

The familiar principle that there is no liability for nonfeasance but only for misfeasance is often presented as reflecting a merely factual difference between acts and omissions and is discussed as a discrete issue in tort law, alongside and after the treatment of general principles. In striking contrast, Francis Bohlen took this distinction to be normative, not factual, and wrote that none is more deeply rooted in and more fundamental to the common law. This article investigates whether his contention is sound and, if so, how it might be accounted for. Its main thesis is that, properly understood, the misfeasance requirement is a central organizing normative idea in private law, providing a unifying moral framework for specifying the varieties of private-law relations. Part II fixes the meaning and the role of misfeasance through a discussion of a variety of situations in which the law denies liability for even foreseeable loss. We see that the misfeasance requirement makes a certain kind of protected interest, namely, an exclusive ownership interest, the necessary condition of liability in private law. But the character of this ownership and of the sort of relation that holds between individuals as bearers of this interest requires explanation. Moreover, the fact that misfeasance makes this the only relevant conception of protected interest needs to be justified from a moral point of view. Part III provides an account of the conceptual–normative genesis of the basic private-law relation of rights and correlative duties involving interests of this kind, with illustrations drawn from different areas of private law. Parts IV and V take up the further question of the moral acceptability of the misfeasance requirement from the standpoint of liberal justice.

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I Introduction

In tort, we say, there is no liability for nonfeasance. When courts, and particularly commentators, explicitly consider the distinction between misfeasance and nonfeasance, they often equate it with a purely factual difference between acts and omissions and view it, much like the exclusionary rule for pure economic loss, as raising a distinct issue – that of

* Faculty of Law, University of Toronto

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'pure omissions' – which qualifies or supplements the application of general principles of negligence.¹ Rarely is this requirement thought of as pertinent to other parts of private law. It is, therefore, striking that Francis Bohlen treated this distinction as normative, not factual, and wrote of it that there is none 'more deeply rooted in the common law and more fundamental.'² He clearly viewed it as going to the basic character of the private-law relation. I want to investigate whether his contention is sound and, if so, how it might be accounted for.

Toward this end, I will explore the meaning, role, and moral basis of the misfeasance requirement. My thesis is that, properly understood, the idea of misfeasance is, in fact, a central organizing normative idea, not only in tort law, but also in private law as a whole. In this article, I sketch an argument as to how and why it may be so viewed. My limited goal is to present and clarify this understanding of private law in its own terms and at a fairly high level of abstraction. Thus, apart from in Part II, I have not included detailed discussions of private-law doctrines, although throughout the paper I presuppose them and, here and there, I refer to certain of them by way of illustration. Nor have I tried, in any detail, to compare the argument with alternative theoretical approaches to private law, whether rights-based or consequentialist, or to address important challenges raised by these competing accounts. Despite these limits, I believe that it is still helpful, as a first step, to present the main idea of this understanding of private law in its own terms, leaving the more detailed development of its parts and its relation to other approaches to further work. I should emphasize that my contention in this article is that misfeasance is *an*, rather than *the*, organizing idea of private law. There may certainly be other central organizing ideas that ought to be explored in their own terms as well as evaluated in comparison to each other. Still, the idea of misfeasance, suitably interpreted, is deeply embedded in and pervasively presupposed throughout

1 For a recent statement of this view from a highest appellate court, see *Stovin v. Wise* [1996] A.C. 923 (H.L.Eng.) at 943, *per* Lord Hoffman [*Stovin*]: 'Omissions, like economic loss, are notoriously a category of conduct in which Lord Atkin's generalization in *Donoghue v. Stevenson* . . . offers limited help.'

2 Francis H. Bohlen, 'The Moral Duty to Aid Others as a Basis of Tort Liability' (1908) 56 U. Pa. L. Rev. 217 at 219 [Bohlen, 'Moral Duty']. Prosser and Keeton adopt Bohlen's view; see W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul, MN: West Group, 1984) at 373 [*Prosser and Keeton*]. Interestingly, the view that misfeasance is central to the understanding of private law is also widely reflected in the history of legal philosophy from at least Aquinas onwards and in doctrines that are otherwise sharply different in approach. For a freedom- or right-based approach, see Georg Wilhelm Friedrich Hegel, *The Philosophy of Right*, trans. by T.M. Knox (Oxford, UK: Oxford University Press, 1952) at para. 38 [Hegel]; for a utilitarian account, see Henry Sidgwick, *The Elements of Politics*, 3d ed. (London: MacMillan, 1908), c. 3, s. 3(2) & c. 4 [Sidgwick] ('the individualistic principle').

the whole of private-law doctrine. It merits careful examination in its own right.

My first task, taken up in Part II, is, therefore, to specify the meaning and the role of misfeasance by drawing on the doctrinal analysis of liability in private law and, more particularly, in the law of negligence, which I take to be a natural point of departure for this purpose. My aim is to uncover the meaning of misfeasance that is latent, and thus publicly available, in private law. For reasons of space, I refer to just a few settled and paradigmatic scenarios, more by way of illustration rather than as a demonstration of the general view developed here. My focus will be situations where tort law denies liability even for foreseeable physical or economic loss. An analysis of these no-liability instances yields a first formulation of the misfeasance–nonfeasance distinction. I shall argue that the view that equates this distinction with a merely factual difference between acts and omissions is unsatisfactory not only in its own terms but also as an interpretation of the way the doctrine actually functions in these cases. It does not reflect what courts do. A different view emerges – one that is more in keeping with Bohlen’s claim. On this view, the requirement of misfeasance embodies a definite *normative* conception of wrongdoing and liability that is supposed throughout tort law and, indeed, private law as a whole. More exactly, misfeasance restricts the fundamental imperative in private law to a prohibition against conduct, whether act *or* omission, that injures or interferes with a definite but limited kind of protected interest; namely, another’s ownership right. This is a *substantive* principle going to the ultimate content of private-law duties. And it is misfeasance so understood that can function, I will argue, as an organizing normative idea in private law. It expresses, at the most fundamental level, the private-law relation between persons.

In Part III, I consider more closely the character and presuppositions of misfeasance’s conception of protected interest. The key to understanding this interest is the normative relation between persons in virtue of which, as between themselves and therefore bilaterally, individuals possess and exercise exclusive control with respect to things. The entire analysis of misfeasance reflects *just* this bilateral relation between persons with respect to things. In this part, I clarify the meaning of this relation of exclusive control and sketch how it functions as a substantive conception that is reflected in basic categories of private law. Instead of simply presupposing the private-law relation of correlative right and duty, my aim is to provide an account of its normative–conceptual genesis.

Parts IV and V try to bring out more fully a possible moral basis for the normativity of misfeasance and to evaluate its moral acceptability from the standpoint of a liberal conception of justice. I should clarify here, at the start, that while this moral basis may seem to derive from certain

philosophical accounts, such as Kant's or Hegel's, I do not argue for it in such terms. Indeed, it may very well be acceptable from within a utilitarian framework, such as Sidgwick's. My presentation aims, rather, to be free-standing in relation to these competing philosophical accounts. I try to elucidate certain moral ideas that are, I believe, latent in and presupposed by private-law doctrines of the common law at a fundamental level.

More specifically, I shall argue that the fundamental normative idea that misfeasance reflects is a certain definite, but severely limited, moral conception of mutual independence. In Part IV, I sketch a conception of the person as free and equal that fits with this view of parties as mutually independent. It represents a conception that is specific to misfeasance and that I call 'juridical,' in contrast to conceptions of the person pertaining to other moral domains, such as the political. In Part V, I briefly discuss how we might think of this juridical conception as acceptable from within a liberal theory of justice. Here, it is crucial to recognize the inherent limits of the juridical conception and to consider whether it can be part of a more complete liberal theory of justice that includes principles of distributive justice, taking Rawls's view of political justice as a standard. I conclude that misfeasance does so fit and, on this account, represents a liberalism of freedom.

II *The meaning and role of misfeasance in private law: Normative, not factual*

It is often thought that the distinction between misfeasance and nonfeasance can be reduced to a merely factual act–omission distinction that reflects specific problems alongside the ordinary principles of negligence. When Bohlen says, however, that no distinction is 'more fundamental' to or 'more deeply rooted in the common law,' he suggests a different view.³ Referring to the case law and, in particular, tort law, I want, in this part, to propose an interpretation of the distinction that is in line with Bohlen's contention and that shows it to be a normative principle that can be basic to the analysis of private law. I shall begin by considering several scenarios in tort law where it is settled that there cannot be liability even though there may be foreseeable loss. Discerning the common thread in these cases yields a first formulation of the misfeasance requirement. I then bring out its scope by explaining why it must be presupposed by contract law as well and argue that this formulation fits with the more stable judicial interpretations of the requirement. Through this discussion, my aim is specify a meaning and role for misfeasance that is latent in and pervasively presupposed by private law.

3 Bohlen, 'Moral Duty,' *supra* note 2 at 219.

A SOME ILLUSTRATIVE TORT SCENARIOS

To guide discussion, a good place to begin is Lord Diplock's influential judicial statement in *Dorset Yacht*:

The branch of English law which deals with civil wrongs abounds with instances of acts, and, more particularly, of omissions which give rise to no legal liability in the doer or omitter for loss or damage sustained by others as a consequence of the act or omission, however reasonably or probably that loss or damage might have been anticipated . . . Examples could be multiplied. You may cause loss to a tradesman by withdrawing your custom though the goods which he supplies are entirely satisfactory; you may damage your neighbour's land by intercepting the flow of percolating water to it even though the interception is of no advantage to yourself; you need not warn him of a risk of physical danger to which he is about to expose himself unless there is some special relationship between the two of you such as that of occupier of land and visitor; you may watch your neighbour's goods being ruined by a thunderstorm though the slightest effort on your part could protect them from the rain and you may do so with impunity unless there is some special relationship between you such as that of bailor and bailee.⁴

I want to discuss several of the examples noted by Lord Diplock, starting with the rescue scenarios. Assuming, for the moment, that the no-rescue rule might be widely seen as a paradigm instance of there being no liability for nonfeasance, I will consider whether there is a common thread in these examples and, if so, formulate it.

i *Failure to rescue*

Most would agree that the paradigm instance of nonfeasance is the failure by one party to rescue another from a danger to which the first party has not in any way contributed. This, then, is a natural starting point for fixing, even if provisionally, the meaning of the misfeasance–nonfeasance distinction.

In the rescue scenario, the first party, we suppose, can avert the impact of this danger on the other's person or property by taking certain – perhaps even effectively costless – measures. But he or she does not, and the other suffers resulting injury. We also assume that this loss is a perfectly foreseeable outcome of the omission and that the requirement of 'cause in fact' is satisfied because a rescue would have prevented the loss.⁵ Suppose, finally, that there is no 'special relation' between the parties whereby the one endangered is entitled to rely on the other for

4 *Home Office v. Dorset Yacht Co.* [1970] A.C. 1004 at 1060.

5 In *Dorset Yacht*, *ibid.*, for example, Lord Diplock states that in the circumstances referred to, liability is denied 'for loss or damage sustained by others *as a consequence of the act or omission, however reasonably or probably that loss or damage might have been anticipated*'; *ibid.* [emphasis added]. For a helpful discussion of omissions and causation, see Richard W. Wright, 'Acts and Omissions as Positive and Negative Causes' in Jason Neyers,

assistance in these circumstances.⁶ Then, apart from legislative provisions, it has long been settled at common law that an action in negligence for this loss must fail.⁷ The generally accepted reason for there being no liability in such circumstances is that the defendant does not owe a duty to the plaintiff to rescue her⁸ from the danger. Why should this be so?

One answer is that the failure to rescue is an instance of pure omission and, in negligence, pure omissions cannot be the basis of liability. The gist of the plaintiff's complaint is that the defendant has done *nothing*. On this view, the defendant owes no duty because he has not acted at all. If there is a complete absence of conduct of any kind, it is a legal and moral truism that there cannot be liability. One cannot wrong another simply by *being*, without *doing* anything. In this way, the distinction between misfeasance and nonfeasance is equated with the difference between acts and omissions.

As an explanation of the rescue cases, however, this analysis is not completely satisfactory. In the circumstances supposed, it is not self-evidently the case that the defendant simply does nothing. To the contrary, the defendant decides to use his capacities, external resources, and the like, not to assist the plaintiff but for something else. This is, after all, a decision and a choice. Courts are not mistaken when, in these and related circumstances, they refer to *acts* of *both* commission *and* omission.⁹ And since there has been choice, and thus conduct of some kind, it is no longer self-evident that there cannot be liability. If, still, there is no liability, it must be, not because of a complete absence of any conduct, but in virtue of the lack of a certain kind of conduct which alone is normatively relevant for the purposes of liability.¹⁰ To see what that might be, let's look more closely at the failure-to-rescue paradigm.

Erika Chamberlain, & Stephen Pitel, eds., *Emerging Issues in Tort Law* (Oxford, UK: Hart, 2007) at 290–2.

6 Throughout the discussion of nonfeasance scenarios that follows, I assume that the plaintiff's loss is *not* the consequence of justified detrimental reliance on the defendant because not only can such reliance be actionable but a situation of reliance is generally not viewed as raising the issue of nonfeasance. Although I do not specifically discuss reliance-based liability in this article, the analysis of misfeasance proposed here is consistent with this view. I discuss the relation between reliance and the misfeasance–nonfeasance distinction in Peter Benson, 'The Basis for Excluding Liability for Economic Loss in Tort Law' in David G. Owen, ed., *Philosophical Foundations of Tort Law* (New York: Oxford University Press, 1995) at 450–5 [Benson, 'Economic Loss'].

7 See *Restatement of the Law (Second): Torts* (St. Paul, MN: American Law Institute, 1977) at s. 314; *Prosser and Keeton*, *supra* note 2 at 375ff.

8 Henceforth, I refer to the plaintiff as 'she' and to the defendant as 'he.'

9 See, e.g., *Southcote v. Stanley* (1856), 1 H. & N. 247 at 250–1, *per* Baron Bramwell.

10 In relation to other kinds of values and considerations, the non-rescuer's decision may very well be morally relevant and a basis for ascribing moral, if not legal, blame. It is

Since it is the plaintiff's life or property that is in danger, the only legally recognized interests which the plaintiff can possibly assert vis-à-vis the defendant are her rights of bodily integrity and property. But these interests are protected through rights to exclude the defendant. At least this is how they function, and are standardly interpreted, in private law. Now, supposing that the defendant has not in any way contributed to the danger, what the plaintiff can assert to the exclusion of the defendant is *just* her bodily existence or property in this condition of danger. This is what belongs to the plaintiff as her protected interest relative to the defendant. And it is this "asset" which the defendant must not injure or otherwise affect without the plaintiff's consent. But this is precisely what the defendant's decision not to rescue does: it simply leaves the plaintiff's condition untouched, as is. Holding the defendant liable would, therefore, compel the gratuitous conferral upon the plaintiff of a benefit over and above what belongs to her exclusively as against the defendant. The parties' merely exclusionary rights cannot require this of the defendant. Even though it may be true that the defendant's failure to rescue represents a choice and decision and so a course of conduct, it is not conduct that can possibly affect whatever protected interests the plaintiff has as against the defendant.

ii *Pure economic loss*

The failure-to-rescue cases are but one instance in which the common law standardly denies liability in tort for conduct that may, nevertheless, cause reasonably foreseeable loss (physical or financial) to others. Consider the further important examples of negligently and intentionally caused pure economic loss. 'Pure' economic loss is financial loss that is not consequential upon damage to the plaintiff's person or property. Ordinarily, such loss is not viewed as raising the same kind of issue as the failure-to-rescue cases. But it does, in fact, do so, as I will now suggest.

First, take negligently caused pure economic loss. Here, the central case is so-called 'relational' economic loss, where a plaintiff sustains pure financial loss as a result of being deprived of the use of something that she neither owns nor possesses. For example, suppose that the plaintiff has a right under a contract with a third party or, alternatively, has only a liberty or privilege¹¹ to use the third party's bridge for her own

noteworthy that, in *Stovin*, supra note 1, Lord Hoffman formulates the misfeasance–nonfeasance contrast as that between 'regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any *relevant* activity' [emphasis added]. The key question is, of course, What is relevant activity for the purposes of this distinction? This article suggests an answer.

- 11 'Liberty' or 'privilege' is intended in Hohfeld's sense: in contrast to a claim-right that has as its correlative a duty on the part of others not to interfere, a liberty or privilege has as its correlative merely the no-rights of others. This is because having a liberty or

commercial purposes. We may even assume that the plaintiff is the sole user of the bridge. Through want of due care, the defendant damages the bridge, which, foreseeably, must be temporarily closed for repairs. During this period, the plaintiff cannot use the bridge, with the result that she loses expected revenues or unavoidably incurs additional costs in making alternative arrangements. Even though this financial loss may be perfectly foreseeable by ordinary standards of negligence, there is a long line of cases in both American and English negligence law that would deny recovery in these circumstances, where the plaintiff has no possessory or property interest in the damaged item.¹² On what basis might this be justified?

The standard explanation, often referred to as the ‘pragmatic objection to liability,’¹³ is that, if recovery were generally available for foreseeable relational economic loss – as some think ordinary principles of negligence support – there would be a danger of exposing defendants to disproportionate, indeterminate, or simply excessive liability for even a momentary and limited failure to use care. This danger can be a real possibility in relational-economic-loss scenarios, where, often, an initial, clearly actionable loss may affect the extensive and indeterminate intertwining of commercial interests that are directly or indirectly involved with the damaged item. To impose such liability on defendants would be unfair or inefficient. A special rule – the ‘economic loss rule’ – is, therefore, needed to limit the usual operation of foreseeability as the fundamental basis for liability. The law’s requirement that plaintiffs must have a property or possessory interest in the damaged item serves this limiting function. It cuts off the spectre of indeterminate or disproportionate liability. The requirement of a proprietary or possessory interest is thus justified *just* insofar as it achieves this goal in given circumstances.

This instrumental justification is subject to serious difficulties.¹⁴ A fundamental problem is that the law treats the requirement of a proprietary or possessory interest as a necessary, *per se*, prerequisite of recovery,

privilege means only that its exercise cannot infringe another’s rights. In relation to my liberty, therefore, others have, by definition, no rights; my conduct is immune from possibly being a wrong, as distinct from being protected against others’ interference; see Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. by Walter Wheeler Cook (New Haven: Yale University Press, 1919) at 38ff [Hohfeld].

12 For representative decisions, see Benson, ‘Economic Loss,’ *supra* note 6 at 427–30.

13 The most influential statement of this justification is Fleming James, Jr., ‘Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal’ (1972) 25 Vand. L. Rev. 43 at 47.

14 I discuss these difficulties at greater length in Benson, ‘Economic Loss,’ *supra* note 6 at 430ff; and, more recently, in Peter Benson, ‘The Problem with Pure Economic Loss’ (2009) 60 S.C. L. Rev. 823 [Benson, ‘Problem’].

whether or not the application of foreseeability would lead to indeterminate or disproportionate liability. Indeed, in a number of the leading cases, there simply was no prospect of such consequences and the decisions did not in any way avert to them as a reason for denying recovery.¹⁵

There is, however, a quite different way of understanding the basis for the denial of claims for relational economic loss – one that fits better with the *per se* character of the law's requirement of a proprietary or possessory interest. What is more, it reflects the same analysis earlier suggested for the rescue cases. The reason for this requirement is not the prospect of indeterminate liability. Instead, the focus is on the character of the plaintiff's interest and whether it is of the right sort to give rise to a duty of care in the first place.¹⁶

For consider, where a plaintiff has a contractual right against a third party to use the bridge or, alternatively, merely has a liberty or privilege to use it, what interest can the plaintiff assert as against the defendant? The contract right is not against the defendant, and a liberty or privilege entails, by definition, no right against any one. *Ex hypothesi*, the plaintiff has no right either of property or of possession in the bridge, although, if she had it, it would certainly qualify as a right against the defendant. In the absence of some generally recognized ground of legal entitlement whereby the plaintiff may rightfully exclude the defendant from affecting her continued use of the bridge, the plaintiff's interest appears to be unprotected against the defendant's interference. While that interference may constitute negligence and a wrong against the bridge owner, it is not such against the plaintiff. The issue of indeterminate liability does not even arise because, while there may be indefinite numbers and kinds of commercial interests indirectly affected by the defendant's negligence, the only question is whether they qualify as protected interests in the required way. Presumably, in almost every instance they will not. But if and where they do – and other requirements, such as foreseeability, are met – there should be recovery, irrespective of the number of claimants or the differences in their interests.

