Private Law, Public Right and the Duty to Rescue

by

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Abstract

This thesis explores the normative framework of private law from the standpoint of corrective justice. After identifying problems in the classic model of Kantian corrective justice, it argues that these difficulties can be remedied by modifying the reliance of corrective justice upon Kantian legal philosophy. Further, by returning to an equality-based approach grounded in Aristotle's principle of corrective justice, this thesis indicates the appropriate method for situating private law within a public realm. Finally, through a careful reanalysis of legal personality under corrective justice, this thesis sets the conceptual basis for the imposition of a limited duty of easy rescue.

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Table of Contents

Chapter 1
Introduction

1.1 Private Law Theory

Private Law is a central area of law and life. Its subject areas – contract, tort, property and unjust enrichment – comprise much of the curriculum of a first-year law student, and for good reason. The student encounters these subjects and finds issues fundamental to and familiar from daily life: When, if ever, must promises be kept and what consequences should follow for their breach? What standard ought to determine liability for damaging another person or their property? How are property rights acquired and what constitutes a transfer? How are boundary lines between bickering neighbours to be settled? What recourse is available for a mistaken, but voluntary, transfer of funds?

These questions are fundamental and familiar because they arise whenever and wherever humans gather to live and interact with each other. Even prior to conceiving of a state or recognizing a government's laws, communities would inevitably run up against these difficulties and struggle for an answer. Against the disorder and confusion, people would seek some solution, some mode of ordering their daily lives.

Private law, to the extent that it fulfills its ambition, is the solution. Arising from intrinsically human problems, it should not be surprising if private law engages with basic features of society and human nature. Of course, private law does not exist in a vacuum or a theoretical state-of-nature. Ultimately, it must account for the civil union and the presence of a

government's laws. Nonetheless, a state-of-nature may illuminate an analysis by providing a pure space of human interaction where these controversies first arose.[1]

Although "fined and refined by an infinite number of Grave and Learned men,"[2] private law has not been uncontested. Private law theory – the field explaining the framework that underlies the doctrines of private law – burst onto the scene in the 1970s and continues to interest scholars, inspire debates and influence courts.[3] Prior to the 1970s, private law (and law in general) had moved through various theoretical conceptions – such as positivism and realism – but the 1970s found private law at the center of a new debate.

The clash that embroiled private law extended a debate that John Rawls had recently revived in political and moral philosophy between consequentialists and moralists.[4] Prior to Rawls, consequentialism in the form of utilitarianism was the predominant systematic theory of modern moral philosophy.[5] As Rawls observed, an ethical theory is largely defined by how it connects the right and the good.[6] Utilitarianism proceeded by first specifying the good

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[1] The statement of Robert Nozick about political theory is equally insightful about private law:

> "State-of-nature explanations of the political realm are fundamental … even if incorrect. We learn much by seeing how the state could have arisen, even if it didn't arise that way. If it didn't arise that way, we also would learn much by determining why it didn't; by trying to explain why the particular bit of the real world that diverges from the state-of-nature model is as it is."

Robert Nozick, *Anarchy, State and Utopia* (NY: Basic Books, Inc., 1974) at 7.

[2] Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* ed. Joseph Cropsey (Chicago: University of Chicago Press, 1971) at 55.

[3] For a brief review of the continued relevance of private law theory, see Peter Cane, "The Anatomy of Private Law Theory: A 25th Anniversary Essay" (2005) Oxford J of Legal Stud 25 [Cane, "Anatomy of Private Law"].

[4] Ernest Weinrib, *The Idea of Private Law* 2nd ed. (Oxford: Oxford University Press, 2012) at ix [Weinrib, *Private Law* 2nd ed.]. For further discussion of the influence of Rawls on private law, see Benjamin C. Zipursky, "Rawls in Tort Theory: Themes and Counter-Themes" (2004) 72 Fordham L Rev 1923 at 1930-1931.

[5] John Rawls, *A Theory of Justice, Revised Edition* (Cambridge, MA: Harvard University Press, 1999) at xvii [Rawls, *Theory*].

[6] *Ibid* at 21.

independently of the right and then defining the right as the maximization of that good.[7] Further, Rawls noted the failure of utilitarianism to respect the separateness of individuals. By maximizing the net balance at the expense of individual losses, Rawls wrote that utilitarianism failed to "take seriously the distinction between persons."[8]

In advancing his theory of "justice as fairness," Rawls sought to provide an alternative to utilitarianism. Proposing an abstract version of social contract theory, Rawls reversed the two characteristics of utilitarianism.[9] Because Rawls ignored specific conceptions of the good and only allowed for a general and abstract conception to be salient in his theory, Rawls prioritized the right over the good.[10] Further, by identifying a procedure whereby each individual agrees on the principles of justice, Rawls defined the right without sacrificing the separateness of individuals.

The private law controversy followed similar themes. On one side, the consequentialists produced pioneering work explaining law as a creature of economics, existing to maximize efficiency or wealth.[11] Like their predecessors, they saw Right as the maximizer of a previously determined good and focused on the overall benefits at the expense of costs to individuals.[12] On the other side, moralists and rights-theorists claimed that law promoted values such as morality,

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[7] *Ibid* at 22.

[8] *Ibid* at 24.

[9] *Ibid* at xviii.

[10] *Ibid* at 22.

[11] Weinrib, *Private Law* 2nd Ed., *supra* note 4 at ix.

[12] For an argument attempting to distinguish economic analysis of law from utilitarianism, see Richard A. Posner, "Utilitarianism, Economics, and Legal Theory," (1979) 8 J of Legal Stud 103. For a rebuttal, see Ernest J. Weinrib, "Utilitarianism, Economics, and Legal Theory," (1980) 30 UTLJ 307.

fairness, liberty and equality.[13] Though these theorists battled each other on the ground of tort law, their arguments embraced the wider field of private law.

Rights-theorists occasionally invoked corrective justice in their battle against consequentialist thinking. As Professor George Fletcher lamented in a well-known 1972 article, the "fashionable questions of the time are instrumental."[14] He observed that, in the traditional view of the history of tort law, the law was torn between two opposing regimes: strict and fault-based liability.[15] Fletcher disagreed. He argued that strict and fault-based liability were not mutually exclusive but represented a unified vision of tort law.[16] The struggle in tort law, in his view, was instead between two radically different paradigms of liability: reasonable and reciprocity.[17]

Fletcher described the paradigm of reasonableness as unapologetically instrumental.[18] Its paradigm justifies the distributions of burdens in a legal system by testing if the distribution optimizes the interests of the community.[19] Under this paradigm, the community's welfare functions as the only criterion for determining the contours of reasonable conduct.[20] Consequently, determination of liability collapses into a single test of reasonableness, calculated by balancing the costs and benefits to society: results of net social disutility attract liability, while

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[13] Weinrib, *Private Law* 2nd Ed., *supra* note 4 at ix.

[14] George P. Fletcher, "Fairness and Utility in Tort Theory" (1972) 85 Harv L Rev 537 at 538 [Fletcher, "Fairness and Utility"].

[15] *Ibid* at 539.

[16] *Ibid* at 549.

[17] *Ibid* at 540.

[18] *Ibid* at 542.

[19] *Ibid* at 569

[20] *Ibid*.

outcomes of net social utility preclude liability.[21] The premise of this paradigm is that net social utility ought to be encouraged and that tort judgments are an appropriate medium for encouraging them.[22]

By contrast, the paradigm of reciprocity resolves disputes by looking only to the litigants before the court.[23] Instead of the single social calculation at the heart of the paradigm of reasonableness, the paradigm of reciprocity utilizes a two-stage analysis to determine liability: it asks, first, whether the victim is entitled to recover damages and, second, whether the defendant ought to be the one to pay them.[24] According to Fletcher, the question in the first stage turns on asking whether the defendant exposed the plaintiff to a nonreciprocal risk. A nonreciprocal risk can be found either in the category of the plaintiff's activity (i.e. strict liability) or in the manner in which the activity was performed (i.e. negligence).[25] A finding of a nonreciprocal risk indicates that the defendant has been singled out from the normal reciprocal risks of life and is therefore entitled to recover damages. The second stage of the analysis asks whether the plaintiff ought to pay those damages or can be excused due to personal mitigating factors.[26] Liability under this paradigm results from the defendant's *unexcused* imposition of a *nonreciprocal* risk upon the plaintiff.

The radical difference between the two paradigms lies in their formal features. The paradigm of reasonableness assesses the litigation between two private parties within the wider

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[21] *Ibid*.

[22] *Ibid* at 543.

[23] *Ibid* at 540.

[24] *Ibid*.

[25] *Ibid* at 548.

[26] *Ibid* at 551.

society in which it occurs. It looks past the two parties before the court and adopts a social lens to assess the conflict between the two litigants. By contrast, the paradigm of reciprocity operates with an assumption that the judgment of a private litigation should be confined to the private relationship before the court. The broader social effects are ignored and the case is decided by the relationship between the two parties (i.e. whether their risks are reciprocal) and personal features of the case (i.e. whether the defendant's conduct was excused). Through this fundamental distinction between bilateral and social paradigms, Fletcher's article can be seen as prefiguring in a general way – that is, without the form of correlativity and the substance of Kant – Weinrib's theory of private law.

1.2 Weinrib's Theory of Private Law

Although other leading tort theorists (e.g., Richard Epstein,[27] Jules Coleman[28]) also developed accounts in which corrective justice had a central role, the most ambitious and pure articulation of corrective justice was developed by Professor Ernest Weinrib in the 1980s. His version of corrective justice – Kantian corrective justice – is ostensibly the purest because it

[27] See, for example, Richard A. Epstein, "Defenses and Subsequent Pleas in a System of Strict Liability" (1974) 3 J Legal Stud 165.

[28] See, for example, Jules L. Coleman, "Justice and the Argument for No-Fault," (1974) 3 Soc Theory & Practice 161. For a general survey of corrective justice approaches and a response from an economic theorist, see Richard A. Posner, "The Concept of Corrective Justice in Recent Theories of Tort Law" (1981) 10 J Legal Stud 187.

maintains the separation between corrective and distributive justice most severely,[29] and it is the most ambitious in virtue of its claims about the inner intelligibility of law.

Weinrib's originality did not rest in his use of corrective justice or his employment of Kantian ideas. Just as some early private law theorists appealed to corrective justice, others similarly utilized Kant's categorical determinations of right in their battle against consequentialism. Charles Fried, for example, endeavored in a well-known book to establish the basis of contractual obligation in Kantian moral norms of individual autonomy and trust.[30] According to Fried, a promise is enforceable because of the "promise principle," which states that the promisor is morally obligated to fulfill the promise that intentionally invoked the promisee's trust in performance.[31] Breach of contract abuses the promisee's confidence and therefore violates "Kantian principles of trust and respect."[32]

Weinrib's approach differed in a few significant ways from these earlier theorists. These differences all originated in a novel methodology that began with structure instead of substance.[33] Weinrib recognized that the debating scholars did not begin their analysis by inspecting law for its own intelligibility but instead devised an ideal, external goal and sought to impose it on private law.[34] For Weinrib, this method fails to explain law because it approaches it from the outside. An external perspective does not illuminate law but rather converts it into

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[29] Ariel Porat, "Questioning the Idea of Correlativity in Weinrib's Theory of Corrective Justice" (2001) 2 Theoretical Inquiries in Law 161 at 161.

[30] Charles Fried, *Contract as Promise* (Cambridge: Harvard University Press, 1982) at 14-17.

[31] *Ibid* at 16.

[32] *Ibid* at 17.

[33] Weinrib, *Private Law* 2nd ed., *supra* note 4 at x.

[34] *Ibid*.

foreign terms. It thereby constitutes a perversion rather than a clarification of law. Instead of making a prior commitment to an external goal, Weinrib claimed that law must be taken on its own terms. It must be understood as its own intelligible mode of ordering interaction.[35] His approach therefore began by investigating the structure and intelligibility inherent in private law.[36]

This methodological difference produced further marks that distinguished his approach. First, because he was focused on the internal structure and intelligibility of private law, Weinrib was offering a non-instrumental explanation of law. This set him apart from those earlier theorists – whether economists or moralists – who assumed that law was merely the instrument in service of a goal and only disagreed about the identity of the goal it was to serve. For Weinrib, private law had no goal but to be private law.

Second, although clearly on the moralist side of the debate, Weinrib was forced to take his argument where it was led by the internal structure of law. As a result, his argument did not appeal directly or coincide fully with our common, personal moral norms (reflected, for example, in private law's objective instead of subjective standard of fault and the absence of duty to rescue). He maintained that the legal sphere – since it had its own structure – possessed its own special morality as a *legal* ordering of life.[37]

Consequently, Weinrib's use of Kant differed from the earlier theorists in terms of the segment of Kant's world into which he connected private law. Previous theorists, seeking to link

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[35] *Ibid*.

[36] *Ibid*.

[37] Ernest Weinrib, "The Special Morality of Tort Law" (1989) 34 McGill LJ 403 [Weinrib, "Special Morality"].

law with moral norms, naturally grasped at Kant's moral philosophy to support their claims about the moral nature of law. Weinrib instead embraced Kant's legal philosophy, articulated in Kant's *The Metaphysics of Morals*,[38] as the substance immanent within the structure of private law.

[38] Immanuel Kant, *The Metaphysics of Morals* in Mary J Gregor ed. and transl., *Cambridge Texts in the History of Philosophy* (Cambridge: Cambridge University Press, 2012) [Kant, *Metaphysics of Morals*].

Chapter 2
Kantian Corrective Justice

2.1 Introduction

Kantian corrective justice is the totality of three claims. (Each claim will be presented in sequence and detail in the following sections.) The first claim adopts legal formalism and argues for the immanent intelligibility of private law. This means that private law is non-instrumental, autonomous, and independently intelligible – and that its coherence rests in the nexus between form and substance, as elaborated below.

The second claim relates to the form of private law. It evaluates the range of institutional and doctrinal features of private law and abstracts a unifying structure. It contends that this extracted form of private law is what Aristotle long ago classified as corrective justice. Corrective justice orders external interaction by relating two parties directly and correlatively to each other.

The third claim concerns the substance of private law. It asserts that the normative substance of corrective justice is Kantian Right – the system of rights and duties Kant elaborated as the bedrock of his legal philosophy. (The first claim of legal formalism provides the method of Weinrib's argument, while the following two claims are the application of the procedure.)

2.2 Legal Formalism

2.2.1 Immanent Intelligibility

Legal formalism claims that law is immanently intelligible. Immanent intelligibility means that something is intelligible on its own terms. This intelligibility is reflected through the coherence of how the pieces of a whole satisfactorily fit together and operate. If something is immanently intelligible, no external validator is required to render it intelligible.

This view may strike one as radical. It may seem strange, if not impossible, for something to be intelligible only by an internal standpoint consisting of the configuration of its parts. It may appear that the circular, self-referential feature precludes an external judgment and is automatically the perishing, not flourishing, of intelligibility.

Weinrib, however, argued that immanent intelligibility must exist conceptually. Condensed, his argument proceeds as follows: If A requires B to provide its intelligibility, then one must investigate B. What renders B intelligible? If B similarly requires C as an external explicator, then one will proceed endlessly without locating a source of intelligibility. The alternative is that B is self-sufficiently intelligible, in which case the existence of immanent intelligibility must be acknowledged. And if it can exist within B, one must countenance that it might exist within A also. From this argument, Weinrib concludes that there are two classes of intelligibility: the superior form, the paradigm of intelligibility, are those things that are

immanently intelligible; the other, lower type of intelligibility are those things that require an external explicator.[39]

According to legal formalism, the earlier theorists (both economists and moralists) who saw law in terms of its goals implicitly and rashly denied the possibility of law being immanently intelligible. These theorists viewed law as an instrument to achieve a goal. An instrument is necessarily not immanently intelligible: it requires its function or goal, which lies outside the instrument, to render it intelligible as a device.[40] Legal formalism criticizes these theories for hastily denying immanent intelligibility for law but accepting it for economics or whatever goal law is to serve.

The above is Weinrib's argument. In short, Weinrib challenges one to either accept that something can be self-sufficiently intelligible or be forced to run endlessly in search of a source. However, it might seem that there is a third possibility available. Weinrib assumes that if immanent intelligibility is denied, A must be understood by B and B by C and so on. But instead of an endless search, one can conceive of eventually returning the intelligibility to A, so that everything is a mutually supportive circle. Nothing alone is immanently intelligible, but everything together – without giving supremacy to any one thing – constitutes an intelligible, mutually reinforcing whole.

Weinrib would likely respond that this possibility illustrates his point that paradigmatic intelligibility rests internally within the configuration of the parts of a whole. The difference between the approaches rests only in the scope of the circle, but the process and assumption stays

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[39] Ernest J. Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97 Yale LJ 949 at 963 [Weinrib, "Legal Formalism"].

[40] *Ibid* at 964.

the same.[41] To be clear, then, Weinrib's argument does not prove the claim that immanent intelligibility must exist within one entity, but that the process of self-clarification, by which the configuration of parts illuminates the whole, must be acknowledged. Intelligibility must rest in "a self-contained circle of mutual reference and support."[42] The question, then, is only whether a given subject is independently intelligible (as Weinrib claims for law) or if nothing alone is immanently intelligible but requires a wider, mutually reinforcing circle.

2.2.1 Form and Content

Legal formalism therefore begins by exploring the possibility of law being immanently intelligible. The intelligibility of something rests in a nexus between its form and content [43] To seek the intelligibility of something is to ask what the thing is and what differentiates it from chaos or something else.[44] It is to understand something as separate, determinate and identifiable.[45]

According to Weinrib, the form of something consists of three components: character, unity and kind.[46] First, a formal analysis of something begins by selecting the features that are so essential to the thing that they can be said to characterize it and discarding the incidental

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[41] See Bruce Chapman, "Ernie's Three Worlds" (2011) 61 UTLJ 179 at 183 ("But, for complex, phenomena, the circle need not be so tight").

[42] Ernest J Weinrib, "The Jurisprudence of Legal Formalism" (1993) 16 Harv JL & Pub Pol'y 583 at 593.

[43] Weinrib, "Legal Formalism," *supra* note 39 at 958-959.

[44] *Ibid*.

[45] *Ibid*.

[46] *Ibid* at 959-960.

elements of the thing. Next, one orders these features in relation to each other and as comprising an organized unity. Instead of conceiving of these essential features as isolated particularities, one views them as together comprising an ordered whole, a thing that is constitutive of all the features in relation to each other. Finally, one must view the thing in sufficient generality as to show its likeness to things of like character and difference from things of a different nature. The result of these three parts constitutes the form of something.

Weinrib explains that form and content are therefore not separate from each other. Form is that which renders content determinate; without form, the thing's content would be chaotic and unintelligible.[47] Conversely, without content, the form would not be the form *of* anything.[48] The intelligibility of something thus requires the mutual-relation of form and content. Form is content *qua* intelligible (it discloses the intelligibility of the content) and content is form *qua* determinate (it provides the determinate content of the form).[49]

2.3 The Form of Private Law: Corrective Justice

Weinrib's second claim is that the form of private law, institutionally and doctrinally, reveals a direct, bilateral and correlative structure linking plaintiff and defendant.[50] Institutionally, private law claims are always between two private litigants, and can be contrasted

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[47] *Ibid*.

[48] *Ibid*.

[49] *Ibid*.

[50] Weinrib, *Private Law* 2nd ed., *supra* note 4 at 1.

with the state presence in public law (e.g., criminal and constitutional) cases.[51] Doctrinally, private law actions cluster around elements that relate the plaintiff to the defendant in a direct, correlative way. Doctrines such as causation in tort law and consideration in contract law link the plaintiff and defendant in one action. Further, private law operates as a system of rights and duties, which are correlated parts of one unit: a defendant's right implies a correlative duty imposed on a plaintiff; conversely, a plaintiff's duty is unintelligible without a corresponding right.

Accordingly, Weinrib argues that the form of private law – the structure that configures the parts into a coherent unity – is the direct, bilateral and correlative relationship, which Aristotle first identified as corrective justice. Aristotle inspected the legal order of his day and presented two forms of justice – corrective and distributive justice – that are so abstract that they exhaust the possibilities for ordering human interaction.[52]

Distributive justice distributes goods – whether benefits or burdens – among persons according to a distributive principle.[53] Distributive justice is fulfilled when each person has the appropriate allocation determined by the principle. People may receive unequal amounts of goods, but, so long as the distributions are sanctioned by the distributive principle, distributive justice has been satisfied.[54]

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[51] *Ibid*.

[52] Ernest Weinrib, "Corrective Justice," (1992) 77 Iowa L Rev 403 at 416.

[53] Aristotle, *Nicomachean Ethics*, Book V, 4, 1131b25-1132b20, transl. Terence Irwin (Indianapolis: Hackett Publishing Co., 1985) [Aristotle, *Nicomachean Ethics]*.

[54] *Ibid* at 1131a30-33.

The form of distributive justice is therefore mediated and omnilateral.[55] It is mediated because the principle determining the distribution and holdings resides at the center. Persons are not related to each other directly but through the principle from which they all receive their holdings. Further, distributive justice is omnilateral because everyone's holdings are determined by the principle. Accordingly, their relation is not restricted to two parties, but embraces all participants simultaneously as the joint recipients of the distributive principle.

Aristotle noted that distributive justice is a certain type of equality. It is not a mathematical equality, as there may be wide disparity between the quantities received by different people, depending on the principle guiding the distribution. Rather, the equality resides in the principle being fulfilled equally for all people, notwithstanding that the principle itself may treat persons unequally. It is equality *before the principle*, not necessarily *by the principle*, i.e. its criteria for distribution. Aristotle referred to this equality as proportional equality between the parties, their holdings and the distributive principle.[56] He noted that it is an equality of ratios. Three components (the parties, their holdings and the criteria of the distributive principle) must be accounted for to determine that distributive justice has been met.

By contrast, corrective justice conceives of interaction between people as direct, without a mediating principle. A direct relation necessarily links two, and only two, parties. Both parties partake of the same action. The action is the nexus linking the doer as the active side and the sufferer as the passive side of the action. Their relation to each other is as counterparts. Corrective justice, with its conception of action as unmediated, comprises the only alternative to distributive justice.

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[55] *Ibid* at 1131b10-13.

[56] *Ibid* at 1131a30-33.

Aristotle observed that corrective justice was the structure underlying and governing private law. He noted that private law conceives of the parties as the two sides of action, and ignores distinguishing features – such as vice or virtue – that differentiate actors from each other.[57] The identities and independence of the two parties exists only in the action itself – one is active, the other passive.[58] All other differentiating particularities about the parties are excluded from the legal analysis.

Corrective justice regards the parties as equals. This notional equality is disturbed by the wrongdoing and corrective justice seeks to restore the parties to their original equality. Just as the wrongdoing is correlative between the parties (i.e., the wrong and the harm are just active and passive sides of the same act), so too the remedy is correlative – the defendant parts with the amount that will restore the plaintiff to the pre-transactional equality.

Nonetheless, Weinrib concedes that there is a gap in Aristotle's corrective justice.[59] While Aristotle's framework explains the coherence and structure of private law, it lacks a defined normative substance. (This is unsurprising, given that form is an abstraction of substance.) Corrective justice neglects to disclose the baseline equality that it seeks to restore. How are we to determine what constitutes a wrong – that is, what disturbs equality – if we do not know the definition of the antecedent equality? Aristotle detected the formal features of private law but failed to elucidate the method for judging the interaction itself.

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[57] *Ibid* at 1132a-5.

[58] *Ibid*.

[59] Ernest Weinrib, "Aristotle's Forms of Justice" (1989) 2 Ratio Juris 211 at 219-220.

Weinrib explains that this missing starting point does not diminish Aristotle's achievement (*contra* a claim made by Hans Kelsen and followed by Peter Westen).[60] While the normative substance may be unknown, the form still operates to exclude substances that contravene the form of corrective justice. The bilateral structure of corrective justice excludes utilitarian and economic considerations, which have an omnilateral form. Further, the correlativity of corrective justice excludes even moral considerations that only take one party into account. For Weinrib, a successful theory of private law must take the two litigants into account and only as relational to each other. It is two – no more (because of bilaterality) and no less (because of correlativity).

Weinrib views correlativity as the most central concept in private law and utilizes this discovery to criticize the earlier theories of Fletcher and Fried that relied, respectively, upon the norms of corrective justice and Kantian morality. His criticism of Fletcher seizes upon the second stage of liability that Fletcher presents as part of the paradigm of reciprocity. Although Fletcher's first stage of analysis for liability suitably adopts a standard that incorporates both parties in relation to each other, his second stage of excuses focuses solely upon the context of the defendant. Fletcher views these excuses as expressions of compassion for human failings that any person would commit in exceptional situations.[61] Nevertheless, as Weinrib points out, these excuses are problematic because they represent a unilateral consideration that attends to the defendant in isolation of the plaintiff.[62] The one-sidedness of these excuses does not meet the

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[60] *Ibid*.

[61] Fletcher, "Fairness and Utility," *supra* note 14 at 53.

[62] Weinrib, *Private Law* 2nd ed., *supra* note 4 at 53.

correlative requirement of private law and therefore is ineligible as a factor in the analysis of the court.

Similarly, Weinrib attacks Fried's promise principle as failing to satisfy the correlative structure of private law. Weinrib explains that although the moral obligation of promise may be intelligible as a demand for internal consistency over time, it does not engage relationally with the promisee.[63] The moral obligation of the promise principle fails to incorporate both poles of the contractual relation and therefore cannot be the basis for the relational obligation of contract law.[64]

These criticisms of Fletcher and Fried arise from Weinrib's methodology of structure over substance and his claim for the independent intelligibility of private law. Through its correlative structure, private law possesses its own normative dimension that is not synonymous with moral obligation or other norms. Even prior to the third claim of corrective justice, which adopts Kant's system of rights as the substance of private law, Weinrib is able to make these criticisms from a purely formal standpoint. This reflects the exclusionary function of form.

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[63] *Ibid* at 52.

[64] *Ibid*.

2.4 The Substance of Private Law: Kantian Right

2.4.1 The Union of Aristotle and Kant

Weinrib's third claim is that Kantian Right provides the normative substance of corrective justice. As noted, corrective justice presupposes a baseline equality that takes account of features that are intrinsic to action/interaction, but ignores the particularities of condition that differentiate people and mark their inequality. Kant's legal philosophy, predicated on the free purposive action of individuals, converges with this form. Just as corrective justice conceives of people as sharing an equal capacity for interaction, Kant regards persons as self-determining agents. Kant's emphasis on purposive action, systematized within a legal philosophy and concretized with correlative rights and duties, thereby corresponds to Aristotle's bilateral linking of doer and sufferer in action. Aristotle and Kant express the same understanding of responsible agency: Aristotle in formal terms, Kant in substantive norms.

2.4.2 Kant's System of Rights

Kant develops his legal philosophy in *The Doctrine of Right*, which together with a second section entitled *The Doctrine of Virtue* comprise his *The Metaphysics of Morals*. As the divided sections suggest, Kant makes a sharp distinction between law (i.e. Right) and morality. In his work, Kant seeks to reconcile individual freedom with the coerciveness of law. Freedom,

indeed, is the catchword and foundation for Kant's legal philosophy.[65] His system, developed in stages, incorporates law's coerciveness as intrinsic to securing freedom for everyone.

Kant's basic assumption is that the characteristic quality of persons is freedom. Persons are free in their capacity for purposive action and as responsible, self-determining agents. The free will is the process by which a person turns an inward purpose into external action.[66]

The free will has both a positive and negative definition. Negatively, Kant defines free choice as independent from sensuous impulse.[67] Purposiveness distinguishes persons from the passivity of a sequence of efficient causes.[68] Free willing presupposes that at any moment in the process of willing, the person can substitute one representation for another.[69] No external purpose or impulse determines the action from without. This, according to Kant, defines persons and distinguishes them from animals and objects that do not possess a purposive capacity. Kant refers to this negative definition of freedom – which like all negative definitions is more exclusionary than substantive – as free choice.[70]

For Kant, the positive definition of freedom is practical reason. Practical reason expresses the rationality inherent in purposiveness.[71] It represents how action can be self-determining: by taking the *form* of action and freedom itself to be the determining ground of

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[65] George P. Fletcher, "Law and Morality: A Kantian Perspective" (1987) 87 Colum L Rev 533 at 535.

[66] Weinrib, "Corrective Justice," *supra* note 52 at 422-423.

[67] *Ibid*.

[68] Ernest J. Weinrib, "Law as a Kantian Idea of Reason," (1987) 87 Colum L Rev 472 at 482.

[69] *Ibid*.

[70] Kant, *Metaphysics of Morals*, *supra* note 38 at 13 [6:213].

[71] Weinrib, "Kantian Idea," *supra* note 68 at 484.

action.[72] To conform to freedom, the determining ground of action must be a principle valid for all purposive beings. Accordingly, Kant expresses this determining ground formally as the categorical imperative to act upon a maxim that can also hold as a universal law.[73] Right thus consists of ensuring the freedom of everyone according to a universal law. It is "the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom."[74]

Kant explains that Right applies to (a) choices in their external relation to others; (b) without reference to the wish or need driving the choice; (c) and without regard to the end that the choices seek.[75] These three attributes reflect the same abstraction of choice from all content.[76] This abstracted choice reflects the identical freedom of every purposive being. Accordingly, an action is right if the action and its maxim can coexist with everyone's freedom in accordance with a universal law.

2.4.3 Innate Right

Kant develops his system as a conceptual sequence.[77] The first subjective right Kant identifies is the innate right to freedom. This is the innate right everyone possesses naturally

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[72] *Ibid* at 483.

[73] Kant, *Metaphysics*, *supra* note 38 at 147 [6:382].

