Who Has the Power to Enforce Private Rights?

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June 2021

It is commonplace among deontological theorists, including those who theorize about private law, to assume that private rights are accompanied by enforcement powers that enforcement are the rightholder's to exercise.[1] In other words, the rightholder may demand of third parties that they refrain from stepping in on her behalf to vindicate her rights absence of her authorization or, more weakly, in the face of her express objection to such intervention. If this is the correct picture of private rights, then we have a non-instrumental justification of a central structural feature of private law—its empowerment of the victim of a private legal wrong to hold her wrongdoer legally liable if she chooses to do so, and the general disempowerment of others to initiate such action on her behalf. [2]

But why shouldn't suitably situated third parties, including the state, be permitted to enforce the rightholder's rights regardless of what the rightholder says about the matter? The intuitive thought behind the commonplace view is that when it is the rightholder's rights that are at stake, it is she who gets to decide whether and how her rights will be enforced precisely because the rights are hers. Her rights protect her interests or vindicate her autonomy. But this isn't entirely satisfactory. If a person's rights define what others owe her as a matter of justice, why isn't it anyone's and everyone's business when they are infringed? True, the threat to justice comes at the expense of her rights in particular. But protecting her rights justly secures her interests or vindicates her autonomy. Why isn't that the business of all?

Here I examine the defense of the commonplace view that is offered by the Kantian version of corrective justice theory—one that proceeds by analogizing the power to enforce to the power of consent—and argue that it rests on a stipulation about the nature of rights that requires a deeper defense. I then sketch an alternative framework that offers a qualified

[1] See e.g., Cecile Fabre, Permissible Rescue Killings, 199 Proceedings of the Aristotelian Society 149, 159 (2009); Victor Tadros, The Ends of Harm: The Moral Foundations of Criminal Law 295 (2011); Ripstein, Private Wrongs 271 (2016).

[2] John Gardner, From Personal Life to Private Law 199-202 (2018); Benjamin C. Zipursky, Philosophy of Private Law, in The Oxford Handbook of Jurisprudence and Philosophy of Law (Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro eds. 2004) 623, 640; Ripstein, supra note 1, at 271.

justification of the commonplace view. It also puts normative powers front and center but in a way that makes justice rather than freedom the central value by building on a picture of private legal rights and their associated normative powers as settling normative uncertainty about justice. Because of epistemic normative uncertainty, valid legal rights and valid agreements will generally settle questions of justice imperfectly. They are nonetheless morally valid when they constitute plausible settlements of that uncertainty and are made by parties who are authorized to settle it. Parties are authorized to settle it when the matter pertains to what justice between them and only them demands.

An implication of the framework is that there can be legal rights infringements that are beyond the pale on any plausible resolution of the uncertainty about justice and legal rights infringements that are only arguably unjust given epistemic normative uncertainty. The former type of infringements, I argue, *are* the business of everyone, including unaffected third parties, and thus the commonplace view can't be defended with respect to such rights infringements. But when it comes to arguably unjust legal rights infringements—infringements that wouldn't count as an injustice between the parties under some plausible resolution of the applicable epistemic normative uncertainty—the parties involved can and should be able to validly agree to a settlement of questions of justice between them that would validate in whole or in part the legal rights infringement after the fact. This in turn entails that any enforcement of the infringed legal right must, as the commonplace view insists, occur at the victim's behest.

I. Corrective Justice and the Plaintiff's Power to Enforce

On its face, private law has the right kind of structure to instantiate the private rights that exist as a matter of morality or justice by establishing a legal relationship that seems to mirror the relationships that rights create at the moral level. A plaintiff's private legal rights are the flipside of legal duties owed by potential defendants to the plaintiff. To prevail, a plaintiff can't simply show that defendant has caused her harm. It isn't even enough for her to show that the harm is a consequence of wrongdoing on the part of the defendant. She must show that she has suffered an injury that arose from a legally wrongful act of the defendant against her in particular. If she succeeds, she will receive a remedy that redresses that breach of duty and only that breach. In

short, private law enables persons to vindicate rights against particular others.[3] It is not a mechanism for vindicating the rights of third parties or promoting broader social purposes like economic efficiency. In Ernest Weinrib's terms, "correlativity" is the central organizing principle of private law.[4]

This correlativity isn't only exemplified by the substantive rules of private law. It is also exemplified by its procedures: "the most extensive legal powers to determine the powers of the court, those most akin to those of a criminal prosecutor, lie with the very person who claims to have been wronged."[5] The victim of an apparent rights infringement is the one who decides whether to initiate and maintain proceedings against the defendant.

But while it seems natural that substantive legal rights should be structured in the same way as underlying moral rights if the latter are to provide a justification of the former, it is less clear that powers of enforcement must mimic the relational structure of the substantive rights they protect at either a legal or moral level. Even if the rights define what is ideally owed by the defendant to the plaintiff in virtue of the plaintiff's interests or autonomy, it doesn't follow without more that enforcement of those rights is a power that must be vested in the plaintiff. To assume otherwise is to commit what John Gardner calls "a legalistic fallacy."[6] The plaintiff's substantive rights might be better protected by delegating the decision to enforce to the state or some other suitably placed third party.

Questions of enforcement arise, moreover, in non-ideal circumstances—when some aren't conforming to their duties. And typically the plaintiff isn't the only victim of such non-conformity. There is no a priori reason to suppose that the appropriate response to a departure from the ideal will mimic the ideal. Enforcement of legal rights that are themselves non-instrumentally grounded might be appropriately justified in instrumental terms with reference to the rights and interests of persons other than the plaintiff as well as those of the plaintiff.[7]

Yet while the surface level considerations will necessarily change as we move from an ideal world to a non-ideal one, the deeper principles that inform the content of the ideal set of rights and duties should persist. This makes it less likely that there would be a sharp

[3] Ripstein, supra note 1, at 73.
[4] Ernest J. Weinrib, The Idea of Private Law 120-126 (1995).
[5] Gardner, supra note 2, at 200.
[6] Id. at 204.
[7] Gardner identifies a set of such considerations. Id. at 208-210.

discontinuity in approach as we move away from the ideal.[8] So let's set the instrumental possibility aside, given that we are assuming with corrective justice theorists that the ideal is best characterized in rights-based terms, and ask whether we can find a justification for leaving enforcement up to the plaintiff that is directly grounded in the rights of the parties.

A. The Kantian Stipulation

On Arthur Ripstein's Kantian account of corrective justice, the power to enforce a private right is, like the power to consent, a corollary of the right itself.[9] But while an analogy to consent is superficially appealing, it is stipulative absent a deeper explanation. Whereas a rightholder's consent to some action that infringes her rights renders permissible an action that would otherwise be impermissible, merely failing to sue the wrongdoer doesn't alter the normative status of the action. The rightholder can coherently maintain that she has been wronged and is owed a duty of repair, even if she decides not to enforce her right against him. Does the Kantian framework have the resources to explain why the power to enforce belongs to the rightholder in the way that the power to consent seems to?

