

PRIVATE ORDER AND PUBLIC JUSTICE: KANT AND RAWLS

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INTRODUCTION

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

No less often, it is said that private law is just one of the activities of states, to be assessed in the same way as any other exercise of state power. Although this second approach has its roots in the utilitarian thought of Jeremy Bentham and John Stuart Mill, in recent decades non-utilitarians have also embraced it. John Rawls famously criticized utilitarianism for ignoring “the distinction between persons.”¹ Many of his most ardent admirers in the academy have sought to put his social contract theory forward as an alterna-

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¹ John Rawls, *A Theory of Justice* 24 (rev. ed. 1999) [hereinafter Rawls, *Theory of Justice*].

tive to utilitarianism, while accepting the basic utilitarian perspective on private law as “public law in disguise.”² Thus, they have sought to carry the structure of Rawls’s theory into the minutiae of the law of tort and contract, and to deploy it against seemingly more ambitious conceptions of property.³

My aim in this Essay is to provide an alternative to these two prominent views. Each of them is right about something. Private rights protect an important kind of freedom. They are not simply bestowed on citizens by the state so as to increase prosperity or provide incentives. At the same time, their enforcement is an exercise of political power, for which society as a whole must take responsibility. If two inconsistent claims are both true, we are faced with what Immanuel Kant called an “antinomy.”⁴ The only way to overcome an antinomy is through a critique of the broader premise that thesis and antithesis share.⁵ In this case, the source of the difficulty is that both the Lockean and utilitarian/egalitarian theories are based on the broader premise that law is an instrument for achieving moral ends that could, in a happier world, have been achieved without it. Both positions go wrong by supposing that the basic demands of political morality make no reference to institutions. The Lockean view regards law as a remedy for the “inconveniences” of a state of nature;⁶ the utilitarian and egalitarian typically regard it as a remedy for some combination of imperfect

² Leon Green, *Tort Law: Public Law in Disguise*, 38 *Tex. L. Rev.* 257, 269 (1960).

³ See, e.g., Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 *Fordham L. Rev.* 1857, 1858 (2004); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *Stan. L. Rev.* 311, 312–13, 340–49 (1996); Kevin A. Kordana & David H. Tabachnick, *On Belling the Cat: Rawls and Corrective Justice*, 92 *Va. L. Rev.* 1279, 1306 (2006) [hereinafter Kordana & Tabachnick, *Belling the Cat*]; Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 *Geo. Wash. L. Rev.* 598, 599–600 (2005); Kevin A. Kordana & David H. Tabachnick, *Tax and the Philosopher’s Stone*, 89 *Va. L. Rev.* 647, 654, 665 (2003) (reviewing Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (2002)); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *Yale L.J.* 472, 474–75 (1980).

⁴ See Immanuel Kant, *Critique of Pure Reason* 410 (Paul Guyer & Allen W. Wood eds. & trans., Cambridge Univ. Press 1998) (1787).

⁵ See *id.* at 467.

⁶ John Locke, *Two Treatises of Government* 370 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

information, selfishness, and high transaction costs.⁷ Defenders of corrective justice have criticized instrumental theories of private law for their failure to capture the transactional structure of private law;⁸ my aim is to broaden those criticisms.⁹

As my use of the term “antinomy” suggests, the alternative I will develop draws on Kant. As the title of this Essay reveals, I will draw on John Rawls as well. I will articulate Kant’s account of the nature and significance of private ordering in relation to freedom. I will use this Kantian idea of private ordering to explain the place of private law in what Rawls has described as the “division of responsibility” between society and the individual. According to Rawls, society has a responsibility to provide citizens with adequate rights and opportunities; each citizen, in turn, is responsible for what he or she makes of his or her own life in light of those resources and opportunities.¹⁰ I will argue that private law is the form of interaction through which a plurality of separate persons can each take up this special responsibility for their own lives, setting and pursuing their own conceptions of the good in a way consistent with the freedom of others to do the same. Private law draws a sharp distinction between nonfeasance and misfeasance: unless you owe a duty to another person, the effects of your conduct on that person

⁷ Henry Sidgwick’s discussion of justice in *The Methods of Ethics* remains the clearest and most forceful statement of the view that law and justice impose general rules in order to achieve a moral good that makes no reference whatsoever to anything rule-like. Henry Sidgwick, *The Methods of Ethics* 264–94 (7th ed. 1907). Sidgwick’s argument explicitly animates recent economic analysis, including, notably, that by Louis Kaplow and Steven Shavell. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* (2002). The Lockean position is subtly different, in that it supposes that the complete statement of morality makes no essential reference to institutions, but is formulated in terms of rules and natural rights.

⁸ See, e.g., Ernest J. Weinrib, *The Idea of Private Law* 49 (1995).

⁹ The idea that law partially forms morality is a central theme in the natural law tradition, starting from Aquinas. See Saint Thomas Aquinas, *Summa Theologica* Ia-IIae 96, art. 4, in *Political Writings* 137, 143–44 (R.W. Dyson ed. & trans., 2002) (1273). A more recent expression can be found in Tony Honoré, *The Dependence of Morality on Law*, 13 *Oxford J. Legal Stud.* 1, 2 (1993) (arguing that a “viable” morality must have an independent legal component). Kant’s version of this thesis is more ambitious than that found in Aquinas or Honoré, because the morality in question requires promulgation as law even on those rare occasions in which it is fully determinate. See Immanuel Kant, *The Metaphysics of Morals* 78–86, (Mary Gregor ed. & trans., 1996) (1797) [hereinafter Kant, *Metaphysics of Morals*].

¹⁰ John Rawls, *Social Unity and Primary Goods*, in *Utilitarianism and beyond* 159, 170 (Amartya Sen & Bernard Williams eds., 1982) [hereinafter Rawls, *Social Unity*].

are irrelevant. I will explain this distinction in terms of an idea of voluntary cooperation. By focusing on the ways in which private law reconciles the capacity of separate persons to pursue their own purposes, I then will explain why private law is an essential part of what, for Rawls, is the fundamental subject of justice—the coercive structure of society.

I have made some of these arguments about private law elsewhere,¹¹ and will not rehearse them in their full detail here, because the other side of the division of responsibility is at least as important: if private order is a realm of freedom, how can the state be entitled to do anything, unless private persons hire it to do so? The main part of my argument will be concerned with showing why private ordering requires public justice. Drawing again on Kant, I will argue that private law is only a system of reciprocal limits on freedom, provided that those limits are general in the right way. Specifically, although the rule of law is often presented as a sort of instrumental good that provides various benefits, either to persons or societies,¹² I will argue that it is more than that. I will argue that the rule of law is a prerequisite both to enforceable rights being consistent with individual freedom and, more broadly, to a reconciliation of individual freedom among a plurality of persons. The use of force subjects one person to the choice of another, unless its use issues from a public standpoint that all can share. Turning once more to Rawls, I will argue that the best way to think about his emphasis on public provision of adequate rights and opportunities is in parallel terms: they are essential conditions to the very possibility of enforceable rights, because they are the moral prerequisites for a shared public sphere. The account I will develop draws out the implications of these Kantian and Rawlsian ideas, but its details are not explicitly developed in either of them.

¹¹ Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *Fordham L. Rev.* 1811 (2004) [hereinafter *Ripstein, Division of Responsibility*].

¹² A particularly forceful statement of this position can be found in Joseph Raz, *The Rule of Law and its Virtue*, in *The Authority of Law: Essays on Law and Morality* 210, 219–21 (1979) (describing the rule of law as useful for curbing forms of arbitrary power, creating a predictable environment in which a person can fix long-term goals and effectively pursue them, and acting as a necessary—but not sufficient—step towards respecting human dignity).

I. PRIVATE LAW, MORAL POWERS, AND THE DIVISION OF
RESPONSIBILITY

Widely accepted views in recent political philosophy make private law seem puzzling. In his brief characterization of corrective justice, Aristotle notes that a judge seeking to resolve a private dispute pays no attention to the wealth or virtues of the parties, but only to the particular transaction between them.¹³ If a poor person wrongs a wealthy one, the poor one must pay the wealthy one. This suggestion that forcibly taking money from a poor person to give to a wealthy one could be a matter of justice strikes many people as bizarre, or incoherent. Both tort and property protect what people *happen* to have, without any thought about how they got it or what they *should* have from a moral point of view. The law attends to the form of the transaction or holding, rather than the needs or interests of the parties to it.

The formality of private law stands in stark tension with prominent understandings of distributive justice. Rawls asks what parties in the original position would want by way of all-purpose means and opportunities, to enable them to exercise their moral powers over a complete life.¹⁴ Amartya Sen focuses on capabilities and the functionings that means and opportunities make possible—again, asking what is required if people are to be able to achieve certain kinds of worthwhile ends.¹⁵ Ronald Dworkin, in his theory of equality of resources, invites readers to imagine an auction in which all resources are allocated to the highest bidder, but then he introduces various forms of insurance against disastrous outcomes.¹⁶ The insurance argument is, again, the introduction of a content-based conception. For all the many differences between Rawls, Sen, and Dworkin, they share a focus on substantive questions of what is needed to enable choice. Utilitarians focus instead on substantive questions about the good to be promoted, or the best means of

¹³ See Aristotle, *Nicomachean Ethics* 120–21 (Martin Oswald trans., The Liberal Arts Press 1962).

¹⁴ Rawls, *Social Unity*, supra note 10, at 170.

¹⁵ Amartya Sen, *Equality of What?*, in *The Tanner Lectures on Human Values*, 197, 218–19 (Sterling M. McMurrin ed., 1980).

¹⁶ Ronald Dworkin, *Sovereign Virtue* 65–83 (2000); see also Arthur Ripstein, *Liberty and Equality*, in *Ronald Dworkin* (Arthur Ripstein ed., forthcoming 2007) [hereinafter *Ripstein, Liberty and Equality*].

promoting it. All of these theories focus on how much each person needs, has, or can expect to have—all measures of what a person should have. That focus makes it difficult to see how *any* further demand of justice could require the state to change a person's distributive share.

As I shall now proceed to show, the entire puzzle is the product of a misunderstanding. In *Social Unity and Primary Goods*, Rawls introduces the idea of a “division of responsibility” between society and the individual. Rawls writes:

[S]ociety, the citizens as a collective body, accepts the responsibility for maintaining the equal basic liberties and fair equality of opportunity . . . while citizens (as individuals) . . . accept the responsibility for revising and adjusting their ends and aspirations in view of the all-purpose means they can expect, given their present and foreseeable situation. This division of responsibility relies on the capacity of persons to assume responsibility for their ends and to moderate the claims they make on their social institutions in accordance with the use of primary goods. Citizens' claims to liberties, opportunities and all-purpose means are made secure from the unreasonable demands of others.¹⁷

¹⁷ Rawls, *Social Unity*, supra note 10, at 170; see also T.M. Scanlon's gloss on the division of responsibility in *What We Owe to Each Other*:

The idea is this. The “basic structure” of society is its legal, political, and economic framework, the function of which is to define the rights and liberties of citizens and to determine a range of social positions to which different powers and economic rewards are attached. If a basic structure does this in an acceptable way—if citizens have no reasonable complaint about their access to various positions within this framework or to the package of rights, liberties, and opportunities for economic reward that particular positions present them with—then that structure is just. It is up to individuals, operating within this framework, to choose their own ends and make use of the given opportunities and resources to pursue those ends as best they can. How successful or unsuccessful, happy or unhappy they are as a result is their own responsibility.