[74] *Ibid* at 24 [6:230].

[75] *Ibid* at 23-24 [6:230].

[76] Weinrib, "Kantian Idea," *supra* note 68 at 488.

[77] Ernest J. Weinrib, "Deterrence and Corrective Justice," (2002) 50 UCLA L Rev 621 at 632-637.

upon birth[78] and it comprises the person's purposiveness, as well as the physical body and mental capacity that embody and express purposiveness. Right, by systematically organizing the co-existence of everyone's freedom, relates all persons to each other. Its entailment of rights and duties situates persons in the bilateral relation of corrective justice.

The innate right is not separate from the universal principle of Right, but merely isolates the individual person within the system of Right. Right is the system that orders and restricts freedom so that everyone's freedom can co-exist. The innate right merely identifies that particular freedom of one subject, which together with the freedom of all other subjects comprise the totality of Right.

2.4.4 Property Rights

Kant's system next develops property rights. While the innate right is internal and original, property rights are external and acquired. Kant's discussion begins by distinguishing two types of possession: sensible possession (i.e. physically holding an object) and intelligible possession (i.e. legal ownership).[79] In a state of nature with just innate rights, physical possession would only invoke the innate right. As Kant illustrates with an example, a person holding an apple would have a right to hold the apple – not because of any reference to the apple – but because of the innate right of the holder, whose placement of fingers would be dislodged

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[78] Leslie Mulholand, *Kant's System of Rights* (New York: Columbia University Press, 1990) at 201.

[79] Kant, *Metaphysics of Morals*, *supra* note 38 at 37 [6:245].

by the person prying the apple away.[80] Accordingly, in the sensible world, the apple does not figure *as an object in its own right* in the juridical relationship between people.

This is the crux of Kant's argument for property rights, i.e. intelligible/legal possession. If property rights in the legal sense do not exist, then objects would needlessly be annihilated and made *res nullius*. The apple would only figure insofar as it invokes my fingers and innate right, that is, with physical possession. As an object – that is, as something external to myself – it would be unusable and non-existent. Kant argues that such a possibility of obliterating objects *as objects* would contravene Right. Right distinguishes between purposive beings and non-purposive objects, and the former's freedom secures the latter as available for use in a juridical relationship. If objects were nevertheless unusable, "freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting *usable* objects beyond any possibility of being *used*."[81] Property rights in objects must therefore exist. Kant refers to this postulate as a "permissive law of practical reason."[82]

Kant demands property ownership but immediately finds it problematic. A property right figures in a juridical relationship between persons and in relation to a thing. It thus comprises two relations: between the person and thing; and between the persons. Kant's argument above is only the first step and constitutes only half of what constitutes a property. It proves that a thing must be available to persons, and therefore only secures the relation between person and thing. But without securing the second relation between persons, this first relation between person and thing is woefully inadequate. The fragmented relation between person and thing only gains

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[80] *Ibid* at 38 [6:248].

[81] *Ibid* at 41 [6:246].

[82] *Ibid*.

practical significance in private law through the normative relation between persons. As such, Kant's point about the availability of property to persons is conceptual.

To actualize property rights within Right, Kant must secure its possibility as between persons. But here Kant encounters a problem. Property rights arise through original acquisition, from the unilateral act of one person imposing an unreciprocated duty on others. But this violates Kant's principle of innate equality. As Kant writes, innate equality is not distinct from freedom.[83] Rather, it is part of the universalizing principle of Right, which demands that freedom be restricting itself to secure the co-existence of everyone's freedom. Here, though, original acquisition is the product of a determinate, unilateral choice of an individual. It is not the product of abstract freedom itself and therefore violates Right. The inevitable conclusion for Kant is that original acquisition – and the actualization of property rights – cannot exist in a state of nature.

Kant has no solution for this problem in a state of nature. His remedy is to depart the state of nature and move to a civil condition to make use of its legislative body. Kant notes that a transition to a civil condition is necessary regardless because of a second postulate, the "postulate of public right," which requires the civil condition to adjudicate disputes and enforce Right. Once all have moved to a civil condition, a public legislative body representing the will of every citizen can endorse original acquisition as a valid mode of acquisition. Since legislation represents the will of all, it transforms original acquisition from being unilaterally imposed to being omnilaterally sanctioned.

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[83] *Ibid* at 30 [6:237].

Accordingly, property rights in a state of nature are paradoxical. On the one hand, the state of nature demands the usability of property, that is, the availability of property to persons. But this possibility cannot manifest itself in a state of nature because property acquisition violates Right and its entailment of a reciprocal, universal freedom between persons. Kant refers to property rights as "provisional" in a state of nature because he is aware of the upcoming move to the civil condition but this term should not disguise the concrete reality that property rights are non-existent in a state of nature.

2.4.5 Contract Rights

The third right Kant identifies is the contractual right. For Kant, the content of the contractual right is the promisor's *choice* to perform, not the *thing* promised. Prior to the contractual agreement, the choice belonged to the promisor as one speck of the promisor's innate right, which includes all the rightful free choices of life. By entering the agreement, the promisor separates a particular choice of action and transfers the right to the promisee. Upon contract formation, the promisee has the right to the performance and can choose whether to enforce the action or not. Contract therefore has an interesting place in Kant's system. It is a sort of compromise between an innate right and a property right: the promisee owns as a *property right* a particle of the promisor's *innate right*.

2.4.5.1 Disgorgement of Gains

Kant's definition of the contractual right as the "causality of another's choice,"[84] as opposed to the thing itself, has important implications for contract remedies.[85] First, it militates against the awarding of disgorgement of gains from a breach of contract.[86] Disgorgement transfers an award of damages to the plaintiff that is commensurate with the gains that accrued to the defendant through breach of contract, not the losses suffered by the plaintiff. If, for example, a plaintiff enters a contract for the sale of an item of $100 value to the purchaser for $50 and then breaches the contract by selling the item to a third party for $200, the plaintiff's financial loss and the defendant's monetary gain are of different amounts. Presuming that the purchaser obtains the item through the market for its true value of $100, the purchaser's loss equals the $50 discount that the original contract would have secured. By contrast, the breach of contract through the sale to a third party made available to the defendant a gain of $100.

Under the traditional formula of expectation damages, the plaintiff is entitled to be placed in the position that he or she could have expected of performance. Consequently, as performance of the contract would have secured a gain of $50, that is the amount the plaintiff would receive through expectation damages. By contrast, an award of disgorgements ignores the plaintiff's loss in reference to the expectation interest and instead focuses on the defendant's gain

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[84] *Ibid* at 59 [6:273].

[85] Ernest J. Weinrib, "Punishment and Disgorgement as Contract Remedies" (2003) 78 Chicago-Kent L Rev 55 [Weinrib, "Contract Remedies"].

[86] *Ibid* at 70-84.

While some courts have allowed for disgorgement of gains as a contract remedy,[87] Kantian corrective justice views it as foreign and at odds with contractual remedies.[88] This is the result of Kant's specific definition of the contractual entitlement as the right to the choice of another person.[89] Had Kant acknowledged that the contractual agreement transferred a right to the item, the promisee would have ownership rights in the item. Included in this ownership right are the possible uses and effects of the item, including the breaching sale to the third party and its attendant gains.[90] As an owner of the contractual item, the plaintiff is entitled to ask for the gains produced by the owned item.

By contrast, Kant's view allows only for an ownership right to the promisor's choice to perform the contract or not. Consequently, breach of contract refers to the promisor refusing to allow the promisee to control the choice. Although the impetus for breach might be the enticing contract with a third-party offering a higher price, the third-party sale is not a constituent part of breach. The breach is complete when the promisor withholds control over the performance. Whether the promisor chooses to transfer this choice by a passive refusal to perform the contract or by actively selling the item to a third-party is immaterial.

This analysis follows from disentangling the negative and positive elements within the breach of contract. Because contractual performance transfers a right to the promisor's choice, the promisor is under a positive obligation to comply with how the promisee exercises this choice. Typically, the promisee exercises the choice by compelling performance and the

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[87] See *Attorney General v Blake*, [2000] 4 All ER 385 and *Adras Building Material v Harlow & Jones*, 42(1) PD 221 (1988), which are both discussed in Weinrib, "Contract Remedies," *supra* note 85 at 72-73.

[88] Weinrib, "Contract Remedies," *supra* note 85 at 72-73.

[89] *Ibid*.

[90] *Ibid* at 77.

promisor is put under an obligation to actively perform the action specified – in this example, the transfer of rights to the item. The breach of contract therefore occurs through an omission – the *non*-performance of the specific choice. Because breach manifests through the negative omission, the positive action that the promisor ultimately chooses is extraneous. The promisee only has a right to decide whether to enforce performance or not, and this right was infringed when the promisor refused to allow the promisee to control this performance. The alternative action ultimately chosen by the promisor – i.e. the sale to a third-party – is beyond the scope of the contractual right according to Kant. The third-party sale was *made available* to the promisor through a wrong to the promisee (i.e. the negative *non*-performance that constitutes breach) but is not *itself a wrong* to the promisee. The gains of the third-party sale are therefore beyond the range of the promisee's rights under contract law.

2.4.5.2 Punitive Damages

Kantian corrective justice also excludes the possibility of punitive damages in contract law.[91] This follows from an appropriate understanding of the role of remedies in private law according to Kantian corrective justice. Weinrib explains that there are two possible ways of conceptualizing remedies.[92] The basis of the defendant's liability (whether in tort or contract) can be seen as either the cause or the condition of the remedy.[93]

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[91] *Ibid* at 84-103.

[92] Ernest Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 81 [Weinrib, *Corrective Justice*].

[93] *Ibid*.

Aristotle adopted the causative conception of remedies.[94] He explains that liability arises when a defendant disrupts the pre-transactional equality through taking from the other party and that a judge restores the antecedent equality by retransferring what was taken to its rightful owner.[95] Aristotle depicts the antecedent equality as a line divided into equal parts.[96] The defendant's wrong disturbs the equality by taking from the plaintiff's share.[97] The judge restores the prior equality by returning the share taken to its rightful owner.[98]

Aristotle's explanation represents the wrong as the causative event for the remedy because what the defendant has wrongfully taken from the plaintiff determines what the judge must take back from the defendant.[99] The baseline equality provides the perspective to govern interaction between the parties. It thereby anchors both the nature of the wrong and the remedy. Because both the wrong and the remedy share the same foundation of an antecedent equality, the wrong is linked as the cause for the remedy.

By contrast, Hans Kelsen adopted the conditional conception of remedies.[100] For Kelsen, the wrong and the remedy are simply the stipulations of a legal order.[101] Under this view, a remedy is a coercive act that the legal order makes to sanction a wrong.[102] The wrong is simply the condition required to trigger the sanction; conversely, the sanction is simply the consequence

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[94] *Ibid*.

[95] Aristotle, *Nicomachean Ethics*, *supra* note 53 at Book V, 1132a25-35.

[96] *Ibid*.

[97] *Ibid*.

[98] *Ibid*.

[99] Weinrib, *Corrective Justice*, *supra* note 92 at 82.

[100] *Ibid*.

[101] *Ibid*.

[102] *Ibid*.

triggered by the condition being met.[103] While Aristotle's conception of remedies presents wrongs and remedies partaking of a shared anchor in the governing baseline equality, Kelsen's version of remedies describes wrongs and remedies as simply sharing the legal order from which they both emanate.

The conception of remedies that Aristotle and Kelsen each articulate are in line with their respective views about law. Aristotle elaborated the causative link between wrong and remedy as part of his elucidation of the form of justice inherent in private law relationships.[104] This form of justice, which sees the private law relationship by their shared direct connection, naturally links the wrong and remedy as cause and effect.[105] The orientation of the form of justice towards thinking of the interaction by its relational structure leads to a conception of remedies that also possesses a relational structure.[106] By attending to the relational structure of the relationship, Aristotle identifies a shared normative baseline that explains both why the defendant's act is wrong and why the wrong must be remedied.

By contrast, Kelsen is not interested in the possible forms of justice within law but rather with the posited nature of law.[107] In Kelsen's view, a law can have any content – whether just or unjust – and remains valid in virtue of its being posited by a legal order.[108] Kelsen therefore sees both wrongs and remedies as the posited norms of a systematic legal order. On the one hand, this means that Kelsen shares Aristotle's view that wrongs and remedies share a foundation. But

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[103] *Ibid*.

[104] *Ibid* at 83.

[105] *Ibid*.

[106] *Ibid*.

[107] *Ibid*.

[108] *Ibid* at 85.

importantly, Kelsen defines the shared foundation in a drastically different manner. In Kelsen's outlook, wrongs and remedies are both simply the emanations of a legal system. By providing for the remedying of a wrong, a legal system simply specifies that the wrong constitutes an act or omission that triggers the coercive consequence of a judicial remedy. For Aristotle, the wrong is the condition of the remedy because it is the cause of the remedy; for Kelsen, the wrong is the cause of the remedy because it is the condition of the remedy.[109]

Through Aristotle's presentation, corrective justice provides a conception of remedies that mirrors the structure of the wrong.[110] For corrective justice, the structure of the wrong is a relational injustice between the two parties. Because rights and duties reflect the same norm governing the private law relationship, each party is seen relationally with the other. A wrong is necessarily always done *to a defendant's right*. Accordingly, a relational injustice must be corrected through a relational remedy.[111] The remedy must take both parties into account as correlatively situated transfer that provides to the plaintiff what is taken from the defendant.

Corrective justice also views the remedy as attending to the same content of the wrong.[112] The right that the wrong infringes survives and becomes the basis of the remedy, even if the object to which the right attaches is destroyed.[113] This is seen clearly by recognizing that ownership rights include both the use and value of the object. As discussed more fully in the next chapter, use and value reflect different elements of ownership. Use represents the

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[109] *Ibid*.

[110] *Ibid* at 87.

[111] *Ibid*.

[112] *Ibid* at 91.

[113] *Ibid*.

relationship between the object and the owner. It delineates the availability of the object to an owner and represents the purposes for which the owner may utilize an object. By contrast, value signifies the relationship between the owner and other persons by viewing an item in terms of its equivalence in other objects. The right to an item's value therefore entails a right to receive the equivalence of the owned item. Although an owner has rights to both use and value, these two contents become prominent at different times. Use is vital while the owner possesses the object and characterizes the control the owner may exercise over the object. Value, however, becomes critical as the possession of the owner ceases and the possibility of use disappears. This is exemplified both in the voluntary exchanges of contract and in the involuntary interactions of tort. In contract, the contracting party surrenders a particular object and its uses but is entitled to its value in return. This value is embodied in the consideration offered in return for the object. In tort, the wrong may damage or destroy the plaintiff's object but it cannot eliminate the plaintiff's right to the object's value. This right to value subsists and requires the defendant to replace the value of the destroyed object. The right to value can be therefore seen as replacing the right to use. The remedy reflects the continuation of the ownership right to value.

The elaboration of the structure and content of the private law relationship makes clear that punitive damages are inappropriate as a contract remedy.[114] Structurally, the court must engage with the parties as relationally situated. Just as the harm is relational between both parties, the remedy must also relate the parties as one unit. The court therefore cannot take into account factors that are subjective to one party alone. Punitive damages, which seek the deterrence or retribution of the defendant's conduct, are therefore not a relational

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[114] *Ibid* at 97.

consideration.[115] It focuses on the defendant in isolation of the plaintiff and therefore is incongruous with the nature of private law. Similarly, the above discussion of the content of the right also reveals the incompatibility of punitive damages in a contract setting. As mentioned, the remedy represents the continuation of the ownership rights and simply reflects the focus being transferred from use to value. The remedy expresses the plaintiff's right to the value of the object and demands the equivalence of the lost right to use. Once this value is replaced, any additional damages are beyond the entitlement of the plaintiff and the basis for a remedy disappears. Because it transfers more than the lost value to the plaintiff, punitive damages cannot be the content of the right of the plaintiff or the remedy of the law.

By contrast, punitive damages are an appropriate response within the criminal context.[116] Just as private law conceives of a wrong as relational to a plaintiff's right, criminal law attends to the possible relation of a wrong to the entire legal order.[117] When a defendant deliberately and coercively violates another person's right to physical integrity or property, the defendant rejects the foundational principle of a legal order that demarcates each person as a self-determining agent.[118] The deliberate coercive act challenges the legal order and its system of rights by treating a person as a thing.[119] By deliberately disregarding the existence of the defendant's rights, the plaintiff treats the legal order as a nullity.[120]

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[115] *Ibid*.

[116] Weinrib, *Corrective Justice*, *supra* note 92 at 92.

[117] *Ibid* at 88.

[118] *Ibid*.

[119] *Ibid*.

[120] *Ibid*.

The nature of the wrong against the legal order determines the appropriate response.[121] Because the wrong is an attack against the entire system of rights, criminal law is the proper medium to impose punitive damages. Criminal law operates through public prosecutors representing the public legal order and the regime of rights.[122] Because of its representation of the regime of rights, the criminal law aptly responds to the wrong it received at the hands of the defendant.

Accordingly, both the presence of punitive measures in the criminal setting and the absence of punitive damages in the contract context establish symmetry between wrongs and remedies. Contract law, through the correlative structure of the private law relationship, views the wrong as relational as between the contracting parties. The appropriate remedy mirrors this bilateral structure by rectifying the wrong but excludes any unilateral consideration relative to the defendant. Punitive damages are therefore unsuitable as a contract remedy. By contrast, the form of the wrong in the criminal context is more akin to the systematic structure embodied in distributive justice. In this light, the wrong bears formal similarity to Kelsen's relation of wrongs to a system that posits law. The response of the legal order to exact punitive measures in vindication of itself is therefore appropriate.

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[121] *Ibid* at 92.

[122] *Ibid*.

Chapter 3
Problems with Kantian Corrective Justice

3.1 Kant's Property Rights

The first problem with Kantian corrective justice is Kant's property rights. As noted, despite Kant's use of the term "provisional," Kant's state of nature has no property rights. The state of nature segments the world into persons, who are unusable, and things, which are usable, but cannot complete this world vision through the actualization of property rights. Kant's description of property rights as provisional refers only to his anticipation of the future *en masse* exodus to the civil condition.

3.1.1 The Problem with Kant

There are two parts to this problem with property rights. The first difficulty is that Kant's solution does not seem to work within his own system. As mentioned, property rights consist of two parts: it is *between persons* and *in relation to an object*. Kant's argument proves that the ownership relation between person-thing must be possible (because its denial would be a gratuitous restriction of freedom). But Kant has no argument to support the person-person relation. After all, the implementation of property rights through original acquisition violates Right and Right is the basis for the entirety of juridical relationships between people.

Kant's postulate of public right requires all to move to the civil condition to correct the chaos that would otherwise reign in a state of nature. People would have no objective method to settle disputes. Further, there would be no guarantee of enforcement. Without enforcement, no one would be expected to fulfill their obligations because they could not rest assured that these gestures would be reciprocated. These problems – judgment and enforcement – are procedural problems and the civil condition appropriately solves them.

In contrast, property rights are substantively defective because original acquisition does not conform to Right.[123] It is not just a procedural hiccup. Accordingly, Kant's reliance upon an omnilateral legislature to correct original acquisition is illegitimate. The civil condition cannot legitimize original acquisition, just as it cannot legitimize theft and other crimes.[124] The civil condition cannot transform wrong into right. Kant's inability to account for original acquisition in a state of nature is therefore a devastating problem.

3.1.2 The Problem with Corrective Justice

Kant's solution is also problematic for the attempt to unite Kant with private law and corrective justice. Property rights are at the core of private law. Per Weinrib's argument, the form of private law is corrective justice – something distinct from a government's allocation of rights according to a distributive principle.

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[123] N W Sage, "Original Acquisition and Unilateralism: Kant, Hegel and Corrective Justice" (2012) 25 Can J L & Jurisprudence 199 at 125-127.

[124] *Ibid*.

Yet Kant must rely on such a government's determination for property rights to exist. In a state of nature, Kant has only shown one side of ownership: the person-thing relationship. He has only proven that non-purposive things are free for the taking. He has yet to prove the mechanism and system for determining how property will be allocated. Since he cannot validate original acquisition, he has only established the minimal and partial conclusion that things are free to be owned. The precise system of property rights – whether it should be via original acquisition or some other distributive principle – is the decision of the legislature.

As such, property rights as a system are the product of distributive justice.[125] Instead of property rights being realized in a state of nature and ordered by rules of original acquisition that arise from freedom, property rights are revealed to be subject entirely to the whims of a legislature and the distributive principle they choose to adopt. This devastates the attempt to unite Kant with private law and corrective justice. The problem can be loosely summarized as follows: the form of private law is corrective justice; the substance of corrective justice is Kantian Right; Kant's property rights are public and the product of distributive justice.

3.2 Kant's Contract Rights

3.2.1 Kant's *In Personam* Contract: An Objection Answered

[125] Alan Brudner, "Private Law and Kantian Right" (2011) 61 UTLJ 279.

A powerful criticism has been pitched at Kant's idiosyncratic view of contract.[126] As mentioned, Kant views contract as transferring a right to the promisor's choice, not the thing itself. Kant maintains that the right is *in personam*, not *in rem*. For example, if a promisor agrees to sell a car, the promisee receives a right to the promisor's choice to transfer the car at the appointed time, but not to the car itself. Now, as discussed, ownership entails two relations – a relation between persons in relation to a thing. Accordingly, ownership is inevitably impacted by the incursion of the contract. Even if the contract only transfers the choice of the owner, the owner can no longer exclude the promisee from the thing. Kant attempts to sustain a dichotomy between an *in personam* contract right and an *in personam* property right. But as this argument shows, a right *in personam* to the owner's choice necessarily invades the owner's right to exclude and thus constitutes an *in rem* right to the thing for the promisee. Kant's distinction between having a right to the promise of a thing or to the thing itself "cannot be sustained."[127]

Remarkably, Kant is insulated from this attack – even if he completely concedes the logic of the argument. This is because Kant's state of nature is an extraordinary place. It has no property rights. Yet it has contractual rights because the innate right fully exists in a state of nature and contract merely severs off a particular choice to be transferred to the promisee. Accordingly, Kant may agree that in a civil condition, where property rights exist, the contractual right to choice inevitably expands into a right to the thing. Kant, however, is presenting a conceptual sequence. He is discussing the private right of a state of nature, not the civil condition. He does not need to prove that the right to the other's choice is sustainable apart from a right to the other's thing *because there are no rights to things in a state of nature*.

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[126] Peter Benson, "Contract as a Transfer of Ownership" (2007) 48 Wm & Mary L Rev 1673 at 1721-1722.

[127] *Ibid*.

3.2.2 The Larger Problem

This discussion highlights what is problematic about Kant's legal system. While his idiosyncratic view of contract and surprising environment of the state of nature fends off the above criticism, it also reveals a deep rift in Kant's private right. On the one hand, property rights exist only through the public legislature. Besides for the concept that non-purposive things must be usable, the system of property acquisition and rights are the product of distributive justice. Accordingly, property rights are not secure from the determinations of public law and distributive justice.

Yet, on the other hand, contract rights fully exist in the state of nature. It is secure in private right and has no reliance upon the civil condition with its distributive scheme. The result of this analysis is that there is a foundational chasm between contract and property rights. Contract is secured by existing in the state of nature while property rights are not. The problem is that contract and property rights are not separate from each other in the civil condition. As the earlier criticism showed, a right to choice inevitably translates into a right to the thing. Kant's response only rested in the special environment of the state of nature. But in reality, law operates within a civil condition. Accordingly, in a single contractual transaction – e.g., selling a car – there are two different paradigms imposed upon the transaction: there is a property regime that can be subject to the influence of the civil condition and distributive justice, and there is a contractual scheme that arises fully in the state of nature and is not susceptible to the civil condition. This leads to a clash between two frameworks operating in one transaction in relation to the same thing, and it is not clear how the conflict ought to be resolved. The contractual right

to choice should be protected, but it is confusing how that can be if the property can operate according to contrary rules.

3.2.3 No Solution for Kant

It might seem that there is a simple solution for Kant. Other philosophers (notably Hegel) view the contractual right as a right to the thing itself, not the choice of the promisor. If Kant shared this view, then contracts would be impossible in a state of nature because there are no rights to things. It would be subsidiary to and dependent on property rights. Accordingly, both contract and property rights would not exist in a state of nature and be reliant upon the civil condition. There would thus be no divergence in their fundamental characters. (Note this symmetry would be obtained at the cost of removing contract from private right.)

Why, in fact, does Kant maintain his peculiar view of contract? There seems to be at least two important reasons. The first reason relates to a conception of value that Hegel possessed. Kant seemed not to apprehend Hegel's conception of value and consequently had to define the contractual right differently. Hegel's elaboration of value begins by distinguishing value from use.[128] An object has a use when its features, qualitative and quantitative, satisfy a person's needs.[129] The use of a thing is determined in reference to the user, not other things.[130]

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[128] Georg Wilhelm Friedrich Hegel, *The Philosophy of Right*, transl T M Knox (Oxford: Oxford University Press, 2015) §63 [Hegel, *Philosophy of Right*]. The above presentation mostly follows the elucidations of Hegel found in Peter Benson, "The Unity of Contract," in Peter Benson ed., *The Theory of Contract Law* (Cambridge: Cambridge University Press, 2001) at 188-191 [Benson, "Unity"] and in Ernest Weinrib, *Corrective Justice*, *supra* note 92 at 190-194.

[129] Weinrib, *Corrective Justice*, *supra* note 92 at 190-194.

By contrast, the value of an object is judged in relation to other objects. The owner of an object benefits from the use and value of the object. The owner enjoys the use of an object only while the object is owned. By contrast, the ownership of value persists even when ownership ceases. This is because value entails the equivalence of the object in terms of other objects. As an owner of value, one is entitled to the object's equivalence in other objects. Transfer triggers value, both in liability and voluntary exchange. In an exchange, the owner is entitled to continue owning the value, now in the form of another object. In liability, the owner is entitled to the value of what was lost.

Three characteristics are entailed in this determination of value: quantity, relation and abstraction.[131] The value of an object is found by locating its equivalence in qualitatively different objects. Since the two objects are qualitatively different, their equivalence is judged in terms of *quantity*. Value is *relational* because one object is measured in terms of another (qualitatively different) object, which necessitates a viewpoint that is shared and relational between the two objects. This relational viewpoint must therefore *abstract* from the particular qualities of the objects and see them purely in (quantitative) terms of the other. These three characteristics are thus interconnected and mutually dependent.

Value, which presupposes transfer, encapsulates the abstract relation of persons as owners. A transfer must occur seamlessly with no temporal gap between alienation and appropriation. Otherwise, the two acts are separate and the new owner acquires an ownerless object. This would require the performance of an act of original acquisition. The unity of wills underlying the transfer prevents a temporal gap. The wills unite in willing the same process,

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[130] *Ibid*.

[131] *Ibid*.

which neither can do alone. The transferor can only alienate property, not foist its acquisition on others. Similarly, the transferee can only acquire property, not take it from others without permission. Accordingly, the process requires the equal participation of both persons. Each party conditions his or her will on the will of the other: the transferor does not alienate to the public at large, but only insofar as the transferee acquires the content; similarly, the transferee seeks to acquire the owner's property, not an ownerless item.

The united wills are made possible by each will being relational and conditioned on the other will. Consistent with the abstract relations of persons, each party is acting as abstract owners. The transferor is acting in the capacity of an owner alienating property. An owner can decide not just when to alienate a property, but how and to whom. Similarly, the transferee is acting in the capacity of an owner acquiring property. Ownership is not foisted on persons, but the result of their choice. Like the transferor, persons can decide not just when they will become an owner, but how as well. The transferee's will conditions becoming an owner on the content being owned, not ownerless. Each will alone cannot achieve a transfer, but conditioned together they can.

The unity of wills is constituted *in the transfer*. The unity does not just generate the transfer but is embodied in it. If the unity merely generated the transfer, the united wills would precede the transfer. But if there is any separation between the unity of wills and the transfer, the transfer will not occur. If the wills unite at moment A and the transfer occurs at moment B, the wills might no longer want the transfer at moment B. They would need to be reaffirmed, but again this unity of wills would create a transfer at moment C.[132]

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[132] Note that this problem is similar but distinct from the simultaneous wills problem mentioned in Kant, *Metaphysics*, *supra* note 38 at 59 [6:274]. Even if the wills are concurrent, both wills must also be simultaneous

The only solution is for the unity of wills to be embodied in the transfer. The unity of the wills and the transfer are interconnected and occur at the same moment. Now, what does it mean for a unity of wills to be embodied in the transfer? Three components – both wills, the transfer, and the transferred content – which form the complete unity are all intrinsically related to each other. A complete unity means that all components are visible within each component. Each component must be indicative of and conditioned by the other components. This means that the wills, the process of transfer, and the transferred content all express the same singular idea. Accordingly, the unity of wills must be seen in the process of transfer and the content of transfer. As already explained, the process of transfer requires alienation and appropriation to unite and be conditioned on each other for the process to be a transfer and not original acquisition. This shows that the unity of wills is embodied in the process of transfer. However, how does the content of transfer embody and reflect the unity of wills?

This is the role of value. Transfer brings value to life. It parallels the abstraction of persons as owners from the standpoint of property. The content transferred *qua value* is relational between people. In exchange contracts, it requires the participation of a second will because it demands the reciprocity of an equivalent value, which must be the willing act of another party. Note that any transfer requires a second will to appropriate the transfer. But this would only show the presence of a second will in the *process* of the transfer, not in the *content* of transfer. By contrast, value shows the presence of a second will in the content of transfer as the content itself, as abstract value owned, demands the return of value. Accordingly, the content of value *qua value* reflects the presence of the second reciprocating will. Now, this obtains for gift

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with the occurrence of transfer. Otherwise, at the later moment of the transfer, the original wills are no longer present and the transfer would be illegitimate.

contracts, even though there is no return of value. Although the owner foregoes the return of equivalent value in a gift contract, this does not diminish the content's reflection of a second will that would, if not for the owner's waiver, require a second will to reciprocate value.

