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Corrective Justice Beyond Private Law

J. Colin Bradley

I. Introduction

Corrective justice theory faces a dilemma. A system of private law organized around the idea of corrective justice aims to uphold the reciprocal independence of both parties to a dispute. It constitutes a normative practice realizing important relational values, and this distinguishes private law from the non-relational, redistributive aims of public law. However, by focusing exclusively on relational values, corrective justice risks ignoring the effects of unfair background conditions on transactions, thereby converting private law into an instrument of injustice. The challenge is to find some way to accommodate these intuitive sources of injustice without collapsing the distinction between private and public law.

I offer a solution to this dilemma. I propose a republican interpretation of corrective justice and its ideal of independence that is sensitive to background unfairness while retaining the emphasis on relational and corrective justice at the heart of private law. On the view I defend, independence is the constitutive aim of a legal system, but independence must be understood in a substantive and not merely formal way. Seeing substantive independence as the constitutive aim of a legal system provides a frame for articulating how private rights—I focus primarily on property and contract rights—should be designed to avoid dependence. Moreover, it shows how a doctrine of exploitation may bear on bilateral litigation over private rights.

Independence so understood provides an attractive interpretation of the ideal of social equality. To show this, I develop Kant's framing of substantive independence as an ideal of equal citizens working together in a productive economy. If corrective justice aims at mutual substantive independence, then it must account for the role of private legal entitlements in causing and upholding the forms of dependence that arise from our interdependent participation in a productive economy around work, housing, education, and

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public accommodation. Independent social equals confront one another as rightsholders, enjoying equal public recognition of a civic status that entails freedom from having to subordinate oneself to others in order to have enough to live. The ideal of social equality as independence in turn grounds a non-distributive approach to social justice that retains the core ideas of relationality and correlativity at the heart of private law. This alternative approach to justice allows private law to incorporate many of the considerations normally associated with public law and distributive justice, while remaining within a corrective justice framework.

This view contrasts with two common approaches. The first, noting that correctively just transactions executed in the context of distributive injustice tend to perpetuate injustice, rejects the idea of private law as a distinctive normative sphere. But I join corrective justice and other "new private law" theorists in resisting this collapse of private law into public law. Collapsing private law, with its distinctive relational focus, into public law, which aims at distributive justice, would involve a dramatic eclipse of private life. As Judge Cardozo worried, under a legal system that ignores the distinctiveness of private law "life [would] have to be made over, and human nature transformed."[1] Moreover, social justice requires independence throughout the transactions that order our shared economic activities—it cannot be deferred to post-hoc redistribution.

My view also contrasts with a second strategy pursued by corrective justice theorists attempting to accommodate the worry that unfair background conditions pose a risk to private transactions. Some insist on a "division of labor" between private law—which enacts corrective justice—and public law—which pursues distributive justice. Such views acknowledge either that "background justice" must be in place for private law to function effectively, or that a *public system* of private law creates new forms of subordination that must be separately addressed by public law pursuing distributive justice.[2] Yet a coherent and attractive connection between these bifurcated goals continues to elude articulation.[3] I argue that corrective justice can accommodate these worries only if it goes beyond "private law" understood in exclusively formal and bilateral terms.[4]

[1] *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (1928); cf. John Oberdiek, "Structure and Justification in Contractualist Tort Theory" in John Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (OUP 2014) 118.

[2] Ernest Weinrib, *Reciprocal Freedom: Private Law and Public Right* (OUP 2022); Arthur Ripstein, *Private Wrongs* (Harvard UP 2016).

[3] See VIII and IX later in the chapter.

[4] Of the sort defended in Ernest Weinrib, *The Idea of Private Law* (OUP 1995).

II. Private Law as a Distinctive Normative Order

If anything comes close to uniting recent philosophical theories of private law, it is a rejection of the instrumentalist conception that reduces private law doctrines entirely to the pursuit of public values like allocative efficiency or even distributive justice.[5] Most agree that private law is or expresses or institutionalizes a distinctive normative domain. And there is broad agreement that what is distinctive about this normative domain is that it is constituted by values like responsibility, privacy, and reciprocity across interpersonal transactions.

Private law theorists characterize private law as "a system recognizing the equality of private individuals;"[6] as "concern[ing] the discrete, interpersonal dealings of specific (natural and corporate) persons" that "employs a distinctive form of justification, which is distinct from the form of justification appropriate to public law;"[7]a proceeding that "aims in the first instance to vindicate certain of the putative victim's interests, rather than those of the state or the public;"[8] the intrinsic value of which "lies in its construction of frameworks of respectful interaction—of just relationships—among genuinely free and equal individuals."[9]

To say that there is a distinctive, *private* normative realm is not to suggest that such a realm is beyond the reach of justice. Everyone should agree with John Rawls that "[i]f the so-called private sphere is a space alleged to be exempt from justice, then there is no such thing."[10] Private law fields of tort, contract, and property have profound implications on the justice of the society in which they are operative, and consequently, private law is part of what Rawls called the "basic structure" of society. To identify a practice or institution as part of the basic structure usually implies regarding it as something that is appropriately regulated by principles of distributive justice.

