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## Distributive Injustice and Private Law

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Aditi Bagchi\*

Of what consequence is distributive injustice to private law? It may be surprising that prevailing academic opinion is that distributive justice is irrelevant to private law.<sup>1</sup> This position is less surprising once one begins to work out the contrary intuition, i.e., that distributive injustice alters our rights and obligations under private law.

The difficulty is translating the demands of social justice into the rights and responsibilities of particular persons toward one another (i.e., agent-specific reasons for liability) in a context where only the entitlements of two people are in dispute. Distributive justice entails a just distribution of resources throughout a political community, and is usually thought best

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\* Assistant Professor of Law, University of Pennsylvania Law School. Many thanks to Matthew Adler, Ed Baker, Stephen Perry and Chris Sanchirico for very helpful comments and discussion. This paper also benefited greatly from comments received at a faculty workshop at Penn Law School.

<sup>1</sup> See, e.g., among legal economists, Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 677 (1994) (arguing that because legal rules designed to redistribute income produce the distortions resulting from the redistribution itself as well as inefficiencies in the activities regulated by the legal rules, it is “appropriate for economic analysis of legal rules to focus on efficiency and to ignore the distribution of income in offering normative judgments”); Michael Trebilcock, *THE LIMITS OF FREEDOM OF CONTRACT* 97-101 (1993); A. Mitchell Polinsky, *AN INTRODUCTION TO LAW AND ECONOMICS* 124-27 (2d ed. 1989). See, e.g., among legal philosophers, Arthur Ripstein, *Private Order and Public Justice*, 92 VIRGINIA L. REV. 1391, 1395 (2006) (“Both tort and property protect what people happen to have, without any thought about how they got it or what they should have from a moral point of view. The law attends to the form of the transaction or holding, rather than the needs or interests of the parties to it.”); Stephen Perry, *On the Relationship between Corrective and Distributive Justice*, in OXFORD ESSAYS ON JURISPRUDENCE 237, 247 (Jeremy Horder ed., Fourth Series 2000) (corrective justice is “an independent moral principle that operates within the context of distributive justice, but not as part of it”); Peter Benson, *The Basis of Corrective Justice and its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 607 (1992) (“The justification of abstract right and of its principles of acquisition does not depend in the least on the prior satisfaction of any distributive requirements of background justice.”); Ernest Weinrib, *THE IDEA OF PRIVATE LAW* 80 (1995) (“As an autonomous form of justice, corrective justice operates on entitlements without addressing the justice of the underlying distribution.”). See also Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 584 (1982) (“The acceptance of the distributive motive into the discussion of what rules of agreement should be in force has never been more than partial and oblique.”). But see Kevin Kordana & David Tabachnick, *Rawls and Contract Law*, 73 Geo. Wash. L. Rev. 598 (2004); Chris Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003 (2000-01); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998); Anthony Kronman, *Contract Law and Distributive Justice*, 89 Yale L. J. 472 (1972); Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971).

achieved through broad-based measures aimed at moving resources between groups through tax and transfer. The demands of distributive justice speak to the community as a whole and transfers are usually made collectively; the state does not pair wealthy with poor individuals and direct each individual to hand some portion of her resources over to another individual. It is generally up to the state to figure out what to do about distributive justice and individuals are free to dispose of their post-tax income as they see fit.

Behind the affirmative arguments in favor of using the state's powers of tax and transfer to effect redistribution, powerful intuitions regarding the boundaries of individual responsibility and its fundamental role in private law have been taken to limit the domain of distributive justice. In private law, individuals are held to account for the losses of others, and we must be able to say that she who is being held to account for a loss is in some sense responsible for it. Whatever our disagreements on the nature of responsibility and its ultimate justificatory function in law, it is difficult to conceive the machinery of private law without some notion of responsibility that explains why we may make some individuals pay but not others, even if we reject the notion that such responsibility defines the scope of legal liability. Theorists of corrective justice are persuasive that a person is responsible for a harmful outcome to which she causally contributed "if and only if she had the capacity to foresee that outcome and the ability and opportunity to take steps to avoid it."<sup>2</sup> In pinning liability to responsibility, the law recognizes "the value of choice: that is to say, the value for an agent of having what happens (including what obligations are incurred) depend on how he or she responds when presented with a set of alternatives under certain conditions."<sup>3</sup> Distributive injustice as a general matter does not necessarily reflect any given individual's choice and thus fails to generate individual

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<sup>2</sup> Perry, *supra* note 1, at 238.

<sup>3</sup> T.M. Scanlon, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW* 112 (P. Benson ed. 2001).

responsibility of this type. Stephen Perry and others have argued that “[i]f distributive justice gives rise to reasons for action for individuals, as opposed to the state, they are presumably agent-general reasons.” That is, “they pertain to all persons within society (or to society as a whole).”<sup>4</sup> Making defendants pay plaintiffs solely because of their respective economic positions, or more practically, making defendants pay more or less in light of their respective wealth, might mitigate the moral arbitrariness manifest in their relative circumstances, but it does so at the expense of arbitrariness within the groups of the well- and worse-off. To be sure, arbitrariness is rampant in social life. But it is nevertheless a strong weight against any institution or practice that would exacerbate it.

And yet the question remains. What happens when the state does not get distribution right? That is, are individuals free to do what they will with their post-tax resources even where the state has not answered adequately the demands of distributive justice? Does the concept of individual responsibility compete so radically with distributive justice that it bars any accommodation of distributive aims in private law? In this paper, I attempt to justify the qualifying effect of distributive injustice on rights and responsibilities otherwise secure under private law. Excessive inequality does not simply identify the basic structure of society as

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<sup>4</sup> *Id.* at 238-39, 243. See also Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 93 (1995) (“Corrective justice concerns the rectification of losses owing to private wrongs. In contrast, distributive justice concerns the general allocation of resources, benefits, opportunities, and the like. The duty to repaid under corrective justice is agent-specific—only wrongdoers need make up the losses of others. The duties imposed by distributive justice are, in contrast, agent-general—everyone has a duty to create and sustain just distributions.”); Eric Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL. STUD. 283, 284 (1995) (“Critics further argue that the welfare system provides a more equitable way to redistribute wealth than legal rules do, because legal rules redistribute wealth only to people who happen to be injured or people in the class of those likely to be injured in a way that can be redress by courts—a small and arbitrarily selected portion of the needy population.”); Melvin Eisenberg, *The Theory of Contracts* 257 in Benson ed., *supra* note 3 (rejecting redistribution in contract law as “completely haphazard”).

unjust.<sup>5</sup> It creates *moral risk* for individuals operating within that structure. Most theorists vaguely gesture toward the possibility that gross injustice might call for redistribution through private law but they implicitly offer an implausible choice: either distributive justice takes over when there is gross distributive injustice, or it does nothing, in all cases short of moral crisis.<sup>6</sup> My argument applies in a wider set of cases, including those circumstances in which most societies find themselves. Even in familiar circumstances, distributive injustice infects legal rules which would otherwise be not only just but optimal. Whatever the relationship between distributive justice and private law in ideal theory, a failure to meet our obligations of distributive justice destabilizes our other our rights and obligations toward one another.<sup>7</sup>

Others have developed the argument that individuals are not morally free to keep their winnings in the market place.<sup>8</sup> My argument is different, in that it focuses not on the individual's moral position but on the law's treatment of it. In particular, I am concerned with how distributive injustice affects individual's legal rights and obligations. Unlike most others who have attempted to defend a role for distributive justice in private law, my argument respects the principle that an individual should not be legally held to account for another's loss in private law unless she is responsible for the loss; distributive justice does not swallow private law

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<sup>5</sup> I do not attempt to assess the merits of the leading theories that specify what level of inequality is unjust. In general, I rely on John Rawls, *A THEORY OF JUSTICE* (1971), as a persuasive account of how much inequality is morally tolerable.

<sup>6</sup> See, e.g., Coleman & Ripstein, *supra* note 4, at 93 ("a requirement that unjust losses be rectified only makes sense provided holdings are not entirely unjust"); Eisenberg, *supra* note 4, at 259 ("Contract law as an institution is acceptable only if the basic structure of the society is fair. If the basic social structure is unfair, rules designed in part to accomplish corrective justice within that structure, including the rules of contract law, may not be justifiable.").

<sup>7</sup> See Liam Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFFAIRS 251 (1999). In arguing that individuals have a duty to promote distributive justice directly, e.g., through direct voluntary transfers, Murphy notes: "What we will always appeal to in practice are principles of nonideal theory. If our theory has implausible implications for the nonideal case, the theory may have some intellectual interest, but it would fail as a normative political theory." *Id.* at 279. See also Michael Phillips, *Reflections on the Transition from Ideal to Non-Ideal Theory*, 19 *Noûs* 551, 554 (1985) ("it cannot be safely assumed that perfect ideals are superior to imperfect ideals for evaluating the moral rules and political institutions of the world in which we live").

<sup>8</sup> See, e.g., Murphy, *supra* note 5; G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 PHIL. & PUB. AFFAIRS 3 (1997).

whole.<sup>9</sup> But a background of distributive injustice properly informs our understanding of what constitutes responsible conduct, and thus, the scope of otherwise secure legal entitlements.

The qualified nature of private law rights under conditions of distributive injustice stems from the force of *imperfect social rights*. Imperfect rights are not held against any single person, and when violated, they do not ground a claim for any particular quantum of redress. Imperfect social rights are claims arising under the principles of distributive justice. Because imperfect social rights have been asserted primarily as claims against the state, and because they do not lend themselves to constitutional adjudication, they have had little traction. In this paper, I will emphasize that any claim on the state is derivative from social rights held against other citizens. Even those who believe that individuals have justiciable social rights against the state should concede an imperfect right against other individuals in the ubiquitous case of partial compliance by the state.

‘Remembering’ that the right to basic income ultimately is held against other individuals takes the issue outside the boundaries of public law. Although the United States does not recognize a constitutional right to adequate income<sup>10</sup>, our private law should and does implicitly recognize certain imperfect social rights. Imperfect rights shape rights and responsibilities with respect to individuals against whom an imperfect right-holder does not otherwise bear a direct claim under private law. They do not give rise to independent, affirmative claims between private persons, but they do disallow, or at least discourage through higher pricing, conduct that would otherwise be permissible.

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<sup>9</sup> I hope to disprove the claim that “from the standpoint of distributive justice, it would be simply arbitrary to restrict the application of its notion of fairness to anything short of the entire transaction.” Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1086 (1988-89). I believe my approach effectively integrates distributive claims with non-distributively motivated limits on legal liability.

<sup>10</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973); *Lindsay v. Normet*, 05 U.S. 56, 74 (1972), *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970).

I will first develop the argument in the context of the contractual doctrine of unconscionability. The doctrine of unconscionability concedes that contract rights are not just defeasible upon payment or change of circumstance but may fail for reasons exogenous to core contract principles. Under conditions of partial compliance, imperfect social rights held against the state sometimes negate the force of contract rights and their correlative contract obligations. Contract claims that would otherwise succeed, fail, because the transaction at issue exploits and exacerbates distributive injustice. My aim is both to shed light on the doctrine of unconscionability and to demonstrate a deeper point about the relationship between imperfect social rights and private law.

My second example of the destabilizing effect of inequality on private law is in the realm of mass torts. While causation is an essential element of tort liability, it has been observed that causation analysis has been relatively relaxed in the context of mass product liability, as in litigation pertaining to asbestos, smoking and high-fat foods. I will suggest that it is natural and perhaps appropriate that a less rigorous standard be applied in light of the underlying inequities reflected in the fact patterns of these cases. While the socio-economic conditions that may have caused certain social groups to have been disproportionately affected by the risky products in question are not on trial, easing the burden on class action litigants is sometimes a third-best solution where there is neither background distributive justice nor the political will to compensate victims ex post through direct legislation.<sup>11</sup> Once again, well-entrenched rules of

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<sup>11</sup> Kaplow & Shavell, *supra* note 1, raise but do not respond to the argument that redistribution through legal rules may be a second best solution where the legislature fails to accomplish redistribution but note that it raises questions “about the function of courts in a democracy” and suggest that “it seems unlikely that courts can accomplish significant redistribution through the legal system without attracting the attention of legislators.” *Id.* at 675. The objection that judges should not pursue ends that the legislature has not specifically endorsed is ironic coming from legal economists who usually endorse the invocation of efficiency norms directly into common law reasoning. Two possible arguments might justify the application of efficiency but not equity norms. First, one might argue that efficiency is already part of the positive law for historical reasons. The temptation of this argument likely motivates the descriptive part of the law and economics project – the claim indirectly supports the accompanying normative

private law give way under the pressure of imperfect social rights. Distributive injustice expands the scope of individual responsibility for others' losses.

