Private Law Exceptionalism? The Case Against Bipolarity and Formal Equality

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Abstract. Contemporary discussions of private law theory have sought to divine the deep structure and content of private law by reference to two key distinctions. First, the distinction between private and criminal law has been utilized to flesh out the distinctively bipolar structure of private law (and its various departments, namely, property, contract, torts, and unjust enrichment). Second, the distinction between formal and distributive equality has served to highlight the special terms of interaction established in private law. In these pages, I argue that the theoretical significance of these distinctions is overdrawn. In fact, I argue that neither distinction (nor some combination of both) succeeds in identifying private law's nature (where such exists).

If I am right, the ongoing debates that arise out of the two key distinctions just mentioned might distort, rather than advance, the important task of understanding and evaluating private law. Concerning the first key distinction, attempts to elucidate the nature of private law by comparison to the different-in-kind criminal law may likely arrive at grossly over-inclusive accounts of the what private law is (such as the ones developed by proponents of the civil recourse theory). Concerning the second key distinction, the debates concerning the nature of the connection, and possible overlap, between ideals of formal and distributive equality in private law may fail to do justice to the normativity of private law. Indeed, the introduction of relational equality is crucial especially because an *ideal* of formal equality is subject to familiar egalitarian objections, on the one hand, while the realization of distributive equality through private law is replete with both pragmatic and principled difficulties, on the other.

Introduction

Almost all non-economic approaches to the study of law acknowledge that a fundamental—and perhaps even essential—feature of the private law is the bipolar structure it happens to embody.[1] That is, private law literally structures a relationship

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[1] This observation has been developed, seperately, by Jules Coleman and by Ernest Weinrib. See, e.g., Jules L. Coleman, The Structure of Tort Law, 97 Yale L.J. 1233, 1241-42 (1988); Ernest W. Weinrib, The Idea of Private Law 9-10, 42-55 (1995). It has since been acknowledged on numerous occasions by any number of private law scholars, including by those whose methodologies and substantive theories are otherwise remarkably different from one another. See, for example, Paul B. Miller, The Fiduciary

between "two litigants" in which "doing and suffering constitute a single integrated sequence in which the justificatory considerations that bear on the doer necessarily bear on the sufferer as well."[2] Identifying it as "the most distinctive feature of private law,"[3] "the structural core,"[4] or the "the most basic"[5] feature has served two roles: Negatively, criticizing accounts that advance public purposes such as social welfare or distributive justice for failing to make sense of private law[6]; and affirmatively, taking this structural feature as key—and on some accounts, the key—to determining the kind of values and interests that could render private law intelligible.[7] Chief among these values and interests is that of formal equality (among formally free persons).

Now, would not it be embarrassing for private law theory if a constitutional law theorist had penned the argument from the bipolar structure of private law?[8] It does not matter why she would do so. Perhaps this theorist inadvertently substituted "private law" for "constitutional law" when arguing that the predominant practice of constitutional rights litigation in many constitutional democracies features a bipolar structure of reasoning about and litigation of a legal dispute. Or perhaps this theorist self-consciously aspired to make a point: That the bipolar structure of private law is not, in fact, distinctive of private law. Instead, it is a feature of a certain *legal system*, namely, a system that vests private individuals with legal powers to seek the vindication of their substantive

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Relationship, in The Philosophy of Fiduciary Law *1, 1 (Andrew S. Gold & Paul B. Miller eds., forthcoming 2014); Henry E. Smith, Modularity and Morality in the Law of Torts, J. Tort L., no. 2, art. 5, Oct. 2011 at 30-31; Hanoch Dagan, The Limited Autonomy of Private Law, 56 Am. J. Comp. L. 809, 813, 817 (2008). As I say in the main text, however, the prominence of bipolarity is not shared by all private law theoriests. For a critical approach to bipolarity (in the area of remedies in private law), see Stephen A. Smith, Duties, Liabilities, and Damages, 125 Harv. L. Rev. 1727, 1749-50 (2012).

[2] Ernest J. Weinrib, The Idea of Private Law 206 (1995).

[3] Ernest J. Weinrib, The Idea of Private Law 76 (1995). See also William Lucy, Philosophy of Private Law 41 (2007).

[4] Jules L. Coleman, The Practice of Principle 16 (2001). Coleman discusses the structural core of tort law, but his observations can be extended to capture other areas of private law (such as contract, restitution, and arguably property).

[5] Arthur Ripstein, Civil Recourse and Separation of Wrongs and Remedies, 39 Fla. St. U. L. Rev. 163, 166 (2011). Ripstein, however, does not seem to take the argument from bipolarity to figure prominently (or at all) in his account of corrective justice. The critique I shall develop in these pages (against accounts of private law that begin from, and depend on, the argument from bipolarity) does not apply to his account. But some of the critical observations I shall make with respect to the place of formal equality in private law will also be relevant to his views.

[6] For an instructive analysis of the methodological and meta-ethical underpinnings of the argument from bipolarity, see Benjamin C. Zipursky, Pragmatic Conceptualism, 6 Legal Theory 457 (2000).

[7] The distinction between "the key" and "key" in the main text above tracks the difference between accounts that view the bipolar structure as a feature that *dictates* the content of private law, on the one hand, and those that take this feature as placing a *constraint* on the sort of contents that can figure in the theory of private law.

[8] At one point, Owen Fiss was very close to do just that when he observed, in passing, that Weinrib's account of corrective justice is, at bottom, a theory of dispute resolution devoid of public value. See Owen Fiss, Coda, 38 UTLJ 229, 230 (1988). Weinrib rightly repudiated this accusation, arguing that "[c]orrective justice involves publicness in every way that dispute resolution does not." Ernest J. Weinrib, Adjudication and Public Values: Fiss's Critique of Corrective Justice, 39 UTLJ 1, 6 (1989).

rights—private law rights *or otherwise*—in a court of law. And so I shall argue presently.

The argument will run through the following stages. Part I will set the stage by introducing the argument from bipolarity. In Part II I shall argue that bipolarity is not a special feature of private law, in which case the argument from bipolarity fails to establish private law's structural distinctiveness. Part III moves from structure to substance. It takes up the terms of the interactions to which private law gives rise. I argue against the view that emphasizes formal equality as private law's distinctive property. In particular, my argument in this stage criticizes a familiar (but, ultimately, misleading) approach to the question of equality in private law, namely, that equality can be *either* formal *or* distributional (or a mix of both). I show that there can be another dimension of equality which I call relational equality. Roughly speaking, I argue that relational equality is neither a formal nor a distributional conception of equality. Against this backdrop, I shall argue that the conceptual claim according to which formal equality is private law's distinctive property must fail. I show that relational equality can just as well inform the basic normative substance of private law's terms of interactions.

I. The Argument from Bipolarity: Preliminary Remarks

It is important to note at the outset that what I shall call the argument from the bipolar structure of private law is a purely *formal* argument. It points out to an intuitively familiar observation, namely, that both the substantive and the remedial powers, rights, duties, and liabilities that arise in legal practices such as torts, contract, restitution, and—arguably—property take a relational form.[9] And they are relational in the sense that they establish a legal relationship between one particular natural or artificial person, the right-holder, and another particular person, the duty-holder.[10] They are, therefore, structurally different from the relationship that exists between a person and her self (as in some accounts of ethics), the moral community as an abstract entity (as in some accounts of morality), or the positive law and public order (as in the criminal law).

[9] I say that property is *arguably* relational in recognition that some view the rights and duties that exist in property law as inconsistent with the relational structure of most other private law rights and obligations. I criticize this view in Avihay Dorfman, The Society of Property 62 U. Toronto L.J. 564 (2012). At any rate, however, nothing in my present argument turns on this question.

[10] And this discrete relationship could then be multiplied by the number of the persons that are deemed duty-holders by the law.

The bipolar relationships at issue need not be limited, as some scholars seem to suggest, to the stage of correcting or redressing a prior wrong.[11] Rather, they can preexist and may very well survive that stage.[12] This is because the *source* of the bipolar structure is the relational character of the substantive rights (including powers) to which private law gives rise, such as my authority as a private owner to determine your normative situation with respect to an object, the power to bind myself to you by way of promise-making, the right that you, rather than merely society as a collective entity, will display reasonable vigilance of my life and limb, and so on.

Although the argument going forward has no historical or causal ambitions, it will be apt to consider the most natural counterexample against which the argument from the bipolar structure of private law is sometimes situated: The criminal law.[13] As I shall argue right after presenting a brief sketch of the private/public wrong distinction, criminal law is ill-suited for the purpose of uncovering the formal distinctiveness of private law. In fact, a comparison of this sort helps to show that private law's formal structure is, to an important extent, continuous with the rest of the law so that, if anything, it is criminal law, rather than private law, that stands out.

The contrast between criminal and private law is often cast in terms of the distinction between public and private wrongdoing.[14] Both forms of wrongdoing express instances

[11] John Gardner, The Purity and Priority of Private Law, 46 U. Toronto L.J. 459, 469-70 (1996); John Gardner, What is Tort Law For? Part I: The Place of Corrective Justice, 30 L. & Phil. 1 (2011); Gregory C. Keating, The Priority of Respect over Repair, 18 Legal Theory 293 (2012); Andrew S. Gold, A Theory of Redressive Justice, 64 UTLJ 160, 162-5 (2014). The through-and-through relational character of private law rights and obligations are further explored in Ernest J. Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 Yale L.J. 949, 980 (1988); Robert Stevens, Torts and Rights (2007); Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy (2009); Ernest J. Weinrib, Corrective Justice 4, 270-80, 334-37 (2012). For more on the scope and ambition of different conceptions of corrective justice, see Robert Stevens, Rights and Other Things, in Rights and Private Law 115, 144-46 (Donal Nolan & Andrew Robertson eds., 2012).

[12] On the latter possibility, see Ernest J. Weinrib, Civil Recourse and Corrective Justice 39 Fla. St. U. L. Rev. 273, 285-86 (2011).

[13] I am aware, of course, that the argument from bipolarity's historical *foil* was and still is the economic analysis of tort law. The point of using criminal law as a counterexample to private law operates at an entirely different level, however. Whereas the bipolarity critique focuses on the justifications provided by the economic analysis of law for the plaintiff/defendant nexus, the example of criminal law seeks to demonstrate the distinctive structure of private law. For discussions of the tort/crime or private/public wrong distinction in the context of private law theory, see Ernest J. Weinrib, Corrective Justice 172-75 (2012); Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy 312-14 (2009); Benjamin C. Zipursky, Substantive Standing, Civil Recourse, and Corrective Justice, 39 Fla. St. U. L. Rev. 299, 306 (2011); Benjamin C. Zipursky, Palsgraf, Punitive Damages, and Preemption, 125 Harv. L. Rev. 1757, 1770 (2012). For a contrary view that casts criminal punishment in terms of correcting injustice, see Jean Hampton, Correcting Harms versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659 (1992).