This raises what might be the central philosophical puzzle for recent theories of private law. How can private law *both* be part of the basic structure of society and hence subject to principles of distributive justice, *and* manifest a

[5] A prominent exception is Liam Murphy, "Purely Formal Wrongs" in Paul Miller and John Oberdiek (eds.), *Civil Wrongs and Justice in Private Law* (OUP 2020); Liam Murphy, "The Artificial Morality of Law: The Persistence of an Illusion" (2020) 70 U. Toronto LJ, 453–88.

[6] Hanoch Dagan and Benjamin Zipursky, "Introduction" in H. Dagan and B. Zipursky (eds.) *Research Handbook on Private Law Theory* (Edward Elgar 2020) 1.

[7] Oberdiek (n 1) 111.

[8] John Goldberg and Benjamin Zipursky, *Recognizing Wrongs* (Harvard UP 2020) 69–70.

[9] Hanoch Dagan and Avihay Dorfman, "Just Relationships" (2016) 116 Columbia L. Rev. 1397.

[10] John Rawls, *Justice as Fairness: A Restatement* (Belknap 2001) 166; cf. Gregory Keating, "Form and Substance in the 'Private Law' of Torts" (2021) 14 J. Tort L. 45–99.

distinctive normative realm in contrast to distributive justice?[11] The challenge is to articulate the principles for what Hanoch Dagan and Avihay Dorfman call "justice in private."[12] Corrective justice theory answers this challenge.

III. Corrective Justice and Normative Foundations

In Ernest Weinrib's formulation, corrective justice is organized around two complementary concepts: correlativity and personality.[13] Correlativity refers to the idea that "the liability of a particular defendant is always a liability to a particular plaintiff."[14] The concept of correlativity functions to structure the process of determining liability—from the institutional arrangement of private litigation between two parties, to the considerations and arguments that are permissible when determining liability and assigning remedies. Personality, on the other hand, is the source of substantive content in private law. By "personality" Weinrib means what Ripstein does by "independence," or "the moral idea that no person is in charge of another."[15]

While correlativity provides the structure of private law, independence provides its *constitutive aim*. Identifying independence as the law's constitutive *aim* will strike some as a mistake. Weinrib, for instance, defends a "brazenly circular" formalism, summarized by the slogan that "the only purpose of private law is to be private law."[16] Although private law contains normative concepts like fairness and independence, this normativity is "indigenous" to private law itself and does not require outside grounding.[17] I argue, however, that even Weinrib should accept the idea of independence as a constitutive aim of law.

Proponents of a *freestanding* approach to corrective justice insist that private law "is an institutional realization of principle, not an instrument in the pursuit of an external and hidden goal."[18] While the main targets of the corrective justice ire were law-and-economics scholars who proposed allocative

[11] Samuel Scheffler, "Distributive Justice, the Basic Structure and the Place of Private Law" (2015) 35 OJLS 225.
[12] Hanoch Dagan and Avihay Dorfman, "Justice in Private: Beyond the Rawlsian Framework" (2018) 37 Law & Phil. 171–201.
[13] Ernest Weinrib, *Corrective Justice* (OUP 2012) 10–14.
[14] Weinrib (n 2).
[15] Ripstein (n 2) 6.
[16] Weinrib (n 13); Weinrib (n 4) 5.
[17] Ernest Weinrib, "The Normative Structuralism of Corrective Justice" in Hanoch Dagan and Benjamin Zipursky (eds.), *Research Handbook on Private Law Theory* (Edward Elgar 2020) 487.
[18] Jules Coleman, *The Practice of Principle* (OUP 2001) 28.

efficiency as the "external and hidden goal," the view opposes instrumentalism of *any* kind.[19] There are a number of considerations in favor of a freestanding or "legalistic" approach to understanding private law.[20] For example, by eschewing a concern with moral foundations, private law can evade persistent moral disagreement by adopting a *modus vivendi* with clear predictability and rule of law benefits.[21]

However, while legalism has clear advantages as an interpretive theory of private law, Weinrib wants to reconstruct private law as a "normative practice."[22] I assume a practice is "normative" if its rules generate reasons for action. Thus the rules of private law give reasons to participants in the legal order of which it is part. Weinrib's formalism and non-instrumentalism amount to the claim that the reasons generated by private law rules are not mere instruments for conforming with some *other* reasons which exist independently of and prior to the development of private law as a normative practice. But it does not follow from this, as John Gardner observed, that private law rules are not instruments in any sense.[23]

Distinguish two ways in which private law could be instrumental. It could be *causally instrumental*, serving an important causal role in bringing about some goal that can in principle be achieved without it. Alternatively, it could be *constitutively instrumental*. The idea of a constitutive instrument can be illustrated with an example. Antibodies in one's bloodstream bring about the status of immunity to some disease. The presence of antibodies does not *cause* some separate phenomenon—the status of immunity. Rather the presence of antibodies *constitutes* the status of immunity: to have immunity *just is* to have the right antibodies (or the ready capacity to produce them).[24] Importantly, however, antibodies can still be better or worse suited to this task of constituting immunity. While there can be no immunity without antibodies, immunity nevertheless provides an independently intelligible standard. Therefore, it is still apt to think of antibodies as instruments.[25]

[19] Weinrib (n 4) ch. 2.

