Private Order and Public Justice: Kant and Rawls

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Private law has a peculiar status in recent political philosophy. It is often said that the law of property and contract establishes basic, pre-political rights that must constrain the activities of states. This broadly Lockean view takes legitimate public law to be nothing more than private law in disguise: your relation to the state is modeled on the relation with any other person or organization that you might hire, alone or in combination with others. It is subject to the same norms of justice, and the same forms of criticism. The state can only make people pay for the services that it provides to those who request or freely accept them. Any other form of taxation is an unjust interference with property rights. This approach is embraced most avidly by libertarians, but it also occupies an important place in the public political discourse of the United States.

No less often, it is said that private law just is one of the activities of states, to be assessed in the same way as any other exercise of state power. This second approach has its roots in the utilitarian thought of Bentham and Mill, but in recent decades it has become home to the primary non-utilitarian account of private rights. John Rawls famously criticized utilitarianism for ignoring "the distinction between persons." Many of his most ardent admirers in the academy have sought to put his social contract theory foreword as an alternative to utilitarianism, while accepting the basic utilitarian perspective on private law as "public law in disguise." They have thus sought to carry its insights and structure into the minutiae of the law of tort and contract, and deploy it against more ambitious conceptions of property.¹

My aim in this paper is to provide an alternative to these two prominent views. Each of them is right about something: Private rights protect an important kind of freedom, and are not simply bestowed on citizens by the state so as to increase prosperity or provide incentives. At the same time, their enforcement is an exercise of political power, for which society as a whole must take responsibility. If two inconsistent claims are both true, we are faced with what Kant called an “antinomy.”² The only way to overcome an antinomy is through a critique of the broader premise that thesis and antithesis share. In this case, the source of the difficulty is the assumption that law is an instrument for achieving moral ends that could, in a happier world, have been achieved without it. Both positions go wrong by supposing that the basic demands of political morality are complete without any reference to institutions. Both treat legality as an

¹ This paper lies at the intersection of two larger projects, one on Kant’s legal and political philosophy, and the other on the relation between private law and distributive justice. I am grateful to Michael Blake, Martin Hevia, Martin Stone, Ernest Weinrib, Karen Weisman and Benjamin Zipursky for discussion of these issues, and to the other participants in the Virginia Symposium for comments and discussion.

instrument that is effective for achieving moral purposes that might, in happier
circumstances, be realized in other ways. The Lockean view regards law as a remedy for
the "inconveniences" of a state of nature; the utilitarian and egalitarian typically regard it
as a remedy for some combination of imperfect information, selfishness and high
transaction costs. Defenders of corrective justice have criticized instrumental theories of
private law for their failure to capture the transactional structure of private law; my aim
is to broaden those criticisms.

As my choice of the term “antinomy” suggests, the alternative I will develop
draws on Kant. As my title reveals, I will also draw on Rawls. I will articulate Kant’s
account of the nature and significance of private ordering in relation to freedom. I will
use this Kantian idea of private ordering to explain the place of private law in what Rawls
has described as the "division of responsibility" between society and the individual.
According to Rawls, society has a responsibility to provide citizens with adequate rights
and opportunities; each citizen, in turn, is responsible for what he or she makes of his or
her own life in light of those resources and opportunities. I will argue that private law is
the form of interaction through which a plurality of separate persons can each take up this
special responsibility for their own lives, setting and pursuing their own conceptions of
the good in a way consistent with the freedom of others to do the same. Private law
draws a sharp distinction between nonfeasance and misfeasance: unless you owe a duty
to another person, the effects of your conduct on that person are irrelevant. I will explain
this distinction in terms of an idea of voluntary cooperation. Focusing on the ways in
which private law reconciles the capacity of separate persons to pursue their own
purposes, I will that explain why it is an essential part of what for Rawls is the
fundamental subject of justice, that is, the coercive structure of society.

I have made some of these arguments about private law elsewhere, and will not
rehearse them in their full detail here, because the other side of the division of
responsibility is just as important: if private order is a realm of freedom, how can the
state be entitled to do anything, unless private persons hire it to do so? The main part of
my argument will be concerned with this converse task of showing why private ordering
requires public justice. Drawing again on Kant, I will argue that private law is only a
system of reciprocal limits on freedom provided that those limits are general in the right
way. The rule of law is often presented as a sort of instrumental good that provides

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3 Sidgwick's discussion of justice in The Methods of Ethics (1874) remains the clearest and most forceful
statement of the view that law and justice imposes general rules in order to achieve a moral good that
makes no reference whatsoever to anything rule-like. Sidgwick's argument explicitly animates recent
economic analysis, including, notably, Louis Kaplow & Steven Shavell, Fairness Versus Welfare (2002).
The Lockean position is subtly different, in that it supposes that the complete statement of morality makes
no essential reference to institutions, but it is formulated in terms of rules and natural rights.

4 The idea that law is partially constitutive of important parts of morality is a central theme in the Natural
Law tradition, starting from Aquinas. See Summa Theologica IaIIae 90 art. 4, in Aquinas, Political
Writings (ed. And trans R.W. Dyson) (2002) A more recent expression can be found in Tony Honoré, The
Dependence of Morality on Law 13 OJLS 1 (1993). Kant’s version of the thesis that law is constitutive of
parts of morality is more ambitious than that found in Aquinas or Honoré, because the morality in question
requires promulgation as law even on those rare occasions in which it is fully determinate.


(Symposium on Rawls and the Law).
various benefits, either to persons or societies. I will argue that it is more than that, and that it is a prerequisite to enforceable rights being consistent with individual freedom, and more broadly, to reconciling the individual freedom of a plurality of persons. The use of force subjects one person to the choice of another, unless it issues from a public standpoint that all can share. Turning once more to Rawls, I will argue that the best way of thinking about his emphasis on public provision of adequate rights and opportunities in parallel terms: they are essential conditions to the very possibility of enforceable rights, because they are the moral prerequisites for a shared public sphere.

Private law, Moral Powers and the Division of responsibility

Widely accepted views in recent political philosophy make private law seem puzzling. In his brief characterization of corrective justice, Aristotle notes that a judge seeking to resolve a private dispute pays no attention to the wealth or virtues of the parties, but only the particular transaction between them. If a poor person wrongs a wealthy one, the poor one must pay the wealthy one. This suggestion that forcibly taking money from a poor person to give to a wealthy one could be a matter of justice strikes many people as bizarre, or incoherent. Both tort and property protect what people happen to have, without any thought about how they got it or what they should have from a moral point of view. The law attends to the form of the transaction or holding, rather than the needs or interests of the parties to it.

The formality of private law stands in stark tension with prominent understandings of distributive justice. Rawls asks about what parties in the original position would want by way of all-purpose means and opportunities, to enable them to exercise their moral powers over a complete life. Amartya Sen focuses on capabilities and the functionings they make possible, again, focusing on what is required if people are to be able to achieve certain kinds of worthwhile ends. Ronald Dworkin, in his theory of equality of resources, invites readers to imagine an auction in which all resources are allocated to the highest bidder, but then introduces various forms of insurance against disastrous outcomes. The insurance argument is, again, the introduction of a content-based conception. For all the many differences between Rawls, Sen, and Dworkin, they share a focus on substantive questions of what is needed to enable choice. Utilitarians focus instead on substantive questions about the good to be promoted, or the best means of promoting it. All of these focus on how much each person needs, has, or can expect to have — all measures of what a person should have. That focus makes it difficult to see how any further demand of justice could require the state to change a person’s ractions. Although there is a perspective from which someone mizzles is the product of a misunderstanding.

In "Social Unity and Primary Goods", Rawls introduces the idea of a "division of responsibility" between society and the individual. Rawls writes:

[The citizens as a collective body, accepts responsibility for maintaining the equal basic liberties and fair equality of opportunity...while citizens (as individuals)... accept the responsibility for revising and adjusting their ends and

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7 A particularly forceful statement of this position can be found in Joseph Raz, The Rule of Law and Its Virtue, in The Authority of Law (1979).
8 See Nichomachean Ethics, Book V, ch.4.
aspirations in view of the all-purpose means they can expect, given their present and foreseeable situation. This division of responsibility relies on the capacity of persons to assume responsibility for their ends and to moderate the claims they make on their social institutions in accordance with the use of primary goods. Citizen’s claims to liberties, opportunities, and all-purpose means are made secure from the unreasonable demands of others.9

Although the division of responsibility had attracted comparatively little attention from Rawls’s commentators and critics, it is central to his vision of justice. The division of responsibility captures the distinctive place of individual responsibility in thinking about justice.10 In his “Reply to Alexander and Musgrave,”11 he says that the division of responsibility is “implicit in the choice of primary goods” as the basis for distributive shares. The entire problem of distribution is given by the idea that persons have private lives as well as public ones, and will take account of their entitlements as they pursue their separate purposes.

The idea that you have a special responsibility for your own life introduces two implicit contrasts. The first is the contrast between your responsibility for what you make of your life, and the responsibility of the state to see to it that you have the opportunity to pursue a successful life, by some measure or other. For example, a utilitarian might suppose that the responsibility of the state is to see to it that as many people as possible have happy lives, however exactly that is conceived. An advocate of theocracy might suppose that the state has a special responsibility to see to it that I have a life worthy of salvation, or at least that is many people as possible have those sorts of lives. Examples might be multiplied of various conceptions of worthwhile lives fixing the responsibility that the state has for each person’s life. Rawls is thinking of something

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9 John Rawls, Social Unity and Primary Goods, in Utilitarianism and Beyond 159 (Amartya Sen & Bernard Williams eds., 1982) at 170. See also T. M. Scanlon’s gloss on the division of responsibility in What We Owe to Each Other:

The idea is this. The ‘basic structure’ of society is its legal, political, and economic framework, the function of which is to define positions to which different powers and economic rewards are attached. If a basic structure does this in an acceptable way – if citizens have no reasonable complaint about their access to various positions within this framework or to the package of rights, liberties, and opportunities for economic reward that particular positions present them with – then that structure is just. It is up to individuals, operating within this framework, to choose their own ends and make use of the given opportunities and resources to pursue those ends as best they can. How successful or unsuccessful, happy or unhappy they are as a result is their own responsibility. See T. M. Scanlon, What We Owe to Each Other 244 (1998). Scanlon’s gloss might appear either crass or confused from the standpoint of recent discussions of responsibility in political philosophy, which typically analyze questions of responsibility in terms of a person’s control over, or identification with, a particular choice. The Rawlsian picture, as Scanlon emphasizes, situates responsibility in the framework of fair interaction. A person can be held to account for those things for which free and equal persons can hold each other to account. For discussion of this issue, see Michael Blake and Matthias Risse, Two Models of Equality and Responsibility (unpublished manuscript on file with the author).

