the need for procedurally fair mechanisms for resolving that uncertainty. Insofar as the polity reasonably resolves the uncertainty through such mechanisms, private actors may then be duty bound to respect the rights that emerge from them. But any wrong a defendant thereby commits when he commits a tort or breaches a contract isn't thereby a substantive wrong against the plaintiff in particular, unless the plaintiff's legal and moral rights converge. It is rather a wrong against the community at large. For it consists in his failure to honor the outputs of the community's procedurally fair decision-making processes.[55] In short, while private

[55] See Christiano, supra note 40 at 286 ("Citizens who skirt democratically made law act contrary to the equal right of all citizens to have a say in making laws when there is substantial and informed disagreement.").

liability on my conception depends on the plaintiff having reasonable grounds for treating her private legal rights as just entitlements, grounds that may derive in part from the democratic credentials of the institutions that helped to define those legal rights by resolving the systemic uncertainty about justice, it doesn't follow that private liability necessarily results from genuine relational wrongdoing by the defendant against the plaintiff.

B. Substantive Unconscionability

Given their comparative disadvantage relative to the state when it comes to resolving systemic uncertainty about justice, it will often be unreasonable to require private parties to assess the extent to which underlying injustice might have influenced their agreements as a predicate to enforcing them. To know whether a one-sided transaction that was freely entered into by both parties is exploitative in this sense, parties would need to know a lot about the underlying distribution of resources, the extent to which this distribution departs from a just distribution, and the extent to which such departures influenced the terms of their transaction.[56] These kinds of systemic considerations are ordinarily not readily accessible to private parties.[57]

The state, by contrast, is well positioned to resolve these questions relatively speaking. But the main way it is equipped to do so is by preventing exploitative deals from happening in the first place by ensuring that the distribution of resources is just. Given an unjust distribution of resources, it will be difficult for the state to specify exactly what counts as exploitation in advance of a contractual dispute in a way that will be accessible to private parties—that is, in a way that doesn't require them to know the relevant systemic considerations and understand their import. Moreover, given pervasive uncertainty about justice, even a well-functioning state is unlikely to realize a perfectly just allocation of benefits and burdens.

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[56] Here I draw implicitly on Hillel Steiner's liberal theory of exploitation according to which exploitation occurs when the terms of an agreement give one party less than he would have received had the agreement been entered into under just conditions (according to the true theory of justice, whatever that may be). See Hillel Steiner, "Exploitation Takes Time," in John Vint et al, eds, *Economic Theory and Economic Thought: Essays for Ian Steedman* (2009) 20.

[57] See Rawls, supra note 37 at 268 ("Individuals and associations cannot comprehend the ramifications of their particular actions viewed collectively, nor can they be expected to foresee future circumstances that shape and transform present tendencies.").

This suggests that so long as the state is doing a good enough job of fairly allocating benefits and burdens it will be reasonable for private parties to view their private rights as establishing a fair baseline for negotiations with others without worrying about the extent to which they may have more and their potential contracting partner less than justice entitles them to. It will also be reasonable for them to enforce their agreements against others without worrying about the extent to which the terms of their agreement may have been influenced by background injustice. On the flip side, however, when it would be readily apparent to even a private party that their transaction has been distorted by systemic injustice, then the party who has clearly benefited from the injustice loses her moral permission to enforce the deal.

Contract law coheres with this picture in making it hard for defendants who enter into one-sided agreements to invalidate them on the grounds of substantive unfairness alone. To prevail they must usually also show that the bargaining process was infected by irregularities that raise the specter that they didn't freely assent to the agreement—that they didn't intend the one-sidedness.[58] On the flip side, a demonstration of procedural irregularities isn't required when the substantive unfairness is extreme—that is, when a deal is so transparently unjust as a substantive matter that a court isn't willing to allow it to be enforced against the disadvantaged party despite no obvious procedural irregularities at the formation stage.[59]

C. Misfeasance versus Nonfeasance

Tort law's reluctance to impose liability for nonfeasance can be justified along similar lines. Whether one person is morally duty-bound to assist a stranger depends on the intensity of the stranger's need and how much the assistance will cost. The greater is the stranger's need and the lower the cost of the assistance, all else equal, the more likely it is that there is a moral duty to assist the stranger. But the thresholds of need and cost that trigger the

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[58] Cases point to a sliding scale: the more the bargaining process was infected by procedural irregularities that make it less likely that the contract was freely entered into, the less substantively one-sided a deal needs to be for it to be held unconscionable, and vice versa. See cases cited supra note 5.