Kantian corrective justice puts a particular conception of freedom front and center. The master principle is the Universal Principle of Right, which requires each to respect the equal freedom of all, and the cardinal sin is unilateralism—the imposition of one agent's will or purposes on another. Hence, the principle of independence—the principle that "no person is in charge of another."[10]

Kantians add to this conception of freedom an assumption that the substantive entailments of the Principle of Right are radically indeterminate. This means that equal freedom cannot be realized in a state of nature because determinations of those entailments will inevitably end up reflecting the relative strength and particular views of private persons. Even if the problem of indeterminacy could be surmounted, moreover, each would lack the assurance that

[8] This is not to say that a more wholeheartedly instrumental approach might eventually make sense as we move much further from the ideal. See Rebecca Stone, The Circumstances of Civil Recourse, Law & Philosophy (forthcoming); Jonathan Quong and Rebecca Stone, Rules and Rights, in David Sobel, Peter Vallentyne, and Stephen Wall (eds), 1 Oxford Studies in Political Philosophy 222 (2015).

[9] Ripstein, supra note 1, at 271-72.

[10] Ripstein, supra note 1, at 56. Weinrib offers a more abstract formulation based on an ideal of free and equal persons as beings who are capable of acting on principles valid for all such beings, which therefore necessarily abstract from particular persons' purposes. Weinrib, supra note 4, at 90-91.

others will refrain from unilaterally interfering with her rights. Hence the need for a suitably constituted state who can define and enforce private rights omnilaterally, such that no-one is at the mercy of particular others. [11]

Thus, on the Kantian conception, the law doesn't breathe light into already existing rights. It constitutes just relations by ensuring that each is free to set his ends and use his means without being subject to anyone else's unilateral will.[12]

At first glance, the correlative structure of private law litigation seems to be justified by this conception. If the injustice that grounds a defendant's liability to a plaintiff is the defendant's infringement of the plaintiff's rights, and those rights express her equal freedom, then it is natural to suppose that the plaintiff as rightholder, alone among private parties, ought to be the one to decide whether to enforce those rights against the defendant.

At second glance, however, it isn't clear why this follows. On the Kantian conception, primary private rights and their associated secondary rights of repair define fundamental relations of equal freedom between persons. So why isn't the state bound to enforce those rights as part of the state's responsibility to uphold justice, even in the absence of the initiation of a lawsuit by the plaintiff?[13] Omnilateral action that prevents a wrong from occurring or forces the defendant to repair it secures the equal freedom of all regardless. [14]

This doesn't rule out a decision by the state to condition enforcement on assent of the rightholder. But neither does it require it. Whether enforcement must be so conditioned looks like a question that the public authority might resolve one way or the other given indeterminacy about the operative principles governing the use of force. To deny the plaintiff the power to enforce her rights is not to subject her to the will of a particular other so long as the collective

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[11] Arthur Ripstein, Authority and Coercion, 32 Philosophy & Public Affairs 2 (2004); Weinrib, supra note 4, at 107; Weinrib, Corrective Justice 111 (2012).

[12] Ripstein, supra note 11, at 8-9.

[13] This is an objection that civil recourse theorists have pressed against corrective justice theorists E.g. Benjamin C. Zipursky, Civil Recourse, not Corrective Justice, 91 Georgia Law Review 695, 741 (2003); John C.P. Goldberg and Benjamin C. Zipursky, Recognizing Wrongs 162 (2020).

[14] Indeed in the context of preventing a wrong that hasn't yet occurred, Ripstein distinguishes between "the principles governing the rights that individual human beings have as against each other with respect to the security of their bodies, and the independence of those bodies from other people's actions" and "a regulative principle governing the way in which a public authority can authorize the enforcement of those first-order rights." Arthur Ripstein, Reclaiming Proportionality (Society for Applied Philosophy Annual Lecture 2016), 34 Journal of Applied Philosophy 1, 2 (2017). Exactly what proper force entails in specific cases is indeterminate, and so public resolution of the indeterminacy is required to prevent any particular person's unilateral will prevailing, which means that the use of force must be authorized by law. Id. at 9

enforces her right in her place. The only thing that is determinately prescribed as far as enforcement is concerned seems to be the state's involvement in the process.

Ripstein, however, contends not only that the rightholder must be the one who decides whether to exercise her rights, but also that the power to enforce the right is part and parcel of the right such that she must also decide whether the right gets enforced.[15] Thus, presumably, Ripstein thinks that this is a question to which there is a determinate answer—an answer found in the nature of private rights—that constrains what the state may do in the name of all.

But the latter claim rests on a stipulation about the nature of rights that isn't itself derivable from the principle of independence. There is an injustice standing in need of correction prior to the initiation of action by the plaintiff against the defendant. The plaintiff's failure to acquiesce to enforcement, even her affirmative objection to it once started, leaves her substantive private rights against the defendant intact. She may coherently maintain that the defendant has unjustly infringed her rights and is duty bound to repair the injustice, yet not want her right to be coercively enforced against the defendant. That a rightholder has the power of consent that enables her to decide whether or not defendant's action infringes her rights in the first place doesn't, without more, entail that she has the power to enforce her rights should defendant infringe them absent her consent.

Granted, the stipulation is consistent with the rest of the Kantian's theoretical apparatus. But it calls out for further explanation. The theory gives the state a central role in constituting individual rights, emphasizing pervasive indeterminacy about the definition and enforcement of rights that must be omnilaterally resolved—a resolutely procedural prescription. At the same time, it assumes that there is a stringent and highly determinate individual constraint on the exercise of the state's enforcement powers arising from the nature of rights—initiation of a lawsuit by the plaintiff against the defendant. But this is stipulated rather than derived from the rest of the Kantian apparatus.

B. Misfeasance versus Nonfeasance

Kantians insist that private rights must be rights against misfeasance not nonfeasance. There cannot be a private law duty to use your rightful means "in a way that suits your neighbor's

[15] Ripstein, supra note 1, at 271-272.

preferred use of those means."[16] But why this substantive restriction on the content of private rights? The Kantian account, as we've seen, revolves around a commitment to omnilateral proceduralism in the face of normative indeterminacy. This seems to entail that anything goes, so long as private rights are constituted via an appropriate procedure.