[14] The distinction between private law and criminal law can also be elaborated by reference to the distinction between corrective and retributive justice, respectively. I shall set this possibility to one side since it is not sufficiently relevant to the present argument.

whereby duties have been violated. A duty, in turn, is a kind of reason for action (or, at least, purports to be one). It, therefore, turns on publicly valid values and interests.[15] For the present purpose, the resort to the distinction between public and private wrongdoing becomes illuminating only insofar as the respective *structures* of the substantive and the remedial rights and duties are considered. The criminal law gives rise to non-relational duties. That is, duties whose existence does not depend on the protected right of a particular person or a class of persons.[16] I do not deny that in many cases, breaching such duties may amount to interference with protected rights. The argument, rather, is that duties in criminal law need not be owed to, or owned by, specific others (or a class of others) so that a wrong can be public *even when* it does not constitute a private one as well. This critical distance is exemplified by acts offending against the public order (or the rule of law) without violating a single right of an individual.[17]

The non-relational character of the criminal law duty is further manifested in instances of addressing its violation. Criminal proceedings—viz., police investigation, prosecution, and punishment—cut the immediate victim (assuming there is one) off from the wrongdoer. I shall not belabor this familiar point. Instead, I shall only make two observations concerning the significance of criminal law's non-relational structure: First, the rise of the victims' rights movement is precisely the outgrowth of this non-relational structure; and second, the structure in question exercises such a powerful hold on our imagination that it colonizes ordinary language—it is quite common to say that a criminal ought to pay his or her due to society, whereas a tortfeasor or a recalcitrant promisor ought to pay his or her due to the victim or frustrated promisee in particular.

There are different other aspects of the distinction between public and private wrongdoing that could have been explored. However, it seems fair to stop at this point, since even this brief discussion of what is not structurally bipolar provides good sense of the qualitative difference between criminal and private law. From a structural point of view, private law is distinctive vis-à-vis criminal law.

More specifically, when viewed against the backdrop of the criminal law, classical articulations of the argument from bipolarity may strike an intuitive (and intuitively important) cord. For instance, Weinrib could then observe that "[i]n private law every

[15] Hence, private wrongs should not be confused with wrongs to non-public values (whatever this may mean). Nor, I should add, should the adjective *private* stand for a milder form of wrongdoing.

[16] Michael Thompson puts the point succinctly by observing that "[t]he verdict of the jury, 'Guilty!', expresses a property of one agent, not a relations of agents." Michael Thompson, What it is to Wrong Someone? A Puzzle about Justice, in Reason and Value 333, 344 (R. J. Wallace et al. eds. 2004).

[17] Consider violations of traffic rules when absolutely no risk (to oneself and/or to others) is at stake. This case calls attention to the distinction between interests and rights. I do not deny that the ground for criminalizing this conduct is, ultimately, the *interest* in safety and bodily security of the public. But such ground does not turn on the violation of the *right* of any individual person in particular.

right implies that others are under a duty not to infringe it, and no duty stands free of its corresponding right," Robert Stevens could add that "[o]ur duties in private law are not owed to society in general," and Peter Birks could say (several years before the Civil Recourse theory has made its splash) that a "civil wrong is one in respect of which a citizen may make his own complaint, on his own account and not on behalf of the citizenship to which he belongs."[18]

The trouble, however, is that the distinction between the respective structures of rights and duties in criminal and private law tells us virtually nothing as to what to make of this qualitative difference. In particular, it is not clear how—in what ways and to what extent—such a demonstrated difference figures *outside* the two domains at issue. It seems that proponents of the argument from bipolarity suppose that the resort to criminal law's counterexample bolsters the most fundamental property of private law there is. I take it that this property counts as "most fundamental" partially because it is *distinctive* of private law.[19] Were it not distinctive, it would be redundant to insist, again and again, that the bipolar structure reflects "the" master[20] or *the* basic feature of the private law.

To be sure, different theoretical accounts of private law might flesh out the conditions under which right- and duty-holders could come to stand to one another in the appropriate—read, relational—way. To give three stylized examples, some fill out the necessary content of such rights and duties by reference to Kant's doctrine of private right, others resort to conventional social norms checked by basic principles of liberal political morality, and yet others emphasize the power to seek a civilized avenue of recourse against a wrongdoer. These accounts and various others differ in this and many other respects, but they are of a piece insofar as they take bipolarity as the distinctive marker of private law's structure, the existence of which either dictates or substantially constrains the content of the private law—the kind of interests, values, principles, and doctrines to which this body of law could plausibly give systematic expression.

On closer inspection, however, it turns out that, if anything, it is the criminal law that can be characterized as somewhat special due to its non-relational structure of substantive and "remedial" rights and duties. The bipolar structure of the private law manifests itself in areas of law that are clearly non-private-law legal practices. Or so I shall argue.

[18] Ernest J. Weinrib, Corrective Justice 4 (2012); Robert Stevens, Torts and Rights 95 (2007), Peter Birks, The Concept of a Civil Wrong, in Philosophical Foundations of Tort Law 31, 39-40 (David G. Owen ed., 1995), respectively.
[19] Ernest J. Weinrib, The Idea of Private Law 76 (1995).
[20] Ernest J. Weinrib, The Idea of Private Law 10 (1995).

II. Bipolarity is *Not* a Feature of Private Law

In order to demonstrate the important extent to which bipolarity is not a feature of private law, I shall take stock of two familiar articulations of the argument from the bipolar structure of private law—a lax one and a strict one. I shall show that the bipolarity they each find inherent in the distinctively private law structure in fact permeates the more general category of relational rights enforceable in courts. Bipolarity, I shall argue, is a property of a certain kind of a legal system, according to which a person possesses relational rights and that these rights entitle her to seek their vindication through courts (perhaps, among other public institutions).

Begin with the civil recourse theory viewed as a sophisticated attempt to develop the argument from bipolarity into a sustained interpretive account of private law.[21] Its most basic theme, "the principle of civil recourse," is stated along the following characteristic lines: "a person who is wronged, but deprived by law of the ability to respond directly, is entitled to an avenue of civil recourse against the wrongdoer."[22] Civil recourse theorists present this "core idea of redress" as that which "marks tort law as a distinctive department of the law."[23] (They have also extended these views to other private law domains and to private law as a whole).[24]

Does it? It has been observed before that the principle of civil recourse does not do a particularly good job in explaining the law of torts as such: It fails to distinguish between tort law and other parts, or even the rest, of the private law.[25] But this extension does not

[21] I shall focus on the interpretive ambitions of this account, rather than on its justificatory ambitions. Moreover, I shall not discuss other arguments developed by civil recourse theorists (such the idea that torts are wrongs and the notion that reasonable care expresses basic civil competency on the part of ordinary citizens) since they are not distinctive of the civil recourse theory.

[22] John C. P. Goldberg & Benjamin C. Zipursky, Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette, 88 Indiana L.J. 569, 573 (2013). See, in the same vein, e.g., Benjamin C. Zipursky, Rights, Wrongs, and Recourse in the Law of Torts, 51 Vand. L. Rev. 1, 82-83 (1998); John C. P. Goldberg, The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs, 115 Yale L.J. 524, 599 (2005); Benjamin C. Zipursky, Substantive Standing, Civil Recourse, and Corrective Justice, 39 Fla. St. U. L. Rev. 299, 309 (2011).

[23] John C. P. Goldberg, The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs,115 Yale L.J. 524, 601 (2005); Benjamin C. Zipursky, Civil Recourse, Not Corrective Justice, 91 Geo. L.J. 695, 733-40 (2003). To be sure, proponents of the civil recourse theory also emphasize another important characteristic of tort law—as a body of law consisting in relational wrongs—but this one cannot distinguish their account from mainstream corrective justice theory.

[24] Benjamin C. Zipursky, Philosophy of Private Law, in The Oxford Handbook of Jurisprudence and Philosophy of Law 623, 632-36, esp. 635 (Jules Coleman and Scott Shapiro eds. 2002) ("The notion that a plaintiff is entitled to a right of action is … centrally important to the idea of private law."); Nathan B. Oman, Consent to Retaliation: A Civil Recourse Theory of Contractual Liability, 96 Iowa L. Rev. 529 (2011).

[25] Avihay Dorfman, What is the Point of the Tort Remedy?, 55 Am. J. Juris. 105 (2010); John Gardner, Torts and Other Wrongs, 39 Fla. St. U. L. Rev. 43, 45 (2011); Gregory C. Keating, The Priority of Respect over Repair, 18 Legal Theory 293, 312 (2012). It seems that Zipursky himself at least implicitly

go far enough. Indeed, the civil recourse's version of the argument from bipolarity—the so-called principle of civil recourse—is an aspect of a *legal system which grants (without leave of the court) private individuals access to the court to vindicate their primary rights, be they private law rights or otherwise*. Even if the standing to seek recourse for rights violations in a court of law distinguishes private from criminal law, it fails to separate the former from basic areas of law that, at the very least, resist the label of private law.

Indeed, the principle of civil recourse manifests itself in key areas of administrative law and, most prominently, constitutional law; and by "constitutional law" I mean the law that protects constitutional rights, rather than what is often called "constitutional torts," which is the application of tort law to human rights violations. That is, the argument going forward does not deal with constitutional torts such as those concerning claims of state violations of anti-discrimination laws or any other hybrid schemes of constitutional law and common law torts. Rather, the object of the discussion going forward focuses on traditional—core, really—cases of state infringement of basic constitutional rights. Fore instance, a state organ can wrong private citizens—either one or many of them at a time—by suppressing the basic rights they each hold against the state, such as the right to freedom of expression (consider a police officer denying me the circulation of harsh anti-war propaganda next to a state court house). I shall argue that insofar as the particular legal system grants citizens the standing to vindicate these rights in a court of law, constitutional right's violation becomes subject to a principle of civil recourse.[26] Thus, they are entitled, first, to obtain a judgment against the injurer and, second, to whatever remedy that could count, in the eyes of the law, appropriate to redress the violation of the right.

Consider the constitutional right to freedom of religion by illustration. Suppose that my heterodox religious faith requires a somewhat barbaric ritual slaughter.[27] The administrative agency in charge of food hygiene and animal protection issues an order against the commission of the ritual. The manner in which this order is issued may vary—on the one hand, it may be a legislative act applicable to the entire polity or one

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acknowledges this much Benjamin C. Zipursky, Philosophy of Private Law, in The Oxford Handbook of Jurisprudence and Philosophy of Law 623, 635 (Jules Coleman and Scott Shapiro eds. 2002).