What about intentionally caused pure economic loss? A natural place to begin is the established point that one cannot be liable even for foreseeable economic loss that one causes to one's competitors by drawing

15 The most striking instance is the leading US Supreme Court decision in *Robins Dry Dock v. Flint*, 275 U.S. 303 (1927). I discuss this decision in detail in Benson, 'Problem,' *ibid.* at 838–56. Also noteworthy is the leading English case, *Weller & Co. v. Foot & Mouth Disease Research Inst.* [1965] 3 All E.R. 560 at 563 (Q.B.), in which the court expressly held that the prospect of these consequences should not be the basis of deciding whether the plaintiff's claim for pure economic loss is actionable.

16 I state here merely the conclusions of an analysis that I develop in detail in Benson, 'Problem,' *supra* note 14.

away, business or custom, so long as one has not done this by procuring or inducing breach of contract.¹⁷

One explanation for the absence of a tort in this instance is that economic competition contributes to the general welfare and that such loss is the unavoidable concomitant of this welfare-enhancing activity.¹⁸ Without denying this fact or the truth of the statement, a quite different, rights-based explanation for the conclusion is available: the reason that I may permissibly cause you even foreseeable competition losses is that in doing so, I do not affect any of your rights that are exclusive as against me.¹⁹ How so?

Clearly, you cannot have a possessory or property right in the continued custom or business of others. At most, there may be a potential or actual contractual relation between you and third parties. If there is, as yet, no contract, there is no right that can be injured. Stated in other terms, any right or liberty you might assert against me must be consistent with respect for an equal right or liberty on my side. But unless and until either of us establishes an exclusionary legal relation of some kind with these third parties, neither of us can assert a claim to their custom that constrains the other consistently with our equality. The fact that one of us happens, or hopes, to benefit from the business of others does not, as such, entail this relation.

And even if you do conclude a contract with them, the contractual rights and obligations, *prima facie*, run between you and the third

17 For general summaries of the law, see *Prosser and Keeton*, *supra* note 2 at 978–1013. Particularly clear judicial discussions are found in *Walker v. Cronin* 107 Mass. 555 at 562–5 (Mass. 1871) [*Walker v. Cronin*]; *May v. Wood* 51 N.E. 191 at 192–3 (Mass. 1898), Holmes, J. dissenting [*May v. Wood*]; *Beekman v. Marsters* 80 N.E. 817 at 818–20 (Mass. 1907) [*Beekman v. Marsters*]; and *Citizens' Light, Heat and Power Co. v. Montgomery Light and Water Power Co.* 171 Fed. 553 at 558–62 (M.D. Ala. 1909) [*Citizens' Light*]. The most important foundational English decisions include *Lumley v. Gye* (1853), 2 El. & Bl. 216 [*Lumley v. Gye*]; *Mogul Steamship Co. v. McGregor, Gow, & Co.* (1889), 23 Q.B.D. 598 (C.A. Eng.) *aff'd* [1892] A.C. 25 (H.L. Eng.) [*Mogul Steamship*]; *Allen v. Flood* [1898] A.C. 1 (H.L. Eng.) [*Allen v. Flood*]; *Quinn v. Leatham* [1901] A.C. 495 (H.L. Eng.) [*Quinn v. Leatham*].

18 On this point, see Sidgwick, *supra* note 2 at 60–1. Oliver Wendell Holmes writes, 'Why is a man at liberty to set up a business which he knows will ruin his neighbor? It is because the public good is supposed to be best subserved by free competition. Obviously such judgments of relative importance will vary in different times and places'; Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harv. L. Rev. 457 at 466 [Holmes, 'Path'].

19 All the decisions, both American and English, cited *supra* note 17 (*Walker v. Cronin*, *May v. Wood*, *Beekman v. Marsters*, *Citizens' Light*, *Lumley v. Gye*, *Mogul Steamship*, *Allen v. Flood*, *Quinn v. Leatham*) analyse this question in terms of the rights and correlative duties among the relevant parties. Particularly instructive discussions are found in *Walker v. Cronin* at 564; *Beekman v. Marsters* at 818–9; and the whole judgment of Bowen, L.J. in *Mogul Steamship*.

party, not us. The fact that third parties may choose to breach their agreements with you by deciding to give me their custom or business does not, without more, make me liable. This is their decision, which may be a wrong against you if it is in breach of contract. It is true that the fact that I am doing business provides the occasion for their decision. But if all that I have done is *just* to act in a way that bears generally on the public,²⁰ I could not avoid attracting these third parties without ceasing this activity in general. Attracting third parties in this way is an inevitable consequence of the very activity in which the *both* of us are engaged.²¹ You cannot have a right against me in this regard because any such right would be self-defeating. If this is all that my drawing away actual or prospective customers entails, then it is *damnum sine inuria*.

Of course I *can* be held liable if I draw customers away from you by inducing or procuring their breach of contract. The requirements of this intentional tort, while still subject to discussion and some disagreement at the margins, stipulate, at the very least, that there must be something more than merely the independent decision of a third party to breach his or her contract with the plaintiff, even where the breach is in response to opportunities provided by the defendant to third parties in general as part of its ordinary competitive strategy. The defendant must have done something that is directed toward the specific contractual relation between plaintiff and third party with the purpose of appropriating, injuring, or otherwise interfering with the relation itself.²² While ordinarily contractual rights are only as against other parties to the contract,²³ in these circumstances where the defendant has targeted the plaintiff's contractual

20 See *Beekman v. Marsters*, supra note 17 at 819: '[A] plaintiff does not go far enough to render a defendant liable for unlawful interference with his contractual rights, when he proves that the defendant, in using the ordinary methods of promoting and increasing his own business, obtained business from the other party to the plaintiff's contract which the other party could not have given him without breaking his contract with the plaintiff, and this was known to the defendant.'

21 *Citizens' Light*, supra note 17 at 560–1: 'The trader who has made a contract with another person has a right, which the law will protect, to have that other keep it. Other traders have the correlative right to solicit the custom to which the contract relates. Whatever damage results to the first trader by the mere solicitation is privileged, so far as the solicitor is concerned, in the interest of proper freedom of competition.'

22 This specifies the 'malice' requirement in the intentional tort of interference with contractual relations. A particularly instructive discussion is still Francis Bowes Sayre, 'Inducing Breach of Contract' (1923) 36 Harv. L. Rev. 663 at 678–86 [Sayre].

23 This is the basis of Justice Coleridge's powerful and scholarly dissent in *Lumley v. Gye*, supra note 17 at 246 as well as of scholarly questioning of this decision by Pollock and Austin, among others; see Frederick Pollock, *The Law of Torts* (Philadelphia: Blackstone, 1887) at 451–3.; John Austin, *Jurisprudence*, 4th ed. (London: John Murray, 1879) at 402.

relation, courts²⁴ and commentators²⁵ treat the plaintiff's contractual interest as a protected right relative to the intentional wrongdoer as well – a 'quasi-property' right as between the parties. This is essential to their finding that a defendant has injured a protected interest and so can be held liable for resulting economic losses, in contrast to the exclusion of liability for competition losses. This conclusion that contractual rights can count as protected assets in such involuntary transactions with third parties parallels the settled doctrine that contract rights may often be assigned, via voluntary transactions, to third parties no differently than rights *in rem*.²⁶

iii Nuisance law

I would like to consider a third well-known instance of foreseeable but non-actionable loss – this time taken from nuisance law. These are cases where a defendant intercepts or blocks the flow of something over or under his own land so that it does not reach the plaintiff's land, to the latter's prejudice. For example, the defendant may block the flow of light by building on his land²⁷ or intercept the flow of percolating water (*i.e.*, water that does not follow a defined path or direction) that is under his land.²⁸ Here, like relational economic loss but in contrast to the failure-to-rescue scenarios, there is something more than an 'omission.' The defendant clearly acts. Both American and English decisions have non-suited the plaintiff's claim in nuisance to prevent defendant's conduct.

One might think that this conclusion follows from the fact that the defendant's use of his land should be found to be reasonable or ordinary vis-à-vis the plaintiff, as measured by the usual criterion of nuisance law. On the given facts, however, we do not ever get to this stage of the nuisance analysis. The decisions which non-suit the plaintiff start from the premise that unless and until an individual captures and contains the light or water or otherwise subjects it to her exclusive control, it does not belong to her.²⁹ Thus the plaintiff has no right, exclusive against

24 A classic illustration is *Raymond v. Yarrington et al.* 96 Tex. 443 at 451 (Tex. 1903). Most recently, see *O.B.G. Ltd. v. Allen* [2008] 1 A.C. 1 at 32 (H.L.) *per* Lord Hoffman.

25 See *Prosser and Keeton*, *supra* note 2 at 981; Sayre, *supra* note 22 at 675–6.

26 For further development of this analysis, see Benson, 'Economic Loss,' *supra* note 6 at 455–7. On the question of the alienability of choses in action, the articles by Walter Wheeler Cook remain particularly instructive; see Walter Wheeler Cook, 'The Alienability of Choses in Action' (1915–6) 29 Harv. L. Rev. 816; Walter Wheeler Cook, 'Reply to Professor Williston' (1917) 30 Harv. L. Rev. 449.

27 As in *Fountainebleau Hotel Corporation v. Forty-Five Twenty-Five, Inc.* 114 So. Ed. 2d 357 (Fla. 1959) [*Fountainebleau*].

28 As in *Mayor of Bradford v. Pickles* [1895] A.C. 587 (H.L.) [*Pickles*].

29 *Fountainebleau*, *supra* note 27 at 359–69; *Pickles*, *supra* note 28 at 592, *per* Lord Halsbury. In *Fountainebleau*, *supra* note 27 at 360, the court underlined that it would not, via the law of nuisance, confer upon the plaintiff 'incorporeal rights incidental to his ownership of land which the law does not sanction.'

the defendant, to the percolating water which the defendant takes from under his own land before it reaches the plaintiff's. Seen in this light, the plaintiff's complaint does not actually bring into play the ordinary use standard because the defendant has not affected any legally protected interest which the plaintiff has in the use and the enjoyment of her land. The fact that the defendant's action frustrates the plaintiff's intended use of her land cannot possibly be a wrong because the frustration results from the loss of something in which the plaintiff has no exclusionary interest as against the defendant. Whatever else it entails, the use of one's property that is protected under nuisance law must consist in the use of something that is under one's exclusive and rightful dominion vis-à-vis the defendant. Notice that this analysis, like the explanation of no liability in the failure-to-rescue and economic-loss scenarios, is normative, not factual: it is not the physical fact that the defendant's use has 'sent' odours, noise, vibrations, and so forth onto the plaintiff's land that, in and of itself, brings the conduct under nuisance; what matters is that, through these emanations, the defendant affects something that belongs exclusively to the plaintiff and that the latter's claim is for loss resulting from this interference.

B A COMMON THREAD?

Despite the differences between the rescue, pure economic loss, and nuisance scenarios – the first involves factual 'omissions' and physical loss whereas the second and third involve factual 'acts' and financial loss – there seems to be a common thread: in these no liability situations, the defendant's conduct does not affect an interest rightfully belonging to the plaintiff *to the exclusion of the defendant*. The existence of such an interest and of conduct possibly affecting it seems, then, to be a prerequisite of the defendant owing a duty of care toward the plaintiff with respect to any loss caused, whether it be physical or purely economic, and however foreseeable that loss may be. Crucially, the fact that the plaintiff may need something or may actually be enjoying the beneficial and profitable use of something does not, without more, obviate the requirement of this protected interest and is not a sufficient basis (even assuming foreseeability) for the imposition of a duty relation.

If, as seems widely agreed, we take the failure-to-rescue cases as the paradigm of nonfeasance, it would seem that the other instances of no liability, which conform to the same basic pattern of analysis, should also be characterized as such. On this view, we may say provisionally that nonfeasance is conduct that does not affect or otherwise interfere with a substantive interest (one's body or things) that belongs to the plaintiff to the rightful exclusion of the defendant. The requirement that there be conduct that can affect such an interest is more basic than and distinct from a merely factual distinction between act and

omission.³⁰ Moreover, whereas a purely factual act–omission distinction refers one-sidedly to the character of the defendant’s conduct taken on its own, the view that I am suggesting is not only normative but crucially bilateral insofar it refers to a *relation* between the defendant’s conduct and the plaintiff’s requisite protected interest as the basic unit of analysis.

This understanding of liability is reflected in the opening lines of Oliver Wendell Holmes’s important discussion in *The Common Law*³¹ of the organizing principles of liability. Holmes writes that

there are certain forms of harm which . . . can *never* be complained of by any one except a person who stands in a particular relation to the actor or to some other person or thing. Thus it is neither a harm nor a wrong to take fish from a pond *unless the pond is possessed or owned by someone*, and then *only* to the possessor or owner. It is neither a harm nor a wrong to abstain from delivering a bale of wool at a certain time and place, unless a binding promise has been made to deliver it and then it is a wrong *only* to the promisee.³²

In this passage and following, Holmes supposes that conduct, whether act or omission, is not a wrong at law unless it is a wrong against someone; that, to be a wrong against someone, the conduct must impair or otherwise affect something that comes under that person’s entitlement, whether by virtue of possession, property, or contract; and finally, that to be recoverable, a loss must be sustained by the one who has such an entitlement and must result from the interference with it. This analysis holds for any kind of recoverable loss and makes no distinction

30 Many courts and commentators have criticized a purely factual act–omission distinction as an unsatisfactory and unstable basis for the rule against nonfeasance. The difference between act and omission is unstable because an omission can always be recharacterized as a choice and because, as both courts and commentators regularly note, almost any instance of conduct can be analysed as a compound of both acts and omissions, with the consequence that there must be a further basis on which to decide what is legally determinative for the issues of duty and liability. For recent judicial comments, see *Stovin*, supra note 1 at 930, *per* Lord Nicholls, & at 945, *per* Lord Hoffman. For commentators, see *Prosser and Keeton*, supra note 2 at 374: ‘It is clear that it is not always a matter of action or inaction as to the particular act or omission which has caused the plaintiff’s damage. Failure to blow a whistle or to shut off steam, although in itself inaction, is readily treated as negligent operation of a train, which is affirmative misconduct . . . On the other hand, the discharge of an employee, which is certainly an affirmative act, may be considered to be no more than non-performance of an agreement to continue employment’; see also Bohlen, ‘Moral Duty,’ supra note 2 at 220, n. 6; and more recently, Jeroen Kortmann, *Altruism in Private Law: Liability for Nonfeasance and Negotiorum Gestio* (Oxford, UK: Oxford University Press, 2005) at 5ff [Kortmann].

31 Oliver Wendell Holmes, *The Common Law*, ed. by Mark DeWolfe Howe (Boston, MA: Little, Brown, 1963) [Holmes, *Common Law*].

32 *Ibid.* at 131 [emphasis added].

between physical and economic damage. Notice also that the question of whether the parties are related in the requisite way is conceptually distinct and prior to the question of whether the defendant has exercised due care. The priority of duty is implicitly but necessarily supposed by Holmes's understanding. Moreover, Holmes appears to assume that, in addition to bodily integrity, there are three, and only three, elementary and general grounds of individual entitlement at common law that give persons standing to complain against others about harms they have done: possession, property, and contract. Thus, he does not present tort law, including negligence, as an additional original source of entitlement but rather as itself supposing that the plaintiff already has the needed entitlement on one of these other bases, including bodily integrity.³³ Finally, he makes clear that he views these entitlements as *exclusionary*³⁴: each consists in a right to exclude others from possessing, using, or disposing what comes under one's own. Whereas ownership and possession, being *in rem*, exclude indefinite others, contract rights are *in personam*, in the sense that they exclude a definite person or persons and so only hold as between the contracting parties.

Holmes, we have just seen, supposes that liability for breach of contract, no less than liability for tort, reflects this same general conception of liability. In other words, on this view, contractual liability is also liability for misfeasance. Yet breach is ordinarily simply an omission to perform. This brings out even more sharply the contrast between the proposed normative conception of the misfeasance requirement and the view that equates it with an act–omission distinction. The case of contract requires closer consideration on its own because, as I shall now briefly explain, the view of misfeasance that I am proposing has basic implications for the analysis of contract formation.

C MISFEASANCE AND CONTRACT

As just noted, it might seem, at first blush, that the requirement of misfeasance is simply irrelevant to contract law. After all, since contractual liability is for omissions to perform, is it not, necessarily, liability for nonfeasance – with breach consisting in the mere failure to confer a positive benefit?³⁵ But if misfeasance embodies a general normative requirement for liability in private law rather than a factual distinction

33 To the same effect, see Richard A. Epstein, 'Nuisance Law: Corrective Justice and Its Utilitarian Constraints' (1979) 8 J. Legal Stud. 49 at 52: '[T]ort law ... presupposes some prior, independent method for defining and recognizing property rights both in the person and in external objects.'

34 Holmes, *The Common Law*, supra note 31 at 193.

35 Even Hohfeld, who emphasized that there was no intrinsic difference between rights *in rem* and rights *in personam*, seems to have accepted this view of breach of contract; see Hohfeld, supra note 11 at 78.

between act and omission, breach should not be understood in this way. To the contrary, in legal contemplation breach is properly viewed as conduct that injures, interferes with, or deprives the plaintiff of an interest that belongs to her to the exclusion of the defendant. And, in fact, this is how breach *must* be understood if we are to make sense of the compensatory character of the expectation remedies. Let me briefly explain.

No proposition is more fundamental to contract law than the principle that expectation damages or specific performance are available for non-performance *as a matter of compensation*, quite apart from whether the plaintiff has detrimentally relied upon the defendant's promise. The law views these remedies as compensatory in character because, through them, it aims to ensure, as far as possible, that the plaintiff receives from the defendant in specie or by way of money damages what she has been promised in accordance with the terms of their contract.³⁶ Now, if the expectation remedies are truly compensatory – as the law maintains they are – it must be the case that they presuppose a base-line from which the defendant's breach subtracts and to which the remedy restores the plaintiff.³⁷ What is this base-line?

Given the aim and content of the expectation remedy, the obvious and natural interpretation of this base-line is that it consists in the plaintiff having, prior to and independent of performance, a protected interest with respect to the thing promised to the exclusion of the defendant. The plaintiff acquires this interest at the moment of, and through, contract formation. At that point, it counts as a rightful interest as between the parties.³⁸ The duty to perform is thus *not* an obligation, positively,

36 For a classic judicial statement of this view of contract damages, see *Sally Wertheim v. Chicoutimi Pulp Co.* (1910), [1911] A.C. 301 (P.C.), *per* Lord Atkinson. This view is taken in equity as well; see *Harnett v. Yielding* (1805), 2 Sch. & Lef. 549 at 553, *per* Lord Redesdale.

37 It is precisely the existence and characterization of this base-line that Fuller and Perdue challenge in their seminal article, Lon Fuller & William R. Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46 Yale L.J. 52 at 52–7 [Fuller & Perdue]. For further discussion of Fuller & Perdue, *ibid.*, see Peter Benson, 'The Unity of Contract Law' in Peter Benson, ed., *The Theory of Contract Law: New Essays* (New York: Cambridge University Press, 2001) 118 at 119 ff. [Benson, 'The Unity of Contract Law']; Peter Benson, 'The Expectation and Reliance Interests in Contract Theory: A Reply to Fuller and Perdue,' online: in J. Gordley, ed., *Issues in Legal Scholarship Symposium: Fuller and Perdue* (2001) <<http://www.bepress.com>>; Ernest J. Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 Chi.-Kent L. Rev. 55.

