There are two contrasting ways of theorizing about the state’s role in the creation of private moral rights. The Kantian way supposes that the state—by defining and enforcing rights in a suitably publicly minded fashion—plays a constitutive role in their creation. Rights, on this view, don’t exist in the state of nature. At best there may be proto versions of rights that the state has some obligation to breathe full life into. The second way—one associated with the Lockean tradition—doesn’t posit this sharp discontinuity between the state of nature and civil society. It doesn’t deny that the state performs an important role in practice in ensuring that rights are protected. Nor need it deny that the definition of many rights may require the existence of a legitimate allocation mechanism, a role that the state may be best positioned to fulfil. Rather, the posited importance of the state in these respects doesn’t rise to the level of a necessary condition. Rights can have robust normative force absent the state, even if the absence of a state means that there are fewer rights overall and it is less likely that those that do exist are respected in practice.

These alternative conceptions of the state’s role in the creation of rights point to divergent ways of justifying state institutions that define and enforce rights such as the institutions of private law. On the Kantian picture, the coercive apparatus of the state doesn’t stand in need of an independent rights-based justification because rights don’t exist absent the state. The state is,
rather, a constitutive part of justice. On the Lockean view, by contrast, rights are the ultimate source of moral authority, and the moral authority of state institutions is ultimately derived from, and must be rendered consistent with, that ultimate source of moral authority.

What then of the institutions of private law? Private law appears to have the right kind of structure to instantiate the private rights that exist as a matter of morality or justice by establishing a relationship in law that mirrors the relationship that rights create at the moral level. A plaintiff’s private legal rights are the flip-side of legal duties owed by potential defendants to the plaintiff. Harm to the plaintiff is not enough to justify imposing legal liability on a defendant. The harm must arise from a legally wrongful act of the defendant. Conversely, bare legal wrongdoing by a defendant is insufficient to trigger liability. The plaintiff cannot prevail simply by showing that she was harmed by a defendant’s wrongdoing. She must also establish that the harm arose from the defendant’s legal wronging of her in particular. In short, private law gives persons a mechanism for vindicating their private legal rights against particular others.\(^1\) It is not a mechanism for vindicating the rights of third parties or promoting broader social purposes like economic efficiency. In Ernest Weinrib’s terms, “correlativity” is the central organizing principle of private law.\(^2\)

The institutions and concepts of private law exemplify this correlativity in a number of ways.\(^3\) First, private law litigation has a relational structure. The plaintiff must initiate and

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\(^1\) As Ripstein puts it: “[t]he concept of a [private] wrong is … irreducibly relational,” and so “the question for the law is always about the relation between the parties, the question of why this plaintiff recovers from this defendant.” Arthur Ripstein, Private Wrongs 73 (2016).


\(^3\) See Weinrib, The Idea of Private Law, supra note 2, at 9-10, 32-33.
maintain proceedings against the defendant in order to vindicate her rights. Second, the rules that define the plaintiff’s legal rights exhibit the requisite relationality. In particular, the plaintiff cannot prevail unless she demonstrates that the defendant infringed her legal rights in particular. Finally, core remedial principles reflect the resulting relationship between the parties. The legal remedy a prevailing plaintiff is usually entitled to receive from the defendant is one designed to rectify the defendant’s breach of duty and only that breach.

Which conception of moral rights can best account for these central features of the private law landscape—the Kantian or the Lockean? I will argue that the Kantian account falls short in important respects and that the Lockean conception has the resources to provide a superior account. Part I describes the central tenets of the Kantian conception of private rights and associated corrective justice accounts of private law focusing on the work of Ernest Weinrib and Arthur Ripstein. Part II casts doubt on the ability of the Kantian account to successfully account in a normatively appealing way for the central structural features of private legal systems that its defenders contend that it can. Part III casts doubt on the sharp distinction that Kantians draw between corrective and distributive justice. Part IV describes the alternative, more Lockean, conception. Part V argues that the alternative account has the resources to overcome some of the difficulties faced by the Kantian account. Part VI concludes.

4 Ripstein, supra note 1, at 271 (“the plaintiff alone is entitled to decide whether or not to stand on his or her rights in cases of wrongdoing”).

5 Ripstein, supra note 1, at 118 (“You need to be careful because people have rights against injury; the wrong of negligence is interfering with the right of someone else in particular, to whom you stand in the right relation.”).

6 Rights, explain Ripstein “survive their own violation.” Ripstein, supra note 1, at 234. Accordingly, the wronged person is entitled to receive from the defendant a remedy that ensures that “from the standpoint of [her] ability to set and pursue purposes, come as close as possible to what [she] would have had if the wrong had never happened.” Id. at 234.
I. Kantian Corrective Justice

Kantian corrective justice theorists believe that the substantive content of the plaintiff’s rights, the infringement of which by the defendant generates the basis for holding defendant liable to the plaintiff, is determined by the Kantian “principle of right,” a principle of reciprocity that requires each to respect the equal freedom of all.7 When a defendant infringes one of the plaintiff’s rights, there is an injustice that can be corrected by the defendant alone, because the injustice arises from the failure of the defendant to respect the plaintiff’s rights. And correction requires that, as far as is possible, the defendant restore the plaintiff to the position that she would have been in had the injustice not occurred, and nothing more than that.

This conception of corrective justice is grounded in a particular understanding of private rights as constituted in part by state allocation and enforcement mechanisms. On this view, a publicly minded centralized coercive allocative and enforcement mechanism is constitutive of a just system of private rights, rather than something that stands in need of independent justification. This is because a system of rights must protect the equal freedom of all from unilateral acts of coercion by others, which it cannot do unless rights are defined and coercively enforced by an appropriately constituted state. In the absence of a state, the principles of right are indeterminate, and each person lacks the assurance that others will refrain from interfering with her rights. Hence the need for “a state that will render the demands of right determinate, through legislation and adjudication, and will render the enforceability of those demands reciprocal through an enforcement mechanism.”8 Were the processes of defining and enforcing rights left

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7 This entails, as we shall see, abstracting from agents’ particular purposes. This is the idea of “personality.” See Weinrib, Corrective Justice, supra note 2, at 21-29. Ripstein justifies the abstracting in terms of the principle of independence—the “moral idea that no-one is in charge of another.” See Ripstein, supra note 1, at 6.

8 Arthur Ripstein, Authority and Coercion, 32 Philosophy & Public Affairs 27 (2004). See also Weinrib, The Idea of Private Law, supra note 2, at 107 (“Since the vindication of right includes the prevention or
entirely to the decentralized determinations of private parties, the resulting system of rights could not secure the equal freedom of all, for those determinations would reflect the relative strength and particular purposes of private parties. This would run counter to the principle of independence—the principle that “no person is in charge of another.” This principle entails that each person ought to be free to set and pursue his own ends, which in turn requires that he be free to set his ends and use his means without being subject to the choices or purposes of others. In short, according to the Kantian conception of rights, there is no explanatory gap between the existence of a private right and its enforceability. Private rights can only exist in a suitably robust sense in the presence of a centralized coercive allocative and enforcement scheme that effectively implements and upholds the overall scheme. This is the inherently public dimension of private rights.

II. Private Law as Kantian Corrective Justice

Kantian theorists contend that this conception of corrective justice accounts for central features of the private law landscape, both structural and substantive. Thus, despite the emphasis on indeterminacy that a state is needed to resolve at the justificatory level, the theory nonetheless

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9 Arthur Ripstein, supra note 1, at 56. In The Idea of Private Law Weinrib formulates the idea in terms of a more abstract formulation of Kantian right. For persons to interact freely and equally within the framework of corrective justice they must interact with each other as free beings, meaning beings who are capable of abstracting their action from their particular purposes and acting on principles valid for all such beings whatever their particular inclinations. Weinrib, The Idea of Private Law, supra note 2, at 90-91.