We can make sense of this claim within the Kantian framework, I will now argue, if private rights are enforceable at the behest of the plaintiff. For Kantians don't deny that there can be legal rights against nonfeasance period, only that such rights must be public rather than private rights. Public rights, unlike private rights, are enforceable at the behest of a public official as a representative of the collective. Given Kantian assumptions, rights against nonfeasance can only be enforced in this way. This points to a second way of understanding how private enforcement fits into the Kantian scheme: not as a necessary entailment of the principle of right but rather as something with implications for the substance of private rights given that principle.

i. Evaluating the Kantian Justification

The basic problem with rights against nonfeasance, on the Kantian view, is that they impose duties on a person that depend on the needs and purposes of the rightholder and/or dutybearer. On Weinrib's conception, this is problematic because persons' interactions must exemplify their status as beings capable of free choice who are capable of detaching their actions from their particular purposes and so must accord with principles valid for all such beings whatever their particular purposes—principles that therefore don't make reference to any particular person's purposes.[17] Hence, there can be no duty to rescue someone because he is in need and it wouldn't be very burdensome to the rescuer to do so.[18]

This justification for distinguishing rights against nonfeasance from rights against misfeasance is elegant but question-begging at a justificatory level. This isn't necessarily a problem for Weinrib as his project is avowedly formalist in nature. He explicitly brackets questions about the desirability of legal arrangements that instantiate corrective justice.[19] But if we are interested not in the coherence of a system of private law as such, but in the normative justifiability of such a scheme, we must confront such justificatory questions directly. In

[16] Ripstein, supra note 1, at 10.
[17] Weinrib, supra note 4, at 90-91; Weinrib, supra note 11, at 11, 21.
[18] Weinrib, supra note 11, at 11.
[19] Weinrib, supra note 4, at 25, 45-46.

particular, we must ask why we should be moved by principles that define agents' rights in this purpose-insensitive way?

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

Ripstein's principle of independence points us towards a more substantive rationale. We abstract from agents' purposes when we define their private rights, because if one agent's duties depended on another's purposes, he could be placed at the mercy of the rightholder's purposes—subjugating him to the rightholder's will.

It isn't obvious why a privately enforceable duty of easy rescue runs counter to a normatively plausible principle of non-domination. A duty of easy rescue, for example, imposes few costs on the dutybearer, while protecting the rightholder from a grave threat. And the proposed duty would be a universal one. The flipside of my duty to rescue someone in some circumstances is that that person is under a duty to do likewise for me when I'm in need of rescuing in similar circumstances. Indeed, it is plausible to suppose that persons situated behind the veil of ignorance would choose to make everyone subject to such a duty.[20]

Moreover, Kantians do not claim that there can be no rights against nonfeasance, only that any such rights must be public rather than private rights. Ripstein doesn't think that it is problematic, for example, for the criminal law to penalize those who fail to come to the aid of others in emergency situations.[21] Yet if there is such a public law duty to rescue, the contours of a person's rights will depend on the needs and purposes of another, even in the absence of a

[20] John Rawls argues as much. John Rawls, Theory of Justice: Revised Edition 297-298 (1999).
[21] See Arthur Ripstein, Three Duties to Rescue: Moral, Civil, and Criminal, 19 Law and Philosophy 751, 751-52 (2000).

private law duty to rescue, because she will be duty-bound to use her means to rescue others sometimes. That duty will be owed to the public at large as opposed to the person in need of aid. But such a duty nonetheless limits the person's rights in a way that depends on the purposes of another. So merely making the contours of a person's rights depend on another's purposes can't be inconsistent with the principle of independence on the Kantian conception. It also matters to whom the duty is owed—the public or a particular other. But why should that make so much difference?

ii. Public versus Private Rights against Nonfeasance

Perhaps what matters is who has the power to waive the right? If there is a public law duty of easy rescue, then a person in need of rescue presumably can't unilaterally waive the right, because the duty is owed to the public at large not to her in particular. By contrast, if the duty is a private law duty, then the person in need of rescue has the power to consent to not being rescued. Thus, there is a sense in which the dutybearer is at the mercy of the person to be rescued: she can unilaterally decide whether to release him from his duty.

There might seem to be something strange about a duty to rescue that can't be waived by the direct beneficiary of the duty. But Ripstein views a public law duty of rescue as analogous to the public law duty to pay one's taxes. The state must provide "the background conditions for a social world of which everyone is a full member," which means that the state must see "to it that everyone has enough to avoid falling into extreme dependence on others."[22] A system of redistributive taxation will be part of this as will state-provided emergency services, and a duty of easy rescue might be regarded as an adjunct of those emergency services.[23] Understood in these terms, it isn't so strange that a duty of easy rescue wouldn't be waivable by the person in need of rescuing. If no rescue attempt is made by the person best positioned to make it, a likely result is that the person in need ends up in the hands of the emergency services, increasing the costs that are imposed on everyone else.

Yet the fact that a public law duty can be waived by the public, but not by the rightholder doesn't alter the fact that in the absence of such a public waiver, the rightholder's purposes

[22] Ripstein, supra note 3, at 289.
[23] Ripstein, supra note 21, at 776-79.

control the duty bearer. And so it is unclear why it should matter so much for the Kantian with whom the power of waiver lies.[24]

Perhaps instead what is crucial here is the fact that when the duty is a public one, the needs and purposes of private persons don't control particular others directly—they are, instead, ingredients, of a larger scheme of distributive justice, which is inherently public rather than private. The beneficiary of distributive injustice, the Kantian may say, isn't wronging any victim of that injustice in a relational sense.[25] Thus, such claims are distinct from claims of private right, which are appropriately addressed to particular persons and so directly constrained by the principle of independence.[26]

But it isn't obvious that claims of corrective justice can be insulated from claims of distributive justice in this way.[27] Suppose that Bob has more than he is entitled to as a matter of distributive justice. Does it really make sense to say that he isn't wronging particular others who have less, such that they don't have claims against him in particular, but only claims against the community at large? Suppose that Jane is one of those others who have less. What might Bob say

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[24] Indeed, it seems unlikely that consent is the fundamental distinction for Ripstein given that relationships of status—relationships, like a parent-child relationship in which one person is unable to consent to the modification of the terms of that relationship—implicate private rights within the Kantian framework. Ripstein, supra note 11, at 18.

[25] Weinrib writes: "the prospect of impoverishment is created by the systemic legitimacy of acquisition, rather than by the appropriative acts of any particular acquirer. The *systemic* difficulty that property poses for innate right is resolved by the *collective* duty imposed on the people to provide subsistence as needed." Weinrib, supra note 11, at 285. Thus, although Weinrib regards the state's support of the poor as a "constitutional essential," id. at 287, because "taxation and property are jointly necessary for a civil condition legitimized by the idea of the original contract," id. at 296, the failure of the state to realize this constitutional essential is a collective one that can't be reduced to individual breaches of duty to the poor. Likewise, for Ripstein public law requirements like taxation and other affirmative duties that are necessary to secure the background justice that ensures "everyone has enough to avoid falling into extreme dependence on others," Ripstein, supra note 1, at 289, "do not give rise to any private right, because … [they are] part of a public system of cooperation," id. at 292.

[26] According to Weinrib, "considerations of poverty have no effect on the definition and application of property rights." Weinrib, supra note 11, at 296. According to Ripstein, the moral idea that no-one is in charge of any other entails that "I cannot take or use your property without authorization" or "act in ways that are inconsistent with your being in charge," but "is silent on the further question of what citizens, acting as a collective body through their governments, should do about the distribution of property." Ripstein, supra note 1, at 44.