The unity underlying transfer is therefore a complete unity. The wills unite not only with each other, but also with the process and content of the transfer. The wills are embodied in the transfer and the transfer is constituted by the wills. Value reflects this unity in the content of transfer. As mentioned above, while use ceases when property transfers, the function of value awakens. Its presence is felt most acutely in transfer – whether involuntary transfers necessitating liability or voluntary transfers of contract – when it demands the return of value. In any of the three parts of the unity – the wills, the transfer, and the content – all the parts are seen. The transfer of contract is a complete unity.

This conception of value is absent from Kant's discussion. This poses a particular problem for the content of the transfer. As mentioned above, the unity of wills does not require the concept of value to reflect the participation of both parties. Each will reflects both wills because each will is ineffective alone and therefore conditions itself on the other will. Similarly, the process of transfer does not need the concept of value to reflect the participation of both parties. Transfer by its very nature reflects the unity of alienation and appropriation. Otherwise, the process would not be a transfer but an act of alienation followed by an act of original acquisition. Kant, however, seems to have difficulty locating the participation of both parties in the content of transfer. How for Kant does the content of contract reflect the relational and unified wills?

Kant finds an answer to this question through the *in personam* right to the causality of another's choice. The choice of a person is a constituent part of purposiveness and freedom. It

is internal to the person's innate right. At this point, choice is not external or separate from the person as a purposive being. The process that externalizes and separates choice from this constituency is transfer, both involuntary and voluntary. When a person coerces or violates another's freedom, the choice of the victim has been externalized through usurpation, and this gives rise to liability. Choice can also be externalized voluntarily, and this is Kant's conception of contract. Transfer, whether voluntary or involuntary, transforms the form of choice. Prior to the transfer, the choice was internal to the person as a constituent part of purposiveness. Transfer is a process of externalization. It separates the choice from the person and allows it to be a thing held by another person.

Hegel's value and Kant's externalization of choice both capture the process of transfer. Value reflects the process of transfer by demanding the return of equivalence. Reciprocating equivalence presupposes that the first object is transferred and must have its value replaced. This basic progression is embodied both through involuntary transfers (tort liability) and voluntary transfers (contract). In the same way, externalized choice presupposes and reflects the process of transfer. In the case of externalized choice, it is not the pure content of choice that reflects the process, but the very *existence* of choice as an external entity. The existence of choice as an external entity is only possible in transfer. Choice by its nature is a process of determination and therefore requires a purposive being to decide whether and how it will be exercised. Choice can never be ownerless. Alienating choice is impossible. It can only be transferred.

This explains Kant's statement that a two-stage transfer "contradicts the concept of contract." The earlier discussion of Hegel revealed that a two-stage transfer (alienation followed by appropriation) contradicts the concept of *transfer* because it is two separate acts resulting in an original acquisition of an ownerless object. Kant agrees with this analysis of the unity of

transfer but this is not the only reason contract must be a unity of wills. If this were the sole reason, Kant would have written that a two-stage transfer contradicts the concept of *transfer*, not *contract*. For Kant, a two-stage transfer contradicts the concept of *contract* because Kant views choice as the content of the contractual right. Contract is the externalization of choice. As mentioned above, the externalization of choice is only possible in transfer. One cannot alienate choice and make it ownerless. Choice is dynamic and must ultimately be determined by a person. This is seen in the following hypothetical: if on Sunday I abandon my choice of working on Tuesday to the world but nobody appropriates the choice, then I will have to choose whether to work or not when Tuesday arrives. Even during the interim between Sunday and Tuesday, the choice was not alienated. If it were, then I would be required to do an act of acquisition, as is required to acquire ownerless objects. This hypothetical defies our expected property standards because, unlike things, choice can only be externalized through transfer.

The very *existence* of *choice as an external entity* thus reflects the unity of wills and transfer. While Hegel found the unity of wills and the transfer reflected in the value of contract's content, Kant finds the unity of wills and the transfer in the existence of the contractual content – external choice. External choice relates two people: one person holds the choice of another person. By its nature, it is possible only through the process of transfer and the agreement of both persons to externalize the choice between them. Kant's idiosyncratic view of the contractual right completes the unity of contract for him just as the conception of value does for Hegel. All three elements of contract – both wills, the process of transfer, and the content of contract (choice) – are each reflective of and conditioned on each other. Kant's *in personam* view is therefore not an inexplicable aberration. It fits together with an understanding of contact as a transfer of united wills. Given Kant's lack of a full conception of value, only choice as an

external content could adequately coalesce with the unity and concept of a transfer of united wills.

As explained, Kant's distinctive definition of the contractual right creates a problematic rift between contract and property rights. The former fully exists in a state of nature while the latter depends upon the civil condition for its realization. However, although Kant might have been forced into this position because he lacked Hegel's conception of value, we have benefitted from Hegel's discussion. Accordingly, if this were the only reason for Kant's idiosyncratic definition, then a local remedy would easily be achieved by adopting Hegel's conception of value. Doing so would allow the contractual right to be defined as Hegel does, which would then make contract rights symmetrical and dependent upon the existence of property rights. Both contract and property rights would thus come into existence at the same time.

However, there is a second reason Kant must define the contractual right as a right to choice. This is because of his "permissive law of practical reason" – that is, the postulate that proved that objects must be usable. The argument was that if things were unusable, then freedom would be gratuitously restricting itself. A similar argument leads to the conclusion that contract transfers a right to a person's choice. A person's choice belongs to the person as one constituent part of his or her innate right. Accordingly, if contract were only a right to the thing, a person would be unable to transfer his or her choice (that particle of the innate right). But since the person owns his or her own choices in a state of nature, he or she must be free to use the free choice as he or she wishes. Right therefore must respect an owner's wishes and allow the transfer of the particle of choice via a contract.

Kant's system of purposiveness leads inexorably to his conclusions about the innate right, contract rights and property rights. Purposiveness necessitates recognizing the foundational

presence of the innate right, which merely separates the purposive individual within the entirety of Right. Next, Kant must separate the innate right of the individual into its constituent parts. These parts are all discrete choices that together comprise the life of a purposive being. Just as the innate right exists fully and inviolably in a state of nature, these constituent choices that comprise the innate right are existent and protected. Consequently, an individual is free to exercise these particular choices, provided he or she does so in conformity with Right. This necessarily means that the individual may transfer a particular choice to another person, so long as the other person contracts voluntarily. As seen through these steps, the contractual transfer of choice is inevitable for Kant. The innate right merely separates Right into its constituent parts (i.e. individual purposive beings) and contract right simply severs the innate right into its constituent elements (i.e. each particular choice of life). The inclusion of the innate right and contract right within the state of nature is absolute because it conforms to Right; conversely, the exclusion of property rights is just as necessary because original acquisition violates Right.

No solution appears plausible to reconcile the wide divergence between contract and property rights. This problem is compounded by the above discussion that reveals that Kant's dichotomy between an *in personam* and an *in rem* right is sustainable only in a state of nature where property rights do not exist. However, once the civil condition is entered, the *in personam* right to choice necessarily invades and restricts an owner's *in rem* right. Since the law ultimately operates within a civil society, contractual transfers of property partake of two wildly different frameworks. The contractual agreement, insofar as it binds the choices of the parties, is protected as a prior right fully existent in the state of nature. By contrast, the property transferred through the contract is subject to a property regime that is subject to the various considerations and decisions of a public, legislative body representing the wishes of every citizen.

This reading of Kant has great bearing on the availability of disgorgement and punishment as contract remedies. The previous chapter detailed the position of Kantian corrective justice, which rejects disgorgement of gains or punitive measures as foreign to contract law. From the standpoint of Kantian corrective justice, the contractual agreement is a correlative relationship whereby the promisor transfers rights to a particular choice to the promisee. Under this view, the promisee does not have rights to the object itself or the content of the contractual transfer but only has a right to exercise the promisee's choice and demand performance. Disgorgement of gains follows from the ownership rights one has to an object. The promisee, possessing only a right to performance but not the contractual object, therefore cannot claim the gains that accrued to the defendant through breach. Further, Kantian corrective justice precludes the presence of punitive measures because it does not match the correlative nature of both the wrong and the harm. By seeking deterrence or retribution from the defendant, punitive damages represent a unilateral focus upon the defendant in isolation of the plaintiff. Any damages that the plaintiff would obtain through punishment would be in addition to the amount already received to restore the wrong. It would therefore be excessive and beyond the contractual entitlement. According to Kantian corrective justice, punitive damages therefore do not have a place in contract law.

According to the argument of this chapter, neither of these conclusions is justified. First, the rejection of disgorgement of gains is predicated upon the distinction between the *in personam* nature of contract rights and the *in rem* quality of property rights. However, as explained, this distinction cannot be maintained because ownership necessarily entails both *in personam* and *in rem* elements. Ownership combines two relationships: the relation between owner and thing (*in rem*) to the exclusion of non-owners (*in personam*). These two elements are integrated within the notion of property ownership and cannot be kept apart. Kant manages to sustain the

distinction temporarily within the distinct sequence of an unfolding argument. The success of his distinction relies upon the anomaly of his state of nature. This state, embodying the postulates of Right, allows for the full existence of rights to choices but does not countenance rights to objects. To explain why contract rights exist in a state of nature while property rights do not, Kant clarifies that the contract right does not have property as its subject matter but rather the particular choice of another person. As a severable element within a person's innate right, particular choices are fully existent in a state of nature and subject to the decisions of its owner. If the owner wishes to transfer the particular choice to another person, he or she may do so – provided that the transfer is not imposed unilaterally upon the recipient. Kant, however, is not saying that contract rights are *in personam* eternally. His postulate requiring the move to a civil condition and his reference to the provisional nature of property rights indicates that he foresees the existence of property rights once the state of nature is left. Once in a civil condition, the *in personam* right of contract necessarily blends with the *in rem* right of property to comprise the definition of property ownership. Kant's distinction between contract and property subsists in a civil condition only when a contract agreement does not pertain to property.

According to this reading of Kant, disgorgement of gains is an appropriate response to a breach of contract that is in respect of property. The law does not operate within a state of nature but in a civil condition that possesses property rights. The contractual transfer of choice in a state of nature blooms into a property right to the object transferred once the civil condition is entered. At this point, disgorgement of gains follows simply from the property ownership that the promisee possesses in the object transferred. As with any property, the owner is entitled to the possible uses and products of the object. By breaching the contract and entering into a lucrative sale with a third-party, the promisor does not only withhold his or her particular choice

of action but infringes upon the property right of the promisee. Gains that accrue to the illegitimate use of the object rightly belong to the promisee.

Similarly, based on the above explanation of Kant's contract and property rights, the categorical denial of punitive damages by Kantian corrective justice is unpersuasive. Kantian corrective justice disallowed punitive damages in contract law because the remedy of a wrong must mirror the nature of the wrong. Since the contract wrong is bilateral and correlative, the appropriate remedy must attend to the restoration of the relational wrong. By retransferring the amount taken through the wrong, contract damages restore the antecedent equality that both parties relate through. The remedy of punishment, with its unilateral focus on the defendant, is therefore inapposite within the bilateral relation of contract law.

This conclusion, however, is not so neat. As mentioned, Kant's system of rights results in a wide divergence between contract and property rights. The origin and existence of contract rights is fully within the scope of the state of nature and its place within private law is thereby secured. By contrast, as mentioned, property rights cannot surface in a state of nature. Kant explains the necessity for external objects to be usable but usability only secures the person-thing relation. Yet undetermined is the method of acquisition whereby a person can become the owner of a thing. For Kant, private right cannot legitimize original acquisition as the appropriate means and so moves to the civil condition to ground a method of acquisition in the omnilateral will of the legislature. However, since private right finds that original acquisition cannot be incorporated into its system of rights, the legislature effectively has no guidance from private right as to the appropriate means of acquiring property. If the legislature ultimately chooses original acquisition as the appropriate means of acquisition, it does not reach this conclusion through the prior determinations of right. By contrast, when a legislature recognizes a

contractual right, it does so because it is tasked to adjudicate and enforce private right. Accordingly, because private right recognizes the creation of a legal obligation through contract formation, public right merely actualizes this reality through its adjudicative and enforcing functions. Property rights, lacking any guidance or requirement from private right as to the method one makes objects usable in exclusion of others, is simply determined by the omnilateral will of the legislature.

The fundamental reliance of property rights upon the omnilateral will of a legislature severely weakens the argument claiming that punitive damages have no place in a contract setting. On the one hand, contract rights exist fully in a state of nature and are thereby secured within private right. The reliance upon public right is only to adjudicate contract disputes and enforce contractual obligations. Public right has no further mandate that would allow it to modify the substance or structure of contract law in any way. Accordingly, the bilateral relation of contract precludes the possibility of punitive damages and public right must respect this result. On the other hand, when a contract transfers rights to property, the contract necessarily also partakes of a property regime. Kant's property regime, however, is not secure within private right but relies fully upon a public legislature to be materialized. As mentioned, private right only determines that property must *be usable to persons* but cannot make any further demands. It relies upon the omnilateral will of the legislature to determine the origin and parameters of property rights.

The structural difference between these two regimes impacts the appropriate remedy in each case. By possessing a bilateral structure that is independent of the will of an omnilateral system, the contractual relation enjoys a normative baseline that defines both the wrong and the consequent remedy. This conforms to the Aristotelian causative conception of remedies. By

contrast, property rights are constructs created by an omnilateral system. Since private right only demands that objects be usable to persons and does not dictate anything further, the legislature is free to postulate the definition and contours of property rights. This systematic control of property rights makes the regime more similar to Kelsen's conditional conception of remedies. Wrongs against another's property right may entail harm to a particular plaintiff but it is still anchored within a systematic regime. This systematic regime is free to govern the operation of property rights because the omnilateral system made these rights possible and brought them into existence.

A contractual transfer of property is therefore unstable and this dislocation can be seen in reference to punitive damages. On the one hand, the contract regime imposes a bilateral structure upon the transaction that restricts considerations to those that are correlative as between the contractual parties. Within this regime, punitive damages are necessarily excluded from the contractual setting. On the other hand, however, the property regime operates according to the omnilateral structure of a legislative system. As mentioned, a contract transfers a right to a particular choice but this inexorably blossoms into a property right once the civil condition is entered. Accordingly, when breach of contract infringes upon the property right that the promisee receives through contractual transfer, the remedy is to be determined also by the property regime. This property regime is not restricted by a bilateral structure, though, and can legitimately impose punitive measures on the defendant for violating the right established by the omnilateral system. This is akin to the appropriate placement of punitive measures within the criminal context. As mentioned, Kantian corrective justice views punitive measures as apt in the criminal context because criminal law may legitimately attend to wrongs against the system. Similarly, because property rights descend from the omnilateral system of a legislature, it may

determine that the appropriate remedy is punitive damages to vindicate and protect the inviolability of its system of property rights.

There is no clear method for resolving the tension between these two competing regimes. The position of Kantian corrective justice excluding punitive damages from contract is justified from the standpoint of contract rights but it is clear why the contract standard should prevail against the property regime. As the contractual right to the promisor's choice becomes a property right once the civil condition is introduced, the contractual transfer blends with and partakes of the property regime. The property regime possesses a different structure and standard, which allows for punitive damages. Kantian corrective justice fails to address this gap. Accordingly, its argument against punitive damages in the contractual setting is incomplete.

Chapter 4
The Fundamental Problem with Kantian Corrective Justice

4.1 Conflicting Values: Equality vs. Freedom

The above problems are traceable to a fundamental tension between Aristotle and Kant. Aristotle's form of corrective justice defines private law, but Kant's legal philosophy diverges from Aristotle's form. Aristotle presented corrective and distributive justice as two forms of equality. Weinrib treats the equality of corrective justice as a useful hint, but as an empty concept that only has exclusionary force. In his view, corrective justice is a placeholder to be filled by a non-distributional equality that conforms to the relational structure of corrective justice. The search for substance ensues and Kant's legal philosophy is embraced as the baseline equality of all interaction in private law. But, under this approach, equality figures in corrective justice as an empty concept. It is a gap, a missing starting point. Its benefit lies in the manner in which it hints of the appropriate substance. Ultimately, once Kantian Right is located, corrective justice ceases to have a function.[133]

The root of the trouble between Aristotle and Kant is a conflict of fundamental values. Aristotle's equality may seem indeterminate but it is not empty. Aristotle's presentation of corrective justice as a form of equality reveals that he views the foundational value of private law to be equality. By contrast, Kant constructs his elaborate legal philosophy on the value of freedom. By defining persons by their abstract freedom, Kant reaches a state of equality. To be

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[133] Zoë Sinel, "Concerns about Corrective Justice" (2013) 26 Can J L & Jurisprudence 137 at 144-145.

sure, equality is a component of his system and ensures that the freedom is universal. But the original value for Kant is freedom, not equality.

The tension is born out in Kant's problem with property rights. Kant finds original acquisition problematic because it violates his abstract, universal conception of freedom. By contrast, Aristotle's corrective justice would not need to find original acquisition troubling. Since Aristotle's foundational value is equality, he has more flexibility in defining legal personality and developing a legal system. Once Kant's "permissive law of practical reason" demands property ownership, the fact that original acquisition is a mode equally available to all purposive beings should be sufficient to satisfy equality. In Aristotle's corrective justice, property rights could exist fully in a state of nature. Private law could remain private.

4.2 Working From Within – A Seamless Movement

The divergent values suggest that Aristotle needs Kantian substance, but not Kant's entire legal philosophy. Like any form, Aristotle's corrective justice must move beyond bare, formal features into a determinate substance. However, this need not occur through an independent step that works outside Aristotle's formal presentation. While Aristotle's emphasis on the shared interaction and abstraction from distinguishing features hints that Kantian purposiveness is crucial, it must be developed internally within Aristotle's framework.

Weinrib encounters problems uniting Aristotle with Kant because he proceeds in two independent steps. Adopting the method of legal formalism, he identifies corrective justice as the structure of private law. Weinrib, however, concedes that Aristotle's discussion is empty of

substance. His only response to Kelsen is that form outlines the contours of an appropriate substance and therefore has a negative, exclusionary role. Having concluded that this emptiness represents the end of a road, Weinrib sets out on a second path in search of substance. He locates Kant's legal philosophy and then proceeds to stitch it back into Aristotle's form by noting that they both see action/interaction as central to private law.

Because he proceeds with a second step, Weinrib's claim of congruence cannot be conclusive. Even if Kant's legal philosophy integrated perfectly with corrective justice and private law, it would only prove that Kantian substance is consistent with corrective justice. It would not exclude the possibility of other substances, provided they are also consistent with the form of corrective justice, from being offered as alternatives to Kant. Weinrib fails to exclude alternatives because his two moves are disjoined – he first moves to Kant and then works back into corrective justice. Further, by leaping to Kant, Weinrib grasps too much of Kant's system and this results in the problems outlined above.

A more promising method – one that is more consistent with legal formalism – is to work from within Aristotle's principle. After concluding that the form of corrective justice is empty, Weinrib quickly moves to Kant to forestall the claim that legal formalism is meaningless and unilluminating. But, if one were to explore the principle of corrective justice fully, it is possible to locate Kantian substance in the presuppositions of the principle of corrective justice. This would develop the substance of private law in a more seamless, unified movement. It would also follow appropriately from the previous steps of Kantian corrective justice. Just as the second claim of Kantian corrective justice abstracts the governing form of corrective justice by working with the presuppositions of private law, the third claim must explore the preconditions for the principle of corrective justice. One must analyze the principle demanding the restoration of an

antecedent equality and identify what, if any, are the pre-conditions for the principle to operate. The following chapter presents such an attempt.

Chapter 5
The Solution: Aristotle's Equality of Private Law

5.1 Sameness and Difference

In Weinrib's work, he notes the fundamental differences between corrective and distributive justice. Corrective justice is direct, bilateral and correlative; distributive justice is mediated and omnilateral. But there is another fundamental feature that he does not attend to fully: sameness and difference.

All entities in existence have features that make the entities like other entities and features that make them unlike other entities. Even identical entities have spatial difference that makes each distinct; similarly, polar opposite entities share existence and the feature of being contrastable. Accordingly, entities can be viewed with an eye towards either feature. One can focus solely on the sameness that is shared by entities, abstracting from all differentiating features; or, alternatively, one can allow difference into view.

The former view, which only sees the relevance of sameness, is presupposed in corrective justice. Corrective justice only views persons by their sameness. When persons are only seen as the same, no distributive principle can be adopted because there are no features that the principle can use to differentiate people. By contrast, distributive justice presupposes the relevancy of difference. Difference enables distributive justice to adopt a distributive principle and prevents distributive justice from collapsing into corrective justice. Sameness and difference are therefore intrinsic to the distinction between corrective and distributive justice. Sameness constitutes mathematical equality since the entities are identical – their sameness is in direct relation to each

other. By contrast, difference can only locate sameness externally, by relating the different persons to the external principle in the same way. Corrective and distributive represent two ways of viewing entities: by their sameness alone or encompassing difference.

5.2 The Presuppositions of Corrective Justice: A Principle of Equality

Corrective justice constitutes a pure principle of equality. A pure principle of equality consists of two elements: equality and a principle. The first element is the shared features, yet unspecified, that constitute the equality. The second element is a principle, a directive to preserve the equality. (The first element will be referred to as the "equality aspect," while the second element will be called the "directive aspect.")

As mentioned, Aristotle's form needs Kantian substance but not the entirety of Kant's system. But instead of moving to Kant as a second, independent step (as Weinrib does), Kantian substance can be developed from within Aristotle's form. When worked out in this way, the Kantian substance is found within Aristotle's form and is therefore constrained by it. There is no danger that Kant's freedom will undermine Aristotle's equality.

Kantian substance can be located within the directive aspect of corrective justice. A directive demands a minimum. As a directive, it presupposes a receiving entity to which it is directed. The receiving entity must have the capacity to fulfill the directive of corrective justice and preserve the equality (whatever the equality is). The entity must therefore be a being that has choice of action, i.e. Kant's purposive being. The principle cannot direct a being that will inexorably obey the principle or a being that will inexorably disobey the principle, as the

directive would be nugatory as such. The directive aspect requires a purposive being at a minimum.

What does the equality aspect presuppose? And of what does the equality of corrective justice consist? So far, the directive aspect has revealed that corrective justice presupposes purposive beings. The equality aspect follows on this first step. First, it precludes corrective justice from applying to other life forms. Corrective justice does not refer to all creatures and life forms – e.g., animals, vegetation – because then there would be inequality within the group. It would include both purposive and non-purposive beings. This inequality cannot be avoided by arguing that the difference will be ignored – per corrective justice – and both the purposive and non-purposive entities will be regarded by their sameness, i.e. that all constitute life forms. The reason this will not succeed is because the directive aspect presupposes purposiveness. Purposiveness therefore cannot be ignored, but must be present as a defining feature.

Two points must be added. First, the sameness must include purposiveness but there is a range of specification available, so long as the features are shared by all persons. For example, it would be correct to add that the equality also consists of mortality since all purposive beings are mortal. (The only difference between mortality and purposiveness is the aspect from which each is derived. Purposiveness must always be included in the definition because the directive aspect presupposes it. Mortality, on the other hand, is a product of the equality aspect.)

The second point is that the principle is context-specific. In its purest sense it applies to all persons. But it is also malleable to context. Suppose, for example, that five male and five female doctors are in a group together. The principle would see everyone as equal by viewing people by their sameness. Accordingly, the principle would abstract from gender (because it differentiates the group), but it would not (need to) abstract from profession. Since everyone in

the group is a doctor, this context can include profession within the sameness shared. However, importantly, purposiveness must also be included in the definition of sameness. Again, this is because purposiveness is the importation and presupposition of the omnipresent directive aspect.

5.3 The Principle of Equality as Remedying Kantian Corrective Justice

The approach above remedies Kantian corrective justice by arriving at Kantian substance from within, and constrained by, Aristotle's form of corrective justice. Weinrib concludes that private law is synonymous with Kantian Right. But, because he adopts Kant as a second step, he excessively values freedom. As indicated by the above discussion, Aristotle's form of corrective justice certainly presupposes – as Weinrib claims – the purposiveness immanent in action and that is at the center of Kant's legal philosophy.

But Aristotle never indicated that purposiveness was the *only* relevant feature and the *only* definition of legal personhood. Aristotle's definition had two parts: it emphasized the purposiveness immanent in action/interaction, and it ignored all differentiation between persons. But there is a range within this definition. At one extreme is purposiveness as the only relevant feature. This is Kant's definition. Kant ignores difference, but he also ignores all other similarities except for the purposive capacity. At the other extreme is a view that includes the purposive capacity but also further features that are shared by persons. These features are not excluded because they do not differentiate people, but merely comprise their identity.

There is no need to restrict Aristotle's range to Kant's personality. Because Weinrib proceeded with a second step, he unnecessarily and dangerously adopted Kant's full system and

restrictive definition. Weinrib correctly identified purposiveness as intrinsic to Aristotle's definition of corrective justice, but assumes without justification that purposiveness is the maximum, i.e. that it exhausts a complete definition, when it is in fact a minimum. In addition to this minimum, other features of sameness can be added – while preserving a priority that orders existence, purposiveness and specific purposes.

This thesis therefore adopts both a more restrictive and a less restrictive view of the form of corrective justice than Kantian corrective justice. It is *more* restrictive in its contention that the form of corrective justice contains substance for private law. It argues that the form can develop substance from within by being attuned to the presuppositions of Aristotle's principle to restore the antecedent equality (i.e. duty presupposes freedom, and equality presupposes sameness). While Weinrib acknowledges Kelsen's criticism and only argues that the emptiness is still important for its special form and exclusionary role, the thesis contends that the principle of corrective justice is not substantively empty. However, as a result of this view of the thesis, Aristotle's substance has a range of sameness to qualify as relevant for juridical relationships. In this sense, it is ultimately *less* restrictive than Kantian corrective justice, which moves quickly to Kant to fill the emptiness of corrective justice and therefore is confined to Kant's restrictive definition of legal personality with its sole focus on purposiveness.

5.4 Kant's Normativity and Legal Formalism

Weinrib argues that Kant's system provides normative significance to corrective justice. Kant's normativity proceeds by first assuming freedom as the defining value and then identifying

duty as arising from freedom. Weinrib notes that Kant is restricted in his conception of a normative duty: it cannot be imposed from without, but must be worked from within the conception of freedom.[134] Duty, according to Kant, is freedom restricting itself to ensure the co-existence of the freedom of all according to a universal principle.

Weinrib rightly observes the elegance of Kant's notion of normativeness,[135] but the method of legal formalism demands the movement to be reversed. Unlike Kant who is beginning from the start, legal formalism presupposes a body of private law that already exists. It is not necessary for it to craft the entire system anew but to understand its parts and operation. Prior to the movement to Kant, Aristotle's principle of corrective justice has been identified: the duty to restore an antecedent equality. The method of legal formalism therefore ought to first explore duty and its presuppositions, which may elucidate further features that make the duty understandable.

Consequently, instead of Kant's movement from freedom to duty, legal formalism must move first from duty to freedom. (Weinrib notes that the method of legal formalism converges with Kant but from the opposite direction.[136]) As argued above, duty presupposes a conception of freedom that makes duty meaningful. In this way, legal formalism arrives at freedom – not as a fundamental assumption like Kant, but as a precondition of duty and the obligation of private

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[134] Ernest Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) at 93 [Weinrib, *Private Law*].

[135] *Ibid* ("Kant's notion of normativeness is extraordinarily elegant").

[136] Ernest J. Weinrib, "Corrective Justice," *supra* note 52 at 424: "Kant and Hegel treat from the standpoint of action what Aristotle describes as a structure of interaction. With interaction as his starting point, Aristotle elucidates the other-directedness of justice and links the parties through the notion of equality. Kant and Hegel, in contrast, start with agency and show its necessary embodiment in a juridical order of abstractly equal agents. *Aristotle's account of corrective justice and the modern accounts of abstract right thus move over the same ground but from different directions*" (emphasis added).

law.[137] This method is available to legal formalism because (unlike Kant's argument) there is already a body of private law and an existent conception of duty to be explicated. Indeed, Maimonides and Kant (elsewhere) make the same argument of moving from duty to freedom.[138]

Once legal formalism moves from duty to freedom, it can connect with Kant's freedom and can then move back from freedom to duty, thus comprising a fully integrated circle. But because it proceeds first from duty to freedom, it is not confined to basing the system on freedom alone or on allowing freedom to be the *only* characteristic relevant to legal personality. Rather, all features of sameness can be relevant, including the existence of life itself.

This does not entirely erase Kant's system of freedom, but situates it and restricts it within Aristotle's framework. Although it allows all sameness to be relevant, there is still a priority in place. Existence is prior to purposiveness because it is presupposed in purposiveness. Similarly, purposiveness is prior to specific purposes because it is presupposed by specific purposes.[139] (Indeed, Weinrib makes an almost identical argument in his justification for the right to preserve property by using another's property. He argues that the continued existence of

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[137] Ernest Weinrib, "Private Law and Public Right" (2011) 61 UTLJ 191 at 193-194 [Weinrib, "Public Right"]: "My point in invoking Aristotle and Kant has not been to reconstruct the place of law within an Aristotelian conception of ethics or a Kantian metaphysics of practical reason. Rather, the task of a legal theory, as I see it, is to bring to the surface the most pervasive ideas latent in law as a normative practice."