10 Ripstein, supra note 8, at 8-9.

is hailed by its proponents for generating determinate institutional prescriptions. This raises the worry that Kantian corrective justice theorists are trying to have it both ways.

In this section, I flesh this worry out by calling into question Kantian corrective justice theorists’ accounts of the general absence of affirmative private legal duties to help strangers in need—so-called duties of nonfeasance—and the correlative structure of private law litigation. The discussion reveals the close interdependence of substance and procedure that underpins the Kantian account. The correlative structure of private law litigation underpins the general absence of liability for nonfeasance towards strangers within the Kantian framework.

A. Misfeasance versus Nonfeasance

Kantian corrective justice theorists regard the common law’s unwillingness to impose liability for nonfeasance towards strangers—liability for a failure to come to the aid of strangers—as a bedrock feature of any system of private law that vindicates principles of corrective justice. On the Kantian conception of corrective justice, there can be no private law duty to use your rightful means “in a way that suits your neighbor’s preferred use of those means.”12 Here we see Kantian theorists finding considerable determinacy about the content of private rights out of a framework that emphasizes the pervasive indeterminacy of rights that makes the state necessary to the realization of justice. Does their explanation of the misfeasance-nonfeasance distinction succeed?

So as to avoid getting off to a false state, notice that a purely formal distinction between misfeasance and nonfeasance is a necessary corollary of any system of rights. Suppose that a person has a duty to rescue a person in need in circumstances C (e.g. those in which he is able to

12 See, e.g., Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (Fla. App. 1959) (no liability for constructing addition to hotel that injures another by blocking light and interfering with view); Letts v. Kessler, 42 N.E. 765 (Ohio 1896) (no liability for building a neighboring fence that deprived the plaintiff’s windows of light and air).
do so at minimal cost or risk to himself) and only such circumstances. Formally, we could describe his situation by saying that his “rightful means” are limited: there is a qualification on his right to use the means that happen to be at his disposal as he wishes because in circumstances C he is required to use those means to rescue the person in need. Described in this way, it would remain the case that the right-holder lacked a duty to use his rightful means to rescue another when not in circumstances C. And failing to rescue the person in need in circumstances C would count as misfeasance not nonfeasance because he would thereby be using his means in a way that he isn’t entitled to.

The Kantian’s claim, however, goes beyond this. The claim is that the system of private rights cannot qualify a person’s right to his means by requiring him to use them to rescue—or otherwise serve the purposes of—another in circumstances C. If an agent has a duty to rescue another in circumstances C, then what he is required to do depends on the needs of the person he must rescue. On the flip side, the rights of the person in need of rescue will depend on the costs the rescuing agent will incur in rescuing him—the extent to which the rescue will set back the rescuing agent’s purposes. It is this dependence of rights and duties on the purposes of others that is problematic for the Kantians and so, on their account, ruled out.

For Weinrib, the independence of rights and purposes follows from a highly abstract formulation of the principle of Kantian right. For persons to interact with one another as free and equal beings—the normative ideal that private law as corrective justice instantiates—their interactions must exemplify their status as free-willing beings. Free willing beings are beings capable of free choice, which means that they are capable of detaching their actions from their particular purposes and so acting on principles valid for all such beings whatever their particular
inclinations. Accordingly, principles that exemplify a person’s status as a free-willing being cannot refer to any person’s particular purposes, including the needs of those who are in need of rescuing. Hence, there can be no duty to rescue someone simply because he is in need.

Weinrib’s justification for the distinction, while elegant, is question-begging at a justificatory level. This isn’t necessarily a problem for Weinrib as his project is avowedly formalist in nature and so explicitly brackets substantive questions about the desirability of legal arrangements that instantiate the principles of corrective justice as he conceives them. But if we are interested not in the coherence of a system of private law as such, but in the normative justifiability of such a scheme, we must confront such substantive questions directly. In this context, we must ask why we should be moved by principles that define agents’ rights in this purpose-insensitive way? The coherence of such principles alone doesn’t answer such questions unless we think that coherence is the first desiderata of any legal system (perhaps for rule of law

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14 Ernest J. Weinrib, Corrective Justice, supra note 2, at 11 (“The presupposition is that, as participants in a regime of liability, the parties are viewed as purposive beings who are not under duties to act for any purposes in particular, no matter how meritorious.”); id. at 21 (“[T]he indispensable presupposition of the defendant’s having breached a duty is the sheer purposiveness of the defendant’s action, rather than a conception of some set of particular purposes that should have guided the defendant’s conduct.”).

15 Weinrib, Corrective Justice, supra note 2, at 11 (“In not requiring action for any particular purpose, personality reflects the structure of the law of obligations as a system of negative duties of non-interference with the rights of others.”).

16 That is, Weinrib doesn’t aim to provide an all-things-considered justification of private law; his aim is to characterize the practical rationality that is immanent within a scheme of corrective justice. See, e.g. Weinrib, The Idea of Private Law, supra note 2, at 25; id. at 45-46 (“What is paramount to the formalist is not the substantive desirability of any legal arrangement, but the coherence of the justificatory considerations that support its component features.”).
type reasons), and these are the only possible coherent principles, or at least the only such principles that are latent in the practice of private law.

Beyond coherence, then, what can be said about Weinrib’s justification? The general idea of respecting all agents’ equal freedom is an obviously appealing one. But Weinrib’s justification for abstracting for agents’ purposes is so minimalist that it isn’t clear why it is an appealing way of implementing the general idea. If people ought to be thought of as moral equals by virtue of their free agency, why doesn’t respecting this moral equality entail a thicker conception of what it is to treat people as equals? Why are principles that respect this agency in the thinnest possible way enough? The mere fact that free beings are able to choose without being controlled by their particular purposes doesn’t mean that principles that govern the interactions among such agents must abstract from the purposes they have chosen. On the contrary, given that a free agent’s needs and purposes are manifestations of his agency, one might think that respect for agency entails respect for those particular needs and purposes. At minimum, there doesn’t seem to be anything incoherent about such an idea.

Ripstein offers a more substantive rationale for principles of right that abstract from agents’ needs and purposes in the form of his principle of independence. We abstract from

17 Weinrib, Corrective Justice, supra note 2, at 13 (“The juridical conception of corrective justice thus honors the law’s reasoning as a good faith attempt—sometimes successful and sometimes not—to make the exercise of official power the product of an internally coherent ensemble of justificatory considerations.”).

18 Weinrib Corrective Justice, supra note 2, at 27 (“Personality matters to the theory of private law not because personality is the source from which the theory is derived, but because personality is latent in the normative practice that the theory aims to comprehend.”).

19 Explaining the contrast between his and Weinrib’s approaches, Ripstein writes: “Rather than working backward from a tort action, my account moves in the opposite direction, starting from the moral idea that no person is in charge of another.” Ripstein, supra note 1, at 6.
agent’s purposes because if one agent’s duties depended on another’s purposes, that agent could be placed at the mercy of another’s purposes. In other words, this minimalist approach to respecting agents’ equal freedom instantiates a principle of non-domination.