T.M. Scanlon, *What We Owe to Each Other* 244 (1998). Scanlon's gloss might appear either crass or confused from the standpoint of recent discussions of responsibility in political philosophy, which typically analyze questions of responsibility in terms of a person's control over, or identification with, a particular choice. The Rawlsian picture, as Scanlon emphasizes, situates responsibility in the framework of fair interaction. A person can be held to account for those things for which free and equal persons can hold each other to account. For a discussion of this issue, see Michael Blake & Mat-

Although the division of responsibility had attracted comparatively little attention from Rawls's commentators and critics, it is central to his vision of justice. The division of responsibility captures the distinctive place of individual responsibility in thinking about justice.¹⁸ In his *Reply to Alexander and Musgrave*, Rawls says that the division of responsibility is "[i]mplicit in the use of primary goods" as the basis for distributive shares.¹⁹ The entire problem of distribution is given by the idea that persons have private lives as well as public ones, and will take account of their entitlements as they pursue their separate purposes.

The idea that you have a special responsibility for your own life highlights two implicit contrasts. The first is the contrast between your responsibility for what you make of your life, and the responsibility of the state to ensure that you have the opportunity to pursue a successful life, by some measure or other. For example, a utilitarian might suppose that the responsibility of the state is to see to it that as many people as possible have happy lives, however exactly that is conceived. An advocate of theocracy might suppose that the state has a special responsibility to see to it that I have a life worthy of salvation, or at least that as many people as possible have that sort of life. One could imagine many such examples of worthwhile lives that fix the responsibility of the state for each person's life. Rawls is thinking of something very different. The two aspects of the division are parts of a single package: the state has a responsibility to see to it that people have the resources and opportunities necessary in order for *each of them* to take responsibility for *their own* lives. What they then go on to make of those lives is entirely up to them: provided that they do not interfere with the

thias Risse, *Two Models of Equality and Responsibility* 21–22 (May 18, 2006) (unpublished manuscript, on file with the Virginia Law Review Association).

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

¹⁹ John Rawls, *Reply to Alexander and Musgrave*, in *Collected Papers* 232, 241–42 (Samuel Freeman ed., 1999) (1974) [hereinafter *Rawls, Reply to Alexander and Musgrave*].

choices of others, or the capacity of others to make such choices, the state takes no interest in any particular person's decisions about how to live his or her life. That is the sense in which Rawlsian liberalism is "neutral" with respect to conceptions of the good. Neutrality is the consequence of a commitment to human freedom, rather than a premise in some argument in favor of granting freedoms.

By articulating the distinction between public and private in this way, the division of responsibility presupposes a further distinction within the private realm between the things for which *I* am responsible, and those for which some *other* private person is responsible. That division of responsibility among individuals is the concern of private law. If the pursuits of separate persons taking up their responsibility for their own lives come into conflict, the dispute is essentially a private one between the parties in question. Instrumental theories of private law take private disputes as a sort of windfall opportunity for achieving such broader social purposes as economic redistribution or the fine-tuning of optimal economic incentives.²⁰ Under the division of responsibility, insofar as such social aims are legitimate public purposes, they can be pursued by society as whole. Private disputes must be resolved between the parties in ways that preserve each party's special responsibility for his or her own life. The formal aspect of private law gives expression to a distinctive way of thinking about human freedom and independence.²¹

²⁰ See Weinrib, *supra* note 8, at 46–48.

²¹ I will not directly take issue with the alternative hypothesis, according to which the formality of private law is merely apparent; that private law is, as Richard Epstein puts it, a matter of a set of "[s]imple rules for a complex world." Richard A. Epstein, *Simple Rules for a Complex World* 21 (1995). For Epstein, these rules are chosen on utilitarian grounds. There are ample utilitarian reasons to keep them simple. Simplicity, in turn, makes them formal in their day-to-day operation, and demands that decisionmakers have incentives to focus on their formality. This is put forward as a series of empirical claims, with very little hard evidence to support them. Whatever its strengths or weaknesses as an explanatory account of the structure of private law, it is an extreme manifestation of the assumption that I mean to call into question, because it supposes that the moral purpose served by private law can be stated without any reference to any rules.

In *Political Liberalism*, Rawls makes some brief remarks that some have offered as evidence that he takes a similar view of the rules of private law. Specifically, Rawls refers to the rules governing "transactions and agreements between individuals and associations (the law of contract, and so on)," and writes that "[t]he rules relating to fraud and duress, and the like, belong to these rules, and satisfy the requirements of

This second distinction reflects the relation between the two moral powers that Rawls emphasizes: first, the capacity to set and pursue a conception of the good and, second, the sense of justice. The latter is to be understood in terms of the readiness to assert my own claims, coupled with the readiness to acknowledge the equivalent ability of others to do the same.²²

The two moral powers that Rawls makes central are both aspects of what Kant describes as the innate “right of humanity” in one’s own person.²³ Kant describes this as the right to be free, where freedom is understood in terms of independence from another person’s choice. The power to set and pursue your own conception of the good is Kant’s right to independence: you, rather than any other person, are the one who determines which purposes you will pursue. The sense of justice, as Rawls describes it, is the capacity to recognize the rights of others, and, just as importantly, to stand up for your own rights. Kant describes this aspect of innate right in terms of what he calls “[r]ightful honor”—the principle of which is that you must never allow yourself to be used by another as a mere means.²⁴ For Rawls, as for Kant, citizens could not consent to a social world in which they were subject to the choices of others, or a world in which other citizens were entitled to determine their life prospects.

These constraints apply on both sides of the division of responsibility between society and the individual. Each person’s special responsibility for his or her own life requires that each person be free to take up that responsibility, and not be subject to the choices of another. Society’s responsibility for providing appropriate rights and opportu-

simplicity and practicality.” John Rawls, *The Basic Structure as Subject*, in *Political Liberalism* 257, 268 (expanded ed. 2005) [hereinafter Rawls, *Basic Structure as Subject*]. Although this passage suggests a “simple rules” approach, the next sentence suggests a more constitutive role for rules of private ordering: “[t]hey are framed to leave individuals and associations free to act effectively in pursuit of their ends and without excessive constraints.” *Id.* The notion of freedom to act effectively is best understood in terms of reconciling the capacities of a plurality of persons to set and pursue their ends, rather than any aggregate notion of efficiency. It is also worth noticing that Rawls focuses on the *pursuit* of ends, not their achievement. This reveals the identity between the first moral power and a Kantian conception of purposiveness.

²² See John Rawls, *Justice as Fairness: A Restatement* 6–7 (Erin Kelly ed., 2001) [hereinafter Rawls, *Justice as Fairness*].

²³ See Kant, *Metaphysics of Morals*, *supra* note 9, at 30.

²⁴ See *id.* at 29.

nities requires that social life not create new relations of dependence, but instead guarantee that all can enjoy their freedoms together.²⁵ The

²⁵ I am aware that reading Rawls in this Kantian way will be controversial in at least two ways. As Stephen Perry has suggested in response to an earlier version of this argument, “Kant’s own methodology . . . is essentially conceptual in character, and it makes strong metaphysical assumptions Rawls introduced the notion of the original position precisely in order to avoid these aspects of Kant’s approach” Stephen Perry, Ripstein, Rawls, and Responsibility, 72 *Fordham L. Rev.* 1845, 1848 (2004). Kevin Kordana and David Tabachnick wonder whether the claim that the division of responsibility presupposes principles of private right is consistent with the Rawlsian claim that:

[T]he original position . . . incorporates pure procedural justice at the highest level. This means that whatever principles the parties select from the list of alternative conceptions presented to them are just. Put another way, the outcome of the original position defines, let us say, the appropriate principles of justice.

See John Rawls, *Kantian Constructivism in Moral Theory*, in *Collected Papers*, supra note 19, at 303, 310–11, *quoted in* Kordana & Tabachnick, *Belling the Cat*, supra note 3, at 1283 n.13.

Although it is not my main purpose to belabor fine points of Rawls’s interpretation here, a few brief remarks are in order. First, Rawls’s argument, like Kant’s, is normative, not conceptual. This Kantian account carries none of the “strong metaphysical assumptions” with which Perry seeks to discredit it. It is not surprising that he gives no examples of such assumptions, because the only assumptions in Kant’s account of private right are normative ones about freedom and equality. Both Kant and Rawls stand out in the history of political philosophy for endorsing the claim that the coercive structure of society is the *sole* subject of the theory of justice, as well as the broader claim that the demands of justice are *in the first instance* institutional rather than individual. This emphasis on the coercive structure is baffling from the point of view of the prominent idea that political philosophy is a branch of applied moral philosophy, but makes perfect sense from the standpoint of a focus on freedom understood as independence—that is, Kant’s “rightful honor” or Rawls’s “two moral powers.” These are preinstitutional components of the theory of justice, in the sense that they are the premises of the contract argument. The choice of a metric of primary goods has the same place in the Rawlsian theory—it is a normative premise based on the moral importance of the two moral powers. The division of responsibility has the same place in the theory: it is presupposed by the contract argument, not a product of it. So does the idea that the coercive structure is the topic, and the related focus on social as opposed to natural inequalities. Rawls makes it clear that the contract device serves to facilitate comparisons between competing conceptions of justice. He writes, “Each aspect of the contractual situation can be given supporting grounds.” Rawls, *Theory of Justice*, supra note 1, at 19. The idea of Rawlsian justice is not that people somehow enter into a pre-contractual contract to agree about what their moral powers will be, what set of goods will govern their decision, or what falls within its purview. These are all antecedent to any possible contract—parties in the “original position” could never begin to consider alternatives unless those questions were set by the conception of persons as free and equal, each with a special responsibility for his or her own life. A system of private law works up and reconciles these presuppositions of the original position into the thesis that citizens are able to take up that special responsibility, using their own “all purpose means” to set and pursue their own concep-

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two moral powers thus limit the means available to the state in pursuit of public purposes.²⁶

The two moral powers map onto Rawls's Kantian distinction between the rational and the reasonable. Rational persons are capable of taking up means to pursue their ends. In contrast, "[r]easonable persons [are moved by a desire for] a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others."²⁷ The core idea of the reasonable is a limit on the means that a person would use in pursuit of his or her ends. As with the moral powers, the rational and the reasonable show up on both sides of the division of responsibility: I can only be responsible for my own life if I am capable of taking up means to set and pursue my own purposes, but, as we shall see, my responsibility for my life demands that I accept constraints on the means I may use. Rawls explicitly mentions one such constraint: I may not demand extra resources from society on the grounds of the superiority of my conception of the good. But there are other, equally important limits on the means that I can use.

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

tions of the good, either independently or cooperatively, as they see fit. So I am not attributing a "preinstitutional" theory of private law to Rawls (or Kant for that matter), but rather a theory of the institutional place of private law: it resolves private disputes between free and equal persons in a way that is consistent with their freedom and equality, against the background of just institutions charged with the responsibility of the citizens considered as a collective body.

²⁶ I discuss this in more detail, *infra* note 77.

²⁷ John Rawls, *Powers of Citizens and Their Representation*, in *Political Liberalism*, *supra* note 21, at 47, 50.

violates either of these constraints, we force the other to bear some of the costs imposed by our choices.