The paper is structured as follows. In Part I, I will explain the majority position on the irrelevance of distributive justice to private law. Scholars of both corrective justice and legal economics posit the 'privateness' of private law in opposition to the quintessential 'publicness' of distributive justice. In Part II, I develop the concept of imperfect social rights. I begin by exploring the general character of imperfect rights, relating them to the more familiar concept of imperfect duty and inquiring whether giving imperfect rights legal force is ever an appropriate method of enforcing imperfect duties. I conclude that imperfect rights may be enforceable. I then turn to the specific imperfect rights generated by distributive justice, distinguishing them from other derivative duties that individuals may have in furtherance of distributive justice. I argue that while justice may be the first virtue of social institutions, some of the rights and obligations of justice which are not enforceable as against the state may be given partial legal effect by individuals and against other private persons. In Part III, I argue that the doctrine of unconscionability may be understood to give effect to imperfect social rights. In Part IV, I contend that the application of private law doctrine too is affected by background inequality, as in the context of mass torts.

## **I. How Private is Private Law?**

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arguments. Second, one might argue that efficiency is apolitical in a way that distribution is not. Both claims would be false, though I cannot present a full argument to that effect here. See Ed Baker, *The Ideology of Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975). But it is worth noting briefly that if any policies should be implemented by the courts without an explicit legislative mandate, it may those with respect to which we expect the political process to function inadequately because the group disadvantaged by inaction lacks the power to compel action. Cf. John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (arguing that judicial scrutiny should protect minorities in the political process). Such a process-sensitive approach is more likely to favor judicial activism in service of distributive justice than of efficiency. Moreover, some level of redistribution already has been endorsed in public policy. The fact that the legislature (and the political community at large) cannot agree either on the optimal level of redistribution or the best means of redistribution does not show that there is no agreement on the need for some transfers, especially in the modest fashion advocated here. Legislative inaction does not demonstrate a consensus against distribution at the margins.



In arguing that imperfect social rights destabilize rights and responsibilities otherwise secured by private law, my aim in part is to highlight one public aspect of private law. But this public aspect is significant only inasmuch as private law is otherwise generally understood to be ‘private.’ Notwithstanding the label, it is not so obvious in what sense private law is private. One initial observation might be that litigation in private law is initiated by a private (non-governmental) person against another private person. But the fact that plaintiff and defendant are both private persons is arguably just symptomatic of a deeper privateness in private law. Scholars of private law will differ on the question of in what that thicker notion of privateness consists.

Scholars of corrective justice might answer that private law implements bilateral justice, and is private in the sense that its principles derive from the rights and responsibilities of two parties with respect to one another. The form of those rights and responsibilities do not importantly depend on a broader social scheme.<sup>12</sup> Along these lines, Ernest Weinrib emphasizes that it is a “basic feature of private law” that “a particular plaintiff sues a particular defendant. Unjust gain and loss are not mutually independent changes in the parties’ holdings; if they were, the loss and the gain could be restored by two independent operations. But 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.”<sup>13</sup> On this view, using the plaintiffs and defendants that appear before the court to advance broader social policies is equally misguided whether the policies in

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<sup>12</sup> Notably, scholars of corrective justice allow generally that the content of particular rights and duties may depend on social and historical context. See Weinrib, *supra* note 1, at 227-28; Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L. J. 91 (1995). As a matter of constitutional doctrine, the Supreme Court rejected the pre-political status of contract in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) (“The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.”).

<sup>13</sup> Weinrib, *supra* note 1, at 63.

question are wealth-enhancing or wealth-redistributing.<sup>14</sup> Most other scholars of corrective justice are also committed to the normative independence of the principles of corrective justice.<sup>15</sup> While normative independence need not correspond to institutional separation, because corrective justice principles are manifest in private law, most corrective justice scholars reject any attempt to enlist private law in the service of an exogenous principle like distributive justice.<sup>16</sup> Private law is then private in that it does not depend on or appeal to any public policy subject to political negotiation. However, private law is not as private as moral law; unlike moral law, it has the essential feature that its positive content is determined and enforced by the state.

Scholars of law and economics construe the ‘private’ element of private law differently. Unlike theorists of corrective justice, legal economists argue that private law does and should advance public purposes, and in particular, the relatively neutral goal of aggregate wealth maximization, which often serves as a proxy for the more normatively interesting ends of welfare, utility or even happiness. Thus, the scope of private rights and obligations are determined with respect to the interests of others besides those of the plaintiff and defendant on

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14 Cf. Thomas Pogge, *Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions*, 12 *Social Phil. & Pol.* 241, 246 (1995) (“Understood as guides to the assessment of social institutions, contractarianism and consequentialism are for the most part not competitors but alternative presentations of a single idea: both tend to assess alternative institutional schemes exclusively by how each would affect its individual human participants.”).

<sup>15</sup> See, e.g., Perry, *supra* note 1, at 237 (“corrective and distributive justice are conceptually independent”).

<sup>16</sup> To be fair, some corrective justice theorists have developed sophisticated accounts of the relationship between distributive and corrective justice that do not insist on their independence. See, e.g., Coleman & Ripstein, *supra* note 4, at 93 (observing, for example, that “corrective and distributive justice are connected [not just in the sense that grave distributive injustice delegitimizes the entitlements protected by corrective justice but] in another way as well. However distributive shares are to be fixed, their value will depend, in part, on the tort regime that is in effect.”). And other theorists, like Kevin Kordana and David Tabachnick, have embraced fully incorporating private law into the machinery with which the state pursues distributive justice. *Rawls and Contract Law*, 73 *GEO. WASH. L. REV.* 598 (2004). They argued that “the rules of contract law [are] designed (in conjunction with all other rules and policies) in a manner maximally instrumental to the principles of justice,” i.e., “as part of an overall scheme that maximizes the position of the least well-off.” *Id.* at 621-22. While I agree that private law is not autonomous, my argument here does not go as far in denying the possibility that private law may be designed primarily to serve ends other than distributive justice, especially in ideal theory.

whose claims and liabilities a given court may pass judgment. Of course, that has not translated into pursuit of social justice through private law. Kaplow and Shavell have argued against the pursuit of redistribution through private law because, while redistributive taxation distorts work incentives, redistributive legal rules are “doubly distortionary” because they also distort the level of precaution undertaken in activities governed by those rules.<sup>17</sup> Chris Sanchirico has demonstrated that their argument is not persuasive on its own terms, because “distortions may counteract one another, and eliminating some of them may exacerbate the negative impact of those that remain.”<sup>18</sup> Moreover, welfare transfers may be possible at the margins around optimal legal rules without any net welfare loss.<sup>19</sup> Kaplow and Shavell’s argument may be gradually losing its dominance in the economics literature. But even while it stood, Kaplow and Shavell’s argument was not a defense of private law from the imposition of “public” ends or public interest. To the contrary, Kaplow and Shavell, like other legal economists, favor the use of private law to pursue public interests, and do not feel constrained by any independent normative principles that might be embodied in private law institutions. Their argument against the pursuit of redistribution is private law is not an argument about the private nature of private law’s *ends*.

The legal economic approach nevertheless defers to a distinct notion of ‘privateness’ and respects private law as the principal space within which those values reign. Legal economists are generally loathe to second-guess preferences adopted by individuals and distrust attempts by the state to second-guess the market’s gage of those preferences. Welfare is, after all, normally taken to be the satisfaction of private preferences; wealth is the means by which individuals pursue the satisfaction of private preferences. Private law, to a far greater extent than public law,

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<sup>17</sup> See Kaplow & Shavell, *supra* note 1.

<sup>18</sup> Sanchirico, *supra* note 1, at 1017.

<sup>19</sup> *Id.* at 1025. See also Ronen Avraham, David Fortus, & Kyle Logue, *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125 (2004); Chris Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. Legal Stud. 797 (2000).

uses market mechanisms to advance the public interest, and it does so by harnessing the value of private information. Private law enables the efficient allocation of resources by setting rules which are likely to allocate entitlements to those who value them most. The state does not independently pass judgment on the relative value of proposed uses of a given property right; private information, valuations and beliefs are king. In fact, were welfare-consequentialists not committed to the priority and privilege of private information and practices – that is, if they did not take satisfaction of private preferences as the primary or sole determinant of the welfare they seek to promote – they might not reject redistribution in private law. Daphna Lewinsohn-Zamir has recently argued that redistribution through private law is more welfare-enhancing than tax and transfer because the former “convey[s] a message as to the things worth having,” “assist[s] in forming notions of entitlement” which are more conducive to self-respect, “enhance[s] recipients’ valuation of the things they have been given,” and faces less resistance from givers.<sup>20</sup> This line of argument is probably anathema to most legal economists because it seeks to dethrone the satisfaction of private preferences, including private values, in favor of an ostensibly objective measure of well-being.

There is another sense in which the legal economic approach to private law treats the domain of property, contract and tort as ‘private.’ In selecting the optimal legal rule, legal economists aggregate expected welfare or wealth under various possible rules. Only aggregates are considered, and total welfare or wealth is nothing more or less than the sum of all private welfare or wealth. Just as the corrective justice approach focuses on the individual as the agent capable of pre-political responsibility, legal economists focus on individuals as the relevant unit of analysis because only individuals form preferences (or so the approach assumes). In both cases, then, matters of distributive justice are naturally set aside or downplayed because

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<sup>20</sup> *In Defense of Redistribution through Private Law*, 91 MINN. L. REV. 326, 331-32 (2006).

distributive justice is a feature of the collective.<sup>21</sup> But if corrective justice theorists and the liberal tradition of which they are often a part are sometimes accused of exaggerating the boundaries between persons, legal economists, and the consequentialist tradition of which they are a part, may fail to take seriously the difference between persons.<sup>22</sup> This criticism is usually leveled at the aggregation strategy per se, but a certain move in the relevant literature is particularly telling. While legal economists sometimes set aside distributive justice for expositional purposes, or because they believe legal rules just never are a good way of advancing distributive justice, often distributive justice is set aside because the economic model takes as its typical economic actor a large firm with numerous, diversified shareholders, equally interested in the performance of all firms in their respective portfolios.<sup>23</sup> On this assumption, the real parties in interest in private litigation are indistinguishable.<sup>24</sup> The same social group – diversified shareholders – is interested equally in the performance of plaintiff and defendant. Thus, there is no important distributive question at stake in private law disputes. If one further assumes that all citizens belong to this group of diversified shareholders and that individuals have no economic interests other than those related to their shareholder status, then matters of distributive justice move still further out into the horizon. If distributive justice is quintessentially public, in that it invokes obligations related to one's membership in a political community, removing the

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21 Of course legal economists do not set aside distributive questions only in the context of private law. One might further divide public law into the domain of tax and transfer, on the one hand, and everything else (with the possible exception of education, which is arguably part of one's initial 'distribution' of human capital and therefore appropriately treated as something more than just another market for services), on the other.

<sup>22</sup> See Rawls, *supra* note 5, at 27 (critiquing utilitarianism).

<sup>23</sup> See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 555 (2003) ("A diversified owner wants the value of his portfolio to increase, not the value of particular firms in his portfolio at the expense of other firms in his portfolio.")

<sup>24</sup> See Daniel Markovits, *Making and Keeping Contracts*, 92 VA. L. REV. 1325, 1350 (2006) ("Whereas contracts, intuitively understood, involve coordination among multiple parties, the transactions addressed by Schwartz and Scott's economic theory ultimately involve only one."). Note that the collapsing of multiple parties into one does not parallel the homogenization of all parties in Rawls' original position. In the original position, parties appear but are not actually identical; stripping them of their particularities is a way of thinking about distributive justice among persons who are in fact different. In the single shareholder model, by contrast, the heterogeneity is apparent and the identity of interests is real.

messiness not just of distributive justice but of distribution from private law indeed leaves a distinctly private sphere.