[26] John Gardner argues that "[i]n public law, a cause of action is available, in general, only with leave of the court." John Gardner, Torts and Other Wrongs, 39 Fla. St. U. L. Rev. 43, 45 (2011). It is not clear to me what (in Gardner's view) counts as "public law," but certainly the constitutional law litigation I discuss in the main text need not place a general constraint on the availability of causes of action, at least when these causes are grounded in the violation of substantive constitutional rights. It is, of course, possible that some legal systems could place such a general constraint (and even then, we need to know why so), but it does not seem to stand as a basic or otherwise fundamental feature of the law of constitutional rights, certainly not everywhere.

[27] Two cases in particular illustrate this state of affairs: Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) and Cha'are Shalom Ve Tsedek v. France [2000] ECHR.

which singles out my heterodox creed; on the other, it may take the form of an ad hoc order issued by the local inspector of slaughterhouses, say, she revokes my slaughterhouse license based on her authority to sustain the general interest in the operation of slaughterhouses. Moreover, the prohibition may either be the unintended consequences of an otherwise acceptable law of general application or an upshot of sheer persecution.[28] Against this familiar backdrop, my constitutional right to the free exercise of religion entitles me, in the first instance, to view the prohibitory order as a form of wrongdoing against me in particular. Whether or not other people may have been wronged does not change the relational characterization of the wrongdoing. Rather, it may mean that several other instances of relationally wrongdoing have occurred.

Now, if the legal system under which I happen to live vests people in my situation with the power to vindicate the right to freedom of religion in a court of law, and insofar as the court is committed rigorously to protect constitutional rights *qua* rights, then the principle of civil recourse becomes the principle that governs my petition against the infringing state agent. Essentially, the claim is that the state or the one who acts in its name ought to restore me to the point I could have occupied post the wrong, save for the wrong, namely, the free exercise of the ritual in question. The restoration in question can be applied *inter partes* or it may affect more people (or communities) depending on the kind of remedy sought for; more specifically, it depends on the structure of constitutional adjudication that a particular legal system adopts. Indeed, the judgment may be limited to the vindication of my right *only*. This could be so if the court restricts the scope of the judgment to my rivalry against the state (on which more below). In other cases, the remedy may apply generally to protect all right-holders against the state (but it can still be the case that only *my* religious practice fell within the prohibitory order so that no one else was wronged by this order to begin with[29]).

More generally, adjudicating constitutional rights may often involve "strong" judicial review, in which case the court can strike down the infringing statute, rule, order, or action made by the relevant state agent. But judicial review may also take a "weaker" form, in which case the court invalidates the application of the statute, rule, order, or action to the case of the plaintiff *only*. On the latter approach, challenging the constitutionality of a statute, rule, order, or action does not—or, need not—reach beyond the plaintiff/defendant nexus. Arguably, the Roman law doctrine of *intercessio* and the *jus tertii* doctrine in contemporary U.S. constitutional adjudication exemplify two different versions of this (weaker) structure of constitutional law adjudication. At some

[28] See *Cha'are* and *Church of Lukumi*, respectively.

[29] Consider state persecution of one particular religious (or moral) creed. One familiar form of targeting this creed is by issuing what appears to be a generally applicable norm which is, in fact, a prohibition that singles out one religious sect for negative treatment. This factual setting appears, for instance, in *Church of Lukumi*.

point, Roman law acknowledged the authority of the tribunes to invoke *intercessio*, which is (among other things) the power to veto the application of the law in a particular instance as opposed to invalidating the law itself.[30] More importantly, U.S. constitutional rights law distinguishes between two forms of challenging the constitutionality of a statute, rule, order, or action by a state agent—challenging its application to the plaintiff and challenging its very validity with respect to the world at large. The former, as-applied form of challenge reflects "the personal nature of constitutional rights"[31] so that "absent a relationship that makes the actual enjoyment of rights by a third party dependent on a challenger's capacity to assert those rights, one party may not escape the application of a statute on the ground that it would be unconstitutional as applied to someone else."[32] A leading expert on the subject even insists that "[a]s-applied challenges are the basic building blocks of constitutional adjudication [in the U.S.]."[33] On this doctrinal approach, constitutional rights litigation picks out a bilateral system of case-by-case dispute-resolution between a plaintiff and a defendant.[34]

Even given that a bilateral structure of litigation is not a feature of private law adjudication, it may still be protested that not all legal systems confer the unusually powerful rights of recourse that figure in my (arguably) hypothetical case of constitutional right infringement. This may be true as a matter of fact. To begin with, some legal systems do not grant private individuals access to the court to vindicate their existing constitutional rights.[35] After all, many constitutional courts today are more open to ad hoc balancing and, in particular, to the view that rights and interests are virtually indistinguishable, conceptually and normatively speaking.[36] On this approach, rights are more defeasible than my hypothetical case presupposes, in which case protecting the "right" shades off into a mere interest that must compete with public interests that need not bear on the right-holder in particular. That said, for my argument against the civil recourse theory to work, all that I need to emphasize is the following two

[30] Cf. Frank Frost Abbott, A History and Description of Roman Political Institutions 198-99, 378 (1901).
[31] New York v. Ferber, 458 U.S. 747, 767 (1982) (italics are mine). See also Gonzales v. Carhart, 550 U.S. 124 (2007).
[32] Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L.J. 853,859-60 (1991).
[33] Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1328 (2000). But see Barry Adler, Rights Against Rules: The Moral Structure of American Constitutional Law, 97 Mich. L. Rev. 1 (1998).
[34] The Court in Allen v. Wright, 468 U.S. 737,751 (1984) has acknowledged "the general prohibition on a litigant's raising another person's legal rights" as well as the "rule barring adjudicaton of generalized grievances"). The as-applied challenge represents "the traditional rule," but it does not govern all cases or all the constitutional rights there are.
[35] Consider, for example, the several constitutional rights to welfare acknowledged in Chapter IV of the Indian Constitution. In addition, the English legal system (at least before the Human Rights Act of 1998) could be interpreted as giving rise to certain unenforceable basic rights, part of what Dicey would call "constitutional morality."
[36] See Robert Alexy, A Theory of Constitutional Rights (Julian Rivers trans., 2002); Kai Möller, The Global Model of Constitutional Rights (2012); Moshe Cohen-Eliya & Iddo Porat, Proportionality and Constitutional Culture (2013). See also Martin Loughlin, Foundations of Public Law 357-58 (2010).

features: First, that the hypothetical legal system from the illustration above *could* exist; and second, that such a legal system embodies a plausible conception of constitutional rights, including their existence, content, and legal protection. I see no reason why a legal system satisfying these two could not exist. (Once again, the constitutional rights law of the U.S. and certain chunks of constitutional law in other jurisdictions, such as human dignity in the German law, can be viewed in this light.)

Now, civil recourse theorists might also protest that the resort to constitutional law's principle of civil recourse obscures three important differences between constitutional and private law—first, that the injurer is the state or state agent, rather than an individual person; second, that tort law deals with harms, rather than violations of rights; and third, that the "remedy" given for the paradigmatic case of constitutional right violations is not the payment of damages and, more generally, the remedy is not measured on tort law principles. I shall take up the first worry below (note, in the meantime, that the "principle of civil recourse" says nothing in favor of excluding state organs or organizations, more generally). Concerning the second worry, civil recourse theorists deny that mere harm is the true object of tort duties.[37] Concerning the third worry, part of the critique leveled by civil recourse theory against corrective justice is that tort law gives rise to any number of remedies that cannot be adequately cast in terms of "make-whole" payments. On the civil recourse account, the power to seek civil recourse gives rise to "a demand by a victim for ameliorative conduct from a wrongdoer."[38] This rather lax articulation is sufficiently vague to include the sort of remedial responses that some constitutional courts can grant to claimants. It seems, to conclude, that the civil recourse theory offers an account of a structural distinction between private law and criminal law, rather than of private law (or tort law), *tout court*.

[37] John C. P. Goldberg, The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs, 115 Yale L.J. 524, 543 n.92 (2005); Benjamin C. Zipursky, Substantive Standing, Civil Recourse, and Corrective Justice, 39 Fla. St. U. L. Rev. 299, 303 (2011). And compare the remarkable similarities between Zipursky's writings on substantive standing (in tort law) and the recent U.S. Supreme Court case on the constitutionality of California's attempt to ban same-sex marriage. There, the court elaborates on the Constitution's Article III doctrine of standing in terms that could nicely be assimilated into Zipursky's account of substantive standing in torts. Hollingsworth v. Perry, 570 U.S. __ (2013). For instance, Zipursky observes, in the course of introducing his theory of substantive standing, that "For all torts, courts reject a plaintiff's claim when the defendant's conduct, even if a wrong to a third party, was not a wrong to the plaintiff herself." Benjamin C. Zipursky, Rights, Wrongs, and Recourse in the Law of Torts, 51 Vand. L. Rev. 1, 3 (1998). Whereas the Supreme Court in Hollingsworth v. Perry holds that "it is not enough that the party invoking the power of the court have a keen interest in the issue. That Party must also have "standing," which requires, among other things, that it have suffered a concrete and particularized injury." (Slip Opinion, at p. 2). The court further emphasizes that "To have standing, a litigant must seek relief for an injury that affects him in personal and individual way." (Slip Opion, at p. 7).

[38] Benjamin C. Zipursky, Substantive Standing, Civil Recourse, and Corrective Justice, 39 Fla. St. U. L. Rev. 299, 338 (2011).

The second articulation of the argument from bipolarity appears to be the most demanding of all. It consists of two elements: a formal one and a substantive one. The argument from bipolarity, recall, focuses on the former; and so shall I.[39] On Weinrib's pioneering study of the distinctive structure of the private law, "the overarching justificatory categories expressive of correlativity are those of the plaintiff's right and the defendant's corresponding duty not to interfere with that right."[40] It follows, with Weinrib, that "doing and suffering come together in the same injustice when the duty breached is correlative to the very right that was infringed," and so, "imputing the breach of such a duty to the defendant justifies his or her liability to the plaintiff."[41] No other considerations (such as those pertaining to need or virtue) figure in the bilaterally-structured relationship between the right- and the duty-holder.[42]

The strictly relational substantive rights and duties in private law also give rise to relational duties of repair. According to Weinrib, "because the plaintiff has lost what the defendant has gained, a single liability links the particular person who gained to the particular person who lost."[43] The gains and losses that call for liability pick out normative, rather than necessarily material, consequences—the injurer "gains" in the sense of exempting himself from a duty owed to the victim, whereas the victim "loses" the benefit of being owed this duty.[44] To this extent, the imposition of liability in private law seeks to restore (in the appropriate sense) the injured person to the point she could have occupied post the wrong, save for the wrong.