[59] *Restatement (Second) of Contracts* § 208 cmt c (1981) ("Theoretically it is possible for a contract to be oppressive taken as a whole, even though there is no weakness in the bargaining process and no single term which is in itself unconscionable.").

duty will often depend, in part, on systemic considerations that are relatively inaccessible to private parties.

In a state of nature in which there is no centralized authority to resolve uncertainty about systemic considerations, persons have a weak basis for concluding that they are entitled to make exclusive use of the resources at their disposal. This in turn suggests that they should be willing to give up their resources to help others who seem to be in greater need. By contrast, when the state has resolved some of the uncertainty about what rights people have in a reasonably fair way, persons have reason to suppose that the distribution gives everyone a fair shot at pursuing their own purposes such that they aren't required to use them to serve the needs of strangers.

Thus, the extent to which private parties are morally duty-bound to assist strangers depends (in part) on systemic considerations—the extent to which the state has fairly distributed the burdens and benefits of social life and the extent to which they have more or less than their fair share. So long as the state is doing this well enough, private parties should be able to treat their private rights as genuine entitlements. The flipside is that beneficiaries of possible duties against nonfeasance won't generally have reasonable grounds for enforcing those duties when those duties would require the duty bearer to do something that their private legal rights give them the permission not to do. And when they lack such reasonable grounds, there shouldn't, on my conception, be liability for nonfeasance.

Again, however, the argument doesn't apply in extreme cases. For example, it doesn't foreclose imposing a duty to make very easy rescues that are clearly morally required regardless of systemic considerations. Thus, while the theory can justify the law's reluctance to impose liability for nonfeasance towards strangers, it cannot justify an absence of such liability across the board. In particular, it doesn't justify the common law's extreme reluctance to enforce duties of very easy rescue between strangers.[60]

[60] In this respect, it is better suited to explain and justify French and German law, which impose civil liability on those who contravene criminal statutes that recognize duties of rescue in emergency situations under a limited set of circumstances. Cees Van Dam, *European Tort Law*, 2d ed (Oxford University Press, 2013) at 520-523.

D. OBJECTIVE LIABILITY STANDARDS

On my conception, there may be a divergence between a person's moral rights and what she may do in defense of them and therefore the contours of a defendant's legal liability. What matters is not whether the defendant has wronged the plaintiff but whether the plaintiff has a reasonable basis for believing that he has wronged her. This may help to explain why negligence liability depends on the plaintiff showing that the defendant's conduct fell short of that of a reasonable person of ordinary mental abilities even if he lacks those abilities.[61] If liability depends on the defendant's actual wrongdoing—that is on his infringement of one of the plaintiff's moral rights—it is difficult to justify the law's insensitivity to the defendant's particular capacities. But if what matters is the plaintiff's permission to enforce her rights, it makes sense to focus only on discrepancies that would be reasonably apparent to her. In the run-of-the-mill negligence case, the defendant's mental capacities likely wouldn't be.

Suppose, however, that the defendant can show during litigation that he is below average in some relevant respect through no fault of his own. Shouldn't he be permitted to mount a defense on those grounds? At first it seems that he should. A showing like this could, in principle, undermine the plaintiff's reasonable basis for treating defendant as if he has infringed her rights, thus rendering any attempt by the plaintiff to enforce her rights impermissible. If the defendant lacked the capacity to avoid infringing her rights, it seems unlikely that his conduct wronged her.[62]

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[61] *Dakter v Cavallino*, 866 NW 2d 656 at 663-64 (Wis 2015) ("Negligence is the failure to exercise . . . that degree of care which under the same or similar circumstances the great mass of mankind would ordinarily exercise."); see also *Restatement (Second) of Torts* § 283C, 895J (1979) ("One who has deficient mental capacity is not immune from tort liability solely for that reason.").