Furthermore, just as the bilateral character and/or normative independence of corrective justice is taken to justify an indifference to matters of distributive justice in private law, legal economists' deference to private valuation too entails a willingness to set aside matters of distributive justice within the confines of private law. A private person's valuation of a given property entitlement depends on her existing entitlements, and therefore, on the background distribution of entitlements. Thus, in taking existing preferences and valuations as one's starting point, one already sets aside some (but not all) distributive questions.

From a utilitarian standpoint, one might characterize the economic approach as an attempt to make the best of this world, but not all worlds. Given a state of the world (including a particular distribution of existing entitlements and preferences), legal economists usually maximize wealth as a rough and reasonable proxy for welfare. From a deontological standpoint, however, the setting aside of distributive questions is problematic. If background social distributions are contested, the valuations of private persons are arguably not self-justifying, i.e., the state does not have reason to facilitate the creation or materialization of that value. The strong (illiberal) claim would be that, where background distribution is contested, private preferences, standing alone, do not properly motivate state action at all. The weaker claim would be that the state cannot easily adopt or aggregate private preferences where those preferences are the product of unjust market conditions. The state (i.e. courts) can defer to private valuation of assets completely only where the background distribution is not at issue.

Of course, one might conclude that it is morally problematic to maximize wealth through private law in a distributively flawed environment<sup>25</sup> and still agree that distribution is properly outside the sphere of private law. That is, after all, the position of those committed to the corrective justice view. On the status of distributive justice in private law – namely, its irrelevance – most scholars of corrective justice and legal economics are in apparent agreement.

## **II. Imperfect Social Rights**

There has been inadequate traction on the problem that distributive injustice poses for private law. An important part of the problem has been that the systemic problems raised by distributive injustice, even if acknowledged as relevant, do not easily translate into common law rules that govern transactions between persons. The first obstacle has been the unfairness and inefficiency inherent in placing the burden of distributive justice disproportionately on those who happen to be defendants in private litigation, and the related undesirability of conferring a windfall on certain plaintiffs as compared to other similarly socially situated.

A related pragmatic problem has been that, while statutory ‘interventions’ in contract law are frequently distributively motivated, it is not at all clear which general rules of contract law consistently disadvantage the socially disadvantaged. To reform particular rules, one would have to make questionable empirical assumptions, such as, who usually has information that they do not want to disclose (but could be required to disclose) or who is more likely to act in substantial reliance on a promise made in the absence of consideration.<sup>26</sup> The most apparent alternative to framing rules that have a favorable distributive effect is to apply rules with distributive ends in

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<sup>25</sup> Most corrective justice theorists would oppose the maximization of wealth through private law irrespective of whether distributive justice obtains.

<sup>26</sup> However, where legal rules are known to affect different classes of individuals differently, they may be effective tools in the pursuit of distributive justice. See Sanchirico, *supra* note 18, at 805; see also Kevin Kordana & David Tabachnick, *On Belling the Cat: Rawls and Tort as Corrective Justice*, 92 VIRGINIA L. REV. 1279, 1307 (2006) (arguing that though the rules need [not] be constructed so as to directly pattern the principles of justice, all of the rules of the legal and political scheme are nevertheless distributive in nature.”).

sight. But any distributively-motivated intervention in a particular case appears not only ad hoc but unfair: why should a particular plaintiff or defendant bear the burden of promoting distributive justice? Even for those who would not believe the individual party is entitled to a justification for liability that implicates her individual (as opposed to collective) responsibilities, it seems grossly inefficient to take distributive considerations into account where there are superior macro measures that could achieve the same distributive ends.<sup>27</sup> If the perceived absence of individual responsibility does not prohibit the pursuit of distributive ends in private law, it may leave it unmotivated.

In what follows I attempt to set forth a way of thinking about distributive justice that situates it within the relationship between the individual parties involved in a private action. My goal is to make sense of the implications of a systemic problem like distributive injustice for two private litigants. Rather than abandon the linchpin of responsibility, I aim to show how distributive injustice can condition individual responsibility. The concept of imperfect social rights helps explain why the distributively advantaged exploiter is and should be legally responsible for her exploitation of the distributively disadvantaged, even though identical conduct between parties differently situated in the social order would not be recognized as exploitation, or at least, would not be recognized as such in private law.

I will begin by exploring the general character of imperfect rights, relating them to the more familiar concept of imperfect duty. I am particularly interested in whether imperfect duties are enforceable, and whether giving imperfect rights legal force is ever an appropriate method of enforcement.<sup>28</sup> I then turn to the specific imperfect rights generated by distributive justice to argue that while justice may be the first virtue of social institutions, some of the rights and

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<sup>27</sup> See Kaplow & Shavell, *supra* note 1.

<sup>28</sup> Cf. G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 PHIL. & PUB. AFFAIRS 3 (1997) (arguing that “principles of distributive justice” apply “to people’s legally unconstrained choices”).



obligations of justice which are not enforceable as against the state may be given partial legal effect by individuals against other private persons. While social rights are ‘positive’ rights, due to their imperfect status, they take familiar legal form as negative perfect rights against conduct that exploits and exacerbates background distributive injustice.

In the discussion that follows, I refer both to Kant’s conception of justice in relation to property, as well as Rawls’ theory of justice. Given that my argument relies in part on a rejection of Kant’s rather constrained understanding of the state’s obligations toward the poor, I should explain why I do not rest my account entirely on Rawls’ compelling account of distributive justice. While Rawls and other neo-Kantians may better characterize our social obligations than does Kant, the very virtues of Rawls’ approach that make it so compelling also make it difficult to articulate the rights and obligations of citizens under conditions of partial compliance by the state. The force of the conclusions drawn from the original position derives in no small part from the fact that the parties to it are unaware of their actual social positions, and the fact that the principles they generate are to govern society as a whole. Rawlsian justice is complete, and citizens in Rawls’ hypothetical just society support the laws necessary to support just institutions. Rawls makes few concessions to reality.<sup>29</sup> The refusal to take existing conditions of inequality as a starting point is necessary to endow the sweeping conclusions of his thought experiment with their moral force. But it also makes it difficult to use his heuristic to

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29 See George Fletcher, *Why Kant*, 87 COLUM. L. REV. 421, 428 (1987) (“Rawls’ principles of justice and the methodology of the original position are explicitly limited to working out the basic framework of social cooperation. The perturbations that constitute the stuff of legal controversy belong to the field of “partial compliance,” a field of justice that Rawls, for good reason, excludes.”); Murphy, *supra* note 3, at 282-83 (“[I]t is not an accident that Rawls is committed to both the primacy of the basic structure as the subject of justice and the primacy of ideal theory; the two positions are mutually supporting.”). Of course, Rawls is not oblivious to the facts driving inequality. He takes moderate natural inequalities as among the circumstances of justice and recognizes the limits of altruism and the realities of personal motivation, *supra* note 5, at 127. These premises underlie the principle that inequality may be justified where it is necessary to improve the position of the worst-off. His principles of justice are intended to be applied to existing societies. Furthermore, the process of reflective equilibrium takes existing normative intuitions as a starting point, *id.* at 48, and those intuitions may be expected to reflect some tolerance for existing conditions. Nevertheless, perhaps because the parties to the original position are unaware of their individual holdings, they do not take the existing distribution as normatively significant; nor does Rawls consider moral reasons to do so.

identify rights and obligations under partial compliance. Rawls takes so seriously the requirements of background justice that it is difficult to know how to act against any other backdrop.

Kant's framework is more conducive to nonideal theory. As discussed further below, Kant too engages in a thought experiment, though his is the more conventional one regarding the transition from a state of nature to civil society. For reasons discussed below, Kant believes the transition secures property rights that were only provisional before the establishment of a state. While he places some limits on the scope of those rights, they reflect by and large the holdings of persons prior to the transition. Of course, Kant would not characterize this move as a 'concession' to reality, but in effect, he takes as his starting point what we too must take as ours in attempting to do anything less than rewrite the basic structure of our society. In fact, Kant's reasons for deferring to initial inequality parallel our own; a universal right to appropriate paired with a universal duty to respect the resulting property claims facilitates, through social cooperation, individual freedom.<sup>30</sup>

Kant's recognition of property rights is a compromise of sorts that serves a further end, just as today we defer to property entitlements largely because they are the foundation of a system that appears to provide a level of security, stability and prosperity – all essential to human flourishing – that no other system has delivered.<sup>31</sup> Because Kant, like us, thinks about our obligations to the poor against the backdrop of unequal holdings, I hope that studying his views will give us more traction on the question of imperfect rights under conditions of imperfect

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<sup>30</sup> *But see* Peter Benson, *External Freedom According to Kant*, 87 COLUM. L. REV. 559, 573 (1987) ("In Kant's view, the significance of the intelligible relation is that it is the first way in which practical reason can express the most fundamental postulate of the entire realm of freedom: the difference between a rationally free being or 'moral personality' – which must always be recognized as an end in itself – and external things – which can simply be used.").

<sup>31</sup> *Cf.* Jules Coleman, RISKS AND WRONGS 350-54 (2002) (arguing that there are good reasons to support a system of private property rights that is not ideal and defending "second best entitlements"). *See also* Perry, *supra* note 1, at 260, 262.

justice than we have had in reliance on the concededly more compelling and holistic account of justice developed by Rawls.

#### A. The Nature of Imperfect Rights

In this section I will describe imperfect rights and argue that such rights may be enforced. Enforceability turns on the content of a right or duty rather than on its form. Imperfect rights are best understood as rights of a particular form. Specifically, they are not held against any single person, and when violated, they do not ground a claim for any particular quantum of redress. As rights of a certain form, imperfect rights are in principle enforceable (they are not unenforceable). Rights and duties that effectuate a just social scheme are affirmatively enforceable; I will call them “political” as opposed to “private” rights. Thus, imperfect rights whose content stems from concerns of distributive justice, or imperfect social rights, should be enforced.

Because imperfect rights are common but not commonly discussed, one might resist the argument at this level of generality. More familiar than the concept of an imperfect right is the concept of an imperfect duty, so I will start there.

The classic imperfect duty may be the duty of self-perfection.<sup>32</sup> While human beings have a duty to themselves to cultivate their capacities and be a “useful member of the world,” Kant describes this as but a “wide and imperfect duty[,] for while it does contain a law for the maxim of actions, it determines nothing about the kind and extent of actions themselves but allows a latitude for free choice.”<sup>33</sup> In other words, our duty to ourselves to cultivate our capacities is indeterminate with respect to specific actions. For example, it does not dictate which books we should read or whether to pursue painting or the saxophone.

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<sup>32</sup> Immanuel Kant, *THE METAPHYSICS OF MORALS* 194 (Mary Gregor trans. & ed., 1996).

<sup>33</sup> *Id.* at 195.

Kant defined imperfect duties more generally as those which “prescribe only the maxim of actions, not actions themselves,” or those which “leave[] a playroom (latitudo) for free choice in following (complying with) the law, that is, that the law cannot specify precisely in what way one is to act and how much one is to do.” The discretion created (or left open) by imperfect duties is not as great as it appears on its face because only certain reasons permit acting for some other end than that specified by the imperfect duty, namely those ends which we are also duty-bound to promote. For example, we may fail to do some good for our neighbor only because we choose instead to do some good for our parents; the implication is that one may not exempt oneself from the imperfect duty in a given situation for no reason at all.

Kant explicitly links the “wide” aspect of certain duties with their “imperfectness.” He states that the “wider the duty, ...the more imperfect is man’s obligation to action; as he, nevertheless, brings closer to narrow duty (duties of right) the maxim of complying with wide duty (in his disposition), so much the more perfect is his virtuous action. Imperfect duties are, accordingly, only duties of virtue.”<sup>34</sup> Thus, on Kant’s view, imperfect duties are wide duties, and wide duties (unlike narrow duties of right) are unenforceable.

It is not clear, however, why an imperfect duty, or that which names a necessary end but fails to command or forbid particular actions, is always unenforceable. A “wide” duty could be wide in the sense that it opens up (i.e., widens) the field in which virtue can be practiced, and therefore corresponds to unenforceable duties. But a duty could also be “wide” in form, in the more literal sense that its prescriptions are open-ended; in the text above, Kant seems to be using the word in this sense. The two senses of “wide” need not overlap entirely. One can imagine duties which should remain unenforceable, and compliance of which should mark out the virtuous, but which prescribe behavior quite precisely. One’s duty to keep a promise to have

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<sup>34</sup> *Id.* at 153.

dinner with a friend is an example of a duty which should not be enforceable, but which is nevertheless perfect. The perfect form of the duty does not imply that it should be enforced. Enforceability does not turn on form.