Must these observations concern private law *in particular*? Consider constitutional law once again. Constitutional rights are typically and particularly held against the state, which means that they establish a juridical relationship between each individual, taken separately, and the state. Moreover, the content of the right—say, a right to the free exercise of religion—*just is* the object of the state's obligation—say, against interfering with the free exercise of religion. Instances of state's disrespect for the right to free exercise would typically, though not necessarily, affect numerous constituents, but in all of these cases, the injury is brought about in a strictly relational fashion. That is, the state interferes with the distinctive rights of citizens, taken severally, rather than with the general, abstract community.[45] The "doing" of the state—say, banning a religious ritual

[39] I shall turn to the substantive element—viz., the Kantian argument from formal freedom and equality—below.
[40] Ernest J. Weinrib, Corrective Justice 19-20 (2012).
[41] Ernest J. Weinrib, Corrective Justice 20 (2012).
[42] See Ernest J. Weinrib, The Idea of Private Law 82 (1995); Ernest J. Weinrib, Corrective Justice 20 (2012).
[43] Ernest J. Weinrib, The Idea of Private Law 63 (1995).
[44] Ernest J. Weinrib, The Idea of Private Law 115-20 (1995).
[45] Cardozo's (drawing on Pollock's) famous observation in *Palsgraf v Long Island R. Co*., 162 N.E. 99, 99 (N.Y. 1928) that "negligence in the air … will not do" applies, *mutatis mutandis*, to the view that religious-based persecution in the air will not do. We may judge that society becomes less tolerant toward religious

in a statute or in a particular decision by a public official in respect of a particular religious person—is the "suffering" of the right-holder. In the course of suing the doer, the sufferer grounds her claim in the former's breach of the duty, which is another way to say that her constitutional right has been infringed. No other considerations besides her having a right are relevant—in particular, her need, merit, or virtue does not influence, let alone determine, the content of the right or the scope of the protection it affords.

In fact, it is part of the ethos of modern bills of rights that courts are not allowed to reduce the right to a mere interest, that is, as if it is on a par with all other competing interests. I do not argue that constitutional rights must, or even can, provide literally absolute protection against state interference (recall that tort law, too, affirms any number of non-absolute rights and duties as well as mitigating doctrines such as private necessity). Rather, the argument is that a familiar characteristic of what it means to possess a constitutional right is the notion of holding a sort of a "firewall" or a "trump" *against* considerations pertaining to the general welfare, social justice, or other interests that are not part of the justificatory essence of the right in question.[46]

The continuity between the argument from bipolarity and constitutional rights law extends to the remedial stage, too. Legal systems that grant citizens the standing to vindicate constitutional rights in a court of law have worked out a set of remedies, the point of which is to compel the right-violator to right the wrong by restoring the victim to the position where she can freely re-assert her constitutional right. In most cases, restoration requires lifting the state's prohibition against invoking one's right so that one would be able to resume exercising this right. For instance, if a warden, purporting to act in the name of the criminal punishment system, places excessive constraints on the practice of religious faith by one of his inmates', and if the court finds him (and, so, the state) liable for infringing the religious freedom of the inmate, the resulting injustice ought to be corrected by way of compelling the warden to restore the victim to the normative situation to which she has been entitled all along as a matter of right—that of being free from excessive interference with her religious liberty. In other cases, under different circumstances, the appropriate remedy may take other forms in order for the imposition of liability to make good on its ambition to right the wrong.

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people in general, but instances of violating religious *freedom* are essentially infringements of the distinct rights owed to particular persons or particular class of person.

[46] The metaphors of firewall and trump come from Jürgen Habermas, Between Facts and Norms 258 (William Rehg trans., 1996); Ronald Dworkin, Taking Rights Seriously 184-205 (1977), respectively.

III. Private Law's Exceptionalism: From Structure to Content

If the structural argument from bipolarity fails to render private law sufficiently distinctive, what feature or set of features could make the appropriate difference? The most natural place to look for the answer is, well, the content (or substance) that pervades the private law. Exploring whether the "content" of private law is, in fact, distinctive (in the right sense) must be made with an eye to two general worries. First, the category of content can come with many different degrees of abstraction. The task is to provide an account of private law's distinctive content which is sufficiently abstract to capture an importantly unifying theme behind the various basic doctrines and organizing principles conventionally associated with "private law." And second, approaching the question of content must not pre-judge the question of what comes first—the bipolar structure or the content. In other words, the content may be said to *conform* to the bipolar structure but logically speaking, it may also be the case that the content *informs* the kind of structure that private law thereby comes to exhibit.[47] At any rate, it is clearly the case that the tradition of private law theory I discuss in these pages deems the connection between the bipolar structure of private law and this law's content to be fairly robust, rather than contingent.

Against this backdrop, I shall explore of the conventional wisdom—shared by most right-based approaches to private law—that private law's distinctiveness may be found in its commitment to *formal equality among private individuals*.[48] According to this wisdom, the contents of the various doctrines and organizing principles of private law express this basic commitment, including even at the expense of distributional or substantive equality.

A. Private Law: Terms of Interactions among Private Individuals

[47] The former view can be traced back to some of Coleman's writings on corrective justice. See, e.g., Jules L. Coleman, The Practice of Principle 32 (2001). It may (but, as I say in a moment unlikely) also be inferred from Weinrib's remark that "[a]t the core of formalism lies the priority of the formal over the substantive." Weinrib, The Idea of Private Law 25. The latter view has been made in Martin Stone, On the Idea of Private Law, 9 Can. J. L. & Juris. 235 (1996). And there is, of course, another possibility, which is Weinrib's: that the form and the content mutually presuppose one another. See Ernest J. Weinrib, Correlativity, Personality, and the Emerging Consensus on Corrective Justice, 2 Theoretical Inq. L. 107, 112 (2001).

[48] Note that this set of distinguishing features does not form part of the structural argument from bipolarity. It may be more accurately to say that the bipolar structure of private law *applies* (mainly, but not exclusively) to private individuals, rather than to state organs. Weinrib, for example, makes clear that his theory of corrective justice combines two complementary, but distinct elements: the form, or what he calls "correlativity," and the content, what he calls "personality." Ernest J. Weinrib, Corrective Justice 15 (2012).

I commence with a rather banal observation, namely, that private law is distinctive not necessarily in its bipolar structure but rather in the identity of the entities whose discrete or ongoing relationships it seeks to govern. Most abstractly, private law sets out terms of interactions among private individuals. By *private individuals* I mean persons who act either on their own behalves or for the benefit of specific other private individuals, rather than persons occupying their public offices as law-makers or as law-executing agents.[49]

By *terms of interactions* among private individuals I mean two things. Most obviously, private law, as just mentioned, preoccupies itself not with the parties in an interaction, taken severally, but rather with the terms of their engagement with each other—the rights and the duties they hold against each other. This last observation does not yet distinguish private law from non-private law practices (such as, recall, constitutional rights law).

But there is another, more important—though still banal—observation concerning the terms of the interaction that figure in the private law: they specify norms of engagement that do not presuppose ongoing relationships or otherwise continuous commitments and responsibilities. Constitutional rights law, by contrast, specify terms of interaction between the state and the citizen that are aspects of an ongoing relationship of care and respect by one party in particular, the state, toward the other. Private law's terms of interaction may also facilitate ongoing relations of care and respect (consider family law or even trust law). However, its terms of interaction can also govern ad hoc interactions, including among complete strangers. A discrete transaction for the sale of a widget or the accidental collision between motorists exemplify the sense in which private law interactions *can*—and often do—arise in the absence of existing forms of thick relationship between the interacting parties.[50]

The preceding observations may help to sharpen the divide between private law and other legal practices featuring a bipolar structure. However, they are merely empirical facts about the world as we think we know it. From a theory perspective, the more important property that defines the content of private law is normative, rather than factual. Indeed, private law's terms of interactions among private individuals may embody, among other things, a conception of equality. Moreover, this conception is not unrelated to the empirical observations just made—it may be viewed as the most

[49] I elaborate on this distinction elsewhere. See Avihay Dorfman & Alon Harel, The Case against Privatization, (2013) 41 Phil. & Pub. Aff. 67 at 79-89; Avihay Dorfman, Ownership and the Standing to Say So, U. Toronto L.J. (forthcoming 2014).

[50] To forestall misunderstandings, the drive I seek to wedge between the terms of the interactions characteristic of constitutional rights law and private law does not turn on the distinction between hierarchy and non-hierarchy, respectively. After all, private law makes ample normative space for asymmetrical relationships in which one party exercises legal authority over another (consider private ownership as the standing to say so). The fact that this authority may be legitimate does not eliminate hierarchy, of course.

appropriate regulative ideal for private individuals interacting, including occasionally, under the terms set by the private law. Thus, the argument going forward moves from the brute fact of the entity—the person—who participates in private-law interactions to the *conception* of this person as free and equal.

B. Private Law and the Question of Formal Equality

A major ambition on the content side of private law's theory is to develop an account of the terms of interactions, including *occasional* interactions, consistent with the demands of equality (and more loosely, fairness). An ambition, that is, to explain and justify these terms by showing that they take the transacting parties as equally human so that their lives are equally important. Thus, it is true that the corrective justice school of thought, broadly defined to include civil recourse and other non-reductionist accounts of private law, consists of various different theories of the morality of private law. But they all begin from, and thus share, the basic intuition that private law is best explained and justified by reference to an ideal of "transactional equality" or "bilateral fairness" which is not reducible to substantive equality.[51] This intuition is deeply ingrained in the familiar observations that tort and contract, for example, ground remedial duties based on notions such as fault, in the case of negligence, and breach, in the case of contract, and that these notions generate responsibility that is virtually indifferent to considerations of distributive equality.[52] Theorists of corrective justice, again broadly defined, aspire to develop an account of the morality of private law in spite of its possible regressive effects[53]—the ambition is to establish the moral standing of *formal equality* even against the backdrop of distributive inequality.[54]

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[51] See Martin Stone, The Significance of Doing and Suffering, in Philosophy and the Law of Torts, in Philosophy and the Law of Torts 131, 156-57 (Gerald J. Postema ed. 2001); Ernest J. Weinrib, Correlativity, Personality, and the Emerging Consensus on Corrective Justice, 2 Theoretical Inq. L. 107, 110 (2001); Ernest J. Weinrib, The Idea of Private Law 82 (1995); Jules Coleman & Arthur Ripstein, Mischief and Misfortune, 41 McGill L.J. 91, 109, 112 (1995); Jules L. Coleman, Second Thoughts and Other First Impressions, in Analyzing Law: New Essays in Legal Theory 257, 304 (Brian Bix ed., 1998).