[27] For other challenges to the independence thesis, see Peter Cane, Distributive Justice and Tort Law, New Zealand Law Review 401 (2001); Hanoch Dagan, The Distributive Foundations of Corrective Justice, 98 Michigan Law Review 138 (1999); Richard L. Lippke, Torts, Corrective Justice, and Distributive Justice, 5 Legal Theory 149 (1999); Dan Priel, The Impossibility of Independent Corrective Justice (unpublished manuscript).

to Jane to explain why he isn't wronging her by having more and she less in the way that he would be wronging her were he to steal from her some her justly held resources?

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

Consider first situations in which it is apparent to all that Bob has more than justice entitles him to and Jane less. Can the Kantian really deny that Bob is wronging Jane in failing to give Jane some of his unjustly held resources?

Perhaps there is uncertainty about the correct principle of rectification. Even though we know Bob has more than justice entitles him to and Jane less, it might not be obvious that Bob should hand over his excess resources to Jane as opposed to others who also have less than justice entitles them to. Thus, even when there is certainty about the injustice of the distribution, there remains uncertainty about what should be done to fix it. And so, the thought might be, Bob can't be wronging Jane until there has been resolution of that uncertainty—uncertainty that the state is presumably in a better position to resolve than private parties.

But whether such uncertainty exists is a contingent matter. Suppose Bob is the only person with more than distributive justice entitles him to and Jane the only person with less. Then the only way the injustice can be rectified is for Bob to give his excess resources to Jane.

Even if such certainty is absent, it doesn't follow from the fact we don't know who must give what to whom to rectify the injustice that those with too much are not wronging particular others. It might entail only that we don't know whom those who have more are wronging. Were Carl in receipt of goods that he knew were stolen, and the goods were, unbeknownst to Carl, stolen from Mary, we would say that Carl was wronging Mary despite his ignorance of the identity of the owner. It's not clear why we shouldn't view the situation between Bob and Jane seems analogous to this one.

Perhaps a stronger defense can be mounted on behalf of the Kantian position when there is epistemic uncertainty about whether Bob has more than he is entitled to as a matter of justice and Jane less because there is uncertainty about the correct principles of justice or facts relevant to implementing those principles. In such situations, it isn't that Bob simply doesn't know the

identity of those to whom he ought to give his excess resources; he isn't even sure that he has more than justice entitles him to in the first place.

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

The above discussion has emphasized epistemic uncertainty that could, at least in principle, be resolved through more reflection or more information. But what about metaphysical uncertainty about the principles of justice? It may be that there are multiple principles that realize a just (or sufficiently just) distribution of resources, such that the realization of justice requires us to choose among them. The Kantian will say, moreover, that it is important that the operative principle be selected, and the resulting distribution implemented, by an entity that acts on behalf of everyone through a legitimate political process—that is, by an appropriately constituted state. If so, then it is the very choice by the state of a particular distribution from the set that makes that distribution the just one (even though other distributions could have acquired that status had they been chosen instead). Before the selection is made there is no just distribution even if everyone has full information about relevant facts, and Bob wouldn't be wronging Jane in a relational sense if he had more than justice entitles him to and Jane less according to one of the eligible principles, so long as at least one other eligible principles of justice would deem the distribution a just one.

Even under such conditions, however, it doesn't follow that Bob wouldn't be wronging Jane when he holds more than justice could entitle him to and Jane less under any of distributions among which the state may permissibly choose. Unless the metaphysical indeterminacy is complete, it doesn't establish that there can never be a situation in which Bob wrongs Jane by virtue of having more than distributive justice entitles him to and Jane less.

And once the state has selected a principle from the eligible set, that becomes the operative principle of justice and so why shouldn't we say that from then onwards Bob wrongs Jane should he have more than he is entitled to and Jane less according to the selected principle.

The metaphysical uncertainty about justice is resolved by the state's selection of such a principle. If after selecting such a principle, the state fails to perfectly implement it, why doesn't it make sense to say beneficiaries of the injustice wrong its victims?

The Kantian will view the coercive implementation of the chosen scheme as constitutive of justice—the omnilateral selection of the principle is insufficient to ground claims of right. But must we say that? Why not say that there are injustices that require rectification to the extent that the state has failed to implement the chosen scheme? When it comes to wrongs of private law, the Kantian is happy to say that there is a relational injustice, even though the enforcement scheme has failed to prevent the injustice from occurring. So why not say the same about distributive failures?

Notice that nothing about this argument necessarily absolves the collective—the state—from responsibility for distributive injustice that arises because it fails to discharge its duty to select a principle from the eligible set and/or implements an unjust distributive scheme. Under these circumstances, it may also make sense to speak of a collective wrong against those who receive less than they are entitled to.

At the same time, it doesn't follow from the fact that the predicament of agents is the result of a collective failure that those who end up with more than they are entitled to are therefore not also wronging those who end up with less. They may not be culpable for this wrongdoing, for it may not be obvious to them that they have more than they are entitled to or how the distributive injustice ought to be best rectified, and as a practical matter, a centralized and coercive machinery is likely necessary to realize full distributive justice. But it doesn't follow that they aren't wronging the have-nots. Were the details of the collective failure and appropriate remedial measures fully apparent to the haves, they would be able to see the path to rectifying the injustice.

The third and final way we might explain the Kantian's disapproval of private, but not public, rights against nonfeasance is by appeal to the identity of entity who is empowered to enforce the rights. If the power to enforce isn't exercised, the dutybearer is in one sense free not to do her duty—and so free from the tyranny of another's needs or purposes. Enforcement of public law duties is initiated by the state, while enforcement of private rights is initiated and maintained by a private party—the rightholder—acting on his own behalf with the state's support.

If the assignment of the enforcement power to private rightholders is the fundamental distinguishing feature of private rights, then the problem with a private law duty of easy rescue is that the rightholder has the power to initiate and maintain enforcement proceedings against the dutybearer on the grounds that the latter owes it to him to use his means to serve his purposes. A public law duty of easy rescue doesn't have this feature because the state initiates the enforcement action in pursuit of public purposes, thus posing no conflict with the principle of independence. So even if the state decides to force me to rescue you, it is the state deciding in furtherance of public purposes that I must use my means for your purposes not you.