II. PRIVATE LAW, NONFEASANCE, AND MISFEASANCE

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

The basic categories of private law serve to define and protect rights to person and to whatever property a person happens to have. Rights to person and property are essential to a specific conception of human freedom. Rawls makes this conception explicit when he talks about the moral power to “form, to revise, and to pursue a conception of the good, and to deliberate in accordance with it.”²⁸ The idea of pursuing a conception of the good contrasts with the very different idea, central to non-liberal thought, of achieving *the* good. The Rawlsian emphasis on both pursuit and “a conception” of the good reflect his distinctive notion of how choice matters to interpersonal interactions. Rawls’s language here echoes the distinction, introduced by Aristotle and developed by Kant, between wish and choice.²⁹ To wish for something is to desire that it should be so; to choose it is to take up means to achieve some particular or general outcome. To make this choice, you must first of all be able to conceive of it—hence talk about conception—and second, you must take yourself to have means adequate to achieving it. Secure means, and the ability to entertain possible uses for them and choose among them, marks off choice from mere wish. Setting and revising a conception of the good sounds like something someone might hope to do all in their head, quite independently of anything that goes on in the world or any actions by others. Rawls is after something different, not least because merely entertaining a conception of the good does not, in and of itself, raise any questions of justice between persons. It is only if you pursue your

²⁸ Id. at 72.

²⁹ Aristotle, *supra* note 13, at 59; Kant, *Metaphysics of Morals*, *supra* note 9, at 13.

conception of the good that questions of justice are engaged, because pursuit requires the availability of at least some means. The good, as you see it, may not be good for you; it may not be good at all. Nonetheless, setting and pursuing your own conception of the good is the most important exercise of your freedom, because you are the person who sets your own path in life. No other person can take it upon themselves to choose for you, precisely because it is your life. From the inside, as you set and pursue particular purposes, you think of them as being not just your conception of the good, but good. Rawlsian liberalism does not dispute that characterization but simply reserves for you the right to be the one who makes the judgment about which ends you will pursue.³⁰

Rawls, like Kant, is silent about the worth of various ends, not because he supposes that they do not matter, but because the idea that each person has a special responsibility for his or her own life requires a focus not on the *ends* that people pursue, but on the *means* they use to pursue them.³¹ The key idea of the division of responsibility is that private persons may only use their own means for setting and pursuing their purposes, and society as a whole may only use such means as are consistent with the freedom of separate persons.

Independence from another person's choice is important not because it is thought of as the best way of promoting successful choice, but rather because it implies the more general idea of reconciling the purposiveness of separate persons—each of whom has a special responsibility for his or her own life—through a set of reciprocal restraints. It is not put forward as an empirical hypothesis

³⁰ Sometimes this idea is cast in skeptical, pluralistic, or epistemological terms. Some say that we create our own good. Others say that different people have different goods, and each person should pursue what is good for them, rather than trying to pursue what is good. Still others insist that there really is an answer to the question of what is best in life, but we turn out not to know it. Rawlsian liberalism contrasts with all of these views, because it is at bottom a theory of entitlements: you are the person who is entitled to make your own way of life, and nobody else has standing to take it upon themselves to decide for you. Your entitlement follows from your two moral powers as a human person, capable of setting your own purposes, not from any kind of empirical evidence, or even hypothesis, that your life is likely to go best if you make your own way, nor because we think there is no determinate answer until you have made one up.

³¹ John Rawls, *Lectures on the History of Moral Philosophy* 231 (Barbara Herman ed., 2000).

about what is most likely to enable people to have control over their lives.³² That is a problem with no general, systematic, or reciprocal solution. How much actual control you have over your life depends on the context in which you find yourself, and the particular things that you want. You might have a high degree of control over your life if you turn out to want exactly those things that are easiest for you to get. Instead, your independence from the choices of others is to be understood as your entitlement to be the one who decides which purposes you will pursue with the means that are at your disposal.

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

³² As a result, it does not succumb to John G. Bennett's criticism that private law might not have such effects. See John G. Bennett, *Freedom and Enforcement: Comments on Ripstein*, 92 Va. L. Rev. 1439, 1439–40 (2006).

people's choices. Independence as separateness and voluntary co-operation is both appealing and realizable.

The idea that each person has responsibility for his or her own life limits the means people are able to use for their purposes. In particular, my special responsibility for my life is only consistent with your special responsibility for yours if each of us is required to forbear from using the other, or from using means belonging to the other, in pursuit of our purposes. That is the very thing that the familiar departments of private law articulate. Thomas Hobbes and David Hume described private law as the law of "Mine and Thine."³³ In our terms, it is the law of who has dominion over which means, in relation to others. Articulating those relations requires an account of how people can have means of their own, consistent with the independence of each person from the others. That is just what the law of contract, tort, and property do. I will not go through full detail, but rather simply point to the structure of contract, property, and tort in order to make this point. The analysis I offer will be brief, and will draw heavily on parts of Kant's division of "private right" in his *Doctrine of Right*.³⁴

Kant's account provides the basis for an understanding of the remedial aspects of private law, but it is not, in the first instance, a theory of liability rules, compensation, damages, or even duties of repair. Instead it is in the first instance an account of *obligations*: norms of conduct governing the interactions of free and equal persons. Those norms are relevant to the resolution of disputes, but the remedial norms of corrective justice follow the primary norms of conduct. It is thus not a backward-looking account that seeks to assign liability on the basis of past events, but a forward-looking one that guides the conduct of persons by delimiting the means available to them as against other private persons.³⁵

Kant approaches private law through its relationship to freedom, understood as independence from the choices of others.³⁶ The idea

³³ Thomas Hobbes, *Leviathan* 90 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651); see David Hume, *A Treatise of Human Nature* 489 (L. Amherst Selby-Bigge ed., 1978) (1739).

³⁴ Kant, *Metaphysics of Morals*, supra note 9, at 37.

³⁵ I explain this in more detail in *As If It Had Never Happened*, 48 *Wm. & Mary L. Rev.* (forthcoming Apr. 2007) (manuscript on file with the Virginia Law Review Association).

³⁶ Kant, *Metaphysics of Morals*, supra note 9, at 30.

that there can be a system of equal freedom has fallen from favor in recent years, but Kant provides a corrective to such intellectual fashion by providing a clear and systematic explication of the distinctive ways in which free persons can interact, consistent with their freedom. In so doing, he provides an alternative to the familiar idea that private law can only be understood and evaluated in terms of its “functions,” where these are understood as the benefits it is thought to provide. On the Kantian analysis, private law does not determine the optimal level of injury, encourage transactions, or even protect people from harm.³⁷ It creates and demarcates a system of equal independence of each person from the choices of others.

Kant’s basic insight is that there are three ways in which private persons can interact, corresponding to the three basic forms of private legal obligations.³⁸ First, separate persons can pursue their separate purposes separately; those pursuits are consistent provided that each person forbears from using means that belong to others, and controls the side-effects of their own activities to avoid damaging means that belong to others. This form of interaction is protected by the negative rights that each person has against all others to security of person, and exclusive possession and use of property. This interaction finds legal expression in the law of tort, which protects person and property against injury through damage-based torts such as negligence and nuisance, as well as against use by others through intentional torts such as trespass and battery. Rights to person and to property differ in important ways, but they are alike in giving the right-bearer the right to security against others and the right to exclude others.³⁹

³⁷ I examine the broader irrelevance of harm to legal and political philosophy in *Beyond the Harm Principle*, 34 *Phil. & Pub. Aff.* 215 (2006).

³⁸ I elaborate these distinctions in more detail in *Authority and Coercion*, 32 *Phil. & Pub. Aff.* 2, 11 (2004) [hereinafter Ripstein, *Authority and Coercion*].

³⁹ For Rawls, property straddles both the two principles of justice and the division of responsibility. In *A Theory of Justice*, he says that the choice between capitalism and socialism is to be made on the basis of deciding which best implements the difference principle. Rawls, *Theory of Justice*, supra note 1, at 247–48. In later works, however, he clarifies that the right to hold personal property is a basic liberty, governed by the first principle, though he also advocates what he calls “property-owning democracy” as the preferred economic system. Rawls, *Justice as Fairness*, supra note 22, at 138. The analysis of property referred to here applies to whatever property private persons and associations have in order to pursue their private purposes.

Second, separate persons can pursue their separate purposes interdependently and consensually. In saying that their purposes remain separate, I do not mean to suggest that two people cannot actively share purposes, but rather that it is up to both of them to decide whether to share. People enter into cooperative arrangements which give rise to binding rights between the parties to them. The law of contract gives effect to these private rights, enabling people to engage in voluntary cooperative activities by transferring their powers to each other. Most of the law of contract is concerned with future transfers in a way that might misleadingly suggest that it gives legal effect to the moral obligation to keep promises. On the Kantian analysis, however, the fundamental structure of a contract is already contained in a present transfer of goods or services: one person gives another person a right to a deed. Future transfers are more familiar because so many significant forms of cooperative activity take place across time. As Rawls once remarked, planning is in large part scheduling.⁴⁰ They are conceptually no different from present transfers: in each case, one person acquires a right to the deed of another.

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

Kant's account provides a distinctive way of understanding the nature of private interaction. These categories are meant to be exhaustive, but rather than explain that aspect of his argument here,⁴¹ I want to draw attention to the overall structure that this conception of private law imposes: people are required to forbear from interfering with each other. Provided they do so, the only grounds of

⁴⁰ See Rawls, *Theory of Justice*, supra note 1, at 360.

⁴¹ I do so in *Authority and Coercion*, supra note 38, at 6–22.

cooperation are voluntary. You are free to enter into cooperative arrangements with others, but nobody can compel you to cooperate with them. This focus on voluntary cooperation is essential to the capacity to set and pursue your own conception of the good. Your powers are available to you to use as you see fit, but you do not need to make them available to others to suit their preferred pursuit of their own purposes. If you did, then you would be compelled to pursue, or aid in the pursuit, of a purpose that you did not set for yourself. In Rawlsian terms, you would thus be blocked in the exercise of your first moral power.

This same idea of voluntary cooperation gives rise to the familiar distinction between nonfeasance and misfeasance. Private law, through tort and property, protects people in whatever they already happen to have. It secures their property against use and interference by others. Negative obligations do nothing, however, to provide people with means that they need, or to compel others to provide them with those means. The law of contract requires affirmative actions, but they need to be voluntarily undertaken. Fiduciary obligations can be broader, and exit from them more onerous, but they too must be voluntarily undertaken.⁴² Nobody can impose an affirmative private obligation on you as a result of their need, no matter how pressing it may be.

The basic apparatus of private law reflects these Kantian distinctions. Most notably, the absence of a private law duty to rescue is itself an expression of the idea of voluntary cooperation and the accompanying distinction between nonfeasance and misfeasance.⁴³ You never need to make your means or powers available to another person, even in the rare case in which life itself is at issue. This does not reflect a distinction between acts and omissions, or any distinctive theses about the nature of causation. Instead, its normative basis is just the requirement that all cooperation is voluntarily undertaken. If nobody has undertaken to provide me with a benefit, then I have no standing to complain against any other particular person that I lack it. In the same way, the familiar tort doctrine barring recovery for pure economic loss follows from the

⁴² Constructive trusts are only an apparent exception to this claim, as they are remedial responses to wrongdoing.