38 That contractual acquisition is characterized as being 'between the parties' is crucial to its classification as *in personam*. This view should not be understood as holding that the acquisition is originally against third parties. Nevertheless, since it involves a rightful holding, contractual acquisition must be respected by everyone. This imperative does not impose on non-parties any requirement of performance. Mere non-performance by them does not – indeed, cannot – constitute interference with the right. Still, it is possible for others to deny a contracting party respect by, for example, acting with

to confer upon the plaintiff something that is not yet rightfully hers. Rather, the juridical significance of performance must be that by performing – and only in this way – the defendant does not interfere with the plaintiff's right to possess and enjoy what is already hers in accordance with the contractual terms. Viewed in this light, breach, even if it amounts to an omission, works, in legal contemplation an interference with what belongs rightfully and exclusively to the plaintiff, thereby constituting misfeasance.³⁹ Contract formation, and in particular such doctrines as offer and acceptance and consideration, must involve a kind of acquisition as between the parties to the contract. I shall return to and elaborate this conception of contractual obligation in the following part.

D MISFEASANCE AS AN ORGANIZING IDEA

Despite the frequent, though misconceived, equation of misfeasance and nonfeasance with acts and omissions respectively, there have been enduring judicial formulations, such as Lord Diplock's, that view the distinction in terms that make it pivotal and utterly basic to the existence of duty and liability. In these formulations, it figures as a fundamental organizing idea. According to these formulations, among which Judge Cardozo's in *Moch v. Rensselaer Water Co.*⁴⁰ is perhaps the most perspicuous, nonfeasance is conduct that merely withholds a benefit, in contrast to working a loss; it entails the absence of a positive rather than the imposition of a negative. Nonfeasance takes nothing from the plaintiff and does not worsen her condition; it simply fails to make her better off. It is this difference between the causing of loss and the mere failure to confer a benefit

the aim of misappropriating or injuring the contractual claim. This is the basis of the tort of intentional interference with contractual relations; see text at note 21 *supra*.

39 Historically, interference with the person or possessory and property rights of another was the paradigm instance of misfeasance. Thus, initially, the mere failure to receive the benefit of a promised performance that was not part of a formal covenant was nonfeasance and not actionable: it was not the loss of anything that the plaintiff already possessed or to which she had a legally recognized right; see Francis Bohlen, 'The Basis of Affirmative Obligations in the Law of Tort' (1905) 53 U. Pa. L. Rev. 209 at 215. It became actionable through the gradual development of *assumpsit*, with its requirement of consideration and so forth. A promise for consideration was eventually viewed as granting the promisee a legal right at the moment the promise was made. Only then did sheer non-performance count in law as an injury and the deprivation of the performance as a loss; *ibid.* at 216

40 159 N.E. 896 at 898 (N.Y. 1928): 'What we need to know is the conduct that engenders the relation. It is here that the formula [the 'time-honored . . . distinction between misfeasance and nonfeasance'], however incomplete, has its value and significance. If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward.' This passage is cited with approval in *Prosser and Keeton*, *supra* note 2 at 375, n. 20.

which, as Bohlen emphasized, 'lies at the root of the marked difference in liability at common law for the consequences of misfeasance and non-feasance.'⁴¹ Now, these formulations presuppose an understanding of benefit and loss. There must be a base-line with reference to which the plus and the minus are determined. But what might it be? The proposed normative interpretation supplies an answer.

In the instances previously discussed of no liability for even foreseeable loss, a plaintiff may certainly be said to have sustained loss in a factual sense as a result of the defendant's frustration or non-fulfilment of her interests. The plaintiffs who suffer relational economic loss or who sustain personal injury that could have been averted by a virtually costless rescue do, in a sense, suffer real losses. They are worse off as measured against some base-line that reflects their interests, whether physical or financial, in a certain condition. But, while this base-line might be relevant for other moral purposes, it does not suffice to found liability in private law. The problem, I have suggested, is that this base-line does not refer to something that belongs rightfully to the plaintiff to the exclusion of the defendant. For the purpose of establishing liability in private law, the base-line must consist in the content and value of such rights. It is in light of *this* base-line that the contrast between 'causing loss or injury' and 'withholding a benefit' is to be construed. Thus, where the loss sustained by the plaintiff does not result from the defendant's interfering with what belongs to the plaintiff as against the defendant, this is not a loss in legal contemplation and the conduct can only amount to a failure to benefit her, despite the fact that the plaintiff may be, in some other sense, worse off as a result. On this view, the relevant conceptions of loss and benefit have a restricted normative and legal meaning.⁴²

In contrast to morals, where positive duties of aid and beneficence can be enjoined, the idiom of obligation in private law is restricted to merely negative prohibitions against injury.⁴³ We are enjoined to leave the protected interests of others alone, as is. It is a principle of mutual non-interference. The misfeasance–nonfeasance distinction thus specifies a

41 Bohlen, 'Moral Duty,' *supra* note 2 at 221. See also James Barr Ames, (1908–9) 'Law and Morals' 22 Harv. L. Rev. 97 at 112.

42 Similarly, in contract law, the definitions of 'legal benefit' and 'detriment' for the purposes of the doctrine of consideration have restricted meanings that are not to be equated with being better or worse off in a larger sense.

43 Certainly, one of the most influential expressions of this fundamental normative idea is Lord Atkin's in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) at 580: 'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.' It is the substitution for the rule of love of an injunction against injury that signals the assertion of misfeasance.

definite conception of obligation and liability. It represents a specific and limited definition of harm because it restricts the notion of protected interest to something that belongs to one to the exclusion of another. At least, this is the view which I am suggesting provisionally on the basis of the prior discussion. Interference with others' interests in a wider sense that involves or serves their well-being or happiness does not seem to be a basis for liability. Precisely because misfeasance does not refer to a matter of fact but is, rather, a normative idea that specifies the necessary foundation of a definite conception of wrong, and nonfeasance is conduct that falls short of this, it makes no sense to ask the question, 'Should there be liability for this instance of nonfeasance?' Thus, there is no need to conjure up further normative reasons for deciding whether an instance of misfeasance or nonfeasance gives rise to a duty relation.⁴⁴ This does not mean that the moral acceptability of misfeasance is either self-evident or beyond controversy – to the contrary, this is a crucial and difficult question, which I discuss in Parts IV and V – but, at least, it suggests the way in which whatever moral acceptability it may have must be shown.

The misfeasance requirement, I have suggested, limits actionable injury to interference with something that rightfully belongs to the plaintiff to the exclusion of the defendant. Unless the condition is met, the loss is only *damnum* but not *injuria*. Thus far, however, I have referred to, without explaining, the idea of an exclusive rightful interest as well as the possibility of conduct that interferes with such interests through its impact on persons and things in a range of scenarios. It is essential to discuss these more fully. Moreover, while misfeasance might be a necessary condition for actionable injury, it is not, by itself, sufficient. Other requirements must be satisfied. For example, in negligence, the plaintiff must generally show, not merely that the loss sustained resulted from conduct affecting her person or property – for this would impose strict liability – but, in addition, that it is of a kind that the defendant reasonably should take care to avoid and, at the least, can reasonably foresee. Otherwise there is no wrong or injury. In nuisance, the plaintiff must establish that the interest in use with which the defendant interferes, even if it is with respect to her property interest, is an ordinary use and enjoyment as measured by the relevant community standard.

44 My view is, thus, precisely the contrary of Kortmann's, which not only insists on giving nonfeasance a purely factual meaning but subordinates the moral difference to this factual characterization. See, e.g., Kortmann, *supra* note 30 at 7, where he writes, 'Hence, we will regard both "not stopping your car to help a man in need" and "not stopping your car to avoid collision" as instances of nonfeasance.' Given this purely factual characterization of the misfeasance–nonfeasance distinction, the question, then must, be asked, Should there be liability for this or that case of nonfeasance? The answer, in any given case of nonfeasance, is contingent on policy considerations.

Otherwise, once again, there is no wrong or injury. Even to recover for loss resulting from a breach of contract, the plaintiff must show, for example, that it is a type of loss that the defendant should have contemplated at the time of contract formation.⁴⁵ What is the connection between the misfeasance requirement of an exclusive interest (in one's body, property, and so on), and these other, seemingly distinct, prerequisites of duty and liability? I take up these and related questions in Part III.

III *The character and genesis of the basic private-law relation*

The misfeasance requirement, I have suggested, holds that, in the absence of conduct that affects a certain kind of interest, there cannot be liability in private law. This normative requirement is substantive and not merely formal. The interests pertain to bodily integrity, property, and contract, and each of these, I assume for now, has a definite object or content that can be held or possessed by one party to the exclusion of the other. The only kind of loss that matters is that which results from conduct that interferes with such interests. All else is irrelevant. Thus, the fact that a defendant interferes with or frustrates what a plaintiff may want, need, prefer, or seek to have does not, in itself, count as misfeasance. Another's purposes, intentions, or wishes do not constitute protected interests. Now, this view of misfeasance immediately raises a number of questions that require discussion: What are the form and content of this relation of exclusive holding by one party against another? How do individuals come to have these holdings? And is the misfeasance requirement morally acceptable from the standpoint of liberal justice?

As I will now explain, the relation in misfeasance is rooted in the idea of the exclusive, rightful control over one's body and things as against others. This idea of exclusive control is intrinsically relational. I will discuss this relation in terms of form and content. Whereas form expresses the main structural features and elements of the relation in general terms, its content consists of specified, different basic categories of this relation that can obtain between persons. Thus, we may view the content as making the form more determinate.

Looking ahead, I will elucidate the form and content of this relation in two distinct but interconnected steps. This integrated two-step analysis represents the normative-conceptual genesis of the basic private-law relation and is essential, I argue, to a proper understanding of it. In the first step, with which the analysis begins, we view exclusive, rightful control in terms of a legal relation of immunity on one side and

45 As enshrined in *Hadley v. Baxendale* (1854) 156 E.R. 145 [*Hadley*].

corresponding disability on the other and as having a content that comprises three basic categories of entitlement which include bodily integrity, property, and contract. In the second step, which is distinguished from but which at the same time presupposes and incorporates the first step, the relation is now framed as one of right and correlative duty between the parties and its content is made up of different bases or categories of liability – such as, tort, breach of contract, and unjust enrichment. As for the further, important question of the moral acceptability of the misfeasance requirement from the standpoint of liberal justice, I take up this issue in Parts IV and V.

A THE FIRST STEP: ENTITLEMENT AND THE RELATION OF IMMUNITY AND DISABILITY

At the heart of the requirement of misfeasance is the idea that there is liability only where the plaintiff can show injury to a rightful holding that excludes the defendant. For the purpose of clarifying the form and content of this requirement, I begin with the idea that, in situations of misfeasance, the plaintiff asserts, and must assert, as against the defendant, rightful *control* over something – her body, the object of her property interest – and demands that the defendant act consistently with her having such exclusive control.⁴⁶ To have this control, a person must alone have the legal (juridical) power or authority to determine what is to be done with a given particular object. Moreover, he or she alone can exercise this power or authority by actually putting the object to some purpose. No one else can make this decision or implement it. By definition, such control can be exclusive only if it vests with someone and not others and only if it is directed toward a definite and individuated object (this thing and not that). Hence, exclusive control consists in a relation between persons that is essentially with respect to a distinct object. Anything that is subject to a person's exclusive control in this way I shall count as his or her 'own,' juridically speaking. Thus understood, 'ownership' is intrinsically a term of relation as between parties. Since the idea of exclusive control requires merely that there be one person who can claim this control vis-à-vis someone else, the basic unit

46 This idea of control is generally reflected in judicial decisions and figures in a wide range of theoretical treatments of private law. See, e.g., the classic discussion in Frederick Pollock & Robert Samuel Wright, *An Essay on Possession in the Common Law* (Oxford, UK: Clarendon Press, 1888) at 11–6, 37ff., 118ff. [Pollock & Wright]. It is commonplace in the natural law tradition. It is central to Kant's account of private right; see Immanuel Kant, 'The Metaphysics of Morals, Part 1,' in Mary J. Gregor, ed., *Practical Philosophy* (New York: Cambridge U. Press, 1996) at 401–21 [6:246–71] [Kant] and to Henry Sidgwick's utilitarian account of property; Sidgwick, *supra* note 2 at c. 4 & 5.

of analysis is as between two parties. As understood in this way, ownership (and 'owner') specify a relation that is necessarily bilateral.⁴⁷

Now, the first formal feature of this relation of exclusive control is that others cannot – unilaterally – deprive the owner of it and vest it in themselves. Accordingly, rightful exclusive control entails, in the first instance, a relation of immunity on the owner's side and a correlative disability (no power) on the side of others.⁴⁸ There is nothing non-owners can do unilaterally – they have no legal power – to change the legal-normative fact that it is the owner alone who has the authority to decide what is to be done with her object and who can execute this authority by actually doing it. This immunity in relation to others is preserved throughout the analysis of liability in private law. Thus, the fact that an owner uses her property, say, in a way that violates the rights of another does not result in ownership of the property vesting with the latter. Because others are under a corresponding disability, they do not affect the owner's exclusive authority, even if they consume, damage, or destroy her object. Her entitlement continues unless or until she decides to give it up. Of course, if the owner consumes her object or it no longer exists through natural causes, her object ceases and with it her control. But this, once again, does not call into question her authority; it simply means that this thing cannot be an object of her authority. Further, the analysis of legal remedies that are given in response to, and as compensation for, violations of ownership supposes that, without exception, this relation of immunity and disability continues as between plaintiff and defendant. It is, therefore, a serious error to view damages, for instance, as the price that wrongdoers must pay to become entitled to use another's property – in effect, to have the ownership transferred to them from the plaintiff without her consent. Given the relation of immunity and disability, there cannot be any such involuntary transfers, and so the meaning of remedies cannot be the price of such transfers.⁴⁹

47 To avoid misunderstanding, I should emphasize that, throughout this article and unless otherwise indicated, I use the terms 'owner,' 'one's own,' and 'ownership' to refer only to this bilateral relation. They connote a strictly transactional conception. Thus, any question of entitlement that requires a determination across transactions – for example, the claim of a bona fide purchaser for value versus the claim of the wrongfully dispossessed original owner – cannot be resolved merely on the basis of true ownership. The latter will only give rise to a conflict of ownership claims. These kinds of situations involve what may be called 'disputes of title' and must be resolved on a different – not purely bilateral – basis. For this idea of a title dispute, see Michael Bridge, *Personal Property Law*, 3d ed. (Oxford, UK: Oxford University Press, 2002) at c. 5.

48 I follow Hohfeld's characterization of this relation; see Hohfeld, *supra* note 11 at 60ff.

49 Interpreted as a difference in entitlements and not merely in remedies, the influential Calabresi-Melamed distinction between liability and property rules is incompatible with this conception of private law. For that distinction, see Guido Calabresi & A. Douglas

Since I am supposing this idea of exclusive control as the basis of the legal relation under the requirement of misfeasance, it sets the terms of what is normatively (legally) relevant. Thus unless a factor or consideration is involved in or follows from this idea of control, it does not come within the legal analysis. This has large implications. For instance, because the idea of exclusive control is conceptually distinct from such matters as the expected or actual utility of the object for the owner – or more generally, from whether and how much the object satisfies her preferences, needs, or purposes, all these considerations fall outside the legal analysis. The ideas of control and well-being are distinct. We see here that, from the start, the more open-ended concerns about

Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harv. L. Rev. 1089 at 1092. Some might suggest, as a counterexample to the conception of relation proposed in the text, the incomplete privilege to use another's property in cases of necessity, which carries with it the requirement to indemnify for loss caused to the thing used in the exercise of that privilege – as decided in *Vincent v. Lake Erie Transportation Company* 124 N.W. 221 (1910) [*Vincent*]. Surely, it is argued, this is a case of forced transfer at a price. This seems to be conceded by Richard Epstein, who suggests that, in *Vincent*, the 'entire system is geared to making one decisive switch in property rights'; see Richard Epstein, 'A Clear View of the Cathedral: The Dominance of Property Rules' (1997) 106 Yale L.J. 2091 at 2110–1. But this interpretation is by no means necessary. Indeed, the contrary view naturally suggests itself. For it is essential to the incomplete privilege in circumstances of necessity that the defendant's right to use the plaintiff's property to save himself or his own property is *not* a property right but rather, as the court put it, in *Vincent* at 221, a right that holds in a situation in which 'the ordinary rules regulating property rights [are] suspended.' To the extent that ownership is a question, it remains with the plaintiff alone. While the plaintiff cannot prevent the defendant from using her property in circumstances of necessity, the defendant acquires no ownership in it. Damages for injury done to the dock ensure that the defendant's use is, in effect, a harmless use, in the sense that it does not affect what comes under the plaintiff's right except for the sheer fact that, during a limited interval, it is the defendant and not the plaintiff who rightfully makes use of it. Precisely because the property remains vested with the plaintiff, the defendant must indemnify him for damage or diminution in value that results from such use. Far from being authorized to dispose of or even to affect it – as the defendant could permissibly do if he were the owner – he must leave it in exactly the condition in which he found it before using it. Strictly speaking, this is not liability either in tort (strict liability) or in unjust enrichment, as some have suggested. Rather, it works in tandem with the incomplete privilege to ensure that, as far as possible, the plaintiff's ownership is respected and vindicated. The incomplete privilege in *Vincent* entails a right to use another's property that, although opposable against the owner, who is under a correlative duty not to prevent or interfere with defendant's use of her property, is a right linked to a specific purpose and rooted in need, not in mutual independence as understood within the framework of misfeasance; see Part V of this article below. Thus, it cannot come under misfeasance's idea of exclusive right (including its principles of liability, such as tort or unjust enrichment) but, to the contrary, qualifies and limits the whole system of rights that do so.

interests and well-being in much economic analysis of law⁵⁰ represent a quite different point of view – one that does not fit within or reflect the character of the legal relation that satisfies the misfeasance requirement. The fact that the legal relation abstracts from these considerations gives it a definite and distinctive, if problematic, normative character. This character is also reflected in the various ways of establishing the ownership relation, to which I now turn.

Our question now is, ‘How does rightful exclusive control, taken as involving a relation of immunity and correlative disability, vest with individuals and apply in actual relations between them?’ I want to suggest that, at the highest level of abstraction, there are three distinct and logically exhaustive elementary modes in which this takes place: bodily integrity, property, and contract. These are the irreducibly basic modes of entitlement that specify the content of the private-law relation at this first step of analysis.

Beginning with bodily integrity (physical and psychological), it is settled that the law views this mode of exclusive control as vesting in individuals just in virtue of their being alive, without their having to do anything to establish it. For this reason, we may refer to this right as ‘innate’ rather than as ‘acquired.’ Since having or not having this exclusive control is independent of one’s acts and vests simply in virtue of one’s being alive, it cannot be gained or lost by any of one’s acts and is, therefore, by definition, inalienable. Thus, control over one’s body and the relation of immunity and correlative disability that this entails are unalterable throughout one’s life.

In this view, our body is not an object that is brought under our exclusive control by subjecting it to our purposes. Rather, it counts simply and immediately as the way we can exist in time and space as distinct persons: our individuated identity in relation to others. Whatever we do, we are necessarily and always in our bodies. In effect, our bodies are ours because, in relation to others, our bodies are us. The notion of my having to do something in order to establish control with respect to my body would be at the very least paradoxical: because my body is not separate from me and any act to acquire control would involve, as it were, my body’s affecting itself, the very act of acquiring control necessarily presupposes that I already rightfully and fully have exclusive control over my body.⁵¹ Absent the latter, my action cannot produce any juridical effects

50 For a discussion of the open-ended character of economic analysis, see Louis Kaplow & Steven Shavell, *Fairness versus Welfare* (Cambridge, MA: Harvard University Press, 2002) at c. 2.

51 As Hegel writes, ‘I am alive in this bodily organism which is my external existence . . . the real pre-condition of *every* further determined mode of existence’ [emphasis added]; see Hegel, *supra* note 2 at para. 47.

imputable to *me*. Thus, bodies are never ownerless and never available for appropriation by anyone.