[20] Felipe Jiménez, "Private Law Legalism" (2022) 73 U. Toronto LJ; Paul B. Miller, "The New Formalism in Private Law" (2021) 66 Am. J. Jurisprudence 175–238.

[21] Jiménez (n 20).

[22] Weinrib (n 2) x–xi, 78.

[23] John Gardner, "What is Tort Law For? Part 1: The Place of Corrective Justice" (2011) 30(1) Law & Phil. 19.

[24] Philip Pettit, "Three Mistakes About Doing Good (and Bad)" (2018) 35 J. Applied Phil. 8.

[25] This reflects the difference between what Rawls called *perfect procedural justice* and *pure procedural justice*. By emphasizing independence as a constitutive *aim* or *instrument*, I am arguing that private law should be understood in terms of perfect, not pure, procedural justice, because independence provides the standard that private law could fail to live up to.

Weinrib objects to treating private law as causally instrumental, but he must be committed to treating it as constitutively instrumental. If the rules of private law are genuinely normative, that is, reason-giving, then there must be some basis for that normativity, even if that normative basis is located within the practice of private law itself. That normative basis, for Weinrib and Ripstein, is *independence*.[26] Thus we not only can but must ask of any proposed interpretation of the norms of private law whether they in fact promote—as constitutive instruments—independence. We can grant that the only purpose of private law is to be private law. But once we specify what it *means* to "be private law" we must ask whether any given interpretation of private law *succeeds* in being private law. The norms of private law must *aim* at successfully realizing the values of which those very norms are institutional expressions. Private law must aim at independence, and therefore independence provides us with the basis for understanding and criticizing proposed interpretations of private law's norms.[27]

IV. Independence

Independence, as I will elaborate here, is best understood as a status attained by free and equal persons in a political community. As will become clear, by drawing on the republican tradition, I interpret independence differently than corrective justice theorists have so far done, emphasizing it as an expression of social equality.

I define *independence* as follows:

> INDEPENDENCE: a person *S* is independent if and only if and because *S* enjoys public recognition of an equal entitlement to make effective, non-subordinated choices across some specified range of options.

Independence is often conflated with some notion of negative liberty or non-interference, or charged with "leav[ing] out concerns for the effective

[26] Arthur Ripstein, "Kantian Perspectives on Private Law" in Andrew Gold and others (eds.), *The Oxford Handbook of the New Private Law* (OUP 2021) 72.

[27] In this chapter, I focus on property and contract law, though the claim is that independence is the constitutive aim of *all* of private law. Some may worry about areas of private law in which *dependence* and *trust* seem paramount. Extending the account to cover these areas is a topic for another day, but the basic idea is that even where the law facilitates trust and dependence, it does so *for the sake* of independence. That is why we construct *legal relationships* of trust and dependence rather than relying solely on non-legal relationships like friendship. Thanks to Paul Miller and Irit Samet.

realization of the person's ability to form and pursue a conception of the good."[28] This is a mistake. Independence is closely related to the neo-republican conception of freedom as non-domination. Like non-domination, independence implies the "full standing of a person among persons."[29] This "full standing" is a status of equality, constituted by the public recognition—provision and protection—of a resourced and protected sphere of free and effective choice.[30]

Independence offers a specific interpretation of the idea of standing in relationships of social equality. In doing so, it is guided by an ideal of what it takes to achieve a publicly recognized status of equality. In the republican tradition, this was the role of the ideal of a *liber* or free person. On the view I elaborate, independence draws on two key ideas. First, the ideal of a citizen participating equally among others in a productive economy. Second, the idea that public recognition of one's equal status is constituted in part by a system of private rights upheld by corrective justice.

A. Protected Choices

Independence refers to a status of persons, but it is defined in terms of an adequately resourced and protected sphere of that person's choices. A person is independent when she enjoys public recognition of the fact that an important subset of her choices are entitled to be effective and non-subordinated. To flesh out the account of independence, therefore, we need to specify the range of options that must be resourced and protected for a person to be independent. There are three basic strategies for doing so: purely formal, purely substantive, or mixed.