[52] Ernest J. Weinrib, The Idea of Private Law 74; Jules L. Coleman, Risks and Wrongs 352; Jules L. Coleman, *Mistakes, Misunderstanding, and Misalignments*, 121 Yale L.J. Online 541, 553-54 (2012), http://yalelawjournal.org/2012/03/20/coleman.html.

[53] For discussions of this point, see Dennis Klimchuk, On the Autonomy of Corrective Justice, 23 Oxford J. Legal Stud. 49, 63-64 (2003); Arthur Ripstein, The Division of Responsibility and the Law of Tort, 72 Fordham L. Rev. 1811, 1843 (2004) (discussing the partial overlap between the demands of corrective and of distributive justice).

[54] Corrective justice theorists acknowledge that formal equality may not be sustained, or even may not have a point, in the face of gross distributive injustice. See, e.g., Ernest J. Weinrib, Corrective Justice 269-70, 283-84 (2012) (arguing that corrective justice requires state's support for the poor). However, any attempt to ground tort law in the demands of corrective justice must include a defense of the critical distance of these demands from the demands of distributive justice. By implication, the demands of corrective justice purport to persist even against the backdrop of an imperfectly just or moderately unjust society. *See* Coleman, Risks and Wrongs 352 (1992) (arguing that the principle of corrective justice can generate moral

Thus, whereas the argument from private law's distinctive bipolar structure points to the distinction between private and criminal law, the argument from formal equality (on which more below) elaborates private law's distinctive normative content by reference to the distinction between preserving formal equality and advancing substantive equality. I shall argue, however, that the latter distinction rests on a misunderstanding of the ideal of equality, in general, and in private law, in particular. Private law can and, perhaps, already embodies an ideal of substantive equality, in which case an ideal of formal equality is not a distinctive feature *of* private law's normative content.

Before I develop my claim, it is important to be clear about my using the term "corrective justice" in connection with an ideal of formal equality. The clarification is in order since recent literature runs together two different conceptions of corrective justice: a narrow and a comprehensive one. Corrective justice in the narrow, more literal sense is familiar from the writings of Gardner, Stevens, Keating, and, at times, Coleman.[55] For them, corrective justice is principally a theory that focuses on cost-allocation, regulating the reversal of a prior occurrence of a wrongful transaction.[56] It purports to justify the correction of injustice whereas the injustice itself is not (and even cannot be[57]) one of corrective (in)justice. To this extent, the theory of corrective justice does not have a role in determining what counts as a wrongful transaction, let alone what we owe to each other as a matter of substantive duties (such as duties of care and respect). Roughly speaking, this approach places the conceptual and normative focus on the remedial aspects of private law and negligence law, in particular.[58]

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duties of repair as long as the underlying rights pass the "minimal" bar of justice, namely, these rights "must be sufficiently defensible in [distributive] justice").

[55] Jules L. Coleman, Risks and Wrongs 303-28 (1992); Robert Stevens, Torts and Rights 327-28 (2007); John Gardner, What is Tort Law For? Part I: The Place of Corrective Justice, 30 L. & Phil. 1 (2011); Gregory C. Keating, The Priority of Respect over Repair, 18 Legal Theory 293 (2012). There is also a reason to believe that at one point, Arthur Ripstein also held a somewhat similar view as can be discerned from his emphasis on "The Problem," namely "WHOSE BAD LUCK IS IT?" Arthur Ripstein, Equality, Responsibility, and the Law 3 (1999).

[56] See also Dennis Klimchuk, On the Autonomy of Corrective Justice, 23 Oxford J Legal Stud. 49, 51-2 (2003).

[57] This is Gardner's view. See John Gardner, The Purity and Priority of Private Law, 46 U. Toronto L.J. 459, 469-70 (1996).

[58] In a recent article, John Gardner has reintroduced Nozick's attempt to recast distributive justice broadly to include *every* norm of allocating burdens and benefits except for norms of correcting injustice, namely norms that aim at *un*doing a given allocation. I have two reservations with respect to this Nozickian framework. To begin with, Gardner's depiction of corrective justice in terms of allocating burdens or benefits "*back* from one party to the other" mischaracterizes paradigmatic cases of private law—although it captures typical cases of restitution, it explains away basic cases involving compensatory damages. (John Gardner, What is Tort Law For? Part I: The Place of Corrective Justice, 30 L. & Phil. 1, 12 (2011)). Some ordinary torts cases, especially those pertaining to accidental infliction of injury to the person or property of another, do not aim at the reversal of a wrongful transaction in the sense discussed by Gardner. The injured person who wins her day in court is entitled to transfer her loss to the injurer; but it is imprecise to cast this transfer in terms of allocating the loss *back* from the former to the latter. Indeed, since the injurer did not

By contrast, corrective justice in the broader sense (as used especially by modern Kantians such as Weinrib and Ripstein, but also, at least sometimes, by Coleman) articulates an account of the structure of private right, by which I mean the basic features of the morality of the law that governs interactions between persons.[59] This is not to say that this approach ignores allocative questions—it does not.[60] Rather, more fundamentally to this approach is the specification of the substantive rights and duties and, by necessary implication, the determination of what could count as wrongful transaction. Repair, then, comes last and least since it is the normative upshot of the two prior stages (that of identifying the substantive rights/duties and the standards by which to assess whether they were violated).

The following discussion of formal equality in private law will track the broader sense of corrective justice. This is so because the ideal of formal equality figures not merely at the stage of rectifying wrongful losses, but rather already in determining the content of the substantive rights and duties private individuals owe one another in private law.[61]

Consider the point of introducing the distinction between formal and distributional equality to the discussion of private law's distinctive normative content. Presenting

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own or hold the "loss" prior to his injuring the victim, it is not clear how could the tort remedy be viewed as an instance of backward allocation. Moreover, and more importantly, despite Gardner's presentation of Nozick's framework as a *conceptual* argument concerning the distinction between corrective and distributive justice (Gardner 14), it is more precise to view Nozick's argument as resting entirely on a normative argument, which is to say a libertarian theory of justice. If that is the case then the Nozickian view of distributive justice rises and falls with his defense of historical justice (roughly speaking, an account of distributive justice in terms of purely historical justice in acquisition and in consensual transactions). Consider the principle of "finders keepers" as a Nozickian norm of distributive justice (for more, see Gardner at 12). I do not deny that there may sometimes be good reasons to adhere to this principle; my argument, however, is that these reasons are not that of distributive *justice*, not even of prima facie distributive justice. Indeed, it does not seem conceptually right to suppose that a norm that allocates burdens and benefits is a norm of distributive justice simply by virtue of its commitment to conduct the allocating in question. It is one thing for a norm to generate a reason for allocating goods; quite another to suppose that this reason is one of justice or morality, more generally. Thus, since it is inseparable from his normative theory of equality and justice, I find the Nozickian notion of distributive justice unhelpful as an *analytical* tool (i.e., as a conceptual framework that is equally available to non-libertarian theories of justice).

[59] Jules Coleman & Arthur Ripstein, Mischief and Misfortune, 41 McGill L.J. 91 (1995); Ernest J. Weinrib, The Idea of Private Law ch. 4 (1995); Ernest J. Weinrib, Corrective Justice ch. 8 (2012); Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy (2009). It has been suggested that Coleman's mature account of tort law focuses on the idea of corrective justice in connection of allocation of costs only. This is not the most sympathetic reconstruction of his scholarship (and is certainly at odds with the way he used to teach his torts class at Yale). See, e.g., Jules L. Coleman, Doing Away with Tort Law, 41 Loy. L.A. L. Rev. 1149, 1167 n.44 (2008).

[60] Arthur Ripstein, As If It Had Never Happened, 48 William & Mary Law Review 1957 (2007); Ernest J. Weinrib, Corrective Justice 87-98 (2012).

[61] For an excellent exposition, see Jules Coleman & Arthur Ripstein, Mischief and Misfortune, 41 McGill L.J. 91 (1995).

distributive equality as formal equality's inverse may be motivated by at least two different reasons. First, this way of proceeding helps to present the normative challenge faced by private law theory, namely, that of elaborating an ideal of equality which is, to an important extent, independent of considerations of substantial equality.[62] And second, formal and distributional equality literally span the entire range of possible ideals of equality to which most legal areas, including areas that fall within private law, can adhere. Be that as it may, both reasons seem to support an *impossibility claim*, which is to say an argument against the possibility of grounding the content of private law's terms of interaction in substantive equality. The alleged impossibility may mean technological impossibility. On this view, insofar as it governs occasional interactions, private law will typically fail to redistribute resources (or welfare) regularly and systematically among *all* members of society. More fundamentally, terms of interpersonal interactions grounded in distributional equality necessarily eliminate the relational rights and duties that, according to corrective justice theorists, characterize the private law. That is, a commitment to distributional equality makes it the case that private law rights and duties find their grounds not between the interacting right-holder and duty-holder in particular, but rather among all members of society, including of course those who take no part whatsoever in this interaction.

It is against this backdrop that Weinrib, to give one prominent example, argues that private law rights and the duties express respect for persons viewed as "noumenal selves," in complete disregard of their "particular features—desires, endowments, circumstances, and so on—that might distinguish one agent from another."[63] Thus, an ideal of formal equality in private law interactions underwrites a conception of the person "formulated at a high degree of abstraction."[64] Other private law theorists, Kantians or otherwise, may use different terms to make a similar point.[65] Once again, the impossibility claim suggests that replacing a concern for formal equality with a concern for distributional equality would implicate private law in the business of assessing individual merit (of whatever kind) for the purpose of deciding both the content of the relevant primary rights, the protection they deserve, and the appropriate remedy for their breach. And in assessing merit, private law will shift the focus to the "relationship" that

[62] For a contrary view of the role of corrective justice, see James R. Gordley, Foundations of Private Law (2006).

[63] Ernest J. Weinrib, The Idea of Private Law 82 (1995). For somewhat similar statements, see Ernest J. Weinrib, Corrective Justice 26 (2012); Alan Brudner, The Unity of the Common Law 110, 353, 354 (2nd ed. 2013).

[64] Ernest J. Weinrib, Corrective Justice 26 (2012).