But can a principle of non-domination provide a satisfactory justification of the minimalist approach within the Kantian framework? I don’t believe that it can for several reasons both substantive and structural. Substantively, and perhaps most importantly, it isn’t clear why a privately enforceable duty of easy rescue runs counter to the normatively plausible idea that no person must find himself at the mercy of particular others. A duty of easy rescue, by definition, imposes minimal costs on the duty-bearer, while protecting the right-holder from a grave threat. And the proposed duty would be a universal one. The flipside of my duty to rescue someone in circumstances C is that that person is under a duty to do likewise for me when I’m in need of rescuing in similar circumstances. Indeed, it is plausible to suppose that persons situated behind the veil of ignorance would chose to make everyone subject to such a duty.20

I also see three structural reasons to reject the Kantian’s justification of the minimalist approach to rights, which I believe point to deeper problems with the Kantian account. First, it is difficult to find a version of the principle of non-domination that reconciles the Kantian’s disavowal of private law duties of aid with her avowal of their public law counterparts. Second, the most plausible way to do so rests on a conception of private law duties as being enforceable at the behest of the right-holder that, contrary to contentions of leading Kantians, doesn’t seem to be a necessary feature of a Kantian conception of the state’s role in the creation of private rights. Finally, the resulting framework rests on a characterization of duties of distributive justice as

20 See John Rawls, Theory of Justice: Revised Edition 98 (1999) (arguing that there is a natural duty of rescue); id. at 297-98 (explaining that a duty of mutual aid would be chosen by parties in the original position).
distinctively public in nature and therefore outside of the domain of private law. In the remainder of this section, I evaluate the first of these two structural reasons. In the next section, I argue that duties of distributive justice are properly thought of as private in nature, such that there is a continuity between corrective justice and distributive justice, contrary to the Kantian’s contention that the two domains of justice are independent of one another.

B. Public Law Duties of Easy Rescue

While Kantians contend that the principle of independence entails that private rights must not depend on agents’ purposes, they view public law duties of easy rescue as compatible with the principle of independence. Ripstein doesn’t think that it is problematic, for example, for the criminal law to penalize those who fail to come to the aid of others in emergency situations. Yet if there is such a public law duty to rescue, the contours of a person’s rights will depend on the needs and purposes of another, even in the absence of a private law duty to rescue, because he will be duty-bound to rescue others in circumstances resembling C. That duty is owed to the public at large as opposed to the person in need of aid. But such a duty nonetheless limits the person’s rights in a way that depends on the purposes of the other.

So merely making the contours of a person’s rights depend on another’s purposes can’t be inconsistent with the principle of independence on the Kantian conception. It must also matter to whom the duty is owed—the public or a particular other. As the Kantian sees things, the contours of our duties may not depend on the purposes of another, but only when those duties are owed to particular others—those whose purposes shape the contours of our rights. But why should it matter so much to whom the duties are owed?

21 See Arthur Ripstein, Three Duties to Rescue: Moral, Civil, and Criminal, 19 Law and Philosophy 751, 751-52 (2000) (arguing that “where just institutions are in place, particular individuals owe no duties of aid to others” but that “the criminal law may well respond to failures to aid which civil law regards as cases of nonfeasance lacking in legal consequences”).

Perhaps what matters is who has the power to waive the right? If there is a public law
duty of easy rescue, then the person who has the right to be rescued by me in circumstances C
presumably can’t unilaterally waive her right, because the duty is owed to the public at large, and
not him in particular. By contrast, if my duty is a private law duty, then the right-holder alone
has the power to consent to not being rescued: “Consent can render rightful what would
otherwise be wrongful, as between private parties.”22 And so there is a sense at which I am at the
mercy of him in particular: she can unilaterally decide whether or not to release me from my
duty to rescue her. This concern is diminished when the decision is not a private one because the
right can’t be waived by the right-holder.

There might seem to be something intuitively odd about a duty to rescue that can’t be
waived by the direct beneficiary of the duty. But Ripstein views a public law duty of rescue as
analogous to the public law duty to pay one’s taxes. The state must provide “the background
conditions for a social world of which everyone is a full member,” which means that the state
must see “to it that everyone has enough to avoid falling into extreme dependence on others.”23
A system of redistributive taxation will be part of this as will state-provided emergency services,
and a duty of easy rescue might be regarded as an adjunct of those emergency services.24
Understood in these terms, it isn’t so strange that a duty of easy rescue wouldn’t be waivable by
the person in need of rescuing. If no rescue attempt is made by the person best positioned to

22 Ripstein, supra note 8, at 16.
23 Ripstein, supra note 1, at 289.
24 Ripstein, supra note 21, at 776-79 (arguing that “the forced labour involved in making an easy rescue is
on a par with taxation”).
make it, a likely result is that the person in need ends up in the hands of the emergency services, increasing the costs that are imposed on all of us.

Yet the fact that a public law duty can be waived by the public, but not by the right-holder doesn’t alter the fact that in the absence of such a public waiver, the right-holder’s purposes control the duty bearer. And so it is unclear why it should matter so much for the Kantian with whom the power of waiver lies.25

A more plausible candidate for the distinction between public and private rights that coheres with the Kantian’s conception of centralized enforcement as constitutive of a system of rights is the assignment of the power to enforce the rights. If a right to rescue isn’t enforced, the duty bearer is in an important sense free not to do her duty—and so free from the tyranny of another’s needs or purposes. Enforcement of public law duties is initiated by the state, while enforcement of private rights is initiated and maintained by a private party—the right-holder—acting on his own behalf, albeit with the assistance of the state. (I will argue shortly that the Kantian account doesn’t satisfactorily explain why private rights must have this structure. But let’s bracket this problem for now.)

If assignment of the enforcement power to private right-holders is the fundamental distinguishing feature of private rights, then the problem with a private law duty of easy rescue is that the putative right-holder has the power to initiate and maintain enforcement proceedings against the putative duty-bearer on the grounds that the latter owes it to him to use his means to serve his purposes. A public law duty of easy rescue doesn’t have this feature because the state

25 Indeed, it seems unlikely that consent is the fundamental distinction for Ripstein given that relationships of status—relationships, like a parent-child relationship in which one person is unable to consent to the modification of the terms of that relationship—implicate private rights within the Kantian framework. On his Kantian view, the fact that the relationship is nonconsenting means that the other party to the relationship is not allowed to use the nonconsenting party and her means in pursuit of his own ends. Ripstein, supra note 8, at 18.
initiates the enforcement action in pursuit of public purposes, thus posing no conflict with the principle of independence. So even if the state decides to force me to rescue you, it is the state deciding in furtherance of public purposes that I must use my means for your purposes not you.

It is unclear to me why this distinction should be given so much significance. Suppose that Tom must rescue Mary on a particular occasion pursuant to Tom’s public law duty of rescue. This deprives Tom of the use of some of his means. Let’s suppose that during the course of the rescue, Tom gives up an opportunity to earn $50 and ruins the $50 clothes he is wearing. Enforcement of the public law duty thus changes the distribution of means: Tom ends up $100 poorer that he would have been had he not rescued Mary, and Mary substantially better off—the equivalent of $10,000 better off—let’s suppose. Suppose that Mary then subsequently enforces her private rights against Tom. Let’s suppose that Tom takes $10,000 from Mary without her consent and then Mary successfully sues Tom for conversion as she would presumably be entitled to do within the Kantian scheme. There remains a significant sense in which Mary is thereby able to constrain the use of Tom’s means by her purposes. Mary is much better off than she would have been because Tom was required to rescue her and she is entitled to use the private law system to protect the situation she finds herself in as a result. This does not seem to me to be relevantly different from a system in which Mary is able to enforce the duty of rescue directly by threatening Tom with a lawsuit for $10,000 in the event Tom fails to rescue her. In both schemes, Mary has the equivalent of $10,000 in part because Tom was required to rescue her, and Tom’s means were depleted because Tom was required to serve Mary’s purposes. And when Mary protects her entitlements after Tom acts pursuant to the public law duty of rescue, she protects polices boundaries that reflect her purposes. Of course, the sense in which she does so is indirect rather than direct, because it was mediated by the public scheme that imposed upon Tom
a duty to rescue you and thereby serve Mary’s purposes. But why should that make so much difference? On the Kantian view, rights are at most provisional in the absence of a set of public legislative, adjudicative, and enforcement mechanisms, so all our rights—both public and private—are dependent on the existence of a public scheme.