Ripstein and Weinrib take a formal approach, guided by Kant's Universal Principle of Right. The basic strategy is to apply the idea of a system of non-subordinated choice to the domain of interactions between persons, and in doing so derive the basic divisions of private law: property, tort, and contract. Private entitlements across these areas are entitled to protection, and protecting these private entitlements is sufficient for independence in their view. This approach is attractive insofar as it can, at least in principle, generate a *system* of equal rights. The downside, however, is that the formal approach seems to radically underdetermine the content of private entitlements. For

[28] Dagan and Dorfman (n 12) 188.
[29] Philip Pettit, "Keeping Republican Freedom Simple" (2002) 30(3) Political Theory 339–56, 350.
[30] Philip Pettit, *On the People's Terms* (CUP 2012) 36ff.

within even the areas of property, contract, and tort, there are indefinitely many varieties and objects of choice, and we will still have to ask of *these* which can be simultaneously protected to achieve mutual independence.

Hanoch Dagan and Avihay Dorfman develop a purely substantive approach, guided by the idea of substantive equality, self-determination, and the value of "ground project" choices.[31] The advantage of this approach is that it can generate a much richer menu of protected choices. The downside is it offers no principle to help guide our systematization of these choices, other than to insist on "accommodation."

The third, mixed, option is exemplified by Kant. Kant, as mentioned, begins with a principle of compossibility: the Universal Principle of Right. But unlike Weinrib and Ripstein, he does not end there. Kant elaborated the bare idea of possible interactions between free persons with the idea of *possible interactions between equal citizens in a productive economy*. This, as I elaborate in the next section, provides the proper criterion by which to specify the range of choices that must be made effective and non-subordinated in order to secure a person's status as independent.

B. Substantive Independence

Kant develops his discussion of independence by turning to the idea of equal citizenship in a civil condition. A civil condition is characterized by a legal order that enables and protects economic activity via a regime of private right. Within a civil condition, a person only maintains her innate independence if she satisfies some further conditions of inclusion in the productive economy that coincides with her political community.[32] In the most widely used English translation of Kant's *Doctrine of Right*, Mary Gregor translates two German words with the English "independence": *Unabhängigkeit* and *Selbstständigkeit*. The former is the term Kant uses when he discusses independence in the state of nature. The latter, often modified by *bürgerliche*, is the term Kant uses for the independence of a citizen within a civil condition and productive economy. It could be translated "civil [*bürgerliche*] self-sufficiency [*Selbstständigkeit*]."[33] Formalist interpretations of Kant neglect this additional dimension of independence.

[31] Dagan and Dorfman (n 9) 1419; Dagan and Dorfman (n 12) 193.

[32] Immanuel Kant, *Practical Philosophy* (Mary Gregor ed. and trans., CUP 1996) [1797] 6:314–15) [hereinafter cited by *DR* or *TP* and page number].

[33] *DR* 6:314.

For Kant, civil self-sufficiency, or substantive independence, is not something everyone automatically possesses in the civil condition. Indeed, it is the basis for his notorious distinction between passive and active citizens. Passive citizens are precisely those members of a political community who lack substantive independence. Kant's characterization of the distinction between passive and active citizenship is a matter of dispute among scholars. In my view, substantive independence requires that one retains active control over her labor process.[34] This helps explain why and in what sense Kant held that owning private property is necessary for substantive independence.

Not just any property makes someone independent. Kant asserted that a blacksmith who owns her own anvil, hammer, and bellows but no iron is dependent, whereas the wigmaker who borrows the hair she fashions is independent. An independent person needs property that "supports her" and allows her to make a living without "giving others permission to make use of [her] powers."[35] The difference between the blacksmith and the wigmaker is that the latter controls her own choices during productive labor, whereas the former is told what to do even with the things that she owns. The blacksmith does not own the right kind of private property, property that functions as productive *capital* that readily translates into control over one's own labor. Kant insists for this reason that knowledge of a fine art or craft—like what the wigmaker possesses—counts as property in the relevant sense. Under then-prevailing processes of manufacture, knowledge of a craft entitled someone either to *de jure* control over her labor in the guild system, or *de facto* control because the craftsperson alone understood how to do the work, and so was immune to managerial control.

What it takes to retain control over one's labor process (including both productive and reproductive labor) is something that varies depending on the conditions under which production takes place. Kant was content with the existence of passive citizens, despite acknowledging that the idea "seems to contradict the concept of a citizen as such," because he assumed it was simple (for men) to acquire independence.[36] All they needed was to acquire productive capital either by leasing or buying land or mastering a craft. A just republican state would ensure fair opportunity to do either of these things.[37]

[34] Cf. Nicolas Vrousalis, "Interdependent Independence: Civil Self-Sufficiency and Productive Community in Kant's Theory of Citizenship" (2022) 27 Kantian Review 443–60.
[35] *TP* 8:295.
[36] *DR* 6:314.
[37] *DR* 6:314; *TP* 8:296.

Today, in a world of collective production organized by sophisticated networks of capital finance and hierarchical firms, in which rural land and craft-based manufacture are no longer primary sources of wealth, substantive independence looks very different. I will suggest later that securing substantive independence has a lot to do with how private entitlements around the workplace—wage contracts, ownership of productive assets—as well as around housing and education are defined. For now, the point is that substantive independence requires some positive control over one's participation in economic activity.