10 Ronald Dworkin has recently explained his account of responsibility in distributive justice as expressing a similar “division of responsibility between the community and its members so that the community is responsible for distributing the resources people need to make successful lives, and individuals for deciding what lives to try to make of those resources, that is, what lives to count as successful.” See Ronald Dworkin, Replies, in Dworkin and his Critics 340, 391 n.18. (Justine Burley ed. 2004). Dworkin’s account requires operating markets, and so presupposes some account of private law.

very different. The two aspects of the division are parts of a single package: the state has a responsibility to see to it that people have the resources and opportunities necessary in order for each of them to take responsibility for their own lives. What they then go on to make of those lives is entirely up to them: provided that they do not interfere with and the choices of others, or the capacity of others to make such choices, the state takes no interest in any particular person’s decisions about how to live their lives. That is the sense in which Rawlsian liberalism is "neutral" with respect to conceptions of the good. Neutrality is the consequence of a commitment to human freedom, rather than a premise in some argument in favor of granting freedoms.

By articulating the distinction between public and private in this way, the division of responsibility presupposes a further distinction within the private realm, between the things for which for which I am responsible, and those for which some other private person is responsible. That is the realm of private law. If the pursuits of separate persons taking up their responsibility for their own lives come into conflict, the dispute is essentially a private one between the parties in question. Instrumental theories of private law take private disputes as sort of windfall opportunity for achieving such broader social purposes as economic redistribution or the fine-tuning of optimal economic incentives. Under the division of responsibility, insofar as such social aims are legitimate public purposes, they can be pursued by society as whole. Any private disputes that arise must be resolved between the parties in way that preserve each one’s special responsibility for his or her own life. The formal aspect of private law gives expression to a distinctive way of thinking about human freedom and independence.

This second distinction reflects the relation between the two moral powers that Rawls emphasizes. The first of these is the capacity to set and pursue a conception of the good, the second the sense of justice. The latter is to be understood in terms of the

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12 See Weinrib, supra note 4, at 47.

13 I will not directly take issue with the alternative hypothesis, according to which the formality of private law is merely apparent, that, as Richard Epstein puts it, a matter of a set of "simple rules for a complex world." See his Simple Rules for a Complex World (1995). For Epstein, these rules are chosen on utilitarian grounds. There are ample utilitarian reasons to keep them simple. Simplicity, in turn, makes them formal in their day-to-day operation, and demands that decision-makers have incentives to focus on their formality. This is put forward as a series of empirical claims, with very little hard evidence to support them. Whenever its strengths or weaknesses as an explanatory account of the structure of private law, it is an extreme manifestation of the assumption that I mean to call into question, because it supposes that the moral purpose is served by private law can be stated without any reference to any rules.

Rawls makes some brief remarks, on page 268 of Political Liberalism that some have put forward as evidence that he takes a similar view of the rules of private law. He refers to the rules governing "transactions and agreements between individuals and associations (the law of contract, and so on). The rules relating to fraud and duress, and the like, belong to these rules, and satisfy the requirements of simplicity and practicality." See John Rawls, Political Liberalism 268 (1993). This suggests a "simple rules" approach. But the next sentence is significant, and suggests a more constitutive role for rules of private ordering: "They are framed to leave individuals and associations free to act effectively in pursuit of their ends and without excessive constraints." Id. The notion of freedom to act effectively is best understood in terms of reconciling the capacities of a plurality of persons to set and pursue their ends, rather than any aggregate notion of efficiency. It is also worth noticing that Rawls focuses on the pursuit of ends, not their achievement. This reveals the identity between the first moral power and a Kantian conception of purposiveness.
readiness to assert my own claims, coupled with the readiness to acknowledge the equivalent claims of others to do the same.\textsuperscript{14}

The two moral powers that Rawls makes central are both aspects of what Kant describes as "the innate right of humanity" in your own person.\textsuperscript{15} Kant describes this as the right to be free, where freedom is understood in terms of independence of another person's choice. The power to set and pursue your own conception of the good is Kant's right to independence: you rather than anyone else, are the one who determines which purposes you will pursue. The sense of justice, as Rawls describes it, is the capacity to recognize the rights of others, and just as importantly, to stand up for your own rights. Kant describes this aspect of innate right in terms of what he calls "rightful honor" the principle of which is that you must never allow yourself to be used by another as a mere means. For Rawls, as for Kant, citizens could not consent to a social world in which they were subject to the choice of others, or a world in which other citizens were entitled to determine their life prospects.

These constraints apply on both sides of the division of responsibility between society and the individual. Each person's special responsibility for his or her own life requires that each person be free to take up that responsibility, and not be subject to the choice of another; society's responsibility for providing appropriate rights and opportunities requires that social life not create new relations of dependence, but instead guarantee that all can enjoy their freedoms together.\textsuperscript{16} The two moral powers thus limit the means available to the state in pursuit of public purposes.\textsuperscript{17}

\textsuperscript{14} See John Rawls, Justice as Fairness: A Restatement 6-7 (Erin Kelly ed., 2001).
\textsuperscript{16} I am aware that reading Rawls in this Kantian way will be controversial in at least two ways. As Stephen Perry has suggested in response to an earlier version of this argument, “Kant's own methodology . . . is essentially conceptual in character, and it makes strong metaphysical assumptions . . . . Rawls introduced the notion of the original position precisely in order to avoid these aspects of Kant's approach.” See Stephen Perry, Ripstein, Rawls, and Responsibility, 72 Fordham L. Rev. 1845, 1848 (2004). Kevin Kordana and David Tabachnik wonder whether the claim that the division of responsibility presupposes principles of private right is consistent with the Rawlsian claim that “[t]he original position . . . incorporates pure procedural justice at the highest level. This means that whatever principles the parties select from the list of alternative conceptions presented to them are just. Put another way, the outcome of the original position defines, let us say, the appropriate principles of justice.” See John Rawls, Kantian Constructivism in Moral Theory, in Collected Papers, supra note 8, at 310, quoted in Kordana & Tabachnik, Belling, supra note 2.

This is not a symposium on Rawls, and it is not my main purpose to belabor fine points of Rawls interpretation here. A few brief remarks are in order, however. First, Rawls’s argument, like Kant’s, is normative, not conceptual. This Kantian account carries none of the “strong metaphysical assumptions” with which Perry seeks to discredit it. It is not surprising that he gives no examples of such assumptions, because the only assumptions in Kant’s account of private right are normative ones about freedom and equality. Both stand out in the history of political philosophy for endorsing the claim that the coercive structure of society is the sole subject of the theory of justice, as well as the broader claim that the demands of justice are in the first instance institutional rather than individual. This emphasis on the coercive structure is baffling from the point of view of the prominent idea that political philosophy is a branch of applied moral philosophy, but makes perfect sense from the standpoint of a focus on freedom understood as independence – that is, Kant’s “rightful honor” or Rawls’s “two moral powers.” These are preinstitutional components of the theory of justice, in the sense that they are the premises of the contract argument. The choice of a metric of primary goods has the same place in the Rawlsian theory – it is a normative premise based on the moral importance of the two moral powers. The division of responsibility has the same place in the theory: it is presupposed by the contract argument, not a product of it. So does the idea that the
The two moral powers map onto Rawls’s Kantian distinction between the rational and the reasonable. Rational persons are capable of taking up means to pursue their ends; "Reasonable persons [are moved by a desire for] a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others."\(^{18}\) The core idea of the reasonable is a limit on the means that a person would use in pursuit of his or her ends. Again, the rational and the reasonable show up on both sides of the division of responsibility: I can only be responsible for my own life if I am capable of taking up means to set and pursue my own purposes, but, as we shall see, my responsibility for my life demands that I accept constraints on the means I may use. Rawls explicitly mentions one: I may not demand extra resources from society on grounds of the superiority of my conception of the good. But there are other, equally important limits on the means I can use.

My capacity to set and pursue my own purposes must be rendered consistent with your ability to set and pursue yours. We can’t be required to reconcile our actual pursuits. Any such requirement would violate one or the other of our claims to set and pursue our own conceptions of the good by requiring one of us to adapt our pursuits to help someone else another achieve his or her purposes. Instead, we avoid interfering with each other’s person and property, and any cooperative interaction between us must be fully voluntary. I can’t use your person or property for my purposes without your consent, and you can’t use mine. We also need to take appropriate steps to avoid injuring each other. If either of us violates either of these constraints, we force the other to bear some of the costs imposed by our choices.

_Private Law, Nonfeasance, and Misfeasance_ 

In order to apply the idea that each person has a special responsibility for their own life to transactions between private parties, we need some way of articulating the idea of interfering with another person, as well as the idea of taking advantage of another person. Both of these can, I will argue, be spelled out through the basic categories of private law, as they can be found in Roman Law and modern Civil Law and Common Law systems.

The basic categories of private law serve to define and protect rights to person and whatever property a person happens to have. Rights to person and property are essential
to a specific conception of human freedom. Rawls makes this conception explicit when he talks about the moral power to “form, to revise, and to pursue a conception of the good, and to deliberate in accordance with it.”19 The idea of pursuing a conception of the good contrasts with the very different idea, central to non-liberal thought, of achieving the good. The Rawlsian emphasis on both pursuit and “a conception” of the good reflect his distinctive conception of how choice matters to interpersonal interactions. Rawls's language here echoes the distinction introduced by Aristotle and developed by Kant, between wish and choice.20 To wish for something is to desire that it should be so; to choose it is to take up means to achieve some particular or general outcome. In order to do so, you must first of all be able to conceive of object – hence talk about conception – and second, you must take yourself to have means adequate to achieving it. Secure means and the ability to entertain possible uses for them, and choose among them marks off choice from mere wish. Setting and revising a conception of the goods sounds like something someone might hope to do all in their head, quite independently of anything that goes on in the world or any actions by others. Rawls is after something different, not least because merely entertaining a conception of the good does not, in and of itself, raise any questions of justice between persons. It is only if you pursue your conception of the good that questions of justice are engaged, because pursuit requires the availability of at least some means. The good, as you see it, may not be good for you; it may not to be good at all. Nonetheless, setting and pursuing your own conception of the good is the most important exercise of your freedom, because you are the person who sets your own path in life. No other person can take it upon themselves to choose for you, precisely because it is your life. From the inside, as you set and pursue particular purposes, you think of them as being not just your conception of the good, but good. Rawlsian liberalism does not dispute that characterization but simply reserves for you the right to be the one who makes the judgment about which ends you will pursue.21

Rawls, like Kant, is silent about the worth of various ends, not because he supposes that they don’t mater, but because the idea that each person has a special responsibility for his or her own life requires a focus not on the ends that people pursue, but on the means they use to pursue them.22 The key idea of the division of responsibility is that private persons may only use their own means for setting and pursuing their purposes, and society as a whole may only use such means as are consistent with the freedom of separate persons.