[138] One of arguments of Maimonides for the existence of free will proceeds this way. In his *Laws of Repentance* Chapter 5:4, Maimonides argues that people must have free will because otherwise God's commandments would be meaningless. Like legal formalism's analysis of private law, Maimonides has this argument available because he already presupposes a duty and a body of commandments in existence.

Kant himself makes use of this argument in *The Critique of Practical Reason*, defending freedom as an actuality. Kant argues that this is the result of moral faith, not theoretical proof: we are all conscious of morality and the obligations we sense – and there cannot be moral obligation without moral freedom. Kant's argument in *The Critique of Practical Reason* thus proceeds from duty to freedom. He contends that we know that we are free because we know that we are morally obligated. *See* Emil Fackenheim, "Kant and Radical Evil" (1954) 23 U of T Quarterly 339 at 343.

[139] Ernest J. Weinrib, "Formalism and Practical Reason, or How to Avoid Seeing Ghosts in the Empty Sepulchre" (1993) 16 Harv J L & Pub Pol'y 683 at 693-694.

property is presupposed by use of the property, and that therefore the owner of the endangered property has a prior and stronger claim against the owner that wishes to determine the object's use.)[140]

By following legal formalism fully, the thesis argues that existence can be relevant and prior to purposiveness in private law. However, the thesis leaves in place the priority of purposiveness to specific purposes. It thus secures most of Kant's principles that arise from his elaboration of freedom. Further, it identifies freedom as relevant from within the operation of legal formalism – i.e. it does not begin with freedom alone as Kant does, but locates it as a presupposition of the duty that is intrinsic to *law*. However, as noted, this freedom is restricted within the framework of equality that is private law.

5.5 Two Methods of Abstraction

As mentioned, Aristotle's principle to restore an antecedent equality emphasizes two elements: the shared interaction and the abstraction from particularizing differences. As argued, this allows for a range of sameness to figure as relevant, even while preserving the priority of existence-purposiveness-purposes. Further, as discussed, Aristotle's corrective justice presupposes sameness while distributive justice requires difference. Once the move from duty to freedom (the directive aspect) imports and restricts the legal realm to purposive beings, sameness defines how the law will view these purposive beings: by all their shared features (not just purposiveness) but with a priority in place.

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[140] Weinrib, *Private Law*, *supra* note 134 at 199-203.

Although Aristotle has an abstract conception of the person that removes all particularizing difference, he arrives at this definition through a different method than Kant. Kant's method of abstraction is to remove all incidental features and focus on the essential elements that characterize the person. By contrast, Aristotle's definition is reached by identifying the shared features within a group of persons. All differences within the group are naturally relinquished and the result is an abstract conception of the person. While Kant's process would work even were he to analyze an individual person, Aristotle's method operates only from a group perspective.

Aristotle believed that the proper method to understand a subject entailed identifying the common element that was present in particular cases. His process of abstraction has been described as follows:

> "We begin by accumulating experience…. From the stage of experience we pass to the stage of science by finding the common element in the particular cases which have been observed….[D]iscovery of the common element…is the method by which first principles are reached…. The final act of insight, whereby we are led on to recognise the principle which lies behind all the particular instances [is] itself an act of intuition … [W]hen the fundamental principles have been discovered … deduction is possible … Thus Aristotle conceived the development of a science as an upward movement of thought … [by] which first principles are discovered and stated, followed by a downward deductive process in which the necessary consequences of those principles are worked out… The material organized by these two movements [can then be] organized according to its various parts, *genera* and *species*." [141]

Though there is a place for both methods for abstraction, different systems may rely more heavily upon one than the other. Like Aristotle, the process of group abstraction is also frequently used in Jewish jurisprudence.[142] By contrast, the Roman jurists – like Kant –

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[141] Peter Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims* (Edinburgh: The University Press, 1966) at 34-36 quoted in James Gordley, *The Jurists* (Oxford: Oxford University Press, 2013) at 13.

[142] The Mishna and Talmud refer to this process as a "tzad hashaveh" (transl. "common side"). A prime example is the discussion at the beginning of Baba Kamma. The Mishna begins by specifying the four generative categories of

abstracted by locating cases that lacked specific content and thereby exhibited a more abstract, general quality.[143] The jurists moved from case to case but stopped short of generalizing across cases.[144]

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damagers: oxen, pits, *maveh* (a debated category) and fire. Next, the Mishna notes that each category has particular features that differentiate it from the others. However, the Mishna reaches a general principle by searching for the commonality in the group. It concludes: "their commonality of the categories (*tzad hashaveh*) is that they customarily damage and it is your responsibility to guard them." Accordingly, any damage that falls within the general principle will incur liability even if it is not included in the four categories. For other examples of this process in the Talmud, see Makkos 4b (allowing the imposition of penalties for omissions) and Bava Metzia 4a (requiring oaths for certain denials of debt).

[143] Daube defines abstraction by this process, and uses examples of Roman law as illustrations in David Daube, "Standing in for Jack Coons" (1988) 7 Rechtshistorisches Journal 179 in *Daube on Roman Law* at 66-67.

[144] Calum Carmichael, "Introduction" in *Daube on Roman Law* in *Collected Works of David Daube* Vol. 5 ed. Calum Carmichael & Laurent Mayali (Berkeley: The Robbins Collection, 2014) at xxiii.

Chapter 6
Private Law and Public Right

6.1 Weinrib on Private Law and Public Right

6.1.1 Introduction

In "Private Law and Public Right,"[145] Professor Weinrib seeks to integrate his view of private law within a public system. According to Weinrib, legal formalism reveals the structure of private law to be corrective justice: the bilateral and correlative liability of a plaintiff to a defendant. These features operate as the expression of Kant's system of rights and duties, which Kant refers to as private right – the system of law in a state of nature.

Weinrib explains that private law is not exhausted by Kant's private right. As Kant noted, private right alone would collapse without public institutions of adjudication and enforcement. Without adjudication and enforcement, a citizen would have no assurance that others would fulfill the obligations of private right. And without such a guarantee, no citizen would risk fulfilling obligations because of the chance of a lack of reciprocation from others. This would be the subordination of the self to others and inconsistent with the equal reciprocal freedom that constitutes private right.[146] Kant therefore argues that citizens cannot remain in a state of nature, but rather must enter a civil condition that allows for the public benefits of

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[145] Ernest Weinrib, "Public Right," *supra* note 137.

[146] Immanuel Kant, *The Metaphysics of Morals*, *supra* note 38 at 86 [6:307].

adjudication and enforcement.[147] Kant refers to this requirement as the "postulate of public right."[148]

Private law therefore consists of the substance of private right and the procedural benefits of public right. Weinrib notes, however, that private right and public right have different methods for relating citizens to one another. While private right represents the form of corrective justice and links plaintiff to defendant in a bilateral nexus, public right relates all citizens to one another through the institutions that represent them all.

6.1.2 Publicness and Systematicity

Weinrib identifies two normative features that permeate public right: publicness and systematicity. Publicness means that institutions must secure rights through norms that can be known and acknowledged by all.[149] Free and equal persons could not be bound by a principle that depended on its being concealed from them.[150] Accordingly, institutions are public because they secure the rights of everyone and do so according to reasons that are public and capable of being acknowledged by all citizens.[151] Weinrib refers to publicness as the formal requirement of public right because it applies to all norms regardless of their content.[152]

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[147] *Ibid*.

[148] *Ibid*.

[149] Weinrib, "Public Right," *supra* note 137 at 196.

[150] *Ibid*.

[151] *Ibid*.

[152] *Ibid*.

The second intrinsic feature of public right is systematicity. While private right orders interaction of free individuals, public right fuses individuals as a political unit that express their united will through a system of laws. The public institutions – the legislative, executive and judicial bodies – systematize norms in relation to each other, thus comprising a whole order.[153] Weinrib refers to systematicity as the substantive requirement of public right because it bears on the relation of norms to each other.[154] (Kant, for his part, discusses publicness as an aspect of public right, but does not mention systematicity.)

Although public right typically just secures private right, Weinrib argues that there are instances where public right transforms the substance of private right.[155] In standard cases, public right merely adds its procedural benefits to rights that existed in a state of nature. Its mechanisms of adjudication and enforcement presuppose the law of private right and merely facilitates its fulfillment. But Weinrib argues that sometimes the two intrinsic features of public right – publicness and systematicity – impose a consequence that conflicts with the demands of private right. When such a conflict arises, Weinrib writes that public right prevails because rights cannot be enjoyed without the adjudication and enforcement of public right.[156]

Weinrib offers three examples to illustrate the transformative power public right may have on private right. He argues that market overt – the principle that allows a sale in a public market to transfer title even if the vendor has no title – exemplifies a consequence of publicness, even though the principle violates the dictates of private right. Weinrib provides two examples

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[153] *Ibid* at 197.

[154] *Ibid*.

[155] *Ibid* at 198.

[156] *Ibid* at 199.

of the effects of systematicity on private right: the tort of induced breach of contract and the privilege in certain cases to damage the property of another to preserve one's own property.

6.1.2.1 Publicness Example: Market Overt

Weinrib draws his example of market overt from Kant. Typically, only an owner of a thing can transfer title to the thing (expressed by the principle *nemo dat quod non habet*). However, the doctrine of market overt allows a purchaser for value without notice of the defective title to retain the thing, provided that the sale occurred in an open market.[157] Weinrib explains Kant as saying that these two opposing notions – that only a true owner can transfer title and yet the title transfers in a market overt – are both valid but from different points of view.[158] The first notion accords with private right, while the latter exception of market overt is the result of public right.[159]

Weinrib explains that title must transfer in market overt for public right to fulfill its function. Without market overt, a purchaser would have to verify the entire chain of title. Since this is essentially impossible, transfers would not be secure. This would be a failure of public right to guarantee secure acquisition. Instead, public right allows for title to transfer so long as the transaction occurs on an open and publicly regulated market.[160]

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[157] *Ibid*.

[158] *Ibid*.

[159] *Ibid*.

[160] *Ibid*.

6.1.2.2 Systematicity Example #1: Induced Breach of Contract

Weinrib explains that in private right a contract only binds the contracting parties.[161] Unlike an *in rem* property right, which is good against the whole world, a contract transfers an *in personam* right against the promisor. But in a state of nature, no one is assured that his or her rights will be respected. In the absence of such assurance, a person will not fulfill his or her own obligations – contractual or otherwise – in order not to subordinate oneself to others who might refuse to reciprocate obligations.[162] Public right cures this defect by providing a system of omnilateral assurances through a system of adjudication and enforcement.[163] The system of omnilateral assurances requires courts to hold contracting parties to their obligations.[164]

But Weinrib claims it also requires something more. Weinrib argues that since the public function of a system of laws is to secure everyone's rights, it demands of everyone to respect everyone else's rights.[165] Weinrib contends that this public function would be unfulfilled if parties external to the contract could induce the promisor to breach the contract.[166] Accordingly,

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[161] *Ibid* at 204.

[162] *Ibid*.

[163] *Ibid*.

[164] *Ibid* at 205.

[165] *Ibid*.

[166] *Ibid*.

while the contractual right in a state of nature is a right held only against the promisor, the system of public right extends this right against the world.[167]

6.1.2.3 Systematicity Example #2: Preserving Property

Weinrib's final example is the privilege to preserve property through the use of the property of another. In *Ploof v Putnam*[168] and *Vincent v Lake Erie*,[169] the court held that a dock owner must allow another person's boat to remain moored during a storm. Weinrib approvingly quotes Pufendorf's formulation of the permit to use another's property. According to Pufendorf, there are three requirements: (a) the disaster must not be able to be averted in an easier way; (b) the damage to the used property must not exceed the value of the property saved; and (c) compensation must be made for the damage, as long as the damage would not have occurred anyway.[170]

According to Weinrib, necessity both justifies and limits the right to preserve property.[171] Necessity justifies temporary use of another's property: by allowing the other's property to be used and damaged, but limits this right by requiring compensation once the danger passes. Justification assumes these two roles because justification presupposes two stages: the right and

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[167] *Ibid*.

[168] *Ploof v Putnam*, 81 Vt 471, 71 A 188 (1908).

[169] *Vincent v Lake Erie Transportation Co.*, 109 Minn 456, 124 NW 221 (1910).

[170] Samuel von Pufendorf, *On the Law of Nature and Nations* (Oxford: Clarendon Press, 1934) at 2.6.8, quoted in Weinrib, "Public Right," *supra* note 137 at 207.

[171] Weinrib, "Public Right," *supra* note 137 at 207.

the justified exception. Here, the owner's right is justifiably infringed but not negated. Its presence therefore requires that the infringement be as minimal as necessary and that compensation be made for the infringement.[172]

Weinrib argues that the possibility of justifying an infringement is a result of the systematicity of public right.[173] The potential divergence between private right and public right allows for a conflict of two stages. On the one hand, private right recognizes the owner's property right as unconditional. On the other hand, the system of public right does not regard the owner's right as absolute but acknowledges that necessity may temporarily limit the right. The law – at the public right stage – is concerned with the entire system of rights and justifications work to adjust the effects of private right to fit within the total system.[174]

Weinrib explains that Pufendorf's formulation treats the rightfulness of preserving property as "implicit in a system of property."[175] In a state of nature, private right views property as a unidirectional right held against the world without limitation. But when incorporated within a system of property rights, this right is modified by the presence of adjacent property rights of others.[176] Pufendorf's formulation attempts to preserve the property rights of both participants of the system to the greatest extent possible.[177]

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[172] *Ibid* at 209.

[173] *Ibid*.

[174] *Ibid* at 209.

[175] *Ibid*.

[176] *Ibid*.

[177] *Ibid*.

6.1.2.4 Weinrib's Two Restrictions on Public Right

Although public right can impose these consequences that vary private right, Weinrib claims that the matter of private right remains unaffected by public right. He identifies two features that reflect the priority and insularity of private right. First, Weinrib argues that while public right might alter specific judgments within property or contract law, the division of categories itself in private right – such as property and contract – are immune from the workings of public right. Despite the ability of public right to rework the judgments of law in each category, the categories themselves are not subject to revision.[178]

Second, Weinrib explains that because public right supervenes upon a prior content of private right, the matter of private right should remain intact and untouched to the extent possible.[179] Accordingly, Weinrib concludes that public right should only vary as minimally as necessary what the judgment would be according to the internal logic of private right. As an example, Weinrib points to market overt, which – although it transfers title to the purchaser – allows the true owner to regain title by reimbursing the purchaser for the paid price.[180] According to Weinrib, this reflects the minimal interference that guides public right's intrusion upon private right: although market overt transfers title, the true owner's rights are not fully extinguished.

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[178] *Ibid* at 202.

[179] *Ibid*.

[180] *Ibid*.

6.1.3 Kant's Four Examples of Publicness

As Weinrib's argument is predicated on Kant's system and Weinrib draws his example of market overt directly from Kant, it is important to analyze Kant's discussion of public right. Although Kant refers to the publicness of public right as the instrumental factor that can change the judgments of private right, he does not make the argument that Weinrib extracts from his discussion. Further, as will be argued below, Weinrib's explanation concedes too much control to public right and undermines his earlier work constructing private law as a distinctive structure that is private as between the parties.

6.1.3.1 Donative Promises

Kant lists four examples of the impact public right may have on private right. Kant's first example is a contract to make a gift, i.e. a donative promise. Kant understands contract as a transfer that occurs through the parties' united wills of offer and acceptance. Kant explains, however, that there is a presumption in private right that a person would not gratuitously surrender his or her freedom or property.[181] Reflecting this aversion to self-sacrifice and subordination, private right presumes that the promisor implicitly attached to the donative promise a reservation allowing the offer to be rescinded, and private right would presume that the promisor exercised this right if the promisor later refuses to deliver the gift. Although it is

[181] "*nemo suum iactare praesumitur*" (transl. "no one is presumed to throw away what is his.") Kant, *Metaphysics*, *supra* note 38 at 78 [6:298].

uncertain whether the promisor actually attached or exercised such a reservation, private right presumes that the promisor did so to be consistent with its principled antipathy to self-sacrifice. Accordingly, if the donative promisor refuses to deliver the gift at the time of performance, the presumptions of private right would release the promisor from any contractual obligation.[182]

However, Kant explains that a court of justice imposes contractual obligation on such a donative promise. As Kant notes, individuals must leave the state of nature to secure their rights via the procedural benefits (adjudication and enforcement) afforded by the civil condition.[183] A court of justice, responsible for the adjudicative function of public right, is guided by publicness. Since a court is confined to judging the case on the facts that are public and available to the court, it cannot engage in hypothesizing what intentions the promisor might have had in mind at the time of the promise. The court must judge the case on the public facts before the court, and on those facts the promisor did not express a reservation to qualify the enforceability of the donative promise. The court must therefore conclude that the donative promise is enforceable.

This is Kant's first example of public right imposing a judgment that would not have been expected of private right. Private right would have found the gift unenforceable. Yet, because the court must operate in a public manner, it reaches a different conclusion. A court, restricted to public facts and principles, naturally has a slightly different analysis and therefore finds the gifts enforceable.

While this is only one example, it is important to highlight the principles at play. The shift in the court's judgment from the dictates of private right is only triggered by certain

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[182] *Ibid* at 78-79.

[183] *Ibid* at 86 [6:307].

conditions. First, there must be *uncertainty* to be resolved. In the case of the donative promise, it is unclear whether the promisor intended to reserve the right to rescind or whether the right was exercised even if it was reserved. The law must resolve uncertainty one way or another, and it does so by making a *presumption* – which is the second element at play. Private right, which has its own normative guidelines about freedom and how it ought not to be gratuitously surrendered, operates according to a presumption that resolves the uncertainty in favour of the promisor. By contrast, public right has the normative feature of publicness, which leads the court to operate according to a different presumption – one that resolves the uncertainty by appealing only to the publicly available facts, which indicate that no reservation was expressed by the promisor.

It is crucial to emphasize that public right is not directly transforming the substance of private right. There is in fact no clear-cut result dictated by private right because the facts are uncertain. The result is law guessing at what is most fair. Private right and public right reach different conclusions because they make different presumptions. But to be clear, this is not public right simply overpowering private right and replacing its laws or definite conclusions. It is only a conflict of presumptions in a case where the result is uncertain. The reason public right prevails is because, as Kant noted, private right depends upon a public court to secure its rights and must therefore make the minor concession of recognizing a presumption that arises from the publicness that is intrinsic to a court of justice. Presumptions are a procedural mechanism to resolve uncertainty, and the conflict of presumptions is a conflict of procedural law. Since the entire transition from a state of nature to a civil condition was to obtain its procedural benefits, the presumption and procedure of public right must be followed. By contrast, however, there is

no need or allowance for private right to permit any of its substantive, certain conclusions to be revised or replaced by public right.[184]

Lastly, because the presumptions are only activated by uncertainty, the promisor is still free to craft a contract that leaves no room for doubt. Neither presumption precludes the promisor from expressing a reservation in clear, public terms. The presumptions do not demand any specific action from the promisor because they are in fact the result of the promisor's uncertain action. Because the presumptions do not directly demand any action or restrict the promisor's freedom, they are not intrinsically a part of the substance of private right (which orders the co-existence of freedom) – or put another way, both presumptions are consistent with the co-existence of freedom. The conflict therefore does not touch the substance of private right, but merely the appropriate procedural mechanism to resolve factual uncertainty. This is a secondary step that does not form part of the first category of substantive law.

By contrast, the actual substance of private right is prior and immune to the workings of public right. There is no need or allowance for public right to permit any of its substantive, certain orders to be revised or replaced by public right. This distinction follows the rationale for moving to a civil condition. Since the impetus for the move was to secure the procedural benefits of public right, the procedure of public right prevails over the procedure of private right. The presumption of publicness favouring the promisee therefore pushes aside the presumption against self-sacrifice favouring the promisor. But by the same token, the rationale is exhausted by its procedural application. The civil condition was needed for its procedural benefits, that is,

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[184] As Kant writes, "the latter (public right) contains no further or other duties of human beings among themselves than can be conceived in the former state; the matter of private right is the same in both. The laws of the condition of public right, accordingly, have to do only with the rightful form of their association (constitution), in view of which these laws must necessarily be conceived as public." Kant, *Metaphysics*, *supra* note 38 at 85 [6:305].

to secure the substantive law of private right. It would therefore be bewildering and perverse were the procedural benefits to have the power to rework and reshape the substance which it was introduced to protect. Kant's example, which relates to procedural but not substantive conflict, is congruent with and a consequence of the rationale for moving to a civil condition.

6.1.3.2 Free Lending

Kant's second example is the free lending of an object, and whether the borrower or lender is responsible for non-negligent damage to the object.[185] In Kant's scenario, a person caught in the rain borrows a raincoat, which is then stolen or damaged by a person pouring discolouring liquid from a street window. Kant explains that according to private right, the borrower cannot simply absolve his or her obligations by returning the damaged coat or reporting it as stolen. Private right presumes that a person would not transfer freedom or property gratuitously, and so it limits the transfer to what was expressly stated. The terms expressly state that the borrower could temporarily use the coat for free, but is silent as to who ought to shoulder responsibility for the damage. The facts, again, are uncertain. And, again, Kant relies upon private law's presumption against self-sacrifice to conclude that the borrower's rights are limited only to what was expressly transferred (i.e. the temporary use of the coat) and not what was left unsaid (i.e. the exemption for loss).[186]

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[185] *Ibid* at 79 [6:299].

[186] *Ibid*.

By contrast, Kant explains that a public court of justice must resolve the uncertainty in favour of the borrower. As in the previous example, Kant explains that a public court of justice can recognize only those facts before the court that are public and clear. The lender clearly transferred the coat to the borrower and could have attached a provision ensuring the borrower's liability in event of non-negligent loss. While private right nevertheless presumes that the lender intended such a provision and therefore holds the borrower liable, a court of justice cannot engage in conjecture of private intentions but is restricted to the public facts available. The express contract did not provide for liability, and therefore the court exempts the borrower of the innocent damage.[187]

As with the first example, Kant details a conflict of procedure. There is factual uncertainty as to the lender's intentions about the party to be held responsible for innocent loss. Private right and public right each have their own procedure and presumption to resolve the uncertainty. Private right adopts a presumption stemming from its normative features of freedom and ownership, while public right makes a presumption arising from its limitations of publicness. Again, the procedural conflict is resolved in favour of public right, but private right would have prevailed had it been a substantive disagreement. As mentioned, this distinction between procedural and substantive conflict naturally follows from the rationale, which calls all individuals to move to the civil condition to secure private right's substance with public right's procedure.

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[187] *Ibid* at 80 [6:300].

6.1.3.3 Market Overt

Kant's third example is market overt. Kant writes that any property that can be alienated must be capable of being transferred to another person.[188] But Kant notes that virtually any transfer of property is plagued by uncertainty. Any transfer of property – even if all the requirements and legal formalities are satisfied – will possibly be null if the seller is not the true owner. Now, Kant argues that the purchaser cannot simply ask the seller to prove true title. First, Kant considers it an offense to question the seller's title because it means that the borrower suspects the seller of fraud. According to Kant's system, it is the right of each individual to be presumed to act honorably until proven otherwise. Further, and perhaps more importantly, it is "largely impossible"[189] to verify the entire chain of title as it will lead to "infinity in an ascending series."[190] The seller's title, then, can hardly ever be fully proven.

Yet transfers occur all the time, despite the uncertainty of title. Typically, the transfer is effected and there are no competing claims to dislodge the purchaser's title. But sometimes, Kant notes, a sale might occur where the seller is not the true owner. In these cases, the purchaser may be unaware that the seller is not the true owner. The purchaser has done nothing wrong and has paid good value for the object. Opposing the purchaser's claim is the true owner who asserts a property right as the true owner. Who has the better claim?

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[188] *Ibid* at 81 [6:301].

[189] *Ibid* at 82 [6:302].

[190] *Ibid* at 81 [6:301].

It is important to repeat that neither party has a certain claim. The purchaser has satisfied all the legal requirements of transfer and appears to be the owner, but this claim is undermined if the earlier owner truly has good title. On the other hand, the earlier owner appears to have good title but this is not fully certain, as it would require proof of the entire chain of title back to the first acquirer. In short, there are two competing claims to the object and a factual uncertainty.

Private right resolves this uncertainty by favouring the earlier owner. According to private right, the purchaser can receive as good a title as the seller possessed. Since the seller turns out to be a fraudulent non-owner, the purchaser has not received title to the property. The purchaser may sue the seller to recover damages, but must return the object to the earlier owner.

By contrast, a public court of justice resolves the uncertainty in favour of the bona fide purchaser. An intrinsic feature of adjudication is to determine uncertainties and resolve disputes. This, in fact, is the benefit of adjudication that necessitates the move to the civil condition. Without adjudication, no one could be assured that others would respect their rights because there would be no impartial judge to determine uncertainties and resolve disputes. Accordingly, to fulfill its role of securing rights, a court must determine whether a transfer of property is to be effective or not. A court cannot simply take the position of private right, that is, to presume the purchaser receives title but not if an earlier owner later arrives and challenges the purchaser's title. This leaves the transfer in limbo and allows uncertainty to persist interminably since one can never know if an earlier owner will later challenge the purchaser's title.

A public court of justice must make an affirmative, clear decision – and its options are limited. It cannot deny the purchaser title because to do so would essentially deny the possibility of transfer. Further, as mentioned, it cannot allow the purchaser to receive title subject to the

provision that title must be returned to an earlier owner that challenges title. To do so would not secure rights, but merely concretize the natural uncertainty into the purchaser's title itself.

A court of justice therefore resolves the uncertainty by making a clear determination. Again, it relies on its emphasis upon the public sphere within which a court operates. A court allows title[191] to transfer to the purchaser, provided that the purchaser has satisfied the court that he or she has done everything possible to appropriately gain title. This includes all the legal requirements and formalities of transfer, but also limits the scope of the transfer to a public market. A public market is the fullest satisfaction of these requirements since a court recognizes that the sale is entirely public and knowable. A court must decide a case on the publicly ascertainable facts. In previous examples, the publicness was limited to the two contracting parties since the dispute was only between those two parties. By contrast, transfer raises the possibility that a third party exists somewhere in the world that might wish to prevent the fraudulent transfer. Consequently, publicness requires that the sale be as "publicly knowable" as possible. Without satisfying this, a court will not trust that the sale exhibits the full force of fact since it was hidden from a potential claimant. Only market overt – a public market – satisfies the court that all potential claimants had the opportunity to be notified of the sale. If none come forward, the court makes a presumption in favour of the purchaser. It resolves the natural uncertainty – i.e. whether the earlier owner is indeed the true owner through an endless chain of title – by presuming that the earlier owner never had true ownership because the chain of title was imperfect somewhere along the line.

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[191] If Kant recognizes the legal right for the earlier owner to repurchase the object from the purchaser, then it might be more accurate to describe the sale as transferring full title to the *value* of the property since this is irrevocably transferred, and not to the *thing* itself, which the earlier owner can recover through repurchase.

Note that when a sale is private and does not satisfy the requirements of market overt, the earlier owner can regain title. This means that private sales provide the purchaser with uncertain title (because the earlier owner might later arrive). However, a public court of justice has still fulfilled its function of enabling a secure means of transfer. If the purchaser nevertheless chooses to conduct a sale privately, the purchaser is responsible for accepting the attendant uncertain title.

Note that market overt therefore possesses the same features as Kant's earlier two examples. Kant rests his analysis on the natural uncertainty as to whether the earlier owner indeed is the true owner. This typically remains uncertain because the entire chain of title can virtually never be proven. Accordingly, private right resolves the uncertainty by presuming that the earlier owner indeed has a valid chain of title, while public right presumes the opposite when the sale occurred in a public market (i.e. market overt).[192] Like the earlier examples, there is uncertainty and a conflict of presumptions – and the procedure of public right prevails for the reasons described earlier.

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[192] A consequence of this analysis is that if the earlier owner can somehow prove the entire chain of title (if this is even possible), then even market overt cannot allow the purchaser to retain title because in this case there would be no uncertainty at play. Assuming that this hypothetical scenario is even possible (Kant appears highly doubtful), the uncertainty it introduces to every transfer is likely so rare and minimal as not to be damaging to function of the court to secure rights and remove uncertainty. (Further, there is simply nothing a court can do to remove this rare uncertainty as the earlier owner's right would be indubitable if the entire chain of title were proven – and public right cannot alter the certain conclusions of private right which demands that a true owner have undiminished title.)

6.1.3.4 Guarantees by Oath

Kant's fourth and final example is the requirement of courts that testimony be guaranteed by oaths.[193] Kant questions why litigants must accept the testimony of witnesses merely because they supported their testimony with an oath. Believers in divine providence and punishment may place value in oath making, but others may remain just as suspect of the veracity of the witnesses after the oath as before the oath. Further, Kant asks why everyone must take an oath even if they do not subscribe to the divine beliefs that ostensibly infuse the oath with believability. Kant views both demands of the court – that a non-believer must accept the veracity of an oath-maker and that a non-believer must introduce his or her own testimony by making an oath – as wrongs.

Kant explains that the reliability courts attribute to oath making is non-existent in a state of nature. Private right does not bind a person to accept oaths as veracity-infusing acts; nor does private right bind a person to make an oath to gain credibility. By contrast, however, Kant notes that public court of justice needs to have some means of establishing truth. Despite Kant's reservations, he argues that sometimes a court has no other way than an oath to get at the truth of something. It must therefore rely on oaths as a "handy means, in keeping with the human propensity to superstition, for uncovering secrets and considers itself authorized to use it because of this."[194] (Despite understanding the desperate need for the mechanism, Kant still views the imposition and centrality of oath making as a wrong that the court inflicts on litigants.[195])

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[193] *Ibid* at 83 [6:303].