It is neither logically nor morally necessary that duties with indeterminate prescriptive content should remain unenforceable. It is certainly not logically necessary, in that a court or other state authority could be vested with the authority to coerce compliance with imperfect duties in accordance with its own judgment as to what actions should be taken to advance the end specified by the imperfect duty.<sup>35</sup> This type of coercion is familiar and pervasive in any system of tax and transfer, where the legislative and executive branches set the means by which we collectively pursue morally necessary ends.

Nor is it morally necessary that imperfect duties remain unenforceable in the judicial sphere. Courts are empowered to enforce perfect rights and duties in individual cases notwithstanding their formal indeterminacy in particular cases.<sup>36</sup> That is, a court may impose liability on a particular defendant on a particular set of facts, even though the formal principle of right governing the case may be indeterminate at that level of particularity. The state nevertheless may exercise its coercive powers to apply the formal rule because (1) state resolution of conflicts arising from alleged violations of private right is necessary – in that resolution in the absence of legitimate political authority necessarily falls short of justice, and (2) while the forms governing private law may be dictated by practical reason, they do not allow

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<sup>35</sup> In the context of imperfect social duties, the idea would not be to actually coerce individuals to adopt distributive ends as their own but to coerce or restrict actions in a manner that the state concludes will advance distributive ends. Thus, the idea of enforcing imperfect duties is not conceptually incoherent in the way that attempting to force individuals to voluntarily promote distributive justice would be. Cf. Mary Gregor, *Kant's Theory of Property*, 4 *POIESIS* 757, 768 (1988) (“another can indeed coerce me to perform actions that are means only to his end, but not to make his end my own”).

<sup>36</sup> While rules designed to maximize efficiency are also indeterminate in practice, given limits to the information available to courts, I make this point with respect to formal rules of abstract right because those prepared to accept economic justifications for the rules of private law are not likely to be concerned about the formal question of whether imperfect duties are ever enforceable.

deduction of specific rules adequate to resolve individual disputes. Thus, states, through courts, must fill in the indeterminacy that arises in the vindication of even perfect rights.

It thus appears that states are not unauthorized to impose burdens or coerce citizens in the absence of a moral rule that specifically authorizes its particular coercive act. If indeterminacy at the level of individual cases can be handled, why should indeterminacy at a broader – or wider – level preclude state enforcement of imperfect duty? Kant does seem to take that position, but it is not clear that this is motivated by anything other than the general notion that human beings cultivate virtue in the field of imperfect duty, and that constricting this field unduly constricts the scope of our moral agency. We can remain committed to preserving the possibility of virtuous action, however, and still conclude that some imperfect duties are enforceable. Just as some but not all perfect duties are enforceable, some but not all imperfect duties may be enforceable. The concern to preserve a sphere for legally unregulated moral action is better-served by drawing the boundaries of enforceability based on the content of the rights and duties proposed for enforcement, rather than on their form. This is not the place to attempt to expound a theory regarding which rights should be enforceable as a general matter. It is enough for my purposes that rights necessary to effectuate political justice are among those which should be enforced, i.e., given coercive effect. Whatever the boundary between political and truly private moral rights, rights intended to treat the basic structure are surely political.

From another angle, one might be tempted to conclude that Kant is not averse to coercive state enforcement of some imperfect duties. After all, Kant does recognize an enforceable duty to support the needy. In his account of the transition to civil society in the *Philosophy of Right*, Kant concludes that the securing of property rights by itself would violate justice if it were to obligate individuals to respect others' (formerly only provisional) property rights without

guaranteeing a basic income in return.<sup>37</sup> This move is reminiscent of the impulse toward reciprocity that underlies many liberal contractarian accounts, though the requirement of reciprocity is not as robust in Kant as it is his contemporary followers like Rawls. Nevertheless, even Kant recognizes a duty to provide for the poor on which the very legitimacy of the state rests. Notably, he further recognizes that the state may coerce property owners to pay for the support to which the poor are entitled. On its face, a duty to provide for the poor smacks of imperfect duty – it does not appear to dictate precisely how much is owed, nor, as a practical matter, exactly who is entitled to support.

Kant does not, however, characterize this duty as an imperfect duty. Perhaps it may be treated formally as a perfect duty because the obligation is only to support bare subsistence (if that is all that is necessary to render a person independent), and so the precise level of support required is conceivably determinable. But today we are unlikely to consider the duty to provide a basic income as determined by literal necessity. Rather, as in the Rawlsian scheme, the duty is likely to be relative to others' income and wealth. The obligatory level of support likely further depends on the costs of distributive measures, at least inasmuch as it affects the absolute level of basic resources which the worst-off group possesses. Given the myriad of uncertainties that plague the application of a distributive principle, even a morally necessary one, it is hard to imagine that the duty of support is perfect in form. It is unlikely to identify either its correlative right-holders (or, at least, beneficiaries) or even a rule that identifies the level of support (as opposed to a decision rule for selecting the level of support). Thus, even if Kant would not have characterized the enforceable duty to support the poor as an imperfect duty, the contemporary version of that principle takes the form of an imperfect duty. Moreover, while Kant would not

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<sup>37</sup> See *infra* for a more detailed discussion of Kant's account of the transition to civil society and how it illuminates the notion of imperfect social rights.

have characterized it thus, the imperfect duty on the part of those well-off corresponds to an imperfect right held by those who stand to benefit from the fulfillment of the imperfect duty.

I have argued that imperfect duties may be enforceable, and the duty to provide for the poor is a familiar one. But having taken “enforceable” to mean just that performance of the duty can be exacted by force, I have not yet shown that the corresponding imperfect rights can ever be enforceable by the rights-holder. Again, while Kant recognized the duty to support the poor as subject to coercive enforcement by the state, he did not characterize that duty as imperfect. Moreover, in his scheme, the duty is owed to the state rather than to poor citizens directly<sup>38</sup>, and the authority of the state to enforce rights it bears as conditions of its own legitimacy may not reflect on the enforceability of imperfect rights by individuals. The question is whether an imperfect right held by individuals can ever be a true or full ‘right’ in the sense of authorizing coercion.

Does the fact that imperfect duty-holders may be subject to coercive enforcement itself imply a right on the part of rights-holders to enforce their rights directly? It does not. I argued that imperfect duties may be subject to enforcement *by the state*, which is entitled to resolve the indeterminacy of the moral space created by imperfect duties, just as it resolves the narrower space inevitably left by the application of formal moral and legal rules in particular cases. The argument for the enforceability of imperfect duties applied only to the state, not to rights-holders directly. In fact, the very analogy between the indeterminacy of enforcing imperfect duties and the indeterminacy in all enforcement of rules, shows that individuals are not entitled to direct enforcement. The indeterminacy of the application of the law of right is one of the reasons that a state is necessary to justly resolve disputes arising from violations of right. Individuals cannot

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<sup>38</sup> See Ernest Weinrib, *Poverty and Property in Kant’s System of Rights*, 78 NOTRE DAME L. REV. 795, 817-18 (2003).



apply those rules because the relationship of power between them, rather than the rule of reason which motivates the law, will inevitably color the discernment and application of the law of right. Thus, even perfect duties, with their correlative perfect rights, are not usually subject to coercive enforcement by right-holders directly. Rather, in the normal case, the state is a necessary intermediary.<sup>39</sup> This suggests that imperfect right-holders may not directly enforce their rights, but the state might act as an intermediary in the enforcement of imperfect rights.

While one could go further and leave the imperfect-rights holder out of the enforcement picture altogether by consigning imperfect rights to public law, it would be peculiar to leave the holders of imperfect rights without any role at all in the enforcement of those rights. After all, our system of private law assigns the holders of perfect rights a substantial role in the enforcement of those rights. Without that role, whatever authority to enforce certain duties, most violations of right would go unaddressed. That is indeed the fate of most imperfect duties. But even apart from the practical point that the absence of a role for rights-holders vitiates their rights, there is also the principled case to be made that in linking rights-bearer to duty-bearer, the law expresses the correlativity of rights and duties. How can the law express this correlativity with respect to imperfect rights and duties?<sup>40</sup> A precise matching of imperfect right and imperfect duty is practically impossible because by definition it is unknown exactly who owes whom what. Arguably, public discourse is capable of linking those who owe to those who are owed. But private law in one sense is an institutional statement of dissatisfaction with solely

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<sup>39</sup> The exceptional cases are ones where the state cannot function as an effective intermediary, as in the case of self-defense. But exceptional instances of justified self-help may exist with respect to imperfect social rights as well, as in cases of necessity.

<sup>40</sup> In *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811, 1843 (2004), Arthur Ripstein acknowledges that “[i]f private holdings are inconsistent with justice, there are bound to be misgivings about treating those holdings as enforceable” but raises “doubt [as to] whether any particular person can rightly appeal to the overall structure of society as a whole in response to a tort action, if only because those who are in the best position to raise such an issue will be the very people who are too poor to be sued anyway.” Weinrib is similarly concerned that introducing distributive justice concerns fails adequately to link the wrong at issue with the defendant asked to redress it. See Weinrib, *supra* note 1, at 79.

discursive methods of linking duty-holders to rights-bearers. The next section suggests how we might harness the correlative structure of private law to give expression to the correlativity of imperfect rights and duties. It is possible to relate imperfect duty to imperfect right within private law, notwithstanding the multiplicity of duty and right-bearers.

#### B. The Justiciable Form of Imperfect Rights

Bare numerosity on either side of the equation is not an insurmountable barrier to incorporating a role for rights-holders in the enforcement of imperfect rights and duties. While the complete set of duty and right-bearers may not be known, it may still be the case that certain individuals owe more than others, or have special obligations, and they may be identifiable. Similarly, while it may be unclear exactly who is being wronged (i.e. the entire set of wronged persons is not specified), it may be clear nevertheless that certain individuals are being wronged.

Nor is it impossible to link particular individuals, even though their rights and duties are generalizable. If there are types of interactions, with identifiable properties, that are contingent upon and exacerbate the injustice resulting from a violation of imperfect rights and duties, we may identify a subset of duty and rights-holders by virtue of their participation in those types of transactions. Participation in the transaction is not a morally arbitrary proxy for one's status as advantaged or disadvantaged.<sup>41</sup> Rather, participation in the transaction is voluntary conduct the moral significance of which may hinge on the parties' social status. Thus, those whose livelihoods are more directly bound up with the poverty of the poor may have special distributive obligations. On a weak interpretation of their obligations, we might say that they are at greater risk than others in their society of violating a universal negative duty to refrain from exploitation of distributive injustice. But we might also say that the weight of distributive injustice will

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<sup>41</sup> Cf. Kronman, *supra* note 1, at 502-03, who takes as a necessary evil the discriminatory effects of contractual regulation (some parties disproportionately bearing the burden of redistribution).

sometimes fall more heavily on them because they *assume* this risk, i.e., they choose to operate under the direct shadow of distributive injustice. For while all citizens' wealth derive in part from the reciprocal cooperation of the socially disadvantaged, some are situated such that their prosperity is more directly linked with or perhaps dependent on the poverty of the poor. If our obligations to the poor can be understood as among the conditions for social cooperation, the obligations to the disadvantaged are thicker for those who seek a thicker level of cooperation through direct, profitable exchange with them.

We need not go so far as to hold individuals liable merely for stepping into the mess created by all. Rather, limited legal responsibility for collective imperfect duties should arise where a transaction is contingent on a broader failure to meet imperfect obligations and exacerbates that collective failure. It would be unfair for a particular defendant to bear the burden of raising a particular plaintiff to that socio-economic status she would occupy in a just social order. But it is not unfair or arbitrary to disallow a defendant from benefiting from either his unjust advantages or his transactional partner's unjust disadvantages in order to further expand his advantage over her. It is one thing to say that one in a group of thieves should restore all that the group has stolen; it is another thing to maintain that the most audacious thief should retain his extra winnings because his colleagues have not been apprehended.