C. The Correlative Structure of Private Law Litigation

As we’ve just seen, the enforcement of private rights is initiated and maintained by the right-holder acting on her own behalf, albeit with the assistance of the state, while enforcement of public law duties is the domain of public actors. I suggested in the previous subsection that this distinction offers the most plausible way to render the Kantian’s embrace of public law duties of rescue consistent with her disavowal of private law counterparts, though I argued that the resulting account of the absence of a private law duty of rescue is unsatisfactory. Here I will suggest that there is a deeper problem with the Kantian account, which holds even if the latter argument fails. The problem is that the Kantian doesn’t have a satisfactory account of the correlative structure of private law litigation—of why enforcement of private rights must be initiated and maintained by the right-holder as opposed to by a representative of the state.

At first glance, the correlative structure of private law litigation seems to be well-explained by a Kantian conception of corrective justice. If the injustice that grounds a defendant’s liability to a plaintiff is the defendant’s infringement of the plaintiff’s rights, and those rights instantiate a principle of equal freedom, then it appears to follow that the plaintiff, as the right-holder, alone among private parties, ought to have the power to initiate enforcement of

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26 This is a distinction that the Kantians seem to care about. See, e.g. Weinrib, The Idea of Private Law, supra note 2, at 71 (“An adjust advantage in a distributive context … affects any one of those other participants only derivatively: they receive less individually because there is less for all to share. Under corrective justice, by contrast, the wrongdoer directly diminishes the holdings of the sufferer, so that a single operation enriches the former at the expense of the latter.”).
her rights. If the plaintiff’s rights ground her equal freedom, then presumably it is the plaintiff who should have the freedom to decide whether the defendant should be forced to correct an infringement of her rights.

At second glance, however, it isn’t clear why the plaintiff’s exercise of a power to obtain a remedy is required. Justice is done by preventing a violation of a right or correcting a violation once it has occurred. Indeed, a compelling component of rights-based accounts of private law is the idea that rights survive their own violation and that therefore the defendant’s (secondary) duty of repair that arises when he violates a plaintiff’s right is a direct corollary of the (primary) right.27 But if a defendant is under a duty to repair a wrong that is continuous in this sense with the duty of justice owed to the plaintiff that the defendant has breached, then why isn’t the state bound to enforce that duty as part of the state’s responsibility to uphold justice, even in the absence of the initiation of a lawsuit by the plaintiff?28 Forcing the defendant to repair the wrong ensures justice is done, thus securing the equal freedom of all.

Does the Kantian corrective justice theorist have the resources to explain why the plaintiff’s affirmative assent should be a prerequisite of enforceability despite the fact that justice seems to be achievable in the absence of such assent? As we have seen, Kantian corrective justice theory is premised on an understanding of private rights as constituted at least in part by the actions of the centralized coercive allocative and enforcement mechanisms of the state. The

27 Ripstein, supra note 1, at 8.

28 This is an objection that civil recourse theorists have pressed against corrective justice theorists to justify their claim that tort law, at its essence, (merely) provides plaintiff with an avenue of civil recourse against the defendant, rather than seeks to do justice. See, e.g. Benjamin C. Zipursky, “Civil Recourse, not Corrective Justice,” 91 Georgia Law Review 695, 741 (2003) (“A right of action is a privilege and a power, and the state is not committed to the normative desirability of its exercise, only to the right to have it.”).
conception entails that the state must authorize the enforcement process in some sense, but it isn’t clear why the state must condition its efforts on the assent of the right-holder.

Ripstein distinguishes between “the principles governing the rights that individual human beings have as against each other with respect to the security of their bodies, and the independence of those bodies from other people’s actions” and “a regulative principle governing the way in which a public authority can authorize the enforcement of those first-order rights.”

For enforcement to be “proportional” and so justified, it must “be done from a properly public standpoint,” meaning that “the person who enforces a right must at least purport to be doing so on behalf of everyone.” This, in turn, requires that any use of force in the name of enforcing rights be consistent with a legal official’s duties to both prevent rights violations and to protect everyone. But exactly what this entails in specific cases is indeterminate, and so public resolution of the indeterminacy is required to prevent any particular person’s unilateral will prevailing. And so it is crucial that the use of force be authorized by law. The use of force is “proportional” whenever it is authorized by law that has been appropriately guided by these principles.

29 Ripstein discusses this in an arguably different context—the context of preventing a wrong that hasn’t yet occurred—but it is unclear why his arguments here don’t generalize to enforcement by the state in the private law context where the state usually acts only after a wrong has occurred. Arthur Ripstein, Reclaiming Proportionality (Society for Applied Philosophy Annual Lecture 2016), 34 Journal of Applied Philosophy 1, 2 (2017).

30 Id. at 9.

31 Id. at 13.

32 Authorization by law is essential because the principles that govern the proper use of force in the name of enforcing rights are abstract concepts that don’t dictate their own application in all cases, such that enforcement may be arbitrary unless made from a suitably public standpoint. Id. at 9.

33 In making central the requirement that the use of force be “authorized by law,” the resulting view of proportionality is fundamentally different from the standard view that pervades the philosophical literature on self-defense. Proportionality, on the standard view, is a constraint on the individual moral
Does such a view entail that enforcement of private rights must be conditioned on assent of the right-holder as a matter of principle as the Kantians contend? Whether private enforcement must be so conditioned looks like a question that the public authority might resolve one way or the other pursuant to the aforementioned regulatory principle. Ripstein, however, contends not only that the right-holder must be the one who decides whether to exercise her rights, but also that the power to enforce the right is part and parcel of the right such that she must also decide whether the right gets enforced.\textsuperscript{34} Thus, presumably, Ripstein thinks that this is a question to which there is a determinate answer—an answer found in the nature of private rights—that any regulatory principle must respect.

But the latter claim seems stipulative. There is an injustice standing in need of correction prior to the initiation of action by the plaintiff against the defendant. The plaintiff’s failure to acquiesce to correction, and even her affirmative objection to it once started, isn’t the same thing as consent to the defendant’s apparently wrongful action by the plaintiff that would eliminate the putative injustice. A plaintiff may coherently maintain that the defendant has unjustly infringed her rights and is duty bound to repair the injustice, yet not want her right to be coercively enforced against the defendant. The fact that a right-holder has the power of consent that enables her to decide whether or not to exercise her rights doesn’t by itself entail that she has the power to enforce the right.

So why must the plaintiff determine enforcement? To deny her the power to enforce her rights is not to subject her to the will of a particular other so long as the collective enforces her

\begin{itemize}
\item permission to use force in self-defense that limits what a victim of a prospective rights violation is permitted to do against her attacker. On Ripstein’s view, by contrast, any use of force that isn’t authorized by law is disproportionate.
\end{itemize}

\textsuperscript{34} Ripstein, supra note 1, at 271-272.
right in her place. Thus, nothing about the principle of independence—the principle that makes no private person the superior or inferior of any other—seems to prescribe that the law should give her this power. The Kantian claim here seems to rest on a stipulation about the nature of rights that is external to the principle of independence.

Granted, this stipulation is consistent with the rest of the Kantian’s theoretical apparatus. But it calls out for further explanation. The theory gives the state a central role in constituting individual rights, emphasizing pervasive indeterminacy that only a centralized authority, acting on behalf of all, may resolve. At the same time, it assumes that there is a stringent individual constraint on the exercise of the state’s enforcement powers arising from the nature of rights—initiation of a lawsuit by the plaintiff against the defendant—a constraint that doesn’t arise from the state’s exercise of judgment, even though it isn’t obvious that the abstract idea of equal freedom that private rights must instantiate requires questions of enforcement of private rights to be authorized by the right-holder.

Now someone might respond that if private rights don’t carry with them the power to enforce them, then no mechanism for protecting rights can exist in the state of nature in which there is no central apparatus to enforce them in a way that is compatible with the interests of all. But, of course, the Kantian can’t avail herself of a picture of rights in the state of nature in defining the contours of rights in civil society given the central role that she gives the state in constituting rights by coercively enFORcing them. There is a discontinuity, on the Kantian view, between purely private acts of self-defense and state-authorized enforcement, such that a conception of proto-rights in the state of nature cannot underpin the conception of their fully-fledged state-constituted counterparts.
III. Corrective Justice versus Distributive Justice.