[62] Goldberg and Zipursky note various respects in which negligence liability is strict, but still insist that there is something wrongful—in the sense of being "substandard"—about conduct that falls short of the duty of due care. John CP Goldberg & Benjamin C Zipursky, "The Strict Liability in Fault and the Fault in Strict Liability," (2016) 85 Fordham L Rev 743 at 746-47. I employ a thicker conception of wrongdoing according to which to wrong someone is to infringe their moral rights. An action that is merely "substandard" isn't necessarily wrongful in this sense.

The law of negligence has been reluctant to allow defenses along these lines. An explanation that is compatible with my theory is that it will often be difficult for a defendant to successfully undermine the plaintiff's reasonable belief that he has infringed her rights in this way. This is partly because an inability on one relevant dimension could be offset by greater than average ability on another. It is also, more importantly, because systematic considerations will be relevant to our evaluation of reasonable conduct in the face of a disability. A rich person with a disability that makes him a more dangerous driver than most can much more easily make alternative arrangements than a poor person. If he decides to drive despite the ease with which he can make such alternative arrangements and ends up injuring someone, it isn't clear that he is off the hook simply in virtue of having the disability. Thus, if systemic considerations feed into our overall evaluations of wrongdoing in situations like this, and systemic considerations are relatively inaccessible to private parties, such evaluations should lie beyond the purview of private litigation.

E. Strict Liability versus Negligence

Does my conception of private liability have anything to say about when liability should be strict and when it should depend on a showing of negligence? It entails that liability standards should be reasonably accessible to private parties. In not requiring proof of breach of a duty of care, strict liability places even fewer epistemic demands on a plaintiff than a negligence standard and so also seems compatible with this constraint.

If the theory doesn't provide an answer, that doesn't mean that there isn't one—only that we must look elsewhere to find it. My primary contention is that the contours of legal liability may diverge from the contours of moral wrongdoing because of moral considerations that shape the right holder's permission to enforce her rights. When those considerations don't yield an answer, an answer may still be found at the level of moral rights.

But the theory may have something to say here. When people engage in activities that impose foreseeable risks on others, even when they do so while taking the utmost care, they risk burdening others in order to benefit themselves. And so complex questions of fairness arise—questions with answers that plausibly depend on systemic considerations of justice. It follows that the precise content of persons' moral duties not to harm others as a result of their risky activities will be difficult for them to ascertain. Persons can guarantee that they meet such standards by avoiding all activities that expose others to a risk of harm. But doing so will be very burdensome. Many commonplace activities that expose others to a risk of harm—driving is an obvious example—will be costly for most to avoid.

When it comes to such duties, therefore, there may be a gap between the set of risky actions that right holders may reasonably compel others to refrain from doing and the set that others are morally duty-bound to refrain from doing. Because standards of liability must, on my conception, be reasonably accessible to private parties, its plausible to think that the former set will be defined by what seems fair in the light of the risks people in fact impose on each other in going about their lives—on what counts as excessive risk relative to community standards.[63] This would imply that ordinary risk-imposing activities, which most members of the community engage in or otherwise benefit from should be subject to a negligence standard with liability triggered by those who impose excessive risks on others by engaging in them without taking due care. Unusually risky activities that only benefit a few, by contrast, would be subject to strict liability, because simply engaging in such activities imposes an excessive risk of harm on others given that only a few engage in and benefit from them.[64]

Ripstein argues that a principle prohibiting persons from imposing excessive risk on others (either as a result of a failure to take due care or by engaging in unusually risky activities) is an implication of his corrective justice theory.[65] But the intuitive appeal of this principle as a principle of justice depends on the background distribution of resources being just. If there are unjust disparities of wealth, it isn't clear why we should be moved by, say, an unjustly poor person's imposition of "excessive risk" on an unjustly rich person, given that what counts as excessive depends ultimately on what people in this unjust society generally do. Even if the background distribution of resources is just, moreover, the notion of "excessive risk" relative to the behavior of ordinary persons in the community is, at best, an approximation of a distributive ideal. The benefits and burdens of an

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[63] See George P Fletcher, "Fairness and Utility in Tort Theory," (1972) 85 Harv L Rev 537 at 548 ("If the defendant creates a risk that exceeds those to which he is reciprocally subject, it seems fair to hold him liable for the results of his aberrant indulgence.").