[194] *Ibid* at 84 [6:304].

[195] *Ibid*.

This example reflects the same pattern as the previous three. Here, the uncertainty is the fundamental and pervasive doubt about the veracity of testimony. Individuals in a state of nature are not obliged to trust statements made under oath or to introduce their own statements with an oath. But public right must fulfill its procedural function of securing rights and cannot allow such ubiquitous uncertainty to undermine all testimony before courts. While private right presumes that an oath is meaningless, public right presumes that an oath provides veracity and thereby allows the court to treat testimony as certain. Again, these are two different procedural responses to uncertainty and, again, public right prevails for the reason mentioned earlier.

6.1.4 Analysis of Weinrib's Arguments

As might have become clear though the preceding discussion of Kant, Weinrib's analysis of publicness and systematicity misconstrues Kant's argument. Weinrib seizes upon Kant's emphasis of the publicness of a court of justice and misunderstands Kant as treating the feature of *publicness alone* as the reason public right changes private right. From this misreading, Weinrib concludes that systematicity – which is just as pervasive and intrinsic to public right as publicness – must also have the same power to modify private right. But Kant never meant that publicness alone – without uncertainty and publicness figuring as a procedural presumption – could alter private right. It is therefore unsurprising that Kant, *contra* Weinrib, did not mention systematicity as a second feature that could modify private right. Kant did not refer to systematicity because it is not the intrinsic features of public right alone that can alter private right, but the procedural aspects that public right utilizes to resolve uncertainty. Weinrib mistakenly understands Kant as empowering publicness as inherently controlling because it is an

intrinsic feature of public right, and therefore adds systematicity to the list. Weinrib concludes from this that his three examples (market overt, induced breach of contract, and preserving property) may be legitimately grounded simply in one of these two features of public right.

This position is unsustainable. First, as mentioned, despite Weinrib's claim to be elucidating Kant's discussion and to be drawing his example of market overt directly from Kant, Weinrib completely diverges from Kant's analysis. Kant's four examples all possessed the same pattern of factual uncertainty, a procedural conflict of presumptions, and the prevailing of the procedure of public right because private right depends upon the procedural benefits of public right. By contrast, Weinrib does not make these features salient in his analysis. In presenting his three examples, Weinrib seems to believe that the features of public right alone – whether publicness or systematicity – can simply modify a judgment from being an expression of private right.

Second, Weinrib's argument is not supportable even as an independent argument that does not claim to be explicating Kant's four examples. Weinrib believes that these two features have the power to modify a judgment but he does not explain the justification for this. Why should publicness or systematicity as independent factors change private right? Take market overt, for example. If private right dictates that the earlier owner retain title against the bona fide purchaser, why should public right have the capacity to alter this determination? After all, private right invokes public right to secure its laws. It would be the ultimate reversal if public right could simply do away with the determinations it ought to secure. The answer, as suggested, is that market overt is a procedural conflict about resolving factual uncertainty, and procedure is the domain of public right. Although private right has its own presumptions and procedure, it gives way to the procedure of public right it so desperately needs. Weinrib – by not making

prominent these features of uncertainty, procedure and presumptions prominent – does away with what legitimizes the changes wrought by public right.

This fundamental defect is present in Weinrib's examples of systematicity as well. Kant's contractual right links the contracting parties in a bilateral relationship. Weinrib argues that once this bilateral right is situated within a system of rights, it transforms into a right against the world. Weinrib claims that since public right exists to secure and allow everyone to enjoy rights, it also secures the contractual right against the world. But this claim is ungrounded. The contractual right against the promisor is not like Kant's four examples – there is no uncertainty present to be resolved by public right. The promisee has a clear and certain right against the promisor's choice. Situating the contractual right within a system of rights need not and ought not to change it at all. The problem in a state of nature was that the promisee could not be assured without adjudication and enforcement that the promisor would fulfill the contractual obligations. Public right provides these assurances and so the problem is solved. By thinking that public right can alter this *in personam* right against the promisor into an *in rem* right against the world, Weinrib ascribes overwhelming power to public right. If public right can change private right simply because of its own intrinsic feature of systematicity, then it collapses the bilateral structure of private law as a system of private right that is insular from public right.

Similarly, Weinrib posits a right to preserve property without elaborating a justification. He simply assumes that when an owner's property right is situated within a system of rights and sees "the presence of an adjacent property right,"[196] it must somehow concede a right to the other person to damage the owner's property in cases of necessity. But Weinrib does not explain why

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[196] Weinrib, "Public Right," *supra* note 137 at 209.

this is so. He quotes Pufendorf's requirements, but Pufendorf also did not clarify the justification of the right. Indeed, Weinrib refers to the right to preserve property as "implicit in a system of property,"[197] when the right truly calls for a vigorous defense and an elaborated explanation. As in the example of induced breach of contract, Weinrib does not mention any uncertainty to be resolved. He acknowledges that private right provides a certain determination that an owner has the right to do as he or she wishes with property, yet concedes that public right can thwart this all simply because it systematizes the property right within an adjudicative process. Weinrib's position ascribes a shocking amount of influence to public right that entirely reverses the priority that private right ought to have in the face of public right. It is not only inconsistent Kant's analysis, it contradicts Weinrib's previous elaborate arguments constructing private law as a bilateral structure that has a protected priority as an expression of private right.

Further, Weinrib's claim that public right cannot alter the division of categories of private right[198] (e.g., contract and property) is also unsound. First, the basis of Weinrib's claim is unclear. Weinrib concedes that public right may alter the internal substance of each category – as recognizing the tort of induced breach of contract changes the substance of contract, and as legitimizing the right to preserve property modifies property rights. Why, then, can public right not do the same to the division of categories? Why is the division immune from public right, while the internal substance is susceptible? Weinrib offers no principled distinction. If somehow the division of categories survive the great wielding power of public right, then Weinrib provides no reason to doubt that it is a coincidental instead of a conceptual result.

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[197] *Ibid*.

[198] *Ibid* at 202.

Second, Weinrib in fact provides an example of public right reshaping the division of categories, thus contradicting his own claim. As his example of induced breach of contract shows, public right converts an *in personam* right against the promisor alone into an *in rem* right against the world. According to Weinrib's account of private right, this distinction is central to the difference between contract and property. Evidently, then, public right does have the capacity to revise and rework the categories themselves. Weinrib's two claims are therefore contradictory.

6.1.5 Alternative Justifications for Weinrib's Examples

If Weinrib's invocation of public right does not – or cannot – explain the courts' recognition of the tort of induced breach of contract and the right to preserve property, then what is the source of this divergence from private right? The earlier discussion of Kant's examples provides an explanation of market overt that is predicated on the features of uncertainty, presumptions and procedure. But these characteristics seem to be lacking in Weinrib's other two examples.[199]

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[199] One may ask why the right to preserve property cannot also be based on uncertainty: namely, the natural uncertainty that the owner is indeed the true owner with a full chain of title. Public right may then, in circumstances of necessity, seize upon this uncertainty and resolve it by presuming that the owner is *not* the true owner, thus allowing the owner of the endangered property to infringe upon the right.

It should be evident that this explanation is untenable. First, as Weinrib notes, the right to preserve property is an exception that presupposes a first-stage where the property right is intact. Evidently, even in a scenario of necessity, public right does not entirely do away with the owner's property right. Second, in standard cases, public right resolves this natural uncertainty just as private right does: it presumes that the owner has a full chain of title because there are no strong claims that require the court to doubt the title. It is only in the case of a bona fide purchaser of value, where all the public criteria and legal requirements have been satisfied, that the court is torn between two competing claims of seemingly equal power. In such a case, the court may resolve the uncertainty against the earlier owner. It cannot, however, do so in the case of necessity because the owner of the endangered property has no legal claim to the needed property.

6.1.5.1 Induced Breach of Contract

If according to Kant the contractual right provides the promisee a right to the promisor's choice in a state of nature, why does the law require third parties not to induce the promisor to breach the contract? If the tort is not the imposition of public right, how can it be explained internally by the principles of private right. There seem to be two possibilities.

One possibility is that, as mentioned, Kant's contractual right is idiosyncratic. It allows the promisee to have a right not to the thing itself, but to the promisor's choice. As discussed, prior to the contract, the promisor's choice belonged to the promisor as one speck of the promisor's innate right. The innate right obligates everyone in the world not to interfere with the promisor's purposiveness. The concept of contract itself recognizes a person's freedom to express purposiveness and therefore respects the person's wishes to transfer the right to this moment of choice to the promisee via contract.

Accordingly, it might be useful to track the stages closely and inspect what changes vis-à-vis this moment of choice from before the parties contract to after the parties contract. Before the parties contract, the world at large were already obligated to respect the promisor's choice and to not to interfere with that choice as a capacity for purposiveness. Once the parties contract, both the promisor and promisee agree to the transfer of a right to the promisor's choice. Since both parties are willing, the choice transfers to the promisee because this is consistent with both parties' wishes and therefore consistent with the equal freedom of both parties.

Now, as mentioned, Kant has a notorious problem with original acquisition because obligations cannot be unilaterally imposed upon the world. By the same token, one might expect that the agreement of two parties is ineffectual for the same reason. Obligations must have a universal characteristic to express the universal principle of Right according to Kant, and here the contractual agreement has only a bilateral characteristic. But this might be a mistaken conclusion. The reason is that the world at large was already under an obligation to respect and to not interfere with the promisor's choice because the choice was part of the promisor's innate right. Assume for instance that there was never a contract – others would be forbidden to prevent the promisor from choosing how to live his or her life. Accordingly, the contractual right might merely represent another manner in which the promisor wishes to exercise that moment of choice – by transferring the right to the choice to be exercised by the promisee. Inducing a breach of contract interferes with how the promisor wishes to live that moment of choice. It prevents the promisee from exercising the contractual right to the choice and is therefore inconsistent with the promisor's own wishes as expressed by the contractual agreement. This explanation reveals how a third party inducing a breach of contract may be inconsistent with private right, and does not require an appeal to public right or any of its features.

A second possibility exists from a peculiarity in Kant's state of nature. As mentioned, Kant's state of nature has contract right but no property rights. As the thesis argued, this strange state allowed for Kant to sustain the dichotomy between contract and property, but in a civil condition where property exists the dichotomy collapses and a contractual right expands into a property right. Accordingly, when Kant describes contract rights as only an *in personam* right against the promisor, this may only refer to the state of nature where property rights do not exist. Once the civil condition is entered and property rights are introduced, a contractual right necessarily

becomes a property right that is held against the world. The world therefore must respect this right and cannot induce a breach of contract, which interferes with the promisee's property right. Unlike the first explanation above, this account relies upon public right but in a way that is consistent with private right. It is consistent with private right merely follows the consequences of private right once the civil condition is reached and property rights are existent instead of provisional.

6.1.5.2 Preserving Property

Interestingly, unlike his recent argument above from systematicity, Weinrib in his earlier work provides an account of the right to preserve property without relying upon features of public right. In his classic book on private law, Weinrib justifies the right to preserve property in Kantian terms by untangling the components that comprise a property right.[200] First, Weinrib notes that the privilege has two parts: that the owner must allow the other person to use his or her property, and that the value saved must be greater than the prospective harm to the used property.[201]

Weinrib first focuses on the first part: use. Weinrib explains that Kant views property use as the expression of the person's freedom and purposiveness.[202] But Weinrib notes that the

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[200] Weinrib, *Private Law*, *supra* note 134 at 200.

[201] *Ibid*.

[202] *Ibid*.

continued existence of an object is the precondition for all potential uses.[203] Consequently, the stage of continued existence of property has a conceptual priority over the stage of usage.[204] Weinrib's argument goes as follows: an owner trying to prevent the other person from using the property will naturally insist that he or she has full rights as owner to the usage of the property. But since this implicitly recognizes the priority of continued existence of the property, the owner must recognize that the two claims are not equal. The person with the endangered property seeks the *continued existence* of property, and this has a priority over the owner's claim to determine who and how the property is to be *used*.[205] According to Weinrib, Kant views property owners as equal purposive beings seeking to express their freedom through property. As equal owners, the owner of the used property cannot assert the right to use property without also recognizing the other's right to his or her own property. But this move also requires acknowledging the priority of existence over use. When these two points are combined, the owner must acknowledge that the person with endangered property has a stronger claim to the property because it is a claim for preservation, which is conceptually prior to the owner's claim for use.[206]

Weinrib next moves to the second part of the right to preserve property: that the value saved must exceed the potential harm to the used property. Weinrib argues that comparing values is not – as it seems to be – a utilitarian move to maximize wealth.[207] Rather, under corrective justice, value signifies the object in abstraction from the particularity of their specific attributes

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[203] *Ibid*.

[204] *Ibid*. Note that Weinrib's argument is structured identically to the argument of the thesis that existence is conceptually prior and presupposed by purposiveness – and that therefore private law can recognize a limited duty to rescue others when their lives are in peril.

[205] *Ibid*.

[206] *Ibid* at 201.

[207] *Ibid* at 199.

or of the specific needs of a given owner.[208] Value treats qualitatively different objects in quantitatively comparative by viewing one object in terms of its exchange for another.[209] Value thus reflects the equal status of property ownership by abstracting from any individualizing qualities that differentiate the objects.

The Kantian argument for preserving property thus begins with the owner of the endangered property approaching with the conceptually prior claim for existence rather than use. But in addition to use, property also has the second feature of value – and it is value, not use, which allows property to be compared to each other in equal terms. Accordingly, the owner of the endangered party must evaluate the competing values to justify the infringement because it is the calculation of value that situates the two property owners as equals. (Use does not abstract as value does: it merely relates the shoe to the wearer; it does not see shoes in abstract terms of exchange, e.g., by how many loaves of bread it would garner in exchange.[210])

Importantly, this earlier analysis of Weinrib purports to explain the right to preserve property from within private right. Besides for the criticisms lodged earlier, it is surprising that Weinrib in his later argument sought to ground the right entirely in public right. As mentioned, the attempt to anchor the permit to preserve property simply in virtue of a feature of public right threatens to overwhelm the priority and insularity of private right. By contrast, Weinrib's earlier

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[208] *Ibid* at 201. For a fuller explanation of value, see Hegel's *Philosophy of Right* §63 and instructive elaborations in Ernest Weinrib, *Corrective Justice*, *supra* note 92 at 190-194 and in Peter Benson, "The Unity of Contract," *supra* note 128 at 188-191.

Note also that this explanation relies upon Hegel's conception of value. As mentioned, Kant seemed to lack Hegel's full conception of value. Accordingly, Weinrib's Kantian account of property preservation draws from Hegel.

[209] Weinrib, *Private Law*, *supra* note 134 at 201.

[210] This example is taken from Weinrib, *Corrective Justice*, *supra* note 92 at 193.

attempt is more consistent with his general approach to private law and its priority as a system of private right.

6.2 Benson on Private Law and Public Right

6.2.1 Introduction: Rawlsian Methodology

In his work, Professor Peter Benson articulates a non-instrumental account of contract law and private law in general. As mentioned, the private law theory debate that erupted in the 1970s was in many ways an extension of the controversy Rawls reignited through his work in political philosophy. Unlike theorists that strive to recognize a place in private law for Rawlsian distributive goals, Benson's conclusions about private law differ greatly from Rawls's principles of justice and instead draw their influence from the methodology Rawls employed.[211]

"The correct regulative principle for anything," Rawls wrote, "depends on the nature of the thing."[212] For Rawls, the "thing" in question was the basic structure of society in a constitutional democracy. Rawls saw the basic structure of society – i.e. the way social institutions distribute fundamental rights and advantages of social cooperation – as the primary subject of justice because of its profound impact on the lives of citizens.[213] By distributing

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[211] Benson, "Unity," *supra* note 128 at 123-124 and Peter Benson, "The Idea of a Public Basis of Justification for Contract," 33 Osgoode Hall LJ 273 at 305 [Benson, "Idea of Public"].

[212] Rawls, *Theory*, *supra* note 5 at 25.

[213] Rawls, "The Basic Structure as Subject," (1977) 14 Amer Phil Quarterly 159 at 159.

primary goods – i.e. essential goods that are wanted regardless of an individual's pursuits[214] – the basic structure of society holds the power to reinforce inequalities of birth[215] and time[216] or achieve durable equality.

A constitutional democracy poses a particular challenge for political philosophy. Through its culture of free institutions, a constitutional democracy results in a diversity of religious, philosophical and moral views among its citizens.[217] Rawls takes these irreconcilable differences, which he terms reasonable pluralism, to be a permanent feature that emerges from the basic liberties of a constitutional democracy,[218] as well as from the burdens of judgments and hazards of correct reasoning that exist in ordinary life.[219] Given the permanence of reasonable pluralism, uniting society under a comprehensive view is beyond the limits of practicality, and can only be achieved through state oppression.[220] Yet, as Rawls notes, an enduring and secure regime must have the voluntary support of at least a majority of its citizens.[221] Accordingly, to

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[214] Rawls, *Justice as Fairness* ed. Erin Kelly (Cambridge, MA: Harvard University Press, 2001 at 59 [Rawls, *Justice as Fairness*].

[215] Rawls, "The Basic Structure," *supra* note 159 at 160.

[216] Rawls views the basic structure as the system capable of correcting the defects that naturally occur over time in a non-cooperative state. His analysis begins with the attractive idea, advocated by Robert Nozick, that society should develop over time in accordance with free agreements. However, Rawls argues that such a system of voluntary transactions will over time introduce unfairness into the antecedent distributions that undergird free agreements. Although the free agreements will still be fair, Rawls notes that their background justice will not. He focuses on the basic structure as the system capable of preserving background justice. *Ibid* at 159-160.

[217] Rawls notes that these differences may entail both general and comprehensive views. A view is general when it applies to a range of subjects. A view is comprehensive when it includes a conception of what is of value in human life, ideals of personal virtue, and informs much of our conduct. See John Rawls, "The Idea of an Overlapping Consensus" (1987) 7 Oxford J Legal Stud 1 at 3.

[218] John Rawls, "The Domain of the Political and Overlapping Consensus" (1989) 64 NYU L Rev 233 at 234.

[219] *Ibid* at 236.

[220] *Ibid* at 234.

[221] *Ibid*.

be stable, a conception of justice must be endorsable by irreconcilable and widely different comprehensive views.

A constitutional democracy poses this challenge, but also suggests the appropriate solution. In order for principles of justice to be widely endorsed despite reasonable pluralism, it must be a political conception that is not rooted in any particular comprehensive view. It must be freestanding – neutral to any particular religious, philosophical or moral doctrine – to garner the support of a diverse citizenry. This definition is negative, excluding the foundations that are impermissible for reasonable pluralism. What, then, can be said positively about the shared basis that can satisfy diverse citizens?

Rawls argues that a shared basis can only be found embedded in the public political culture itself. In a reasonably stable democratic society, fundamental ideas exist – even if only intuitively or implicitly – that can be developed into a framework of justice. The main institutions of society, traditional interpretations of the constitution and basic laws, leading historical documents and widely known political writings all serve as a shared and public fund of basic ideas and principles.[222] By working up a conception of justice from these discrete sources that are public and shared by all citizens, citizens relate to each other through a mutually shared point of view.

The focus of Rawls is circumscribed. He does not make an argument for the benefits of forming or joining a constitutional democracy.[223] Instead, Rawls engages with reasonable

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[222] John Rawls, "Justice as Fairness: Political not Metaphysical" (1985) 14 Phil & Public Affairs 223 at 228 and John Rawls, "Reply to Habermas" (1995) 80 The Journal of Philosophy 132 at 135.

[223] Burton Dreben, "On Rawls and Political Liberalism," in *The Cambridge Companion to Rawls* ed. Samuel Freeman (Cambridge: Cambridge University Press, 2002) at 323.

people who he presumes wish to live in a constitutional democracy, and yet find an impasse to mutual agreement in the diverse comprehensive views held by citizens.[224] In elaborating his principles of justice, Rawls intends to resolve the deadlock by providing a shared method of reasoning and public discourse that is suitable to all citizens.

The crux of his answer lies in identifying the basic structure of a constitutional democracy as a limited political sphere that possesses a particular conception of justice and method of reasoning appropriate to it. Rawls distinguishes his subject of justice – domestic justice (i.e. the basic structure of society) – from two other domains to which his discussion does not apply: local justice and global justice. Local justice refers to the principles for institutions and associations that exist within society. The principles for the basic structure of society constrain, but do not directly determine, the content of local justice. Global justice denotes the international principles governing the relations between nations. Although Rawls acknowledges their relation to domestic justice, Rawls sees local and global justice as two independent domains to be decided on their own merits.[225]

Because the society of a constitutional democracy gives rise to a conflict of comprehensive views, its political realm must transcend those subjective and divergent views. Rawls crafts a freestanding sphere of political justice by negative and positive definitions. Negatively, independence is achieved through a neutral stance that abstains from aligning with any particular comprehensive view. Positively, the political conception of justice becomes freestanding by latching on to a framework that is immanent and accessible within the public political culture itself.

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[224] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at xvi.

[225] Rawls, *Justice as Fairness*, *supra* note 214 at 11.

The political sphere is thus a public, shared space and is guided by reason appropriate to it. Citizens shed their subjective comprehensive views as they enter this freestanding political arena. Instead of attempting to unilaterally assert their private views on each other, citizens engage in a process of reasoning that is public and shared by all citizens. The arguments employed and the methods of reasoning found acceptable must conform to the public norms latent in the political culture.

According to Rawls, the public political culture of a constitutional democracy supports his view that persons are free, equal and possess two moral powers (i.e. first, a capacity for a sense of justice, that is, the ability to understand, apply and act from the fair terms of social cooperation; second, a capacity for a conception of the good, meaning, the ability to adopt, revise and rationally pursue a conception of the good).[226] Rawls thus anchors his theory of justice, "justice as fairness" with its well-known principles, in the public political framework of a constitutional democracy. Rawls appropriately refers to his theory as a political, not metaphysical, conception of justice.

For citizens of a constitutional democracy, their public political culture is enormously appropriate to serve as a shared point of view. The basic structure of a constitutional democracy itself enables and secures the freedom for each citizen to craft their life plans and pursue their own conceptions of the good. These norms, and the framework they comprise, facilitate the diverse comprehensive views that are the root of the problem for identifying a shared conception of justice.

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[226] *Ibid* at 18-19.

The political conception of justice for a constitutional democracy is thus both the problem's source and solution. The political framework gives rise to reasonable pluralism. The diversity of comprehensive views causes disorder for a well-ordered society, which requires a public and shared conception of justice.[227] Yet, at the same time, the political framework suggests the solution. It calls for a freestanding conception of justice that transcends any particular strand within reasonable pluralism and that is anchored in the norms and framework of the public political culture – the same norms and framework that facilitated reasonable pluralism and made it a permanent feature of a constitutional democracy.

Rawls presents his approach as essential to a public justification. Justification is needed when conflict arises and is addressed to the opposing counterpart to a disagreement.[228] Rawls notes that reasoning, in its attempt to bridge or settle disagreement, must proceed from a shared basis that all parties hold in common.[229] Logical justification – which merely relates two statements into an intelligible whole – may help expose and clarify a viewpoint, but is inadequate to persuade others who disagree with both statements.[230] Public justification proceeds from premises that all parties in disagreement may reasonably be expected to accept.[231]

In a constitutional democracy, public justification occurs through the content of public reason, which is the criterion of reciprocity, viewed as applied between free and equal citizens,

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[227] *Ibid* at 4.

[228] *Ibid* at 508.

[229] *Ibid*.

[230] Rawls, *Justice as Fairness*, *supra* note 214 at 27.

[231] *Ibid*.

who are also seen as reasonable and rational.[232] Rawls outlines three features that characterize these conceptions: certain basic rights, liberties and opportunities familiar from the constitutional regime; an assignment of special priority to those rights, liberties and opportunities; and measures ensuring for all citizens means to make effective use of their freedom.[233]

The movements of Rawls's argument mark an elegance of method. First, Rawls identifies a subject of its own – the basic structure of society in a constitutional democracy – and inspects its nature in search of its principles of justice. This entails a recognizing the distinctive qualities of this circumscribed territory that call for its own conception of justice. Second, Rawls notes the features, such as reasonable pluralism, that define the field and the possible conceptions of justice appropriate. Finally, Rawls follows this line of reasoning, which calls for a political conception of justice that transcends the dividing lines by being public and shared by all citizens. Worked up from within the public political culture itself, the political conception of justice becomes self-affirming: the very culture that gives rise to division provides the public, shared basis for unity. The political conception of justice thus reaches its elegance in its self-affirming quality. The principles of justice and the limitations of public justification, arising organically from within the public political culture itself, provide the normativity appropriate for the specified subject: the basic structure of society in a constitutional democracy.

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[232] Rawls, "The Idea of Public Reason Revisited," (1997) 64 University of Chicago L Rev 765 at 774.

[233] *Ibid*.

6.2.2 A Public Basis of Justification for Contract Law

In his work, Benson develops a conception of contract law that he terms a "public basis of justification for contract law." Benson begins his approach by noting that all contract theories purport to be theories *of contract law* and consequently presuppose a body and perspective of law that comprises contract law.[234] For Benson, this legal point of view is the anchor for any legal theorizing. Any theory of contract law that neglects settled doctrine, or the framework represented by those doctrines, is superfluous at best and wrong at worst. It would constitute a failure to explain the object of study: contract law.

According to Benson, a viable theory of contract law must provide a public basis of justification. A justification is public for contract law when it is framed to be acceptable to individuals considered as juridical persons engaged in the social relation that comprises a juridical interaction, i.e. voluntary transactions for contractual obligation and involuntary transactions for tort liability.[235] Postulated in this requirement is the idea that contract law represents a particular way of viewing contracting parties and their relationship. It views contracting parties as juridical persons possessing certain rights and duties, and as engaged in a juridical relationship that differs from other social interactions.[236] Naturally, this distinct juridical sphere of contract has its own particular conception of justice – contract law – to govern the contractual relationship.

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[234] Benson, "Unity," *supra* note 128 at 124.

[235] Benson, "Idea of Public," *supra* note 211 at 305.

[236] *Ibid*.

To identify these particular conceptions of the contractual parties and their relationship, Benson explains that a public basis of justification must draw on basic normative ideas that exist, whether explicitly or implicitly, in the public legal culture and that are articulated through the principles and doctrines of settled contract law.[237] Existing in the legal domain, these juridical norms are publicly accessible to all individuals and therefore serve as appropriate means of justification for the coercive force of contract law. These settled principles and doctrines represent fixed starting points for the development of a contract theory and a public justification of contract law.[238] The immediate task, then, is to analyze these discrete points and identify the overarching framework and particular juridical point of view that they manifest.[239] The unifying framework that emerges is public and shared by all individuals and is thus appropriate to decide contractual disputes.[240]

Benson emphasizes that a public justification of contract law is necessarily non-foundational.[241] Though the conception of contract may correspond with other comprehensive frameworks or principles, it does not ground itself in any such normative order.[242] The test for the conception of contract is only whether its framework organizes the disparate doctrines of contract law into a coherent whole.[243] Doctrines fit together if they express the same organizing

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[237] *Ibid*.

[238] *Ibid*.

[239] *Ibid*.

[240] *Ibid* at 306.

[241] Benson, "Unity," *supra* note 128 at 125.

[242] *Ibid*.

[243] *Ibid*.

normative principle and contribute in an essential way to its full articulation.[244] The disparate parts are mutually supportive and cannot be understood in isolation from their counterparts.[245]

Benson acknowledges that locating the underlying unity of contract law necessitates a process of abstraction.[246] Often, a court decision or a legal principle will presuppose an organizing framework but not make it explicit in the decision or principle. This is especially true because the organizing framework provides not only the foundation for the decision or principle, but the relation between all accepted decisions and settled principles. Since a decision or principle attends primarily to the discrete matter at hand and not the overall unity of contract law, the organizing framework naturally remains latently expressed. The connections of the parts remain somewhat hidden. The task for contract theory is uncovering and making salient the silent but essential foundation that makes contract law a coherent whole.

In terms of methodology, Benson's public justification for contract is analogous to Rawls's political conception of justice. Both theories begin by delimiting and attending closely to a specific subject. Both note that their identified objects – the basic structure in a constitutional democracy for Rawls and the juridical point of view for Benson – are independent spheres that possess latent ideas that can be developed into a normative structure. Both conceive of this process of development to be one of coherence and integration: a pulling together of disparate latent ideas into a unifying framework. According to both Rawls and Benson, a freestanding and non-foundational structure that is drawn from publicly accessible norms represents the only

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[244] *Ibid*.

[245] *Ibid*.

[246] *Ibid*.

acceptably objective manner in which parties can justify coercion – whether through the state apparatus or the legal system.

Though there are differences in substance and terminology, Benson's method also resembles the approach of Kantian corrective justice in important ways. Putting aside for the moment the latter two assertions of Kantian corrective justice (i.e. that the form of private law is corrective justice and the substance of corrective justice is Kant's legal philosophy), the first claim of Kantian corrective justice is for the immanent intelligibility of law. This contention, which asserts that private law is an independent and self-intelligible mode of ordering, is similar to the claim of Rawls and Benson that a normative structure can be elucidated from within, respectively, a constitutional democracy or contract law.

The manner of extracting the normative structure is also shared among all three methods. For Kantian corrective justice, there is paramount importance in the various components that comprise the internal structure of the private law relation: the ensemble of concepts, principles and processes triggered by a legal claim.[247] Kantian corrective justice values these disparate components because it views the interlocking of the parts into an integrated whole as essential to a justificatory enterprise.[248] This crucial role of coherence in justification mirrors the quest of Rawls and Benson for an organizing framework immanent in latent public norms to justify, respectively, political and legal coercion.