We’ve seen that the Kantian corrective justice theorist doesn’t rule out the possibility that a persons’ rights will reflect the purposes of others. But she insists that they can do so only as a matter of public right—decisions over the enforcement of which are committed to the sole discretion of the state, as opposed to being delegated to the right-holder as is the case in matters of private right. Claims based on a person’s needs, like those arising from duties of nonfeasance, are claims of distributive justice, which are matters of public right appropriately addressed to the community at large rather than particular others. The beneficiary of distributive injustice, on the Kantian conception, isn’t wronging any victim of that injustice in a relational sense. Thus, such claims are distinct from claims of private right, which are appropriately addressed to particular private persons and so, unlike such claims of public right, constrained by the principle of independence.

35 The sense is necessarily systemic for the Kantian and gives rise only to a collective duty. In Weinrib’s words: “the prospect of impoverishment is created by the systemic legitimacy of acquisition, rather than by the appropriative acts of any particular acquirer. The systemic difficulty that property poses for innate right is resolved by the collective duty imposed on the people to provide subsistence as needed.” Weinrib, Corrective Justice, supra note 2, at 285. Thus, although Weinrib regards the state’s support of the poor as a “constitutional essential,” id. at 287, because “taxation and property are jointly necessary for a civil condition legitimized by the idea of the original contract,” id. at 296, the failure of the state to realize this constitutional essential is a collective one that can’t be reduced to individual breaches of duty to the poor. Likewise, for Ripstein public law requirements like taxation and other affirmative duties that are necessary to secure the background justice that ensures “everyone has enough to avoid falling into extreme dependence on others,” Ripstein, supra note 1, at 289, “do not give rise to any private right, because … [they are] part of a public system of cooperation,” id. at 292.

36 On Weinrib’s view, corrective justice and distributive justice “connote categorically different structures of justification. Neither of them can integrate the other within it.” Weinrib, Corrective Justice, supra note 2, at 269. See also id. at 19 (“For purposes of justifying a determination of liability, corrective justice is independent of distributive justice.”). Thus, “considerations of poverty have no effect on the definition and application of property rights.” Id. at 296. On Ripstein’s view, the moral idea that no-one is in charge of any other entails that “I cannot take or use your property without authorization” or “act in ways that are inconsistent with your being in charge,” but “is silent on the further question of what citizens, acting as a collective body through their governments, should do about the distribution of property.” Ripstein, supra note 1, at 44.
Does this distinction between corrective and distributive justice hold up? It’s not obvious that it does. Suppose that Bob has more than he is entitled to as a matter of distributive justice. Does it really make sense to say that he personally isn’t wronging particular others who have less, such that they don’t have claims against him in particular, but only claims against the community at large? Suppose that Jane is one of those others who have less. What might Bob say to Jane to explain why he isn’t wronging her in particular by having more and she less in the way he would be wronging her were he to take from her some her justly held resources?

The Kantian idea seems to be that the situation is the result solely of a collective failure and is therefore a failure that only the collective has a duty to rectify. But while it is hard to deny that a centralized institution will have an important role to play in realizing a just distribution of resources as a practical matter, it isn’t obvious that this necessarily absolves the beneficiaries of injustice from claims by its victims.

Consider first situations in which it is apparent to all that Bob has more than justice entitles him to and Jane less. Can the Kantian really deny that Bob is wronging Jane in a relational sense in failing to give Jane some of his unjustly held resources? If the reason for the distributive injustice depends in part on Jane’s needs, then the Kantian will appeal to the principle of independence to deny this in the same way that he does so to deny that there can be private liability for nonfeasance, in which case the tenability of the distinction between corrective and distributive justice rises is subject to the same set of objections I developed above.

Even if those objections fail, the principle of independence is only a partial response, because some distributive injustices aren’t a function of anyone’s needs or purposes. So what else might we say in defense of the Kantian position? Perhaps there is uncertainty about the

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37 It is plausible to suppose, for example, that distributive justice gives each person a presumptive claim to an equal share of the world’s resources regardless of anyone’s preferences.
correct principle of rectification. Even though we know Bob has more than justice entitles him to and Jane less, it might not be obvious that Bob should hand over his excess resources to Jane as opposed to others who also have less than justice entitles them to. Thus, even when there is certainty about the injustice of the distribution, there remains uncertainty about the procedure that is required (who must give what to whom) by which the injustice is to be eliminated. And so, the thought might run, Bob can’t be wronging Jane in particular until that uncertainty is resolved—uncertainty that the state is presumably in a better position to resolve than private parties.

While this response sounds plausible enough, notice, first of all, that whether such uncertainty exists is a contingent matter. Suppose Bob is the only person with more than distributive justice entitles him to and Jane the only person with less. Then the only way the injustice can be rectified is for Bob to give his excess resources to Jane.

The problem with the Kantian’s response, however, is not restricted to such cases. It doesn’t follow from the fact we don’t know who must give what to whom to rectify the injustice that those with too much are not wronging particular others. It entails only that the former cannot identify in advance those who they are wronging. Bob knows he has more than he is entitled to and that some others have less. In such circumstances of uncertainty, we need not deny that Bob could be wronging Jane in a relational sense. Rather we should say that Bob may well be wronging Jane in a relational sense, but we will need more information to determine that it is Jane he is wronging as opposed to other victims of the distributive injustice. Were Carl in receipt of goods that he knew were stolen, and the goods were, unbeknownst to Carl, stolen from Mary, we would say that Carl was wronging Mary in a relational sense despite his ignorance of the identity of the owner. The situation between Bob and Jane seems analogous to this one.
Perhaps a stronger defense can be mounted on behalf of the Kantian position when there is epistemic uncertainty about whether Bob has more than he is entitled to as a matter of justice and Jane less because there is uncertainty about the correct principles of justice or facts relevant to implementing those principles. In such situations, it isn’t that Bob simply doesn’t know the identity of those to whom he ought to give his excess resources; he isn’t even sure that he has more than justice entitles him to in the first place.

But while the fact that Bob doesn’t know that he has more than he ought to have may absolve him of culpability for having too much, it doesn’t entail that he doesn’t in fact owe some of his resources to particular others such as Jane, such that those others have a claim against him for those resources. His situation is analogous to that of a recipient of stolen goods who doesn’t know that the goods are stolen. That the merits of any claim by Jane or the owner of the stolen goods may be uncertain doesn’t destroy the existence of such a claim, though it may give us pragmatic reasons not to allow such claims to proceed in practice.

The above discussion has emphasized epistemic uncertainty—uncertainty that could be resolved through more reflection or more information. But what about metaphysical uncertainty about the principles of justice? It may be that there are multiple principles that realize a just (or sufficiently just) distribution of resources, such that the realization of justice requires us to choose among them. Moreover, we might think it important that the operative principle be selected, and the resulting distribution implemented, by an entity that acts on behalf of everyone through a legitimate political process—that is, by an appropriately constituted state. If this is the case, then the choice by the state of a particular distribution from the set would make that distribution the just one, even though other distributions would have acquired that status had they been chosen instead. But before the selection is made there would be inherent indeterminacy
about the nature of the just distribution even if everyone had perfect information. It is clear that the state is required to realize full distributive justice in such circumstances. This means that prior to the state’s selection of a principle of justice from the eligible set, Bob wouldn’t be wronging Jane in a relational sense if he had more than justice entitles him to and Jane less according to one of the eligible principles, so long as at least one other eligible principles of justice would deem the distribution a just one.