Moreover, the basis of this authority is not that people need their bodies as *means* to accomplish their purposes, although this is certainly true. One's needs, purposes, and well-being are not the basis. Self-ownership, as it were, holds just insofar as one happens to be alive, and, therefore, the object that comes under one's exclusive control is just one's body in whatever condition it happens to be, independently and apart from interaction with others. This is what one has as a matter of exclusive control vis-à-vis others. Thus, whatever duties it may turn out that others have, these cannot consist in an obligation to preserve your body against internal or external factors that affect your bodily condition independently of interaction with them.

One's rightful exclusive control over one's body is innate because it is the necessary condition of one's counting, in the first place, as a distinct person in relation to others. As such, it is the essential presupposition of every other mode of having and exercising such control in relations with others. What about exclusive control that can be established through one's acts as a person so related to others? Paralleling the analysis of bodily integrity, the main idea here is that one's presence as a distinct person in relation to others is to be recognized not merely in one's bodily existence but also in one's acts. And just as others do not have authority over one's body, so they would not have authority over one's acts. In this respect, also, there would be a relation of immunity and a corresponding disability. This would be the normative significance of acquired rightful control, that is, of exclusive control that is established in and through one's acts. But what sorts of acts might be relevant here and with respect to what kinds of objects?

First, the acts must be in relation to objects that are separate or separable from persons – otherwise, they come under the innate right of bodily integrity. Moreover, let's say, provisionally, that the requisite acts consist in subjecting such things to one's control in a way that is reasonably recognizable by relevant others. This reflects the fact that ownership is bilateral. Thus, in themselves, the actor's inward or subjective intent and motive are irrelevant. This is implicit in and consistent with the settled law which, in all cases of acquired rights, requires certain definite, external acts of will (for instance, taking possession by occupancy), acts that themselves represent exercises of exclusive control. In legal contemplation, it is just these acts of control, not the parties' wishes, needs, or purposes, that are the basis of such rights. One therefore acquires ownership in something just by *doing* something that already manifests dominion over it. Now, furthermore, we may divide acquired rights into two categories, depending on the circumstances of acquisition: it may be either of something that *is not* or alternatively of something that *already*

is under another's rightful control. In the first case, which I shall call 'property,' the acquisition is 'original' because the object is presently owned by nobody; the second, which I call 'contract,' is 'derivative' acquisition – that is, acquisition from someone else who already owns the thing.⁵² In both cases, however, ownership⁵³ of some kind is acquired.

In the case of property,⁵⁴ since *ex hypothesi* acquisition here is of something that is not yet under anyone's control, the object must be something that exists in space separately from anyone's body – a separate physical object. More specifically, the objects of property acquisition cannot include services of any kind. This is because services involve the exercise of bodily (including mental) powers and therefore, as such, *already* belong to individuals under their rightful bodily integrity and so are not available for appropriation without their prior consent. Services can only be appropriated by way of derivative acquisition. As for the act, the law requires occupancy; that is, an external (purposive) act by a single individual which reasonably manifests to others that that individual has brought the object under his or her present control with the intention and effective capacity of being in a position to use it at will.⁵⁵ One who does this first in time is deemed the owner relative to any and all others who come after. As I have already indicated, one acquires ownership, that is rightful exclusive control, of an object by doing something that itself consists in asserting and exercising control over it: in other words, one becomes an owner by acting as an owner. What is necessary for this purpose will depend, of course, on the particular features and the situation of the object. But anything that falls short of the requisite act of exercising control is legally ineffective and, indeed, legally irrelevant for the purpose of establishing an entitlement. So, the fact that one may need or may want the thing, that one may have invested time or resources into trying to obtain it,⁵⁶ or that one will be better off relative to others by having it is of no matter. Finally, whether one is exercising control does not depend on the particular purposes to which one

52 I take the terms and meaning of 'original' and 'derivative' from Grotius, although, in some form or another, the distinction is commonplace in the philosophical literature; see Hugo Grotius, *The Rights of War and Peace*, ed. by Richard Tuck (Indianapolis, IN: Liberty Fund, 2005) at Bk. 2, c. 3 & 6 [Grotius].

53 As stated earlier in note 47 *supra*, it is crucial to keep in mind that ownership is understood throughout this article in terms of a bilateral relation, rather than in terms of issues of 'title.' Otherwise, there is no chance of my argument's being plausible.

54 Here I revise and develop the view of property suggested in my earlier article, Peter Benson, 'The Philosophy of Property Law' in Jules Coleman & Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, UK: Oxford University Press, 2002) at 752.

55 Pollock & Wright, *supra* note 46.

56 *Pierson v. Post* 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

puts the object. All such considerations (needs, preferences, purposes, and so forth) that, in fact, differentiate one individual's act from that of another are in themselves irrelevant.

A person who, relative to others, occupies an object first has done everything necessary to subsume it under his or her control relative to others and counts as its owner. However, it would be mistaken to conclude that this recognition, therefore, treats the fact of temporal priority – or any other particularity that distinguishes person from person – as, in itself, morally significant.⁵⁷ Rather, what counts is just that now a presently unowned object has been brought under the control of *someone*. This should be understood quite literally, since it is not in virtue of any factors that differentiate persons that exclusive authority vests with the first occupier but simply because now, for the first time, there has been an interpersonally recognizable exercise of control, *tout court*. The abstract significance of the act – namely, that it is a representative exercise of control by one who counts just as 'anyone' – is intrinsic to the legal analysis. The one who appropriates becomes 'first' only in relation to others – if and when they happen to arrive at the scene. And, of course, a person who may be first in relation to some particular person may not be first relative to others. The idea of ownership is intrinsically relative because bilateral.⁵⁸

Taking this analysis one step further, we may specify, in conceptually exhaustive terms, that the conduct that counts as the exercise of property ownership is as follows: first, the act of taking control of something that previously was not subject to one's control (appropriation); secondly, the act of making use of it as something that is already under one's control (use); and thirdly, the act of disposing of it in a way that places it beyond, and thus no longer within, one's control (alienation). In all three instances, one shows oneself an owner by acting as an owner. Thus, both appropriation and alienation, no less than use, are acts of ownership that manifest ownership. And, in all three instances, in legal contemplation, others do not have any legal power unilaterally to deprive these acts of this character.

Whether one has manifested control in any of these three ways is decided by how one's conduct reasonably appears to others. Thus, it is perfectly possible that, even though actual physical taking or holding may be necessary for the initial act of appropriation – because this is the only way control can be manifested to others with respect to a

57 Hegel, for one, is explicit that this is not the basis; see Hegel, *supra* note 2, at para. 50 ('Addition').

58 This aspect is emphasized by Pollock & Wright, *supra* note 46. See also Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law*, 4th ed. (London: MacMillan, 1918) at c. 7.

physically separate object – this may not be necessary to signal the *persistence* of control, which may be reasonably evident to others despite the absence of continuing physical holding.⁵⁹ If, for example, I put my thing down and walk away in circumstances where it still reasonably appears to others that someone is effectively in a position, and has the present intention, to use it, even if at some future time, it is still under the control and custody of someone in whom the rightful (property) ownership vests. In this way, one may have exclusive control even though one does not have the thing in one's continuous physical possession.

Certain things follow from the fact that property acquisition is established through a reasonably recognizable exercise of control by a single individual alone. First, given that the legal analysis of acquisition is independent of the particular purposes to which an owner puts his or her property and is neither explained nor justified in terms of the fulfilment of the owner's needs and desires, the range of purposes that comes under an owner's exclusive authority and immunity is necessarily open-ended and indeterminate. This hallmark of property ownership⁶⁰ follows from the irrelevance of particular purpose to the analysis of acquisition, not from a concern that individuals enjoy, as owners, as wide a range of ends as possible for their individual or collective well-being.

Moreover, because the establishment of exclusive control is always relative to other individuals, there is no such thing as ownership against the world *en bloc*.⁶¹ Ownership always consists in a relation between individuals⁶² and the scope of individual relations with respect to a given thing depends entirely on the range of persons for whom such control is reasonably apparent. Property acquisition, which is effected by a single individual's act alone, does not involve the participation of any determinate other or others.⁶³ As I have already noted, it is in relation to unspecified others who may come after and may be in a position to affect the

59 Holmes, *Common Law*, supra note 31 at 186: 'Every one agrees that it is not necessary to have always a present power over the thing, otherwise one could only possess what was under his hand.' Kant emphasizes this; see Kant, supra note 46 at 401ff. [6:246–50].

60 Jim Harris treated this feature as central to the concept of ownership interests; see J.W. Harris, *Property and Justice* (Oxford, UK: Oxford University Press, 1996) at 5, 29–32.

61 As argued by James Penner, for example; see James E. Penner, *The Idea of Property in Private Law* (Oxford, UK: Oxford University Press, 1996) at 25ff.

62 This is something that Hohfeld, correctly in my view, insisted upon; see Hohfeld, supra note 11 at 92ff.

63 This, I would suggest, is the way we should take Hegel's statement that, in contrast to contract, property ownership involves 'the freedom of a single person related only to himself'; Hegel, supra note 2 at para. 40. There is no need to view this as denying the fundamentally bilateral character of ownership. For a different view, see Jacob Weinrib, 'What Can Kant Teach Us about Legal Classification' (2010) 23 Can. J. Law & Juris. 203 at 225–30.

thing owned that the exercise of exclusive control must be reasonably apparent. Thus, acquisition entails a potentially open-ended number of individual relations of immunity and correlative disability with respect to the acquired thing, where each such relation is between the owner and another who counts as 'anyone' rather than as a specified, determinate person. The set of relations that come under this description are *in rem*. The immunity is precisely the same in every individual relation and holds simultaneously *in potentia* against all those for whom the act is reasonably recognizable as an exercise of exclusive control.

It is important to emphasize that, in the proposed view, we do not conceive property acquisition as based on the consideration that persons may need various means to achieve their ends, despite the fact that the individuals who appropriate may certainly view their objects as means to their various purposes. For objects can be understood as means only insofar as they are treated as conducive toward, and thus related to, ends. But so far as the establishment of property acquisition is concerned, ends and purposes have, as such, no *normative* relevance. Accordingly, the entire analysis in terms of means and ends is wholly irrelevant from this normative point of view. Rather, paralleling the analysis of the right to bodily integrity, property acquisition is to be viewed as based on and as expressing nothing but our status as distinct and separate legal subjects; with property rights, our actions serve as individuated markers of our being distinct persons in relation to others. Clearly, much more needs to be said to explain and to substantiate this assertion. I take this up in Parts IV and V.

It is the fact that property acquisition is based on the actions of individuals singly that distinguishes it qualitatively from derivative acquisition, which involves appropriation of something that is already subject to another's exclusive control. In this second case, which I have called contract, a person cannot acquire control by himself or herself alone – for this would violate another's existing exclusive control – but can do so only with and, indeed, through the other's assent. In addition to the first assent giving up control, there is need for a second manifesting an intent to take control. Otherwise, the first person's assent can, at most, result in the object's being abandoned. Derivative acquisition thus requires *two* acts: alienation that yields control and appropriation that takes it. Moreover, these acts must be mutually related in a definite way, as I shall now explain.⁶⁴

If contract (or derivative acquisition) is to be qualitatively distinct from and irreducible to property (or first appropriation), then acquisition

64 For more detailed discussion, see Benson, 'The Unity of Contract Law,' *supra* note 37 at 128–38; and more recently, Peter Benson, 'Contract as a Transfer of Ownership' (2007) 48 Wm. & Mary L. Rev. 1673 at 1693–719 [Benson, 'Contract'].

must be of something that is *not* in the condition of being ownerless. In other words, it cannot involve a sequence in which the first party abandons control, leaving the thing ownerless and thus available to be appropriated by (any) others. This would simply make possible first, not derivative, acquisition. Rather, and this is crucial, appropriation by the second person must be of the object *as still subject* to the control of the first. If acquisition in contract is to be genuinely distinct from first appropriation, the acts of alienation and appropriation – which, as already discussed, are each exercises of ownership and control – must, therefore, be considered in legal contemplation as being made, not sequentially, but at the same time.⁶⁵ Contract postulates an irreducibly transactional form of acquisition in which the acts are but two sides of a single relation. Each act is reasonably intended to be, and is, effective only in conjunction with and in relation to the other. This relational character is, as it were, intrinsic to each side. Contractual acquisition is thus effected through a transaction constituted by mutually related exercises of control consistent with the existing immunities of both parties.

Precisely because of this transactional character of contractual acquisition, the acts that are operative here need not be acts of occupancy involving an actual physical subordination of the subject matter of the contract, as is required, we saw, for first acquisition.⁶⁶ So long as the words and conduct of one party may reasonably be viewed by the other as manifesting an intent to alienate or appropriate as the case may be, they count as such. The test of reasonableness applies just as between the two parties. Through mutually related assents, parties can, therefore, jointly signal the giving up and taking of control, independently of and prior to transferring physical possession of the object from one to the other. The capacity of the parties to transfer control independently of physical transfer goes beyond the possibility in property acquisition mentioned previously of manifesting continuing exclusive control over something even when one is no longer physically holding it. It completely does away with the necessity of physical occupancy. And independence from the requirement of physical occupancy means that there can be rightful acquisition prior to actual delivery, with the necessary and sufficient basis of acquisition being the parties' mutual assents at 'contract formation' (the moment of agreement) and with performance signifying merely

65 It was Kant and then Hegel, following him, who first brought out the need for and the significance of this feature; see Kant, *supra* note 46 at 424 [6:274]; Hegel, *supra* note 2 at para. 72.

66 In the case of first acquisition ('property'), it may be possible, depending on the character of the object and the surrounding circumstances, for one to occupy it through a merely symbolic marking. This is the furthest attenuation of the physical aspect that is possible under first acquisition. But even still, the marking must *physically* alter or affect the thing.

compliance with and respect for a change in entitlement that has already taken place. This is the essential condition of the possibility of the fully enforceable executory contract in modern contract law and of the expectation remedy being compensatory in character. Without some such analysis, we cannot make sense of the legal point of view that deems breach to be, not a failure to confer on the plaintiff a new benefit, but rather an injury that interferes with what rightly belongs to the plaintiff from the moment of contract formation.

Not only the acts that transfer control but also the content of *what* is acquired are defined transactionally. As in the case of first appropriation, the content, here, must be something that can rightfully be acquired and over which control may be rightly exercised. It must be something that is alienable. In the case of contractual acquisition, however, the objects of such acquisition can be services (actions)⁶⁷ as well as physically separate things. Moreover, the incidents of ownership (possession, use, and alienation) conveyed contractually are determined by the express and implied terms of the transaction. For instance, whereas the time and manner of taking physical possession of an unowned thing are determined by whatever happens to be the individual act of occupancy, in contract, this is specified in advance by the parties' mutual assents at the time of performance. In general, the content that is acquired in contract may be limited and qualified by the parties both in kind and extent, yielding different categories of contractual relations.⁶⁸

In the discussion of first acquisition, I suggested that the immunity–disability relation is merely a potentiality that is actualized only if and when an undetermined second person appears who can affect the owner's object. This follows from the fact that one takes first possession by one's single act alone, without the participation of others. By contrast, in the case of contract, because acquisition is necessarily and actually transactional, the analysis of the immunity–disability relation is different. Here there is an *actual* (not merely potential) relation of immunity and corresponding disability between the party who acquires (the contractual transferee) and another definite individual – the party who alienates. During the temporal gap between formation and performance, the second party is actually and necessarily in a position to affect what the first has acquired from him. Whatever the second person does cannot count, in law, as rightful exercise of control over the first party's

67 As I have already noted, services can only be acquired with and through the consent of the one who is to act and so are not available for unilateral appropriation by others. Until this consent is given, a service figures as part of a person's right of bodily integrity relatively to others.

68 I discuss the question of the object of contractual acquisition in more detail in Benson, 'Contract,' *supra* note 64 at 1719–31.

acquisition, keeping in mind that the metes and bounds of what is acquired are constituted by the contractual terms. This actual, necessary, and determinate relation holds *only* between the parties and reflects the fact that acquisition takes place just through their mutually related acts. In contrast to *in rem* relations, this actual, necessary, and determinate relation between persons is the proper and specific meaning of *in personam* relations.⁶⁹

At the same time, one who has acquired contractually stands in potential relations (of immunity and correlative disability) with indeterminate others with respect to that acquisition. It is possible for third parties to do something with the intent of exercising control over this acquisition. Arguably, this is so in circumstances of intentional interference with contractual relations, as briefly discussed earlier.⁷⁰ We can say in advance of all such actions that, in legal contemplation, they cannot (*i.e.*, there is no legal power to) deprive the contracting party of whatever exclusive control the contract has vested in her vis-à-vis the other contracting party. Note that these relations, qua potential and indeterminate, are distinct from the *in personam* relation between the parties. Moreover, whereas the relation between the parties is constituted by – just is – the contractual acquisition itself, the relations with third parties are one step removed and depend, reflexively, on the logically prior and independent establishment of the contractual relation by the parties. The acts by third parties that are legally relevant are those that might possibly affect one contracting party's authority vis-à-vis the other contracting party.⁷¹ Even with these differences, however, I should underline that, in light of the view presented here, both rights *in rem* and *in personam* are

69 This is the rational basis of privity. Thus understood, privity is simply the manifestation of the fact that private-law relations (which, as will be shown in Part III.B below, are specified as right-duty relations) are as between determinate persons. Thus, the main kinds of liability – unjust enrichment, tort, and breach of contract – are as between determinate persons and so embody the idea of privity. A tort illustration is Judge Cardozo's requirement in *Palsgraf v. Long Island Railroad Co.* 162 N.E. 99 (N.Y. Ct. App. 1928) [*Palsgraf*] that reasonable foreseeability in negligence must be relative as between defendant and plaintiff, and not someone else, an understanding which, in turn, reflects the more general structural requirement that '[t]he plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another'; *ibid.* at 100.

70 See text accompanying note 22 *supra*.

71 Thus, for there to be conduct by third parties that may possibly affect a contracting party's contractual rights, this conduct must be aimed at or done with the purpose of affecting the latter's contract rights against the other contracting party. It is only in this way that third parties can possibly touch the object acquired by the contract, which, I have tried to emphasize, must be understood in transactional terms as between the two contracting parties. This conclusion is consistent with the law; see text at note 22 *supra*.

rights of ownership, since both consist in rightful exclusive control with respect to alienable things in relation to others.

Whether the parties' interaction may be reasonably construed as yielding or accepting control is the primary, and indeed the only relevant, question. Their purposes for so acting and the impact this may have on their well-being have no independent significance and are not normatively relevant considerations in their own right. This is implicit in contract doctrine,⁷² which sharply distinguishes consideration from motive or purpose⁷³ and asks only whether there has been offer and acceptance irrespective of the parties' particular ends or the effects of performance on their welfare. The fundamental principle that parties must be *ad idem*, when construed in accordance with the objective test, ensures that contract formation abstracts from whatever can differentiate the parties, who therefore, as participants in contract formation, figure as completely identical persons exercising powers of ownership. Here again, while the parties certainly have separate interests and purposes which they seek to fulfil by transacting with each other – and indeed without which they would not transact – this is *not* the basis of contractual acquisition. Any analysis in terms of means and ends, while subjectively real and essential, is normatively irrelevant here.⁷⁴ Paralleling the accounts of bodily integrity and property, contractual acquisition seems to reflect a definite conception of the parties: through their mutually related acts of yielding and taking control, the parties give recognizable expression to the fact that they are separate, yet identical, persons, wholly defined in terms of a capacity for ownership. Whether this is, indeed, the case and how it is to be understood are questions that I address in the following parts.

The foregoing division of relations of rightful exclusive control into innate and acquired, with the latter being itself divided into original and derivative, would appear, on its face, to be logically complete and exhaustive. However, it is not enough to show merely that a division is complete, since there may be other equally complete divisions and, in any case, the fact that a given division is complete does not ensure that the division is of the *right* sort – one that reflects only, and at the same time does not omit, relevant considerations and features. In the case of the framework of misfeasance, for example, the central idea is the

72 I discuss this in connection with the doctrines of offer and acceptance, consideration, and unconscionability in Benson, 'The Unity of Contract Law,' *supra* note 37 at 138–201.