⁴³ I discuss this issue in more detail in *Three Duties to Rescue: Civil, Moral, and Criminal*, 19 L. & Phil. 751, 753, 756–62 (2000).

idea of voluntary cooperation. In a classic example, the defendant damages something, such as a bridge, to which the plaintiff has a contractual right, but no property right. The plaintiff has no property right in the bridge, thus he has no legal standing to exclude the defendant from using or damaging it.⁴⁴ The bridge-owner, however, can recover from the defendant, and the plaintiff may be able to recover from the bridge-owner, depending upon the terms of their contract.⁴⁵ The plaintiff cannot proceed directly against the defendant, however, because he does not have a right against all others to the bridge. The plaintiff's only right is a contractual right against the person who transferred it—that is, the bridge-owner. The defendant is a stranger to the contract between the plaintiff and the owner of the bridge, so they cannot, through their voluntary cooperation, impose any obligations on the defendant that he did not already have. Thus, the contract imposes no obligations on the defendant.

Cast in Rawlsian terms, private law as a whole secures for private persons the exercise of their first moral power, the capacity to set and pursue a conception of the good, in the face of the equally valid claims of all other private persons to do the same. Its role is constitutive, rather than instrumental, in relation to this moral power. The claim is not that, standing behind a Rawlsian veil of ignorance, rational and fully informed persons would *predict* that a system of private law would best improve their prospects of exercising this moral power. Those concerned with maximizing their prospects of success might choose prudently to disregard the distinction between nonfeasance and misfeasance, or to apply it only selectively, based on the particular interests that are at stake and their estimation of the circumstances in which they are likely to find themselves. For example, from the standpoint of maximizing

⁴⁴ See, e.g., *Rickards v. Sun Oil Co.*, 41 A.2d 267, 269 (N.J. 1945) (denying recovery because injury was not foreseeable and, therefore, the person occasioning the loss did not owe a duty, arising from contract or otherwise, to the person sustaining the loss); *Weller & Co. v. Foot & Mouth Disease Research Inst.*, (1966) 1 Q.B. 569, 587 (same); cf. *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 51 (1st Cir. 1985) (denying recovery for purely financial harm caused by negligence, even where the injury was foreseeable).

⁴⁵ See, e.g., *Barber Lines A/S*, 764 F.2d at 54 (defending decision to deny recovery because, among other reasons, the financially injured party could have contracted in advance for insurance or alternative compensation).

the capacity to set and pursue his own purposes, an individual's interest in continuing to live is important enough that he might agree to a scheme of mutual aid, allowing a greater risk to offset a lesser one. That is not the place of private law in the division of responsibility. Instead, its role is partially constitutive: the special responsibility that each person has for his or her own life is not the conclusion of the contract argument, but rather the premise that gives it its entire moral point. Persons are entitled to use their powers as they see fit, consistent with the ability of others to do the same.

If the choice of private law rules or systems is treated as a decision for parties to make in the original position, in light of their expected interests, the contract argument simply collapses into a form of consequentialism, as parties look at their expected advantage under competing systems.⁴⁶ Aside from all of the difficulties with utilitarianism that are captured in Rawls's famous claim that it "ignores the distinction between persons," the core difficulty with such a consequentialist understanding of private law is that it renders it inconsistent with the division of responsibility, and the special responsibility that each person has for his or her own life. The distinction between nonfeasance and misfeasance is invisible from a consequentialist perspective precisely because that distinction is just the distinction that persons apply to their private interactions. If an article of tort law is chosen on the basis of its expected consequences, then persons are held to account based not on their own choices but rather on the aggregate advantages that will flow to others.⁴⁷

⁴⁶ I explain this in more detail in *Division of Responsibility*, supra note 11, at 1821.

⁴⁷ It is possible to generate an apparent tension between *any* account of private disputes and the Rawlsian focus on justice in distribution. Kordana and Tabachnick do so by characterizing that focus as committing Rawls to the implausible idea that his difference principle generates an ideal of moment-by-moment distributive shares for everyone, and sets out rules of private law to approximate this ideal in the aggregate. Kordana & Tabachnick, *Belling the Cat*, supra note 3, at 1280 n.4 and accompanying text. Rawls's arguments point in a very different direction, because he contends that the difference principle does not govern distributions as such, but rather expectations as generated by social institutions. See Rawls, *Theory of Justice*, supra note 1, at 64. As citizens take up responsibility for their own lives, they, either individually or through associations, can use or dispose of their distributive shares as they see fit. In *Political Liberalism*, Rawls is explicit that the aggregate effects of private transactions must not be allowed to generate injustices. See Rawls, *Basic Structure as Subject*, supra note 21, at 266. Implicit in this claim is the assumption that the micro-effects of

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

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

III. THE OTHER SIDE OF THE DIVISION: PUBLIC RIGHT

Private law demarcates a sphere of individual freedom and voluntary cooperation. You are free to use your resources as you see fit, consistent with the right of others to use theirs. You do not

particular choices do not, as such, generate any injustices. Rawls's claim does not imply that, while a small distributive imbalance is generated every time someone makes a purchase or damages his or her own property, it is inefficient to correct the imbalance because of an extrinsic reason, such as high transaction costs. Instead, permissible private transactions raise no such issues. Each person has a claim against society as a whole to a just basic structure, and claims as against other citizens to justice in individual transactions. To borrow a helpful distinction from Stephen Perry, Rawls offers a *dynamic* rather than static account of distributive justice. Stephan R. Perry, *On the Relationship between Corrective and Distributive Justice*, in *Oxford Essays in Jurisprudence* 237, 245 (Jeremy Horder ed., Fourth Series 2000). Kantian "private right" is simply a demarcation of the boundaries of legitimate private transactions.

The idea that a concern for the expectations of the worst-off *must* yield an account of momentary shares is a residue of the assumption that morality is complete without institutions, so that institutions should be designed so as to approximate a result that can be specified without reference to them. See *supra* text accompanying note 7. This is not Rawls's view.

have to cooperate with anyone unless you choose to do so. Those limits are not self-policing or self-enforcing, and any enforcement of them needs to be done in a way that is consistent with the equal freedom of all.

Rawls describes the state as a form of social cooperation, in a way that might, misleadingly, suggest that it is like other forms of social cooperation, such as a baseball league, a neighborhood picnic,⁴⁸ an orchestra,⁴⁹ or, to use Hume's famous example, two men rowing across the pond, working their oars in unison.⁵⁰ These idyllic pictures of social cooperation provide poor models for the type of cooperation involved in the state. State action is not just a more complex version of a group of people getting together, sorting out a division of labor, and setting to work to achieve their common purpose. States exercise powers that few people would ever grant to the other members of their baseball league or orchestra. For one thing, they claim powers of enforcement and redistribution. The *schnorer* who eats heartily but never contributes anything to the annual neighborhood picnic may behave unfairly, but few people would think that his neighbors are entitled to let themselves into his pantry to seize food for the picnic. The curmudgeonly neighbor who skips the picnic cannot be forced to come join in the fun. By contrast, states make people pay for benefits whether they want them or not. States also claim to be entitled to issue binding laws and to force people to do as they are told. They claim to be entitled to do so within their territory (and sometimes even outside it), so that participation in this form of social cooperation is not voluntary. In these ways, state action is fundamentally different from the type of voluntary social cooperation that is at the heart of private ordering.⁵¹

⁴⁸ See A. John Simmons, Fair Play and Political Obligation: Twenty Years Later, *in* *Justification and Legitimacy: Essays on Rights and Obligations* 27, 29–31; A. John Simmons, The Principle of Fair Play, *in* *Justification and Legitimacy*, *supra*, at 1, 11, 23, 26.

⁴⁹ See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 20 (1996).

⁵⁰ Hume, *supra* note 33, at 490.

⁵¹ This question does not concern either the existence of a moral obligation to obey the law, apart from its moral merits, or the attitude that citizens should take to the law. Those are interesting questions, but they are not my question. Instead, I am concerned only with the question of legitimacy: under what conditions can a society force its members to conform to its requirements, both in the form of first-order require-

There are a number of strategies for denying or bridging these differences. The first two correspond to the two ways of collapsing the distinction between public and private law that I mentioned in my opening paragraph. Utilitarians and egalitarians who deny the normative integrity and significance of private law can say that the voluntariness of such interaction is only incidental to the benefits that private law provides, and that its rules must be selected on the basis of their expected effects.⁵² This way of understanding public powers is just the converse of the rejection of a distinctive account of private order.⁵³

The other familiar way of collapsing the distinction is through a Lockean interpretation of the metaphor of a social contract, complete with the doctrine of consent, to argue that states are only legitimate when they are genuinely voluntary forms of cooperation. The Lockean understands relations between the individual and the state no differently than relations between private individuals: they are legitimate only if fully voluntary. Locke's invocation of the concept of tacit consent blunts some of the force of this equivalence, but the structure of the strategy is clear: only private ordering is consistent with freedom. The Lockean strategy collapses

ments on conduct, and through designated forums for dispute resolution in cases of conflict? The question of a state's title to coerce differs from another idea, familiar in constitutional theory, according to which a constitutional order is only legitimate if ordinary citizens willingly accept it as a source of moral obligation. Social life might well be impossible if most people do not willingly comply with the demands of law, but acceptance of legal obligations is not sufficient for legitimacy. In the same way, different political regimes might be evaluated in terms of their success at protecting important rights, but the question of legitimacy is the question of the entitlement to use force to do so.

⁵² See, e.g., Ronald Dworkin, *Law's Empire* 276–312 (1986); Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 157 (2000); Richard A. Posner, *The Problems of Jurisprudence* 360 (1990). See generally Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 16, 24–34 (1970); Kaplow & Shavell, *supra* note 7, at xvii; William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 4–5 (1987); Kordana & Tabachnick, *Belling the Cat*, *supra* note 3, at 1287–88; Kronman, *supra* note 3, at 474. Dworkin is prepared to grant some independent significance to the law of contract, but none to tort. I examine this issue in *Liberty and Equality*, *supra* note 16.

⁵³ The idea, familiar in economic analysis, that voluntary exchanges are preferable underscores this point: the claim is that they produce a net increase in wealth. Even when this claim is taken to be an analytical definition rather than an empirical discovery, economic analysis, like the utilitarianism to which it is heir, evaluates voluntariness in terms of its *effects*.

public justice into private law by denying the normative significance of the most significantly obvious public aspect of private right, the resolution of disputes through public procedures for applying antecedently articulated laws governing all citizens—in short, the rule of law. Locke argued that rational persons would prefer the rule of law to the state of nature, that they would adopt it for instrumental purposes.⁵⁴ But the rule of law carries no independent normative weight according to his account. Just as the utilitarian sees private law as merely instrumental in relation to one set of goals, so the Lockean sees the public aspects of the rule of law as merely instrumental to a different set of goals.

The third strategy, which can be found in Kant and Rawls, supposes that the state has a distinctive set of powers, which can only be exercised legitimately from a distinctively public perspective.⁵⁵ The existence of such a public perspective is a prerequisite to any legitimate exercise of force. In Kant's preferred vocabulary, it takes the form of a "united will";⁵⁶ in Rawls's "the citizens as a collective body" act together.⁵⁷ A central task of political philosophy is to articulate the distinctive features and requirements of such a public perspective. That is the strategy that I will explore here.