But notice that it doesn’t follow from this that Bob isn’t wronging Jane when he holds more than justice could entitle him to and Jane less under any of distributions among which the state may permissibly choose. Unless the metaphysical indeterminacy is complete—that is, it is impossible to say that there is a distributive injustice prior to the state’s selection of a particular distribution—such uncertainty cannot serve as the basis of a claim that there can never be a situation in which Bob wrongs Jane in a relational sense by virtue of having more than distributive justice entitles him to and Jane less.

Moreover, once the state has selected a principle from the eligible set, that becomes the operative principle of justice and so why shouldn’t we say that from then onwards Bob wrongs Jane in a relational sense should he have more than he is entitled to and Jane less according to the selected principle. The metaphysical uncertainty about justice is resolved by the state’s selection of such a principle. If after selecting such a principle, the state fails to perfectly implement it, why doesn’t it make sense to say beneficiaries of the injustice wrong the victims in a relational sense (assuming analogous uncertainty about the appropriate remedial principles have also been resolved).

The Kantian, of course, will view the coercive implementation of the chosen scheme as constitutive of justice—the mere selection of the principle is insufficient to ground rights for the
Kantian. But why not say that there are relational injustices that require rectification to the extent that the state has failed to implement the chosen scheme? When it comes to wrongs of private law, the Kantian is happy to say that there is a relational injustice, even though the enforcement scheme has failed to prevent the injustice from occurring. So why not say the same about distributive failures? If we can’t appeal to the principle of independence, it isn’t obvious what the basis for the distinction is here.

Notice that nothing about this argument necessarily absolves the collective—the state—from responsibility for distributive injustice that arises because it fails to discharge its duty to select a principle from the eligible set and/or implements an unjust distributive scheme. Under these circumstances, it may also make sense to speak of a collective wrong against those who receive less than they are entitled to. At the same time, it doesn’t follow from the fact that there is a collective failure that those who end up with more than they are entitled to are therefore not also wronging those who end up with less. They may not be culpable for this wrongdoing, for it may not be obvious to them that they have more than they are entitled to or how the distributive injustice ought to be best rectified, and as a practical matter, a centralized and coercive machinery is likely necessary to realize full distributive justice. But it doesn’t follow that they aren’t wronging the have-nots in a relational sense just because the situation is a result of a collective failure. Were the details of the collective failure and appropriate remedial measures fully apparent to the have-haves, they would be able to see that their excess resources belong to the have-nots. The fact that it is not so apparent may absolve them of culpability for their wrongdoing but it doesn’t erase the underlying wrong.
IV. A More Lockean Alternative

I favor a different way of conceptualizing the relationship between the state and private rights. On this view, the state has an important role to play in protecting rights and may play a constitutive role in defining the contours of some of persons’ entitlements. But the state’s role is limited in two important respects. First, some rights exist in the absence of any state apparatus, shaping what private persons may do to one another, and at least absent alternative mechanisms of enforcement, licensing actions by rights holders against those who infringe their rights. Second, even when the state plays a constitutive role in defining rights, the resulting rights have an existence independent of state enforcement mechanisms.

Can there be rights in the state of nature? It’s plausible to suppose that we have pre-institutional rights over our person. And given that there are significant constraints on what could count as a just allocation of resources, there will be an upper bound on the resources each person is entitled to. There may well be a multitude of mutually exclusive ways that justice could be realized, such that realizing full justice would require a mechanism for selecting among them. At the same time, many allocations of resources will be ruled out by all possible principles of justice, such that even in the absence of any such mechanism we can conclude that each person is entitled to at least some modest amount of the world’s resources compatible with others having a claim to at least a similar amount.

Of course, the absence of a state enforcement mechanism may mean that the pre-institutional rights of many get infringed with impunity. The powerful may accumulate resources at the expense of the powerless. There may be pervasive ignorance about what justice minimally entitles people to, legitimizing an unjust distribution of resources, secured perhaps by a

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38 On this point, even Ripstein agrees up to a point, as he endorses Kant’s view that we have an “innate right of humanity” in our own person. Ripstein, supra note 8, at 13 n.18.
decentralized system of norms supporting a rough system of property rights. But rights can continue to define normative relations among persons even when they are being disregarded. Thus, while the notion that rights must generally be respected for rights to do the work they are supposed to do in realizing relations of equal freedom in practice, I don’t think we should conclude with the Kantians that a publicly justified central enforcement system that establishes such general respect is constitutive of those rights. Rather, normative conclusions about the rights people have in the state of nature may help to justify the creation of a centralized coercive apparatus that will protect those rights, while also placing moral constraints on state action.

Specifying the details of a coercive scheme that can be justified in this way may not be a straightforward task, as the discussion at the end of Section II.C suggested. The bare idea that rights must be respected doesn’t tell us anything about who ought to have the power to enforce rights, for example. Nor does it tell us what may be done in the name of enforcing a person’s rights, particularly if those efforts come at the expense of the rights of others, or choices must be made among actual and potential victims of rights infringements. But, assuming that such details can be worked out, coercive action on the part of the state to protect rights will, on this picture, be justified so long as it heeds moral constraints on the use of coercive force that arise from the system of rights in circumstances in which people are suffering actual or threatened infringements of their rights.

What then should we make of the plausible idea that the state plays a constitutive role in the creation of some rights? The Kantian view derives much of its plausibility from the likelihood that multiple possible allocations of entitlements could realize justice and resulting metaphysical indeterminacy about the content of rights prior to the selection of a particular allocation from the just set. This metaphysical indeterminacy creates the need for a publicly
justified selection mechanism to determine the content of private rights. Indeed, the picture is more complex than this, for on top of brute metaphysical indeterminacy there is likely epistemic indeterminacy arising from reasonable disagreement about justice. Both types of indeterminacy make it important that allocative principles be selected in a suitably public fashion, such that the selection procedure itself is essential to the realization of justice. Indeed, substance and procedure may be on a par to some extent here: it may be preferable that the operative allocative principle be one that many erroneously but reasonably believe implements substantive justice than one that substantively realizes justice, if the former is the principle that actually gets selected by the publicly justified selection mechanism. Thus, when it comes to allocation decisions that are subject to normative indeterminacy, it is difficult to deny that the state—insofar as the state is constituted by publicly justified decision procedures—are constitutive of those rights.

Can the alternative picture accommodate this insight without ceding too much to the Kantian? I believe that it can, because the state’s role as creator of rights can be separated from its role in enforcing rights. That is, where the state plays a constitutive role in the creation of rights, the resulting rights then exist in a robust sense—shaping the normative relations among private parties—even in the absence of a state machinery to enforce them. What may be done to enforce those rights once an allocation has been determined is, in other words, a separate question.

The Kantian will likely object that rights can’t exist without a state enforcing them because metaphysical and epistemic indeterminacy that requires resolution from suitably public standpoint extends to principles of enforcement. But, unless such indeterminacy is all encompassing, it need not entail that rights may not be coercively enforced absent the state.
Rather, it entails that rights can only be coercively enforced in a way that is compatible with all permissible resolutions of that indeterminacy.

Thus, so long as there is some determinacy about the applicable principles, enforcement absent the state may be justifiable. And it is plausible to think there are determinant moral constraints on the enforcement of rights. There is widespread agreement among moral philosophers that the use of defensive force is subject to necessity and proportionality constraints. The proportionality constraint places an upper limit on what an enforcer may do to an attacker, while the necessity constraint obligates enforcers to take measures to minimize harm to the aggressor so long as doing so imposes minimal costs on innocent others.\textsuperscript{39} Philosophers disagree about the normative foundations of those constraints and precisely how they should be formulated. And there will be reasonable disagreement at the level of particulars about how those constraints play out in particular factual situations. But it is likely that there will also be considerable agreement about whether certain actions are morally permissible in a range of easy cases involving the use of defensive force.