Independence from another person's choice is not important because it thought of as the best way of promoting successful choice, but rather as an implication of the more

21 Sometimes this idea is cast in skeptical, pluralistic or epistemological terms. Some say that we create our own good; others that different people have different goods, and each person should pursue what is good for them, rather than trying to pursue what is good. Still others insist that there really is an answer to questions of what is best in life, but we turn out not to know it. Rawlsian liberalism contrasts with all of these views, because it is at bottom a theory of entitlements: you are the person who is entitled to make your own way of life, and nobody else has standing to take it upon themselves to decide for you. This follows from your two moral powers as a human person, capable of setting your own purposes, not from any kind of empirical evidence, or even hypothesis, that your life is likely to go best if you do that, nor because we think there is no determinate answer until you have made it up.
general idea of reconciling the purposiveness of separate persons, each with a special responsibility for his or her own life, through a set of reciprocal restraints. It is not put forward as an empirical hypothesis about what is most likely to enable people to have control over their lives. That is a problem with no general, systematic, or reciprocal solution. How much actual control you have over your life depends on the context in which you find yourself, and the particular things that you want. You might have a high degree of control over your life if you turn out to want exactly those things that are easiest for you to get. Instead, your independence from the choices of other is he is to be understood as your entitlement to be the one who decides which purposes he will pursue with the means that are at your disposal.

The idea that particular means are at your disposal introduces two further contrasts: first, between something being subject to your choice, and it being subject to some other person’s choice. Second, there is a contrast between the means that are subject to your choice and the context in which you use them. The context in which you use your means is made up largely of the choices of other people, and the consequences of those choices. I am not entitled to compel another person to use his or her means in the way that best suits my use of my own maintenance. I cannot compel you to refrain from opening a restaurant in order to make my use of my premises as a restaurant more successful; you cannot compel me to put up a fence to reduce your air-conditioning bills, or tear one down to protect your garden. Each of us is free to use our powers for our purposes, which means that neither can compel the other to use them in a particular way so as to provide a favorable context. Instead, as I will explain in more detail below, any cooperation between us must be voluntary. That is the only way in which each of us can take up our own responsibility for his or her own life in a way consistent with the ability of others to do the same. Independence as such is both an unappealing and unrealizable ideal. Independence as separateness and voluntary cooperation is both appealing and realizable.

The idea that each person has responsibility for his or her own life limits the means people are able to use for their purposes. In particular, my special responsibility for my life is only consistent with your special responsibility for yours if each of us is required to forbear from using the other, or means belonging to the other, in pursuit of our purposes. That is the very thing that the familiar departments of private law articulate. Hobbes and Grotius described private law as "the law of mine and thine." In our terms, it is the law of who has dominion over which means, in relation to others. Articulating those relations requires an account of how people can have means as their own consistent with the independence of each of them from each of the others. That is just what the law of contract, tort, and property do. I will not go through full detail, but rather simply point to the structure of tort, property, and contract in order to make this point. The analysis I offer will be brief, and will draw heavily on (parts of) Kant’s division of “private right” in his *Doctrine of Right*.

Kant’s account provides the basis for an understanding of the remedial aspects of private law, but it is not, in the first instance, a theory of liability rules, compensation, damages, or even duties of repair. Instead it is in the first instance an account of *obligations*: norms of conduct governing the interactions of free and equal persons. Those norms are relevant to the resolution of disputes, but the remedial norms of corrective justice follow the primary norms of conduct. It is thus not a “backward looking” account
that seeks to assign liability on the basis of past events, but a forward-looking one that guides the conduct of persons by delimiting the means available to them as against other private persons.23

Kant's approaches private law through its relationship to freedom, understood as independence from the choices of others. The idea that there can be a system of equal freedom has fallen from favour in recent years, but Kant provides a corrective to such intellectual fashion by providing a clear and systematic explication of the distinctive ways in which free persons can interact, consistent with their freedom. In so doing, he provides an alternative the familiar idea that private law can only be understood and evaluated in terms of its “functions” where these are understood as the benefits it is thought to provide. On the Kantian analysis, private law does not determine the optimal level of injury, encourage transactions or even to protect people from harm.24 It creates and demarcates a system of equal independence of each person from the choices of others.

Kant's basic insight is that there are three ways in which private persons can interact, corresponding to the three basic forms of private legal obligations.25 First, separate persons can pursue their separate purposes separately; those pursuits are consistent provided that each person forbears from using means that belong to others, and controls the side-effects of their own activities to avoid damaging means that belong to others. This form of interaction is protected by the negative rights that each person has against all others to security of a person, and exclusive possession and use of property. It finds legal expression in the law of tort, which protects person and property against injury, through negligence and other damage-based torts, such as nuisance, and against use by others through intentional torts such as trespass and battery. Rights to person and to property differ in important ways, but they are alike in giving the right bearer the right to security against others and the right to exclude others.26

Second, separate persons can pursue their separate purposes interdependently and consensually. In saying that their purposes remain separate, I do not mean to suggest that people cannot actively share purposes, but rather that it is up to both of them to decide whether to share. People enter into cooperative arrangements which give rise to binding rights between the parties to them. The law of contract gives effect to these private rights, enabling people to engage in voluntary cooperative activities by transferring their powers to each other. Most of the law of contract is concerned with future transfers in a way that might misleadingly suggest that it gives legal effect to the moral obligation to keep promises. On the Kantian analysis, however, the fundamental structure of a contract is
already contained in a present transfer of goods or services: one person gives another person a right to a deed. Future transfers are more familiar because so many significant forms of cooperative activity take place across time. As Rawls once remarked, planning is in large part scheduling. They are conceptually no different from present transfers: in each case, one person acquires a right to the deed of another.

Third, separate persons can pursue their separate purposes interdependently but non-consensually. In such cases, whether consent is normatively impossible, as in the case of guardians of minor children, or factually impossible with respect to particulars, as in relationships of agency, or some mix of the two, one party is required to act on behalf of the non-consenting one, and precluded from profiting from the relationship. In such cases, the beneficiary has something stronger than a contractual right, and the form of a right to a person, rather than merely against one. This is the realm of fiduciary obligation, the realm in which one party is required to act on behalf of another.

Kant's account provides a distinctive way of understanding the nature of private interaction. These categories are meant to be exhaustive, but rather than explain that aspect of his argument here, I want to draw attention to the overall structure that this conception of private law imposes: people are required to forbear from interfering with each other. Provided they do so, the only grounds of cooperation are voluntary. You are free to enter into cooperative arrangements with others, but nobody can compel you to cooperate with them. This focus on voluntary cooperation is essential to the capacity to set and pursue your own conception of the good. Your powers are available to you to use as you see fit, but you do not need to make them available to others to suit their preferred pursuit of their own purposes. If you did, then you would be compelled to pursue, or aid in the pursuit, of a purpose that you did not set for yourself. In Rawlsian terms, you would thus be blocked in the exercise of your first moral power.

This same idea of voluntary cooperation gives rise to the familiar distinction between nonfeasance and misfeasance. Private law, through tort and property, protects people in whatever they already happen to have. It secures them against use and interference by others. Negative obligations do nothing, however, to provide people with means that they need, or to compel others to provide them with those means. The law of contract requires affirmative actions, but they need to be voluntarily undertaken. Fiduciary obligations can be broader, and exit from them more onerous, but they too must be voluntarily undertaken. Nobody can impose an affirmative private obligation on you as a result of their need, no matter how pressing.

The basic apparatus of private law reflects these Kantian distinctions. Most notably, the absence of a private law duty to rescue is itself an expression of the idea of voluntary cooperation and the accompanying distinction between nonfeasance and misfeasance. You never need to make your means or powers available to another person, even in the limiting case in which life itself is at issue. This does not reflect a distinction between acts and omissions, or any distinctive theses about the nature of causation. Instead, its normative basis is just the requirement that all cooperation is

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27 Rawls, Theory, supra note 20, at 410.
28 I do so in Authority and Coercion, supra note 19.
29 Constructive trusts are remedial responses to wrongdoing.
30 I discuss this issue in more detail in Three Duties to Rescue: Civil, Moral, and Criminal, 19 L. & Phil. 751 (2000).
voluntarily undertaken. If nobody has undertaken to provide me with a benefit, then I have no standing to complain against any other particular person that I lack it. In the same way, the familiar tort doctrine barring recovery for pure economic loss follows for of the idea of voluntary cooperation. In the classic examples, defendant damages something, such as a bridge, to which plaintiff has a contractual right, but no property right. Plaintiff has no property right in the bridge, he has no legal standing to exclude defendant from using or damaging it. Bridge owner can recover from defendant, and plaintiff may be able to recover from Bridge owner, depending upon the terms of their contract. What plaintiff cannot do is proceed directly against defendant, because plaintiff does not have a right against all others to the bridge. Plaintiff’s only right is a contractual right against the person who transferred it, that is, the bridge owner. Defendant is a stranger to the contract between plaintiff and the owner of the bridge, so they cannot, through their voluntary cooperation, impose any obligations on defendant that he did not already have. So the contract generates no obligation.

Cast in Rawlsian terms, private law as a whole secures for private persons the exercise of their first moral power, the capacity to set and pursue a conception of the good, in the face of the equally valid claims of all other private persons to do the same. Its role is constitutive, rather than instrumental, in relation to this moral power. The claim is not that, standing behind a Rawlsian veil of ignorance, rational and fully informed persons would predict that a system of private law would best improve their prospects of exercising this moral power. Those concerned to maximize their prospects of success might prudently choose to disregard the distinction between nonfeasance and misfeasance, or apply it only selectively, on the basis of the particular interests that are at stake and their estimation of the circumstances they were likely to find themselves in. For example, from the standpoint of maximizing the capacity to set and pursue your own purposes, you interest in continuing to live is important enough that you might agree to a scheme of mutual aid, allowing a greater risk to offset a lesser one. That is not the place of private law in the division of responsibility. Instead, its role is partially constitutive: the special responsibility that each person has for his or her own life is not the conclusion of the contract argument, but rather the premise that gives it its entire moral point. Persons are entitled to use their powers as they see fit, consistent with the ability of others to do the same.