[65] See, e.g., Daniel Markovits, Promise as an Arm's Length Relation, in Promises and Agreements: Philosophical Essays 295, 307, 312 (Hanoch Scheinmann ed. 2011) ("generic personality"); Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy 275 (2009) (capacity for "purposiveness"); Alan Brudner, The Unity of the Common Law 354 (2nd ed. 2013) ("free will"); Peter Benson, The Basis of Corrective Justice and its Relation to Distributive Justice, 77 Iowa L. Rev. 515, 561 (1992) ("abstract equality").

holds between each party to the interaction, taken separately, and society as a whole. "Private law" would then become a nominal description of a legal framework, the real function of which is to achieve better conformity with equality in holdings *across society*. Indeed, repudiating formal equality represents a break away from, rather than a shift within, private law.[66] Or so the impossibility claim implies. Note that even critics of corrective justice implicitly reinforce the importance of this claim when they argue that corrective justice is founded on considerations of distributive justice or that corrective justice forms a special domain within the broader field of distributive justice.[67] In that, the critique does not suggest that corrective justice entirely collapses into equality in holdings, but rather insists that formal equality cannot be evaluated apart from the distributive patterns to which it gives rise or otherwise sustains. Corrective justice, if you like, is an especially interesting particular category of distributive justice, rather than distributive justice *simpliciter*.

That said, the so-called impossibility claim is false. It rests on an inaccurate presupposition: That terms of interactions can be grounded in *either* formal *or* distributional equality.[68] A rigid dichotomy like this seems to entail that, since distributional equality is incompatible with the idea of private law interactions, formal equality represents not just one, but rather the *only one*, conception of equality on which to model such interactions. In this sense, formal equality is the distinctive feature of private law's normative content. But as I have just asserted, the rigid dichotomy between formal and distributional equality should be rejected. This is so because it overlooks the possibility of regulating private law's terms of interactions around a *relational*, rather than merely distributional, conception of *substantive*, rather than merely formal, equality.[69]

To unpack this claim, I shall first distinguish between the relational and the formal conceptions of equality, arguing that the former is a species of substantive equality. I shall then seek to show the qualitative difference between relational and distributional equality. Finally, I shall identify doctrinal footprints of relational equality in contemporary private law.

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[66] Note that the argument is not that a distributive turn is not desirable. Rather, the point is that pursuing distributive equality will turn "private law" into a different beast, as it were.

[67] See Hanoch Dagan, The Distributive Foundation of Corrective Justice, 98 Mich. L. Rev. 138 (1999); Peter Cane, Distributive Justice and Tort Law, (2001) NZ L. Rev. 401; CITE TO HANOCH SCHEINMANN; JOHN GARDNER (The Philosophy of Tort Law, forthcoming 2014).

[68] The either/or dichotomy in question may also include a mix of both conceptions of equality, as when considerations of distributional equality are being deployed in the service of moderating some excessive consequences of formal equality's regulative ideal.

[69] Variants of the conception of relational equality are most extensively developed in the writings of political philosophers Iris Young, Elizabeth Anderson, and Samuel Scheffler. I take stock of these variants in Hanoch Dagan & Avihay Dorfman, Just Relationships (unpublished manuscript)

To forestall misunderstandings, my argument is not that relational equality is the most, or even just more, desirable conception of equality on which to model private law's terms of interaction. I take up this challenge elsewhere. Nor do I seek to make the ambitious interpretive claim that this conception, as opposed to the formal one, is already built into the normative content of contemporary private law (although I shall provide some evidence to support such a claim below). Rather, my ambition, recall, is to refute the impossibility claim. Accordingly, I seek to show that it is conceptually possible to ground private law's normative content in a conception of relational equality (which is neither a formal nor a distributional conception of equality).

C. Formal Equality vs. Relational Equality

For the sake of exposition, I shall outline the main implications of formal equality for private law by reference to a distinction between voluntary and involuntary interactions. On the formal conception in question, *voluntary* interactions are governed by a principle of independence.[70] Gaining access to my property, having an entitlement to my services, or entering into a joint venture with me depends on my consent. Anything short of that amounts to an attempt to denying my independence by converting my person or property into a mere means of yours. For this reason, the terms of a voluntary interaction must be determined (or otherwise accepted) by the party whose basic entitlements to exercise control over her person and property are at stake. *Involuntary* interactions, too, are governed by a principle of independence and, so, the terms of such interactions must reflect the formal equal independence of each interacting party, taken severally. That is, they cannot be determined by your (or my) judgment concerning what respect to my (or your) person and property requires.[71] Nor can they be fixed by reference to your (or mine) defective competence.[72] Incorporating such subjective factors into the terms of an involuntary interaction violates formal equal freedom because it gives one party to the interaction the standing unilaterally to determine these terms. Thus, in order to be consistent with formal equal freedom, the terms of involuntary interactions must be determined *objectively* in the negative sense that they must refrain from taking into account the idiosyncrasies of the particular person whose conduct is being assessed.[73]

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[70] For more on the idea of freedom as independence in the context of Kant's private right, see Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy 42-43 (2009).

[71] See, e.g., Jules Coleman & Arthur Ripstein, Mischief and Misfortune, 41 McGill L.J. 91, 109, 112 (1995); Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy 171 (2009) (arguing that "objective standards of conduct are required by a system of equal freedom, in which no person's entitlements are dependent on the choices of others.").

[72] This proposition should be qualified to account for cases in which the defective competence reaches severe incapacity, e.g., outright insanity as opposed to mere diminished capacity.

[73] See, e.g., Arthur Ripstein, Civil Recourse and Separation of Wrongs and Remedies, 39 Fla. St. U. L. Rev. 163, 181 (2011).

The formal conception under discussion presupposes a rather thin conception of the person as free and equal agent.[74] In particular, a private individual is free in virtue of her capacity for choice, which is to say the capacity to set and pursue ends by deploying one's person and property. Private individuals are equal in virtue of having this capacity (to a sufficient degree). Accordingly, for any set of terms of an interaction between private individuals to count as fair, the ability of one participant to set and pursue her ends using her means must be consistent with a like ability on the part of the other participant(s).[75] In conceptualizing the person in these terms, corrective justice theory insists on insulating the interacting individuals from their actual particularities. This is why proponents of formal equality use such terms as "noumenal selves"[76] and "generic personality"[77] to express formal equality's extremely ambitious claim: That "the conceptual structure of private right can only be made to apply to particulars if it is applied in the *same way* for everyone."[78] To be clear, the argument is not that this approach can elaborate a suitable conception of the person for the purpose of ordering interactions between private individuals. Rather, the claim is that it *must* be so in order for persons to engage one another as equals in the private law context.

Relational equality, as I said a moment ago, is a species of substantive equality.[79] To begin with, it is substantive in the contrastive sense that it is not formal (as just described). Moreover, it is substantive in the sense that it does not ignore (at least not entirely) the differences between persons in the following sense. Both the formal and the substantive conceptions of relational equality seek to address the same question: What it is for *persons* to stand in a relationship of equality. The fundamental difference between them arises from the *conception of the person* that each ideal underwrites. Whereas formal equality equates the person with "noumenal sel[f]" or "generic personality," substantive equality can allow personal qualities to inform the conception of the person for the purpose of determining the terms of the private law interactions. To fix ideas, consider a typical interaction between a work candidate and an employer. They may well

[74] The conception of the person in question need not be suitable to other domains of human relationships, such as political relationships (i.e., among citizens).
[75] Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy 362-63 (2009).
[76] Weinrib, The Idea of Private Law 82 (1995). For somewhat similar statements, see Ernest J. Weinrib, Corrective Justice 26 (2012); Alan Brudner, The Unity of the Common Law 110, 353, 354 (2nd ed. 2013); Peter Benson, The Basis of Corrective Justice and its Relation to Distributive Justice, 77 Iowa L. Rev. 515, 559 (1992).
[77] Daniel Markovits, Promise as an Arm's Length Relation, in Promises and Agreements: Philosophical Essays 295, 307, 312 (Hanoch Scheinmann ed. 2011).
[78] Arthur Ripstein, Civil Recourse and Separation of Wrongs and Remedies, 39 Fla. St. U. L. Rev. 163, 181 (2011); Ripstein adds that "the law purports to hold everyone to the same standards on the grounds that everyone has the same formal right to the security of what he or she already has." Ibid.
[79] For more on relational equality in the philosophical literature, see Samuel Scheffler, Equality and Tradition: Questions of Value in Moral and Political Theory chs. 7-8 (2010); Elizabeth Anderson, Equality, in The Oxford Handbook of Political Philosophy 40 (David Estlund ed., 2012).

be formally equal, but they may not be relationally equal insofar as it is permissible—morally and legally—for the employer to refuse to accommodate, to a reasonable extent, basic family or even religious commitments of the former.[80] A refusal to accommodate means that, as between the two, the work candidate is left to bear the entire costs of care-giving or of religious devotion. But this view offends against our moral intuitions (and the modern law[81]) concerning what it is to stand in a relationship of equality—in particular, the non-accommodating employer and the candidate do not stand in a relationship of equality if the former refuses to respect the latter as the particular person whom the candidate really is.[82] Formal equality, that is, leaves the employer with a shallow conception of being in a relationship (of equality) with a "person"—a noumenal person, really—whom the candidate is not.

Thus, on the relational ideal of equality, personal qualities ought not to be excluded entirely from the process of shaping the powers, the rights, and the duties of the interacting parties. The respect that these parties accord one another should sometimes also incorporate, in some measure, the brute fact of their choices (say, to worship god) and circumstances (say, physical disability)—that is, the persons whom they actually are. Persons can relate as "equals" in the formal sense insofar as each can use her own means—her person and property—as she sees fit, regardless of whether these means can guarantee a, more or less, fair starting point from which both can realize their respective freedoms, properly conceived. To relate as equals, the terms of the interaction must not be specified in disregard of the choices and the circumstances that are crucial for the interacting parties to act as self-determining agents *given* the persons they actually are.[83]

Before I demonstrate how this abstract ideal of relational equality can, and probably already does, figure in some areas of private law, I shall first discuss the critical distance between relational and distributional equality.

D. Relational vs. Distributional Equality

One might suspect that relational and distributional equality share more than just the rejection of formal equality. Relational equality, it may be thought, is essentially a form of distributional equality, in which case the dichotomy between formal and distributional

[80] The case for accommodating religious devotion often arises in connection with the candidate's need to observe her Sabbath or other holidays, but there may be other instances as well.
[81] See Sophia Moreau, What is Discrimination?, 38 Phil. & Pub. Aff. 143 (2010).
[82] I do not claim that the employer must accommodate all the particular traits and qualities of the candidate. It seems that familial status and religious faith present compelling cases where some measure of accommodation on the part of the employer is in order.
[83] Again, a more comprehensive discussion of relational equality is developed in Dagan & Dorfman, Just Relationships (unpublished manuscript).

equality remains unchallenged and so does the impossibility claim mentioned above. The suspicion can arise in the light of the example of workplace accommodation and, especially, the *cost*-internalization it requires: That the employer must make reasonable accommodation in the light of the employee's familial status, religious faith, or physical disability. In response, I shall seek to show that it is groundless—relational equality is not reducible to distributive equality; by implication, the demands of justice placed by the former ideal need not replicate, or even merely overlap, the demands generated by the latter.