The Kantian strategy articulates the public nature of the enforcement of rights, and in so doing reveals the broader demands of public justice. Just as Kant's argument about private rights is non-instrumental, so too is his argument about public justice. It makes no appeal to factual claims about the likelihood of conflict or its lack of resolution in a state of nature in which private parties would be left to their own devices for enforcement. Kant would not have denied that the "warped wood"⁵⁸ would lead to conflict, but such factual claims play no part in his argument, because he focuses on the *normative* inadequacies of private enforcement. Pri-

⁵⁴ Locke, *supra* note 6, at 368.

⁵⁵ See Kant, *Metaphysics of Morals*, *supra* note 9, at 89–113; John Rawls, Reply to Habermas, *in* *Political Liberalism*, *supra* note 21, at 372, 393.

⁵⁶ See Kant, *Metaphysics of Morals*, *supra* note 9, at 91.

⁵⁷ See Rawls, *Social Unity*, *supra* note 10, at 170.

⁵⁸ See Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, *in* *Kant: Political Writings* 41, 46 (Hans Reiss ed., 1991). Isaiah Berlin's translation, referring to the "crooked timber of humanity" is more familiar. Isaiah Berlin, *The Pursuit of the Ideal*, *in* *The Crooked Timber of Humanity: Chapters in the History of Ideas* 1, 19 (Henry Hardy ed., 1990).

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vate enforcement, for Kant, is not merely unreliable, inefficient, or likely to escalate. Even if good fortune were to prevent these problems from arising, the underlying problem would remain. The idea of a private “executive right” of enforcement is inconsistent with the underlying ideas of freedom and equality that make private rights and voluntary cooperation seem so compelling. Private enforcement is always unilateral enforcement, always a right of the stronger.

IV. PRIVATE ENFORCEMENT

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

On the surface, Kant’s account is similar, but at root it is fundamentally different because it denies that there could be an executive right to enforce rights without impartial institutions of adjudication and enforcement. The Lockean account moves from the true premise that freedom-based rights necessarily set limits on the legitimate use of force, and its corollary that rights are presumptively enforceable, to the further claim that each person has an “executive right” to enforce his rights in the absence of institutions and procedures. Locke writes:

For the *Law of Nature* would, as all other Laws that concern Men in this World, be in vain, if there were no body that in the State of Nature, had a *Power to Execute* that Law, and thereby preserve the innocent and restrain offenders, and if any one in the State of Nature may punish another, for any evil he has done, every one may do so. For in that *State of perfect Equality*, where naturally there is no superiority or jurisdiction of one, over another, what any may do in Prosecution of that Law, every one must needs have a Right to do.⁵⁹

⁵⁹ Locke, *supra* note 6, at 289–90.

Locke's observation about unenforceable rights is perfectly sound, but the further implication he hopes to draw from it is in tension with the more general requirement that different people's rights form a consistent set. My right ends where yours begins, and more generally, a system of rights sets reciprocal limits on freedom—no person is entitled to limit the freedom of another unilaterally. As I shall now explain, if private rights are understood as systematic in this way, then nobody could have a private right to enforcement consistent with others enjoying the same rights. Instead, people could have a right to have fair procedures govern the enforcement of any rights.⁶⁰ The correct conclusion from Locke's sound observation about the difficulties of unenforceable rights is that the only way in which anyone can have the right is if everyone has the right together—it belongs to the citizens considered as a

⁶⁰ John Simmons provides the most plausible defense of the idea of a Lockean right to punish in a state of nature: “[i]nsofar as there are objective moral rules (defining rights) under which all persons (originally) stand, and protection under the rules depends on others' obedience to them, then, a proportional forfeiture of moral rights may be a necessary consequence of infringing the moral rights of others.” A. John Simmons, *The Lockean Theory of Rights* 153 (1992). Putting aside any other difficulties this argument may have, it does not lead to a right to punish, but to a right to be punished subject to public procedures.

Simmons suggests that Locke combines natural law arguments with theological and rule-utilitarian ones to generate his account of natural rights. Although this is not the place to examine those arguments fully, it is worth noting that the basic premises of both the theological and rule-utilitarian arguments are in the same tension with the idea of an executive right in a state of nature, as is the Kantian account defended here. The theological argument that the world was given to mankind in common presupposes that the rights generated through this act of divine grace form a consistent set, something which executive rights in a state of nature do not do. The rule-utilitarian argument seeks to justify private rights on the grounds that they are the most advantageous set of overall limits on conduct. The empirical question cannot be examined, however, without also raising the question of enforcement. Given the “inconveniences” of private enforcement that Locke catalogues, Locke, *supra* note 6, at 368–71, the best overall rule cannot be one that generates rights that come into conflict in this way. Instead, the difficulties of private enforcement must enter into the evaluation of the consequences of any proposed set of rights. Here again, it seems that a right to a fair procedure would be the rule-utilitarian solution. The natural law arguments operate somewhat differently. In them, the root of the problem is clearest: if natural rights are to be a genuine alternative to divine right theories of government, they must begin with the idea that persons are free and equal—which is the very idea that the rights of different persons, both primary and executive, must form a consistent set.

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collective body, rather than to any one considered as an individual.⁶¹

I want to make this point by briefly considering the Lockean image of persons in a state of nature transferring their rights of private enforcement to the state in order to better secure the advantages that come from uniform and consistent enforcement. The core of Kant's argument is that the right to enforce rights cannot be enjoyed in a state of nature. The right that Locke imagines people trading away is one that can only be enjoyed through the rule of law.

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

The right to enforce is remedial: it addresses a private wrong in a way that is consistent with the underlying right. On Kant's analysis, private wrongdoing is always a matter of one person being subject to the choice of another. If I deprive you of means that are rightfully yours—perhaps I carelessly bump you, and injure your body, or damage your property—I have interfered with your right to be the one who determines how your means will be used, your right to continue having the means that you have. Because it is a right, it is only binding against other persons. You have no standing, as a matter of private right, to complain if a hailstone injures you or damages your property, because there is nobody for you to complain *about*.⁶² You have every right to complain—to me and *about* me—if I cause the same damage. In wronging you, I upset our respective independence from each other; the limits on our choice are no longer reciprocal, but subject to my unilateral choice. Your remedy against me is supposed to give you back what you were entitled to all along. From the point of view of our freedom, it is as though the wrong never happened, even though, from the point of view of my assets, it is as though I squandered them. Your right of

⁶¹ I am grateful to Jonathan Wolff for suggesting this way of making the point.

⁶² Unless someone breaches a contractual obligation to protect your property (for example, your car).

enforcement against me is a right to make me restore you to the position you would have had if I never wronged you. Your right survives my wrong in the form of a remedy; the remedy serves to undo the unilateral aspect of my deed.⁶³

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

In Kant's preferred vocabulary, rights are a matter of "freedom in accordance with universal laws."⁶⁴ In exactly the same way, enforcement must be done in a way that is consistent with freedom in accordance with universal laws. Private rights are presumptively enforceable, because any violation of them is inconsistent with equal freedom, and any enforcement of them merely repairs that inconsistency. But freedom must be repaired in a way that itself preserves equal freedom rather than subverting it.

Just as Kant's argument about private rights focuses on the formality of primary rights, so his argument about enforcement draws out the parallel formal difficulty of unilateral enforcement. He contends that rights can never be secure in a state of nature no matter how "law-abiding and good men might be" because the problem is with one person's entitlement to decide, not with the likelihood or consequences of abuse of that entitlement.⁶⁵ Private enforcement is not merely inconvenient: it is inconsistent with justice because it is ultimately the rule of the stronger.⁶⁶

⁶³ I explain this in more detail in *As If It Had Never Happened*, supra note 35, at 19–24.

⁶⁴ Kant, *Metaphysics of Morals*, supra note 9, at 25, 145–46.

⁶⁵ See id. at 90.

⁶⁶ The same point can be made about private rights of action: your primary right to be free of interference from others, and to have others satisfy their obligations to you, generates a remedial right to repair if others violate your rights. See Benjamin Zipursky, *The Philosophy of Private Law*, in *The Oxford Companion to Jurisprudence &*

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

If we are left to resolve our dispute on our own, one of us will probably be willing to back down, or perhaps we will reach some sort of compromise. The readiness to either back down or compromise reflects good sense on both of our parts, but it is also the rule of the stronger, because whether one of us will back down or we will compromise depends on who we find ourselves arguing against, not on our perception of the merits of the case. If I am big-

the *Philosophy of Law* 624, 643–44 (Jules Coleman & Scott Shapiro eds., 2002). Your right of action is consistent with the rights of others only if there is a fair procedure in place for determining the precise contours of your respective rights and the application of those contours to the concrete situation. If I do something that you think violates your rights and you exercise “self-help,” claiming one of my cattle or tearing down my fence, and I think I have done no wrong, or a lesser wrong, then things are likely to escalate, as I seek reparation for what I believe to be your wrong against me. Escalation is a symptom of the normative problem: if we both stand on what we take to be our rights, we stand in inconsistent places, and our conduct is not subject to reciprocal limits.

ger than you, you will have incentive to compromise, but then again, if I seem like a pushover, you will be less likely to do so.

Private enforcement by the person who happens to prevail might work to your advantage, either because you prevail, or the person who prevails agrees with you. But someone is always subject to someone else's choice, and who wins depends on factors that the loser should regard as arbitrary. Even if, acting in good faith, neither of us resorts to our threat advantage, charm, or stubbornness, the party who concedes a point in the face of disagreement does so in light of factors that he or she believes to be arbitrary in relation to the merits of the case. Our disagreement survives our separate articulations of what is relevant to the merits. Any grounds that one of us has for making a concession is strategic in the narrow sense that our acceptance of it depends upon something other than the perceived merits of the dispute. That arbitrariness means that the loser is subject to the winner's choice.⁶⁷ Perhaps neither of us

⁶⁷ Kant traces this problem and its solution to what he calls the innate "right of humanity" in your own person. Kant, *Metaphysics of Morals*, supra note 9, at 29. The right is innate because it does not require an affirmative act to establish it. It is at once the right to freedom and equality, that is, the right to only be bound by others in the same ways that they are bound by you and, at the same time, the right to be "beyond reproach." He makes the connection between the two in a surprising way: first, he says there is only one innate right. *Id.* at 30. He then goes on to insist that it "contains" the right to be beyond reproach. The containment follows from the plausible claim (for which Kant mounts an explicit defense) that rights are coercively enforceable. The *first* aspect of the innate right of humanity, the right to freedom consistent with the freedom of others, governs the basic norms of interaction. They must be norms of equal freedom, guaranteeing that no person is subject to another's choice. Kant's account of private right articulates the structure of independent interaction. The *second* aspect of the same innate right of humanity governs the enforcement of rights, via the application of those primary norms of conduct to particular cases. Just as each person's freedom needs to be limited by the freedom of others so as to form a consistent set, so too each person's right to enforce in case of disputes about rights needs to be part of a consistent set so that the remedial process for resolving disputes does not turn into the subjection of one person to another person's choice. Kant makes this point explicit when he notes that the right to be beyond reproach is the basis of the burden of proof: a person is entitled to be presumed to have done nothing wrong. *Id.* The burden of proof is often thought of as a pragmatic or administrative matter, through which institutions allocate burdens to make their tasks easier, or to discourage frivolous litigation. Kant offers a fundamentally different account: the burden of proof lies with the plaintiff because no person is allowed to exercise force against another person (or call on the state to do so) simply on his or her own say so. The same normative structure that gives rise to private rights thus gives rise to a right to fair procedures governing the application of those rights. Every aspect of remedial

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will back down and we will fight it out, introducing the right of the stronger in a more parochial sense.