It is unclear that this distinction has normative significance. Suppose that Tom must rescue Mary from injury on a particular occasion pursuant to Tom's public law duty of rescue. If he does his duty under the threat of coercive public enforcement, this deprives Tom of the use of some of his means. Let's suppose that during the course of the rescue, Tom gives up an opportunity to earn $50 and ruins the $50 clothes he is wearing, thus altering the distribution of means: Tom ends up $100 poorer that he would have been had he not rescued Mary, and Mary, her bodily resources intact, substantially better off—the equivalent of $10,000 better off let's suppose. Suppose that Mary then subsequently enforces her private rights against Tom. Let's suppose that Tom takes $10,000 from Mary without her consent as compensation for his heroic act, and then Mary successfully sues Tom for conversion. There remains a significant sense in which Mary is thereby able to constrain the use of Tom's means by her purposes. Mary is much better off than she would have been because Tom was required to rescue her and she is entitled to use the private law system to protect the situation she finds herself in as a result. This does not seem to me to be relevantly different from a system in which Mary is able to enforce the duty of rescue directly by threatening Tom with a lawsuit for $10,000 in the event Tom fails to rescue her. In both schemes, Mary has the equivalent of $10,000 in part because Tom was required to rescue her, and Tom's means were depleted because Tom was required to serve Mary's purposes. And when Mary protects her entitlements after Tom acts pursuant to the public law duty of rescue, she protects polices boundaries that reflect her purposes.

For the Kantians, however, it must matter that Mary policies boundaries that reflect her purposes only indirectly—mediated by the public scheme that imposed upon Tom an enforceable

duty to rescue her and thereby serve purposes.[28] The duty to rescue is enforceable by the public, and so the decision to force Tom to serve Mary's purposes is an omnilateral one that is thus compatible with the principle of independence. The enforcement of a private duty of rescue, by contrast, is committed to Mary's discretion. Mary gets to decide whether to coerce Tom in the name of her own purposes.

Even on the Kantian conception, it's not so clear why such indirectness should matter so much. Kantian rights are at most provisional in the absence of a set of public legislative, adjudicative, and enforcement mechanisms, so all our rights—both public and private—are dependent on the existence of a public scheme.

But we now, at least, can see why the private enforceability of private rights matters within the Kantian scheme. If there are privately enforceable rights, then they must be rights against misfeasance not rights against nonfeasance. Rights of the latter kind must be publicly enforceable.

Still this does not establish that there must be privately enforceable rights, only that such rights must take a certain form: they must be rights against misfeasance not nonfeasance. The argument has not established that private rights against misfeasance must be privately enforceable. The Kantian stipulation about the nature of rights is needed to fill that gap.

II. Alternative Foundations

Can anything more be said in favor of committing enforcement of private rights to the discretion of the rightholder? I believe that Ripstein is heading in the right direction with his analogy to consent but that more is needed. In the remainder of the paper, I offer a more substantive conception of private rights that allows us to connect the plaintiff's power to enforce her rights with the normative powers that are associated with her private rights. On this conception, private rights don't merely vindicate the independence of each from all. They are constituted and constrained by determinations of substantive justice.

[28] Weinrib writes: "An unjust advantage in a distributive context … affects any one of those other participants only derivatively: they receive less individually because there is less for all to share. Under corrective justice, by contrast, the wrongdoer directly diminishes the holdings of the sufferer, so that a single operation enriches the former at the expense of the latter." Weinrib, supra note 4, at 71.

A. Kantian Normative Powers

We have seen that for the Kantians, corrective justice is instantiated by the omnilateral definition and enforcement of private rights. The conception of justice that emerges is resolutely procedural. As we have seen, they insist that persons' private rights must be rights against misfeasance not nonfeasance. They also require that each has enough to prevent her from ending up in a position of de facto dependence on others.[29] But beyond those minimal substantive constraints, private rights are not *about* anything beyond the protection of persons' means whatever they happen to be.

The Kantian conception of the normative powers of consent and contract—powers that are typically supposed to be corollaries of most private rights—is also a procedural one. These powers derive their normative significance from the fact that they "enable free persons to exercise self-mastery together."[30] Just as the determination and enforcement of the background rights must be expressions of an omnilateral will in order to prevent each from being subject to the unilateral will of others, consent and contract have significance because they make actions of another that would otherwise infringe a rightholder's rights instead expressions of the rightholder's freedom: "an exercise of your freedom cannot be a violation of your freedom and so cannot be a wrong against you."[31] They transform what would otherwise be a unilateral imposition on the rightholder into an expression of the rightholder's own will. When a rightholder consents to another's use of her person or property, the other's use is transformed into an exercise of the rightholder's freedom where in the absence of consent it would be an infringement of her rights and so a violation of the principle of independence.[32] When two people enter into a contract or transfer property, they create new rights by uniting their wills about what is to be done or transferred.[33]

The account isn't completely devoid of substance. Although free persons have the right to contract, "a contract cannot turn a person into a thing."[34] Thus, a person "cannot consent to [her] own murder or enslavement because it lies beyond [her] normative power for uniting [her] will

[29] Ripstein, supra note 1, at 289
[30] Ripstein, Force and Freedom 108 (2009).
[31] Id. at 128.
[32] Id. at 110.
[33] Id. at 112-116.
[34] Id. at 135.

with that of another."[35] But beyond such minimal substantive constraints, the validity of the exercise of the power is a matter of whether it was free in a procedural sense—undeceived and uncoerced such that the authorized actions are consistent with the will of both parties to the transaction. The substantive reasons that lie behind its exercise are irrelevant.[36]

B. Justifying Proceduralism

Suppose that the polity settles on a very unequal distribution of means. A procedural conception of our private rights and associated normative powers would nonetheless be all-things-considered justified if all substantive questions about the justice of the distribution of means that private rights protect are metaphysically indeterminate—a matter of rational indifference, so long as they are settled somehow. But justice surely requires more than that. We, of course, disagree vigorously about what exactly it requires, but that's an indication that the substantive content of justice is epistemically uncertain, not that it is a matter of indifference so long as the question gets decided somehow.

A procedural conception would also be all-things-considered justified if substantive questions of justice are lexically subordinate to the principle of independence—that is, if unilateralism is in fact the cardinal sin to which the polity must respond that must be secured before we start worrying about equalizing the means each has at his disposal. But the right to do as one wishes with one's means free from the interference of others isn't a very meaningful one for those with very little. And if others have a lot, the formal freedom of each entrenches relations of substantive inequality.

More modestly, the Kantian might simply insist that questions of substantive justice are the province of public institutions rather than private ones, such that private institutions that instantiate procedural corrective justice are justified in a qualified sense in the face of public failures. But it's unclear how such a qualified justification justifies anything, given that it serves to protect and preserve the resulting substantively unjust distribution of means. Even if public institutions have not failed, the Kantian conception is only vindicated for the conditions of an ideal world. A justificatory void reemerges as soon as the polity moves away from the ideal.

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[35] Id. at 133.

[36] "Kant's analysis makes no reference to what he calls the 'matter' of choice, that is, the reasons that I might want to transfer my watch or horse to you. … All that is required is that I freely offer you the watch and you freely accept it." Id. at 113.