Indeed, Ripstein’s take on “proportionality” appears to be so far from the dominant approach that he seems to have in mind a rather different concept. Enforcement is proportional for Ripstein if “done from a properly public standpoint,” meaning that “the person who enforces a right must at least purport to be doing so on behalf of everyone.”\textsuperscript{40} Of course, it isn’t surprising that he takes this tack, for on his Kantian view, there is no morally justified enforcement of rights except that authorized by an appropriately constituted state. But notice that the plausibility of

\textsuperscript{39} See Jeff McMahan, Proportionality and Necessity in Jus in Bello, in The Oxford Handbook of Ethics of War (Seth Lazar & Helen Frowe eds. 2016), 2.

\textsuperscript{40} Supra note 29 at 9.
Ripstein’s reconceptualization depends on the existence of indeterminacy about what counts as proper enforcement of rights. If there are independent moral constraints on what may be done in the name of enforcing rights, then those moral constraints ought to constrain what the state may do in the name of enforcing rights, such that the significance of the “properly public standpoint” should be confined to the application of particulars to facts and resolution of reasonable disagreement about the precise content of those moral constraints.

Thus, on the alternative picture I favor there is a disconnect between questions about the allocation of rights and questions about the enforcement of rights. Persons have rights as a matter of justice. While some rights exist absent the operation of a procedurally fair allocation mechanism, the operation of such a mechanism is constitutive of many rights. But, even those rights that depend on the operation of such a mechanism govern relations among persons in the absence of the operation of a centralized enforcement mechanism. And those rights are enforceable by private action so long as, where there is indeterminacy about operative principles of enforcement, such action would be authorized no matter how that indeterminacy is resolved.

I believe that this alternative picture has intuitive appeal that the Kantian picture lacks. On the alternative view, but not the Kantian view, people owe duties of justice to particular others, and, on the flipside, can wrong one another in a robust relational sense in the absence of a state. Further, their moral permission to enforce their rights has definition in the state of nature. Not only is it permissible for them to enforce their rights in the state of nature, but this moral permission is connected to their rights and is accordingly appropriately constrained. This is consistent with contemporary accounts of the permission to defend oneself in situations like war—situations where there is no governing state—as constrained by proportionality and
necessity constraints. On such accounts, acts of self-defense against aggressors that violate these constraints wrong those aggressors in a robust relational sense. So long as there is enough determinacy about the content of those constraints, enforcement of rights can be justified at least to some extent in the absence of fair procedures to resolve any remaining determinacy.

V. An Alternative Rights-Based Conception of Private Law

While the contention that justice is difficult to achieve in the absence of a state is very plausible, I have suggested that the Kantian view overstates the extent to which rights are unrealized and unenforceable in the state of nature and privately unenforceable when constituted by state action. If this is correct, we need not conclude that there is a sharp discontinuity between the state of nature and civil society as far as the enforcement of rights is concerned. Instead, we can avail ourselves of the alternative conception sketched in the previous section, which starts with a view of what rights look like in the absence of the state and ask how the introduction of state institutions are justified or required in the light of such a picture. On this alternative conception, duties owed by persons to other persons are the fundamental building blocks of political morality, and justifications for state institutions, including the institutions of private law, must respect them. The state may play a necessary role in constituting some rights. But any constitutive role it plays will depend on its resolution of indeterminacy about the content of rights, which does not go all the way down.

More importantly, the state’s role in enforcing rights is, on the alternative conception, separable from its role in defining rights. This is because, at least in the absence of any action on the part of the state, right-holders (and/or, perhaps, others acting on her behalf) are permitted to

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41 Supra note 39 and accompanying text.

42 See subsection V.A below for defense of the claim that it is the rightholder’s prerogative to determine whether her rights get enforced.
enforce their rights subject to moral constraints, such as the proportionality and necessity constraints, and the state’s actions in enforcing rights must be compatible with that moral permission, though where there is indeterminacy about the content of those moral constraints, it will play a necessary constitutive role in expanding the permission.

The separation of allocative and enforcement functions inherent in the alternative conception means that private legal institutions may, at least in part, be best viewed as vehicles for assisting right-holders (and/or others) to exercise the moral permission to enforce their rights, as opposed to vehicles for vindicating those rights directly as corrective justice theorists would have it. The fundamentals of this alternative view are the moral considerations that shape the moral permission to enforce rights—rather than the rights themselves. The rights themselves play an indirect role in the justificatory scheme—via their effect on the moral permission. But it is the moral permission to enforce that ultimately grounds the coercive—as distinct from the allocative—component of private law.

Although on the alternative conception, the moral permission to enforce rights is fundamental, the state may, by changing the circumstances of enforcement, alter how the permission plays out in practice. Most fundamentally, by providing private parties with a peaceful and impartial arena within which to resolve their disputes about their rights, those parties then become duty-bound to utilize such an arena to enforce their rights in most circumstances instead of taking matters entirely into their own hands. The alteration comes about not because the existence of a peaceful and impartial arena for dispute resolution is constitutive of those rights, as the Kantians would have it. Rather, it is because morally persons ought to defend themselves in ways that don’t impose unnecessary costs on others. Thus, they may be
moral duty-bound to make use of such state-provided mechanisms where they exist to minimize harms against those who appear to be threatening their rights.

Similarly, the larger institutional landscape may change how the moral permission plays out. If, for example, there is a robust system of social insurance for negligently caused accidents, a right-holder may be morally permitted to do less to defend her rights against a negligent actor than she would in the absence of such an insurance scheme. Intuitively, such defense of her rights becomes less necessary when there is a system of social insurance in place to protect her from some of the resulting harms.\(^43\) But this is a consequence of the nature of her moral permission. The state must respect that permission when participating in rights enforcement, even if it can modify what that permission entails by modifying the circumstances in which it is exercised.

A. The Correlative Structure of Private Law Litigation

Does the alternative conception have the resources to account for the central structural features of the private law landscape that I have argued are not easily accounted for by the Kantian conception? Consider first of all what the alternative account can say in defense of the correlative structure of private law litigation—the requirement that enforcement occur only at the behest of the right-holder. The Kantian, recall, lacks the resources to explain this, because for the Kantian rights exist to secure the equal freedom of all from coercion, and only come into being once there is a centralized coercive structure that ensures rights are generally enforced in the name of all. Justice might be secured if the state has discretion over enforcement actions just as it might be secured if the assent of the right-holder is made a prerequisite for enforcement. The

\(^{43}\) On the necessity constraint see note 41 supra and accompanying text.
framework doesn’t seem to offer an affirmative basis for assigning control over the enforcement decision to the right-holder.

The alternative conception has more resources to offer such an affirmative account, for it begins with an account of rights as realizable in the absence of any publicly justified coercive authority that generally protects rights. Contra the Kantians, rights exist in a robust sense defining relations of equality among persons even absent a coercive machinery of this kind. This is because rights define relations of equality among persons even when they don’t guarantee equal freedom of each from coercion. Rights on this view prescribe what persons must do or refrain from doing to treat one another as moral equals. Accordingly, they have normative significance even if they are widely regularly disregarded in practice. For instance, they tell one who has amassed more resources than he is entitled to that he ought to give some of them up to those who have less. Should he do so, he respects the equal status of his fellow persons, even if similarly situated others fail to do likewise.

Where do enforcement powers lie in the state of nature on this alternative conception? It isn’t as obvious as it might seem that the power must exclusively lie with the right-holder. Certainly, practical problems could arise if multiple people can enforce anyone’s rights. A failure to coordinate of such efforts could result in over-enforcement of rights—a violation of the proportionality constraint. Moreover, third-parties might be ill-placed relative to the right-holder to evaluate what actions are truly necessary to enforce the rights, for they often won’t be well placed to quantify the burdens alternative course of actions will place on the right-holder. But these practical problems simply point to reasons why third-parties should be cautious when enforcing another’s rights to avoid infringing those moral constraints. They don’t seem sufficient to establish that power over enforcement must be the exclusive domain of the right-holder.
But for enforcement powers to exist in a robust sense in the state of nature, it can’t be the case that one private person could override the right-holder’s decision to enforce the right or not. If that were the case, enforceability would be a kind of free for all that would undermine the rightholder’s control over the relationships that are established by her rights.