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

The solution to this problem is the rule of law: impartial dispute resolution, subject to general rules that bind everyone. Impartiality is a requirement of a court, even though it is *not* a requirement of private parties towards each other. In setting and pursuing our own respective conceptions of the good, we do not need to treat our own purposes and those of others impartially. You are entitled to be partial to your own conception of the good and indifferent to mine. Impartiality matters *to a court* because its task is to resolve disputes in a way that is consistent with the freedom of the parties before it. When a plaintiff comes before a court, alleging that the defendant has wronged her, she demands a remedy to make good that wrong. The plaintiff is asking the court to grant her a remarkable power: the power to exact a claim against the defendant's resources, and thus to interrupt the defendant's power to use those resources as he or she sees fit. The grant of such a power can only be consistent with a defendant's freedom provided that the forum granting the power is suitably impartial.⁶⁸

rights is a right to a procedure, not forbearance on the part of others. If private wrongdoing is taking unfair advantage of others, then so is private enforcement.

⁶⁸The objection to private enforcement in a "state of nature" is that it subjects one person to the choice of another, so that whether your claim against me prevails depends upon how credible your powers of enforcement seemed to me or, if I am more fair-minded and our state of nature more Lockean, on how convincing I find your arguments. It might be thought that institutions solve this part of this problem, only to replace it with another. It may be that, if we have set up courts with honest and competent police powers to enforce their judgments, the success of your claim against me will not depend directly on our respective physical strength. It might be thought to depend upon how good an advocate you are, or how good an advocate you are able to hire, and so, ultimately, on how convincing the decisionmaker finds your argument as presented. Even if the force of argument is less violent than the argument of force, you might complain that the resolution of our dispute depends upon what the decisionmaker decides. The real world of legal procedure might erode your confidence

V. TWO KINDS OF DISPUTES

On the Kantian account, legal institutions provide publicity in two overlapping ways, reflecting the differences between two distinct types of disputes about private rights. In one class of cases, a court simply provides an impartial forum for a dispute that has a completely determinate answer at the level of private right. Sometimes, the defendant wins because the plaintiff has failed to state a cause of action: if everything happened just as the plaintiff contends it did, the plaintiff has failed to allege that the defendant violated any right of hers. When a stranger to a contract seeks consequential damages for the breach of that contract, there is no issue

further, because it is a familiar fact that procedure is expensive, and those with the money to delay proceedings can simply price their opponents out of the system. These are contemporary reminders of Locke's observation that:

Absolute Monarchs are but Men, and if Government is to be the Remedy of those Evils, which necessarily follow from Mens being Judges in their own Cases, and the State of Nature is therefore not to be endured, I desire to know what kind of Government that is, and how much better it is than the State of Nature.

See Locke, *supra* note 6, at 294. Locke's immediate concern is the power of an absolute monarch to be judge in his own case, a problem which can be solved through a separation of powers. The more general concern is that the decisionmaker will still have to decide somehow, possibly, so it might be feared, by bringing in irrelevant factors.

Nonetheless, the Kantian point here is not about the empirical dependence on a decisionmaker's decision. The problem is not that somebody decides, as if somehow in an ideal world, there would not be a human decisionmaker involved. The rule of law requires that someone decide in these cases, because there is *no* just answer without a determinative judgment. Nonetheless, the making of the judgment needs to be consistent with the freedom of all, which requires that the *authorization* to make the judgment must be in some important sense something that comes from everyone. This contrast is important even if the result in a case is exactly the same as would have occurred in the state of nature. Even if we have reason to suppose that its content would be exactly the same, it would issue from the wrong standpoint. The disappointed party could have only strategic or pragmatic reasons for accepting it. In a rightful condition, by contrast, the disappointed party would have a moral reason for accepting it, that is, that accepting the authority of the duly authorized courts and officials is the only way to reconcile his freedom with that of others. The notion of reconciling freedom at issue here is not empirical. It is not that he makes some calculation about the likelihood of favorable outcomes across time, in the way that Lockean persons are supposed to reason about exiting a state of nature. Instead, it is the only way in which the parties can enjoy their freedom together, and thus the only way in which the disappointed party can enjoy his or her freedom rightfully. The alternative is what Kant, following Rousseau, calls "wild, lawless freedom." See Kant, *Metaphysics of Morals*, *supra* note 9, at 93.

for a court to decide. Violating a right against one person does not, taken simply as such, engage the rights of third parties. Conversely, sometimes the existence of the wrong is beyond dispute, as when the defendant breaches the explicit terms of a contract, or trespasses against the plaintiff's person or property. Even in such cases, a public forum of dispute resolution is required in order for the rights in question to be enforceable. Absent such a forum, the plaintiff's avenue for self-help would be nothing more than a unilateral imposition of force.

There is another class of cases in which public institutions of justice are required. These are the cases in which positive law is required to fix the precise contours of private right. Such disputes are more familiar.⁶⁹ In them, the role of the legal system is to provide a common answer to disputes about private right, rather than to declare an antecedent answer.

Even the most straightforward disputes generate a problem of unilateral enforcement, however, because a juridical principle of private right is only as good as the objects to which it applies. If I complain about a wrong in relation to property, for example, I can only stand on my rights provided that I can establish secure title to the property in question. My title to what I have presupposes a resolution to both types of issues. Ownership requires some sort of affirmative act to establish it—I must acquire it from an unowned condition, or receive it from some other person or agency that has the right to give it to me. Whatever the requisite affirmative act might be, it is *my* act, and not yours. As *my* act, it may raise issues of determinacy: if I take possession of a piece of land, how much of it have I acquired? My physical movements do not dictate a single determinate answer.⁷⁰ Nor can my intentions. This brings us to the second difficulty. My unilateral act (or bilateral act of acquisition through contract) is supposed to bear on the rights of others, who

⁶⁹ I do not say that such disputes are more frequent because this would be very hard to know. If plaintiffs have competent legal counsel, cases in which plaintiffs fail to state a cause of action (i.e., cases in the former category) get litigated much less frequently.

⁷⁰ As Robert Nozick points out, “[b]uilding a fence around a territory presumably would make one the owner of only the fence (and the land immediately underneath it).” Robert Nozick, *Anarchy, State and Utopia* 174 (1974). Nozick considerably understates the difficulty: why the land under the fence, rather than under the posts? Why not just the posts? Why not the area *outside* the fence?

were not parties to it, by putting them under an obligation to refrain from using what is mine. At the heart of private right, however, is the principle that you can only be bound by a private transaction if you are a party to it—that is why you and I cannot get together to deprive a third person of her rights. If my claim to my property is supposed to apply to others, then there needs to be a public perspective from which the others are somehow party to my act of acquisition.

I want to illustrate the role of the legal system in demarcating private rights, and thereby making them into the system of reciprocal limits on freedom, by considering one of Kant's own examples: the law of adverse possession.⁷¹ The law of adverse possession is a familiar landmark in all legal systems descended from Roman law. It is also a standard puzzle for the theory of property. The dominant academic view is that its rationale lies in its incentive effects: land will go to a more productive use if subject to "the use it or lose it" rule.⁷² Such an explanation can be given either a utilitarian or a Lockean spin. Locke subjected property rights to the law of "waste" on the grounds that the earth was given to mankind for mankind's preservation. Land that was not used for purposes of self-preservation must become available for others to use it for their own self-preservation. The utilitarian tells the same basic story, but he emphasizes the more general idea of productive use rather than the particular use of self-preservation. Presumably, the utilitarian would also want those independent criteria to cover the prescriptive period, so as to better map on to the underlying purposes of self-preservation or productive use.

Neither the utilitarian nor the Lockean rationale fits the positive law of adverse possession. Under that law, a trespasser can become an owner without using the land productively, and an owner can retain rights against a trespasser merely by entering the land periodically, or even by licensing the trespasser, thereby depriving the latter of the claim to possess the land in a way that is hostile to the

⁷¹ Kant considers a series of further examples, including wills, contracts without consideration, contracts to lend an object, recovery of a stolen object, and conclusive presumptions of fact. In each case, Kant explains the role of determinate procedure in rendering individual rights systematically consistent. See Kant, *Metaphysics of Morals*, supra note 9, at 78–84.

⁷² See, e.g., Robert Cooter & Thomas Ulen, *Law and Economics* 155 (4th ed. 2003).

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owner's title to it. Most strikingly, the clock on possession runs when the trespasser first enters the land, not when the prior owner stops taking care of it. You can only claim "wasted" land by occupying it, and you can do the same even if it is not wasted. The owner can reclaim the land simply by returning before the prescriptive period has run, because you get no credit for the earlier period of disuse. It is open to either the utilitarian or the Lockean to claim that these features of the law are merely marks of administrative convenience, or to demand that the positive law be changed so as to conform better to their independent moral criteria.⁷³ It is not my purpose here to show that they cannot develop such an account,⁷⁴ but to lay out an alternative way of understanding why a system of equal freedom *must* allow the possibility that an act that is presumptively wrong can sometimes establish a right.

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

Kant's analysis shows the familiar legal doctrine to be a systematic requirement of private right: if rights are to form a single sys-

⁷³ Again, a libertarian might propose the abolition of the law of adverse possession on the grounds that a property right can only be extinguished through a voluntary act of the owner. See generally Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 Wash. U. L.Q. 667 (1986).

⁷⁴ It is worth noting, however, that the idea that the positive law *must be* purely accidental from the point of view of morality reflects the more general bias of both Lockean and utilitarians. They exclude the possibility that any part of morality requires law *as such*, allowing it instead only indirectly because of human foibles and frailties. Both view law as at best an empirically effective tool for realizing values that might, in happier circumstances, have been realized differently.

tem of reciprocal limits on freedom, the law must enforce closure on disputes about title. A system of adverse possession can do so in a way that a system of title registration could not. Without the doctrine of adverse possession, any such system would be vulnerable to claims about ownership prior to the introduction of the registry. A registry cannot impose closure with respect to such claims—but that is just Kant's point.

All of the familiar features of the doctrine of adverse possession follow from this rule: the ways in which owner and trespasser use the land are irrelevant; the prescriptive period begins when the trespasser enters the land; the trespasser's use must be hostile to the owner's claim; and when the period expires, the person who was to all appearances a trespasser turns out to have been the owner from the moment he or she entered the land. These are not introduced on the basis of instrumental considerations about what would best achieve closure. Instead, they are expressions of the idea that systemic closure with respect to title requires closure with respect to the possible grounds of proof of title. That is just another manifestation of the more general requirement that procedures for fixing rights be public, not private.