If the choice of private law rules or systems is treated as a decision for parties to make in the original position, in light of their expected interests, the contract argument simply collapses into a form of utilitarianism, as parties look at their expected advantage under competing systems. Aside from all of the difficulties with utilitarianism that are summed up in Rawls's famous claim that it "ignores the distinction between persons," the core difficulty with such a consequentialist understanding of private law is that it renders it inconsistent with the division of responsibility, and the special responsibility that each person has for his or her own life. The distinction between and misfeasance is invisible from a consequentialist perspective precisely because that distinction just is the distinction between persons apply to their private interactions. If an article of tort law is

32 I explain this in more detail in The Division of Responsibility and the Law of Tort, supra note 6.
chosen on the basis of its expected consequences, then persons are held to account based not on their own choices but rather on the aggregate advantages that will flow to others.\textsuperscript{33}

Private law protects people in what they have, and gives them an entitlement to decide how they will respond to the incentives offered by others. Nobody needs to cooperate with others if they do not wish to. This dual focus on protecting what people already happen to have and allowing them to decide how their powers will be used provides an explanation of the formality of private law, and also of its relationship to freedom. Private law is formal because it governs the relations between persons with respect to the means they have, independently of any inquiries into the particular means that some particular person happens to have. The division of responsibility also explains why private law must be part of the coercive structure of Rawlsian justice: its obligations are the protections that enable the reciprocal exercise of the first moral power.

This focus on voluntary cooperation might invite the thought that private law is the only type of justice it is consistent with individual freedom. In particular, the state presents itself as a form of mandatory cooperation, in a way that might appear to be in tension with the idea of freedom. I will now argue that private law requires public justice.

\textit{The other side of the division: Public Right}

Private law demarcates a sphere of individual freedom and voluntary cooperation. You are free to use your resources as you see fit, consistent with the right of others to use theirs. You don’t have to cooperate with anyone unless you choose to. Those limits are not self-policing or self-enforcing, and any enforcement of them needs to be done in a way that is consistent with the equal freedom of all.

Rawls describes the state as a form of social cooperation, in a way that might, misleadingly, suggest that it is like other forms of social cooperation, such as a baseball

\begin{footnotesize}
\textsuperscript{33} As I noted, \textit{supra} note 12, this is not a symposium on Rawls, and so it would be out of place for me to go on at great length defending the claim that the position outlined in the text is implicit in Rawlsian justice. Nonetheless, one further clarification is in order. It is possible to generate an apparent tension between \textit{any} account of private disputes and the Rawlsian focus on justice in distribution by representing that focus as committing Rawls to the implausible idea that his difference principle generates an ideal of moment-by-moment distributive shares for everyone, as do Kordana and Tabachnik, Belling, \textit{supra} note 2. Rawls’s arguments point in a very different direction, because he contends that the difference principle does not govern distributions as such, but rather expectations as generated by social institutions. See Rawls, \textit{Theory}, \textit{supra} note 20, at 64. As citizens take up their responsibility for their own lives, they, either individually or through associations, can use or dispose of their distributive shares as they see fit. In "The Basic Structure as Subject" Rawls is explicit that the aggregate effects of private transactions must not be allowed to generate injustices. See The Basic Structure as Subject, \textit{in} Rawls, \textit{supra}, \textit{supra} note 10, at 266. Implicit in this claim is that assumption that the micro-effects of particular choices do not, as such, generate any injustices. It is not that the small distributive imbalance is generated every time somebody makes a purchase, or damages their own property, but it is not worth while to correct it because of transaction costs, or for some other such extrinsic reason. Instead, permissible private transactions raise no such issues. To borrow a helpful distinction from Stephen Perry, Rawls’s offers a \textit{dynamic} rather than static account of distributive justice. Stephan R. Perry, \textit{On the Relationship between Corrective and Distributive Justice}, \textit{in} Oxford Essays in Jurisprudence 237 (4\textsuperscript{th} series, Jeremy Horder ed., 2000). Kantian Private Right is simply a demarcation of the boundaries of legitimate private transactions.

The idea that a concern for the expectations of the worst-off \textit{must} yield an account of momentary shares is a residue of the assumption, discussed in the text surrounding note 3, that morality is complete without institutions, that institutions should be designed so as to approximate a result that can be specified without reference to them. This is not Rawls’s view.
\end{footnotesize}
league, a neighborhood picnic \(^{34}\), an orchestra, \(^{35}\) or, to use Hume’s famous example, two men rowing across the pond, working their oars in unison \(^{36}\). These idyllic pictures of social cooperation provide poor models for the type of cooperation involved in the state. State action is not just a more complex version of a group of people getting together, sorting out a division of labor, and setting to work to achieve their common purpose. States exercise powers that few people would ever grant to the other members of their baseball league or orchestra. For one thing, they claim powers of enforcement and redistribution. The *schnorer* who eats heartily but never contributes anything to the annual neighbourhood picnic may behave unfairly, but few people would think that his neighbours are entitled to let themselves into his pantry to seize food for the picnic. The curmudgeonly neighbour who skips the picnic cannot be forced to come join in the fun. States make people pay for benefits whether they want them or not. States also claim to be entitled to issue binding laws and to force people to do as they are told. They claim to be entitled to do so within their territory (sometimes even outside it), so that participation in this form of social cooperation is not voluntary. In these ways it is fundamentally different from the type of voluntary social cooperation that is at the heart of private ordering. \(^{37}\)

There are a number of strategies for denying or bridging these differences. The first two correspond to the two ways of collapsing the distinction between public and private law that I mentioned in my opening paragraph. Utilitarians and egalitarians who deny the normative integrity and significance of private law can say that the voluntariness of such interaction is only incidental to the benefits it provides, and that its rules must be selected on the basis of their expected effects. \(^{38}\) This way of understanding public powers is just the converse of the rejection of a distinctive account of private order. \(^{39}\)

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\(^{34}\) See A. John Simmons, The Principle of Fair Play, in Justification and Legitimacy: Essays on Rights and Obligations 26 (2001); Fair Play and Political Obligation: Twenty Years Later, *id.*, at 27–42.


\(^{36}\) See David Hume, A Treatise of Human Nature, Bk 3, S. II (1740).

\(^{37}\) This question does not concern either the existence of a moral obligation to obey the law, apart from its moral merits, or the attitude that citizens should take to the law. Those are interesting questions, but they are not my question. Instead, I am concerned only with the question of legitimacy: under what conditions can a society force its members to conform to its requirements, both in the form of first-order requirements on conduct, and though designated forums for dispute resolution in cases of conflict? The question of state’s title to coerce differs from another idea, familiar in constitutional theory, according to which a constitutional order is only legitimate if ordinary citizens willingly accept it as a source of moral obligation. Social life might well be impossible if most people do not willingly comply with the demands of law, but such acceptance of legal obligations is not sufficient for legitimacy. In the same way, different political regimes might be evaluated in terms of their success at protecting important rights, but the question of legitimacy is the question of the entitlement to use force to do so.


\(^{39}\) The idea, familiar in economic analysis, that voluntary exchanges are preferable underscores this point: the claim is that they produce a net increase in wealth. Even when this claim is taken to be an analytical definition rather than an empirical discovery, economic analysis, like the utilitarianism to which it is heir, evaluates voluntariness in terms of its effects.
The other familiar way of collapsing the distinction is through a Lockean interpretation of the metaphor of a social contract, complete with the doctrine of consent, to argue that states are only legitimate when they are genuinely voluntary forms of cooperation. The Lockean understands relations between the individual and the state no differently than relations between private individuals: they are legitimate only if fully voluntary. Locke’s invocation the concept of tacit consent blunts some of the force of this equivalence, but the structure of the strategy is clear: only private ordering is consistent with freedom. The Lockean strategy collapses public justice into private law by denying the normative significance of the most significantly obvious public aspect of private right, the resolution of disputes through public procedures for applying antecedently articulated laws governing all citizens – in short, the rule of law. Locke argued that rational persons would prefer the rule of law to the state of nature, that they would adopt it for instrumental purposes. But the rule of law carries no independent normative weight in his account. Just as the utilitarian sees private law as merely instrumental in relation to one set of goals, so the Lockean sees the public aspects of the rule of law as merely instrumental to a different set of goals.

The third strategy, which can be found in Kant and Rawls, supposes that the state has a distinctive set of powers, which can only be exercised legitimately from a distinctively public perspective. The existence of such a public perspective is prerequisite to any legitimate exercise of force. In Kant’s preferred vocabulary, it takes the form of a “united general will”; in Rawls’s “the citizens considered as a collective body” act together. A central task of political philosophy is to articulate the distinctive features and requirements of such a public perspective. That is the strategy that I will explore here.

The Kantian strategy articulates the public nature of the enforcement of rights, and in so doing reveals the broader demands of public justice. Just as Kant's argument about private rights is non-instrumental, so too is his argument about public justice. It makes no appeal to factual claims about the likelihood of conflict and irresolvable resolution of them in a state of nature in which private parties were left to their own devices for enforcement. Kant would not have denied that the "warped wood" would lead to conflict, but such factual claims play no part in his argument, because he focuses on the normative inadequacies of private enforcement. Private enforcement, for Kant, is not merely unreliable, inefficient, or likely to escalate. Even if good fortune were to prevent these problems from arising, the underlying problem would remain. The idea of a private "executive right" of enforcement is inconsistent with the underlying ideas of freedom and equality that make private rights and voluntary cooperation seem so compelling. Private enforcement is always unilateral enforcement, always a right of the stronger.

Private enforcement

It is a commonplace of political philosophy that private enforcement of rights is biased and unreliable. Private enforcement is likely to exacerbate the effects of disputes, and make disagreements escalate. Locke concludes from this that prudent people would leave the state of nature, and delegate their executive power to the state, to exercise it on everyone's behalf.

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On the surface, Kant’s account is similar, but at root it is fundamentally different, because it denies that there could be an executive right to enforce rights without impartial institutions of adjudication and enforcement. The Lockean account moves from the true premise that freedom-based rights necessarily set limits on the legitimate use of force, and its corollary that rights are presumptively enforceable, to the further claim that each person has an "executive right" to enforce his rights in the absence of institutions and procedures. Locke writes "the law of nature would, as all other laws that concern men in this world, be in vain, if nobody in that state of nature had a power to execute that law and thereby preserve the innocent and restrain offenders. And if any one and in the state of nature may punish another for any evil he has done, everyone may do so; for in that state of perfect equality where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must needs have a right to do."41 Although Locke is right to identify a problem about unenforceable rights, the further implication he hopes to draw from it does not follow, because it is in tension with the more general requirement that different people's rights form a consistent set. My right ends where yours begins, and more generally, a system or rights sets reciprocal limits on freedom – no person is entitled to limit the freedom of another unilaterally. As I shall now explain, if private rights are understood as systematic in this way, then nobody could have a private right to enforcement, consistent with others enjoying the same rights. Instead, people can have a right to have fair procedures govern the enforcement of any rights.42 Instead, the correct conclusion from Locke's sound observation about the difficulties of unenforceable rights is that the only way in which anyone could have the right is if everyone has the right, together.