[64] As is true of the positive law. See *Restatement (Second) of Torts* § 519 (1977) (endorsing strict liability for abnormally dangerous activities).

[65] Ripstein, supra note 1 at 102, 123-24, 144.

activity like driving are not perfectly equally distributed, even if there is a rough kind of parity.

On my conception, by contrast, private liability doesn't depend on there being an injustice that stands in need of correction so long as a right holder has a reasonable basis for treating the defendant as if he has infringed her rights. When a defendant exposes her to "excessive risk" relative to community standards, the plaintiff may have a reasonable basis to believe that her rights have been infringed, when the content of those rights depends on systemic considerations that are relatively inaccessible to her as a private person. What she needs to justify such a belief is a reasonable basis for treating the baseline distribution of benefits and burdens as just. My conception can thus explain why liability should depend on a showing that the defendant harmed the plaintiff as a result of imposing risk on her that was excessive relative to local community standards, even when those standards arose under conditions of moderate systemic injustice that are not reasonably apparent to private parties.

For similar reasons, my conception can help to explain why liability is strict in the realm of contract law, at least as a default matter. Because agreements tend to be idiosyncratic—reflecting the goals that the parties have chosen to pursue together—there is less likely to be a generally applicable norm beyond the agreement itself against which to evaluate whether conduct that risks a breach is excessively risky. In the absence of a more general norm, it makes sense to take the contract terms as strictly defining what counts as a breach, at least assuming that the contract arose under background conditions that are not obviously unjust.

Of course, sometimes more general norms exist in contracting contexts and contemporary contract law embraces the imputation of local norms of behavior—courses of dealing, courses of performance, and usages of trade to use the language of the Uniform Commercial Code—into parties' agreements.[66] Given that such norms are by their nature accessible to contracting parties, making liability arise from noncompliance with them is compatible with the theory.

F. Remedies

I have argued that private liability justifiably arises when the defendant's infringement of her legal rights gives the plaintiff reasonable grounds to

[66] *UCC* § 1-303 (2004).

treat the defendant as having infringed her moral rights. Because the measures that she can take to enforce her rights under these conditions are also subject to proportionality and necessity constraints, private law remedies sometimes ought not to be fully corrective. Thus, my conception can account for remedial principles that prevent a plaintiff from demanding that she be made whole.

i. The Avoidability Doctrine

The principle of avoidability is one such principle. It limits a plaintiff's damages to losses that she could have reasonably avoided.[67] When we focus on the defendant's duties alone, it is difficult to justify such a limitation. As Seana Shiffrin puts it: "It is morally distasteful to expect the promisee to do work that could be done by the promisor when the occasion for the work is the promisor's own wrongdoing."[68]

But such a limitation is a natural implication of a theory derived from a plaintiff's permission to enforce her rights. When a plaintiff can easily take steps to minimize the harm that she will suffer as a result of a defendant's wrongdoing, it isn't reasonably necessary for her to force the defendant to compensate her for the harm she could easily avoid, because she could have taken steps to mitigate her losses instead.

ii. Foreseeability

The principle of foreseeability is a remedial principle that most clearly applies in the realm of contract, limiting consequential damages for breach to those that "may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract."[69] By preventing her from recovering damages to cover losses arising from unusual consequences of breach, the principle gives a promisee who anticipates unusual consequential losses reason to alert the promisor to the possibility of such losses when they enter into their agreement. It isn't burdensome for a promisee to alert the promisor to such a possibility and once alerted, the promisor can take appropriate steps to reduce the likelihood of breach or demand

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[67] *Restatement (Second) of Contracts* § 350 (1981); *Restatement (Second) of Torts* § 918 (1979).

[68] Seana Valentine Shiffrin, "The Divergence of Contract and Promise," (2007) 120 Harv L Rev 708 at 725.