C. Towards a Substantive Conception of Private Rights

My preferred approach is to make principles of substantive justice the starting point and build out the edifice from there. Exactly what substantive justice entails is a difficult question. Competing answers will inevitably be supplied. But disagreements are genuine ones—disagreements with a significant epistemic component. Procedural considerations will remain in view insofar as we need fair mechanisms for resolving disputes. But so long as there are better and worse ways of resolving uncertainty about substantive justice that we are sometimes able to accurately adjudicate between, there will be substance built into the content of our private rights and constraining the exercise of our normative powers. Here I set out the fundamentals of my preferred approach, which I call the settling conception, compare and contrast it to the Kantian conception, and develop implications for the right to enforce. Elsewhere I develop the conception in greater detail and defend it from foundational objections.[37]

I begin with the reasons that govern agents' choices. Those reasons consist of impartial moral reasons that everyone shares and partial reasons that vary across persons. It may well be rational, for example, for persons to give greater weight to their own interests or interests of those with whom they stand in particular relationships—friends, family members, colleagues and so forth. The set of reasons that apply to an agent define her rational standpoint, which generates prescriptions about what should be done in light of the balance of those reasons.

Because some of those reasons are partial reasons, conflicts among standpoints can arise: a choice that is prescribed by one agent's standpoint may differ from that prescribed by another's. This means that it matters whose standpoint governs a given choice and agents need conflict resolution mechanisms. The reasons that define particular standpoints can't supply them given that they conflict. So agents must appeal to a further set of normative considerations to resolve the conflicts. I refer to these as considerations of justice, since they allocate standpoints among choices.

Without specifying exactly what they are and entail I assume that considerations of justice include both considerations of fairness and human flourishing. All else equal flourishing will be advanced when an agent's standpoint is allocated to choices that matter most to her, for

[37] Rebecca Stone, Normative Uncertainty, Normative Powers, and the Limits of Freedom of Contract (unpublished manuscript); Rebecca Stone, Putting Freedom of Contract in its Place (unpublished manuscript).

example, choices about how she will use her own body and resources that will readily serve her own ends. All else equal fairness is advanced when each person's standpoint governs a similar number of choices, weighted by their significance, as do others.

The questions of reason and justice that arise within this framework are tremendously complex. It will often be difficult to figure out what reason requires from a given standpoint, even for the person who occupies that standpoint. Metaphysical indeterminacy may arise when reasons are incommensurable with one another. Even when there is a single correct answer, it may be epistemically difficult to figure out what the balance of the standpoint's reasons demands even with full knowledge of relevant facts. Metaphysical and epistemic normative uncertainty may also interact as when there is epistemic uncertainty about the extent to which a problem is metaphysically indeterminate. Finally, there may be factual uncertainty that raises further normative questions about the proper way to respond to such uncertainty.

Figuring out the just allocation of standpoints to choices is also a very complicated task. There will be metaphysical indeterminacy about justice whenever justice is indifferent among a set of possible allocations of standpoints to choices. Incommensurability among considerations of justice will add a further layer of metaphysical indeterminacy. And then there will be considerable epistemic uncertainty about the content of the correct principles of justice. This will be the case even when the focus is on ascertaining what would ideally be required.[38] The epistemic challenges will be even more serious when, as in our actual world, many aren't so ideally motivated raising the problem of distributing the burdens created by non-compliance.

Once there is normative uncertainty about the demands of reason and justice, it isn't sufficient to allocate standpoints to choices in order to work out what is to be done. Agents need to allocate authority to resolve applicable normative uncertainty about justice and about the standpoints that govern choices given the resulting resolution of the question of justice.

At first glance, it might seem that the solution is allocating authority in a way that would be instrumentally best—in the way that is most likely to get us closest to reason and justice. But such an approach is problematic. Insofar as the normative uncertainty is metaphysical, the only thing that matters instrumentally is that the uncertainty gets resolved, such that there will be

[38] As John Rawls and others have emphasized, reasonable people will regularly disagree about justice even when we assume a populace of persons who are in large part motivated to conform to justice. John Rawls, Political Liberalism, liv (1993). See also Ronald Dworkin, Law's Empire 178 (1986); Jeremy Waldron, Law and Disagreement 1-4 (1999).

multiple allocations of authority that are instrumentally best. Insofar as the normative uncertainty is epistemic, there may be an allocation of authority that is determinately the best from an instrumental standpoint, but the normative uncertainty is likely to make it epistemically uncertain what that allocation is. And even if it were possible to ascertain the instrumentally best allocation of authority in the face of epistemic uncertainty, it isn't clear that it is the just assignment all things considered. Such an assignment may run counter to liberal egalitarian commitments to the value of individual autonomy or equal respect for persons, say by authorizing a cadre of moral experts to resolve uncertainty about others' standpoints.

This suggests that instrumental recommendations must be tempered by intrinsic considerations that sound in autonomy and equal respect for persons. Such considerations suggest, at minimum, that each agent should, presumptively at least, be authorized to resolve uncertainty about her own standpoint.

When it comes to the assignment of authority to resolve normative uncertainty about questions of justice, it is perhaps less clear that these intrinsic considerations recommend something different from the instrumentally best assignment of authority. For the first-order question that is to be determined by the second-order allocation of authority reflects substantive commitments to flourishing and fairness. Allocating authority in an instrumentally suboptimal way is arguably in tension with those commitments.

But even here it the answer can't plausibly be determined solely by what is instrumentally best. That might allocate authority to a single expert about justice even when it comes to questions about which people reasonably disagree. Perhaps, therefore, in the spirit of Rawlsian political liberalism, authority to resolve questions of justice should be allocated in a way that minimizes the chance that unreasonable resolutions of uncertainty about justice are implemented, with authority to resolve questions about which reasonable people disagree allocated in a more reasonable fashion. This wouldn't entail that all of the latter kinds of questions of justice would have to be submitted to the community at large. Questions of justice that arise among particular groups would be properly resolvable by members of the group. But groups of persons would be empowered to reasonably resolve uncertainty about justice that pertains to the group with the community at large authorized to resolve uncertainty about community-wide questions.

If this is the just solution, the resulting conception shares with the Kantian conception a commitment to resolution of questions of justice by omnilateral decision procedures but it is a much more qualified one. Instead of securing independence by eliminating unilateralism for its own sake, omnilateralism is needed insofar as it serves substantive principles of autonomy and equal respect for persons. The mere fact that there is normative uncertainty about justice doesn't entail that there must be an omnilateral decision procedure in place to resolve it. Omnilateral allocations of authority that produce an unreasonable resolution of a question of justice are ruled out. And the resolution of some forms of metaphysical indeterminacy might not require resolution by an omnilateral procedure either. Suppose, for example, justice is perfectly indifferent between two allocations of standpoints to choices, such that selection among them presents a pure coordination problem like the decision whether to require driving on the left or driving on the right. Any kind of coordination device should do, even one that meant deferring to a single person.

Omnilateralism may be more important to securing equal respect for persons where metaphysical indeterminacy arises not from indifference but from incommensurability or when the source of the uncertainty is epistemic. Both types of uncertainty make it the case that a chosen allocation may reflect the views of some but not others. But the ultimate question raised by the proposed framework is a substantive one: which allocation of authority best instantiates principles of equal respect for persons and individual autonomy.