I want to make this point by briefly considering the Lockean image of persons in a state of nature transferring their rights of private enforcement to the state in order to

41 John Locke, The Second Treatise Of Civil Government, 2.7 (1690).
42 John Simmons provides the most plausible defense of the idea of a Lockean right to punish in a State of Nature: "insofar as there are objective moral rules (defining rights) under which all persons (originally) stand, and the protection under these rules depends on others' obedience to them, then, a proportional forfeiture of moral rights may be a necessary consequence of infringing the moral rights of others." See A. John Simmons, The Lockean Theory of Rights 153 (1992). Putting aside any other difficulties this argument may have, it is not lead to a right to punish, but to a right to be punished subject to public procedures.

Simmons suggests that Locke combines natural law arguments with theological and rule-utilitarian ones to generate his account of natural rights. This is not the place to examine those arguments in their full detail. It is worth noting, however, that the basic premises of both the theological and rule-utilitarian arguments are in the same tension with the idea of an executive right in a state of nature as the Kantian account defended here. The theological argument that the world was given to mankind in common presupposes that the rights generated through this act of divine grace form a consistent set, something which executive rights in a state of nature do not do. The rule-utilitarian argument private rights on the grounds that they are the most advantageous set of overall limits on conduct. That empirical question cannot be examined, however, without also raising the question of enforcement. Given the "inconveniences" of private enforcement that Locke catalogues, it cannot be that the best overall rule is one that generates rights that come into conflict in this way. Instead, the difficulties of private enforcement must enter into the evaluation of the consequences of any proposed set of rights. Here again, it seems that a right to a fair procedure would be the rule-utilitarian solution. The natural law arguments operate somewhat differently, it in them the root of the problem is clearest: if natural rights are to be a genuine alternative to divine right theories of government, they must begin with the idea that persons are free and equal -which is just the very idea that the rights of different persons, both primary and executive, must form a consistent set.
better secure the advantages that come from uniform and consistent enforcement. The core of Kant's argument is that the right to enforce rights cannot be enjoyed in a state of nature. The right that Locke imagines people trading away is one that can only be enjoyed through the rule of law.

On Kant’s understanding, a right is both a title to coerce and a part of a system of rights. The only rights that we can have are those that are consistent with others having the same rights in a system of equal freedom through equal rights. The right to enforce your rights is no different: it too must be part of a system of equal rights.

The right to enforce is remedial: it addresses a private wrong in a way that is consistent with the underlying right. On Kant’s analysis, private wrongdoing is always a matter of one person being subject to the choice of another. If I deprive you of means that are rightfully yours – perhaps I carelessly bump you, and injure your body, or damage your property – I have interfered with your right to be the one who determines how your means will be used, your right to continue having the means that you have. Because it is a right, it is only binding against other persons. You have no standing, as a matter of private right, to complain if a hailstone injures you or damages your property, because there is nobody for you to complain about.43 You have every right to complain – to me and about me – if I cause the same damage. In wronging you, I upset our respective independence from each other; the limits on our choice are no longer reciprocal, but subject to my unilateral choice. You remedy against me is supposed to give you back what you were entitled to all along – from the point of view of our freedom, it is as though the wrong had never happened, even though, from the point of view of my assets, it is as though I had squandered them. Your right of enforcement against me is a right to make me restore you to the position you had been if I had never wronged you. Your right survives my wrong in the form of a remedy; the remedy serves to undo the unilateral aspect of my deed.44

Kant’s insight is that just as primary rights to freedom must be subject to reciprocal limits, so too must secondary rights to enforcement. Your right to a remedy in response to my wrongdoing upholds your right, and so in a sense, guarantees that it survives my wrong, because it gives you an entitlement to means equivalent to the ones I deprived you of. Yet your act of enforcement looks like it has the same problem that my deed did, that is, it is purely unilateral on your part. For all of the reasons that neither is the of us can be subject to the choice of the other with respect to our deeds, neither of us can be subject to the choice of the other with respect to the undoing of any wrongs that have been committed.

In Kant’s preferred vocabulary, rights are a matter of “freedom in accordance with universal laws.”45 In exactly the same way, enforcement must be done in a way that is consistent with freedom in accordance with universal laws. Private rights are presumptively enforceable, because any violation of them is inconsistent with equal freedom, and any enforcement of them is merely repairs that inconsistency. But freedom must be repaired in a way that itself preserves equal freedom rather than subverting it.

Just as Kant’s argument about private rights focuses on the formality of primary rights, so his argument about enforcement draws out the parallel formal difficulty of

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43 Unless someone breaches a contractual obligation to keep your car protected.
44 I explain this in more detail in As If It Had Never Happened (forthcoming 2006).
45 See Kant, supra note 14, at 6:231, 6:246, 6:380.
unilateral enforcement. He contends that rights can never be secure in a state of nature no matter how "law-abiding and good men might be" because the problem is with one person's entitlement to decide, not with the likelihood or consequences of abuse of that entitlement. Private enforcement is not merely inconvenient: it is inconsistent with justice because it is ultimately the rule of the stronger.46

Kant’s treatment of private rights shows that reciprocal limits on freedom can be articulated at a high level of abstraction, but at the more detailed level at which actual people interact, the formal categories of private law do not apply themselves. People acting in good faith might disagree about what they require in a particular case. If you and I can’t agree about whether your injury was a foreseeable consequence of my conduct, or whether we had completed a contract, or which aspects of my loss are within the scope of your wrong, our disagreement can survive an agreed statement of the facts and agreement about the general principles that should govern our interactions. Although there is a perspective from which someone might say that in such a situation, our answers must be equally good, so that neither of us has any reason to stand by our claims, neither of us has any reason to take such a perspective, because each of us has what we regard as a good argument for our own position. I may think that you should recognize that our positions are equally defensible, and so endorse mine as a just solution to our dispute. You may think that I should endorse your solution. That is exactly our problem. All we can do is act on our own best judgment. Why back down if you believe that justice is on your side, even if it is not uniquely on your side? Your sense of justice demands that you accept the claims of others, but not that you always abandon your own.

If we are left to resolve our dispute on our own, one of us will probably be willing to back down, or perhaps we will reach some sort of compromise. The readiness to back down or compromise reflects good sense on both of our parts, but it is also the rule of the stronger, because whether we will do either of these things depends on who it is that we find ourselves arguing against, not on our perception of the merits of the case. If I am bigger than you, you will have incentive to compromise, but then again, if I seem like a pushover, you will be less likely to.

Private enforcement by the person who happens to prevail might work to your advantage, either because you prevail, or the person who prevails agrees with you. But someone is always subject to someone else's choice, and who wins depends on factors that the loser should regard as arbitrary. Even if, acting in good faith, neither of us resorts to our threat advantage, charm, or stubbornness, the party who concedes a point in the face of disagreement does so in light of factors that he or she believes to be arbitrary in relation to the merits of the case. Our disagreement survives our separate articulations of

46 The same point can be made about private rights of action: your primary right to be free of interference of others, and have others satisfy their obligations to you generates a remedial right to repair if others violate their rights. On these issues, see Benjamin Zipursky, The Philosophy of Private Law, in The Oxford Companion to Jurisprudence and Legal Philosophy (Jules Coleman & Scott Shapiro eds., 2002). Your right of action is only consistent with the rights of others provided that there is a fair procedure in place for determining the precise contours of your respective rights and the application of those contours to the concrete situation. If I do something that you think has violated your rights, and exercise "self-help", claiming one of my cattle or tearing down my fence, and I think I have done no wrong, or a lesser wrong, things are likely to escalate, as I seek reparation for what I believe to of thing you are wrong against me. Escalation is a symptom of the normative problem: if we both stand on what we take to be our rights, we stand in inconsistent places, and our conduct is not subject to reciprocal limits.
what is relevant to the merits, so any grounds that one of us has four making a concession
he is strategic in the narrow sense that our acceptance of the depends upon some purpose
external to the merits of the dispute. That arbitrariness means that the loser is subject to
the winner’s choice. Perhaps neither of us will back down, and we will just fight it out,
introducing the right of the stronger in a more parochial sense.

Having the resolution of our dispute depend on these factors is not only irrelevant
from the standpoint of justice: it is contrary to it, because inconsistent with the idea that
we are subject to the same limits on our freedom, that our rights that are identical in form.
The person who backs down in such a situation may do better than she would have done
had she stood on her rights, she will still be subject to the other person’s will.

The solution to this problem is the rule of law: impartial dispute resolution,
subject to general rules that bind everyone. Impartiality is a requirement of a court, even
though it is not a requirement of private parties towards each other. In setting and
pursuing our own respective conceptions of the good, we do not need to treat our own
purposes and those of others impartially. You are entitled to be partial to your own
conception of the good, and indifferent to mine. Impartiality matters to a court because
its task is to resolve disputes in a way that is consistent with the freedom of the parties
before it. When plaintiff comes before a court, alleging that defendant has wronged her,
she demands a remedy to make good that wrong. Plaintiff is asking the court to grant her
a remarkable power: the power to exact a claim against defendant’s resources, and thus to
interrupt defendant’s power to use those resources as he or she sees fit. The grant of such
a power can only be consistent with defendant’s freedom provided that the forum
granting it is suitably impartial.48

47 Kant traces this problem and its solution to what he calls the "innate right of humanity" in your own
person. The right is innate because it does not require an affirmative act to establish it. It is at once the
right to freedom and equality, that is, the right to only be bound by others in the same ways that they are
bound by you and, at the same time, the right to be "beyond reproach." He makes the connection between
the two in a surprising way: first he says there is only one innate right. He then goes on to insist that it
"contains" the right to be beyond reproach. The containment follows from the plausible claim (for which
Kat mounts an explicit defense) that rights are coercively enforceable. The first aspect of the innate right of
humanity, the right to freedom consistent with the freedom of others, governs the basic norms of
interaction. They must be norms of equal freedom, guaranteeing that no person is subject to another’s
choice. Kant's account of private right articulates the structure of independent interaction. The second
aspect of the same innate right of humanity governs the enforcement of rights, via the application of those
primary norms of conduct to particular cases. Just as each person’s freedom needs to be limited by the
freedom of others so as to form a consistent set, so too each person’s right to enforce in case of disputes
about rights needs to part of a consistent set so that the remedial process for resolving disputes not turn into
the subjection of one person to another person' choice. Kant makes this point explicit when he notes that
the right to be beyond reproach is the basis of the burden of proof: a person is entitled to be presumed to
have done nothing wrong. The burden of proof is often thought of as a pragmatic or administered of
matter, through which institutions allocate burdens to make their tasks easier, or to discourage frivolous
litigation. Kant offers a fundamentally different account: the burden of proof lies with the plaintiff because
no person is allowed to exercise force against another person (or call on the state to do so) simply on his or
her own say so. The same normative structure that gives rise to private rights, thus gives rise to a right to
fair procedures governing the application of those rights. Every aspect of remedial rights is a right to a
procedure, not forbearance on the part of others. If private wrongdoing is taking unfair advantage of
others, private enforcement also is. See Kant, The Metaphysics of Morals, supra note 14.