[69] *Hadley v Baxendale*, 156 Eng Rep 145 (Court of Exchequer, 1854); *Restatement (Second) of Contracts* § 351 (1981).

adjustments of the terms of their agreement. Thus, arguably, the necessity constraint dictates that the promisee shouldn't be permitted to recover those losses if she failed to communicate them to the promisor at the outset.[70]

Justifying the foreseeability limitation in these terms depends on the consequences of breach being foreseeable to the promisee at the time of contracting. A promisee can't be expected to inform a promisor of consequences of breach that the promisor reasonably couldn't have foreseen if she couldn't have foreseen them either. But the doctrine appears to extend the foreseeability limitation to losses that were in the contemplation of neither party at the time of contracting.[71]

Limiting a promisee's ability to recover losses that neither party contemplated at the time of contracting may, however, be justified in terms of the proportionality constraint. Exactly what limit proportionality imposes on the right holder's recovery here will depend on our underlying theory of what makes a defensive act proportional to a wrong. But it is plausible to suppose that considerations of fairness to the defendant might limit consequential damages to those that are reasonably foreseeable at least when it comes to inadvertent breaches.[72] When it comes to bad faith breaches, by contrast, it is less clear that a defendant can justify not making the plaintiff

[70] *C.f. Evra Corp v Swiss Bank Corp*, 673 F 2d 951 (1982) (Posner, J) (exploring the affinity between the rule of *Hadley v Baxendale* and the doctrine of avoidable consequences).

[71] See *Restatement (Second) of Contracts* § 351 (1981) ("[d]amages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made"); *Hadley*, 156 Eng Rep at 152 (limiting consequential damages to those that "may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract").

[72] On one plausible theory, proportionality reflects the stringency of the right that has been infringed where stringency connotes the strength or the weight of the right holder's claim. Quong, supra note 24 at 107-114. It is plausible to think that the stringency of a right to performance of a contract is a function, at least in part, of the harms that the duty bearer could have foreseen would have resulted from its infringement and that what the right holder may do in response accordingly increases as such harms increase.

whole on fairness grounds, in which case the limitation should be restricted to non-willful breaches.[73]

As a doctrinal matter, it is less clear whether a tort defendant may be held liable at common law for consequential damages that were not reasonably foreseeable to him at or prior to the time he breached his legal duty to the plaintiff.[74] My conception suggests that such a limitation should apply in tort when the same considerations of proportionality and necessity are in play. The fact that liability in contract doesn't require a showing of fault suggests that a foreseeability limitation on damages is more likely to be appropriate in contract than in tort. But many fault-based standards in tort law are also demanding and unforgiving. Thus, this difference between contract law and tort law cannot justify different treatment across the board.[75]

The case for a foreseeability-based limitation on damages in both contract and tort is especially compelling in the non-ideal world we are imagining in which there is systematic injustice in the distribution of private entitlements. When we are sure that legal rights track moral rights and contracting parties reached their agreement from a just starting point, it is harder to resist the idea that the defendant owes full compensation to the

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[73] French law imposes such a restriction. According to Article 1150 of the French civil code: "The obligor is liable only for the damages foreseen or which could have been foreseen at the time of the contract, so long as it is not due to his fraud that the obligation has not been performed." George A Berman and Vivian Grosswald Curran, *French Law: Constitution and Selective Legislation* (Juris Publishing, Inc 1998).

[74] The orthodox view seems to be that he isn't. Andrew Tettenborn, "Hadley v. Baxendale: Contract Doctrine or Compensation Rule," (2005) 11 Tex Wesleyan L Rev 505 at 506. But there is authority to the contrary, both past and present. Tettenborn, supra at 507; *Evra Corp v Swiss Bank Corp*, 673 F 2d 951 (7th Cir 1982) (Posner, J) (applying the principles underlying *Hadley v Baxendale* to a tort claim); Parsons (Livestock) Ltd V Uttley Ingham & Co, Ltd [1978] QB 791 at 801-03 (Scarman, LJ). In both tort law and contract law, once a category of consequential loss is deemed reasonably foreseeable, the plaintiff can recover the entire amount of such losses, even if they are unusually large. In tort law, this is known as the "thin skull" rule—the rule that "a defendant takes the plaintiff as he finds her, without regard to the foreseeability or otherwise of her condition." Tettenborn, supra at 513.