It may seem that the intrinsic unfairness of exploitation does all the work in this account, but conduct can only be characterized as exploitive in the legally relevant sense because it violates some right – and that is how an imperfect right alters the legal character of a given transaction notwithstanding the general indeterminacy of the right. One could imagine a characterization of certain behavior as exploitive because it extracts gain from the violation of some right unrelated to distributive justice. For example, it could be exploitive to take advantage

of another's suffering. But in that case, one would have to identify the nature and source of the right not to have one's suffering taken advantage of. If that right should not be enforced, the right cannot render exploitation of a violation of that right legally consequential. My claim is that it is exploitive in the legally relevant sense to take advantage of an injustice –not misfortune – that another has suffered, at least where one is a party to the injustice. The very same rights which enable us to name the injustice allow us to label conduct which feeds off that injustice as exploitive in a special sense. Furthermore, if the injustice is of a political character (and the notion of injustice may imply this), then just as the state may rectify the injustice directly, where possible, it may enlist judicial resources to rectify exploitation of the injustice. There may be many types of exploitation unrelated to distributive injustice, and imperfect social rights would not help us decide the legal effect of those types of exploitation.

The crux of my claim is this: An individual can be *responsible* for another's loss in the legally relevant sense just because of background distributive injustice. It is morally irresponsible to exploit another's disadvantageous circumstances where your own moral wrong created those circumstances; in this case, the exploitation is a compounding moral wrong. Likewise, one is legally responsible for the exploitation of another's disadvantageous circumstances where a legal wrong (i.e. a wrong which can be coercively remedied) created those circumstances; the exploitation is a second legal wrong. The initial legal wrong may be a direct injury. For example, if I poke a hole in my neighbor's tire, my charging an exorbitant fee to replace it will give rise to a separate legal claim. But the background legal claim may also be an imperfect one. If the circumstances of exploitation are the result of both the exploiter's failure to fulfill enforceable imperfect duties and a violation of the victim's imperfect rights, the exploitation is a second legal wrong.

The relevance of the background right is apparent when one considers the case of someone who exploits knowledge of another's secret (which is not in itself shameful but will nevertheless do damage to the victim if revealed). Our judgment about a threat to reveal the secret may vary considerably depending on whether the exploiter of the secret has a valid claim against the exploited. Thus, an employee that knows of widespread abuses of employee rights and threatens to reveal all to a local paper unless the employer carries through on a promise to that employee is differently situated than one who demands payment greater than that promised by the employer. Likewise, the employee's situation will turn on whether the employee is obligated (to others) to reveal the employer's secret or whether the employee is obligated to keep the secret (e.g. a trade secret). The bare fact that one takes advantage of a condition reveals little about the moral character of the action, let alone whether the law should prohibit such exploitation.

Exploitation of a circumstance or characteristic of a person is generally more wrong to the extent one is responsible for that circumstance or characteristic, and less wrong to the extent the exploited party is herself responsible for the disadvantage. Thus, to exploit someone's vanity or avarice is not so bad, unless perhaps one has stoked that vanity or avarice through flattery or provocative tales about others' luxury. To exploit someone's circumstances brought about through natural disaster is bad only inasmuch as we have a background duty to alleviate those circumstances. Thus, a taxi driver might exploit flooding of the rail lines that leaves commuters temporarily stranded; but he may not exploit one who needs to flee some imminent danger.

Importantly, it is not responsibility for the background condition per se, which any given exploiter shares with numerous third parties, that justifies prohibiting exploitation of a condition. Moral responsibility for a background condition may not always justify legal liability for its

exploitation even where that moral responsibility is unique. For example, whether saving a stranded person for a significant sum is exploitive depends on whether there was a duty to save the stranded person at lower cost. But because in many cases there is a moral but not a legal duty, moral and legal exploitation diverge. Whether the exploiter's conduct amounts to legal exploitation depends on how we characterize her background duty. In the rescue case, it turns on whether the would-be rescuer had not just a moral but a legal duty to rescue.

While the degree of moral responsibility on the part of an exploiter for the circumstance or characteristic that she exploits may dictate how we judge her conduct, it does not determine whether the exploitive conduct is legally prohibited. Whether a form of exploitation is legally prohibited further depends on whether the condition being exploited results from violation of an essentially private moral duty/right, or instead a duty/right with public or political dimensions adequate to justify coercive enforcement.

Exploitation of a condition should be prohibited to the extent that that the right or duty to correct the condition is itself subject to coercive enforcement. As argued in the previous section, imperfect social rights and duties are subject to coercive enforcement. Even if they are not directly actionable, their eligibility for coercive enforcement in principle renders exploitation of distributive injustice a separate legal wrong that is enforceable in private law. That is why it was important to show that imperfect rights can be enforceable notwithstanding their form, and in particular, that social rights are enforceable political rights, not unenforceable private ones.

One might object that it is misleading to compare exploitation of a stranded driver by the person who damaged the driver's tires to exploitation of a more general condition which the exploiter, together with others, had a duty to correct. There are differences of course. Poking a hole in someone's tire is actionable in itself; failing to remedy distributive injustice generates no

similar free-standing claim. We might not usually bother to even label the charging of a high price to the stranded driver as exploitive; the exploitation is overshadowed by the earlier injury. But bad conduct does not become benign just because it was preceded by still worse behavior. Whether the right initially violated was perfect or imperfect, the initial wrong frames the moral and legal upshot of subsequent conduct.

This argument is consistent with how we think about exploitation. Numerous theorists – under varying labels -- have distinguished between exploitation of circumstances as one finds them, and exploitation of circumstances created by one’s own rights violation. Alan Wertheimer, in his well-developed theory of exploitation, observes that “the fact that an agreement arises out of unfair background conditions is not, in itself” a reason “to justify not permitting A to exploit B.”<sup>42</sup> Joel Feinberg allows for a broad notion of exploitation, on which most exploiters are opportunists who “extract advantage from situations that are not of their own making,” but he separates out “coercers” who “are typically makers rather than mere discoverers and users of opportunities.”<sup>43</sup> Feinberg maintains that consent is “valid” where an offer exploits another’s misfortune, but the offeror did not create that misfortune. He follows the distinction of David Zimmerman who argues that only where the offeror has created the Hobbesian choice completed by his offer is the offer coercive.<sup>44</sup> Similarly, Jeffrie Murphy has characterized duress

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<sup>42</sup> Alan Wertheimer, *EXPLOITATION* 298 (1999). But Wertheimer also says that “in virtually all societies, relatively just and relatively unjust, citizens will find themselves in situations in which they can strike agreements that will produce mutual gains. The parties to such transaction may understand that even though some fare less well than others by the appropriate principles of social justice, it is unreasonable to expect the better-off party to repair those background conditions by adjusting the terms of a particular transaction.” *Id.* at 234. This is because “even when B’s suffering is rooted in social injustice, it may (reasonably) be treated as a misfortune by A, if A bears no special responsibility for causing or alleviating B’s suffering.” *Id.* at 298. The role of imperfect social rights in my argument is to show that A is responsible for B’s misfortune, and that this responsibility is legally relevant because it stems from imperfect social duties which are properly subject to legal enforcement.

<sup>43</sup> Joel Feinberg, *THE MORAL LIMITS OF THE CRIMINAL LAW* (VOL. 3): HARM TO SELF 184 (1986).

<sup>44</sup> See Joel Feinberg, *THE MORAL LIMITS OF THE CRIMINAL LAW* (VOL. 4): HARMLESS WRONGDOING 244 (1990); David Zimmerman, *Coercive Wage Offers*, 10 *PHIL. & PUB. AFFAIRS* 121, 133-34 (1981) (“for P’s offer to be genuinely coercive it must be the case that he actively prevents Q from being in the alternative pre-proposal situation Q strongly prefers”).

as the situation where a person consents to another's proposal only because he is suffering wrongful treatment from her.<sup>45</sup>

Robert Nozick too implicitly relies on this distinction in separating threats from offers. He suggests that "whether someone makes a threat against Q's doing an action or an offer to Q to do the action depends on how the consequence he says he will bring about changes the consequences of Q's action from what they would have been in the normal or natural or expected course of events."<sup>46</sup> Of course, much depends on what is expected; the term shifts between "the predicted and the morally required," but the morally required takes precedence where it the course preferred by the victim. While the discussion of threats and offers studies parties at the moment prior to possible exploitation, it parallels how we should separate transactions that result from such coercive offers. Those whose offers turn on their failure to fulfill moral duties are actually making threats. Those whose offers improve the other's situation as compared to the moral baseline may be regarded as noncoercive offerors. The notion that either the label exploitation or the consequences of exploitation turn on the exploiter's background obligations with respect to the circumstances of exploitation is deep-seeded.

To be sure, background conditions of distributive injustice, unlike the blown tire, have been brought about by a collective, and not just the exploiter. But legal liability has never been limited to conduct which renders a person exclusively or exhaustively responsible for resulting losses. It is enough that the conduct reveals some choice, some agency, on account of which we can label the person responsible. Exploitation of injustice implicates this requisite type of responsibility, because it "does not refer simply to the distributive results of a transaction, but to

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<sup>45</sup> Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79, 81 (1981).

<sup>46</sup> Robert Nozick, *Coercion* in PHILOSOPHY, SCIENCE AND METHOD 447, 449-51 (S. Morgenbesser et al. eds. 1969).



the fact that the exploiting agent (singular or plural) had available an alternative course of action.”<sup>47</sup>

Thus, we may impose liability with respect to transactions (voluntary or involuntary) that are conditioned by a violation of imperfect rights where the exchange reinforces that violation. Individuals may not control the collective failure to fulfill imperfect duties, but they do control a range of events that take place because of and in furtherance of the unjust condition. That individual responsibility links particular defendants to particular plaintiffs within a broader scheme of imperfect duty and right.<sup>48</sup> On this approach, although the moral right to distributive justice is positive, its imperfect status vis-a-vis other individuals is expressed in its legal form as a negative right. Although this negative right is perfect, it is derivative from an imperfect (positive) right, not some other possible perfect negative right, e.g. a right against exploitation more generally.

Legally recognizing the special obligations of certain imperfect duty-holders in private law does not have to take the form of an independent cause of action for violation of the imperfect right. Rather, an imperfect right that has gone unfulfilled operates in the manner of an excuse. It does not categorically excuse one from liability (nor will imperfect duty alone render anyone liable), and it will not deny the normal force of the obligations that are sometimes excused, but it will render some generally sound legal rules inapplicable in certain cases.<sup>49</sup>

Nothing I have said shows that imperfect duties or rights must take this legal form. My objective has been only to show that they may take this form – that is, there is nothing incoherent

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<sup>47</sup> David Miller, *Exploitation in the Market*, in MODERN THEORIES OF EXPLOITATION 161 (Reeve ed. 1987).

<sup>48</sup> See Stephen Perry, *The Distribution Turn: Mischief, Misfortune and Tort Law*, 16 Q.L.R. 315, 330-31 (1996) (“What we are looking for is a conception of responsibility that will tie persons to (certain) harms they cause others. Responsibility premised on control...gives us what up to this point we have been missing: a normative connection between actor and outcome.”).

<sup>49</sup> See George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 559 (1972), on “the difference between changing the rule and finding in a particular case that it does not apply.”

or morally arbitrary about giving legal effect to imperfect rights and obligations even within private law.

### C. Imperfect Social Rights as Derivative from Duties of Distributive Justice

I have so far assumed that imperfect social rights exist, and have been concerned to demonstrate that their content justifies giving them legal effect notwithstanding their form. But one might concede the enforceable character of the hypothetical class of rights but deny that individuals and not just states bear rights and obligations relating to broad social structures. Thus, in this section, I take a step back and defend the proposition that the demands of distributive justice are naturally conceived in terms of individual imperfect duty and right.