48 The objection to private enforcement in a "state of nature" is that its subjects one person to the choice of
another, so that whether your claim against me prevails depends upon how credible your powers of
enforcement seemed to me or, if I am more fair-minded and our state of nature more Lockean, on how
Two Kinks of Disputes

On the Kantian account, legal institutions provide this publicity in two overlapping ways, reflecting the differences between two distinct types of disputes about private rights. Sometimes, a court simply provides an impartial forum for a dispute that has a completely determinate answer at the level of private right. In such cases, defendant wins because plaintiff has failed to state a cause of action: if everything happened just as plaintiff contends it did, plaintiff has failed to allege that defendant violated any right of hers. When a stranger to a contract seeks consequential damages for the breach of that contract, there is no issue for a court to decide. Violating a right against one person does not, taken simply as such, engage the rights of third parties. There are also, conversely, cases in which the existence of the wrong is beyond dispute, as when defendant breaches the explicit terms of a contract, or trespasses against plaintiff's person or property. Even in such cases, a public forum of dispute resolution is required in order for the rights in question to be enforceable. Absent such a forum, plaintiff's self-help is nothing more than a unilateral imposition of force.

There is another, more familiar, class of cases in which public institutions of justice are required in a further sense. These are the cases in which positive law is required to fix the precise contours of private right. In such cases, the role of the legal convincing I find your arguments. It might be thought that institutions solve this part of this problem, only to replace it with another. It may be that if we have set up courts with honest and competent police powers to enforce their judgments the success of your claim against me will not depend directly on our respective physical strength. It might be thought to still depend upon how good an advocate you are, or how good an advocate you are able to hire, and so, ultimately, on how convincing the decision maker finds your argument as presented. Even if the force of argument is less a violent than the argument of force, you might complain that the resolution of our dispute depends upon what the decision maker decides. The real world of legal procedure might erode your confidence further, because it is a familiar fact that procedure is expensive, and those with the money to delay proceedings can simply price their opponents out of the system. These are contemporary reminders of Locke's observation that "absolute monarchs are but men, and if government is to be the remedy of those evils which necessary follow from men's being judges in their own cases in the state of nature is not therefore to be endured, a desire to know what kind of government that is, and how much better it is that the state of nature." See Locke, supra note 34, at 2.13. Locke's immediate concern is the power of an absolute monarch to be judge in his own case, and then a problem which can be solved through a separation of powers. The more general concern is that the decision maker will still have to decide somehow, and so it might be feared, bringing in irrelevant factors.

Nonetheless, the Kantian point here is not about the up empirical dependence on a decision maker's decision. The problem is not that somebody decides, as if somehow in an ideal world, it would be no human decision maker involved. The rule of law requires that someone decide in these cases, because there is no just answer without a determinative judgment. Nonetheless, the making of the judgment needs to be consistent with the freedom of all, which requires that the authorization to make the judgment must be in some important sense something that comes from everyone. This contrast is important even if, the result in some case is exactly the same that it would have been in the state of nature. Even if we had reason to suppose that its content would be exactly the same, it would issue from the wrong standpoint. The disappointed party could have only strategic or pragmatic reasons for accepting it. In a rightful condition, by contrast, the disappointed party has a moral reason for accepting it, that is, that accepting the authority of the duly authorized courts and officials is the only way to reconcile his freedom with that of others. The notion of reconciling freedom at issue here is not empirical. It is not that he makes some calculation about the likelihood of favorable outcomes across time, and the way that Lockean persons are supposed to reason about exiting a state of nature. Instead, it is the only way in which the parties can enjoy their freedom together, and thus the only way in which the disappointed party can enjoy his or her freedom rightfully. The alternative is what Kant, following Rousseau calls "wild, lawless freedom." See Kant, supra note 14, at 6:316.
system is to provide a common answer to disputes about private right, rather than to declare an antecedent answer. Such disputes are more familiar.  

Even the most straightforward disputes generate a problem of unilateral enforcement, however, because a juridical principle of private right is only as good as the objects to which it applies. If I complain about a wrong in relation to property, for example, I can only stand on my rights provided that I can establish secure title to the property in question. My title to what I have presupposes a resolution to both types of issues. Ownership requires some sort of affirmative act to establish it – I must acquire it from an unowned condition, or receive it from some other person or agency that has the right to give it to me. Whatever the requisite affirmative act might be, it is my act, and not yours. As my act, it may raise issues of determinacy: if I take possession of a piece of land, how much of it have I acquired? My physical movements do not dictate a single determinate answer. Nor can my intentions. This brings us to the second difficulty. My unilateral act (or bilateral act of acquisition through contract) is supposed to bear on the rights of others, who were not parties to it, by putting them under an obligation to refrain from using what is mine. At the heart of private right, however, is the principle that you can only be bound by a private transaction if you are a party to it – that is why you and I cannot get together to deprive a third person of her rights. If my claim to my property is supposed to apply to others, then there needs to be a public perspective from which they are somehow party to my act of acquisition.

I want to illustrate the role of the legal system in demarcating private rights, and thereby making them into the system of reciprocal limits on freedom by considering one of Kant’s own examples: the law of adverse possession. The law of adverse possession is a familiar landmark in all legal systems descended from Roman law. It is also a standard puzzle for the theory of property. The dominant academic view is that its rationale is to be found in its incentive effects: land will go to a more productive use if subject to a “the use it or lose it” rule. Such an explanation can be given either a utilitarian or a Lockean spin. Locke subjected property rights to the law of “waste” on the grounds that the earth was given to mankind for their preservation. Land that was not used for purposes of self-preservation must become available for others to use it for their own self-preservation. The utilitarian tells the same basic story slightly differently, emphasizing not the particular use of self-preservation, but rather the more general idea of productive use. Presumably they would also want those independent criteria to cover

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49 I do not say that they are more frequent, both because it would be very hard to know, since cases in the former category, where plaintiff fails to state a cause of action get litigated much less frequently if plaintiffs have competent legal advice.

50 As Robert Nozick points out, “Building a fence around a territory presumably would make one the owner of only the fence (and the land immediately underneath it).” Robert Nozick, Anarchy, State and Utopia, 174 (1974). Nozick considerably understates the difficulty: why the land under the fence, rather than under the posts? Why not the area outside the fence?

51 Kant considers a series of further examples, including wills, contracts without consideration, contracts to lend an object, recovery of a stolen object, and conclusive presumptions of fact. In each case, Kant explains the role of determinate procedure in rendering individual rights systematically consistent. See Kant, supra note 14, at 6:298-6:303.

the prescriptive period, so as to better map on to the underlying purposes of self-preservation or productive use.

Neither the utilitarian nor the Lockean rationale fits the positive law of adverse possession. Under that law, a trespasser can become an owner without using the land productively, and an owner to hand retained rights against a trespasser merely by entering the land periodically, or even by licensing the trespasser, thereby depriving trespasser of the claim to possess the land in a way that is hostile to the owner’s title to it. Most strikingly, the clock on possession runs when the trespasser first enters the land, not when the prior owner stops taking care of it. You can only claim “wasted” land by occupying it, and you can do the same even if it isn’t wasted. The owner can reclaim the land simply by returning before the prescriptive period has run, because you get no credit for the earlier period of disuse. It is open to either the utilitarian or the Lockean to claim that these features of the law are merely marks of administrative convenience, or to demand that the positive law be changed so as to conform better to their independent moral criteria.\(^53\) It is not my purpose here to show that they cannot develop such an account,\(^54\) but to lay out an alternative way of understanding why a system of equal freedom must allow the possibility that an act that is presumptively wrong can sometimes establish a right.

Kant provides a fundamentally different explanation of this familiar doctrine. The law of adverse possession has nothing to do with incentives or the preservation of the species. It provides closure. People can only have full proprietary rights to things provided that they can have them conclusively, that is, such that it is not open to anyone further to dispute their title. The need for closure requires that the mere fact of continuous occupation of a piece of property give rise to a right to it, and that that right be superior to any earlier claim. If, after the requisite amount of time has passed, the previous owner could come back and assert a superior claim, closure would be impossible, because it would always be possible for some still earlier owner to assert an earlier, and thus superior claim. The only way the claims can be conclusive is if closure is imposed by long use.

Kant’s analysis shows the familiar legal doctrine to be a systematic requirement of private right: if rights are to form a single system of reciprocal limits on freedom, the law must enforce closure on disputes about title. A system of adverse possession can do so in a way that a system of title registration could not. Without the doctrine of adverse possession, any such system would be vulnerable to claims about ownership prior to the introduction of the registry. A registry can impose closure with respect to such claims – but that just is Kant’s point.

All of the familiar features of the doctrine follow from this role: the ways in which owner and trespasser use the land are irrelevant; the prescriptive period begins when the trespasser enters the land; the trespassers use must be hostile to the owners

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\(^53\) Again, a libertarian might propose the abolition of the law of adverse possession on the grounds that a property right can only be extinguished through a voluntary act of the owner. See Richard Epstein, Past and Future: The Temporal Dimension in the Law of Property, 64 Wash. U. L. Q. 667 (1986).

\(^54\) It is, however, worth noting that the idea that the positive law must be purely accidental from the point of view of morality reflects the more general bias of both Lockeans and utilitarians. They exclude the possibility that any part of morality requires law as such, allowing it instead only indirectly because of human foibles and frailties. Both view law as at best an empirically effective tool for realizing values that might, in happier circumstances, have been realized differently.
claim, and, when the period expires the person who was to all appearances a trespasser turns out to have owned if from the moment he or she entered the land. These are not introduced on the basis of instrumental considerations about what would best achieve closure. Instead, they are expressions of the idea that systemic closure with respect to title requires closure with respect to the possible grounds of proof of title. That is just another manifestation of the more general requirement that procedures for fixing rights be public, not private.