[75] See Goldberg & Zipursky, supra note 62 at 746-57 (documenting the various ways in which fault-based standards in tort law are unforgiving).

plaintiff, even in the case of a good faith breach. But when there is systematic injustice in the distribution of private entitlements, allowing plaintiff a remedy that makes her whole forces the defendant to bear the entire risk of systematic error in the definition of their entitlements.

iii. Preference for Monetary Remedies over Injunctive Relief

Finally, my conception helps to justify private law's preference for substitutional remedies over injunctive relief. Forcing someone to do something is generally more intrusive than making them vulnerable to the loss of a sum of money. Thus, the necessity constraint justifies requiring a plaintiff to show that damages won't adequately compensate her as a condition for obtaining injunctive relief.[76]

IV. RELATIONSHIP TO OTHER THEORIES

How does my conception of private law relate to other leading theories of private law?

A. Deontological Alternatives

The most significant way in which my conception diverges from corrective justice accounts of private law is its detachment of legal liability from notions of wrongdoing. While legal liability ought to track moral liability as much as is reasonably possible on my conception, normative uncertainty about justice means that the tracking will tend to be imperfect when systematic considerations are in play. Some moral duties will not be privately enforceable, like duties to assist others, the existence of which hinge on systemic considerations that aren't reasonably accessible to private parties. Conversely, a defendant may sometimes be held liable despite not breaching any underlying duty of justice, as when the defendant is the disadvantaged party to an exploitative contract.

Although they reject corrective justice theory, civil recourse theorists Goldberg and Zipursky nonetheless insist that a notion of wrongdoing is at

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[76] *Restatement (Second) of Contracts* § 359 (1981) ("Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party."); *Restatement (Second) of Torts* § 938 (1979) ("The relative adequacy to the plaintiff of an injunction, as compared with other available remedies, is one of the factors to be considered in determining the appropriateness of injunction against tort.").

the heart of private law—or at least, tort law, which is their focus.[77] This is because wrongdoing, according to their theory, arises from violating a legal standard of conduct—from committing a legal wrong.[78]

But unless the legal standard is also a moral standard of conduct, it isn't obvious how its violation can count as a genuine wrong. The descriptive statement that the legal system has asserted "that the act in question is not to be done, and that it merits some form of accountability when done" doesn't, without more, entail that I have a reason not to do it.[79] This is not to say that there may be important interactions between the legal and the moral. A legal system may, for example, be required to give determinate content to certain moral wrongs. But the relationship needs to be properly specified if legal "wrongdoing" is to count as genuine wrongdoing.

In the background of my conception, by contrast, are moral rights—the rights we owe each other as a matter of justice, infringements of which constitute genuine wrongs against the right holder. Private liability reflects not the rights themselves, but the contours of a right holder's moral permission to enforce her apparent rights. The latter can diverge from the former, because the moral permission depends not on the right holder having been wronged but on her having reasonable grounds to treat the defendant as if he has wronged her—as if the legal rights the defendant has infringed correspond to moral rights.

Thus, contrary to civil recourse theory, private law on my conception is not essentially concerned with defining standards of conduct to regulate private interactions. Private parties are not well positioned to determine the scope of their moral rights and the duties of justice those rights entail insofar as those rights depend on systemic considerations that are relatively inaccessible to them. But so long as the state is doing a reasonably good job of resolving normatively uncertainty about those systemic considerations, private plaintiffs may treat their legal rights as genuine moral entitlements in their disputes with other private actors. This means that a defendant's private legal liability won't necessarily correspond with his moral liability whenever the state has imperfectly resolved systemic questions of justice.

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[77] Goldberg & Zipursky, supra note 19 at 154-163. Indeed, the title of their recent book-length statement of their theory is "Recognizing Wrongs." Ibid.

[78] Ibid at 3; Goldberg & Zipursky, supra note 75 at 755-56.