73 See *Thomas v. Thomas* (1842) 2 Q.B. 851 at 859: 'Motive is not the same thing with consideration.'

74 This is fundamental to both Hegel's and Kant's accounts. See Hegel, *supra* note 2 at para. 71; Kant, *supra* note 46 at 387 [6:230]: '[in] the concept of right ... no account at all is taken of the *matter* of choice, that is, of the end each has in mind with the object he wants.'

bilateral conception of rightful exclusive control (ownership), understood in abstraction from purposes, needs, inward intentions, and so forth. If so, a division that is not only complete but also of the right sort should refer only to this central idea (including whatever it entails) and introduce nothing extraneous to or incongruous with it. Reviewing the main points already made, it seems that the proposed division meets these criteria.

To elaborate, we begin with bodily integrity, for this is the necessary premise of the very possibility of relations between distinct and separate individuals involving exclusive control at all. Since, we have supposed, bilateral relations consist in forms of possible interaction between persons, bodily integrity is next supplemented by an account of exclusive control that is established in and through one's acts. Such control, being distinct from bodily integrity, can only consist in the subordination of separable things to one's power; and therefore, these acts represent forms of appropriation that, more particularly, can be completely divided into the appropriation of things that either are not yet or, alternatively, are already subject to another's power. The first mode of appropriation (property) is by a single person acting alone, though in a way that is recognizable by others and hence potentially and implicitly involving relation to others; the second form of appropriation (contract) is accomplished through the parties' acting together and so is actually and explicitly transactional. The transactional mode of establishing exclusive control over things fully and explicitly exhibits the central idea of the relational conception of ownership and so completes the division in the right way. All three categories presuppose that what is at stake is a relation between persons who are separate and mutually independent and whose interests are summed up in the assertion of mutually exclusive control with respect to their bodies and separable things.

Not only does this division into these categories seem to be complete and of the right sort, but, if this conclusion is warranted, these would seem to constitute the basic or primary general categories of entitlement within the framework of misfeasance. Because these three primary categories, as I have tried to present them, are the simplest, most basic, and most comprehensive ways of understanding innate and acquired entitlements, all private-law entitlements involving this idea of exclusive control will presuppose one or more of them. Thus, because bodily integrity refers simply to whatever is the person as an existing individual potentially interacting with others, any form of innate entitlement must be a further specification of that bodily integrity; next, first possession provides the basic framework for understanding any individual acquisition of an unowned thing, while making clear that such entitlements need not require continuous physical holding; finally, contract is the indispensable framework for understanding every kind of transactional

acquisition, showing that such entitlements can be prior to and independent of actual performance or delivery.⁷⁵

Thus far our analysis of the legal relation of exclusive control entailed by the misfeasance requirement has been framed in terms of a relation of immunity on the side of the owner and a corresponding disability on the part of non-owners. To repeat, this relation implies simply that *nothing* the non-owner does can unilaterally divest the owner of her sole authority to deal with her body or things; put in other terms, since it is *exclusive* control that is at stake here, whatever the non-owner does with or to the thing, cannot count, against the owner, as an exercise of ownership. The owner's authority is indefeasible in relation to non-owners. Notice, however, that we have not yet said that the non-owner's affecting the thing is a wrong or injury. The characterization of the non-owner's conduct as a wrong is not, as such, part of the immunity–disability analysis. Yet clearly the idea of misfeasance requires that we provide such an account. Misfeasance, we have seen, postulates conceptions of duty and liability that are construed with reference to a prohibition against injuring what comes under another's exclusive rights. We must now take a second step in the analysis of exclusive control by showing how this notion, or in other words, the idea of ownership, entails a relation of right and correlative duty that frames this prohibition against injury. In doing this, we do not start afresh but build upon the preceding analysis. The idea of ownership is the unifying basis of these two dimensions of the legal relationship under misfeasance. If, as is widely supposed, private-law relations, and indeed legal relations more generally,⁷⁶ are relations of (claim) rights and corresponding duties between individuals, I shall argue that, through this unifying idea of exclusive control, elucidated in a two-step sequence, we can see how misfeasance specifies a distinct form of right–duty relation that is characteristic of private law.

B THE SECOND STEP: LIABILITY AND THE RELATION OF RIGHT AND DUTY

Beyond a relation of exclusive authority in the form of immunity and corresponding disability, the idea of exclusive control also entails that others should not do anything that reasonably appears to be an actual exercise of control over the right holder's objects. What exclusive ownership

⁷⁵ In this article, I cannot explore the basis of the entitlements involved in reputational or fiduciary claims (so far as these come under misfeasance) but my approach would be to see these claims as specifying the same basic categories and as presupposing the same elementary notions of ownership and transaction as are discussed here. At this fundamental level, no new ideas need be introduced.

⁷⁶ For discussion, see Herbert L.A. Hart, 'Are There Any Natural Rights?' (1955) 64 *Phil. Rev.* 175 at 179ff.; John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at 239 [Rawls, *Theory*]. Within a utilitarian framework, Sidgwick also took this view; see Sidgwick, *supra* note 2 at 31–2.

prohibits is just any exercise of control by others with respect to what belongs to the right holder. For this must be incompatible with the latter's exclusive authority. Others must thus be under a duty not to do this and the owner has a corresponding right that this not be done. Conversely, conduct that cannot possibly represent such control over another's body or objects cannot be a violation of duty or the cause of legally cognizable injury. Such conduct is nonfeasance.

This further step in the elucidation of the idea of exclusive control, except perhaps the concluding identification with nonfeasance, seems to be self-explanatory. Nevertheless, it is crucial to my argument that it represents a second and distinct aspect or dimension of the legal relation entailed by ownership. Whereas, we have seen, the meaning of the first aspect is simply that only the owner's dealings with her body or things count as the exercise of rightful authority and that whatever others do cannot possibly have this juridical significance, the second aspect establishes a relation of constraint upon the conduct of others as required by the idea of exclusive control or ownership. Under this second aspect, the legal relation is now a relation of (claim) right and corresponding duty in the strict sense specified by Hohfeld.⁷⁷ This entails a limitation on the liberties or privileges, in contrast to the rights, of others. Further, the establishment of the right-duty relation specifies the basic relation for the analysis of liability or wrong. I want to underline the contrast between this analysis of liability and that of the forms of entitlement which as discussed in the preceding section, consist of bodily integrity, on the one hand, and acquired entitlement (property and contract), on the other. These dimensions of entitlement and liability are juridically distinct.⁷⁸ At the same time, they fit together and, as such, constitute the basic private-law relation.

To appreciate the point of drawing this distinction, consider the following arguments against the fault standard in negligence or against the ordinary-use standard in nuisance law. They begin with the premise

77 See Hohfeld, *supra* note 11. While it is not unusual to use the term 'rights' to refer both to entitlements and to the plaintiff's side of the duty (liability) relation, I want to restrict its use only to the latter so as to avoid confusion. A right is always understood as a claim against another who is under a correlative duty with respect to the content of that claim. I also distinguish between 'rights' and 'rightful' (such as in the case of rightful exclusive control). 'Rightful' is a general notion of being normatively acceptable. As I discuss in Part IV, this general notion is understood as reflecting definite conceptions of freedom and equality that mark misfeasance as a distinct normative domain.

78 This distinction informs, I think, Peter Birks's interesting analysis of the difference between 'the *vindicatio*,' on the one hand, and 'personal claims for wrongful interference and unjust enrichment' on the other; see Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' (1997) N.Z.L. Rev. 623 at 645ff.

that the plaintiff, as owner, has the authority to choose how she will use her thing. So far as others are concerned, this use may be foreseeable or unforeseeable, ordinary or unusual. No matter. It is for her as owner to decide. In the previous section, I suggested that this premise is, indeed, entailed by the idea of ownership as entitlement, understood in terms of a relation of immunity–disability. But suppose that one takes this premise also to decide the existence of the right–duty relation or the question of liability. Then any conduct that interferes with the choices that the plaintiff has made with respect to use of her thing will be a violation of her (claim) right, however unforeseeable or extraordinary that use (and the ensuing loss) may be. Assuming that tort law broadly aims to vindicate interests in bodily integrity and property, this analysis would require that general strict liability be the basic form of unintentional tort.⁷⁹ Moreover, it would immediately render problematic the very core of nuisance law, which does not protect non-ordinary or ultra-sensitive uses of one's property from interference. Nuisance law would have to be understood as a derogation from ownership rights justified by some extrinsic policy-based rationale.⁸⁰ Thus, the very possibility of negligence (as opposed to general strict liability) and of nuisance law depends upon whether we can rightly make the suggested contrast between entitlement and liability as two distinct steps in the sequenced elucidation of the idea of exclusive control.⁸¹ I want now to specify more fully some of the main features of the second step. I will first present some general features and then illustrate these with more particular reference to instances of liability in private law.

To be incompatible with plaintiff's exclusive control and therefore to be misfeasance, the defendant's conduct, I have suggested, must itself involve an assertion of control, express or implied, over the plaintiff's object. Just as misfeasance stipulates that acquisition depends on certain definite external acts, so it prohibits as incompatible with ownership only certain definite external acts, viz. those asserting present and

79 This is another way of putting the argument that was first made by Ernest Weinrib against Richard Epstein's justification for strict liability; see Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) at 172–7 [Weinrib, *Private Law*].

80 Leading nineteenth-century French and German civilian writers concluded that nuisance law was problematic on this basis; see James Gordley, *Foundations of Private Law* (Oxford, UK: Oxford University Press, 2006) at 69–71.

81 Similarly but conversely, beginning with the defendant's authority to use and move his body, say, in whatever way he wishes, if this standpoint were also to determine the terms of interaction between the parties as part of the relation of right and duty, this would justify a purely subjective standard, at most, in assessing liability. Once again, this is another way of presenting Weinrib's argument against the subjective standard; see Weinrib, *Private Law*, supra note 79 at 177–83.

effective control: only such conduct as can conceivably interfere with or injure another's ownership. In particular, control which violates ownership itself consists in one of three basic modes of exercising exclusive control, namely, taking possession, use, and alienation. And finally, whether a defendant has so acted is decided by how his conduct reasonably appears to another – in this case, the plaintiff owner. Others are, therefore, subject to a prohibition against doing the very kinds of acts, abstractly characterized, that the right holder, qua owner, has the sole juridical authority to do with her thing. The establishment of the right-duty relation reflects a fundamental equivalence between the kind of act that establishes a right and the sort that is incompatible with this right. These are the only forms of conduct that are legally relevant from the standpoint of misfeasance.

Notice that, whereas others may be subject to a disability just in virtue of an individual's first appropriation and thus, even in the absence of conduct on their part, the duty relation necessarily makes reference to their conduct insofar as it can possibly be incompatible with the right holder's exclusive control. To establish a relation of right and duty, it is not enough to refer merely to the plaintiff's act of appropriation or, more generally, to any one-sided set of considerations. We must refer to both sides. As in the case of contractual acquisition, the conditions giving rise to the right-duty relation are inherently transactional.

By setting the framework of the legal relation in private law – namely, a duty (with a correlative right) not to injure what comes under another's exclusive rights – misfeasance functions as a central organizing idea in private law. The prohibition applies to exercises of control by one person over the person or objects of another. What is prohibited is, of course, an exercise of control over another's person or property, in contrast to one's own. This is the general form of interaction prohibited by misfeasance.

Now certainly, where one intentionally touches another's body or intentionally takes another's thing into one's possession (thereby committing a conversion or trespass), this seems clearly to be an incompatible exercise of control. Notice that in these situations, the requirement of a wrongful exercise of control is satisfied simply in virtue of the defendant's conduct constituting a taking of possession, whether or not it damages the plaintiff's thing or otherwise interferes with the latter's actual or potential use of it. These are injuries to qualitatively different aspects of the right of ownership – not just possession, but use and value. The trespass, being an assertion of possession over what belongs to another, is thus, *per se*, an injury, irrespectively of whether it also causes losses. What gives trespass its juridical character as an intentional tort is, therefore, not that it involves an intention, subjective or not, to injure another's rights (as is requisite for a criminal wrong), but rather

that it consists in conduct that externally manifests a certain kind of exercise of control, namely, a taking possession.

But in many situations, the question of whether a defendant has asserted wrongful control is not as straightforward as this, even where he has affected (in a material sense) the plaintiff's object. Consider the paradigm scenario in negligence where, for example, the defendant damages the plaintiff's chattel while in the course of using *his* (the defendant's) own thing (whether his person or property). Or take the central case in nuisance law where the defendant's use and enjoyment of his real property interferes with the plaintiff's use and enjoyment of her own property. Does the defendant's interference, in either instance, reasonably count, implicitly or explicitly, as an assertion of control over the plaintiff's property rather than over his own? We need to consider more than the mere fact that the defendant has affected the plaintiff's holdings in some way or the undeniable constant that the plaintiff has exclusive control with respect to her person or property. The defendant has interfered with the plaintiff in the course of using his own property for his own independent purposes. Why can't we say that, in such circumstances, the defendant is merely asserting control over his, not the plaintiff's, property and that the impact on the plaintiff's property is, for example, merely the consequence of pre-existing background risks arising from the interconnectedness of everyday living and the use of things,⁸² for which neither party is responsible? If the defendant is to be held liable in these circumstances, then it must be on a basis that suitably takes into account the equal standing of the defendant as having exclusive authority over his own person and things.

While the organizing idea of misfeasance clearly holds that, as between individuals, the parameters of respect for what belongs to one must be specified on a basis of equal recognition of what belongs to another, the prohibition against injury to another's person or property must be supplemented by other principles and doctrines that ensure neither side is subordinated to other. These 'companion' principles and doctrines are needed to ensure that the defendant's conduct may reasonably be shown to involve an assertion of control over the plaintiff's person and things, even if as the unintended consequence of his use of his own person and things. They presuppose and fit with the misfeasance framework inasmuch as they further specify and fill out the character and circumstances of conduct that is prohibited under misfeasance. Accordingly, each of the basic categories of liability – tort, contract, and unjust enrichment – has these principles and doctrines, specified, of course, in a way that fits with its distinctive form of liability. To illustrate my

82 On these inevitable background risks, see *Bolton v. Stone* [1951] A.C. 850 at 867, *per* Lord Reid.

point, I will now briefly discuss a few of the more settled and familiar instances.

Prominent among negligence doctrines is the standard of reasonable foreseeability. Its role as a companion principle may be explained as follows. If individuals were held strictly liable for causing unforeseeable damage to others' property, they could not exercise control over or use their own things, given the wholly indeterminate and unavoidable risk of liability to others that such use would inevitably entail. This would imply the subordination of one owner (defendant) to another (plaintiff). Thus there must be some level of foreseeability to impose a duty of non-injury upon the defendant with respect to the plaintiff's belongings. At the same time, if a defendant could never be liable for indirect loss, however foreseeable, on the ground that he causes it in the course of using his own things, this would entail, once again, the subordination of owner to owner – this time the plaintiff to the defendant. Beyond this, it seems reasonable that, within certain parameters, the degree and the seriousness of the risk of loss should be relevant considerations. Thus, arguably, a person appropriately careful to avoid injuring the protected interests of others might reasonably ignore risks either extremely small or threatening trivial damage.⁸³ This standard is fully consistent with the equality of the parties and distinguishes actionable risks from the background risks that generally and inevitably arise 'in the crowded conditions of modern life.'

Accordingly, where the use of one's property creates a clearly foreseeable risk of sufficiently significant damage to another's property or person and one, nevertheless, chooses to go ahead without taking suitable precautions to avoid the risk, it is reasonable to view one as having thereby chosen to subordinate the other's person or property to the pursuit of one's own purposes. But whereas, in the case of trespass, the defendant's conduct entails an assertion of possession over the plaintiff's object and, as such, is directly incompatible with the plaintiff's ownership, this is not so in the case of negligence. How, then, is it reasonable to view the defendant's negligent conduct as a wrongful exercise of control over that object? As a general matter, I have suggested that the conduct must be of the same kind as the plaintiff alone is entitled to exercise. To be such in circumstances where the defendant does not take the object into his possession, his conduct must affect the object in a way that changes the plaintiff's ability to use it as she decides. Thus, the defendant must actually affect the object by changing its qualities and, therefore, the uses it can be put to, including its value. By doing this, the defendant's

83 The locus classicus of this standard is *Bolton v. Stone*, *ibid.* The most instructive discussion of this case and, more generally, of this conception of negligence is still Weinrib, *Private Law*, *supra* note 79 at 147ff.

conduct can count as an exercise of control over the object, even though he does not take possession of it. In this way, the conduct affects the usability of the object without exercising possession of it. Indeed, in the absence of a taking by the defendant, this is the only external conduct that can engage the plaintiff's exclusive control. And only in this way can the defendant's choice to act indirectly vis-à-vis the plaintiff's object be subject to a duty relation under misfeasance. This not only defines the kind of foreseeable risk that the defendant must impose for there to be liability. It also explains why the mere imposition of any risk (including this kind) cannot, in and of itself, be enough: for unless the risk materializes as loss, the defendant's conduct cannot reasonably be construed as an exercise of control over the plaintiff's object, in violation of the prohibition against misfeasance.

Notice, further, that the foreseeability doctrine is relational, applying as between two determinate parties. This is an intrinsic and necessary feature. Thus, it applies to the defendant's conduct, not someone else's, and asks whether the defendant, as a reasonable person, should foresee that his conduct poses the requisite risk of danger to the plaintiff's person or property.⁸⁴ It aims to determine whether his conduct is incompatible with plaintiff's right as against him. While the reasonable-person standard abstracts from the particularities of the parties, it singles out and applies to an actual relation between two determinate persons, in this respect paralleling the modality of *in personam* rights. The legal relation of right and correlative duty in negligence is, and must be, *in personam*.⁸⁵

Nuisance law also preserves the equal standing of both parties as holders of exclusive rights. It does this by adjudicating a plaintiff owner's claims against other owners with respect to the use and enjoyment of her real property, in accordance with a locality standard of ordinary use, hypersensitivity, and so forth. To found a claim in nuisance, it is not enough for a plaintiff to establish that the defendant has merely adversely affected her use of land in which she has a proprietary interest. Her protected interest as between the parties – that is, the content of her right and of the defendant's corresponding duty – is determined in light of these further principles. In light of the view that I am proposing, a defendant whose use of his own property produces effects on neighbouring properties that are within the local standard of ordinary use is exercising control over his own and not neighbouring property and so is acting consistently with the protected interests of other owners. Like negligence, and for the reasons discussed earlier in connection with negligence, nuisance involves a wrongful exercise of control that is indirect and implicit,

84 As emphasized in *Palsgraf*, supra note 69.

85 As Hohfeld recognized; see Hohfeld, supra note 11 at 101ff.

given that the wrongful conduct does not amount to taking possession of the plaintiff's property as occurs in cases of trespass. Hence, once again, like negligence, nuisance is not actionable without loss.

As part of the misfeasance framework, the standard that specifies the relation of right and duty in nuisance must not represent an external constraint upon, but rather has to be part of, the logic of ownership. Thus, there must be a way of construing what counts as ordinary use without reference to aggregative standards, such as is required by a utilitarian approach. While I cannot discuss this here in detail, I suggest the following way of doing so.⁸⁶

To be ordinary, a given use must, whatever else, be capable of coexisting with others' uses of their property. The more one owner's use can coexist with a greater range of others' uses, all things being equal, the more it is eligible to count as ordinary. The difference between ordinary and non-ordinary is on a continuum and is relative or comparative with reference to different possible uses. Accordingly, disallowing claims that rest upon a plaintiff's hypersensitive susceptibility to the effects of others' property uses is justified insofar as, by definition, such hypersensitivity is at the extreme of incompatibility with respect to the greatest range of other uses. Such claims cannot be for ordinary enjoyment and use. Similarly, a use of property which inevitably produces effects that are incompatible with a great range of other uses is, to that extent, non-ordinary and impermissible, despite the fact that it may not reasonably be possible to do it in a less intrusive manner. Understood in this way, the ordinary character of a use means that, to the extent that it can coexist with other uses, its particular features no longer stand out or matter as such; that, as between property owners, an ordinary use represents abstractly, and at a higher level of generality, just a use of one's property that is the same as any other ordinary use; and that, consequently, it would be arbitrary, as between owners, to impose liability for the effects of an ordinary use, since that would deny to one what the other necessarily must be claiming for himself. Thus, ordinary use reflects a standard of equality that is framed as the fair and reasonable terms of interaction between persons as property owners.