The one thing the need for closure does not fix is the length of the prescriptive period. So, even if everyone in an imagined "state of nature" could see its importance, they would have no basis for agreement on it. Or rather, any basis for agreement, including epistemic salience, or conventional understanding, would only be accepted on strategic or prudential grounds,⁷⁵ and so would be an acknowledgement of the costs of conflict, and thus of the right of the stronger. Only a lawmaking institution can provide an answer with a claim to being more than strategic (even if people ultimately comply with it purely on instrumental grounds, they are complying with something that is consistent with equal freedom). Whatever length of time the institution selects will be consistent with reciprocal limits on freedom. But it needs to choose one, because failing to do so would leave rights indeterminate.

⁷⁵ On the role of salience in generating conventional understandings, see David Gauthier, *David Hume: Contractarian*, 88 *Phil. Rev.* 3, 5–7 (1979). Unsurprisingly, Gauthier explicitly represents the acceptance of the rules of justice as purely strategic.

Thus, the Kantian account avoids the familiar charge that natural law theories of property negate all current holdings because a single illicit transaction in the chain of owners undermines the legitimacy of all subsequent transactions.⁷⁶ The Kantian account shows that the possibility of secure title is a precondition of the systematic enjoyment of property rights. It also bridges the gap between the views that property is pre-institutional or post-institutional by showing the sense in which it is both. The possibility of people having external powers subject to their choice is a basic structure of free interaction. It can only be secured, and so only realized consistent with the freedom of all, through institutions.

These remarks about private enforcement do more than show difficulties in the Lockean argument. They also show that the use of force is only legitimate provided that it issues from a public perspective, so that it is not simply the exercise of one person's power over another. Instead, it needs to be in accordance with law and procedures.

The need for procedure underwrites the existence of a public perspective, distinct from the perspective of private persons, but consistent with the integrity of their separate standpoints. Public institutions to make, apply, and enforce law need to have powers that no private person could have; this distinctively public character makes the use of force consistent with equal freedom. Anything else would be a merely unilateral use of force.⁷⁷

⁷⁶ Robert Nozick, a leading defender of a Lockean account, concedes that he knows of no "thorough or theoretically sophisticated treatment of such issues." Nozick, *supra* note 70, at 152.

⁷⁷ Public institutions of dispute resolution can be thought of as the solution to a certain kind of abstract coordination problem: everyone needs to arrive at a single determinate answer. But the argument to show that they are legitimate does not presuppose any more general claims about the legitimate enforcement of solutions to coordination problems. In particular, the fact that something could be done much more efficiently if people were to coordinate does not show that someone has standing to force others to participate in the system of coordination. The enforcement of private rights is a special case, precisely because the non-voluntary nature of the public institutions is consistent with the freedom that will result because such enforcement secures the freedom of all, by providing public fora to reconcile conflicting freedoms. Other coordination problems are a problem from the standpoint of particular desires particular people happen to have, and so are not binding on those who lack the desires. Freedom is binding on all. (Of course, once a state is in place, it also has standing to solve some coordination problems.)

Recall my earlier example of a good faith dispute about rights, in which I offered inconsistent, though not unreasonable, applications of the relevant principles to agreed facts.⁷⁸ I suggested that there is a perspective from which our competing positions were equally good, but that there was no basis for either of us to occupy that perspective, since it had no claim to superiority over our separate perspectives. The public standpoint is a perspective that can claim superiority. If there is a way in which procedures and institutions can decide to act on behalf of everyone, then the fact that the public institution has selected one or the other of our competing answers provides us with a reason to accept that, namely that its interpretation of how the law applies to the agreed facts is not just yours or mine, but ours.⁷⁹

Kant borrows Rousseau's vocabulary of a social contract and a "general will" to describe the nature of the public perspective. The contract metaphor is potentially misleading, because it might seem to suggest that the people transfer something that they already fully possessed in order to gain some benefit. For Kant, the whole point of the united will is to make it possible for people to have things conclusively at all, in a way that is consistent with others having the same rights. So there is nothing that they have that they then transfer away. Entering what Kant calls "a civil condition"⁸⁰ is not a private transaction at all, but a public one that makes private transactions enforceable. It is an act of what Rawls describes as

⁷⁸ See supra note 67 and accompanying text.

⁷⁹ Dan Markovits has reminded me that the need for a shared standpoint could at least sometimes be solved through our joint selection of a third person as arbitrator, in particular, through our precommitment to such arbitration, a familiar feature of transnational contracting by large corporations. With respect to a particular contractual dispute, this solution is unobjectionable, or rather, only objectionable if, as might be the case, there could be a question about whether a particular dispute fell within the confines of the arbitration clause in question. That, of course, gets us back to the issue of closure. But the issue of closure presents itself even more robustly with respect to property. As a matter of the positive law of every modern nation, including, strikingly, even the former Soviet Union, property rights are rights as against all other private persons. See Anthony M. Honoré, *Ownership*, in *Oxford Essays on Jurisprudence* 107, 112 (Anthony G. Guest ed., 1961). Not all such systems meet the demands of justice, but the general point still applies to them: procedures for demarcating proprietary claims must be shared as between all of the people that they purport to bind. Thus a broader "omnilateral" basis is required to justify their enforcement.

⁸⁰ Kant, *Metaphysics of Morals*, supra note 9, at 89.

“the citizens as a collective body”⁸¹ that makes private transactions enforceable. That is why it is a mandatory form of cooperation: unlike a binding legal contract, nobody is entitled to refuse to be bound, because that would subject others to his unilateral choice.

VI. PUBLIC RIGHT

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

Even if the public realm is distinctive in this way, it might be wondered whether it provides merely a conceptual victory against the libertarian. After all, the rationale for public institutions is precisely to preserve, or perhaps complete, a system of private rights by making them enforceable. As such, the Kantian argument might seem insufficient to gain the familiar powers that states claim. I now want to argue, however, that it does. This is not the place to consider the Kantian argument for “republican government” and a separation of powers between the legislature, executive, and judiciary, or his account of the power to regulate commerce and land. Those central aspects of the modern state are peripheral to the main themes of contemporary political philosophy, and I will not attempt to reintroduce them here. I will focus instead on the division of responsibility, that is, the relation between the nature of a public standpoint and the responsibility of the “citizens as a collective body,” acting through the state, to provide citizens with adequate resources and opportunities.

My argument once again draws on Kant. Kant argues that provision for the poor follows directly from the very idea of a united will. He remarks that the idea of a united law-giving will requires that citizens regard the state as existing “in perpetuity.” By this, he does not mean to impose an absurd requirement that people live forever, but rather that the basis of the state’s unity—the ability of the state to speak and act for everyone—survives changes in its membership. You are the same person you were a year ago because your same principle of organization has stayed the same

⁸¹ Rawls, *Social Unity*, supra note 10, at 170.

through changes in the matter making you up;⁸² a flame preserves its form as matter and energy pass through it. In the same way, the state must sustain its basic principle of organization through time, even as some members die or move away and new ones are born or move in. Otherwise, any use of force that it made would be unilateral action on the part of those who were there first. The alternative is to have a self-sustaining system that guarantees that all citizens stand in the right relation to each other—in particular, that they do not stand in any relation inconsistent with their sharing a united will.

The most obvious way in which people could fail to share such a will is through relations of private dependence. Kant's own example remains sadly relevant: poverty. Kant does not analyze the problem of poverty through the category of need, but rather through that of dependence. The problem of poverty, on Kant's analysis, is that the poor are completely subject to the choice of those in more fortunate circumstances. Although Kant does not deny that there is an ethical duty to give to charity,⁸³ he argues that dependence on private charity is inconsistent with the united will that is required for people to live together in a rightful condition. The difficulty is that the poor are subject to the choices of those who have more: the affluent are entitled to use their powers as they see fit, and so their decisions on whether to give to those in need, or how much to give, or to whom to give, is entirely discretionary.⁸⁴ Kant's argument is that such discretion is inconsistent with people

⁸² In the *Critique of Pure Reason*, Kant introduces what he calls "Ideas of Reason" through the example of a republican constitution. Ideas of reason are not given an experience, and no experience can be fully adequate to them, but they nonetheless organize our thinking about experience. Kant, *supra* note 4, at 396–97. His other examples of Ideas of Reason include plants and animals, that is, living things that are subject to a principle of organization that survives changes in their matter, and to which no particular example will be entirely adequate. *Id.* at 397–98. Horses have four legs, even if some particular horse loses one or more of those legs, and the female mayfly lays thousands of eggs even though most female mayflies never survive to reproduce. The formal principle governs the empirical particulars.

⁸³ Immanuel Kant, *Groundwork for the Metaphysics of Morals* 224 (Thomas E. Hill, Jr. & Arnulf Zweig eds., Arnulf Zweig trans., Oxford Univ. Press 2002) (1785)

⁸⁴ That is why Kant describes the duty to give to charity as an "imperfect" duty: although you have an obligation to make meeting the needs of others one of your ends, it is up to you to decide which people, which needs, and to what extent you will meet them.

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sharing a united will. This claim echoes Rousseau's argument in *The Social Contract* that extremes of poverty and wealth are inconsistent with people acting together to give laws to themselves.⁸⁵ Where Rousseau might be taken to be making a factual claim about political sociology, Kant's claim is normative: a social world in which one person has the power of life and death over another is inconsistent with a united will, no matter how the first came to have that power over the second.

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

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

This argument for economic redistribution is *internal* to the idea that disputes must be resolved through public procedures that can be accepted by all. The public nature of dispute resolution is both the source of the problem and its solution. Absent institutions of public justice, the rich person's claim to exclude the poor one from

⁸⁵ Jean Jacques Rousseau, *The Social Contract* 46–48 (Charles Frankel ed., Hafner Publ'g Co. 1947) (1762).

his or her property would just be a unilateral imposition of force. Those who have property have the right to exclude others, provided that their holdings of property are consistent with a united general will shared by all, that the system of private rights really is part of a system of equal independence of free persons. Where that system turns into a system of dependence, it loses its public character. So, to preserve the public character, it must be subject to limits that make its enforcement consistent with equal freedom.

The Kantian argument is formal and procedural rather than substantive. In particular, it does not specify the *level* of social provision, whether it covers merely biological needs, or if it extends to the preconditions of full citizenship. Nor does it provide a detailed analysis of the nature of wrongful dependence: whether, for example, severe inequalities of bargaining power between employers and workers could qualify as forms of dependence. Although Kant focuses on the example of support for the poor, the force of his argument is concerned with the structure of the general will. As a result, it requires actual institutions to give effect to it—to set appropriate levels and mechanisms of aid, and introduce forms of regulation where necessary. As a philosophical account, it is supposed to show what means are available to the state, consistent with the freedom of all; it is not supposed to micromanage social policy. Just as questions about the limitations period for adverse possession or the standard of care in the law of negligence can only be answered through the exercise of determinative judgment by a properly constituted public authority, so too can these questions only be so answered. The requirements of a general will constrain the form of possible answers, but not their substance. Any answers need to be consistent with equal freedom, so they cannot introduce mandatory forms of cooperation merely on the grounds that they will produce an aggregate increase in welfare. Nor can they use private rights as a bulwark against the claims of the general will. But, within the appropriate structure, the answers must be imposed by the people themselves.