The most influential account of distributive justice today is that advanced by John Rawls in his *Theory of Justice*. There Rawls argued that justice requires that social institutions secure basic liberties for all, and then, maximize the primary goods (generally useful resources) of the worst-off group.<sup>50</sup> The account describes what a just society looks like, or more precisely, what justice requires of the basic structure of society. Its primary audience is comprised of citizens reflecting on how they should vote. In that sense, it *is* directed to prescribing action on the part of individuals, and it implies a duty on their part to vote in a way that supports the demands of justice. But the theory does not demand that individuals advance the theory of justice in their everyday lives, through their private transactions. Nor does Rawls' theory of justice primarily address rights-holders, or in particular, those who may have rights violated under contemporary institutions. Perhaps for this reason, together with the demographics of Rawls' primary readership, the rights generated by Rawls have been less central to the debate about Rawls than the duties he ascribes to us.<sup>51</sup>

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<sup>50</sup> Rawls, *supra* note 5, at 60.

<sup>51</sup> *But see* Joseph Carens, *Rights and Duties in Egalitarian Society*, 14 POL. THEORY 31 (1986).

Because Rawls neither recognizes any direct duties on the part of citizens either to help achieve justice or to not exacerbate it, it is not clear that he would recognize imperfect social duties. Because he does not speak in terms of social right either, we cannot easily assess the implications of his theory for imperfect social rights. Given that Rawls simply does not set forth his theory on these individualized terms, several possibilities obtain. *First*, it is possible that Rawls' theory of justice is inconsistent with the recognition of imperfect social rights. *Second*, it is possible that his theory implies imperfect social rights but does not speak to their relationship to private law. *Third*, this theory could be read to permit recognition of imperfect social rights in private law. *Fourth*, justice might be bifurcated such that imperfect social rights obtain in one sphere but do not properly interfere with the realm of justice in which private law is located. *Last*, justice might require recognition of imperfect social rights. I will argue that the last interpretation is correct, i.e., that Rawls' compelling account of the demands of justice implies that rights and responsibilities in private law are qualified by unrealized imperfect social rights. Imperfect social rights do not extinguish any category of private law entitlements, but they do modify those commitments by expanding the scope of individual responsibility under certain circumstances.

The critical first step is to recognize, as Liam Murphy suggests, that “legal, political, and other social institutions” do not constitute “a separate normative realm” but are rather the “means that people employ the better to achieve their collective political/moral goals.”<sup>52</sup> While Murphy is concerned with individuals' extra-legal obligations, the point can also be made with respect to individual obligations derivative from the demands of distributive justice that can and should have legal effect. It is useful to think of the state as having moral obligations to the poor, and it is coherent to do so in that the state is a moral agent which can both make moral claims on others

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<sup>52</sup> See Murphy, *supra* note 3, at 253.

and is subject to moral claims on it. However, the state is a moral agent in a more literal sense than is a natural person. The state is the means by which we fulfill our obligations to each other. The failure of an agent to carry out the obligations of its principals does not excuse the principal, at least where the failure is obvious and the principal is on notice that it is operating in a kind of breach.

To appreciate the derivative nature of the state's role in distribution from individuals' direct obligations to each other, it is useful to review Kant's hypothetical account of the transition from the state of nature to civil society, and his related notion of provisional property rights – the rights held by individuals prior to the establishment of civil society.<sup>53</sup> The narrative may not be plausible – nor was it intended to be literal – but it suggests how the state acts as a moral agent on behalf of individuals, who bear ultimate responsibility for the demands of distributive justice.

In Kant's hypothetical account, individuals in the state of nature are capable of appropriating objects, including land. The trick is explaining how their unilateral acts of appropriation can bind others, where it is a postulate of practical reason that one may not unilaterally impose obligations on another.<sup>54</sup> Physical possession of objects is the easier (though arguably still troubling) case. The obligation to respect another's right in what he is physically holding arises from the natural duty to respect each other's physical space and to refrain from compromising others' bodily integrity. More problematic is what Kant calls intelligible possession, or property rights in objects that are not in physical possession but the appropriation

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<sup>53</sup> This is not to suggest that Kant would recognize imperfect social rights or duties as I have presented them here.

<sup>54</sup> See Kenneth Baynes, *Kant on Property Rights and the Social Contract*, 72 *MONIST* 433 (1989). Baynes explains that appropriation in the state of nature is permitted by way of temporarily “suspending a general prohibition in anticipation of the creation of a more just state of affairs.” *Id.* at 436. “[T]his restriction upon the general prohibition not to limit the freedom of others itself occasions a degree of freedom that would otherwise not have been possible.” *Id.* at 438.

of which nevertheless binds others. Kant resolves the problem of intelligible possession by arguing that all individuals have a liberty interest in a rule that would recognize such appropriation. As such, they cannot act contrary to that rule even in a state of nature.<sup>55</sup> But property rights in pre-civil society are tainted by the unilateral character of the initial appropriation, and do not solidify until the establishment of civil society, at which time all citizens – through the state – can be said to have collectively authorized the property entitlements which property holders previously asserted unilaterally against one another.<sup>56</sup>

Kant points out, though, that the transition to civil society does not by itself assure reciprocity in the recognition of property. After all, some citizens will not have property, or will have too little to live in a state of independence. Since liberty was the justification for a regime of property, those who do not gain liberty are worse off as a result of others' newly secured property entitlements. Kant maintains that in light of this residual lack of reciprocity, the legitimacy of the transition to civil society depends on a duty on the part of the newly formed state to provide for the basic needs of the poor. Property holders essentially must recognize the state's duty to support the poor, together with the right to tax in order to be able to do so, in order to make right their demand that others respect their property claims.

The relative ease of the transition into civil society in Kant's account depends on his relatively weak standards (in a contemporary light) for the obligations of distributive justice.

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<sup>55</sup> Characteristically, Kant does not believe that one's obligation in the state of nature to act in accordance with a property rule that would promote liberty turns on other individuals' compliance with that rule. He does not recognize, or at least sympathize, with the 'moral collective action problem', i.e., that one's duty to comport with the best rule may require coordination with others to do the same, especially where unilateral compliance will result not just in personal disadvantage but inferior outcomes. This may be why his account of property rights, or the duty to recognize others' property rights in the state of nature, may strike many as implausible. However, nothing in my use of Kant turns on this aspect of his account.

<sup>56</sup> "Possession in anticipation of and preparation for the civil condition...is provisionally rightful possession, whereas possession found in an actual civil condition would be conclusive possession." Kant, *supra* note 32, at 78. See also Brian Tierney, *Kant on Property: The Problem of Permissive Law*, 62 JOURNAL OF THE HISTORY OF IDEAS 301 (2001).

Because most of us now recognize greater obligations of distributive justice, the transition from provisional to peremptory property rights is more problematic. The question arises (the central question of this paper): of what consequence is a failure to meet the obligations of distributive justice? If the state does not make payment on our behalf, does our debt go away? It does not. Civil society is no limited liability enterprise protecting its members from distributive moral claims. The above account suggests that there are consequences for private law. Redistribution through the state may be the primary mechanism by which we make other social institutions just, but the imperative of just institutions stems from the need to make just the myriad property-related claims we make on each other.

Distributive injustice gives rise to imperfect social duties and rights in this way. Speaking of imperfect duties and rights borne by individuals does not deny that the state is the proper instrument by which to achieve distributive justice, and that in ideal theory, individuals may not need to pause to acknowledge the demands of distributive justice on their transactional plans. But at least in nonideal theory, where the state has not achieved distributive justice, individuals have active imperfect social duties and rights. The demands of distributive justice are not limited to institutional design.

I have argued that imperfect rights may be given legal effect, and that there is such a thing as imperfect social rights. Furthermore, I have proposed the legal form that imperfect social rights should take: a negative right against conduct that exploits and exacerbates distributive injustice. This approach situates individual plaintiffs and defendants within a scheme of distributive justice and gives expression to their imperfect social rights and duties in a non-morally arbitrary way. It does not entail using the administration of private law to directly transfer money from rich (or some rich people) to poor (or some poor people) with the aim of

achieving some marginal step toward distributive justice. Rather, it takes imperfect social rights to create boundaries on morally acceptable individual behavior in a society that fails to meet the distributive obligations of political morality. A duty not to take advantage of distributive injustice and make it worse probably does not exhaust the scope of individual moral duty under conditions of distributive injustice; indeed, it may not exhaust the scope of legally enforceable duty. My aim has been to argue for this much, at least.

In the next two sections, I will attempt to illustrate and justify how those rights are in fact given effect in private law today, notwithstanding theoretical resistance to the demands of distributive justice within the domain of private law.

### **III. Unconscionability**

The doctrine of unconscionability concedes that contract rights are not just defeasible upon payment or change of circumstance but may give way under the force of imperfect social rights. Specifically, a contract is voidable where a party exploits and exacerbates distributive injustice.

While the doctrine of unconscionability is not explicitly framed in distributive terms, its distributive aspects have been often noted. Moreover, viewing unconscionability as derivative from imperfect social rights helps explain why courts usually do not apply the doctrine to the benefit of rich victims.<sup>57</sup> More generally, it helps explain why contract law does not usually recognize as exploitive high prices extracted as a result of disparate bargaining power, where the disparity does not reflect social injustice. The stranded driver or skier usually will have to pay a high price for rescue. While courts might limit prices to reduce the cost of the risk-creating

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<sup>57</sup> See Philip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 U. CHI. L. REV. 1513, 1527 (2003) (“An examination of the cases in which courts have invalidated contracts under Section 2-302 reveals that the appeal to intuitive conceptions of fairness is most pronounced in cases where the plaintiff is a woman, poor, or the recipient of governmental aid.”).

activity, or in order to lower bargaining costs (given that bilateral monopoly often characterizes rescues), for the most part, courts – and the common reader – are less sympathetic to those whose weak bargaining power reflects bad luck rather than distributive injustice.

By contrast, a purely procedural take on unconscionability fails to explain the tendency to treat poor claimants more leniently, unless one assumes that rich people are uniformly intelligent and well-informed, a hypothesis that experience disproves. While unconscionability is a narrow doctrine in the common law, its underlying principles are of wider significance because many statutory interventions in contract law are essentially transaction-type-specific rules of unconscionability. For example, minimum wages laws essentially hold wages below the specified one are unconscionable. Similarly, regulations excusing tenant rent obligations where minimum housing standards are not met provide that contracts for substandard housing are unconscionable.

A modern classic in the realm of unconscionability aptly demonstrates the role of the doctrine in relieving disadvantaged persons from the obligation to respect certain property entitlements where the latter are the product of distributive injustice (procedurally unconscionable) and further reinforce that injustice (substantively unconscionable). In *Williams v. Walker-Thomas Furniture Co.*, rent-to-own stores included cross-collateral clauses in their customer contracts; the effect of those provisions was that the balance due on every item purchased continued until the balance due on all items, whenever purchased, was liquidated.<sup>58</sup> The appellate court emphasized the background distribution in its analysis, noting that “[w]hether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the

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<sup>58</sup> 350 F.2d 445 (DC Cir. 1965).



meaningfulness of the choice is negated by a gross inequality of bargaining power.”<sup>59</sup> While the court suggested that the parties’ “obvious education or lack of it” was relevant, the emphasis was on the inequality of bargaining power that was a direct result of the disadvantageous market position occupied by the rent-to-own consumer. The court was not so naïve as to suggest that any contract which reflected one party’s disadvantageous market position would be unconscionable. Rather, courts should look to “the general commercial background and the commercial needs of the particular trade or case,” presumably to understand whether the terms actually made the consumers worse off in light of other market alternatives that were foregone as a result of the contract at issue, or whether the contract was as good as it could get for the defendant, and thus not exploitive.<sup>60</sup> Where a contractual party takes advantage of and reinforces distributive injustice, imperfect social rights help us to name that conduct as exploitive. Contract law will not protect the otherwise legitimate contractual expectations of the exploitive party.

The doctrine of unconscionability, interpreted in this fashion, would not look radically different than it does today. Two points are worth emphasizing.<sup>61</sup> First, where a good or service is widely purchased on similar terms, procedural unconscionability will not be present. That is because it cannot be said under those circumstances that the terms of the transaction are conditioned on the respective social positions of buyer and seller. In this respect, procedural unconscionability on this approach is far narrower than the more conventional interpretation of procedural unconscionability, which labels every mass contract of adhesion procedurally

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<sup>59</sup> *Id.* at 449.

<sup>60</sup> *Id.* at 450.

<sup>61</sup> Richard Craswell has observed that economists tend to focus on the market as a whole while non-economists tend to focus on individual transactions. *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 63 (1993). The accompanying text assesses the moral relevance of market structure for individual transactions.

unconscionable because of the absence of a meaningful bargaining process behind it. (These contracts are not voidable, however, unless they are also substantively unconscionable.)