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[247] Ernest Weinrib, "The Jurisprudence of Legal Formalism," *supra* note 42 at 584

[248] *Ibid* at 588.

6.2.3 Contract Law

6.2.3.1 Misfeasance

The most central and pervasive feature that Benson identifies in contract law[249] – and in private law in general[250] – is the principle of misfeasance. This principle distinguishes between instances of misfeasance and nonfeasance, and reflects the strict aversion of private law to imposing liability for nonfeasance. According to Benson, the principle of misfeasance provides a basic point of view that represents the rights and duties between parties in private transactions.[251]

Rights and duties are terms that represent the rightful possession of an owner – whether to the owner's body, external property or another person's contractual performance – and the consequent claim that can be made against another person to respect that right.[252] As an instance of ownership materializes, two relations immediately surface. First, there is the relation between the owner and the material that comprises the substance of the right. As mentioned, this can be one's own body, external property or another person's contractual performance. The relation between the owner and this material is characterized by the freedom with which the owner may possess, use or alienate the material. Second, and more importantly for a discussion of rights and duties, there is a relation between an owner and non-owners. Both parties relate to each other

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[249] Benson, "Idea of Public," *supra* note 211 at 315.

[250] Peter Benson, "Misfeasance as an Organizing Normative Idea in Private Law," (2010) 60 UTLJ 731 at 732 [Benson, "Misfeasance"].

[251] Benson, "Idea of Public," *supra* note 211 at 315.

[252] *Ibid*.

through the deference with which they show to the first relation. The first relation demarcates the owner's freedom in relation to the thing; the second relation secures that freedom in relation to others by excluding non-owners from infringing on the owner's freedom. Rights and duties, which capture the second relation, are correlative terms that merely reflect the same ownership right. A right simply describes the standpoint of the owner who demands non-owners to respect the owner's freedom vis-à-vis the thing, while a duty manifests the viewpoint of a non-owner who must not infringe on this freedom.

To show how the principle of misfeasance manifests the rights and duties of private law, Benson clarifies that the distinction between misfeasance and nonfeasance is normative, not factual.[253] In these regards, Benson follows an early article by Professor Francis Bohlen where Bohlen, first, claims that no distinction is "more deeply rooted in the common law and more fundamental" than the misfeasance-nonfeasance divide and, second, suggests that the traditional act-omission distinction does not adequately capture the misfeasance-nonfeasance dichotomy.[254] Bohlen claimed that although the act-omission division is clear in theory, it is often practically difficult to demarcate the dividing lines between active and passive misconduct.[255] He noted that often an act is of a mixed character, partaking of the nature of both action and inaction.[256] He provided, as an example, the operation of a defective machine without prior inspection to ascertain whether it is fit and safe for use.[257] In this scenario, action exists in the operation of the

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[253] Benson, "Misfeasance," *supra* note 250 at 734.

[254] Francis H. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability," (1908) 56 U PA L Rev 217 at 219.

[255] *Ibid* at 220.

[256] *Ibid*.

[257] *Ibid*.

defective machine and inaction resides in the failure to inspect and correct the defect. While he acknowledges the tendency to view the entirety of this scenario as an act of misfeasance,[258] his larger point aptly highlights the vagueness lurking in the act-omission definition of misfeasance.

Bohlen's own definition of misfeasance attempts to describe a more complex picture by pulling two different elements together. The first element Bohlen includes in his definition is the act-omission distinction.[259] The second distinguishing element Bohlen adds is that misfeasance positively worsens the defendant, while nonfeasance merely deprives the defendant of a potential benefit.[260] Bohlen explains that the first element distinguishes misfeasance and nonfeasance by the character of their conduct, while the second element distinguishes them by their consequent results.[261]

Bohlen's definition steps in the right direction but remains skeletal and incomplete.[262] Bohlen identifies two essential features as comprising misfeasance but neglects to elaborate each feature fully. His first element – the distinction in conduct between act and omission – never overcomes the objection Bohlen concedes is problematic. Bohlen acknowledges the ambiguities rife in practically separating mixtures of action and inaction but fails to provide a workable solution. He seems to simply accept the tendency to characterize these mixtures as misfeasance.[263] In *Newton v Ellis*,[264] a paradigmatic case of these mixtures, the defendant dug a

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[258] *Ibid*.

[259] *Ibid*.

[260] *Ibid*.

[261] *Ibid*.

[262] Ernest Weinrib, "The Case for a Duty to Rescue," (1980) 90 Yale LJ 247 at 252 [Weinrib, "Duty to Rescue"].

[263] Bohlen, "The Moral Duty to Aid Others," *supra* note 254 at 220.

[264] 119 Eng. Rep. 424 (K.B. 1855).

hole by a highway but failed to affix appropriate lighting and was found liable for damage resulting to the plaintiff's passing carriage.[265] The issue in *Newton* and these cases of mixtures lies in determining the particularity by which the alleged misconduct is analyzed. If analyzed by its discrete parts, no independent piece will suffice to attract liability: the action of digging is not wrongful alone (negligence only arises by failing to implement precautions to prevent foreseeable harm), and the failure to take the precaution of affixing lamps remains inaction. If, however, the entirety of the alleged misconduct is taken as one unit, then that unit as a whole contains the needed combination of action and fault. Bohlen's comment that "the tendency is to consider that the whole constitutes an act of misfeasance"[266] indicates his approval for the court's approach of evaluating misconduct through a more general and inclusive lens. However, both Bohlen's discussion and the court's judgment assume this approach without providing justification. Since liability rests in this very issue of determining whether the misconduct is to be conceptualized as a whole or by its parts, Bohlen's discussion and the court's judgments are unsatisfying.

Instead of providing a justified framework for disentangling action from inaction, Bohlen moves quickly to his second distinguishing feature of misfeasance but this element raises its own difficulties. The problem with this distinction – which rests in differentiating actual loss from failure to confer a benefit – is that it cannot be applied in the abstract. Though these two categories are distinct, they cannot be analyzed in isolation but presuppose a baseline to solidify entitlements and adequately distinguish the actual from the potential.[267] Without such a

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[265] For analysis of this case and the following objection, see Weinrib, "Duty to Rescue," *supra* note 262 at 252.

[266] Bohlen, "The Moral Duty to Aid Others," *supra* note 254 at 220.

[267] Weinrib, "The Case for a Duty to Rescue," *supra* note 262 at 252.

fundamental reference point, Bohlen's distinction is unhelpful in guiding an analysis to determine whether an alleged misconduct is misfeasance or not.

These difficulties with each of his two elements, for which Bohlen has been rightly criticized,[268] expose an overarching awkwardness in Bohlen's combined definition. Bohlen tries pulling together two very different elements under the umbrella of misfeasance without explaining the nature of the unity. He finds active conduct and actual loss to both be essential to the definition of misfeasance, but does not explain why either alone is insufficient (e.g., why no liability attaches to actively withholding a benefit or passively causing a loss) or what about misfeasance configures these two elements into a coherent whole. Since one element relates to the character of conduct and the other to the results that follow, the two elements are not interpenetrating and it is therefore necessary for Bohlen to identify the organizing core that links them together as an integrated unit of misfeasance. The ambiguity at play in each element only intensifies the instability of the combination. The vague zones of mixed action-inaction and the missing baseline to make appropriate computations are both isolated distinctions that are intelligible only as part of an organizing framework. Simply combining the two elements of active conduct and actual loss does not resolve their independent problems or reveal an illuminating structure. It only makes clearer the need for an organizing unity.

Bohlen encounters these difficulties because his definition of misfeasance remains factual. Bohlen recognizes that the traditional act-omission definition is an inadequate guide to separating action and inaction in tangled cases. But he mistakenly believes that this problem about defining conduct is corrected by adding a second element differentiating results. The

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[268] *Ibid*.

problem is not solved. The act-omission definition could not provide guidance in cases of mixed misconduct because the definition adopts a factual lens. Without a conceptualizing framework, these ambiguities are not resolved. By adding a second element relating to losses and benefits without providing the baseline to make these calculations, Bohlen simply deepens the factual nature of the definition and multiplies the ambiguities. Now, not only must the law disentangle action from inaction without a conceptual framework, it must distinguish losses from benefits without a measuring reference. Further, the merging of these two elements – one concerning to conduct and one relating to results – remains unclear. Bohlen's mistake lies in his continued reliance upon a factual definition of misfeasance to provide conceptual clarity.

These criticisms indicate that the definition of misfeasance must be, as Benson claims, a normative principle. By conceptualizing misfeasance as a normative framework, Benson avoids the factual uncertainties that plague Bohlen's definition. Further, he substantiates Bohlen's claim that no principle is more fundamental and more deeply rooted in the common law than the principle of misfeasance. Bohlen rightly identified the fundamental nature of misfeasance but undermined this claim by defining misfeasance by factual considerations. Because factual considerations are incapable of defining cases of mixed misconduct or determining when a potential benefit constitutes a loss, they indicate that the principle of misfeasance is incomplete and that something perhaps more fundamental is needed. By redefining misfeasance as a normative principle that does not require an external framework for its own illumination, Benson corroborates Bohlen's claim of the importance of misfeasance as an integrating framework for private law.

Instead of reaching his conclusion about the normative nature of misfeasance via the above arguments, Benson makes his point through an analysis of disparate doctrines of private

law. He begins by analyzing three central examples in tort law – the absence of a general duty to rescue, pure economic loss and nuisance complaints – claiming that the common thread indicates that the principle of misfeasance is normative. He then extends this analysis into the contract domain by analyzing the doctrines and principles of contract law. By integrating this framework with the correlative rights and duties that comprise the basic private law relation, Benson shows that misfeasance is fundamental to and deeply rooted in private law because of its organizing normative dimension.

Benson's first example in support of his claim is the general absence of a duty to rescue another person from a danger that the potential rescuer did not create.[269] He notes that private law maintains this stance even when the injury threatened is foreseeable and even if the rescue measures are effectively costless.[270] Benson explains that in these cases of danger threatening the plaintiff's life and property, the recognized interests of the plaintiff are the plaintiff's rights to bodily integrity and property.[271] But vis-à-vis the defendant, private law protects these rights by excluding the defendant from the body and property of the defendant.[272] Since the right expresses itself through the negative exclusion of the defendant, the defendant does nothing wrong by staying away.[273]

Benson's point is that the absence of the duty comes from the normative dimension of ownership rights in private law, not the mere factual matter of an omission. The ownership that

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[269] Benson, "Misfeasance," *supra* note 250 at 735.

[270] *Ibid*.

[271] *Ibid*.

[272] *Ibid*.

[273] *Ibid*.

private law delineates allows an owner the freedom to exercise his or her will on the object owned. But vis-à-vis others, this right is secured through negative exclusion. Non-owners must respect the owner's freedom in relation to the object (whether bodily integrity, property or contractual obligation) by not intruding on the owner's sphere of freedom.

In this way, Benson integrates misfeasance in a normative framework that encompasses the private law relation with its correlative relationship of rights and duty. Private law organizes itself through units of ownership. Whether the ownership is of one's own body, property or contractual obligation, the same format applies. The owner relates to the object of ownership through a capacity of freedom to exercise and to other non-owners through a capacity to exclude. The correlative rights and duties manifest the relationship between persons vis-à-vis the thing owned. Rights reflect the internal view of the owner who is free to exercise his or her will on the object owned, while duties represent the external perspective of the excluded non-owner who must not intrude upon the owner's sphere of freedom.

Benson's provides his second example of the normative dimension of misfeasance from cases of pure economic loss.[274] Pure economic loss denotes financial loss that is not a consequence of damage to the plaintiff's person or property.[275] It is settled tort law that there is no liability for negligently caused pure economic loss, even if the loss is foreseeable and avoidable.[276] In a standard example, a defendant interferes with something – e.g., a bridge – that the plaintiff does not own or possess but may be entitled to use through a contract with the third-

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[274] *Ibid* at 737.

[275] *Ibid*.

[276] Peter Benson, "The Problem with Pure Economic Loss," (2009) 60 SC L Rev 823 at 823 [Benson, "Pure Economic Loss"].

party owner or as a member of the public.[277] Under the categorical rule in these cases, the plaintiff cannot recover for any additional costs or lost profits resulting from the defendant's misconduct.[278]

The standard rationale for this rule is a policy of pragmatism.[279] This approach, influentially expressed by Professor Fleming James Jr., accepts that general principles of tort law should impose liability for foreseeable consequences of negligence.[280] However, a policy of pragmatism must ensure that legal solutions actually work and, to this end, the coherence of legal doctrines must be balanced against countervailing pragmatic considerations.[281] The overarching pragmatic anxiety in cases of pure economic loss is indeterminacy: while physical consequences of negligence are limited, economic losses are far-reaching and potentially endless.[282] The looming possibility of "liability in an indeterminate amount for an indeterminate time to an indeterminate class"[283] may crush useful activity and the pragmatic approach views the bar to recovery in cases of pure economic loss as an antidote to the crippling effects of indeterminacy.[284]

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[277] *Ibid* at 824.

[278] The classic case for this rule is *Cattle v Stockton Waterworks Co.*, (1875) 10 QB 453 (Eng.).

[279] Benson, "Pure Economic Loss," *supra* note 276 at 830.

[280] Fleming James Jr., "Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal" (1972) 25 Vand L Rev 43 at 48 [James, "Limitations on Liability"].

[281] *Ibid* at 48.

[282] *Ibid* at 45.

[283] *Ultramares Corp. v Touche*, 255 NY 170, 179, 174 NE 441, 444 (1931).

[284] James, "Limitations on Liability," *supra* note 280 at 48-49.

Benson's main criticism of the pragmatic approach is that the rationale does not match the categorical nature of the rule.[285] If the rationale were indeed a policy concern about indeterminate liability, one would expect to find a rule reflecting this sensitivity by crafting a rule that imposes liability in cases where the prospect of indeterminacy does not lurk. As James himself observed, a rule must be fashioned "to separate the wheat from the chaff."[286] Yet leading cases uphold the rule categorically, even in instances where indeterminacy is not implicated.[287] As mentioned, a theory of law or a rationale for a rule must remain cognizant of the legal datum it purports to illuminate. The pragmatic approach proposes a rationale that is too elastic and under-inclusive to correlate with the categorical application of the bar to recovery. As such, it fails to provide a plausible explanation for the rule.

In Benson's view, the categorical requirement that the plaintiff have a proprietary or possessory interest in the property to recover damages reflects the normative framework of ownership in private law.[288] Because the plaintiff at most has only a contractual right against the owner of the bridge, there is no interest to assert against the defendant who is not privy to the contract. The denial of recovery in all cases of pure economic loss, whether potential indeterminacy exists or not, shows the centrality of ownership to a finding of liability in private law. Liability presupposes the basic relation of private law that exists between an owner and a non-owner. It reflects the violation of a non-owner intruding upon the owner's protected sphere

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[285] Benson, "Misfeasance," supra note 250 at 738.

[286] James, "Limitations on Liability," *supra* note 280 at 50.

[287] *Robins Dry Dock v Flint*, 275 US 303 (1927); *Weller & Co. v Foot & Mouth Disease Research Inst.*, [1965] 3 All ER 560 (QB).

[288] Benson, "Misfeasance," *supra* note 250 at 739.

of freedom. Without such a protected interest in play, the plaintiff has not engaged in the private law relation that is needed to trigger liability.

Benson finds this same essential feature in cases of intentionally caused pure economic loss.[289] Courts invariably deny recovery for foreseeable economic loss that results from drawing away a competitor's business, provided the defendant has not induced a breach of contract.[290] In Benson's view, although competition may be a welfare-enhancing activity, denial is not predicated on a commitment to the public good of free competition.[291] Rather, denial reflects the private law norm that ownership is essential to comprise the correlative relationship of right-duty that grounds liability.[292] Since the plaintiff does not possess the lost business clients or profits in an exclusionary legal relation vis-à-vis the defendant, there is no ownership right to generate liability.[293]

Benson draws his third example of the normative nature of misfeasance from the law of nuisance.[294] Courts consistently deny recovery when a defendant blocks the flow of a good – e.g., sunlight[295] or water[296] – from reaching the plaintiff's property.[297] AS Benson notes, courts do not predicate this denial on the reasonability of the defendant's use of land, but non-suit the

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[289] *Ibid*.

[290] *Ibid* at 740.

[291] *Ibid*.

[292] *Ibid*.

[293] *Ibid*.

[294] *Ibid* at 742.

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

[296] *Mayor of Bradford v Pickles*, [1895] AC 587 (HL).

[297] Benson, "Misfeasance," *supra* note 250 at 742.

plaintiff from the start.[298] Benson views this as further instantiating the essential need of a property interest for a finding of liability. Without the existence of an ownership right, the private law relation of correlative rights and duties does not materialize and there is no violation of which to speak.

Benson's latter two examples, pure economic loss and nuisance law, challenge the tradition act-omission definition of misfeasance because they satisfy the conditions of liability – i.e. active misconduct resulting in foreseeable harm – yet do not result in liability. Clearly, Benson argues, something more fundamental than act-omission is at play. Benson uses these seemingly anomalous patterns to undermine the traditional paradigm of misfeasance. In its place, he structures a normative framework of misfeasance that clusters around the centrality of ownership, with its attendant components of freedom-exclusion and rights-duties.

It is important to note, however, that Benson's first example – the absence of a duty to rescue – does not pose a direct challenge to the traditional paradigm of misfeasance. In typical cases of rescue, the defendant remains inactive and is faulted by the plaintiff for a failure to act. According to the traditional act-omission definition of misfeasance, the defendant is not liable because the failure to rescue constitutes an omission. As such, Benson's example of rescue corroborates instead of confronts the contention that nonfeasance is synonymous with omission.

Benson's argument instead rests in an independent argument that erases the distinction between action and inaction. His point is that it is a mischaracterization to describe the conduct of the potential rescuer as inaction.[299] By remaining passive, the potential rescuer decided to use

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[298] *Ibid* at 743.

[299] *Ibid* at 736.

his or her capacities and resources in other ways instead of extricating the plaintiff from danger.[300] Benson views this decision and choice as "conduct of some kind" and therefore approves of describing failures to rescue as "*acts* of *both* commission *and* omission."[301]

Benson's short treatment of this example disguises the comprehensive nature and implications of his argument. He focuses on the duty to rescue but the argument employed is completely independent of, and goes beyond, the rescue example. It simply denies the distinction between action and inaction. The choice to *not act*, Benson claims, is still actionable conduct. Benson's paragraph is somewhat cryptic in its interchangeable use of terms. Although his argument begins with the term "action," he slides quickly into describing the potential rescuer's failure as a "decision," "commission," "conduct of some kind" and "choice." It is unclear whether Benson's argument is that passive restraint constitutes an "act" of simply being or, paradoxically, of "not doing" or, alternatively, if Benson's argument is that action is really just a person's "choice" or "decision" to manifest his or her will in existence and that passivity is therefore just as much a choice and decision. The latter appears to be the stronger and intended argument. It challenges the entire act-omission factual distinction by asking if it is not simply overvaluing movement at the cost of ignoring the animating will and decision.

This critique is especially well placed within a Kantian framework that views law as a mode of securing the co-existence of free choices. Although Kant's system does not recognize a duty to rescue for its own reasons, the perspective it adopts would seemingly agree with Benson's disregard for the factual distinction between act and omission. Both movement and non-movement are choices that can potentially be held accountable. Attending to the normative

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[300] *Ibid*.

[301] *Ibid* (emphasis in original).

framework appropriate for ordering these choices is a more promising approach than getting entangled in the external effects of these choices.

Benson's three examples therefore represent a negative and positive argument for the normative character of misfeasance. His negative argument, however, differs in the first example from the latter two. The first example denies the entire factual distinction between act and omission, while the latter two examples deny the normative relevance of the distinction to private law. In the first example of duty to rescue, his negative argument against the act-omission definition, though delivered through the duty to rescue example, is wholly independent of the rescue case. It claims that all manifestations of the will – whether action or passivity – should constitute conduct because they express a decision that can be the subject of liability. The law should attend to the generative choice, which remains the same in both active and passive conduct, and not be unduly concerned with whether the choice entails movement or not. Benson's argument takes Bohlen's point about the ambiguities of mixed action-inaction to its broadest level. While Bohlen recognized vague zones where action and inaction mingle, Benson asserts that all inaction retains a feature of active conduct. His positive argument, replacing the factual definition of misfeasance with a normative framework, draws upon all three examples of duty to rescue, pure economic loss and nuisance law. These examples, which demonstrate that active misconduct does not translate into liability, shows that the definition of misfeasance lies in a normative framework of ownership and not a factual definition of action. The lack of a recognized ownership interest in cases of pure economic loss and nuisance law, as well as in the rescue example, prevents the basic private law relation from surfacing.

In relation to Bohlen's definition of misfeasance, Benson's framework denies the first element but corrects the second feature. Benson denies the relevance, and even the existence, of

the distinction between act and omission. He denies the relevance through his positive argument about the normative character of misfeasance and the existence through his negative argument relating to the conduct in rescue cases (and any other instance of passivity). Bohlen's second element distinguishing actual loss from failure to confer a benefit remains intact. The problem with Bohlen's distinction was that it lacked a normative baseline to properly assess the difference between a loss and a potential benefit. Benson supplies this baseline by presenting misfeasance as an integrative normative framework of ownership. With this normative structure in place, losses and benefits can be computed in reference to the ownership interest: the denial of that which is included in the recognized interest is a loss, while anything outside this protected sphere is an extraneous potential benefit.

Benson's normative definition of misfeasance, through its integrative framework of ownership, provides a basis for distinguishing wrongs from losses. Gains and losses represent, respectively, an excess and shortfall relative to some baseline.[302] There are two possible conceptions of this baseline: one factual, one normative.[303] The factual conception assumes that the appropriate baseline is the material distribution existing prior to the relevant interaction: an increase from this antecedent state is a gain, while a decrease constitutes a loss.[304] The normative conception, by contrast, view gains and losses as discrepancies between what the parties have and what they should have according to the norm governing their interaction.[305]

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[302] Ernest Weinrib, "The Gains and Losses of Corrective Justice" (1994) 44 Duke LJ 277 at 282.

[303] *Ibid*.

[304] *Ibid*.

[305] *Ibid* at 283.

Weinrib argues that private law cares about the normative conception of gains and losses.[306] He explains that the factual conception of gains and losses is unsustainable because the antecedent distribution connecting resources and the person holding them has an unavoidable normative dimension.[307] Resources belong to a person only if they are held legitimately and legitimacy invokes the operation of a legitimizing norm.[308] Accordingly, Weinrib proves that the factual definition of gains and losses is untenable by locating within the antecedent distribution spheres of ownership, which necessarily entail a norm to legitimize entitlements.

Though both agree that private law works with the normative conception of gains and losses, Weinrib and Benson move in opposite directions. Weinrib moves backward from the competing conceptions of gains and losses to locate an unavoidable presence of ownership, thus introducing the necessity of a normative framework. By contrast, Benson identifies ownership with an organizing framework of misfeasance that pervades private law. As such, the normative conception of gains and losses follows naturally as the unfolding of a violation of an ownership right.

The conclusion shared is that normative gains and losses are the material transferred in private law interactions. The normative framework of ownership allows the clear demarcation of any transfer that violates the normative order. Just as the notions of right and duty merely reflect the different perspective of the owner and non-owner that comprise the private law relation, gains and losses represent the different sides of the violating transfer. Accordingly, through its organizing idea of ownership, the normative framework of misfeasance integrates the rights-

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[306] *Ibid* at 284.

[307] *Ibid*.

[308] *Ibid*.

duties that comprise the private law relation and the gains-losses that makeup the private law interaction.

6.2.3.2 Expectation Damages and Contract as Transfer

Although Benson identifies the normativity of misfeasance through tort principles, he utilizes the framework to answer a central challenge to contract law raised by Professor Lon Fuller and William Perdue.[309] Fuller and Perdue begin their article by identifying three purposes for awarding contract damages.[310] First, there is the restitution interest. This interest is triggered when, in reliance of the defendant's promise, the plaintiff confers some benefit upon the defendant. When the defendant fails to fulfill the contract, a court may force the defendant to disgorge or return the benefit to the plaintiff.[311] Fuller and Perdue note that the restitution interest corrects what would otherwise be the unjust enrichment of the defendant at the plaintiff's expense, and accordingly might be better described as a quasi-contractual remedy.[312]

The second interest that Fuller and Perdue identify is the reliance interest. In this example, the plaintiff has detrimentally relied upon the defendant's unfulfilled promise.[313] The plaintiff, for example, may have expended costs in investigating the seller's title or refrained

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[309] Benson, "Misfeasance," *supra* note 250 at 746.

[310] L. L. Fuller & William R. Perdue, Jr., "The Reliance Interest in Contract Damages: I" (1936) 46 Yale LJ 52 at 53.

[311] *Ibid* at 54.

[312] *Ibid*.

[313] *Ibid*.

from entering other contracts while performance was still expected.[314] Like the restitution interest, the plaintiff has suffered a loss as a result of relying upon the defendant's promise, though in this case the defendant has not been concurrently enriched. Nonetheless, the defendant must restore the plaintiff to the plaintiff's pre-contract position by compensating for the losses resulting from detrimental reliance.[315]

The third interest that Fuller and Perdue catalogue is the expectation interest. In this standard case of contract breach, there is no detrimental reliance or unjust enrichment. Yet the law seeks to give the plaintiff the value of the expectancy that the promise created.[316] The law does this through compelling specific performance or the equivalence in value through damages. The object of the expectation interest is to put the plaintiff in the position the plaintiff could have expected to be in had the promise been performed.[317]

Fuller and Perdue explain that the first two interests are similar in nature.[318] In both the restitution interest and the reliance interest, the plaintiff has detrimentally relied upon the defendant's unfulfilled promise. The difference between the two interests lies in whether the plaintiff's loss enriches the defendant or not. Accordingly, the restitution interest can be seen as a special case of the reliance interest.[319] All cases of the restitution fall within the reliance

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[314] *Ibid*.

[315] *Ibid*.

[316] *Ibid*.

[317] *Ibid*.

[318] *Ibid* at 55.

[319] *Ibid*.

interest, which is broader and includes cases where the plaintiff's detrimental reliance does not enrich the defendant.[320]

By contrast, Fuller and Perdue note that the expectation interest differs significantly from the reliance and restitution interests. They observe that the difference between the reliance and restitution interests on the one hand and the expectation interest on the other do not coincide with the distinction between losses caused and benefits prevented.[321] They note that reliance and restitution interests may include detrimental reliance to forego a benefit; conversely, expectation interests may include losses expended by the plaintiff because of the breach of contract.[322] Excluding these exceptions, however, it is clear that Fuller and Perdue associate the first two interests with a lost benefit and the expectation interest with a benefit prevented.

Consequently, Fuller and Perdue argue that these three interests do not have equal claims to judicial intervention but rather decrease in strength in the order listed.[323] The restitution interest presents the strongest claim because it doubles the strength of the reliance interest by combining the plaintiff's unjust loss with the defendant's unjust gain.[324] Following Aristotle's definition of justice as preserving an equal distribution among members of society, the discrepancy between the holdings of the contractual parties in the restitution interest is two units, not one.[325] The reliance interest has the second strongest claim because it presents an unjust loss to the plaintiff, which results in a discrepancy of one unit between the contractual parties.

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[320] *Ibid*.

[321] *Ibid*.

[322] *Ibid* at 56.

[323] *Ibid*.

[324] *Ibid*.

[325] *Ibid*.

Finally, Fuller and Perdue assert that the expectation interest does not reveal a discrepancy in holdings at all but merely satisfies the plaintiff's disappointment in not receiving what was expected.[326] In passing from the reliance and restitution interests to the expectation interests, Fuller and Perdue write that private law passes from the realm of corrective justice to that of distributive justice: instead of healing a disturbed status quo, the law is bringing about a new holding.[327]

Fuller and Perdue argue that by shedding its restorative role for a creative function in expectation damages, the law abandons its justification for legal relief.[328] It is no longer evident, they claim, why the plaintiff ought to recover an expectation that was not held prior to the contract.[329] Yet the standard recovery in cases of contract breach is expectation damages, a remedy that the law sees as compensation.[330] In expressing their puzzlement over a compensatory award for mere expectations, Fuller and Perdue challenge a central tenet of contract law and its remedies.

It is clear that Fuller and Perdue's challenge presumes a factual definition of gains and losses, not a normative conception. Although they are quick to point out that detrimental reliance can lead through missed opportunities to lost benefits and that expectation damages may include expenses that constitute actual losses, these exceptions indicate that otherwise Fuller and Perdue link detrimental reliance with actual losses and expectation damages with prevented

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[326] *Ibid*.

[327] *Ibid*.

[328] *Ibid*.

[329] *Ibid*.

[330] *Sally Wertheim v Chicoutimi Pulp Co.*, (1910), [1911] AC 301 (PC) *per* Lord Atkinson.

benefits. This factual conception of gains and losses is corroborated by their argument that, under Aristotle's formula, the claim to judicial intervention of restitution interest is doubly as strong as the reliance interest. Because of their factual definition of gains and losses in relation to the antecedent status, Fuller and Perdue see two disruptions in the restitution interest: the plaintiff has lost an antecedent holding and the defendant has gained something that was not held prior to the transaction.