Moreover, it is consistent with this equality that the determination of ordinary use be contextual, taking into account the make-up of different localities. For purposes of nuisance law, a locality is a space occupied by owners who affect and are affected by each other in their use and enjoyment of their properties. The boundaries between localities are always fluid and to some extent indeterminate. Nevertheless, the range of different uses may distinguish one locality from another – for example, one

86 A more detailed and fundamentally similar approach is taken by Weinrib, *Private Law*, supra note 79 at 190ff.

may be predominantly industrial whereas another is mainly residential. And this should be reflected in setting the ordinary standard. Thus, in an overwhelmingly industrial area, a residential user can reasonably expect *some* reduction in, say, the level of noise that would otherwise be ordinary as between industrial users because compatible with the coexistence of a range of such uses. This level will undoubtedly be higher than what residential users could reasonably claim just as between themselves. But if, in the predominantly industrial district, the residential user requires a much greater reduction, one that would be simply incompatible with the many kinds of coexisting industrial uses in their normal operation, the claim could reasonably be viewed as one for a non-ordinary use and should fail.⁸⁷ In that locality, the residential user's incompatible requirements would amount to a kind of hypersensitivity. The converse would be true if the locality were mainly residential and a defendant industrial user were unable to lower the noise to a level that was compatible with the great range of coexisting residential uses and enjoyment. Whether a use is ordinary or not is thus always a question of degree to be determined comparatively and relatively in the context of inherently changeable circumstances. In this relative assessment, no particular kind of use of property in a given locality, even if it was there first in time, can fix unilaterally and permanently what counts as ordinary and hence permissible vis-à-vis other sorts of use and enjoyment.⁸⁸ No use can insulate itself from this assessment of its fitness to coexist with other uses.

I now turn, very briefly, to contract law for a final illustration of the principles needed to ensure equality between the parties as part of the elucidation of a relation of right and duty at the second step. I suggested earlier that the doctrines of contract formation, such as offer and acceptance and consideration, establish the legal relation of immunity-disability that comes under the first step in the analysis of rightful exclusive control. By and at contract formation, one party acquires from another, within the contractual terms, exclusive rightful control with respect to some object or service and therefore is vested with the sole and indefeasible authority to possess, use, or alienate it in accordance with those terms. This exclusive rightful control also entails a prohibition against conduct by the other party that is incompatible with it. In other words, the contractual relation establishes a relation of right and duty and, therefore, a particular basis of liability.

First and foremost, the second contracting party is actually and necessarily under a duty to the first to do or not to do certain things, with failure to comply being, per se, incompatible with the first party's rights. A

87 See the discussion in *Sturges v. Bridgman* (1879) 11 Ch.D. 852 at 865 (C.A.).

88 Ibid.

crucial point, here, is that the contract itself determines the content of this relation of right and correlative duty. The distinctively transactional character of the immunity–disability contract relation in the first step is fully preserved in the specification of the conditions of liability at the second step. Whether the defendant's conduct involves, factually, an act or omission is not a determining factor: what counts is simply its normative significance as a wrong, and this is fixed solely by the parties' agreement. In legal contemplation, an omission that is incompatible with the agreement is fully an external choice that constitutes an injury, no less than an 'act' in any other part of private law. This brings out most clearly the normative character of misfeasance.

In light of the two-step analysis, it is not correct to view the content of the defendant's duty as what the plaintiff acquires at contract formation. At common law, for example, what the plaintiff acquires is the substance that meets the requirement of consideration: what the plaintiff acquires contractually is just what the defendant promises or gives her in return for her promise. The so-called duty to perform consists in those acts or omissions which the defendant must, respectively, do or not do if he is to respect the plaintiff's entitlement. The duty to perform is thus what the defendant owes the plaintiff as a matter of respect in relation to what the plaintiff owns. In this regard, it is no different than the duty of care in negligence, which represents what the defendant owes the plaintiff, not what the plaintiff owns. It comes under the second step (liability), not the first (acquisition).

At the same time, contractual liability differs from the various kinds of tort liability. In contrast with non-intentional torts such as negligence and nuisance, which are actionable only if there is interference with use (not possession) that causes the plaintiff loss, breach potentially affects all the aspects of ownership. Thus, mere non-performance through an omission to deliver represents a direct and wrongful interference with the plaintiff's possession of the promised object or service. It is, *per se*, an injury against the plaintiff, similarly to trespass, and, like trespass, it necessarily gives rise to a damage award (nominal damages), even where there has been no measurable loss. But unlike trespass, in which a defendant must physically assert possession over the plaintiff's thing, the defendant in breach of contract is deemed to have wrongfully asserted possession even through a mere omission to do something because this is how such conduct must reasonably be construed in accordance with the contractual terms. There is no need for there to be any physical taking of any kind. In this way, the conduct that constitutes breach shares the same character as the conduct that establishes contractual entitlements: acquisition by contract, I have emphasized, need not involve any physical yielding or taking control as between the parties precisely because of its transactional character and basis.

Beyond wrongful possession, there can also be contractual liability for interference with use and resulting loss, making contractual liability the most complete and comprehensive form of liability, in addition to being the most explicitly transactional. We see this, for example, in connection with the law's treatment of consequential loss under the rule in *Hadley v. Baxendale*.⁸⁹ This rule may properly be viewed as governing the assessment of any contractual claim having to do with loss resulting from interference with the plaintiff's use and enjoyment, in contrast to her mere possession, of what she was promised under the agreement. Where the plaintiff intended to put the promised thing to some use, the question is whether the defendant should be liable for resulting loss when the breach makes the exercise of this use impossible or more costly. *Hadley* answers that the defendant is responsible only for those kinds of losses that reasonably should have been in his contemplation at contract formation as likely to result from his breach. This rule has been frequently viewed as a policy-based *limitation* on the full application and logic of the basic expectation principle for damages.⁹⁰ The assumption is that expectation damages, in meeting the goal of putting the plaintiff in the position of full performance, should ideally compensate her for interference with any of her planned uses. She is entitled to decide those uses and remedial principles, by distinguishing foreseeable and unforeseeable losses, impose an extrinsic limit. This view is mistaken and, like the arguments against the fault standard in negligence and the ordinary use standard in nuisance previously discussed, it results from a failure to distinguish the two steps that I have identified in this part. Let me explain briefly.

At contract formation, the plaintiff acquires, within the terms of the contract and as against the other party, exclusive control with respect to the promised thing and, as part of this, the exclusive authority to decide what to do with it. This authority is indeed open-ended and can encompass any and every (permissible) purpose and use, however unforeseeable and unusual. This, however, characterizes only the immunity-disability relation between the parties. It does not decide the question posed and answered by *Hadley*, which has to do with the content of the right-duty relation and the conditions of liability. To determine whether the defendant should be liable for consequential loss of some kind, it is essential to ensure that the right-duty relation embodies the equal standing of both sides. Just as for negligence, if the defendant were held liable for a completely unforeseeable kind of consequential loss, he would be taking on an indeterminate liability for no compensation. This would amount to a forfeiture of the defendant's proprietary

89 Supra note 45.

90 See Fuller & Perdue, supra note 37 at 84–8.

or other interests. No one can be assumed to have taken on this risk. To ensure equality, it is essential, at the very least, that the defendant have had the opportunity either to try to adjust the contract terms to reflect the risk of liability undertaken or to decide not to contract at all: 'of this advantage it would be very unjust to deprive [the defendant].'⁹¹ In short, the defendant is responsible only for loss resulting from the kinds of uses for which he could reasonably be viewed as having assumed responsibility as part of the transaction with the plaintiff.

Like the doctrine in *Hadley*, the so-called expectation principle for damages is a measure of liability and, therefore, also presupposes what I have characterized as the right-duty relation in contract. That is why, for example, the measure of expectation damages is itself framed by the requirement of mitigation: once again, the aim is appropriately to ensure reasonableness as between the parties. Whereas expectation damages proper (*i.e.*, the difference between contract and market prices) give the plaintiff the means to purchase a substitute on the market and thereby ensure that the plaintiff obtains, in accordance with contractual terms, physical possession of the promised thing as well as the possibility of putting it to her chosen future uses, damages for consequential loss give her the value of those uses that the defendant's breach has interfered with and for which the defendant could reasonably be taken to have assumed responsibility at contract formation. The latter form of compensation is not a limit upon the former but rather expresses the very same principle underlying it.

More generally, every aspect of contract damages – from nominal damages and expectation damages measured by the difference between contract price and market price to compensation for lost use – is determined transactionally on a basis that respects the independence and equality of both sides. The parties' factual interaction (consisting of words and conduct) is legally existent and effective as an enforceable contract only if, and to the extent that, it can reasonably be construed as itself establishing a transactional analysis for the parties. This is the basis of the unity of the different doctrines of contract law.

In sum, the structure and content of the different forms of liability that I have considered in this section rest on the possibility of distinguishing between entitlement and liability as parts of a two-step sequence.⁹² To

91 *Hadley*, *supra* note 45 at 151.

92 In this article, I have not tried to set out a classification of the forms of liability, which, after the classification of the categories of entitlement, represents the second part of a complete classification of private law. Indeed, my discussion of liability has not even touched on unjust enrichment. How unjust enrichment should be understood is clearly a difficult and much controverted question. I will not venture, here, to attempt this, except to suggest, very tentatively, that the two aspects of immunity and liability must be constitutive of the relation in unjust enrichment, as elsewhere in

repeat, the first step stipulates merely that non-owners are under a legal disability whereby nothing they unilaterally do can vest them with rightful control over the owner's thing; the second goes further and holds that others can owe the owner a duty of non-interference that they violate by implicitly or explicitly asserting control over what belongs to the owner and not merely to themselves. The open-ended character of ownership is true only with respect to the owner's exclusive authority (under immunity–disability relation) vis-à-vis others as non-owners (which, in contract, is the relation between the acquiring party and the alienating party). It does not specify either the content of the right–duty relation between the parties or the grounds on which one side may rightly complain when the other affects her contractual or other ownership interests: in short, the question of liability. For this purpose, there must be terms that reflect the equal status of both sides as owners. In contrast to the analysis of the immunity–disability relation, the right–duty relation is, therefore, as between persons who figure simultaneously and equally as owners. And it is only on this basis that individuals' holdings count as protected interests between them. At the same time, distinctions (between foreseeable and unforeseeable loss, ordinary and non-ordinary use, and so on) made in setting the terms of duty do not affect, in the least, the character and scope of an owner's exclusive authority to exercise control over her thing. To the extent that anyone can decide what to do with it, it is the owner alone who can rightfully do so. Her exclusive authority remains fully intact and unchanged throughout the analysis of duty and of liability.

IV A moral basis for misfeasance in freedom and equality?

Thus far, I have tried to fix and to elucidate a meaning for the requirement of misfeasance that fits with common law principles at a fundamental level. Misfeasance holds that, at the base of an actionable claim in

private law. Thus, the plaintiff must be able to assert an exclusive entitlement as against the defendant that has *not* been effectively alienated or abandoned as between them. There must be a continuing ownership interest vested with the plaintiff, keeping in mind that, by 'ownership,' I am referring to some kind of rightful exclusive control as between two parties, whereas 'title' is not bilateral but holds across transactions; see discussion, *supra* note 47. At the same time, this does not decide whether there has been an unjust enrichment. For this, reference must be made to other considerations, such as change of position, free acceptance, and so forth. These are the functional equivalents of fault and foreseeability in negligence actions or the ordinary-use standard in nuisance cases. For a valuable discussion of what, in effect, is the 'immunity' aspect of this claim – the requirement of continuing exclusive right as between the parties – see Brian F. Fitzgerald, 'Ownership as the Proximity or Privy Principle in Unjust Enrichment of Law' (1994–5) 18 U. Queensland L.J. 166 at 172–80.

private law, there must be interference with an exclusive right in the sense discussed. My thesis has been that this is an organizing idea in private law. But, since my contention is that misfeasance is a *normative* idea, there is, of course, the further question of its moral acceptability and more specifically of whether it is consonant with a liberal conception of justice.

This issue is far from straightforward. While the misfeasance requirement appears to uphold individuals as persons, worthy of respect and with a capacity for rights, it acknowledges them only as owners vested with exclusive control and subject to a merely negative imperative prohibiting injury, with apparent total indifference to need, purpose, and well-being as such. Certainly, this cannot be a complete view of what justice requires. Even so, does misfeasance reflect certain, even if limited, normative values and ideas that qualify it to be a part of a liberal conception of justice? Since justice is owed to persons, viewed as having a certain character and status, we must see whether misfeasance may reasonably be viewed as reflecting, even implicitly, a liberal conception of the person. In particular, the following issues should be addressed: What moral capacities or powers characterize persons when they are viewed as owners that have rights and correlative duties in misfeasance? How, if at all, are they free and equal in virtue of these powers? And in what way do they express these moral powers in the legal relations that satisfy misfeasance? In this part, I address these questions. In the fourth and final part, I argue, albeit incompletely and briefly, that, understood on this basis, misfeasance qualifies as a liberal conception and can fit within a more complete theory of justice that includes robust distributive principles of social and political justice, taking Rawls's political conception of justice as a standard.

A JURIDICAL CONCEPTION OF PERSONS

To be acceptable from the standpoint of liberal justice, misfeasance must, I shall assume, reflect a definite norm of respect for individuals as free and equal. In working out an appropriate conception of free and equal persons for misfeasance, we should not, however, assume that this conception must be the same in all respects as those that are suitable for other kinds of relations, such as, for instance, political relations among citizens, as part of public constitutional law and distributive justice. The conception of persons for misfeasance is intended to fit with the particular kind of relation that is characteristic of misfeasance. It is presented as a specific rather than as a general conception: juridical, as distinguished from political, familial, or economic.⁹³

93 In connection with his presentation of the political conception of the person, Rawls stresses that it is part of, and specific to, his account of social and political justice for

In particular, there are two basic features that are definitive of and specific to misfeasance which should be reflected in its conception of the person and which will therefore differentiate it from conceptions for other kinds of relations. First, negatively, misfeasance is, we have seen, indifferent toward the needs, wishes, preferences, purposes, and well-being as such of individuals and does not view any of these as considerations that, in their own right, can be the basis of rightful claims. Second, positively, misfeasance holds that, as between individuals, there can be rightful claims with respect to, but only with respect to, whatever comes under their exclusive control without violation of the rights of others. Apart from such conduct, individuals are, in Kant's phrase, beyond reproach.⁹⁴ In short, misfeasance supposes that individuals have the moral and other capacities to participate in relations of rights and duties that fit within these parameters. As a possible conception of the person that might be consonant with these two basic features of misfeasance, consider the following.⁹⁵

Although we certainly have particular desires, needs, or purposes and find ourselves situated in external circumstances and conditions, we can, when choosing how to act, stand above the particular desires and needs that we happen to have at any given moment or the situation in which we happen to be. In reflectively standing back from any of these factors, we are in a position to decide whether (if at all) and how we should accept them as part of our choices and conduct. If we could not do this without restriction – if we were in any way inherently and inevitably determined by anything in particular, including even the desire to preserve ourselves⁹⁶ – we could not view ourselves – nor be viewed by others – as morally accountable or as responsible choosing beings in the first place. We could not view ourselves as related to others by rights and duties of respect. Instead, we would count as mere passive carriers of this or that feature, desire, need, or situation. When judging ourselves and others, we are able to take up a point of view in which we consider ourselves

the basic structure of society; see John Rawls, *Justice as Fairness: A Restatement*, ed. by Erin Kelly (Cambridge, MA: Harvard University Press, 2001) at 19 [Rawls, *Justice*].

94 Kant, *supra* note 46 at 393 [6:238]: 'The principle of innate freedom already involves the following authorizations . . . being a human being *beyond reproach (iusti)* since before he performs any act affecting rights he has done no wrong to anyone . . .'

95 While this conception draws on what I take to be a widely shared understanding of legal and moral accountability in everyday life, it is also given philosophical expression, for example, in Hegel's account of personality in his section 'Abstract Right,' Hegel, *supra* note 2 at paras. 4–7 & 35–7; see further Rawls's insightful presentation of Hegel's view in John Rawls, *Lectures on the History of Moral Philosophy*, ed. by Barbara Herman (Cambridge, MA: Harvard University Press, 2000) at 340–4.

96 This is reflected in the uncontroversial moral fact that one can remain accountable for one's conduct even if that conduct is motivated by the desire to preserve oneself or to avoid violent and immediate death.

and them as not bound by, that is, as independent of, any and all of these factors.⁹⁷

This capacity to distinguish ourselves from what we happen to want or need and from the situation in which we find ourselves represents a moral power that we have. It is essentially a negative moral power because, far from specifying our need for certain goods, it is restricted to the bare fact that we can reflectively stand above everything and so be in a position to choose whether or not to adopt something as our good.⁹⁸ It represents the mere potentiality for choice, not the exercise of choice, which, by definition, must always be directed toward some object as good. And because this power involves the capacity to distance and distinguish ourselves from precisely those factors that differentiate us across time and in relation to others, we count as identical, in both respects, when we take up this point of view.

In addition to a moral power to stand above everything particular, we also suppose that individuals who can form relations of rights and duties within the parameters of misfeasance have the capacity or moral power to recognize the normative significance and implications of their independence, not only for themselves but for others as well. They have a second moral power of understanding and following the requirements of respect for persons so conceived. Now, respect for persons who view themselves as independent most naturally consists in not subordinating them or whatever embodies or expresses their independence to anything external and given: nothing should be unilaterally imposed on those whose very nature involves the capacity to distinguish themselves from, and to stand above, any given factor. Thus, persons claim against others the right to be free from unilateral imposition and to be treated in ways that always accommodate their own independent self-assertion. And since there is nothing in this standpoint of abstraction from everything particular to privilege or even differentiate one person relative to another – to the contrary, individuals count as simply identical – they also understand that, in asserting their own independence, they must recognize this very same claim by others in relation to themselves. This

97 Within the framework of misfeasance, a person is, as Hegel puts it, 'a unit of freedom aware of its sheer independence'; see Hegel, *supra* note 2 at para 35 ('Addition').

98 Thus, this power to abstract, which, I shall argue, fits with misfeasance, is not simply equivalent to what Rawls identifies as the second moral power of free and equal citizens, viz., to have, revise, and rationally pursue a conception of their good; see Rawls, *Justice*, *supra* note 93 at 19ff. The latter goes beyond the bare, essentially negative power to abstract and supposes that the choice of (permissible) means and ends has positive value, with the consequence that, now, individuals are viewed as having legitimate needs and interests that give rise to claims in political justice. I compare these two conceptions of the person in more detail in Peter Benson, 'Rawls, Hegel, and Personhood' (1994) 22 *Pol. Theory* 491.

aspect expresses a notion of reciprocity. Individuals assert for themselves and recognize in others their status as mutually independent.⁹⁹

In what sense may persons who view themselves and others in this way be said to be free and equal? Their freedom consists simply in their independence and whatever this entails. To begin with, individuals claim the right to view their persons as independent from, and so not identified with, their particular purposes, desires, needs, or circumstances – their particular conceptions of their good and whatever happens to differentiate or situate them in relation to other things and persons. They assert a view of their own normative (legal) identity – and recognize the same in others – that is irreducible to and independent of these factors. Thus, if we provisionally suppose, for now, that the legal capacity to own and to exercise ownership reflects freedom as independence, this capacity does not depend on individuals' having or pursuing a particular set of purposes and is not affected by revisions over time of their purposes. In addition, as free, such persons assert their right to be independent of the purposes and needs of others and to act without having to justify their conduct in light of others' purposes and needs. As a result, they view themselves as having the capacity to make claims in relation to others that have weight of their own and so they regard themselves, in Rawls's phrase, as 'self-authenticating sources of valid claims.'¹⁰⁰ A final way in which individuals are free is that, in virtue of their moral power to distance themselves in thought from their desires, needs, purposes, and so forth, they are viewed as having the capacity to take responsibility for their ends and for adapting their ends to whatever respect for others' rights enjoins or permits.