Suppose that Mary has the power to enforce her rights over her person and Ned is trying to stamp very hard on her foot, an infringement of her rights. For her power to enforce to be meaningful, Mary must be able to decide whether or not her right gets enforced. She has compelling reasons to enforce her right—protecting herself from pain and her foot from harm. But she may also have compelling reasons not to enforce it connected to managing her relationship with Ned. Perhaps Ned is her depressed friend and she doesn’t want to get into a physical confrontation with him as she knows that this will push him over the edge. She might not be able to secure her preferred outcome, however, if Sally is also permitted to intervene unilaterally to prevent Ned from stamping on her foot.

Analogous arguments establish that Sally’s ability to secure her preferred outcome is similarly limited by Mary’s power to enforce Mary’s right. But the situation of Sally and Mary is not symmetrical in an important respect. For the relationship between Mary and Ned that is instantiated by Mary’s right not to have her foot stamped on by Ned is at stake in a way that Sally’s relationship with Ned is not. This is because the prospect that Sally might enforce Mary’s right places a significant burden on that right, by putting pressure on Mary to waive her right, thus rendering Ned’s action permissible and any action by Sally in defense of her right impermissible. But Mary may have good reasons arising from her relationship with Ned not to do this. It may be important to their relationship that Ned’s action be acknowledged as wrongful. Waiving her right in order to protect Ned from Sally would be an awkward second best.
Now it is true that Sally having the power to unilaterally enforce Mary’s rights will work to Mary’s benefit too where Mary wants to enforce her rights and is unable to do so. But in such circumstances, Mary could always ask Sally to intervene on her behalf. And if the circumstances are exigent, making such a request impossible, Sally should be permitted to intervene absent express authorization, notwithstanding the fact that she lacks the unilateral to enforce Mary’s rights, on the grounds that Mary would usually want someone to intervene on her behalf. So long as Sally’s permission extends only to such circumstances, Mary’s control over the enforcement of her rights wouldn’t be problematically diminished.

Thus, once we begin from a conception of rights as defining relations of equality among persons that exist even when a centralized apparatus that effectively protects everyone’s rights is lacking, affirmative reasons to give the right-holder alone the power to enforce her rights emerge. Rights on this alternative view set boundaries on what it means for each person to respect the status of another as an equal, and so instantiate normative relations between persons that continue to exist even when rights infringements are pervasive. And once we have such a conception of rights in hand, it makes sense that control over enforcement should be in the hands of the right-holder, for it is the right-holder who is the proper manager of the relationships that her rights instantiate.

**B. The Relationship between Corrective Justice and Distributive Justice**

The alternative conception of rights draws no sharp distinction between corrective and distributive justice. There are simply claims of justice period and it makes sense to think of all such claims as generating relational wrongs, because justice instantiates relations of equality between free persons. When one person infringes another’s rights he treats the other as if she lacks the status of a free and equal person.
Claims of justice that persons can make in the state of nature are more limited than the claims people can make when there is a state constituting rights by allocating resources according to a particular principle of justice. But such claims can nonetheless be made. They arise from persons’ pre-institutional rights over their person and their rights to the limited share of the resources that is compatible with all possible principles of justice.

Moreover, even when the state plays a constitutive role in creating rights, the resulting rights define relations among persons regardless of whether the state sets up a machinery to enforce them. Moreover, they do so only when they accord with a possible principle of justice, or at least a principle that reasonable people could view as just. Thus, when the state allocates resources in an unjust way, a person’s legal entitlements can diverge from his moral entitlements, such that infringements of legal rights don’t necessarily correspond to genuine wrongs and, conversely, persons may wrong others—in the sense of infringing their rights—by keeping hold of their legal entitlements.

When the state has allocated resources in an unjust way, a collective failure lies behind these wrongs that may absolve persons of blame for holding onto their resources at least where they reasonably but wrongly believe that justice has been done. But the absence of blame doesn’t mean there was no wrongdoing. Justice, on the alternative conception, defines relations of equality between all persons, and to the extent one person has more than she is entitled to and others less, she isn’t standing in the proper relationships of equality with those persons.44

44 Indeed, Hillel Steiner has argued contra Weinrib that a Kantian should view distributive justice as entailing claims of private right for reasons along these lines. See his Corrective Rights in New Essays on the Nature of Rights (Mark McBride ed. 2017).
C. Substantive Implications

While the Kantian conception of rights differs sharply from the alternative, it isn’t immediately obvious that the difference will have implications for the substantive content of private law. Both are rights-based theories after all, and while the alternative account shifts our attention away from rights themselves to persons’ moral powers to enforce their rights, that may not make much difference if a right-holder’s power to enforce is triggered when and only when another has breached a duty that he owes to the right-holder. If there is such a tight correspondence between rights and their associated enforcement powers, then the conditions under which enforcement permissibly occurs will neatly correspond with those under which a duty-bearer has wronged a right-holder.

But, as the previous subsection suggests, there may not be such a tight correspondence, at least when the state has allocated entitlements in a way that runs counter to any permissible principle of justice. A person’s moral permission to defend herself against another plausibly depends not on her rights actually being threatened, but on her having a reasonable belief that the other is threatening her rights. And given that figuring out what justice entails is a complex epistemic problem that is also subject to metaphysical indeterminacy, people may not always know whether their legal entitlements generate claims of justice. The state on the other hand is well situated to resolve uncertainty about rights of both the epistemic and metaphysical kind. And therefore private parties may—at least where, despite some degree of collective failure, the state is doing a reasonably good job of achieving justice—have a reasonable basis for erroneously supposing that legal rights generate claims of justice, thus licensing actions in defense of those rights, despite their lack of moral grounding.\(^45\) Thus, private legal liability that

\(^45\) For further elaboration of these arguments, see Rebecca Stone, Private Liability without Wrongdoing, Unpublished Manuscript.
arises when a defendant infringes a plaintiff’s legal rights could reflect a plaintiff’s moral permission take action against a defendant who hasn’t infringed her moral rights. Conversely, a plaintiff might lack recourse against a defendant who is infringing her moral rights where the defendant isn’t infringing any of her legal rights. For instance, a plaintiff may lack recourse against a defendant who fails to come to her aid where the defendant is morally duty-bound to do so.46

VI. Conclusion

I have argued that a more Lockean conception of the role of the state in the creation of rights is superior to the Kantian conception in having both greater normative appeal and greater explanatory power. It is normatively more appealing because it is based on a thicker conception of what we, as private individuals, owe to one another. In particular, private persons who have more than they are entitled to as a matter of distributive justice have robust relational duties to come to the aid of the have-nots, even if the injustice is, in part, the product of a collective failure.

The Lockean account’s greater explanatory appeal unsurprisingly comes at the price of—indeed, is partly a function of its—greater complexity. There are two fundamental components of the account. First, there are persons’ underlying moral rights and duties. Second, there are persons’ moral permissions to enforce their apparent rights, which bear an imperfect correspondence to the underlying rights themselves, such that, depending on the circumstances, a person may be morally entitled to enforce an apparent right in the absence of a true moral right or lack the moral permission to enforce a genuine right. The state’s role is an important one but,

46 Elsewhere I offer an explanation of tort law’s misfeasance-nonfeasance distinction in these terms. Rebecca Stone, Private Liability without Wrongdoing, Unpublished Manuscript.
while it may have a necessary role to play in defining some rights, its role as an enforcer of rights is a contingent one. It may alter the circumstances of enforcement, such that the contours of the moral permission change. But the moral permission provides the ultimate justification for the state’s efforts to enforce private rights through private law rather than the moral rights themselves.