Kant's discussion of substantive independence elaborates the formal account of independence by identifying the idea of an equal citizen in a productive economy as the guiding ideal of independence. Substantive independence—with its ideal of property understood as the capacity to control one's own labor—fills in the picture of a republican society of equals. The vision is of people who meet each other as equal property owners, that is, as people who do not need to subordinate themselves in order to have enough to live as they navigate unavoidable social processes of production and reproduction.

C. Social Equality as Independence

This notion of substantive independence offers an attractive way to understand the constitutive aim of private law because it provides a specific interpretation of the ideal of social or relational equality. To be dependent or dominated is a particularly troubling way to be in an inegalitarian relationship.[38] And to enjoy public recognition of one's equal entitlement to make effective, non-subordinated choices in areas that implicate one's equal participation in a productive economy is, I argue, a compelling articulation of the ideal of social equality as it bears on social justice.

I will defend the independence approach to social equality by briefly contrasting it with a few other theories of social equality, indicating why I take independence to be superior. To begin, independence differs from Sabine Tsuruda's interpretation of social equality as equal standing to engage in reciprocal moral address.[39] Focusing on inequality in the workplace, Tsuruda argues that "the lack of meaningful opportunities to communicate moral indignation to a perceived wrongdoer and have that communication taken seriously can preclude

[38] Schemmel (n 11) 67.
[39] Sabine Tsuruda, "Working as Equal Moral Agents" (2020) 26 Legal Theory 305–37, 314–15.

employees from relating with colleagues and bosses as moral equals."[40] This is probably true, but this focus on egalitarian moral address cannot suffice as an alternative to the ideal of independence.[41] The reason is that the kind of equality presupposed in successful relational moral address is just a different kind of equality than the kind that independence focuses on. A boss can organize listening circles in which she sincerely considers the moral complaints and criticisms of her employees. But so long as she retains the legal authority to decide how they engage in work and retains the arbitrary power to end the relationship by firing or re-assigning the employee, then although they possess an important kind of moral equality, they lack another important kind of equality: independence. The prerogative to express indignation to one's boss is very different from the publicly recognized entitlement to make effective non-subordinated choices in the workplace.

The independence approach resembles Dagan and Dorfman's theory of "relational justice" and has benefited from their discussions, but there remain important differences. The most important of these turns on how independence and relational justice conceptualize the person and which choices need to be protected for a person to enjoy recognition as free and equal. Dagan and Dorfman argue that people are only recognized as free and equal to the extent that law imposes duties on persons acting in their private capacities to accommodate the choices and traits of others "that are properly deemed as constitutive of their being the persons they are."[42] These include immutable characteristics or "circumstances" as well as choices that reflect deeply valued "ground projects."

This contrasts, they argue, with relational egalitarian and republican views that focus on the person conceived as a *citizen*.[43] It would be arbitrary and unjust, they object, to restrict duties of relational justice to people who happen to have the same national citizenship. This is true. But this is not usually what republicans or egalitarians have in mind when invoking the status of citizenship. "Citizen" is a generic idea meaning something like "member of the political community," where this should *not* be misconstrued in terms of existing laws of national citizenship. Why do republicans, Kantians, and egalitarians use the terminology of "citizen" then? The point is to emphasize that on these views, social equality is recognized via the possession of a status that is achieved or brought about by active political cooperation. We bring about

[40] Tsuruda (n 39) 315.
[41] Ibid. 333, n 98.
[42] Dagan and Dorfman (n 12) 193.
[43] Ibid. 186.

political community and thereby, to the extent it is egalitarian, we bring about the status of independence that people lacked prior to political community (though they might have some other kind of "moral equality").[44]

On the republican-inflected conception of social equality as independence, the status to be equally protected is that of an independent citizen in a productive economy. This conception of the person is, I argue, preferable to Dagan and Dorfman's broader notion of the "person" that someone "really is." By focusing on what it takes for a person to remain an equally independent participant in processes of production and reproduction, we do not need to make perfectionist or moralistic judgments about which choices or traits reflect who a person really is. Dagan and Dorfman offer little guidance on these difficult questions. At one point they suggest that having blue eyes is reflective of who someone truly is. Elsewhere it is more plausibly limited to things like religious faith, familial status, and disability.[45] Yet they also *exclude* from accommodation traits or choices where "authenticity and sincerity" are important, even though one would expect significant overlap between these and traits or choices that are reflective of someone's deep or true self.[46] The areas they do specify as especially important—housing, employment, commercial activity, public spaces—can be unified under the idea of participating in a productive economy.