At this point normative powers of consent and promise enter the picture. Consider the set of choices the agent may face. Many of these will be controlled by her own standpoint. Normative uncertainty about its dictates means that it won't always be clear what she should do. If authority to resolve such normative uncertainty is allocated to the agent, as I just argued, she must settle the uncertainty herself by exercising the power of decision-making. If the decision she reaches is valid because it plausibly resolves any such normative uncertainty, she has a pro tanto reason not to reconsider it and, assuming she doesn't end up reconsidering it, to act in accordance with it.

What about choices of others that are controlled by the agent's standpoint? Consider, for example, choices of others that might result in them intimately touching her. Justice plausibly entails that many such choices are controlled (at least in part) by her standpoint. The power of consent, I suggest, is the power to resolve normative uncertainty about what his standpoint has to

say about such choices. Thus, when an agent validly consents to such a touching, the other is permitted to touch him in this way as a result, because by consenting he has resolved normative uncertainty about what his own standpoint has to say about such a touching. Consent thus resembles decisionmaking but applied to the choices of others when they are controlled by her standpoint rather than to the agent's own choices.

Notice that what counts as a valid act of consent (or decision), on this framework, is inexorably tied to the reasons that define the agent's standpoint. Contra the Kantian conception, consent has its moorings in the substantive reasons that give rise to it. To be valid, an act of consent must plausibly resolve uncertainty about the balance of reasons that define the agent's standpoint. If it is perfectly clear that the agent's standpoint would proscribe the consented to action, the agent's attempt to consent to it is invalid on this conception. But uncertainty means that, though consent must be sufficiently tied to those reasons to be valid, the agent will usually have considerable latitude. We could incorporate into the framework free-floating autonomy concerns that would give the agent a limited power to authorize or prohibit actions that run counter to her standpoint, thus further expanding the domain of consent to include a right to authorize the irrational. But such autonomy concerns aren't needed to ground the power in the face of normative uncertainty about the dictates of an agent's standpoint.

When it comes to uncertainty about the demands of justice, agents need an analogous power to resolve normative uncertainty about its demands. This, I suggest, is how promises and agreements should be understood. Valid promises and agreements resolve normative uncertainty about what justice demands between the parties—that is, about how their standpoints should be allocated to their choices. Again, what counts as a valid agreement will inexorably be tied to the relevant considerations of justice. It must, at minimum, plausibly resolve uncertainty about considerations of justice between the parties. Perhaps it must do more than this by reasonably resolving uncertainty about justice. But no matter how the substantive bar is defined, promises and agreements are morally significant not because they are exercises of freedom, but because they constitute genuine settlements of what justice between the parties requires. Of course, normative uncertainty gives the parties latitude to specify the content of their agreements. But they are constrained by the range of allocations that normative uncertainty can plausibly or reasonably support.

Agreements don't resolve normative uncertainty about justice between the parties in a vacuum. They occur against the backdrop of prior attempts by the community at large to settle what normative uncertainty about justice requires. Those attempts give rise to the private legal rights that the parties may modify through their agreements. Because of epistemic normative uncertainty about justice, those legal rights will generally differ from the rights that justice truly prescribes. But similar validity conditions control here too. So long as those community efforts result in reasonable resolutions of that uncertainty, parties should take those rights as the baseline for their negotiations about what justice between them demands. If they succeed in forming a valid agreement against such the backdrop of a set of valid legal rights, they effectively modify those rights, reallocating standpoints among possible choices in accordance with their agreement.

Notice that the settling conception makes considerations of distributive justice highly relevant to the content of private rights, if by distributive justice we mean the normative considerations that govern the allocation of standpoints to choices. There is also no implication that private rights must be rights against misfeasance. Which choices each person's standpoint controls is a substantive question of justice that plausibly will depend on persons' needs and purposes—considerations that will shape agents' standpoints. If legal rights protect entitlements that have been distributed in a way that is incompatible with any plausible conception of justice, then the validity of those legal rights is open to challenge and exercises of normative powers that take those invalid legal rights as their starting point may themselves be invalid for doing so.

At the same time, the framework tolerates some injustice. Private legal rights and agreements that purport to modify those rights are valid if they resolve uncertainty about justice in a plausible way. So long as there is normative uncertainty, persons' legal rights and the exercises of normative powers that purport to modify them are inherently provisional, and thus subject to revision through further valid exercises of normative powers compatible with that normative uncertainty.

D. Enforcement Powers

What does the settling conception suggest may be done in response to infringements of persons' private legal rights where those legal rights have arisen from valid efforts by the community and subgroups within it to resolve normative uncertainty about justice?

Recall that legal rights and agreements are valid if they constitute plausible settlement of normative uncertainty about justice by those authorized to settle it. This means that we can distinguish between two possible ways in which valid legal rights may be infringed. First, a valid legal right may be infringed in a manner that is only an arguable injustice at the deep moral level because while it fails to conform to the settlement of the normative uncertainty about justice that is embodied in the legal right, it conforms to another plausible settlement of that normative uncertainty. Second, it may be infringed in a manner that is a certain injustice because it fails to conform to any alternative plausible resolution of the applicable normative uncertainty.

Consider arguable infringements first. Suppose that D, a duty bearer, injures R, the rightholder, because he fails to take some precaution that would have reduced the risk of injuring R and R has a cause of action in negligence against D under prevailing law as a result. Suppose further that D fails to take this precaution because he suffers from a minor disability that makes taking the precaution particularly burdensome to him relative to a typical member of the population. If there is a plausible argument that justice doesn't demand that he take that precaution contrary to the law's conclusion that it does, then the infringement is only an arguable injustice. Because it is only an arguable injustice, R and D may reasonably take the view that D didn't in fact infringe R's rights. Indeed, in advance of D's decision not to take the precaution, R could, according to the settling conception, have validly waived her legal right against non-injury by D.

But suppose that R didn't do this. Despite its compatibility with a plausible theory of justice, there remains a potential problem with D's action. The problem isn't that it is a substantive injustice—it might be, but, given normative uncertainty, no-one is in a position to say so for sure. The problem is rather that he has defied a valid settlement of normative uncertainty about justice.

But this is a problem that could plausibly be rectified by R's acquiescence *after* the fact. R is the one against whom an arguable injustice has been committed. Since the injustice is only arguable and D and R have the authority to jointly resolve uncertainty about justice between them, R's voluntary acquiescence after the fact has special normative significance when it coheres with a plausible view about what justice between them requires because it can then constitute part of a valid joint settlement by the parties of the normative uncertainty about what justice between them requires.

In the Kantian framework, an agreement can't have this kind of robust validating effect. The principle of independence rules out unilateralism, but the pre-existing legal rights have been omnilaterally defined and so state enforcement of those against the parties is compatible with the principle of independence. It is true that respecting a freely-agreed to settlement agreement would also be compatible with the principle of independence because both parties have agreed to it eliminating any problem of unilateralism. But doing so doesn't seem to be required by the principle of independence.