To begin with, the suspicion at issue cannot be that relational equality has important allocative and, therefore, distributive *consequences*. It surely does (but so does formal equality). Instead, the suspicion must be that relational equality aims, at bottom, to realize distributive equality. A suspicion of this sort reflects a tendency among some liberal egalitarians to cast all questions of equality in distributive terms. On this approach, equality is, at bottom, a distributive value so that a theory of equality is primarily an account of the equalisandum, which is the kind of thing whose equal distribution produces justice.[84] However, relational equality is no mere principle of distributive equality.[85]

Indeed, the suspicion at issue can be explained away. Relational equality concerns the *terms* of the relationships between individuals. Distributive equality focuses on considerations of justice in the holdings of persons, *taken severally*.[86] The different normative orientations just mentioned are not merely theoretical. Rather, the distributive implications of establishing relationally equal terms of interaction need not be compatible with the demands of distributive equality and, indeed, distributive justice. Demanding the employer to accommodate, to a reasonable extent, some of the personal qualities and circumstances of the employee need not pass the bar of distributive justice. It might be best, from the point of view of distributional equality, to impose the costs of accommodation on the entire class of taxpayers, according to a criterion of desert, responsibility, or any other just method of meritorious assessment.

Thus, suppose that relational equality demands that our employer accommodate, to a reasonable extent, the physically-disabled employee (or, for that matter, his religious or

[84] A representative statement of this tendency is G. A. Cohen, On the Currency of Egalitarian Justice, 99 Ethics 906, 906 (1989); Richard Arneson, Egalitarianism, in The Stanford Encyclopedia of Philosophy (2013), available at http://plato.stanford.edu/entries/egalitarianism/.

[85] On the distinction between relational and distributive equality see Samuel Scheffler, The Practice of Equality, in Social Equality: Essays on What it Means to be Equal (C. Fourie et al. eds. forthcoming).

[86] Equality in holdings is used here as a term of art. Distributional equality may be measured by reference to equality in resources, welfare, opportunity for welfare, capabilities, and so on. Addressing this second-order question (which is the question posed by Amartya Sen, equality of what) is beyond the scope of the present discussion.

familial commitments). Whether or not this demand can be justified on grounds of distributive justice depends on considerations that are not relevant to the employer/employee terms of interaction only. Some of these considerations will focus on the employee's situation: For instance, the responsibility of the employee for how his disability came about—viz., whether through fault (no fault) or choice (no choice) of his own. Other considerations will focus on the employer and on the distributive-based reasons for or against imposing the costs of accommodation on the employer's shoulders in particular.[87] For instance, all else is being equal, hiring a physically disabled person is commonly considered morally and socially desirable—for work is consequential to social and political integration. These and many other considerations of distributive equality or fairness determine what allocation of the costs associated with the employee's choice and circumstances counts as distributively just. Relational equality, by contrast, focuses on the terms of the interaction between the employer and the employee. In particular, it focuses on what it means for the former to respect the latter—to take her seriously—by recognizing her as the person whom she actually is. Thus, relational and distributional equality are quite different forms of non-formal equality. This difference, moreover, is institutionally manifested in the different dimensions they each currently capture: whereas the former governs the horizontal interactions between *agents*, the latter regulates the vertical interactions between the distributing agent, which is typically the welfare state, and its *patients*.

IV. Does Relational Equality Figure, in some measure, in the Private Law?

Relational equality, I have argued, proposes an ideal of equality irreducible to either formal or distributional equality. Contrary to formal equality, it can work out a sufficiently thick conception of the person in defiance of the austere conception of the person as constituting "generic personality" or as being a "noumenal sel[f]." And in contrast to distributional equality or equality in holdings, it focuses on the terms of the interaction between the right- and the duty-holder in particular. At least in *theory*, the existence of a norm of relational equality refutes the impossibility claim mentioned above. It is about time to consider whether relational equality can be seen to figure in practice. That is, the challenge is to show that relational equality captures its own normative space, as it were, without collapsing to either formal or distributional equality. The argument going forward, therefore, further elaborates on the ideal of relational equality in private law. The discussion will be brief, since my ambition is to identify, rather than pursue, the doctrinal footprints of relational equality in familiar areas of private law—recall that the point of the analysis is to refute the impossibility claim,

[87] Some liberal egalitarians insist that some choices—such as religious and other demanding forms of ethical commitments—should also be allowed to fall on society as a matter of distributive justice (or, more precisely, as an internal corrective to distributive justice)

rather than develop a comprehensive account of the place of relational equality in private law. But even this brief inquiry will be able to demonstrate that the dichotomy between formal and distributional equality is false and, by implication, private law too can give rise to an ideal of substantive equality.

One last introductory remark is in order. The two cases I shall mention were selected with an eye to two possible challenges, namely, that I exercise an illegitimate pick-n'-choose among the various areas that are included in the "private law." One such challenge may be that of mixing "private law" with extra-private law forms of statutory interventions. Thus, were I to reintroduce the case of workplace accommodation, the counterargument would be that, if anything, it proves that relational equality may well give rise to an ideal of substantive equality, but that this case is better understood as a combination of private law with regulatory law; in particular, the state addresses social injustice by commandeering the support of private employers.[88] The other challenge could arise if I would have invoked doctrines that are peculiar to the common law tradition, rather than to the broader idea of private law—for instance, consider the substantive principles of equity and, especially, their willingness to decide cases by looking beyond the generic personality of the interacting persons.

Thus, the first case is the standard of reasonable care. This piece of doctrine is not only key to understanding a major area in torts. Rather, it has also been corrective justice's poster child for the crucial place of formal equality in private law.[89] The next case is contract, and especially the discrete contractual "relationship" established by self-interested strangers. This latter case will no doubt figure prominently in any account of private law's formal equality.[90] But as I shall seek to show, there are reasons to believe that both cases are better cast in terms of substantive, rather than merely formal, equality.

A. Reasonable Care and Relational Equality

The familiar tort maxim that the tort-feasor takes her victim as she finds him is typically associated with the thin eggshell skull doctrine.[91] But it applies far more broadly than the

[88] To be sure, I continue to insist that the employer's duty to make reasonable accommodation can be properly conceive as a private law duty. As I argue elsewhere, the case of workplace accommodation should best be understood as giving rise to a duty owed by the employer *to* the employee, rather than only a duty to support the effort of the state to fulfill *its* obligation toward would-be victims of discrimination. See Hanoch Dagan & Avihay Dorfman, Just Relationships (unpublished manuscript).

[89] Ernest J. Weinrib, The Idea of Private Law 148 (1995); Jules Coleman, Tort Law and Tort Theory: Preliminary Reflections on Method, in Philosophy and the Law of Torts 183, 206 (Gerald J. Postema ed. 2001). See also Anthony M. Honoré, Responsibility and Luck, 104 L.Q.R. 530 (1988).

[90] See Peter Benson, The unity of Contraqct Law, in The Theory of Contract Law: New Essays 118, 130-31 (Peter Benson ed., 2001); Daniel Markovits, Contract and Collaboration, 113 Yale L.J. 1417, 1450 (2004).

[91] A celebrated case in point is Vosburg v. Putney, 47 N.W. 99 (Wis. 1890).

determination of the amount of compensation to victims with an unusually sensitive constitution—it also governs judgments concerning what counts as negligent behavior.[92] Consider the case where a person with a disability, physical or mental, is struck by an automobile while crossing a street. The victim's disability can affect the terms of the interaction and, ultimately, the resolution of this case in two important ways: It can partially determine whether the injurer's conduct is negligent at all, on the one hand, and it may determine the scope of the liability that can be imposed on a negligent injurer, on the other.[93] Concerning the former, in a tort regime of negligence, the injurer can be held liable only insofar as she has failed to exercise reasonable care toward the victim. The diminished capacity of the victim can be partially constitutive of what counts as reasonable (or unreasonable) exercise of care by the injurer. Indeed, any non-arbitrary attempt at identifying the "reasonable" speed limit presupposes a *prior* judgment concerning what counts as reasonable conduct on the part of a potential *victim* responding to an approaching car. In tort law's parlance, the method of assessing the conduct of the responding victim partially constitutes the content of the duty of care the potential injurer owes the potential victim. It will be unreasonable, say, to drive at 20 MPH under the relevant circumstances if, *and only if*, the law supposes that the potential victim(s) will likely fail to stay off harm's way—this is why reasonable driving next to an elementary school calls for driving at a very slow pace. Concerning the latter, even when the injurer's conduct is utterly negligent, the diminished capacity of the victim may partially fix the scope of the injurer's liability. This is because his or her liability can be reduced to reflect the fault of the victim. Hence, it matters whether or not the law ignores the disability in question for the purpose of assessing comparative negligence: ignoring the disability decreases the scope of injurer's liability, and *vice versa*.

A commitment to formal equality calls for ignoring the disability in question.[94] This is because the terms of the interaction must be determined objectively in the negative sense that it must refrain from taking into account the idiosyncrasies of the particular

[92] That is, the maxim in question applies not only to the proximate or legal cause element of the negligence cause of action, but rather also to the breach element.

[93] I describe the effects of comparative (or victim) fault in some detail to forestall misunderstanding. Some leading tort scholars treat comparative fault as if it is morally unrelated to considerations of primary (or injurer) fault. See, e.g., Gregory C. Keating, Reasonableness and Rationality in Negligence Theory, 48 Stan. L. Rev. 311, 371 (1996); Stephen Todd, Defences, in The Law of Torts in New Zealand 1040-1 (Stephen Todd ed., 3rd ed. 2001). On this familiar view, where negligence on the part of the injurer may express a moral failure, negligence on the part of the victim can only reflect imprudence toward oneself. The discussion in the main text below shows why this view misses the intimate connection between the two considerations of negligence (the injurer's and the victim's). That is, every time courts determine the reasonableness of the conduct of either one—the injurer or the victim—they necessarily engage in the business of fixing the terms of the interaction between both. And the terms of the interaction, at least in connection with accidental physical harm, cannot escape considerations of justice in relationships.