Under a normative conception of gains and losses, their argument that the restitution interest possesses a doubly strong claim to judicial relief would not follow. A normative conception of gains and losses would seek the legitimizing norm of ownership and assess any gains or losses in reference to the normative baseline of ownership. Such a perspective would see the defendant's actions, which wrongfully induces the plaintiff to detrimentally rely upon the promise. By damaging through inducement the plaintiff's ownership in the lost property, the plaintiff has seized more than allowed under a normative structure of law – just as a plaintiff does in a tort, such as negligence. Under a normative framework, gains and losses are assessed in reference to rights and duties: a gain results from the violation of duty, a loss arises from the infringement of a right. Since rights and duties are correlative terms reflecting the same relation between an owner and a non-owner, gains and losses similarly represent the effects on each party from a single violation that occurs in that relation. In both the restitution and reliance interests, the plaintiff has infringed the defendant's ownership right by inducing detrimental reliance. The claim for judicial relief follows from this normative violation. Whether the defendant is the recipient of this loss or not may realistically matter for the defendant's finances, but it does not doubly strengthen the claim of the restitution interest for judicial intervention.

Fuller and Perdue's challenge to expectation damages follows from their factual definition of gains and losses. When gains and losses are assessed by reference to the antecedent distribution, the need for judicial remedies becomes salient in cases of detrimental reliance. The negative effects are clear by checking them against what the plaintiff's holdings were or would be without the existence of the transaction. By contrast, Fuller and Perdue see no lost antecedent holding in cases of breach without detrimental reliance. Without such a prior holding, the expectation interest simply confers a benefit that the defendant never had. Unsurprisingly, given their understanding of the contractual transaction, Fuller and Perdue find the standard remedy of expectation damages in contract law baffling.

Benson's response to Fuller and Perdue entails, first, a switch to a normative conception of gains and losses. Under the normative framework of misfeasance, the need for a remedy is triggered by the infringement of an ownership right. As evidenced through their challenge, Fuller and Perdue do not view the plaintiff as possessing an ownership right in the promised performance. They do not locate the promised performance in the plaintiff's antecedent holdings and they do not understand contract formation as contributing such a right to the plaintiff. But, as Benson argues, if the law and its compensatory remedy of expectation damages is to be taken seriously, it must be supposed the defendant possesses an ownership right in the promised performance prior to the breach and independently of detrimental reliance.[331]

Benson explains that the source of the plaintiff's ownership right is the contract itself, which transfers a right to the promised performance through the contractual agreement.[332] Under this view, contractual obligation is not an external result superimposed upon the

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[331] Benson, "Misfeasance," *supra* note 250 at 746.

[332] Benson, "Contract as a Transfer of Ownership," *supra* note 26 at 1677.

contractual parties in furtherance of some social or economic goal.[333] Rather, it is the natural result and operation of the contractual agreement itself, which remains a content-neutral mode of transferring the promised performance. [334] As the recipient of this transfer, the plaintiff possesses an ownership interest in the promised performance. Instead of merely satisfying the disappointment of the plaintiff, expectation damages correct the violation of the right transferred and deliver on the ownership interest held by the plaintiff.

Benson explains the contractual operation of transfer by locating the essential features of transfer of a physical object.[335] The first requirement in a physical transfer is the owner's consent to part with his or her property.[336] The owner manifests this decision through physically transferring the object, but the mere physical act alone has no juridical effects.[337] The juridical significance of physically parting with the object is that the act embodies and actualizes the intent of the owner to alienate his or her property.[338]

This first requirement alone, however, only represents half of the operation of transfer.[339] The owner's intention manifested through action has the juridical effect of alienating the object. For a transfer to occur, there must a complementary will of the recipient, expressed through

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[333] *Ibid*.

[334] *Ibid*.

[335] *Ibid* at 1694.

[336] Benson, "Unity," *supra* note 128 at 128.

[337] *Ibid*.

[338] *Ibid*.

[339] *Ibid*.

action, to unreservedly accept the object transferred.[340] Together, the intentions manifested through action of the transferor and transferee makeup the unified unit of transfer.

The operation of transfer unifies two temporally sequenced assents.[341] Because the recipient must respect the ownership rights of the transferor, the recipient's acceptance is significant only once the owner has evidenced the intention and act to surrender ownership rights through transfer.[342] Accordingly, the recipient's acceptance must be responsive to, and therefore temporally follow, the transferor's manifested will to transfer.[343] Conversely, although a transferor can unilaterally alienate property, a transfer cannot occur without the acceptance of the recipient. A transferor cannot simply foist the transfer upon the recipient with unilateral force but can only tender the transfer as an offer to which the recipient may accept.

A unified transfer of temporally sequenced assents thus reflects a respect for the ownership capacity of both parties. Because each party must defer to the ownership capacity of the other, each can only contribute half of the operation of transfer. The transferor has the capacity to alienate his or her property and can tender this alienation as half of the transfer, should the recipient choose to accept the object; the recipient has the capacity to decide whether he or she wishes to accept the tendered transfer and assume ownership status over the object. Because neither party nor their acts are sufficient on their own, the operation of transfer represents the manner in which a bilateral nexus transcends the unilateral acts of subjective parties.

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[340] *Ibid* at 129.

[341] *Ibid*.

[342] *Ibid*.

[343] *Ibid*.

The salient features of transfer are therefore a bilateral nexus between two parties with ownership capacities. The requirements of intention and delivery stem from these capacities. The transferor manifests ownership rights through voluntarily deciding to alienate the object and recognizes the recipient's capacity for ownership by offering the object without unilateral imposition. Similarly, the recipient manifests ownership rights through voluntarily deciding to appropriate the object and recognizes the transferor's ownership by awaiting and responding to a previously expressed offer. The operation of a physical transfer is thereby integrated private law's normative framework of ownership and constitutes the bilateral manner in which private law transfers ownership rights.

Through the doctrines of contract formation, Benson locates the same salient features of transfer: a bilateral nexus between two parties with a capacity for ownership. The first doctrine Benson analyzes is offer and acceptance.[344] The standard view requires an expression of assent (an "offer") specifying terms of contractual exchange that is directed toward another person's potential assent ("an acceptance").[345] The offer and acceptance are responsive to each other and, consequently, must follow each other in time.[346]

The requirement of temporal succession of offer and acceptance is surprising given that contract formation is traditionally conceived as a meeting of minds between contractual parties. One would therefore expect concurrent declarations of identical terms of exchange to form a binding contract. Yet contract law does not recognize concurrent offers as satisfying the

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[344] Benson, "Unity," *supra* note 128 at 138.

[345] *Ibid* at 139.

[346] *Ibid*.

essential conditions of contract formation. In *Tinn v Hoffman*,[347] the contractual parties sent letters by post to each other on the same day stipulating similar terms but the court held that the cross-offers did not create a contract.

The required temporal succession of offer and acceptance is explicable in light of the bilateral nexus that triggers the contractual transfer.[348] As seen with physical objects, a transfer occurs through the combined contributions of the transferor and transferee. By melding together the wills and acts of each party with the other, a new unit is created that transcends either party's subjective contributions. This new unit represents a bilateral nexus that has independent existence and neither party can revoke its existence unilaterally. Similarly, offer and acceptance reflects the bilateral nexus in the context of contractual transfer – i.e. transfer of a contractual right as opposed to the physical object. Offer and acceptance must be responsive to each other in order to meld together into one unit and thereby satisfy the conception of contract as a bilateral nexus of transfer. Responsiveness in turn necessitates temporal sequence. Responsiveness entails an awareness of something external to which one's own action responds. This feature is obtainable when offers are declared concurrently, even though the parties evidence mutual satisfaction with the contractual terms. By proposing their assent to the other party as a fragment calling for the other's assent, the parties fashion their offer and acceptance into a bilateral unit of their united wills.

The importance of this bilateral nexus is further demonstrated through the objective test of contract formation.[349] The objective test stipulates a process that does not look to the

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[347] (1873) 29 LT 271.

[348] Benson, "Contract as Transfer," *supra* note 26 at 1710.

[349] Benson, "Unity," *supra* note 128 at 139.

subjective intentions of the parties but to the objective standard of what a reasonable person in the position of the parties would understand.[350] The meeting of the minds is made possible by the mutual access both parties have to the perspective of a reasonable person in their context. The objective standard mirrors the independence of the bilateral nexus. It represents the fact that the bilateral nexus of contractual transfer has transcended either party's subjective acts, understandings and interpretations. By abstracting from the subjective quality of each assent and instead focusing on how it would appear to the other party on a standard of reasonableness, the objective test aptly fits with the independence of the contractual relation.

Lastly, Benson shows how the other central requirement of contract formation – the doctrine of consideration – exhibits the same bilateral relation.[351] Benson identifies four major requirements of the doctrine of consideration. First, consideration must be either a promise or an act that moves from each contractual party.[352] Each consideration must be legally imputed to the party from which it moves. It cannot come from a third party nor originate from the party receiving the consideration. This requirement ensures the existence of two sides in terms of the materials exchanged, which parallel the two sides represented by the contractual parties and their manifested assents.[353]

The second feature of consideration is that the consideration and promise must be mutually inducing in the eyes of the law.[354] While the first requirement secures the existence of

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[350] *Smith v Hughes*, (1871) LR 6 WB 597, [1861-73] All ER Rep 632 (QB).

[351] Peter Benson, "The Idea of Consideration," (2011) 61 UTLJ 241 at 257.

[352] *Ibid* at 250.

[353] *Ibid* at 251.

[354] *Ibid*.

two materials moving in opposite direction, the second feature links them together in a reciprocal exchange. As with offer and acceptance, the doctrine of consideration is governed by the objective test. Accordingly, notwithstanding the personal motives of the parties, this second requirement is met so long as the express or implied terms of the contract purport to link the consideration-promise relation as mutually inducing.[355]

The third feature of consideration is that the promise or act must have value in the eyes of the law.[356] Consideration counts if it is either a legal benefit to the promisor or a legal detriment to the promisee.[357] Benefit and detriment refer to the substance of consideration and ensure that something is surrendered that can be the object of the promisor's possible purposes and interests.[358] Again, the subjective desires of the contracting parties are immaterial and value is determined according to the objective standard of a reasonable person in the parties' context.

The final feature of consideration is that its comparative value relative to the exchanged promise is irrelevant.[359] As long as the consideration is something of value that can be wanted by the other party, the requirement is met. Nominal consideration suffices. Instead of a quantitative comparison between the promise and consideration, the law inspects the promise and consideration for qualitative difference to ensure that there is an exchange occurring.

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[355] *Ibid* at 252.

[356] *Ibid* at 253.

[357] *Ibid*.

[358] *Ibid* at 254.

[359] *Ibid* at 255.

Benson explains that these features of consideration reflect the bilateral nexus at the heart of a transfer.[360] Just as offer and acceptance reflect the bilateral relation between the parties' assents, the doctrine of consideration parallels this relation in terms of the materials transferred. By linking the promise and consideration in a mutually inducing and reciprocal relation, the doctrine ensures that neither movement exists in isolation of the other. Each party's act is thereby intrinsically linked with the other party's act and unintelligible apart from each other. As with the parties' assents, the nexus created by the reciprocal movements of value transcend either party's unilateral act. The bilateral relation exists apart from either subjective party and thereby wrests away from either party's unilateral control or power to revoke. The effects of this agreement are instantaneous and the parties each receive a contractual right to the performance transferred.

By providing a normative explanation for contractual transfer that mirrors the operation of a physical transfer, Benson completes his answer to Fuller and Perdue's challenge. Gains and losses are assessed in reference to a normative baseline. Contrary to the presumption of Fuller and Perdue, contract formation transfers an ownership right to contractual performance that sets the normative baseline to judge each party's appropriate holdings. By breaching the contract, the defendant violates the plaintiff's right to receive contractual performance. The expectation interest recognizes this by requiring the defendant to put the plaintiff in the position he or she would have been in had the contract been performed.

In summary, the essential conditions of contract formation reflect the same bilateral relation that generates legal transfer. In physical transfers, the presence of the physical object at

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[360] *Ibid* at 257.

the center of the bilateral nexus allows the object to transfer fully when delivered. In the contractual context, the transfer delivers a right to the promisee to the content of the contractual promise. The obligation to deliver the physical object at the time specified by the contractual terms is the mere consequence of this correlative right and duty of contractual obligation.

Accordingly, contractual obligation manifests the organizing normative idea of misfeasance. As mentioned, misfeasance encapsulates the idea that the bilateral relation of ownership comprises the basis unit of private law. In the tort context, this ownership right delineates the duty not to infringe upon the owner's sphere of freedom. Barring this limited conception of duty, the actions of the non-owner are not limited, as seen in the examples of rescue, pure economic loss and nuisance law. Similarly, in the contractual context, the content of the contractual duty is set by the ownership right in the contractual performance that is transferred at the outset of the contract. Since all the organizing ideas mentioned – i.e. normative misfeasance, rights and duties, gains and losses – reflect the same bilateral relation between owner and non-owner, it is natural for the creation of new ownership via transfer to require the bilateral participation of both parties. This entire structure makes clear the centrality of the bilateral relation in private law, whether in its ability to create new ownership or in its demarcation of the resulting spheres of freedom held by owners in exclusion of others.

6.2.3.3 Contract as Transactional Justice

Benson's overarching point is that there is a specific juridical point of view that is manifested through these public legal norms. This juridical standpoint has a particular conception of the person and the juridical relationship, which differ from conceptions found in

other social relations. Ownership, manifested in the normative framework of misfeasance, is the central concept at the center of the juridical viewpoint. When unpacked, the concept of ownership entails the basic structure of private law.

As mentioned, ownership postulates two relations simultaneously: between the owner and thing, and between owner and non-owner. Both relations reveal ownership as a capacity to exercise one's free will. The first relation distinguishes an owner, who possesses this self-determining capacity, from a thing, which does not. The owner has exclusive freedom over the thing and may utilize the thing as a means to further chosen goals. The second relation corroborates this conception of the owner by requiring non-owners to refrain from invading the owner's sphere of freedom. Both relations thereby demarcate the spheres of freedom to exercise control that comprise ownership.

Besides for fitting together with the first relation that it must respect, the second relation integrates rights and duties into a correlative relationship that reflects the most basic relation of private law: the bilateral relation between owner and non-owner. Law, through rights and duties, orders interaction by viewing persons as owners with capacities to set their own agenda. The rights and duties emanate from ownership, which private law categorizes into a three-part division. First, there is self-ownership, or the right to bodily integrity. Second, there is property ownership, where the owner asserts exclusive freedom over an external thing. Lastly, there is contractual ownership, where a promisee has an ownership right in the contractual performance of another person.

These three categories of ownership each have their distinctive features but they all represent the capacity for freedom that ownership protects. While the latter two categories require an acquisitive act, bodily integrity is a right that does not require action. Since self-

ownership is the precondition for the latter two forms of ownership, it would be paradoxical and self-contradictory (if not impossible) to demand persons to acquire ownership over themselves. Although it does not require an acquisitive act, self-ownership still embodies the same bilateral relation coursing through the other categories of ownership in private law: it demarcates a sphere of freedom (the right to bodily integrity) that non-owners must respect. Similarly, the latter categories mark the same sphere in reference to external property and contractual performance. Although the mode of (first) acquisition of property differs from contract (i.e. property acquisition is a unilateral act while contractual obligation is a joint, bilateral transfer), the owner's *in rem* right in the property is still bilateral. Although the *in rem* right is held against the entire world, this merely reflects the aggregation of numerous bilateral relations with non-owners.

The bilateral relation of owner and non-owner that defines private law represents the juridical point of view. Benson's discussion reveals contract law to be a conception of justice that is appropriate for bilateral transactions. As Benson notes, the result of this transactional conception of justice is that it is content-neutral and that is must be content-neutral as a result of the misfeasance principle.[361] Through the principle of misfeasance, the law ignores any particular conception of the good that a person wishes to realize through the contractual agreement.[362] This is exemplified in the doctrines of contract formation analyzed earlier, which together with the objective test, show that the subjective goals of each party are replaced by an objective, though contextual, standard that exists in the bilateral relation between both parties. This exclusive context precludes the relevance of considerations that are extrinsic to both parties

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[361] Benson, "Idea of Public," *supra* note 211 at 322.

[362] *Ibid*.

while at the same time cutting of factors that exist subjectively within an individual party. According to Benson, this restricted context demarcates the juridical standpoint of the bilateral relation that is at the heart of contract – and private – law.

6.2.4 Public Markets

While Weinrib attempts to integrate his theory of private law directly into public right, Benson advances a Hegelian method of first linking private law within a more limited public sphere. Benson accomplishes this by situating the contractual relation within the economic phenomenon of markets.[363] As mentioned, Weinrib's integration of private law within public right concedes too much control to public right with its features of publicness and systematicity. This concession parallels a fundamental problem in Weinrib's structure of private law: the reliance of property rights upon a public scheme and the divergence thus created between contract and property law. This excessive reliance upon the public and systematic features of public right possibly results from the directness with which Weinrib integrates his private law into public right. By connecting contract law first within the more limited scope of public markets, Benson's attempt appears to be a more promising way to integrate private law into a public realm without sacrificing the internal structure of private law. To do so, Benson must show that contract law fits in within a market phenomenon without undue tension or conflict.

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[363] Benson, *Justice in Transactions*, (forthcoming) Chapter 8 at 159.

Ostensibly, it would appear that the fitting together of contract law and economic markets is bound to be awkward for two reasons.[364] The first reason is substantive. Markets provide a system of exchange that presupposes that participants each have their own self-chosen particular substantive goals.[365] To satisfy their personal preferences and goals, participants enter into an exchange with others who seek in turn to satisfy their own needs. The basis of the market is the recognition that individuals each posses different substantive goals that swapping may satisfy. By contrast, the bilateral transaction of contract law abstracts entirely from these substantive goals and needs.[366] The transactional standpoint lies in the relational unit shared between both parties and is therefore not married to either party's subjective needs, preferences and aims. Because the contractual relation is an operation of transfer, the parties are seen identically by their abstracted capacities for ownership. These identities of ownership, with its capacities to alienate or accept ownership rights, provide the means for the parties to operate a transfer through contract. This bare conception of ownership is all that is needed for contractual transfer and therefore comprises the entirety of the juridical standpoint of contract law. Other extraneous elements, such as the subjective features, needs and goals of the contracting parties are not operational and therefore not relevant. The contractual relation and public markets are therefore predicated on opposing substances.

The second reason that contract law appears to conflict with public markets is formal.[367] Contract, as a relational transaction of transfer, is necessarily bilateral as between the contracting parties. The transfer is generated by the unity created by the joined combinations of both parties.

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[364] *Ibid* at 161.

[365] *Ibid* at 160.

[366] *Ibid*.

[367] *Ibid* at 161.

This bilateral nexus is the essence of the transactional conception of contract law. By contrast, a market goes beyond this bilateral unit. As a domain to satisfy every individual's preferences and goals, a market is a system of infinite exchanges.[368] Accordingly, while contract entails a private bilateral relation between two parties, a market is a public omnilateral system uniting all market participants.

Despite these substantive and formal differences, it would be surprising if contract law could not accommodate the existence of a public market.[369] Although a public market exceeds the contours of the transactional conception of contract, its basic unit is the contractual exchange. A market presupposes and aggregates discrete transactions of exchange into a public, unified system. By recognizing a public market, contract law takes into account a system that expresses and actualizes contractual units of exchange. The task of recognition, however, must be balanced. Contract law must be able to accept the preference-satisfying function of markets without incorporating that teleological satisfaction as a goal of contract law.[370] The task is to situate contract law comfortably within a public market that has different substantive and formal features without sacrificing the normative structure of contract law.

Benson begins his stitching of contract law into a public market by carefully defining the latter. He describes a market as an interconnected system of social practice that coordinates in a decentralized way infinite bilateral transactions via prices.[371] It brings together two intrinsic

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[368] *Ibid*.

[369] *Ibid* at 160.

[370] *Ibid*.

[371] *Ibid* at 163.

features.[372] On the one hand, a market reflects the particularities and differences that draw each person to enter the market. These preferences, needs and goals distinguish market participants from each other. On the other hand, by providing the forum by which these people can satisfy their individual preferences and goals, a market also brings unity and interdependence to the relations between market participants. A market's dual recognition of both the differences and the interdependence of its participant is aptly captured in Hegel's descriptive term "system of needs."[373] "Needs" reflect the varying desires and goals that differentiate people, while "system" captures the unity and interdependence that a market brings by facilitating exchanges.

Accordingly, although a market is predicated on the satisfaction of subjective preferences, the notion of exchange abstracts from this subjectivity.[374] Exchange requires participants to recognize that their self-satisfaction is possible only through satisfying the different preferences of other participants. A market participant must always balance self-awareness with an awareness of others. Instead of a subjective view that isolates a desired good or satisfaction, the standpoint of exchange requires one good or satisfaction to be seen in relation to another's good or satisfaction. The combined viewpoints entailed in exchange provide the standpoint of market: it recognizes subjective preferences, not as isolated endeavours but as joint ventures of exchange. Although the bedrock of a market is the internal goals of its participants, the operation of exchange necessarily transcends and abstracts from these particular subjective aims. In short, a market presupposes individual preferences without incorporating the particular differences into the goals of the market itself. It cognizes these preferences as the basis for entering the market

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[372] *Ibid* at 164.

[373] Hegel, *Philosophy of Right*, *supra* note 128 at paras 182-208.

[374] Benson, *Justice in Transactions*, *supra* note 363 at 164.

but does not inspect the preferences themselves. The relational character of exchange summarily describes this joint recognition and abstraction.

This joint recognition of and abstraction from subjectivity entailed in exchange is encapsulated in market prices.[375] Market prices simultaneously compare all market exchanges and relate every object with each other in pure quantitative terms.[376] Just as value represents the relational standpoint of objects in a contract, market prices reflect the relational system of objects in a market.[377] The significant difference is that value represents the relation of two objects determined by, and reflective of, the bilateral parties; market prices reflect the collective relation of all objects determined by, and representative of, the omnilaterality of all market participants.[378] Although both value and market prices follow the same process of relational abstraction, market prices have a more general, inclusive and universal character than value.[379]

While a market goes beyond contract law by recognizing subjective differences, its system remains sufficiently general and abstract. No particular difference or preference is introduced as important in its own right to the market. Through its operations of exchange and prices, a public market retains abstract neutrality that mirrors that of contract law. Its system of exchange parallels the distinction in contract law between persons with a capacity for ownership and things

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[375] *Ibid* at 171.

[376] *Ibid* at 172.

[377] *Ibid* at 171.

[378] *Ibid* at 172.

[379] *Ibid*.

that are free to be owned.[380] These features suggest that contract law can accommodate entry into a market scheme without surrendering the transactional norms that define contract law.

Although a market respects the abstract relational equality of contract law, it nonetheless imposes its own distinctive features and norms on market transactions. These impositions follow from the formal character of a market as a public omnilateral system and from the substantive goal of preference-satisfaction. For example, because market participants pursue their own goals through the satisfaction of the preferences of others, they require knowledge of the needs and wants of other market participants.[381] A market must therefore concern itself with ensuring the public knowledge of the owned rights and their desired transferability.[382] This example results from both the substantive and formal features of a market. The substantive goal of preference-satisfaction via exchange calls for this knowledge to be available, while the formal feature of a public system allows for this information to be broadcast to all market participants.

Interestingly, the presence of a market – or "system of needs" – in Hegel's legal philosophy and the absence of it in Kant's system seems to follow from the difference between Kant and Hegel in reference to a sophisticated conception of value. As mentioned earlier, Hegel's conception of value as an abstract, relational concept of equivalence in exchange seems to be lacking in Kant's work. Earlier, this discrepancy was presented as one reason that Kant and Hegel define the subject matter of contract differently. Hegel's reliance upon his conception of value locates the relational element within the contractual object, while Kant must appeal to the relational possession of another's choice to uncover the correlative nature of the subject matter

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[380] *Ibid* at 168-169.

[381] *Ibid* at 164.

[382] *Ibid*.

transferred. Similarly, Hegel's conception of a "system of needs" whereby market participants satisfy their different needs through market exchange relies upon a parallel conception of market prices. Market prices merely take the abstract conception of value in contract from a bilateral notion to an omnilateral, universal standard. The lack of such a system from Kant's discussion seems to follow from the absence of Hegel's conception of value in Kant's work. Just as Kant lacked the conception of value, he likewise seems to have neglected the nature of market prices. This follows from Kant's definition of contract as a right to a choice instead of an object. Without conceiving exchanges as relating goods, there cannot be a universal market price produced through market exchanges. In Kant's view, the contracting parties are not exchanging goods and so cannot be determining the value of goods vis-à-vis each other. Although this thesis contends that Kant acknowledges the transfer of property once the civil condition is reached, this cannot provide a market existing prior to the civil condition. Without a mechanism for viewing market exchanges from an equal standpoint of abstract, relational market participants, it is unsurprising that Kant did not recognize a system of needs. Instead, Kant moved directly from private right to public right.

6.3 The Approach Consistent with the Thesis

6.3.1 The Tripartite Division

Although the Aristotelian approach advocated by this thesis follows Kantian corrective justice in segmenting private and public law into respective spheres of corrective and distributive justice, it emphasizes that sameness and difference are the master features that respective

animate each area. Corrective justice presupposes a mode of ordering that only recognizes features that are the same across individuals. In virtue of this complete identity among persons, corrective justice does not assume a distributive principle to mediate interaction. No distributive principle is adopted in corrective justice because there are no relevant differences for a principle to use to differentiate people and their entitlements. By contrast, distributive justice must allow differentiating particularities to be relevant. Without such differences, distributive justice would have no means for differentiating people and would thereby collapse into corrective justice. Sameness and difference are thus the organizing ideas within the two forms of justice.

Aristotle suggests this through his description of the two forms of justice as different modes of equality. Equality entails the comparison of two entities by something shared. The two forms of justice achieve this comparison through different means. Corrective justice views persons only by their shared features – that is, through the sameness that is internal to both entities. By contrast, distributive justice allows difference into view and therefore cannot locate the purity of something internally shared. Instead, though each person is different, they share the guiding distributive principle that organizes these differences into a unified scheme. This is an externally found sameness through the mediating principle of distributive justice. By consisting of opposing ways to view persons – by their shared features or their differences – the two forms of justice exhaust the possibilities for locating equality between people: either internally or externally.

Although the thesis follows Kantian corrective justice in its use of dichotomies – i.e. private vs. public law, corrective vs. distributive justice – the identification of sameness and difference as fundamental features allows for a third blended category to bridge private and public law. This third category is neither a pure instance of private law nor a full application of public law

but rather a combination of both elements. This mixed domain provides an appropriate linking of private with public law and corrective with distributive justice.

Private law moves to this mixed sphere through its own momentum. Although private law manifests a restricted view of sameness through its doctrines and principles, it must subsequently take note of difference. The reason this is required is that difference itself comprises something that is shared by all persons. The existence of no two persons is completely identical. Every person possesses differentiating particularities that make up their identity as a particular individual. Because all persons share difference, difference must be recognized subsequent to the circumscribed sameness that private law embodies.

Importantly, private law must only take note of difference in its general sense at this level. Because it is viewing difference as something all people share, private law at this point abstracts from the specific content of the differences (e.g., colour of hair, specific height). Instead, the view notices that all people possess such differences, whatever they are, and are therefore alike in their possession of these differences. (Note this mode of abstraction is typical of the Aristotelian approach, which abstracts utilizing a group perspective that sheds elements that are not common to the group. As discussed, this method stands in contrast to the Kantian approach, which abstracts on an individual level by isolating those features that are essential to the individual while eliminating elements that are incidental or superfluous.) Accordingly, difference in its general sense represents a midpoint between the sameness of private law and the difference of public right. It combines elements of both. It recognizes the differences that are prominent in public law but only from the abstracting standpoint of sameness that comprises private law.

The Aristotelian approach therefore differs from the Kantian approach in its tripartite division of legal modes of ordering. Kantian corrective justice divides private law and public law rigidly into two compartments. As indicated earlier, part of Weinrib's difficulties with integrating private law into public right stemmed from the direct method by which he sought to fit together these different realms. Due to this rigid separation, Weinrib extracted more than necessary from public right through its features of publicness and systematicity without justifying the reason that private law required those features. As discussed earlier, private law only required the procedural benefits – adjudication and enforcement – of public right. To this degree, private law would make way only for these procedural benefits and procedural presumptions in response to uncertainty. Anything further, even if derived from the public right's normative dimensions of publicness and systematicity, are unnecessary for this task and therefore powerless to displace the prior structure of private law.

The tripartite division of the Aristotelian approach are linked sequentially through the momentum that shifts from one stage to the next. First, private law begins with its circumscribed difference. It elaborates the doctrines and principles that embody this standpoint of sameness, providing a normative conception of its own. Next, it must take into account the generality of difference because the fact of difference is itself a feature that is shared by all persons. This midpoint stage combines the two elements of sameness and difference by recognizing only the general sense of difference, without taking note of its specific particularities. Finally, once this midpoint stage is reached and fully demarcated as its own mixed sphere, private law must move to the public law realm where the full expression of difference with all its particularity exists. While the general recognition of difference at the middle level is inadequate to ground a distributive principle, the existence of specific content at the final level provides the differentiating particularities that a distributive principle requires.

6.3.2 The Move to Market

The midpoint level, which recognizes the existence of difference without taking note of its particular content, converges with Benson's public market. A public market matches this general sense of difference by its combination: although it recognizes the different needs, preferences and goals of individuals, a public market does not treat the particular content of these differences as salient. Instead, it abstracts to a general level of recognition through the interdependence of exchange relations. A public market differs from the contractual relation while at the same time remaining distinct from the distributive regime of public law. It is a midpoint where difference exists in an abstracted, general form.

The convergence of the Aristotelian middle stage with a public market provides a formal corroboration of Benson's theory. The Aristotelian approach moves to the midpoint stage from a purely formal sequence that consists only of the two elements of sameness and difference. While Benson situates contract law into a public market through their mutual concern with transactional exchanges, the Aristotelian argument moves to a public because of its mixed dimension of sameness and difference. In the Aristotelian picture, a market embodies the general recognition of difference.