Second, where there is reason to believe that the market does not support a more favorable alternative for the disadvantaged party and similarly situated buyers, substantive unconscionability will not be present. We can only say that a transaction has exacerbated distributive injustice by making the plaintiff worse off where there exist other alternatives which the plaintiff would have pursued were it not for her dealings with the defendant.<sup>62</sup> In these cases, even if the fact of mutual consent suggests that the disadvantaged party valued what she was promised more highly than what she agreed to pay (assuming that she appreciated both), it does not demonstrate that she is better off as a result of the transaction. It fails to factor in the opportunity costs she unintentionally forewent by entering into the transaction at issue.<sup>63</sup> Taking into account those opportunity costs, the transaction was not Pareto superior.

Where the defendant operates in a competitive market and offers its goods or services on terms comparable to those of its competitors, it is presumptively the case that the plaintiff would not have had any better option, and therefore, her voluntary involvement in the transaction would suggest that she has not been made worse off as a result of it. In the usual case of distributive unconscionability, the exploitation is only possible either because the plaintiff is unaware of superior options or because of temporary market conditions under which a competitor with

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<sup>62</sup> Relatedly, Wertheimer claims that “when we say that A takes unfair advantage of B, we typically assume that A could have chosen not to take unfair advantage of B, that their specific transaction could have occurred on fairer terms. And this is precisely what generally cannot occur in a perfectly competitive market.” Wertheimer, *supra* note 40, at 217. I prefer to make the point in terms of the but-for effect of the alleged exploiter on the defendant’s options. Wertheimer seems to glide from long-term economic impossibility to impossibility in any given transaction, and it is not obvious that the former controls. For example, one might imagine that price discrimination could make it feasible to charge certain customers less. But the possibility of such price discrimination would not normally create a right to it.

<sup>63</sup> In principle, one might say that the very fact that buyer chose to forego those alternatives demonstrates her preference for the challenged transaction, and that my discussion attributed irrationality to the buyer. But to take the position that the buyer preferred an objectively inferior contract is also to attribute irrationality to the buyer. Usually the buyer is not irrational at all, but simply does not have the information or other means (e.g. car) necessary to take advantage of the alternative.

substantially more favorable terms has not yet fully accessed the market in which defendant operates.

By contrast, where the defendant occupies a monopoly position, the transaction is appropriately subject to greater scrutiny. A monopolist which markets its products or services widely would be protected under the first prong, i.e., procedural unconscionability (for the reasons discussed above).<sup>64</sup> A monopolist which markets its products to the socially disadvantaged is in a more precarious position. In some cases of monopoly pricing<sup>65</sup> – e.g. in the patent context -- it may be the case that the monopolist has not made things worse for plaintiff and others similarly situated, because the ‘excess’ profits were necessary to incentive the monopolist to develop the good or service. Whether this is the case, or whether instead the monopolist has targeted the disadvantaged group for reasons the buyers could not endorse, is a tough empirical question. It is not, however, a novel one. It maps on to existing legal inquiries; its pitfalls are familiar.<sup>66</sup>

The approach to unconscionability I have outlined here is not intended to be exhaustive.

There are no doubt cases that merit rescission on grounds of unconscionability in which

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<sup>64</sup> It is worth noting the road not taken: one might alternatively argue that in these cases, it is incumbent on the monopolist, where feasible, to price its product differently in the poorer market.

<sup>65</sup> I refer to price because that it is the term that is most likely to be worse in a noncompetitive market. See Richard Schmalensee, *Market Structure, Durability and Quality*, 17 ECON INQUIRY 177, 182 (1979) (concluding that under certain conditions quality is independent of market structure). However, there may be circumstances under which the allegedly unconscionable term is a nonprice term, as was the case in *Walker-Thomas*. Disputes regarding nonprice terms can usually be translated into a dispute about the price term. For example, a claim that a cross-collateral term is unconscionable may really be a claim that the price paid was too high in light of the cross-collateral term. Even where a monopolist offers products and services that are superior in quality to those that would likely prevail in a competitive market, we can say that the price paid was too high as compared to what most consumers would be willing to pay for those goods and services where the optimal level of quality was also available at a competitive price.

<sup>66</sup> We might be concerned to have courts adjudicate antitrust issues in the context of contract claims. See Posner, *supra* note 4, at 296; Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1075-76 (1977). But it is not clear why, in cases of consequence, there cannot be public interest and class action litigation regarding unconscionability as there is in antitrust. It may also be the case that an antitrust claim implicates a different set of facts and standards than those appropriate to a contract claim, since the plaintiff and the remedy sought both differ.

imperfect social rights play no part. However, most unconscionability cases are marked by background distributive injustice, and it is worth pausing to explore the advantages of the above approach. First and foremost among those advantages is the absence of any need to characterize the defendant's consent to the initial transaction as 'involuntary' -- contrary to all intuitions, including the self-understanding of the defendant.<sup>67</sup> Ignorance of neither a contract term nor market price suffices to render consent to a contract involuntary. Otherwise, the vast majority of contracts would lack consent. Compared to prevailing accounts of unconscionability, the proposed distributive account of unconscionability focuses less on the plaintiff and more on the defendant, i.e., on the party alleged to have exploited and exacerbated distributive injustice.<sup>68</sup> I started from the premise that it is morally impermissible -- or at least undesirable -- to impose an exceptional liability on a person in the absence of a non-morally arbitrary reason, and that is why I have narrowed the conditions for distributive liability to ones where the defendant has acted in a way that makes him specifically responsible for plaintiff's loss.

The interest in avoiding moral arbitrariness is symmetrical, in that we should also wish to avoid conferring a windfall on certain members of the class of disadvantaged persons. However,

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<sup>67</sup> Cf. Richard Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 295 (1975) (arguing that unconscionability "should be used only to allow courts to police the process whereby private agreements are formed, and in that connection, only to facilitate the setting aside of agreements that are as a matter of probabilities likely to be vitiated by the classical defenses of duress, fraud, or incompetence"); John Hill, *Exploitation*, 79 CORNELL L. REV. 631, 654 (1994) ("The exculpatory nature of exploitation has to do with its effect upon the subjective ability of the party to reason and to act freely and voluntarily."). See also Kronman, *supra* note 1 (arguing that the notion of voluntarism is vague and ultimately requires background equity; thus, libertarians committed to giving effect only to voluntary transactions must be egalitarians too); Philip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 U. CHI. L. REV. 1513, 1526-27 (2003) (observing how courts implausibly tend to infer a defect in the mental processes of a party from the presence of unfavorable terms).

While the principle of autonomy does not call for the enforcement of all commitments just by virtue of the fact that they were voluntarily entered, even to the extent autonomy is well-served by the enforcement of contractual promises that were voluntarily made, Seana Shiffrin has persuasively argued that it does not follow that the state's considerations end there. *Paternalism, Unconscionability Doctrine, and Accommodation*, 20 Phil. & Pub. Affairs 205, 223 (2000) ("viewing autonomous agreements as worthy of respect does not entail relinquishing one's own capacities to exercise independent moral judgment or to set distinct priorities for action").

<sup>68</sup> Plaintiff and defendant are switched in the unconscionability context because unconscionability is normally asserted as a defense.

the operation of responsibility is not symmetrical. Responsibility should be taken as a necessary condition of legal liability, but the absence of responsibility on the part of the plaintiff is neither necessary nor sufficient for the success or failure of her unconscionability claim. Not only may we wish to compensate a victim for losses for which she was partially responsible, but we may not even wish to reduce compensation to reflect the measure of her responsibility. If we think responsibility for an event can be allocated among persons in a zero-sum manner, a policy of compensating or awarding relief to individuals under certain circumstances would imply that their alleged exploiters are to that very extent not responsible for the loss at issue. But if we think responsibility turns on conduct rather than consequences, it should not surprise us that there is no fixed amount of moral responsibility for a given loss to be distributed among the relevant actors.

Thus, asserting that an exploiter is responsible for the loss he would have willing imposed on a socially disadvantaged person is not to imply that the victim was not also responsible for her loss, let alone incapable of such responsibility. Alleged exploiters are not responsible only where their conduct is coercive, i.e., where it deprives their victims of responsibility for transactional outcomes. Inasmuch as my argument appeals to autonomy, it is indirect. Individuals have an autonomy interest in their political community respecting their imperfect social rights. But I am not concerned here with individuals' autonomy interests as endangered by specific transactions. I am not limiting myself to those transactions which, if allowed, would momentarily deprive victims of agency altogether. Far less drastic conditions warrant liability on distributive grounds, and indeed, unconscionability is repeatedly found present in transactions between fully functional moral agents.

Nor does the distributive approach over-extend a limited doctrine (at least in common law). As discussed, most cases of distributive unconscionability are recognizable under existing unconscionability doctrine. A distributive approach would not carve out an entirely different set of cases as candidates for unconscionability. For the most part, it reinterprets the principles which motivate existing law.

#### **IV. Causation in Mass Tort.**

The demands of distributive injustice also help us make sense of a more specific phenomenon in the application of private law: the relaxation of the causation analysis in class action torts. It is not my aim to persuade the reader that such relaxation takes place, but to point to various observations and apparent instances of the practice and then suggest how imperfect social rights may help us to understand it. To the extent the reader is left unpersuaded that distributive considerations explain judicial behavior in this context, either because the cases are adequately explained on other grounds, or because distributive considerations do not adequately predict those cases in which causation is relaxed (as opposed to those in which it is not), you are invited to treat the following as an elaboration of a hypothetical situation in which distribution might matter.

The Supreme Court has repeatedly observed that rational and fair compensation for victims of asbestos exposure is best achieved by the legislature.<sup>69</sup> But the United States Congress has yet to pass legislation that would establish an administrative alternative to the courts.<sup>70</sup> Interestingly, notwithstanding certain procedural barriers to judicial resolution erected (or insisted upon) by the Supreme Court, the judiciary has not abdicated its role in sorting through asbestos claims, but rather continues to be the primary venue for handling asbestos

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<sup>69</sup> See, e.g., *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *Norfolk & Western Railway Co. v. Ayers.*, 538 U.S. 135, 166 (2003).

<sup>70</sup> See Stephen Labaton, *Asbestos Bill is Sidelined by the Senate*, N.Y. TIMES, Feb. 14, 2006, at C1.

claims. In playing this part, courts have not even grasped at whatever legal doctrines they might have used to quickly dismiss large numbers of claims. Rather, they appear to have bent over backwards to arrive at plaintiff-friendly solutions.

Jane Stapleton recently identified what she calls “two causal fictions” in asbestos law.<sup>71</sup> First, courts use a “substantial factor” approach in asbestos cases.<sup>72</sup> The “substantial factor” approach is applicable to diseases that operate by a threshold mechanism where there is no injury until the accumulated dose exceeds some threshold. However, it cannot be said that all of the asbestos products used by a plaintiff contributed to her mesothelioma. Thus, the application of the “substantial factor” test rests on a fiction about the relationship between exposure and disease contraction. Second, courts treat the asbestos disease as if the severity of the disease was dose-independent, or as though there were an indivisible injury. This too is a “scientific fiction” as applied to asbestosis.<sup>73</sup> Whether one believes the fictions sufficiently scientifically grounded, it does appear that courts are explicitly treating asbestos differently than other formally analogous tort claims. For example, in *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203 (Cal. 1997), the court itself characterized the substantial factor test as “formulated to aid plaintiffs as a broader rule of causality than the “but for” test.” It observed that “generally applicable standard instructions on causation are insufficient” in the asbestos context, and thus held that “plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff’s exposure to defendant’s asbestos-containing product in reasonable medical probability was a

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<sup>71</sup> *Two Causal Fictions at the Heart of U.S. Asbestos Doctrine*, 122 L.Q.R. 189 (2006).

<sup>72</sup> *In re Manguno*, 961 F.2d 533 (5th Cir. 1992) (holding that, under Louisiana law, cigarette smoking and asbestos exposure could be concurrent causes of workers’ lung cancer, even if it was possible that cigarette smoking alone could have caused cancer).