In what sense are such persons equal? Given their normative conception of themselves as able to distinguish themselves from the very factors that differentiate them, there is, as noted above, nothing that inherently distinguishes them qua persons. Their equality consists here simply in being identical. Accordingly, the whole range of factors that differentiate persons must fall outside and be irrelevant to their status as equals. It also follows that whatever one party asserts from this standpoint must be true of everyone else. And this is something that all who can so view themselves can also recognize in others. Therefore, the claims parties make in relation to each other must be absolutely the same. No one claims the right to place others under any obligation or constraint that others could not similarly do vis-à-vis her.¹⁰¹ Moreover,

99 Hence Hegel's statement of the basic imperative of private law: 'Be a person and respect others as persons'; Hegel, *supra* note 2 at para. 36.

100 Rawls, *Justice*, *supra* note 93 at 23–4.

101 According to Kant, this is 'innate equality' and a further entailment of the innate freedom of human beings (in addition to being beyond reproach); see Kant, *supra*

having the two moral powers to distance themselves and to follow the requirements of respect for persons conceived in this way is a sufficient basis for their equality.¹⁰² Note that this equal status is not acquired by doing anything in particular. To the contrary, it inheres in individuals as persons prior to any acts. Most importantly, a person's equal standing does not depend on the fact that he or she has this or that purpose and does not require one person to share another's ends or conception of good. This follows from the fundamental point that all such factors do not belong to the conception of the person.

Here, then, is a specific normative conception of the person which, precisely like misfeasance, stands above and is indifferent toward the whole range of considerations having to do with purpose, need, preference, and so forth. In short, it reflects the first negative feature of misfeasance set out above¹⁰³ and could not, given this indifference to need, be the basis of claims in distributive political justice. Because of its character and fit with misfeasance, I will refer to this conception of the person as 'juridical.' What about the relation, if any, between this juridical conception of the person and the second basic feature of misfeasance, namely, the fact that misfeasance treats exclusive control as the necessary basis for rightful claims and restricts its imperative to the prohibition of conduct that is incompatible with such control? In other words, how do the legal relations framed by misfeasance express respect for individuals as free and equal juridical persons? I now address this further question.

B PRIVATE-LAW RELATIONS AND THE JURIDICAL CONCEPTION OF PERSONS

Individuals, I have said, have the free and equal status of being mutually independent prior to and apart from doing anything in particular. Consequently, they have this status whether or not they acquire anything, enter into contracts, and so on. In order to be mutually independent, they do not need to do these things. What this means, crucially, is that their freedom and equality, so understood, is not a basis upon which to claim that external things must be shared (in some proportion say) or that participation in transactions (in some degree) must be assured. Granting this, the question remains as to whether the rights of bodily integrity, property, and contract, within the parameters of misfeasance, can reasonably be understood as ways of expressing this status of mutual independence in relations with others. In addressing this further question, let's say that a system of rights reflects the innate

note 46 at 393–4 [6:238]: '*innate equality*, that is, independence from being bound by others to more than one can in turn bind them.'

102 I draw on Rawls's discussion of the basis of equality in Rawls, *Theory*, supra note 76 at 505–6.

103 See text following note 93 supra.

mutual independence of persons to the extent that such rights may reasonably be viewed as embodying or as resting on nothing but the juridical conception of persons and whatever this entails.

The right of bodily integrity seems to be most clearly amenable to this analysis. In their bodily (physical and mental) existence, individuals are not to be subject to the constraints or control of others. The prohibition against non-subordination is owed individuals as a matter of innate right, prior to any act on their parts. At the same time, no one is under any positive obligation to preserve, aid, enhance, or care for another's bodily condition, whatever it happens to be. Thus needs, purposes, and well-being are in themselves and in their own right legally irrelevant. They are not grounds for rightful claims or complaint in misfeasance. This, I have stressed, is the critical basis of the bounds of misfeasance, which does not include a duty to rescue or support. Indeed, from the standpoint of misfeasance, it is not even morally necessary that individuals choose to continue in their bodily existence: suicide is not an actionable wrong because it does not deny the exclusive bodily or ownership rights of others.

The intrinsic character and limits of the right of bodily integrity are reflected in the character and limits of the juridical conception of persons. On the one hand, it is only as alive in my body that I can assert my independence from everything particular and exist as such a person in relation to others. Thus, in respecting my bodily integrity by not unilaterally subjecting it to their purposes and needs, others show respect for me as a person. Moreover, it is only my status as a person, that is, my independence, that is so recognized. The negative character of the right of bodily integrity, as one of mere non-interference, fits with the purely negative stance of indifference toward need, impulse, purpose, and situation that is the hallmark of the juridical person's independence. This would not be the case if personhood were defined, positively, as having a capacity to pursue particular ends¹⁰⁴; misfeasance would be unjustifiably restrictive and limited once the pursuit of (even permissible) purposes is intrinsic to being free and equal and is thus a valid basis for making claims.¹⁰⁵ Also in keeping with the limits of misfeasance, juridical persons need not choose to continue to live to be independent. The unrestricted capacity to abstract from one's desires and needs includes

104 As in Rawls's political conception of the person; see note 93 *supra*.

105 For example, a categorical exclusion of a duty to rescue would now be problematic. Thus, Samuel Freeman argues persuasively for a limited duty to aid the distressed but does so on the basis of a normative conception of persons that brings into play needs and purposes which, while appropriate and essential to a political distributive conception of justice, does not stay within the parameters of misfeasance; see Samuel Freeman, 'Criminal Liability and the Duty to Aid the Distressed' (1994) 142 U. Pa. L. Rev. 1455.

the power to stand back and to abstract from the most urgent and compelling desire of all: self-preservation. Clearly, this is, and must be, presupposed in viewing individuals as genuinely accountable. Suicide, qua act, does not compromise but, to the contrary, presupposes the independence of persons. From the standpoint of independence, suicide counts as simply one choice among others, which the individual can view as something which she might not have done and, therefore, which does not intrinsically define her. It is solely in relation to others that one's body is untouchable because it is only action by others that can affect the body in a way that is incompatible with one's independence.

What about acquired rights? Since, in contrast to the right of bodily integrity, these rights are established by certain definite external acts, what is at stake, here, is whether acts of this kind, and perhaps only such acts, reflect just the mutual independence of persons. Although, I will now argue, this is, indeed, the case, the explanation is not as straightforward as is the analysis for bodily integrity.

Within the framework of misfeasance, the external acts essential for acquisition are externally manifested assertions of control with respect to a determinate object – in the case of original or first acquisition, there must be occupancy of a spatially situated physical object. The normative meaning of this act is wholly other-related. Rightful control is vested with the right holder, not others, who not only cannot make her object their own (which is their disability) but, further, are prohibited from doing anything that reasonably manifests control over it (which is their duty). By treating the thing as not subject to their use, others recognize the right holder's act of control as untouchable and, by implication, pay respect to the presence of the person whose will the act embodies. Still, as I have emphasized previously, it is not on the basis of individuals' needs, preferences, purposes, or well-being that ownership is acquired or this prohibition is imposed. Thus, there is no positive obligation to act in a way that enables or ensures that others have the opportunity to acquire. Persons do not need (and so have neither a right¹⁰⁶ nor a duty) to acquire in order to be mutually independent as understood within the framework of misfeasance. Their rights are not violated just because something is no longer available for appropriation by them.

Understood in this way, acquired rights, like the innate right of bodily integrity, seem, at first blush, to reflect only the status of mutual independence and the juridical conception of persons defined by the moral power to abstract. Beyond this, the fact that the misfeasance requirement limits legally relevant acts – those necessary to establish claims or to give

106 A 'claim right,' not a mere 'liberty' or 'power' in Hohfeld's sense of these terms; see Hohfeld, *supra* note 11.

rise to liability – only to acts that manifest exclusive control naturally raises an even more basic question: Is it only acts of appropriation and rightful control over things that reflect, and that can reflect, the normative status of mutual independence within the misfeasance framework? To see whether this is the case, we should consider what, in general terms, an act must consist in if it is to reflect the juridical conception of persons within this framework.

First, an act that expresses independence must be that of a single individual: my act, not another's. It must be action that originates with my independent decision and that is imputable to me quite apart from others. But since there is, and can be, no intrinsic differentiation between persons, it is an act that anyone can initiate. Now, to count as an act that brings into play something more than the right of bodily integrity, it must have an object that is separable from my body. However, I cannot do anything unilaterally that makes other persons my object. My act must, therefore, be directed, if at all, to whatever is not a person. Let's call 'things' anything that is not a person insofar as it does not have, even as a potentiality, the power to abstract. We also suppose that, so conceived, things (for example, inanimate objects) are, therefore, entities that individuals may subject to their control and use without violating the normative status of things. When we view individuals as juridical persons, we take up a moral standpoint in which the distinction between persons, who cannot be used, and things, which can, is exhaustive and provides the only normatively relevant criterion.

Given this normative distinction between persons and things, therefore, the moral significance of any act can only be framed in these terms. We are concerned simply with whether a person abstains from using other persons and whether she suitably manifests control over things. These are the sole terms in which acts can have moral significance within this framework. And since, reflecting persons' mutual independence, acts are imputed to distinct and separate individuals, control over things must also have the character of being individual decisions attributable to one person alone. From the standpoint of mutual independence, with its contrast between persons and things, acts can only be assessed as to whether they are assertions of exclusive individual control over things, not persons – and nothing more. Any other consideration would introduce a factor that is alien to this framework.

The complex richness of moral action is thus reduced to this bare and minimal external manifestation of control. Nevertheless, it represents something of moral importance. When the use of things as things is recognized as within the equal power of all persons, without distinction; when acquisition is established just on the basis of acts of control rather than on need or advantage; and when such control is viewed as exclusive vis-à-vis others, the normative meaning of the use of things expresses just

the mutual independence of separate but identical individuals and reflects the fundamental contrast between persons, who may never be used, and things, which can. On this basis, the presence of personhood, so defined, is recognized not just in another's bodily existence but also in his or her actions.

To fill out and complete this discussion of the relation between acquired rights and the juridical conception of persons, I want to address two important objections that concern the scope and the legitimacy of property acquisition. If correct, they challenge my basic claim that property (and ownership in general) within the misfeasance framework enshrines the freedom and equality of juridical persons. The first objection is that, even though some temporally limited use of things should be respected as a matter of rights, it is unnecessary and unjustified to widen this protection to include the kind of open-ended, quasi-permanent exclusive control that vests under the right of property. The second objection is as follows. At least in the case of property acquisition of previously unowned things, the argument permits a person, merely by exercising her will without the prior or concurrent consent of others, to impose on them an obligation that did not exist previously. But this, the objection holds, is incompatible with their equality. Indeed, it appears to conflict with the idea that persons are beyond reproach unless they do something that affects rights because it subjects them to an obligation, without their having done anything at all. I will briefly address each objection in turn.

Why, then, is it necessary and justified, within the framework of misfeasance, for the right of property to be more than, as Sidgwick put it, 'a right to use transiently, to make the material thing a means to the satisfaction of needs and desires, not necessarily combined with any power to exclude another from using the same thing immediately afterwards – or even at the same time, so far as this second use does not actually impede the first'?¹⁰⁷ In such case, the duty corresponding to the right would merely be that of not interfering with actual use. Now the objection would be correct if it were possible to limit on a non-arbitrary basis the meaning of exclusive control to actual, unhampered use. But this cannot be done. An assertion of control over something need not, by its very nature, be limited to any particular purpose or use. Nor need it be temporally limited, since control may be imposed for the

107 Sidgwick, *supra* note 2 at 67. In denying that airplane overflights trespass on a landowner's property rights because the latter has no such right in the airspace above her land. The court in *Hinman v. Pacific Air Transport* 84 F.2d 755 (9th Cir. 1936) held that 'the owner of land owns as much of the space above him as he uses, but only so long as he uses it.' On the court's view, the right is, thus, merely a right of unhampered actual use.

sake of a future use. These limits necessarily rest on making rightful control conditional on the pursuit of a given purpose or set of purposes – a condition that, from the standpoint of misfeasance, must be arbitrary because irrelevant. Nor can limiting property to actual unhampered use be justified on the ground that rightful control must consist in an actual physical holding of the thing used. Within the framework of misfeasance, the only thing necessary is that there be a manifestation of control reasonably recognizable by others, and this, I have argued, does not necessarily require actual physical holding, particularly with respect to the continuance of control. In short, once we accept the idea that individuals can have rightful exclusive control in a way that expresses their mutual independence, there is no reason, within this framework, to limit control just to unhampered actual use. Indeed, so doing obscures the moral significance of control from this standpoint.

This brings me to the second objection. In a nutshell, this objection holds that the case of property acquisition is inherently problematic from the standpoint of equality, even within the framework of misfeasance, because, here, the duty on others is established by a single person's act without their participation, concurrence, or actual consent: how can their innate entitlement to be viewed as beyond reproach be modified, not by their own act, but by another's?¹⁰⁸ This objection is more far-reaching than the first because it would bring into question even a limited right to unhampered actual use, so far as this protects the act of using something as distinct from mere bodily integrity.¹⁰⁹ The objection holds that the only condition under which this modification of relations by a person's unconsented-to act can be rightful is if all others in general authorize the power to do this. In reply, at least within the framework of misfeasance, this authorization is already and necessarily given as an implication of mutual independence.

Let me explain. No one has a right, in the sense of an exclusive right, to any external object prior to appropriating it. What everyone has is merely a rightful power¹¹⁰ (in contrast to a claim right) to take something under his or her control and thereby make it no longer available to others as a possible object to appropriate. Doing this establishes a relation of immunity and corresponding disability that is compatible with, because

108 Ernest Weinrib makes a detailed and careful argument along these lines; see Ernest J. Weinrib, 'Poverty and Property in Kant's System of Rights' (2003) 78 *Notre Dame L. Rev.* 795 [Weinrib, 'Poverty and Property'].

109 I assume here that, as a factual matter, it is possible to interfere with actual use (by doing something to the object used) without necessarily touching or interfering with the user's body, so that there can be an injury to use cognizable apart from any injury to bodily integrity. The legal remedy would be for lost use as such and for the consequences of such interference for the user.

110 As defined by Hohfeld, *supra* note 11 at 50ff.

it cannot violate, the rights of others. Reflecting the normativity of mutual independence, the power vests in and is exercised by individuals in their singular capacity and on their own initiative. This power belongs to everyone equally as persons prior to any acts and therefore as a matter of innate right. Thus, it is equal personhood itself which is the source of this power. The possibility of individual, exclusive authority with respect to things must be acknowledged by everyone because it merely signifies the assertion of independence in the use of things so far as this relates to others. To deny this possibility is to deny that acts can express mutual independence. But this is something that individuals cannot choose to do consistently with their conception of themselves as persons. There is thus no basis in personhood to deny this power.

Moreover, when a given individual exercises this power, he or she does so as a person. At least, this is how that exercise of power is viewed from a normative point of view. It expresses and embodies this status and nothing else. All features and considerations that distinguish individuals are normatively irrelevant, as I have tried to emphasize throughout. Therefore, when an individual exercises this power, he or she does so in a capacity that is representative of just anyone and everyone. The significance of my appropriation is not that I, as a particular individual with my particular needs, purposes, circumstances, and so on, have done so but, to the contrary, that, as it were, juridical personhood itself has given itself – and been given – determinate expression through the appropriation of this particular (in contrast to that) thing. Thus, while it is a single individual who asserts control, that assertion of control embodies nothing but what is universal and identical in all.

This foundation in equality is preserved and is followed through in specifying the conditions of the right-duty relation: I can claim against you a right against non-interference with my body and property only on a basis that equally recognizes your rightful exclusive control over yours. We saw how this informs the framing of duty in negligence, nuisance, and breach of contract. Unless the articulation of the right-duty relation intrinsically satisfies this condition of reciprocity, it necessarily subordinates the rights of one side to the will of the other. But that would deny the very basis of misfeasance and the conception of person that fits with it.¹¹¹ So neither side can reasonably claim that the imposition

111 An inequality in standing suffered by one party is thus *not* something that can be offset or compensated for by his or her treatment across other transactions. Since what is a stake, here, is recognition of the parties' equal status as owners, not the welfare consequences related to or resulting from such recognition, it is by no means clear how there could, in any case, be such correction. There is no basis for comparing or off-setting burdens or benefits across transactions, as is proposed, for instance, by Epstein, who argues that liability for overhead flights, though technically trespasses in his view, should not be actionable because plaintiffs are already implicitly

of a duty framed to satisfy reciprocity violates, compromises, or even qualifies his or her rights. And consequently, there is absolutely nothing that requires either side's actual consent. They have already given their authorization *ipso facto* in their innate capacity as mutually independent persons.

To avoid misunderstanding, it is crucial here to keep in mind that individuals do not need to appropriate anything in order to establish or to maintain their status as mutually independent. If, to the contrary, this were necessary, everyone would have a rightful claim, rooted in their status, to be able to have, in fact, some property always available for their use and appropriation. The right of first occupancy would be subject to an appropriate proviso or other distributive arrangement that ensured this availability. The same would be true if the basis of rightful claims were individual needs, purposes, well-being, and so forth. But the whole character of misfeasance lies in the complete irrelevance of these considerations and the rejection of any such proviso. Its central idea of mutual independence reflects a conception of the person in which the crucial moral power is the purely negative one of standing apart in thought and judgement from these very factors and a conception of duty in which there are only negative prohibitions against injury. When rights are conceived in this way, there is no complaint individuals can reasonably make against others' asserting, on their own initiative, exclusive control over things, any more than they can do so against others' asserting such control over their bodies.¹¹² Both modes of exercising

compensated in kind by being able to benefit from air travel; see Richard A. Epstein, '*Intel v. Hamidi*: The Role of Self-Help in Cyberspace' (2005) 1 J. Law Econ. & Pol'y 147 at 154–5; or by Kronman who argues that liability for breach of contract should be determined by similar reasoning under the guidance of his 'paretian principle' of distributive justice; see Anthony Kronman, 'Contract Law and Distributive Justice' (1980) 80 Yale L.J. 472. I discuss Kronman's view in detail in Peter Benson, 'Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory' (1989) 10 Cardozo L.R. 1077 at 1119–45.