Another prominent approach to social equality identifies it with the absence of hierarchy. Niko Kolodny, for example, holds that a person enjoys social equality just in case no other person has greater a priori opportunity for influence over political decision-making.[47] From the perspective of independence, this view has two shortcomings. The first is that it is *purely egalitarian*, in the sense that it cherishes merely the absence of hierarchy. Independence, by contrast, requires not only the absence of hierarchy, but the presence of some sphere of positive control, or effective choice.[48] The second is that independence requires *public* recognition of equal entitlements. This implies that a "public" exists, which can only happen if it has been brought about by active cooperation among persons living and producing together. On Kolodny's egalitarian view, by contrast, social equality can be achieved in a "state of

[44] This is not to say that any given person's independence requires her own ongoing active political participation. Independence is a legal status that one is entitled to enjoy whether or not one actively participates in politics.

[45] Dagan and Dorfman (n 12) 178–79.

[46] Ibid. 196.

[47] Niko Kolodny, "Rule Over None II: Social Equality and the Justification of Democracy" (2014) 42 Phil. & Pub. Aff. 287–336, 321; Niko Kolodny, *The Pecking Order* (Harvard UP 2023) 324.

[48] Andreas T. Schmidt, "Domination Without Inequality? Mutual Domination, Republicanism, and Gun Control" (2018) 46(2) Phil. & Pub. Aff. 175–206, 175.

nature." But in such a condition, it would be impossible to enjoy public recognition of one's status, for there is neither public nor society in a state of nature.

Less ambitious forms of egalitarianism like Kolodny's are sometimes motivated by the concern that non-domination or independence is "impossible" to achieve.[49] But this charge rests on mistaking independence for a form of non-interference, and it neglects the important function of corrective justice remedies in constituting independence. Social equality as independence is achieved by public recognition of private rights: a public system of private right is partly constitutive of the status of independence.

Public recognition of private rights does not require minimizing interference with private rights, but rather minimizing *uncontrolled* or *irremediable* interference.[50] This means that I can retain independence even in the face of the invasion of my rights. Independence requires that when wrongful invasion occurs, the wronged person has a way to retain public recognition of her entitlement. This reflects the fact that independence, though its definition refers to free choices, is ultimately defined in terms of status equality. This also points to an overlooked connection between republican ideas of freedom and equality, and corrective justice theory. Independence can survive invasion so long as it is possible to receive public recognition of one's ongoing entitlement to make effective non-subordinated choices, even though someone acted as if you lacked such an entitlement. According to corrective justice theory, this—not winding back the clock or slaking a thirst for vengeance—is what *remedies* provide. A legal system constitutes independence when it publicly recognizes private rights, that is, entitlements to make effective, non-subordinated choices in a productive economy. It delivers recognition, in part, by guaranteeing remedial action when rights are invaded and protected choices thwarted.

V. Independence: Relational, not Bilateral

The core idea of corrective justice is sometimes glossed as the idea that a right survives its violation.[51] A legal system aimed at independence must be one that treats private entitlements as normative conditions that survive their violation and ground remedial action that consists in restoring publicly recognized control. My property right to my car survives the fact that you have stolen it, and

[49] Kolodny, *The Pecking Order* (n 47) 277; Thomas Simpson, "The Impossibility of Republican Freedom" (2017) 45 Phil. & Pub. Aff. 27–53.
[50] Schmidt (n 48) 179–84; Pettit (n 30) 70.
[51] Ripstein (n 2) 8.

this requires that the legal system stands ready to award me a judgment affirming my title to the car and a remedy returning the car (or its equivalent value) to me.[52]

Yet corrective justice theorists also stress a distinct idea, namely that the "organizing idea of corrective justice is that of correlativity."[53] Correlativity "is fundamentally the idea that the bipolar structure of a [private law] action reflects the bipolar structure of the wrong that the action is supposed to address."[54] But we should be careful about making too much out of the idea of bipolarity or bilaterality. In particular, we should hesitate before accepting the idea that the bipolar structure of private litigation is revelatory of the structure of the moral wrong—a violation of independence—that the litigation aims to redress.[55] Even if independence is indigenous to the practice of private law, we cannot simply assume that the bipolar form of private litigation entails that independence takes bipolar form as well, since the bipolar form of private litigation might reflect the combined influence of the value of independence with other values like liberal fairness, separation of powers, and democratic legitimacy.

Suppose *Dierdre* (*D*) wrongs *Priya* (*P*) by stealing *Priya*'s car. *P*'s independence is threatened because *D* acts in a way that disregards *P*'s entitlement to be the one who decides how to use what is hers. In order to uphold *P*'s independence, the legal system must continue to recognize *P*'s entitlement to be the one to decide how her car is used. One way to do this would be to enable *P* to sue *D* and ask a court to find that *D* wronged *P* and order *D* to give the car back. But why think that this kind of procedure is *necessary* for *P*'s independence? Couldn't *P* have her independence restored if the mayor of her town held a press conference in which she presented *P* with the keys to a new car and solemnly declared the polity's ongoing commitment to the fact that *P* is entitled to be the only one who decides how to use *P*'s car? Suppose this is not just largesse before an election, but this is what the law provides for, and *P* has a legal entitlement to initiate this sort of procedure. The point is that while *D* needs to be involved in *P*'s loss of independence (because there needs to be someone who wrongs *P*), it is less clear why *D* needs to be involved in *P*'s restoration of independence. What she needs in terms of a remedy is the capacity to demand