By contrast, when we frame the problem as one of resolving normative uncertainty about justice in accordance with those who are authorized by justice to settle it, we can break the tie in favor of respecting the settlement. This is because the framework suggests that, for substantive reasons of autonomy and equal respect for persons, we ought to respect the parties' settlement so long as it is arrived at in good faith and reflects a plausible view about what justice between them requires. The reasons to respect the settlement are even more compelling when the normative uncertainty about justice between them has a significant epistemic component and the parties are more likely than the community at large to understand the specific issues of justice between them because it turns on considerations particular to their circumstances and relationship.

For such a settlement to be valid on my proposed conception, we must of course be confident that the settlement does in fact reflect the parties' freely determined views about what justice between them requires. A settlement that results from R's impoverishment and resulting lack of resources to litigate her dispute would not, for example, be valid. This is not to say that potential litigation costs entailed by a good faith dispute between the parties about, say, what in fact transpired, could not serve as a valid basis for validly settling a lawsuit. Such dispute resolution costs present a genuine issue of justice between the parties. What is important is that any settlement reflects a procedurally free and fair determination by the parties of matters of justice between them—including questions about how the burdens of dispute resolution should be managed and shared.

It also follows that third parties should not interfere with the settlement process based on their own different view about what justice between the parties requires. The question of justice is one that according to the settling conception the parties alone are authorized to resolve. Thus, the decision to enforce must be left to R. If the state were to enforce the right over R's objections, that would interfere with the parties' abilities to freely decide what justice between

them requires. On the settling conception, the state's determination of the parties' rights is provisional and subject to revision by the parties based on more fine-grained considerations of justice that apply to the parties' particular relationship. For the parties to be able to freely evaluate those considerations, third parties including the state must refrain from enforcing persons' legal rights absent R's authorization.

But now consider an infringement by D that is incompatible with all possible plausible resolutions of normative uncertainty about justice and is therefore a certain injustice. In such circumstances, R cannot validly acquiesce to what has been done to her after the fact on the settlement conception just as she couldn't validly do so before the fact. The defendant's conduct remains wrongful regardless and protecting the plaintiff against the injustice is therefore properly the business of the community at large. This type of injustice *is* the business of third parties—and so deference to R is not required.

Does it follow that in such cases, direct state enforcement on the model of the criminal law is required? Not necessarily. The state may have good institutional reasons to delegate the decision to initiate and sustain proceedings to potential plaintiffs. Doing say may increase the chance that justice is done given the plaintiff's knowledge of the dispute. It may reduce the overall expense of doing justice by enabling the parties to exploit the threat of further litigation to come to an adequate settlement earlier. Decentralization of dispute resolution may also help the polity avoid unhealthy concentrations of power in official hands.[39]

Such considerations may give the polity reasons to set enforcement up on the civil law model with the plaintiff entitled to decide whether or not to enforce her rights. Any decision to set itself up in this way should reflect the polity's judgment about what non-ideal justice requires by considering which institutional arrangement would get it closer to the ideal of protecting every person's rights, and if neither would get close to the ideal, which arrangement would achieve the most just balance of securing persons' rights and equitably spreading the burdens of private and official non-compliance. The delegation to the plaintiff would be an instrument for achieving justice rather than reflecting a power that intrinsically belongs to her.

Larissa Katz and Matthew Shapiro have criticized John Gardner's suggestion that such an institutional justification of the power to sue justifies giving plaintiffs a power to conscript public

[39] These are reasons John Gardner canvasses in developing his institutional account of the plaintiff's power to sue. Gardner, supra note 2, 209-210.

authority for private purposes proposing instead that plaintiffs are better viewed as sharing the power to enforce private rights with the courts and therefore constrained by the reasons that justify such an arrangement.[40] They also view the justifying reasons as more personal to the plaintiff than Gardner's account allows. These include interests in "not abasing oneself by letting rights violations go unanswered" and "not being a stickler."[41] Katz and Shapiro regard these personal reasons as insufficient to make it the case that the plaintiff must have the power. Thus, they agree with Gardner that the power isn't a direct corollary of the plaintiff's primary and secondary private rights. But they believe that these personal moral reasons support a presumption in favor of the plaintiff having the power, because rightsholders themselves "are generally better placed than government officials to strike the right balance between vindicating their rightful honor and avoiding sticklerism."[42]

My conception points to a slightly different way of carving up the terrain. When it comes to private rights infringements that are merely arguable injustices, the power to sue belongs in a strong intrinsic sense to the plaintiff as the person authorized (in conjunction with the defendant) to settle applicable normative uncertainty to determine whether the defendant's action is compatible with a plausible joint settlement of what justice between them requires. I don't characterize this as the plaintiff trading off an interest in not abasing herself against an interest in not being a stickler, but rather as the plaintiff and defendant together coming together to settle what justice between them requires.

When it comes to private rights infringements that are certain injustices, by contrast, there is no normative uncertainty to settle and the polity faces a purely instrumental decision of how best to prevent and repair such infringements. In this realm, any delegation to the plaintiff doesn't reflect concerns personal to the plaintiff. The polity faces an institutional design question the answer to which is properly guided by questions of ideal and non-ideal justice. I don't think we can say a priori whether the polity should give plaintiff an untrammeled discretion to conscript the courts for private purposes or whether it should impose some constraints on the exercise of that discretion that reflect the considerations of ideal and non-ideal justice that underpin the polity's design choice. It is plausible to suppose that Gardner's conscription model

[40] Larissa Katz and Matthew A. Shapiro, The Role of Plaintiffs in Private Law Institutions in volume on John Gardner's Work on Private Law Theory (forthcoming).
[41] Id.
[42] Id.

or a power-sharing arrangement or even the third model that Katz and Shapiro consider that casts plaintiffs in an even more public role of quasi-official may be appropriate depending on the circumstances.

III. Conclusion

I have proposed that a conception of private legal rights and agreements according to which they constitutively resolve normative uncertainty about justice provides a non-instrumental justification of the delegation of enforcement of private rights to the rightholder when the infringement wouldn't count as an injustice according to at least one plausible resolution of normative uncertainty about justice. This is because the settling conception supposes that the parties have the moral authority to settle normative uncertainty about justice between them. Thus, the rightholder can validly agree after the fact that the infringement not count as a wrong, or that it is deserving of a lesser remedy than the law would otherwise prescribe, if doing so is compatible with such normative uncertainty.

Such a move is not available to an adherent of the Kantian conception because on that conception, private rights and their associated normative powers are not *about* an underlying substantive problem of justice. There is indeterminacy in that framework but it is indeterminacy that is resolved—at least from the perspective of private law—by omnilateral action. This means that the framework can't explain why it is important that a prior omnilateral resolution of what justice requires be alterable by private agreement and so it leaves underdetermined how enforcement of private rights should occur.