The one thing the need for closure does not fix is the length of the prescriptive period. So even if everyone in an imagined “state of nature” could see its importance, they would have no basis for agreement on it. Or rather, any basis for agreement, including epistemic salience, or conventional understanding, would only be accepted on strategic or prudential grounds, and so would be an acknowledgement of the costs of conflict, and so of the right of the stronger. Only a lawmaking institution can provide an answer with a claim to be more than strategic (even if people ultimately comply with it purely on instrumental grounds, they are complying with something that is consistent with equal freedom.) Whatever number it picks will be consistent with reciprocal limits on freedom. But it needs to choose one, because failing to do so leaves rights indeterminate.

Thus the Kantian account avoids the familiar charge that natural law theories of property negate all current holdings because a single illicit transaction in the chain of owners undermines the legitimacy of all subsequent transactions. The Kantian account shows that the possibility of secure title is a precondition of the systematic enjoyment of property rights. It also bridges the gap between the view that property is pre-institutional and post-institutional by showing the sense in which it is both. The possibility of people having external powers subject to their choice is a basic structure of free interaction. It can only be secured, and so only realized consistent with the freedom of all, through institutions.

These remarks about private enforcement do more than show difficulties in the Lockean argument. They also show that the use of force is only legitimate provided that it issues from a public perspective, so that it is not simply the exercise of one person’s pass power over another. Instead, it needs to be in accordance with law and procedures. The need for procedure underwrites the existence of a public perspective, distinct from the perspective of private persons, but consistent with the integrity of their separate standpoints. Public institutions to make, apply, and enforce law need to have powers that no private person could have; this distinctively public character makes the use of force consistent with equal freedom. Anything else would be a merely unilateral use of force.

55 On the role of salience in generating conventional understandings, see David Gauthier, David Hume: Contractarian, 88 Phil. Rev. 3 (1979). Unsurprisingly, Gauthier explicitly represents the acceptance of the rules of justice as purely strategic.
56 Robert Nozick, a leading defender of a Lockean account, concedes that he knows of no thorough or theoretically sophisticated treatment of such issues. See, Anarchy, State and Utopia 152 (1974).
57 Public institutions of dispute resolution can be thought of as the solution to a certain kind of abstract coordination problem: everyone needs to arrive at a single determinate answer. But the argument to show that they are legitimate does not presuppose any more general claims about the legitimate enforcement of solutions to coordination problems. In particular, the fact that something could be done much more efficiently if people were to coordinate does not show that and he won has standing to force others to participate in the system of coordination. The enforcement of private rights is a special case, precisely
Recall our earlier example of a good faith dispute about rights, in which we offered inconsistent though not unreasonable applications of the relevant principles to agreed facts. I suggested that there is the perspective from which our competing positions were equally good, but that there was no basis for either of us to occupy that perspective, since it had no claim to superiority over our separate perspectives. The public standpoint is a perspective that can claim superiority. If there is a way in which procedures and institutions can decide an act on behalf of everyone, then the fact that the public institution has selected one or the other of our competing answers provides us with a reason to accept that one, namely that its interpretation of how the law applies to the agreed facts is not just yours or mine, but ours.58

Kant borrows Rousseau’s vocabulary of a social contract and a “general will” to describe the nature of the public perspective. The contract metaphor is potentially misleading, because it might seem to suggest that the people transfer something that they already fully had in order to gain some benefit. For Kant, the whole point of the united will is to make it possible for people to have things conclusively at all, in a way that is consistent with other is having the same rights. So there is nothing that they have which they then transfer away. Entering what Kant calls "a civil condition" is not a private transaction at all, but a public one that makes private transactions enforceable. It is an act of what Rawls describes as “the citizens as a collective body”59 that makes private transactions enforceable. That is why it is a mandatory form of cooperation: unlike a binding legal contract, nobody is entitled to refuse to be bound, because that would subject others to his unilateral choice.

Public Right

The fundamental principle of public right is practices can only be enforced – that mandatory forms of social cooperation can exist – if they issue from a public standpoint that all can authorize.

Even if the public realm is distinctive in this way, it might be wondered whether it provides merely a conceptual victory against the libertarian. After all, the rationale for public institutions is precisely to preserve, or perhaps, complete, a system of private rights, by making them enforceable. As such, the Kantian argument might seem because the non-voluntary nature of the public institutions is consistent with the freedom will fall because it secures the freedom of all, by providing public fora to reconcile conflicting freedoms. Other coordination problems are a problem from the standpoint of particular desires particular people happen to have, and so are not binding on those who lack the desires. Freedom is binding on all. (Of course, once a state is in place, it also has standing to solve some coordination problems.)

58 Dan Markovitz has reminded me the need for a shared standpoint could at least sometimes be solved through our joint selection of a third person as arbitrator, in particular, through our precommitment to such arbitration, a familiar feature of transnational contracting by large corporations. With respect to a particular contractual dispute this solution is unobjectionable, or rather, only objectionable if, as might be the case, there could be a question about whether a particular dispute fell within the confines of the arbitration clause in question. That, of course, gets us back to the issue of closure. But the issue of closure presents itself even more robustly with respect to property. As a matter of the positive law of every modern nation, including, strikingly, even the former Soviet Union, property rights are rights as against all other private persons. See AM Honoré Ownership in (AG Guest Ed.) Oxford Essays in Jurisprudence, 112 (1961). Not all such systems meet the demands of justice, but the general point still applies to them: Procedures for demarcating proprietary claims must be shared as between all of the people who they purport to bind. Thus a broader "omnilateral" basis is required to justify their enforcement.

59 Rawls, supra, note 8.
insufficient to gain the familiar powers that states claim. I now want to argue, however, that it does. This is not the place to consider the Kantian argument for “republican Government” and a separation of powers between legislature, executive and judiciary, or his account of the power to regulate commerce and land. Those central aspects of the modern state are peripheral to the main themes of contemporary political philosophy, and I will not attempt to reintroduce them here. I will focus instead on the division of responsibility, that is, the relation between the nature of a public standpoint and the responsibility of "the citizens as a collective body," acting through the state, to provide citizens with adequate resources and opportunities.

My argument once again draws on Kant. Kant argues that provision for the poor follows directly from the very idea of a united will. He remarks that the idea of a united law giving will requires that citizens regard the state as existing "in perpetuity." By this he does not mean to impose an absurd requirement that people live forever, but rather that the basis of its unity, that is, the ability of the state to speak and act for everyone survives changes in its membership. You are the same person you were a year ago because your same principle of organization has stayed the same through changes in the matter making you up; a flame preserves its form as matter and energy pass through it. In the same way, the state must sustain its basic principle of organization through time, even as some members die or move away and new ones are born or move in. Otherwise any use of force that it made for would be unilateral action on the part of those who were there first. The alternative is to have a self-sustaining system that guarantees that all citizens stand in the right relation to each other, in particular, do not stand in any relation inconsistent with their sharing a united will.

The most obvious way in which people could fail to share such a will is through relations of private dependence. Kant's own example remains sadly relevant: poverty. Kant does not analyze the problem of poverty through the category of need, but rather through that of dependence. The problem of poverty, on Kant's analysis, is that the poor are completely subject to the choice of those in more fortunate circumstances. Although Kant does not deny that there is an ethical duty to give to charity, he argues that dependence on private charity is inconsistent with a united will that is required for people to live together in a rightful condition. The difficulty is that the poor person is subject to the choice of those who have more: they are entitled to use their powers as they see fit, and so the decision whether to give to those in need, or how much to give, or to whom among the needy is entirely discretionary. Kant's argument is that such discretion is inconsistent with people sharing a united will. This claim echoes Rousseau's argument in

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60 In the Critique of Pure Reason, Kant introduces what he calls "Ideas of Reason" through the example of a republican constitution. Ideas of reason are not given an experience, and no experience can be fully adequate to them, but they nonetheless organize our thinking about experience. See Immanuel Kant, Critique of Pure Reason, A316/B373, 397 supra note 2. His other examples of Ideas of Reason include plants and animals, that is, living things that are subject to a principle of organization that survives changes in their matter, and to which no particular example will be entirely adequate. Horses have four legs, even if some particular horse loses one or more of those legs, and the female mayfly lays thousands of eggs even though most female mayflies never survive to reproduce. The formal principle governs the empirical particulars.

61 Immanuel Kant, Groundwork of the Metaphysics of Morals Gr. 423 (1785)

62 That is why Kant describes the duty to give to charity as an "imperfect" duty: although you have an obligation to make meeting the needs of others one of your ends, it is up to you to decide which people, which needs, and to what extent you will meet them.
The Social Contract that extremes of poverty and wealth are inconsistent with the people giving laws to themselves together. Where Rousseau might be taken to be making a factual claim about political sociology, Kant’s claim is normative: A social world in which one person has the power of life and death over another is inconsistent with a united will, no matter how the first came to have that power over the second.

Poverty poses a problem for a united general will because it is supposed to make the enforcement of private rights consistent with the freedom of all. Most significant of these, in this case, are property rights, understood as the right to exclude others. Free persons can authorize enforceable property rights, because those rights are a way of enabling them to exercise their respective freedom. Yet they could not authorize rights up to the point that they made some people entirely subject to the discretion of others, because such powers would be inconsistent with the freedom of those who were dependent in this way. Without an institutional solution to this problem, those who are in need could not regard themselves as authorizing the general will at all. As a result, the enforcement of property rights would be exactly what critics of property accuse it of being: a unilateral power exercised by the strong against the weak. Need is a natural problem, but dependence on the goodwill others is a problem of justice.

The institutional problem requires an institutional solution: taxation to provide for those in need. Taxation is consistent with the freedom of those who are taxed because their wealth consists entirely in their entitlement to exclude others from their goods, which in turn is consistent with the equal freedom only when consistent with the general will.

This argument for economic redistribution is internal to the idea that disputes must be resolved though public procedures that can be accepted by all. The public nature of dispute resolution is both the source of the problem and its solution. Absent institutions of public justice, the rich person's claim to exclude the poor one from his or her property would just be a unilateral imposition of force. Those who have property have the right to exclude provided that their holdings of property are consistent with a united general will shared by all, that the system of private rights really is part of a system of equal independence of free persons. Where that system turns into a system of dependence, it loses its public character. So to preserve the public character, it must be subject to limits that make its enforcement consistent with equal freedom.

The Kantian argument is formal and procedural rather than substantive. In particular, it does not specify the level of social provision, whether it covers merely biological needs, or the preconditions of full citizenship. Nor does it provide a detailed analysis of the nature of wrongful dependence, whether, for example, severe inequalities of bargaining power between employers and workers could qualify as forms of dependence. Although Kant focuses on the example of support for the poor, the force of his argument is concerned with the structure of the general will. As a result, it requires actual institutions to give effect to it – to set appropriate levels and mechanisms of aid, and introduce forms of regulation where necessary. As a philosophical account it is supposed to show what means are available to the state, consistent with the freedom of all; it is not supposed to micromanage social policy. Just as questions about the limitations period for adverse possession or the standard of care in the law of negligence can only be answered through that exercise of determinative judgment by a properly

constituted public authority, so too can these questions only be so answered. The requirements of a general will constrain the form of possible answers, but not their substance. Any answers need to be consistent with equal freedom, so they cannot introduce mandatory forms of cooperation merely on the grounds that they will produce an aggregate increase in welfare. Nor can they use private rights as a bulwark against the claims of the general will. But within the appropriate structure, the answers must be imposed by the people themselves.