[52] There are well-known debates about the appropriate way to think about corrective justice remedies. I leave those debates aside here, focusing on the general shape of the view.
[53] Weinrib (n 13) 10.
[54] Ripstein (n 2) 261.
[55] Murphy, "Purely Formal Wrongs" (n 5) 25.

public recognition of her status as an equal with the entitlement to control what is hers. It is not clear what special role *D* has to play in that.[56]

Of course, the violation of a private right is often also a *wronging*. This suggests that the importance of bipolarity might be that it captures the fact that those who are wronged "are *victims* of moral carelessness who have a *claim* to better treatment."[57] Sometimes it is said that what is distinctive about private law is that it gives institutional expression to the fact that "we have the moral authority to hold each other accountable"[58] or that "individuals justify their conduct to each other directly within a bilateral relationship."[59] I doubt whether private law aims to institutionalize a supposed pre-legal moral right of redress. In any case, a legal system can recognize and give force to a plaintiff's claim-right to better treatment even without bipolar private litigation. The mayor could announce that *Priya* was wronged and in virtue of being the victim of this wronging is entitled to a new car. Of course, there are *other* reasons why we should prefer private litigation to mayoral press conferences, but whatever case there might be for bipolarity does not derive from the normative value of independence.

Independence remains a relational, or correlative value, as it is essentially concerned with egalitarian relationships between people who exercise control over their shared world. Any instance of *wronging* will involve the subordination of one person's will or purposes to another's. And any remedy that restores independence or legal tool that protects it will undo or prevent this subordination. But the protection and restoration of independence need not be narrowly bipolar.[60]

VI. Independence Without Distributive Justice

A legal system that aims for substantive independence will have to make room for many considerations of background unfairness that intuitively bear on

[56] Rebecca Stone has made the complementary point that, on the Kantian approach, it is not obvious why *P* needs to be the one who initiates remedial action, rather than some third party like the state. Rebecca Stone "Who Has the Power to Enforce Private Rights?" in Paul Miller and John Oberdiek (eds.) *Oxford Studies in Private Law Theory Vol. II* (OUP 2022).

[57] John Oberdiek, "Method and Morality in the New Private Law of Torts" (2012) 125 Harv. L. Rev. Forum) 201.

[58] Tom Dougherty and Johann Frick, "Morality and Institutional Detail in the Law of Torts: Reflections on Goldberg's and Zipursky's *Recognizing Wrongs*" (2022) 41 Law & Phil. 16.

[59] Oberdiek (n 1) 117.

[60] In other words, even if the primary duty has a bilateral structure, it does not follow that a secondary duty of redress has the same bilateral structure.

the justice of private interactions. This raises what I earlier termed the central philosophical puzzle for private law: How can private law incorporate these concerns while remaining distinct from distributive justice? The answer is that corrective justice, understood as a relational form of justice that aims for substantive independence, provides a compelling alternative to distributive conceptions of justice. Because the ideal of social equality as independence grounds a non-distributive form of social justice, we can accommodate these considerations without collapsing private law into a tool for distributive justice.

Let us say that distributive justice allocates access to cooperatively produced means to pursue goals. These means can be liberty, or wealth, or honors, or other social goods. As Weinrib puts it, following Aristotle, "distributive justice divides a benefit or burden in accordance with some criterion that compares the participants' merit relative to one another."[61] The aim is for everyone to receive their fair share, determined by "their respective merits under the criterion in question."[62] Under distributive justice, persons have claims to their proportionate share of the total product, and the principles of distributive justice determine what those proportionate shares are.

However, distributive justice can be understood as depending upon a deeper ideal of social or relational equality.[63] According to republicans and relational egalitarians, "justice is primarily about status, not about goods."[64] Whereas "authority, status, and standing essentially refer to types of interpersonal relations," as Elizabeth Anderson argues, "equality in the distributive conception consists in the mere coincidence of what one person has with what others in the comparison class independently have and need not entail that the persons being compared stand in any social relations with one another."[65] Thus, like corrective justice theorists, republicans and relational egalitarians have developed an alternative to thinking of justice in distributive terms; one that is relational, correlative, and emphasizes status equality.

[61] Weinrib (n 13) 16.

[62] Ibid. 16.

[63] Christian Schemmel, *Justice and Egalitarian Relations* (OUP 2021); Tsuruda (n 39); Dagan and Dorfman (n 12); Pettit (n 30) 91; Samuel Scheffler, "What Is Egalitarianism?" (2003) 31 Phil. & Pub. Aff. 5–39; Elizabeth Anderson, "What Is the Point of Equality?" (1999) 109 Ethics 287–337; David Miller, "Equality and Justice" (1997) 10(3) Ratio 222–37.