The tripartite sequence of the Aristotelian approach explains the formal necessity of a market to contract law while preserving the priority of contract law. From an Aristotelian standpoint, the move to a market is inevitable because the move to the middle stage is inescapable. The separation between sameness and difference cannot remain a rigid dichotomy. There must exist

a middle stage where these components are blended by a view that acknowledges *the sameness of difference* – that is, the general sense of difference. This is the move to a public market. Yet, because this view incorporates difference – even if only in a general sense – it is a somewhat paradoxical category. It does not retain the purity of the first stage, which consists solely of sameness. The middle stage is therefore excluded from the first stage and instead comprises a second, midpoint stage between private and public law. In this way, the formal Aristotelian approach secures the priority of contract law while simultaneously explaining the essential need to situate contract law within a public market.

In addition to this formal necessity to move to a public market, Benson may find a substantive impetus through the doctrine of unconscionability. Unconscionability is found in contracts that have a gross discrepancy of values in circumstances of impaired bargaining power where the reason for the disparity is unclear.[383] If the impoverished party voluntarily assumed the risk of the loss or intended to enrich the other party, then the contract is binding despite the gross discrepancy.[384] If, however, there was no donative intent or voluntary assumption of risk, then the contract will be set aside due to unconscionability.[385] The uncertainty as to the impoverished party's intent arises from the mixture of substance and procedure – i.e. the grossly unequal values and the impaired bargaining power.[386] The law resolves this uncertainty in favour of the impoverished party because the law presumes that a party would not gratuitously surrender something of value.[387] Because of the possibility that there was donative intent or

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[383] Benson, "Unity," *supra* note 128 at 185.

[384] *Ibid* at 186.

[385] *Ibid*.

[386] *Ibid*.

[387] *Ibid*.

assumption of risk, the law does not void the contract but renders the agreement voidable at the sole discretion of the impoverished party.[388]

The role of the market is prominent in the case of unconscionability. As mentioned, prices in the market function equivalently to value in contract, with the following exception: contract value represents the relational standpoint of bilateral parties, while market prices reflect the universal value produced by all market activity. This distinction becomes crucial in circumstances of unconscionability because the ascription of value from the impoverished party is suspect. Yet from within the bilateral standpoint of contract law there is no objective manner to decide this issue. Through their universal standard for defining the value of objects, market prices provide the needed objectivity to clarify that there is a clear transfer of grossly unreciprocated value. This triggers the legal presumption against gratuitous transfers to render the contract voidable, thereby restoring the value to the owner's hands.

If contract law did not recognize market prices, no questions about gratuitous transfers would arise in cases of unconscionability. In absence of clear procedural unfairness (e.g., undue influence or duress), the law would be forced to accept that the discrepancy of values reflected the owner's wishes. Yet the law is aware that even in the absence of duress and the like, there may be circumstances of impaired bargaining power where the owner did not voluntarily intend to transfer the discrepancy in value. But without the universal standard of market prices, the law would have no method for identifying the gross discrepancy of value that prompts the uncertainty. Since market prices are needed to provide this alarming function, contract law must rely upon the universal standard supplied by the totality of market exchanges.

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[388] *Ibid* at 187.

The doctrine of unconscionability is analogous to the four examples of Kant that were discussed earlier in that uncertainty calls for an appeal to a normative structure outside private law. In Kant's examples, the encounter with uncertainty led to a reliance upon the normative presumptions of public right. Because private law requires the procedural benefits of public right, the presumptions of public right – which are procedural techniques to resolve uncertainty – are valid for private law. In a slightly similar way, contract law encounters vagueness in circumstances of unconscionability. It knows that there must be cases of impaired bargaining power that, though falling short of procedural unfairness the likes of duress, lack donative intent. Yet it has no method for identifying these cases through an objective standard of value. Its internal bilateral standpoint consigns these cases to remain vague and unidentifiable. A public market supplements private law by providing the needed universal standard of value to recognize gross discrepancies of value. Once these unconscionable transfers are located, the presumption against gratuitous transfers is triggered and the doctrine of unconscionability renders the agreement voidable.

6.3.3 Constitutional Human Rights and Private Law

6.3.3.1 Barak's Four Models

The congruency with which contracts may be situated within a public market raises interesting questions for the relation between constitutional rights and private law. According to Professor Aharon Barak, there are four possible models to describe the influence constitutional

human rights may have on private parties.[389] The first model that Barak describes is the direct application model. Constitution rights in this model apply not only to the government but also to private parties.[390] According to this model, the danger of harm to human rights do not just emanate from government bodies but arise equally, if not more so, from the private sector.[391] Notable instances of the direct application model exist in Switzerland and, according to some scholars, Germany.[392]

The second theoretical model that Barak identifies is the non-application model, which is the complete opposite of the first model. Constitutional rights in this model apply only against the government and do not have any application – direct or indirect – in private law.[393] This model draws a strict line between public and private law: the constitution protects private parties from the government, while the rights and duties between private parties is regulated by private law.[394] Barak explains that the strict division of this model seeks to avoid complications that would arise if constitutional rights applied in the private law setting. He notes that if, for example, prohibitions against discrimination applied to a testator's distribution between heirs or a seller's engagement with potential buyers, then the constitutional rights would limit the principles of autonomy and freedom of contract embodied in private law.[395] Conceivably, a balance would have to be struck between the constitutional human rights and the values

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[389] Aharon Barak, "Constitutional Human Rights and Private Law," (1996) 3 Rev Const Stud 224 at 224 [Barak, "Constitutional Human Rights"].

[390] *Ibid*.

[391] *Ibid* at 228.

[392] *Ibid* at 243-246.

[393] *Ibid* at 225.

[394] *Ibid* at 231-232.

[395] *Ibid* at 232.

enshrined in private law, but the crafting of an appropriate formula would likely be difficult.[396] According to Barak, the non-application model simply avoids these issues by keeping the public and private spheres completely apart. Canadian constitutional law abides by this model.[397]

The third possible model that Barak lists is the indirect application model. According to this model, constitutional human rights do not directly permeate private law in and of themselves but waft into private law through the development of private law doctrines that are intended to absorb and reflect constitutional values.[398] Proponents of this model claim that private law rules have always valued and embodied human rights of personhood, autonomy and dignity.[399] Further, they see concepts such as good faith, reasonableness and negligence as techniques employed to balance competing human rights (e.g., one party's freedom of action vs. another party's bodily integrity).[400] Lastly, they perceive the use of public policy to be an appropriate avenue for constitutional values to filter into private law.[401] This model operates in Italy, Spain and Japan.[402]

The final model that Barak classifies is the application to the judiciary model. Under this model, constitutional human rights only apply to the government and have no direct or indirect application to private relationships.[403] However, according to this model, the definition of

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[396] *Ibid*.

[397] *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery*, [1986] 2 SCR 573 at 603.

[398] Barak, "Constitutional Human Rights," *supra* note 389 at 225-226.

[399] *Ibid* at 236.

[400] *Ibid*.

[401] *Ibid* at 237.

[402] *Ibid* at 252-254.

[403] *Ibid* at 226.

government includes the judiciary. Consequently, courts must develop private law and adjudicate cases without harming constitutional human rights.[404] For example, if a constitutional right prohibits government from infringing freedom of expression, then courts must develop the law of defamation in a manner that respects freedom of expression.[405] This model has been adopted in the United States.[406]

6.3.3.2 Two Further Models: Public Markets

The Canadian non-application model not only fits with Canadian constitutional law but, according to corrective justice, the model is also corroborated from the standpoint of private law. As the domain of corrective justice, private law embodies a particular mode of ordering that reflects the direct relation between private parties. A government is necessary for the adjudication and enforcement of private law, but it is not empowered to modify or influence the normative structure and principles of private law. Such government regulations are the domain of public law and distributive justice.

Nonetheless, the preceding discussions about private law and public markets raise two further models that can be added to Barak's list. The first possible model begins with the strict division between constitutional human rights and private law (i.e. the non-application model). However, according to this model, the insulation of private parties from constitutional human

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[404] *Ibid*.

[405] *Ibid*.

[406] *Ibid* at 254-257.

rights is only insofar as their interactions remain in a private setting guided by private law. Insofar as their transactions take place in a public market, their interactions are no longer within the protected domain of private law but have entered the middle stage that, as noted earlier, combines elements of corrective justice (i.e. sameness) and distributive justice (i.e. difference). According to this model, constitutional human rights do not apply directly to private parties but attach to the public persona assumed as they enter the setting of a public market.

The result of this model would prohibit a seller publicly advertising some good or service on the market to deny a potential customer on discriminatory grounds. By entering the public market and taking advantage of the publicly accessible knowledge of exchanges, the individual sheds a purely private persona and becomes a participant in a public market. This act attracts the constitutional human rights that are not restricted from applying to public bodies and to their representative members.

This model works by being sensitive to the different contexts in which private parties interact. In this regard, it is analogous to the decisions in *C.B.C. v Dagenais*[407] and *Hill v Church of Scientology*,[408] where the Supreme Court of Canada held that although the Charter would not apply even indirectly to private matters, it would apply if the private matters occurred in an "essentially public" criminal context. Similarly, this model attends closely to the varying contexts in which private interactions occur and differentiates the public setting of markets from the purely private background in other interactions between private parties.

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[407] [1994] 3 SCR 835.

[408] [1995] 2 SCR 1130.

The second possible model arising from the previous discussion works in a slightly different way. It begins with the premise that constitutional human rights do not apply to private interactions, even if they occur in a public market. Accordingly, it fully adopts the non-application model. Yet, even though constitutional human rights do not apply directly or indirectly, it is possible to locate the substance of at least some constitutional rights in a private setting: the public market. While the previous model accepts the possibility that constitutional human rights apply to market participants, this model attempts to locate the substance of constitutional human rights independently.

According to this model, a public market on its own will prohibit discriminatory practices in market exchanges. Instead of grounding itself in constitutional human rights, this prohibition is entailed within the normative dimension of a public market. As discussed, a public market retains an abstract and universal quality that is embodied in market prices. These market prices are reliable indications of value because they are the result of all voluntary exchanges that occur on the market. Further, although the market takes into account the differentiating particularity of each individual that draws them to the market, it also abstracts from this and stays at a general level that does not inspect or make salient the particular content of these differences. Accordingly, a market participation that engages in discriminatory practices in an exchange disrupts the normative order of the public market. First, the discriminatory practice prevents market prices from attaining its universal character. Instead of reflecting the relational value placed on *goods* by all market participants, the market price will include the impurity of a discriminatory preference against a particular *individual*. Further, because a market maintains only a general recognition of difference and not particular contents, a discriminatory practice has no place or foundation within a market exchange. Discriminatory practice necessarily entails a view of the particular differences that comprise the person. As mentioned, this recognition of

particularity is allowed only in the third domain of distributive justice, not in the middle level of market. Accordingly, market participants must abide by the normative dimension of a market and cannot base their market activity on a basis that collides with this normative character.

Chapter 7
The Duty to Rescue in Private Law

7.1 The Theoretical Justification

7.1.1 Weinrib's Early View

In Weinrib's early work,[409] he argued that private law should recognize a limited duty to rescue others in imminent peril. He supported his conclusion with both utilitarian and Kantian arguments. His Kantian argument begins with Kant's definition of the subject as a purposive and choosing entity that has the capacity to set self-determined ends.[410] This definition of the person includes physical integrity as a precondition to accomplish his or her self-determined goals.[411] Because the recognition of personhood and its preconditions in one's self demands the recognition of the same in others, Kant's reciprocal restrictions on freedom are appropriately applied to secure physical integrity.[412] This conception of the right to life is therefore derived from life's presupposition in the notion of personhood and moral action.[413] The structure of this argument results in a priority that must be ascribed to life itself.[414]

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[409] Ernest J. Weinrib, "The Case for a Duty to Rescue," *supra* note 262.

[410] *Ibid* at 287.

[411] *Ibid* at 288.

[412] *Ibid*.

[413] *Ibid*.

[414] *Ibid* at 289.

Weinrib soon repudiated his early view. In developing his theory of private law, Weinrib moved through the three claims of his argument. He argued for the immanent intelligibility of law as a nexus of form and content, identified the form as corrective justice and adopted Kant's legal philosophy as the matching substance for corrective justice. In Kant's legal philosophy, the only feature that figures in juridical relationships is the purposive capacity. All other wishes and needs fall outside this scope, even if it is the need for life itself that is presupposed by the purposive capacity. The result of this argument leads inexorably to a framework of negative duties not to infringe upon another person's protected sphere of freedom. Positive obligations to secure any further benefits to others are non-existent, even if the benefit is of the most fundamental importance.

7.1.2 The Argument from Corrective Justice

This thesis has argued that this conclusion is unwarranted. According to this thesis, Weinrib's approach need not lead to Kant's narrow definition of legal personality. Following Weinrib's first two steps closely – i.e. claiming law's immanent intelligibility and identifying the formal features of corrective justice – lead instead to a locating the paramount importance of sameness in private law. Although Kant's legal philosophy conforms to this ideal of sameness, the feature that it assumes to comprise the content of sameness (i.e. the purposive capacity) is unduly narrow. Further features can figure in private law and juridical relationships provided that all share those features.

Kant's purposive capacity therefore reflects a minimum requirement, not a maximum. It is a necessary condition to the private law conception of persons and their equality, but it does not

follow that the purposive capacity suffices or exhausts this conception. As argued, the purposive capacity is a necessary minimum because it is the intrinsic precondition for any notion of obligation or duty. Even with its formal and limited conception of duty as the restoration of an antecedent equality, corrective justice implicitly presupposes the purposive capacity (through the "directive aspect of any principle"). If such a capacity did not exist – that is, if entities' fulfillment or violation of the duty principle were inevitable and beyond their control – then the principle of corrective justice would be nugatory.

The outcome of this framework is that life itself becomes relevant to private law and figures as an ordered priority. The framework includes the purposive capacity as a minimal requirement of the directive aspect and allows for further features to be recognized with the limitation (i.e. the "equality aspect") that these features be shared by all parties. Life itself necessarily enters the picture because it, first, is presupposed by the purposive capacity and second, is shared by all parties.

The fact that life is presupposed *within* the purposive capacity orders its priority. On the one hand, its necessity as a precondition to all action requires that it be recognized as a feature that has greater significance due to this priority. On the other hand, because this priority is in virtue of life's presupposition by the purposive capacity, the priority of life cannot overwhelm and erase the purposive capacity of persons. If it did so, then it would self-contradictorily undermine the capacity that makes its priority salient in the first place. Accordingly, the presupposition of life within the purposive capacity both provides the basis and the limitation for its ordered priority.

7.1.3 The Argument from Self-Perpetuity

Once this framework makes life salient in private law, a further argument can be made to support the recognition of a duty to rescue in private law. This argument follows from the coherence that is prized by Weinrib's first claim of immanent intelligibility. The configuration of the parts is coherent if they suitably coalesce and express a unified system. However, for a system to be coherent, it should not only comprise an organized unity but also secure its own continued existence. It would be the ultimate of incoherence and self-contradictoriness if a system, purporting to be something, undermined its own existence through its own normative principles. This basic requirement of self-perpetuity – requiring that a system, to the best of its ability, secure its continued existence – resembles the importance with which Rawls required that a political scheme generate its own support and stability.[415]

This basic requirement of self-perpetuity would be unfulfilled if private law did not, to the best of its ability, secure the continued existence of the constituent members of private law. Certainly, it is always possible that a large-scale natural disaster or enormous wrong may be unpreventable by private law. To that extent, private law is working against conditions that are beyond its control. However, to the degree that this continued subsistence could be secured by preventing the deaths of strangers that can be easily rescued, private law must do its part to ensure that those lives are not lost. It does so by expressing the commitment to self-perpetuity through its principles and thereby brings coherence to its systematic mode of ordering private interactions between people.

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[415] *See*, for example, John Rawls, *Justice as Fairness*, *supra* note 214 at 186.

7.1.4 The Argument from Morality

The framework defended in this thesis also enables a moral argument to be made for the creation of a duty to rescue. This argument begins by acknowledging the long-recognized fact that moral obligation and legal obligation are not synonymous terms. Moral obligation does not necessarily translate into a legal duty.[416] However, following Weinrib's claim of immanent intelligibility, the basis for this distinction lies in the independent normative orders that morality and law each constitute. The juridical sphere possesses its own self-illumination that is distinct from moral argument and comprises its own "immanent moral rationality"[417] or "special morality."[418]

Nonetheless, since the framework of this thesis allows for a range of features to constitute the sameness of private law, it allows for the possibility of a duty to rescue in private law. Once this duty exists as a *possibility* that is equally expressive of the normative order of private law, moral argument[419] may be employed to transform it into a necessary requirement of private law. In this sense, moral argument is functioning only *within* the normative framework of private law. It adds weight to a particular outcome that is within a range of plausible options, all consistent with the framework of private law. The moral argument for rescue thereby adds persuasive force to ensuring that the sameness is not limited to the bare purposive capacity but includes a thicker sense of personhood that is inclusive of the right to life. Moral argument, appropriately

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[416] James Barr Ames, "Law and Morals" (1908) 22 Harv L Rev 92 [Ames, "Morals"].

[417] Weinrib, "Legal Formalism," *supra* note 39 at 954.

[418] Weinrib, "Special Morality," *supra* note 37.

[419] Most discussions in the literature and judgments assume that there is a moral duty of easy rescue. See, e.g., Ames, "Morals," *supra* note 416 and *Buch v Amory Mfg. Co.*, 69 NH 257, 260, 44 A 809 (1897) at 810.

operating within a limited scope consistent with corrective justice, thus militates in favour of limited duty of easy rescue.

7.1.5 Misfeasance and the Balanced Result

Misfeasance, as discussed earlier, is a normative organizing idea in private law. The factual importance of act-omission is not determinative in its own right. Accordingly, there is no factual problem with the imposition of liability for a breached duty to rescue, even though the violation occurs by remaining passive and omitting to act for the stranger's benefit. The description of a positive or negative obligation is not analyzed in the abstract but in relation to what the ownership rights demand. The important question for a duty to rescue therefore lies in the manner in which it can be integrated into the normative order captured by misfeasance.

According to this thesis, and following previous discussions, the normative framework of misfeasance represents the priority of an individual's capacity for purposes before particular purposes. Private law is a system that secures the capacity for purposes by reciprocally limiting everyone's freedom to ensure the co-existence of everyone's capacity. Only after these capacities are secured can one speak of the pursuit or the imposition of particular purposes.

The normative dimension of misfeasance expresses this priority of capacities before their particular expressions. Because each capacity must be protected through mutual limitation, each person in private law is under an obligation not to intrude upon these protected spheres of freedom. Ownership, which is central to the normative conception of misfeasance, demarcates

these protected spheres to the exclusion of non-owners. Accordingly, within these protected areas, an owner is free to express his or her purposive capacity at will.

The argument of this thesis lengthens this sequence of priority to include the priority of life. Instead of a priority sequence of purposiveness-purposes, there is a three part ordering of life-purposiveness-purposes. The result of this ordering is that a limited duty of easy rescue signifies a background context where purposiveness is not paramount but must make a limited concession to ensuring the continuation of life.

This argument mirrors Weinrib's argument explaining the right to preserve property through the damage caused to another's property. Weinrib explains that the capacity of ownership is prior to the particular uses that ownership makes possible. Consequently, he explains that an owner is justified in protecting the continued existence of his or her property even by infringing upon another person's property. The infringed person's ownership right, which allows for the infringed owner to determine the uses of the object, presupposes itself the continued existence that makes these uses possible. This priority of continued existence over the possibilities it results in a prior right to existence that trumps rights that presuppose it.

The three-part sequence of life-purposiveness-purposes is a similar categorization. The priority of life justifies a limited infringement of purposiveness. The limitation on purposiveness is reflected in the limited duty to rescue. Duty necessarily limits the capacity for purposiveness because it imposes an external obligation that is not expressive of the self-determining capacity of the rescuer. Yet, just as with the right to preserve property, the rescuer cannot refuse by asserting his or her capacity for purposiveness because such a capacity presupposes the continued existence of life. The priority of life is therefore allowed to restrict the capacity for purposiveness.

It is important to note that this priority must result in a balanced result that does not excessively limit the capacity for purposiveness. On the one hand, the priority of existence allows for a limitation on the purposive capacity. However, on the other hand, this allowance is restricted because the priority of life is only in virtue of its presupposition *within* the purposive capacity.[420] Accordingly, existence cannot overwhelm or erase too much of the purposive capacity. The presupposition of existence in the purposive capacity thereby both creates and limits the priority of the right to life. This explains the conceptual underpinnings of a limited duty of easy rescue that seeks to balance the priority of life without excessively infringing upon the purposive capacity.[421]

7.2 Sketching the Way Forward: The Creation of Duty

7.2.1 Introduction

The main task of this thesis has been to show the conceptual basis for recognizing the right to life and its priority within the system of private law. In his casebook on tort law, Weinrib queries the reader to decide between his earlier and later analyses of the duty to rescue, asking: "Did he [Weinrib] get it right the first time?"[422] The thesis answers in the affirmative. It returns

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[420] Weinrib makes a similar point in Weinrib, "Duty to Rescue," *supra* note 262 at 288-291.

[421] A similar qualification would relate to Weinrib's argument regarding the right to preserve property at another's expense: the owner of the endangered property has a better claim because property *existence* is prior to property *use* – therefore the other's property can be used but not destroyed (or damaged at a greater value than the value saved).

[422] Ernest J. Weinrib, *Tort Law: Cases and Materials* 3rd ed. (Toronto, CA: Emond Montgomery Publications Ltd., 2009) at 581.

to Weinrib's early conclusion (supporting a limited duty of easy rescue) with his latter analysis (legal formalism and corrective justice).

Many have criticized the general absence of a duty to rescue in private law. For example, one of the most persistent criticisms of feminist legal theory targets the absence of a duty to rescue.[423] However, basis of these criticisms often relies upon the direct appeal to moral norms or conceptions of the interconnectedness of social life.[424] These attacks fail to persuade adherents of Kantian corrective justice because they utilize considerations that are foreign to private law in the view of Kantian corrective justice. By contrast, this thesis has echoed the call for a duty to rescue from within the process of Kantian corrective justice. It follows the first two claims of Kantian corrective justice (regarding immanent intelligibility and corrective justice) and argues that the third step adopting Kant's legal philosophy does not follow. By constructing a view of private law that follows more directly from the first two claims, this thesis makes a call from within for a duty to rescue. The argument's conclusion should therefore not be easily ignored.

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[423] Peter Cane, "Anatomy of Private Law," *supra* note 3 at 212.

[424] *Ibid*. See, for example, Leslie Bender, "A Lawyer's Primer on Feminist Theory and Tort," (1988) 38 Journal of Legal Ed 3 at 33-36.

7.2.2 The Common Law

While the common law has consistently rejected a general duty to rescue, it has also made cut against this position.[425] For example, the defense of voluntary assumption of risk and contributory negligence are not applicable when a rescuer is injured. The defendant cannot argue that the plaintiff voluntary assumed the risk of injury by attempting the rescue unless the rescuer's attempt was extremely reckless and grossly negligent.[426] More importantly, the law has increasingly carved out "special relationships" that impose a duty to rescue: e.g., employer-employee,[427] proprietor-customer,[428] landlord-trespasser,[429] carrier-passenger,[430] innkeeper-guest,[431] companion-companion,[432] schoolteacher-student[433] (even beyond school hours per an Australian court)[434] and more.

The increasing categories of special relationships make the justification of these categories difficult while maintaining a general aversion to a duty to rescue. The difficulty is one of coherence: of identifying the justification that extends to all the categories, and the reason that both underlies the absence of a general duty and obligates the rescue in these special

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[425] Mary Ransford White, "The Duty to Rescue" (1966) 28 U Pitt L Rev 61 at 75. Weinrib, "Duty to Rescue," *supra* note 262 at 247.

[426] *Perpich v Leetonina Mining Co.*, 118 Minn 508, 512, 137 NW 12, 13 (1912).

[427] *Anderson v Atchison*, T & SF Ry., 333 US 821, 823 (1948).

[428] *Devlin v Safeway Stores, Inc.*, 235 F Supp 882, 887 (SDNY 1964).

[429] *Pridgen v Boston Hous. Auth.*, 364 Mass 696, 308 NE2d 467 (1974).

[430] *Middleton v Whitridge*, 213 NY 499, 108 NE 192 (1915).

[431] *West v Spratling*, 204 Alq 478, 86 So 32 (1920).

[432] *Farwell v Keaton*, 396 Mich 281, 290-91, 240 NW2d 217, 221-22 (1976).

[433] *Richards v State of Victoria*, [1969] VR 136.

[434] *Geyer v Downs*, [1969] VR 140-141, affirmed in *State of Victoria v Bryar* [1970] ALR 809.

relationships. These increasing categories of special relationships and the strict denial of the defense of voluntary assumption of risk indicate that the stance of private law on a duty to rescue is not so clear-cut.

Yet the task of this thesis is not to specify the exact parameters and details of a proposed duty to rescue. As a notorious area of discussion and debate, the practical dimensions of a duty to rescue are beyond the scope of this thesis. Instead, this concluding section will sketch two models of a duty to rescue that are possible results of the earlier arguments of this thesis.

7.2.3 Two Possible Models: Bilateral and Systematic

The first model is the full integration of the duty to rescue into the private relationship of bilateral parties. This model imposes a limited duty to rescue directly on to the potential rescuer. Without specifying the full parameters of an easy duty to rescue, there are certain instances that undeniably fit into this category. These are the cases where there is virtually no inconvenience to the potential rescuer, as when the simple extension of a word or hand will prevent death. As Weinrib notes, the proper response to indeterminacy is not the denial of all duty.[435] It is possible to recognize clear instances of a duty to rescue even without clearly delineating the borders and details of the duty. The first model inserts this limited duty directly into a correlative relationship of right and duty. It is thereby fully integrated within the system of private law and

[435] Weinrib, "Duty to Rescue," *supra* note 262 at 291.

is only reliant upon the procedural aspects of public right – adjudication and enforcement – of which all parts of private law rely.

The second, alternative model for a duty to rescue works more indirectly. It relies upon the framework of the thesis, which allows private law to recognize the priority of life. Once this priority is recognized, private law must secure the existence of its members through a duty to rescue but can rely upon public, omnilateral methods that are external to the private law relationship. A system constructed that tasks individual members – not relating them bilaterally, but through the omnilateral system – to engage in an easy rescue may secure the priority of life in private law. As discussed, the moral argument for a duty to rescue demands the performance of rescue but may be indifferent to whether its organization consists of a public, unified structure. Similarly, as mentioned, private law must secure its own existence to purport to be a coherent system. This basic requirement of self-perpetuity, however, may be satisfied through a systematic commitment to rescue lives.

7.2.4 Conclusion

This thesis began by tracking the three steps of Kantian corrective justice. It noted that that the second step followed from the first but that the third does not follow from the second. Once the first claim has been made for the immanent intelligibility of law, which is elucidated through the nexus of form and content, the second step to discover the form of private law is natural. Kantian corrective justice correctly identifies the importance of the bilateral and correlative relationship to private law. But in seeking to ground this formal structure in

substantive norms, Kantian corrective justice does not strictly follow the implications of its second step.

Kantian corrective justice diverges from the second step by moving to Kant. The full importation of Kant's legal philosophy disrupts the union of corrective justice and private law because Kant predicated his philosophy on an excessively thin definition of legal personality. As discussed, Kant's restrictive definition of purposiveness encountered trouble in its attempt to validate property rights. Like Weinrib's elaboration of the congruence between private law and public right, too much control is ceded to public elements that are foreign to private law. Property rights become reliant upon a civil society, while contract rights are independent and private. For Kant, private law rights must be divided into three fundamental categories: innate rights, property rights and contract rights. Accordingly, the divergence between property and contract rights in their relation to a public, civil society is deeply troubling. Kant's system allows for the imposition of two different regimes upon a single contractual transfer of property without providing the means for solving such tension.

According to this thesis, Kantian corrective justice rashly made its third step because it did not explore the full extent of its second step. First, although Kantian corrective justice correctly emphasizes the importance of the bilateral and correlative relationship, it does not appropriately recognize the importance of sameness and difference to corrective and distributive justice. Second, although Kantian corrective justice abstracts the formal dimensions of corrective justice by exploring the presuppositions of private law, it does not adequately continue to unpack the presuppositions of the principle of corrective justice itself.

While the principle of corrective justice contains only two elements, it is not empty. As a principle directing the preservation of an antecedent equality, the principle has two components:

one directs a specific action and the other views persons by their shared features. Since a directive component implicitly presupposes a capacity for purposiveness, Kantian substance can be located within the principle of corrective justice without a second, independent step to Kant. In this way, the full adoption of Kant's legal philosophy is prevented. Instead, the importance of purposiveness is contained within the restricted framework of corrective justice. While Kant viewed purposiveness as the maximum and sole definition of legal personality, this approach views purposiveness as a minimum presupposed by a principle directing action.

Since the principle also possesses a second component restricting its view to shared features, corrective justice is not limited to defining legal personality by purposiveness alone. It can include other features that are shared, such as existence itself. The result of this analysis of the two components that are presupposed in corrective justice allows for the three-part priority to be in place between existence, purposiveness and specific purposes. While the normative dimension of misfeasance is maintained within the relation of priority between purposiveness and specific purposes, the recognition of the fundamental precondition of existence allows for a limited background context where purposiveness is restricted to secure the co-*existence* of all purposive beings.

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