Just as it echoes Rousseau, the Kantian argument foreshadows Rawls: redistribution is a precondition of the citizens as a collective body, placing themselves under coercive laws consistent with the freedom of all. The Kantian argument is not the precise argument Rawls makes, but, like Rawls's argument, it is political rather than

metaphysical. It addresses the question of economic redistribution in the terms that the question presents itself: by what right does the state forcibly claim things from some people and transfer them to others, given that the state enforces those claims to those things? The answer is entirely in terms of the legitimate use of force and the distinctively public nature of the state. Both focus on the special responsibility that each citizen has for his or her own life, and each citizen's entitlement to exercise it through interaction with other private citizens and associations, and on the coercive structure of the state. The citizens as a collective body must guarantee adequate resources and opportunities to all, in order to fulfill the state's claim to secure each person in his or her private claims as against other private persons, in a way consistent with the freedom and equality of all.

This twin focus on public right and the use of force distances the Kantian argument from more familiar contemporary approaches to economic redistribution. One familiar argument defends redistributive taxation on the grounds that wealth is a social product, rather than an individual one.⁸⁶ As a result, society as a whole is said to have a claim on the social product, having generated it. This view incorporates a social version of the Lockean idea that a person's claim to an object depends upon the toil he or she has exerted in creating or acquiring it. Rather than saying that you own this apple because you have picked it off the tree through the sweat of your brow, we say instead that we, as society, own everything be-

⁸⁶ See Murphy & Nagel, *supra* note 3, at 32–33:

There is no market without government and no government without taxes; and what type of market there is depends on laws and policy decisions that government must make. In the absence of a legal system supported by taxes, there couldn't be money, banks, corporations, stock exchanges, patents, or a modern market economy—none of the institutions that make possible the existence of almost all contemporary forms of income and wealth.

It is therefore logically impossible that people should have any kind of entitlement to all their pretax income. All they can be entitled to is what they would be left with after taxes under a legitimate system, supported by legitimate taxation—and this shows that we cannot evaluate the legitimacy of taxes by reference to pretax income.

They continue: "Property rights are the product of a set of laws and conventions, of which the tax system forms a part." *Id.* at 74. As a *reductio ad absurdum* of the Lockean claim that entitlement follows causation, such an argument is beyond reproach. The proper way to repair the failings of the Lockean argument is to reject the idea that rights are grounded in the causation of valuable object.

cause we have produced it. It is also like the Lockean position in that it supposes that *society* acquires a sort of absolute dominion over the things *it* has produced.

The Kantian approach must reject such an argument, both because it seeks to establish a right of ownership on the basis of effort expended, rather than a system of equal freedom, and, more significantly, because it treats the state as a private party, free to dispose of its assets as it sees fit. This not only generates some doubt about the specific claim to use that wealth to achieve a just distribution—if the state has a claim on wealth because it produced it, it might just as well use it for some *other* publicly selected purpose, instead of for redistribution. This state's claim to redistribute does not come from the fact that all property belongs to it to begin with, but rather from the fact that the right to exclude generates potential relations of dependence, which are inconsistent with the existence of a united general will. Put in Rawls's preferred vocabulary, the right to participate in a system of enforceable private transactions must work to the advantage of all, in order for the citizens considered as a collective body to enforce the private claims of individual citizens against each other.

Its emphasis on the public nature of the united general will also distances the Kantian account of economic redistribution from the "luck-egalitarian" position that has been prominent in recent philosophy. For luck-egalitarians, justice requires the elimination of the effects of luck. People can be made to bear the costs of their choices, but not of their unchosen circumstances, whether social or natural. Expensive needs must be met, but expensive tastes are, according to this view, the responsibility of the people who choose to develop them.⁸⁷

From a Kantian standpoint, the fundamental difficulty with luck-egalitarianism is not the implausible implications that many people have pointed to,⁸⁸ but its inadequate conception of political soci-

⁸⁷ See Will Kymlicka, *Contemporary Political Philosophy: An Introduction* 75 (1990); Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 *Phil. Stud.* 77, 79 (1989); G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 *Ethics* 906, 923 (1989).

⁸⁸ See Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *Ethics* 287, 288–89 (1999); Samuel Scheffler, *What is Egalitarianism?*, 31 *Phil. & Pub. Aff.* 5, 5–6 (2003); Jonathan Wolff, *Fairness, Respect, and the Egalitarian Ethos*, 27 *Phil. & Pub. Aff.* 97, 113–15 (1998).

ety.⁸⁹ For the luck-egalitarian, society's basic moral purpose is to eliminate chance from the world. It conceives of people primarily as recipients of the just society and sees the state as just one of several agents that might contribute to this endeavour.⁹⁰ Individuals and institutions alike are supposed to contribute to this end. The Kantian approach, with its focus on the general will, regards people as the authors of the laws that bind them. That is what it means for the standpoint to be public: the use of force is always legitimated by the fact that everyone has authorized it together, so that in using force, the state acts on behalf of everyone. A public version of the familiar distinction between nonfeasance and misfeasance applies to its acts: as authors of the laws, citizens are responsible for what the state does, but not for what merely happens. As always, the contrast turns on the means available to society as a whole in pursuing its public purposes.⁹¹

⁸⁹ Perhaps the luck-egalitarian position can be developed in a different direction, as suggested by Daniel Markovits, *How Much Redistribution Should There Be?*, 112 *Yale L.J.* 2291, 2298–99, 2323 (2003) (rejecting the notion that one can simultaneously secure the non-subordination of people as free choosers rather than as recipients of luck, and arguing that the former is preferable to the latter). My remarks here focus only on the main thrust of luck-egalitarian writing.

⁹⁰ See G. A. Cohen, *If You're an Egalitarian, How Come You're So Rich?* 3–6 (2000).

⁹¹ The Kantian focus on the unavailability of certain means, which I claim animates Rawls's understanding of the sense of justice, is a central feature of constitutional jurisprudence in many modern democracies. Consider the remarks by President Aharon Barak of the Israel Supreme Court in a decision involving the legality of interrogation practices:

We are aware that this decision does not make it easier to deal with [the] reality [of fighting terrorism]. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.

HCJ 5100/94 *Pub. Comm. Against Torture in Israel v. Gov't of Israel* [1999] *IsrSC* 53(4) 817, 845. President Barak's comments were endorsed by Justices Iacobucci and Arbour of the Supreme Court of Canada in *Application Under Section 83.28 of the Criminal Code (Re)*, [2004] 2 *S.C.R.* 248. They have also been endorsed in speeches by leading constitutional jurists, including by Justice Ruth Bader Ginsburg, *A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication*, Address at the Annual Meeting of the American Society of International Law (Apr. 1, 2005), <http://www.asil.org/events/AM05/ginsburg050401.html>, and by the English Law Lord Johan Steyn, *Guantanamo Bay:*

The same distinction between nonfeasance and misfeasance applies to the contract argument at the level of public right. People choosing institutions are concerned with protecting their own rightful honor, or, in Rawls's vocabulary, their two moral powers. As such, they will not trade away their independence so as to better advance their own interests. Rather, they will set up institutions so as to prevent natural inequalities from generating social domination. Relations of dependence that arise as a result of the coercive structure of society pose a special problem for the general will, precisely because they implicate the general will's own creation of the right to exclude. They bring the general will into potential tension with itself, and so they must be addressed. Natural inequalities and unchosen circumstances, simply as such, are not public acts and so generate no such tension. They may result in relations of dependence, but if they do, it is the relations of dependence that are the problem, not their source.⁹²

The Legal Black Hole, 53 *Int'l & Comp. L.Q.* 1, 15 (2004). Similar concerns arise in the recent decision by the German constitutional court voiding § 14.3 of the Aviation Security Act, governing the authorization to shoot down hijacked civilian aircraft to prevent them from "doing further damage." See Bundesverfassungsgericht [BVerfG] [federal constitutional court] Feb. 15, 2006, 1 BvR 357/05, (F.R.G.), available at http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html. The court's rationale was that:

Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.

Id.

⁹² In two recent influential articles, Thomas Pogge has argued that the Rawlsian social contract collapses into a form of consequentialism, because the parties in the original position are simply concerned to advance their own interests, and regard themselves only as recipients of the principles of political order, rather than authors. See Thomas Pogge, *Equal Liberty for All?*, 28 *Midwest Stud. in Phil.* 266, 271–73 (2004); Thomas W. Pogge, *Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions*, 12 *Soc. Phil. & Pol'y* 241, 243–44 (1995) [hereinafter Pogge, *Three Problems*]. On the Kantian reading of Rawls defended here, the charge has no purchase, because the entire point of the social contract is to guarantee that the citizens are the authors of the laws that bind them, so that the use of force is consistent with their freedom and equality. They could not authorize a system in which people were held accountable for things they had not done. Nor could they accept draconian punishments on the basis of their expected advantages in fighting crime. As always, certain means are unavailable. Instead, they would choose the insti-

Luck egalitarians have criticized Rawls for his focus on socially generated inequalities, but the Kantian account reveals that Rawls has the better of the argument. Rawls insists that the basic structure must not magnify the effects of natural inequalities, not that it must eliminate them.⁹³ In its most abstract formulation, the difference principle requires that the legal and political institutions not compromise the ability of citizens to exercise their two moral powers, so that the existence of social cooperation works to the benefit of all.⁹⁴ That is a distinctive way of developing Kant's basic insight: the enforcement of rights is justified because it alone makes it possible for a plurality of persons to realize their freedom together, but such enforcement must realize the freedom of everyone. For both Kant and Rawls, the coercive structure of society is the basic subject of political philosophy because it implicates independence as nothing else does, and coercion is only legitimate if it does not create relations of dependence.

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

tutions that place the burden of proof on the state, and guarantee that coercive action is a response to individual responsibility.

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

⁹³ Rawls, *Theory of Justice*, supra note 1, at 74.

⁹⁴ It is worth remembering that Rawls introduces the difference principle through a discussion of offices within social institutions, rather than in relation to wealth, considered as such. See John Rawls, *Justice as Fairness*, in *Collected Papers*, supra note 19, at 47, 50.

CONCLUSION

I want to close by touching on one other issue that has been prominent in contemporary political philosophy: the dispute about whether individuals and institutions are subject to the same normative principles. Throughout his career, John Rawls argued that individuals have a duty to create just institutions, and denied that they owe each other direct duties to realize the difference principle.⁹⁵ Critics of this view, most prominently, G.A. Cohen⁹⁶ and Liam Murphy,⁹⁷ have assailed Rawls for this “dualism” and argued that private persons are under the same duties of justice as social institutions are. Cohen connects this point to a claim about the relative insignificance of the coercive structure of society, emphasizing the importance of the social ethos in determining both the sizes of social shares and the relative life prospects of different persons in a society. Both Cohen and Murphy assail dualism from a progressive and redistributive perspective, but the same arguments might just as easily be found in the hands of libertarians, who share their belief that the social institutions can only be assessed in terms of their efficacy in achieving moral outcomes that could, in principle, be realized without them. This assumption that morality is complete without any institutions, and that the state and law enter merely as instruments, enters both libertarian and egalitarian thought as an undefended and, indeed, unexamined assumption. The division of responsibility shows how just institutions, both public and private, enable free persons to be independent together.

⁹⁵ See Rawls, *Theory of Justice*, supra note 1, at 53–54; Rawls, *Basic Structure as Subject*, supra note 21, at 283.

⁹⁶ See Cohen, supra note 90, at 6.

⁹⁷ Liam B. Murphy, *Institutions and the Demands of Justice*, 27 *Phil. & Pub. Aff.* 251, 254–55 (1998).