Just as it echoes Rousseau, the Kantian argument foreshadows Rawls: redistribution is a precondition of the citizens as a collective body placing themselves under coercive laws consistent with the freedom of all. The Kantian argument is not the precise argument Rawls makes, but like Rawls’s argument, it is political rather than metaphysical. It addresses the question of economic redistribution in the term that the question presents itself: by what right does the state forcibly claim things from some people and transfer them to others, given that the state enforces those claims to those things? The answer is entirely in terms of the legitimate use of force and the distinctively public nature of the state: the citizens as a collective body guarantee adequate resources and opportunities to all and secure each person in his or her private claims as against other private persons.

This twin focus on public right and the use of force distances the Kantian argument from more familiar contemporary approaches to economic redistribution. One familiar argument defends redistributive taxation on the grounds that wealth is a social product, rather than an individual one. As a result, society as a whole is said to have a claim on the social product, having generated it. This view incorporates a social version of the Lockean idea that a person’s claim to an object depends upon the toil he or she has exerted in creating or acquiring. Rather than saying that you own this apple because you have picked it off the tree through the sweat of your brow, we say instead that we, as society, own everything because we have produced it. It is also like the Lockean position in that it supposes that society acquires a sort of absolute dominion over the things it has produced.

The Kantian approach must reject such an argument, both because it seeks to establish a right of ownership on the basis of effort expended, rather than a system of equal freedom and, more significantly, because it treats the state as a private party, free to dispose of its assets as it sees fit. Not only does this generate some question about the specific claim to use that wealth to achieve a just distribution – if the state has a claim on wealth because it produced it, it might just as well use it for some other publicly selected

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64 See Murphy & Nagel, supra note 2, at 33-34. “There is no market without government and no government without taxes; and what type of market there is depends on laws and policy decisions that governments must make. In the absence of a legal system supported by taxes, there couldn’t be money, banks, corporations, stock exchanges, patents, or a modern market economy—none of the institutions that make possible the existence of almost all contemporary forms of income and wealth. It is therefore logically impossible that people should have any kind of entitlement to all their pretax income. All they can be entitled to is what they would be left with after taxes under a legitimate system, supported by legitimate taxation—and this shows that we cannot evaluate the legitimacy of taxes by reference to pretax income.” The continue at 74: “Property rights are the product of a set of laws and conventions, of which the tax system forms a part.” As a reductio ad absurdum of the Lockean claim that entitlement follows causation, such an argument is beyond reproach. The idea that rights are grounded in the causation of valuable object is just as suspect in the mouths of egalitarians as in those of Lockeans.
purpose, instead of for redistribution. This state's claim to redistribute does not come from the fact that all property belongs to it to begin with, but rather from the fact that the right to exclude generates potential relations of dependence, which are inconsistent with the existence of a united general will. Put in Rawls's preferred vocabulary, the right to participate in a system of enforceable private transactions must work to the advantage of all, in order for the citizens considered as a collective body to enforce the private claims of individual citizens against each other.

Its emphasis on the public nature of the united general will also distances the Kantian account of economic redistribution from the "luck-egalitarian" position that has been prominent in recent philosophy. For luck-egalitarians, justice requires the elimination of the effects of luck. People can be made to bear the costs of their choices, but not of their unchosen circumstances, whether social circumstances or natural. Expensive needs must be met, but expensive tastes are, on this view, the responsibility of the people who choose to develop them.65

From a Kantian standpoint, the fundamental difficulty with luck-egalitarianism is not the implausible implications that many people have pointed to66, but its inadequate conception of political society.67 For the luck-egalitarian, society's basic moral purpose is to eliminate chance from the world. It conceives of people primarily as recipients of the just society and sees the state as just one of several agents that might contribute to this endeavour.68 Individuals and institutions are al supposed to contribute to this end. The Kantian approach, with its focus on the general will, regards people as the authors of the laws that bind them. That is what it means for the standpoint to be public: the use of force is always legitimated by the fact that everyone has authorized it together, so that in using force the state acts on behalf of everyone. A public version of the familiar distinction between nonfeasance and misfeasance applies to its acts: as authors of the laws, citizens are responsible for what it does, but not for what merely happens. As always, the contrast turns on the means available to society as a whole in pursuing its public purposes.69

67 Perhaps the luck-egalitarian position can be developed in a different direction, as suggested by Daniel Markovits in How Much Redistribution Should There Be?, 112 Yale L.J. 2291 (2003). My remarks here focus only on the main thrust of luck-egalitarian writing.
69 The Kantian focus on the unavailability of certain means which I claim animates Rawls's understanding of the sense of justice is a central feature of constitutional jurisprudence in many modern democracies. Consider the remarks by President Barak of the Israel Supreme Court: "We are aware that this decision does not make it easier to deal with that reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties. H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. Gov't of Israel, 53(4) P.D. 817, 845. Barak’s comments were endorsed by Iacobucci J. in Application under s. 83.28 of the Criminal Code (Re) 2004 SCC 42. They have also been endorsed in speeches by leading constitutional jurists, including Associate Justice Ruth Bader Ginsburg in "A decent Respect to the Opinions of [Human]kind": The Value of a Comparative
The same distinction between nonfeasance and misfeasance applies to the contract argument at the level of public right. People choosing institutions are concerned to protect their own rightful honor, or in Rawls's vocabulary, their two moral powers. As such, they will not trade away their independence so as to better advance their own interests. They will set up institutions so as to prevent natural inequalities from generating social domination. Relations of dependence that arise as a result of the coercive structure of society pose a special problem for the general will, precisely because they implicate the general will’s own creation of the right to exclude. They bring the general will into potential tension with itself, and so they must be addressed. Natural inequalities and unchosen circumstances, simply as such, are not public acts, and so generate no such tension. They may result in relations of dependence, but if they do, it is the relations of dependence that are the problem, not their source.70

Luck egalitarians have criticized Rawls for his focus on socially generated inequalities, but that Kantian account reveals that Rawls has the better of the argument. Rawls insists that the basic structure must not magnify the effects of natural inequalities, not that it must eliminate them.71 In its most abstract formulation, the difference principle requires that the legal and political institutions not compromise the ability of citizens to exercise their two moral powers, so that the existence of social cooperation works to the

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70 In two recent influential articles, Thomas Pogge has argued that the Rawlsian social contract collapses into a form of consequentialism, because the parties in the original position are simply concerned to advance their own interests, and regard themselves only as recipients of the principles of political order, rather than authors. See Thomas W. Pogge, Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions, 12 Soc. Phil. & Pol’y 241(1995) [hereinafter Pogge, Three Problems] and Equal Freedom for All?, 28 Mid. Stud. Phil. 266 (2004). On the Kantian reading of Rawls defended here, the charge has no purchase, because the entire point of the social contract is to guarantee that the citizens of our of the authors of the laws that bind them, so that the use of force is consistent with their freedom and equality. They could not authorize a system in which people were held accountable for things they had not done. Nor could they accept draconian punishments on the basis of their expected advantages in fighting crime. As always, certain means are unavailable. Instead, they would choose the institutions that place the burden of proof on the state, and guarantee that coercive action was a response to individual responsibility.

Pogge’s sole textual evidence for his reading of Rawls is a brief passage in which Rawls appears to endorse H.L.A. Hart’s conception of responsibility. See Pogge, Three Problems, at 258. The passage is unrepresentative in several respects, however. First, Rawls is talking about emergency powers, to be invoked only to prevent the breakdown of civil society. It is not clear that the contract methodology applies to such a situation. If it does, much more argument would be needed to show that the reasoning that it yields generalizes to other cases as Pogge suggests. It is also inconsistent with the division of responsibility that Rawls later saw to be the central presupposition of his work.

71 Rawls, Theory, supra note 20, at 73.
benefit of all.\textsuperscript{72} That is distinctive way of developing Kant’s basic insight: the enforcement of rights is justified because it alone makes it possible for a plurality of person to realize their freedom together, but such enforcement must realize the freedom of everyone. For both Kant and Rawls, the coercive structure of society is the basic subject of political philosophy because it implicates independence as nothing else does, and coercion is only legitimate if it does not create relations of dependence.

The basic structure of society is not important merely because it exerts a tremendous influence on people's life prospects. It is also important because the use of force needs to be rendered consistent with the independence of each person from others. Mandatory forms of social cooperation – notably the state – are justified only if they serve to create and sustain conditions of equal freedom in which ordinary forms of social cooperation are fully voluntary.

Conclusion

I want to close by touching on one other issue that has been prominent in contemporary political philosophy: the dispute about whether individuals and institutions are subject to the same normative principles. Throughout his career, John Rawls argued that individuals have a duty to create just institutions, and denied that they owe each other direct duties to realize the difference principle.\textsuperscript{73} Critics of this view, most prominently G.A. Cohen\textsuperscript{74} and Liam Murphy\textsuperscript{75}, have assailed Rawls for this "dualism" and argued that private persons are under the same duties of justice as social institutions are. Cohen connects this point to a claim about the relative insignificance of the coercive structure of society, emphasizing the importance of the social ethos in determining both the sizes of social shares and the relative life prospects of different persons in a society. Both Cohen and Murphy assail dualism from a progressive and redistributive perspective, but the same arguments might just as easily be found in the hands of libertarians, who share their belief that the social institutions can only be assessed in terms of their efficacy in achieving moral outcomes that could, in principle, be realized without them. This assumption that morality is complete without any institutions, and the state and law enter merely as instruments enters both libertarian and egalitarian thought as an undefended, and, indeed, unexamined, assumption. The division of responsibility shows how just institutions, both public and private, enable free persons to be independent together.

\textsuperscript{72} It is worth remembering that Rawls introduces the difference principle through a discussion of offices within social institutions, rather than to wealth, considered as such. See Rawls, Justice as Fairness in Collected Papers 47, 50 (Samuel Freeman ed., 1999).

\textsuperscript{73} See Theory, supra note 20, at 54; The Basic Structure as Subject, in Political Liberalism, supra note 10, at 283.


\textsuperscript{75} Liam Murphy, Institutions and the Demands of Justice, 27 Phil. Pub. Aff. 251 (1998)