- 112 It might be argued that there is the following basic difference in the consequences of recognizing first appropriation as compared to bodily integrity: in the latter, recognition does not impose on others an obligation that did not exist previously because there is never a moment when anyone's body is available for appropriation, whereas this is precisely the case with the former. Yet, although correct, this argument merely reflects the different ways in which our innate status as mutually independent can be applied or expressed. The fact that there is a 'new' obligation in the case of first appropriation is just the specific modality of our mutual independence – when rights are established by doing something (hence involving persons and separate things) rather than simply by being alive (involving persons and their bodies) – and does not, I believe, raise a separate problem of rights that requires either consent or some further, distinct authorization to legitimate it. For a different analysis, see Arthur Ripstein, *Force and Freedom* at c. 6, s. 1 (Cambridge, MA: Harvard University Press, 2009).

control are authorized – because supported – by the innate moral quality of being mutually independent with a capacity for such rights.¹¹³

Rightful exclusive control is thus not precluded because it is inherently incompatible with the mutual independence of persons. There is, though, a different and, indeed, inherent difficulty with this mode of expressing freedom and equality. It arises in the following way. We have seen that a person's assertion of exclusive control (both for bodily integrity and acquired rights) entails, objectively, the demand that others recognize and respect it: this means not only that others cannot unilaterally acquire what has been brought under the first person's control but that, in addition, they are under a duty not to do anything that is incompatible with his or her exclusive control. Their conduct is thereby constrained. However, the equal independence of persons requires that others also be assured that *their* holdings will be recognized and respected by the first party, whose conduct will likewise be constrained. This assurance of reciprocity¹¹⁴ is an intrinsic and necessary aspect of the first party's own assertion. Unless the first party can provide this assurance, he or she cannot insist that others constrain their conduct, even if his or her exclusive control can be, and is, rightful. But this assurance neither the first party nor any party can effectively give. It would require a party to apply to himself or herself a coercive law – which is impossible – and to be judge in his or her own case – which is incompatible with the equal standing of the other party. This difficulty affects the whole of

113 In his important discussion of the relation between innate right (in the form of bodily integrity) and property, Professor Weinrib argues that the latter is problematic insofar as it may subtract from what one is entitled to under the former. As part of the right of bodily integrity, he suggests, one can use things necessary for one's survival, but this is not assured under property acquisition, given that what one needs may already have been appropriated by others; see Weinrib, 'Poverty and Property,' *supra* note 108. But the right of bodily integrity intrinsically assures only that one has a place to be (insofar as one cannot be dislodged without being touched), not things to use. The fact that one happens to be holding or touching something (let alone something that is needed for survival) is accidental and contingent in relation to this right. Moreover, others can, as a matter of fact, affect what one is holding (damaging it, for example) without touching one's body, even indirectly, and so without consequence for this right. Conversely, it is fully consistent with the character and the basis of the right of property if it is explicitly qualified in a way that preserves the innate right of persons to be where chance or nature has placed them. This right to be somewhere does not involve any acquisition and so cannot contradict the principle of first possession. Thus, there is no reason why the former cannot be viewed as lexically prior (in Rawls's sense) to the latter: in specifying and applying the principles of acquisition, we do so against a background that satisfies the requirements of the innate right of bodily integrity. For Rawls's understanding of lexical priority, see Rawls, *Justice*, *supra* note 93 at 46–7.

114 I take this to be, in Kant's view, the basis of possession's being merely provisional as opposed to conclusive; see Kant, *supra* note 46 at 409–11 [6:256–8].

misfeasance, not just first possession. An impartial and disinterested party with coercive authority, distinct from the interacting parties, is thus necessary to make good this guarantee, without which the equality inherent in the assertion and recognition of anyone's exclusive rights cannot be fulfilled.

The assurance problem is compounded by a further difficulty. Within this framework, whether or not one has taken exclusive control in the requisite way depends on how one's conduct reasonably appears to others. But who has standing vis-à-vis others to impose his or her view of what a reasonable interpretation entails in particular circumstances? Neither party, taken as an independent individual with interests, can reasonably claim against the other to have the well-founded authority to interpret the reasonable meaning of either or both of the parties' acts, so far as these bear on rights. Insofar as parties are taken in their capacity as independent, they are absolutely identical and equal: there is no basis for choosing the interpretation of one over that of the other. Inasmuch as they are differentiated by their diverse particular interests, parties cannot show each other that they are *not* judging from their particular standpoint, which need not be shared by others. Once again, the standard of interpretation that misfeasance requires can be satisfied, if at all, only by going beyond the perspectives of the interacting parties to the standpoint of a third, disinterested person who can legitimately claim to determine what is reasonable in their interaction.¹¹⁵ This standpoint of the reasonable person is distinct from that of either party as an independent individual and need not actually be shared by them. Yet, for juridical purposes of determining rights, the vindication of this standpoint is essential to there being a common – that is, a public – point of view from which to evaluate their interaction.

V *Conclusion: The limits of misfeasance and the requirements of liberal justice*

In this fifth and concluding part, I address one main question: Is misfeasance acceptable from the standpoint of a liberal conception of justice? My answer here will have to be brief and incomplete.

The previous discussion of how misfeasance reflects a definite conception of freedom and equality specified in terms of the innate mutual independence of all persons suggests, at least *prima facie*, that it is. Summing up, we might say that misfeasance, with its juridical conception of the person, reflects utterly basic and minimal notions of

115 According to Hegel, this is an internal or immanent reason for the deficiency of the standpoint of misfeasance (which Hegel calls 'abstract right') and which requires a mode of rightful relations that goes beyond it; see Hegel, *supra* note 2 at paras. 102–3.

freedom and equality that do nothing more than recognize the sheer difference between persons (as non-usable subjects who are, in their own right, equally self-authenticating sources of claims) and things (which may permissibly be used and can make no claims), so far as this difference pertains to relations with others. This is the whole meaning of mutual independence within the framework of misfeasance. Now, it is reasonable to suppose that any legitimate conception of liberal justice must start from, and respect throughout, this difference. How could a theory of justice purport to be liberal in any sense of that term without taking the mutual independence (as here understood) of persons as basic?

Moreover, through the basic private-law relation, misfeasance specifies a criterion of reciprocity, thereby meeting a fundamental requirement of liberal conceptions of justice.¹¹⁶ The right-duty relation in misfeasance, we have seen, directly embodies reciprocity. Thus, individuals can make claims against others within this framework which they can reasonably expect others to accept in their capacity as mutually independent and as free and equal, not as subordinated or as subject to the will of others. No one can make purely unilateral, rightful claims; everyone is equally and identically subject to the very same constraints. Misfeasance specifies a criterion of reciprocity at its most fundamental level.

Nevertheless, misfeasance's juridical conception of justice is radically under-developed from the standpoint of widely accepted requirements and considerations of liberal social and political justice. Let me elaborate. First, precisely because it abstracts from all particular factors, the idea of mutual independence in misfeasance allows these factors, operating as moral contingencies, to shape how persons fare in their external relations – for example, whether one has or acquires something and if so, what and how much. In misfeasance, we saw, these factors do not give rise to claims of rights. It is not that misfeasance regards the influence of these contingencies on outcomes as morally deserved. Rather, it does not recognize their influence as morally relevant. But the very absoluteness of misfeasance's indifference and the exhaustiveness of the distinction between persons and things ensure the unmitigated effect of these contingencies. Not only does misfeasance not address the question as to whether and under what conditions the influence of these factors might be justified. It completely ignores the impact these contingencies have on one's capacity to form and pursue a conception

116 In his last writings, Rawls emphasizes reciprocity as definitive of the liberal political relation. See John Rawls, 'The Idea of Public Reason Revisited' in John Rawls, *Collected Papers*, ed. by Samuel Freeman (Cambridge, MA: Harvard University Press, 1999) 573 at 574–79; John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999) at 14, 49–50 [Rawls, *Law of Peoples*].

of one's good. This is because misfeasance does not recognize either the intrinsic moral significance of forming and pursuing (as well as revising) a conceptions of one's good or the social and political conditions that are essential to supporting this interest. To address these matters, we would have to treat this capacity as one of the moral powers definitive of free and equal persons and have to specify, for example, a suitable conception of persons' needs as free and equal as well as of the kinds of claims such persons can rightly make against each other to have those needs reasonably met. Such is Rawls's political conception of the person, which goes well beyond the parameters of misfeasance, with its more limited juridical notion of persons.¹¹⁷

This brings me to a second basic way in which misfeasance is limited from the standpoint of a more complete justice. Misfeasance views the content of exclusive rights as something immediate and given, not produced or made possible by – and so arising from – productive social cooperation. The only relevant factor is the object as it just happens to exist, abstracted from the history of its production and the complex of social relations that were necessary for it to become what it is.

Thus, the content of my right of bodily integrity is my body, just as it is, here and now and in whatever condition it happens to be. Misfeasance abstracts from the fact that my body is what it is only because of the vast system of cooperation that maintained and nurtured it – and continues to do so. It also abstracts from the fact that my bodily condition and circumstances at any given time might have been very different under alternative institutional (social, economic, familial, political) arrangements. The same is true with respect to the objects of acquired rights. Whether the object is a wild animal found in nature or a product of human labour is irrelevant to the basis and operation of the principles of acquisition and ownership. This dimension simply doesn't enter the picture. It cannot be explained or evaluated from within the framework of misfeasance. The only question is whether persons have done something with or to the thing that reasonably manifests control, whether or not that activity changes the object and, in particular, whether or not the activity is productive.¹¹⁸ Productive activity may qualify as occupancy under first possession but it does so not qua productive but only as a manifestation of control. It is just – and only – because misfeasance abstracts from these considerations and takes for its content the bare object, without reference to the system of cooperation, that the fundamental unit of analysis is the transactional relation of right and duty between two persons. However, clearly, the fact of social cooperation raises a whole set of distinct and basic questions of justice that must be

117 See discussion, *supra* note 98.

118 Grotius makes this point clearly; see Grotius, *supra* note 52 at 455 [Bk. 2, c. 3, s. iii].

addressed insofar as it is through such a system that free and equal persons not only meet their needs but shape their conceptions of their good and their identities over time.¹¹⁹ When persons and things are viewed as part of a system of productive cooperation,¹²⁰ the justice of such a system – and of persons' claims against each other as participants in it – needs to be understood and explored within its own framework and thus in terms that go beyond the entire standpoint of misfeasance. These terms will be specified by appropriate principles of social and political (distributive) justice.

The upshot of the preceding, much too brief comments is that, even if misfeasance reflects a distinct and coherent normative conception (the juridical idea of mutually independent free and equal persons) and so, at least provisionally, should be viewed as liberal in character, it is also a fundamentally limited conception and must be supplemented with suitable norms of social and political justice that properly order the very factors and issues from which it abstracts. Standing alone, misfeasance must have arbitrary consequences and implications when these are viewed from the standpoint of liberal social justice.¹²¹ While misfeasance treats individuals as mutually independent within the parameters of their having an equal capacity for rights (to exercise exclusive authority in the use and disposition of things), it does nothing to ensure that they are actually in a position to exercise these rights on a footing of an appropriate degree of economic and social equality. The conception of mutual independence in misfeasance does not rule out, but, to the contrary, is fully compatible with, relations of the utter dependency of some on others (as in an unmitigated private-law capitalist relation of wage labour) for the whole range of things needed to make mutual independence not merely a formal capacity but a fully realized social and economic existence. By itself, therefore, misfeasance cannot be a fully acceptable ideal of justice.

The full acceptability of misfeasance for liberal justice depends, then, on the possibility of its being part of a more complete conception of justice, one that preserves it while appropriately incorporating these other concerns. To show this with the requisite detail is beyond the scope of this article.¹²² However, on a more modest scale, I want to

119 Rawls emphasizes this point throughout his writings; see, e.g., Rawls, *Justice*, supra note 93 at 55–7.

120 Rawls stresses the signal importance of this conception of *productive* social cooperation for his theory: 'Social cooperation, we assume, is *always productive* and without cooperation there would be nothing produced and so nothing to distribute ...'; *ibid.* at 61 [emphasis added].

121 Again, Rawls stresses this point throughout; see, e.g., *ibid.* at 52–5.

122 I discuss this further in Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa L. Rev. 515 at 605–24 [Benson, 'Basis'].

suggest now that, at least, there is nothing in the basis and operation of misfeasance that is necessarily in tension with a distributive conception such as Rawls's and that, therefore, misfeasance can be part of a larger theory of justice that addresses the very concerns toward which it, misfeasance, is indifferent. This brings out the important point that misfeasance is not at all a form of libertarianism.

To begin, in contrast with libertarianism, misfeasance does not itself necessarily enjoin any particular set of entitlements in external things which must be respected by other principles, such as those of distributive justice. Taken by itself and in its own terms, misfeasance does not require that any given thing be acquired by individuals in accordance with its principles. Misfeasance does not oblige anyone to acquire anything. Nor does it require that there be things, let alone certain kinds or quantities of things, to be appropriated. The mutual independence of persons can be fully respected and preserved within the framework of misfeasance whether or not a particular item is available for individual appropriation. How much or what persons appropriate is, in itself, a matter of indifference.¹²³ In this sense, misfeasance does not conclusively determine the field of its own operation. Misfeasance says only that, if something (without reference to its particular features) happens to be available for individual appropriation, and if someone (anyone) performs the requisite acts that manifest exclusive control, that person's control must be respected by the relevant others in their relations of equal mutual independence without regard for the very factors and considerations which distributive justice treats as normatively salient.¹²⁴ What misfeasance does intrinsically and necessarily require of all further principles is only an appropriate recognition of the difference between persons and things: so long as persons are not themselves objects of appropriation but are recognized as subjects with a legal capacity for ownership in relation to others, misfeasance is respected.

Precisely because of the way it abstracts, misfeasance presupposes a certain merely partial standpoint and is authoritative only within it. It does not, because it cannot, order relations once we view them as part of a productive system of social cooperation. Whereas libertarianism purports to be a complete conception of distributive justice, which denies

123 On this point, Hegel, though not the first to emphasize this, was exceptionally clear; see Hegel, *supra* note 2 at paras. 37 & 49. Rawls rightly emphasizes this aspect of Hegel's view; see Rawls, *Lectures*, *supra* note 95 at 340–4.

124 This conditional characterization of the operation of misfeasance is underlined by both Hegel and Kant. See Hegel, *supra* note 2 at para. 38: '[A]bstract right is ... *only a possibility*, and to have a right is therefore to have only a permission or a warrant.' For Kant, acquisition is a merely 'permissive law'; see Kant, *supra* note 46 at 404–6 [6:250–2].

that productive social cooperation raises distinct and fundamental considerations of justice, misfeasance does not prejudge this question because its underlying normative basis, in its own terms, is not sufficiently rich or determinate to address it. Thus, even if we suppose the conceptual priority of misfeasance as the most elementary manifestation of freedom and equality,¹²⁵ its principles of acquisition and transfer (in contrast with the inalienable innate right of bodily integrity) do not specify any particular set of entitlements that determines or constrains the scope and operation of distributive justice. The benefits and burdens of social cooperation that distributive justice orders are not, as libertarianism contends, already and definitively the objects of pre-existing private-law claims that govern and constrain the operation of misfeasance.¹²⁶ Indeed, once relations between persons with respect to things are viewed from the standpoint of a productive system of social cooperation, with its qualitatively different way of conceiving these relations, the available subject matter and field of operation for misfeasance can be determined compatibly with, and against the background of, distributively fair terms of cooperation, without undermining its integrity. Rawls's idea of a division of labour between background distributive justice for the basic structure of society and local principles for transactions is one such way of conceiving their integration in a more complete conception of justice.¹²⁷ Since, within the framework of misfeasance, the principles of acquisition and transfer express the idea of pure procedural justice in relation to transactions no less than do Rawls's two principles of background justice, this division of labour would seem to be not only possible but natural.¹²⁸ Whereas libertarianism is incompatible with Rawls's

125 This is, I believe, the view taken by both Kant and Hegel and I share it. See my discussion in Benson, 'Basis,' supra note 122.

126 Thus, the normative idea of misfeasance leaves open the question, for example, of whether there should be private or public control of the means of production and of natural resources – a consequence that is fully compatible with Rawls's account, which denies that either alternative is required as a basic liberty under the first principle of justice; see Rawls, *Justice*, supra note 93 at 114.

127 See Rawls, *Justice*, supra note 93 at 53–5.

128 In light of these comparisons, the further question arises as to whether the principles of private law might be chosen by parties in an original position, analogously to the choice of principles for background justice. Since misfeasance views individuals as strictly equal, they can be represented by parties symmetrically situated as is required by the idea of the original position. In the case of an original position for private law, however, it must model the particular conception of the person, the notions of reasonableness and rationality, and the sort of relation at issue (transactions in abstraction from productive social cooperation) that characterize misfeasance. One cannot simply assume that it would include an account of social primary goods, as does the argument for principles of background justice. Moreover, it would have to incorporate a method of selection (*e.g.*, choosing from a menu of alternative principles or evaluating different interpretations of a list of principles) appropriate

conception of a division of labour between principles – precisely because it denies the special role of distributive justice in addressing matters of justice that go beyond transactional fairness, the normative idea of misfeasance makes room for distributive principles and, indeed, requires this division of labour for its own full acceptability. Unlike libertarianism, misfeasance is a liberalism of freedom that takes transactions as its subject of justice.

Beyond the fact that misfeasance does not rule out egalitarian principles of background distributive justice, it fits with political liberalism at an even deeper level. Indeed, the underlying moral basis of misfeasance has certain features that are also crucial to Rawls's political conception of the person and of justice, but it embodies them in an even more basic way.

For example, no less than Rawls's political conception, misfeasance is also publicly liberal in the sense that its principles are in no way conditioned by persons endorsing any particular comprehensive doctrine. Indeed, this irrelevance of comprehensive doctrines in the formulation of principles is assured by the fact that misfeasance abstracts entirely from all particular purposes, individual or collective, and gives standing to no purposes whatsoever. The permissibility of conduct is assessed solely on the basis of whether exclusive control has been established or interfered with, nothing more or less. An individual's standing to make claims is thus wholly independent of his or her conception of good and similarly of that of others. At its very core, and like Rawls's conception of political liberalism, misfeasance is neutral in aim and compatible with the fact of reasonable pluralism.¹²⁹

Moreover, the power to distinguish oneself as a person from what one happens to want or need or from the circumstances in which one finds oneself must be presupposed by any liberal conception, such as

to the matter at hand. To my knowledge, this has yet to be done for private law. Rawls's highly interesting remarks comparing and contrasting the original position models for domestic and global justice in Rawls, *Law of Peoples*, supra note 116 at 30–4, 39–42, 68–70 would provide important guidance.

129 On the idea of neutrality of aim, see *ibid.* at 153, n. 27. For Rawls's, the fact of reasonable pluralism refers to a permanent, long-term feature of the public culture of modern constitutional democracy; namely, that it will be characterized by a diversity of conflicting and irreconcilable yet politically reasonable moral, philosophical, and religious doctrines and world-views or what Rawls's calls 'comprehensive doctrines'. Public agreement on principles of justice cannot therefore reasonably be expected to be on the basis of any of these comprehensive doctrines; *ibid.* at 3–4, 33–4. By drawing on principles and ideas that are at least latent in private-law doctrines, my account of misfeasance, consistently with reasonable pluralism, aims to be a free-standing juridical conception that can be presented independently of any comprehensive philosophical or moral doctrines.

Rawls's,¹³⁰ which views persons as having the capacities to take responsibility for their ends and to make their claims against each other only in light of what they are entitled to by fair terms of cooperation, not on the basis of what they happen to want or desire. This power is crucial to distinguishing legitimate needs that can be the basis of claims from mere wants or desires, however intense.¹³¹ In this way, a theory can work out a conception of legitimate interests upon which claims may be reasonably made. Indeed, it is only by initially bringing into question the moral validity of anything someone happens to want or need that we can go on to specify the needs and interests of responsible selves for the purposes of any liberal conception of justice. The complete abstraction from particularity that I have associated with misfeasance supplies this first step.

At the same time, even though misfeasance focuses on the factor of exclusive control and not on the particular purposes that manifest and embody control, the idea of permissible purposes emerges as a consequence, or as an implication, of this analysis. While misfeasance does not itself specify a conception of needs or interests in light of which individuals are entitled to make claims against others, it does mark their bodily existence and certain of their acts as protected vis-à-vis others. Consequently, the pursuit of certain purposes but not of others may now be viewed as compatible with the mutual independence of free and equal persons. Arguably, this is conceptually the first and most elementary way in which this distinction between permissible and impermissible ends can apply in a liberal conception of justice. Given this distinction and on this basis, it is now possible to ascribe intrinsic moral significance to the fact that persons form and pursue their (permissible) particular purposes; in other words, as self-authenticating sources of claims, persons may now be taken to have a moral capacity or power to conceive their good and this must be suitably reflected in the principles of justice.¹³² But while misfeasance prepares the ground for this richer, more developed view of persons, the latter, it still must be emphasized, goes beyond misfeasance's strictly limited conception of individuals as mutually independent.

130 See Rawls's discussion in John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) at 33–4.

131 Rawls makes this distinction; see, *e.g.*, *ibid.* at 189, n. 20.

132 As in Rawls, *Lectures*, *supra* note 95.