<sup>73</sup> *Id.* at 193. Stapleton points out that part of the reason the United States may be plaintiff-friendly in this area is that because most employees are barred from suing their employer in tort, injured workers sue other parties in order to access tort-level damages. *Id.* at 194. *Cf.* Jules Coleman, *Risks and Wrongs* 401-04 (rights and duties of corrective justice may depend on the absence of other institutional measures that ensure victims receive appropriate compensation for their wrongful losses).

substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth.” There is no reason to believe that such plaintiff sympathy is limited to the asbestos context.<sup>74</sup> Rather, it is likely to arise wherever well-known demographic facts make painfully clear that a ‘mass’ injury is in fact disproportionately the loss of those who had relatively little to begin with.<sup>75</sup>

The introduction of distributive concerns at the stage of rule application is more controversial than at the stage of rule formation. Anthony Kronman, in the context of a piece defending the use of contract regulation to advance distributive ends, seems inclined to agree that “in particular cases judges and others charged with responsibility or policing individual transactions should apply established legal rules regardless of their distributional consequences” on the grounds that judges cannot properly assess distributional consequences on a case by case basis and, in any event, to do otherwise would frustrate expectations and render exchange insecure.<sup>76</sup> Similarly, Liam Murphy, in the context of an article arguing that individuals have duties of justice that bind them directly (albeit non-coercively), concedes that “[p]eople lead freer and better lives, facts of normative significance, if they can devote most of their concerns to

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<sup>74</sup> Consumer fraud suits involving plaintiffs who are as a class socially disadvantaged may also benefit from relaxed standards. See, e.g., *Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005) (claiming consumption of chain's food caused obesity and related serious health problems, and that chain violated false advertising and deceptive trade practices provisions). While consumer fraud cases may generally be subject to lower causation standards, I would speculate that socio-economically disadvantaged plaintiff classes may disproportionately benefit from this reduced burden. A related empirical question is whether the widespread softening of the reliance element in consumer fraud cases – see, e.g., *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768 (Mass. 1975) and *Varacallo v. Massachusetts Mutual Life Ins. Co.*, 752 A.2d 807 (N.J. Super. Ct. App. Div. 2000) -- is also related to the distributive implications of consumer fraud litigation.

<sup>75</sup> Some have proposed that proof of causation be abolished generally in the context of mass toxic torts. See Margaret Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117 (1997). Again, whether the cases in which causation is in fact effectively done away with are disproportionately those in which plaintiffs are socio-economically disadvantaged is an empirical question that I cannot resolve here.

<sup>76</sup> Kronman, *supra* note 1, at 501.



their own affairs without always monitoring levels of well-being or degrees of social inequality.”<sup>77</sup>

But to the extent that the only qualifications on property rights are broad categorical rules, they are hardly qualifications at all – they are better characterized as mere definition of the scope of the initial right. Since the fact of definition is inescapable, it does not require much justification (though particular definitions do). Certainly, profound inequality is not necessary to justify the imposition of certain limits on the scope of property rights. Arguably, though, background injustice and the corrective imperative it generates is necessary to justify the less predictable but still not unpredictable character of flexible rules arising from distributive injustice.

I would not dispute the common wisdom that intervening in individual transactions on an ad hoc basis, with the general aim of achieving a more just distribution of income or wealth, is unpromising and unappealing. But there may be patterns in the application of formally uniform law, as in the asbestos case, which are predictable and therefore do not realize the worst fears of all those committed to the rule of law. Predictability may be defined in two related ways. First, we might say application is predictable ex post where observers of the legal system accurately predict the results of particular cases. Second, we might say that application is predictable ex ante when individuals know before they act what the legal consequences of their considered actions will be. Since the two senses of predictability are but two ways of characterizing the same state of affairs, it is not necessary to choose between them. But it is really predictability in the second sense that is important to individual freedom.<sup>78</sup> The question is then, does the

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<sup>77</sup> Murphy, *supra* note 3, at 258.

<sup>78</sup> One might also value predictability because it is a prerequisite to the assessment of particular judgments. It may be that without some public means, i.e., a common reference point, with which to pronounce judgments fair, they

introduction of distributive concerns at the stage of application leave individuals without notice of potential liability?

It does not. The individuals whose rights or responsibilities are altered as a result of distributive claims are not unfairly surprised. They are not only on notice of the general obligations of distributive justice, but in the account I have set forth, imperfect social duties manifest themselves in private law only where the poverty of one party conditioned the conduct of the other. For example, in contract, distributive justice affects claims where one party has exploited the other in a way that she is unlikely to do without knowledge of the fact of exploitation.

Given that intentionality is not a prerequisite for liability in tort, the nature of the notice requirement in this context is necessarily weaker than in contract, but here too one might say that persons act with knowledge of the kinds of risks to which they expose some known class of potential victims, and the caution with which they proceed should reflect in part the particular vulnerabilities and related claims of that class. If a class of potential victims is marked by a disadvantaged social position, it is often but not always the case that social disadvantage is causally related to a higher degree of exposure to the risk at issue. One might argue that a defendant in such a tort case cannot be held responsible for the additional measure of distributive injustice which his negligence creates because he did not act with the aim or perhaps even actual knowledge that his conduct would have this distributive effect. But so long as the distributive effect is as foreseeable as the primary harms for which his conduct is labeled a tort, he is no more or less responsible for those distributive consequences as for those other harms. For example, the driver of a large, luxury automobile may not intend to target drivers of inexpensive

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are not. *See* Andrew Williams, *Incentives, Inequality and Publicity*, 27 PHIL. & PUB. AFFAIRS 225, 246 (1998) (“justice must be seen in order to be done”).

automobiles when she drives negligently. But under certain circumstances, it might be appropriate to hold her to a higher standard of conduct vis-à-vis those less protected drivers, given that the special danger to which they are exposed, which is greater than the risk they would pose to her should they engage in equally negligent driving, is as foreseeable as the base level of danger created by her negligent driving.

Thus, the limited recognition of imperfect social rights in private law does not require that individuals go about *actively* avoiding the exacerbation of distributive injustice. They need only refrain from negligent conduct that foreseeably exacerbates the problem. The narrow scope for imperfect social rights that I have proposed here not only ensures localized effect, it ensures that those effects are usually predictable by those who choose to profit in morally hazardous territory. These distribution-sensitive liability rules do not involve adjusting damages to the parties' wealth but rather take background distributive injustice into account in setting the rules of conduct, i.e., in deciding what conduct is permissible (or at least, what conduct is free) and what conduct will require compensation.<sup>79</sup>

There will likely be some residual level of unpredictability that results from occasional appeal to imperfect social rights to strengthen certain plaintiff class action claims. This unpredictability is a genuine cost of taking distributive injustice into account in the adjudication of private law claims, and it has a negative impact on liberty. But two points are worth remembering here. First, as Anthony Kronman argued, liberty trade-offs are inevitable in all distributive enterprises.<sup>80</sup> That is not a special consequence of taking distributive demands into

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<sup>79</sup> Cf. Jennifer Arlen, *Should Defendants' Wealth Matter?*, 21 J. LEGAL STUD. 413 (1992) (arguing that, where individuals are risk averse, it is efficient to require a higher level of care from wealthy defendants, and that defendants should be required to pay a higher level of damages). Arlen's result turns on the fact that a marginal increase in care is less 'costly' for a wealthy defendant due to decreasing marginal utility of wealth. Her results apply wherever the defendant is of greater wealth than the victim; more generally, defendant's wealth is relevant wherever there is a difference between injurer and victim's wealth.

<sup>80</sup> See Kronman, *supra* note 1, at 506.

account in private law. To the extent taking distributive considerations into account at the stage of application introduces more unpredictability than would other means of achieving distributive justice, by all means, let us use superior means. But where the choice is not between private law and public law but private law or nothing, criteria that speak to the relative merits of tax and transfer are beside the point.

Second, there is deeper reason why appeal to distributive justice will result in some measure of unpredictability, and it has liberal implications. Wherever an area of law is motivated by multiple, overlapping principles that are not reducible to one another, this pluralism is likely to result in some unpredictability because individual actors within the system rank the motivating principles differently, or even fail to recognize some of those principles.<sup>81</sup> For example, one judge may believe that economic efficiency is the supreme goal of contract law, but believe that this aim gives way under the force of imperfect social rights in some cases. Another judge may believe that tort law is intended to map on to the natural obligations of individuals who impose loss on others, and that those pre-political obligations leave no room for distributive considerations. Still another may believe that, just as moral culpability is (arguably) necessary but insufficient to justify punishment, moral responsibility is necessary but insufficient to justify the imposition of liability in contract or tort.

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<sup>81</sup> Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1488 (2005) (referring to “an embarrassment of riches” in contract theory and the “brute fact of theoretical pluralism”). Oman himself is committed to what he calls the “priority of liberty,” which he argues “suggests that, by and large, promises ought to be enforced in some way.” He further concludes that this argues against “employing fairness or distributive justice as a secondary value in place of efficiency...because practically speaking such goals can only be pursued in contract law by violating the priority of liberty,” that is, by “limiting the ability of parties to bargain away from the desired distributive outcomes.” *Id.* at 1504-05.

Pluralism is not limited to private law theory. “To refuse to institute a beneficial policy in a specific instance because that policy would not have the same effect in all similar instances, with ‘similar’ suitably defined, would be to eliminate almost all state action, including the prosecution of criminals and the compensation of victims.” Sanchirico, *supra* note 1, at 1054.

Moreover, theories of private law differ in their core spheres of application. In the realm of contract, economic theories may be more relevant where the parties are corporations, or individuals whose only relevant interests are economic. Rights-based theories may be more relevant where the stakes importantly affect individuals' life plans. Similarly, the paradigmatic tort for legal economists may be a loss of fungible property, whose market value roughly corresponds to its owner's valuation. The paradigmatic tort in theories of corrective justice is a bodily injury, or other violation of personal integrity. The principles of corrective justice and economics are more or less illuminating and compelling depending on the type of contract or tort at issue.

While it is useful to attempt to identify and persuade all actors within our legal system that a single principle animates all of contract and tort law, the reality is that the shallow consensus on which we can and must operate reflects multiple commitments.<sup>82</sup> Most of the time, those commitments point toward the same outcome; indeed, only theories that 'fit' most of the existing doctrine are plausible theories at all. While it is desirable to thicken the terms of our consensus, we should not take too lightly the privilege of disagreeing on the foundations of private law. Pluralism permeates the practice of private law. Making normative space for distributive justice may cost us some predictability, but it is fundamentally liberal.

## **Conclusion**

The major difficulty in defending the consideration of distributive injustice in the domain of private law has been justifying the imposition of liability on a particular defendant and the award of damages to a particular plaintiff based on deficiencies in our collective institutions. I

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<sup>82</sup> See Eisenberg, *supra* note 4, at 241 ("Part of the human moral condition is that we hold many proper values, some of which will conflict in given cases, and part of the human social condition is that many values are relevant to the creation of a good world, some of which will conflict in given cases. Contract law cannot escape these moral and social conditions. In contract law, as in life, all meritorious values must be taken into account, even if those values may sometimes conflict, and even at the expense of determinacy.").

have used the concept of imperfect rights and duties to situate individuals within the demands of distributive justice, and to explain how the legal rights and duties of two persons may be shaped and linked by distributive injustice. Traditional private law entitlements are not simply modified to serve humanitarian ends where bankruptcy or the welfare state are deemed inadequate tools. Rather, distributive injustice is imbedded in the moral structure of our interpersonal relations and plays a direct role in defining the scope of individual responsibility for others' loss.

While my primary claims have been normative, I have also suggested that the common law already does give some legal effect to imperfect rights in our private law. I have offered two examples, but have not surveyed the practice throughout American private law, as would be necessary to demonstrate a systemic role for distributive claims. To understand the actual role that imperfect social rights play, one should also consider which institutional features make a regime of private law more susceptible to the demands of distributive justice. It is worth exploring whether common law systems are more or less likely than civil law systems to be responsive to the force of imperfect social rights in the private law context. I suspect that the general sensitivity of a political culture to distributive issues does not fully explain the particular response of its private law regime (as apart from its public law regime) to the problem of inequality. Other relevant factors may include what the formally recognized sources of private law are (e.g., precedent versus code), whether private and public law are separately administered, and more generally, whether the system takes private law to be a part of the regulatory apparatus of the state or a self-contained system of bilateral justice.