[79] Goldberg & Zipursky, supra note 21 at 950.

Detaching liability from notions of wrongdoing comes at an interpretative cost if we take the language of wrongdoing that pervades private law seriously. This is because it won't always be the case that a defendant who is properly held liable violated an underlying duty. The theory thus gives us no reason to think that private legal duties are generally binding on legal subjects.

I don't regard this as a fatal problem. The main advantage of my conception is that it offers a normative justification for private law in non-ideal conditions. It is unsurprising that a theory that can do this cannot also explain why there is always a duty to follow the law's edicts. Moreover, private law duties will be morally binding on subjects according to my conception whenever the state succeeds in defining their entitlements justly. The more ideal are the background entitlements against which private law operates, the more likely it is that a given person is clearly morally bound to adhere to the law's edicts. It could be that everyone is morally bound to do as private law instructs when background conditions are perfectly just.

B. Instrumental Considerations

My conception doesn't provide a justification of private law when distributive injustice is obvious and widespread. This is because private parties may defer to the state's determinations of their rights when enforcing their rights only when such deference is reasonable. When it is obvious that the law has given them more than justice entitles them to and others less, their deference isn't justified.

Under such conditions, neither persons' moral rights nor their moral permission to enforce their apparent rights can serve to justify the edifice. The only possible justification of private law is an instrumental one. The state, that is, might still be justified in enforcing private legal rights, but only if failing to do so would result in worse outcomes from the standpoint of overall justice. Perhaps, for example, failing to do so would be so destabilizing that it would make it impossible for the polity to enact necessary progressive reforms. Then private law would be justified insofar as it provides the stability necessary for progressive reform.

Moral rights are not irrelevant to the justification of private law under such conditions. We need to know something about the configuration of rights that justice ideally entails in order to figure out whether enforcing private rights will take us closer or further from the ideal. But moral rights figure only indirectly in the justification. Private legal rights don't instantiate moral rights, or even a moral permission to enforce such rights under such conditions. Enforcing them is at most a means towards the end of greater overall justice.

Thus, legal rights will lack any intrinsic moral significance for private parties under very unjust conditions.[80] Private parties might be morally duty bound to respect the private legal rights of others, but only insofar as doing so would help the community to secure the instrumental benefits of the overall scheme. Their duty to do so, moreover, will be owed to the community, not to the particular persons whose legal rights they have infringed. Legal right holders will also lack a permission grounded in their moral rights to enforce their private legal rights, though they might be justified in doing so insofar as such actions facilitate the smooth enforcement of the instrumentally justified scheme.

V. CONCLUSION

I have argued that focusing on a right holder's moral permission to enforce her rights provides a superior justificatory lens for evaluating private law institutions than focusing on a defendant's possible wrongdoing. I agree with corrective justice theorists that private law is centrally about enforcing private actors' rights against other private actors, but I disagree that this entails that private liability directly instantiates moral rights. Private liability, on my conception, is instead best justified in terms of the moral considerations that govern the enforcement of persons' rights against one another. These moral considerations depend on the underlying moral rights but aren't fully determined by them.

The result of this shift in focus is that the underlying moral rights don't on their own determine the boundaries of legal liability. A plaintiff may have a legal claim even if her rights were not infringed if she has a reasonable basis for believing that they were. Conversely, she may lack a legal claim even if one of her rights was infringed where the contours of that right are not reasonably accessible to private parties. The crucial point is that legal liability must depend on considerations that are sufficiently accessible

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[80] For further exploration of this idea, see Rebecca Stone, "The Circumstances of Civil Recourse," Law & Phil (forthcoming); Jonathan Quong and Rebecca Stone, "Rules and Rights," in David Sobel, Peter Valentyne & Stephen Wall, eds, *Oxford Studies in Political Philosophy, Volume 1* (2015) 222.

to private parties. Focusing on these considerations alone won't yield determinate answers about the appropriate boundaries of legal liability. The theory necessarily piggybacks on theories of persons' underlying moral rights. But I hope to have shown that it yields insights beyond those that a focus on those rights alone can yield and that it offers a plausible way of justifying private liability under moderately non-ideal conditions.