[94] See, e.g., Jules Coleman & Arthur Ripstein, Mischief and Misfortune, 41 McGill L.J. 91, 109, 112 (1995); Ernest J. Weinrib, The Idea of Private Law 147-52 (1995); Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy 171 (2009).

person whose conduct is being assessed. Incorporating such subjective factors into the terms of an involuntary interaction would give one party to the interaction the standing to determine these terms unilaterally, which is to say in violation of formal equality.[95] The law, however, rejects formal equality. In its stead, the law adopts the maxim mentioned above, requiring that the duty of care owed by the injurer to the victim should be partially fixed by the latter's sensibility. The injurer must be responsible to take extra care—viz., incur additional costs—to protect the disabled person, rather than merely the non-disabled person, from the former's dangerous activity. As Stable J. points out, it cannot be the case that "the law is quite so absurd as to say that, if a pedestrian happens to be old and slow and a little stupid, and does not possess the skill of the hypothetical pedestrian, he or she can only walk about his or her native country at his or her own risk."[96] Stable J. then observes "[o]ne must take people as one finds them."[97]

This requirement, moreover, is best understood as giving rise to an idea of relational equality as opposed to either formal or distributive equality. I have already mentioned that an idea of formal equality calls for a duty of care that exempts the injurer from attending to the special circumstances of the victim. Such a non-accommodative duty would only go so far as respecting the victim in the abstract, that is, apart from her special makeup. Furthermore, it is also clear that accommodating the sensibilities of the victim is not necessarily a requirement grounded in distributive equality. Indeed, the responsibility of the pedestrian concerning how his disability came about—viz., whether through fault (no fault) or choice (no choice) of his own—could matter from a distributive equality point of view. However, it makes absolutely no difference when considering the existence and the content of an accommodative duty of care in negligence law.

To be sure, introducing an idea of relational equality in connection with negligence law raises concerns that go beyond the case of disabled victim. In particular, there exists any number of questions regarding the appropriate scope and extent of the accommodation to which relational equality gives rise. For instance, what personal qualities ought to be accommodated by the duty of reasonable care—in particular, what sensibilities other than physical, mental, and cognitive disabilities must be

[95] Corrective justice theorists are quite ambivalent about the possibility of justifying the departure from the objectively-fixed standard of due care. On the one hand, they invoke formal equality against such a departure. See Ernest J. Weinrib, The Idea of Private Law 169 n.53(1) (1995); Arthur Ripstein, Civil Recourse and Separation of Wrongs and Remedies, 39 Fla. St. U. L. Rev. 163, 181 (2011). On the other hand they make (very brief) remarks concerning the possibility of reconciling corrective justice with *departures* from formal equality. See Arthur Ripstein, Equality, Responsibility, and the Law 111-13 (1999); Ernest J. Weinrib, The Idea of Private Law 183 n.22 (1995). For other inconsistencies in the corrective justice approach to the standard of due care, see Mayo Moran, Rethinking the Reasonable Person 52-54 (2003).

[96] Daly v. Liverpool Corporation [1939] 2 All ER 142.

[97] Ibid.

accommodated? Must the same analysis be applied to the case of a disabled injurer?[98] Must a commitment to relational equality be sensitive to the choices of victims (say, to their risk-preferring attitudes) or to their conceptions of the good?[99] Can equality considerations other than relational equality (say, distributive equality) override the demands placed by an accommodative duty of care?[100] What is the standard of due care that is all-things-considered best in the case of children?[101] And so on. I set these questions to one side since my present ambition has been to identify, rather than pursue, the existence of relational equality in private law. In that, I have demonstrated that the dichotomy between formal and distributional equality is false not merely theoretically, but also legally—the private law doctrine of reasonable care features, to some extent, an ideal of substantive equality.

B. Contract, Property, and Relational Equality

The intuition that a contract interaction just is a relationship among formally equal persons is hard to resist. People who bargain over a contract may differ from one another in any number of ways, including in their capacities, skills, experience, wealth, and other traits. Accordingly, it may be thought that the only possible way for the terms of their contractual interaction to express some notion of equality at all is by resort to formal equality. However, I shall argue that it is better to understand the formal equality of the typical contractual engagement not as a freestanding normative ideal, but rather as a conditional one—that is, contractual interaction expresses the formal equality of the interacting parties *but only because, and only insofar as*, it occurs against the background of substantive equality.

The seemingly tight connection between the contract form of interaction and the ideal of formal equality is, to an important extent, the by product of the various doctrines whose basic organizing idea is that of excluding the participation of people whose capacities for contract-making and -keeping lies below a certain threshold. Such doctrines aim to reduce the risk that the disparities between the parties will make formal equality not just undesirable but rather morally hollow. The reduction in question can be produced by placing three different sets of constraint on the legal practice of contract—concerning the requisite personality to make contract, the scope of permissible

[98] See Avihay Dorfman, Negligence and Accommodation (unpublished manuscript).
[99] Ibid. See also, Avihay Dorfman, Assumption of Risk, After All, 15 Theoretical Inquiries L. (forthcoming 2014).
[100] See Gregory C. Keating, Rawlsian Fairness and Regime Choice in the Law of Accidents, 72 Fordham Law Review 1857 (2004); Ariel Porat, Misalignments in Tort Law, 121 Yale L.J. 82, 97-107 (2011).
[101] See Mayo Moran, Rethinking the Reasonable Person (2003).

manipulation within the contract relationship, and the limits of the contractual transaction itself. I shall take each set in turn.

First, some doctrines draw clear and rigid lines between those who possess the requisite legal personality and those who do not—for instance, infants (including grown-up children) and the mentally disadvantaged do not possess the legal personality to make an enforceable promise.

Second, other doctrines, such as duress, undue influence, and, to some extent, unconscionability, further constrain the scope of the practice of contract-making even when the participants possess the requisite legal personality and, to this extent, stand in a relationship of *formal* equality. The doctrines in question display hostility toward a particular transaction based on the worry that participants could not approach their bargain on an equal footing because, as between the two, one of them is far less competent to make a contractual promise under the relevant circumstances.

Finally, there exist doctrines, sometimes inaccurately referred to by lawyer economists as private takings, that seek to do away with the contractual transaction as a necessary means to receive authorization to use another's property. Consider the doctrine of private necessity and, in particular, the entitlement of a severely strained owner to use another's property to save her own property (including or excluding her person).[102] Normally, securing the *ex ante* agreement of the latter reflects the status of the interacting parties as formally equal. However, insisting on the parties being formally equal in the face of an unexpected emergency is tantamount to empty formalism—after all, it seems implausible to ignore the disadvantageous position occupied by the strained owner relative to the other party in the interaction. The doctrine of private necessity dissolves this inequality difficulty in a way that goes beyond the doctrines mentioned above (especially duress and unconscionability). Indeed, private necessity sets to one side the basic requirement to secure the consent of the owner, rendering it permissible unilaterally to use this owner's property to save one's own.

A person who needs to invade the property of another because her own property is under imminent danger of grave harm does not stand in a relationship of genuine equality to the owner of the invaded property, at least not for the purpose of engaging in a contractual transaction. Against this backdrop, the doctrine of private necessity beats a retreat from contract not because the persons concerned are formally unequal. Rather, the reason is that although they are formally equal, this measure of equality cannot lauder the relationship of substantive inequality (in bargaining powers) that exists due to the

[102] Private necessity, as the famous case of Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910) demonstrates, applies not only to cases where the person of the defendant is at risk (as in *Ploof v. Putnam*, 71 A. 188 (Vt. 1908)), but rather also when only her property is at risk.

unusual circumstances. At the same time, it is important to note that the doctrine is not grounded in considerations of distributive equality.[103] In particular, a partial privilege to make an unauthorized use of another's property does not express an ideal of distributive equality.[104] After all, the law confers this privilege in complete disregard of the material well-being of the relevant parties either prior to or after the interaction. As a result, the duty to compensate for the damage occasioned by the privileged user may allow, reinforce, or even exacerbate standing distributional *in*equalities.

Now, the doctrines just mentioned attempt to reduce the gap between the formal and the non-formal dimensions of equality among parties in a contract. But it may well be the case that some or even all of them currently fail to eliminate this gap, perhaps due to the over-restrictive interpretation of these doctrines by courts. However, the point I was making is structural, rather than substantive: That the various sets of doctrine in question serve, among other things, as buffers against the excesses of treating the parties in a contract situation as formally equal. In principle, these doctrines turn what would otherwise be a *freestanding* ideal of formal equality into one which is *conditional* on its (loose) proximity to substantive equality.

* * *

To conclude, the preceding discussions have sought to demonstrate that, first, the impossibility claim is false when tested on two core private law areas and, second, that an idea of substantive equality can be helpful, at least in some measure, to understanding their respective normative underpinnings. It may, therefore, be appropriate to supplant the impossibility claim with a possibility claim—that is, that the terms of interactions of at least some, non-trivial chunks of private law *can* be grounded in substantive, though not distributive, equality.

Conclusion

Contemporary discussions of private law theory have sought to divine the deep structure and content of private law by reference to two key distinctions. First, the distinction between private and criminal law has been utilized to flesh out the distinctively bipolar

[103] Indeed, considerations of distributive justice typically fall outside the purview of the private necessity doctrine. See Southwark v. Williams [1971] Ch. 734, 744 (A.C.). The opposite approach is defended in Eduardo Moisés Peñalver & Sonia K. Katyal, Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership 153-54 (2010).

[104] Of course, the privilege is partial only, since the right to use another's property comes with a duty to make good on the damage done to this property.

structure of private law. Second, the distinction between formal and distributive equality has served to highlight the special terms of interaction established in private law. In these pages, I have argued that the theoretical significance of these distinctions is overdrawn. In fact, I have argued that neither distinction (nor some combination of both) succeeds in identifying private law's nature (where such exists).

If I am right, therefore, the ongoing debates that arise out of the two key distinctions just mentioned might distort, rather than advance, the important task of understanding and evaluating private law. Concerning the first key distinction, attempts to elucidate the nature of private law by comparison to the different-in-kind criminal law may likely arrive at grossly over-inclusive accounts of the what private law is such as the ones developed by the civil recourse theory. Concerning the second key distinction, the debates concerning the nature of the connection, and possible overlap, between ideals of formal and distributive equality in private law may fail to do justice to the normativity of private law. Indeed, the introduction of relational equality is crucial especially because an *ideal* of formal equality is subject to familiar egalitarian objections, on the one hand, while the realization of distributive equality through private law is replete with both pragmatic and principled difficulties, on the other.[105]

[105] See, further, Hanoch Dagan & Avihay Dorfman, Just Relationships (unpublished manuscript); Hanoch Dagan & Avihay Dorfman, The Value of Private Law (unpublished manuscript).