[64] Rainer Forst, "A Kantian Republican Conception of Justice as Non-Domination" in Andreas Niederberger and Philipp Schink (eds.), *Republican Democracy: Liberty, Law and Politics* (EUP 2013) 157.

[65] Elizabeth Anderson, "Equality" in David Estlund (ed.), *The Oxford Handbook of Political Philosophy* (OUP 2012) 41.

Once this ideal of social equality is identified, moreover, we can ask whether distributive justice is sufficient for achieving social equality. Though there is uncertainty here, I say no. This can be for any of several reasons. For one, a society can scrupulously allocate goods in accordance with fair principles of distributive justice, and nevertheless contain social inequality because the fair distribution of goods is compatible with other forms of social hierarchy, including inequalities in power, *de facto* authority, and consideration.[66] Additionally, there is something sociologically naïve about the idea of a fair distribution of goods which does not address inequalities surrounding the *production* of goods. According to this line of thought, the possibility of achieving distributive justice practically presupposes a kind of social equality that extends not just to the distribution of already-produced wealth, but to the relationships that undergird the production of goods in the first place. This is why Rawls, in his late work, emphasized that social justice and equality require the elimination of a class hierarchy between owners and non-owners of the means of production.[67]

If we have a right to independence, then we have a right to the socially egalitarian conditions of independence. Social equality as independence is, in other words, a demand of non-distributive justice. As I argued in section IV.B, substantive independence requires property in Kant's sense of the conditions needed to exercise control over one's productive and reproductive labor. So, for reasons prior to and independent of distributive justice, social equality and substantive independence *require* property in this sense, and all that implies for a system of private right. As Weinrib notes, once property law is instituted in a civil condition, accumulation and new forms of subordination become possible.[68] Specifically, accumulation of productive property becomes possible, rendering non-owners potentially dependent on owners. In a civil condition with its productive economy, achieving social equality as independence may require us to address this kind of dependence at its source. Since the system of private entitlements itself is a partial cause and ground of this kind of dependence, it is consistent with corrective justice's constitutive aim to alter those private entitlements to the extent necessary to make mutual substantive independence compossible.

One might object that this distinction between an independence theory of social justice and distributive justice is without a relevant difference. For,

[66] Kolodny, "Rule Over None II" (n 47) 293–94.
[67] Rawls (n 10) 137–41.
[68] Weinrib (n 2) 102–04. I discuss Weinrib's treatment at length below.

first, delivering substantive independence likely requires the same kinds of instrumental policy decisions as delivering distributive justice would. And second, though independence may be a relational concept, it is relational in the wrong way, distracting from the moral nexus between parties to bilateral transactions.

To the first objection, I concede that determining what counts as substantive independence, and what policies or doctrines help constitute it requires a level of discretion that surpasses what judges must do in exercising judgment to close open texture or resolve hard questions. It may involve public decision-making of a distinctly legislative kind. But this is irrelevant to a supposed *conceptual* distinction between private law and public values. There are still good reasons for insisting on an *institutional* division of labor between courts and legislatures: the superior democratic legitimacy of legislatures, their superior institutional capacity, and liberal rule of law considerations that weigh against announcing new substantive decisions rules in litigation. But it is a mistake to identify private law with what courts do.

The second worry is that considerations that bear on achieving substantive independence are not "correlatively structured and therefore cannot fairly and coherently figure within private law."[69] This objection cannot be that substantive independence is not relational at all. But perhaps principles can be relational in the wrong way. Perhaps some principles are relational but *omnilateral*, whereas the kinds of relational principles that figure fairly and coherently in private law must be *bilateral*.[70] I argued in Section 5 that bilaterality is not essential to securing a plaintiff's independence. But there is a separate reason to insist on bilaterality in the institutional setting of private litigation: it is unfair to hold a *defendant* liable based on considerations for which she is not responsible.

I turn now to offer a sketch of how considerations of substantive independence, understood as an ideal of equal citizens in a productive economy, can fairly and coherently bear on private law—both in defining private entitlements and litigating bilateral disputes. The following way of thinking about substantive independence as the constitutive aim of law only involves correlative concepts, is not unfair to defendants, and preserves the idea that private law should not collapse into distributive justice.

[69] Weinrib (n 2) 109.

[70] John Oberdiek, "It's Something Personal: On the Relationality of Duty and Civil Wrongs" in Paul Miller and John Oberdiek (eds.), *Civil Wrongs and Justice in Private Law* (OUP 2020) 319–20.

VII. Public Corrective Justice

We can distinguish two moments in which the conditions of substantive independence might figure into private law. The first is the definition of private entitlements and the formation of private law doctrines. The second is the adjudication and interpretation of the content of entitlements, and the application of those doctrines.

A. Substantive Independence in the Definition of Private Entitlements

Private law requires legislative decision-making. Legislatures must determine the rules of property acquisition. They must determine what things in the world are possible objects of property—whether genetic codes can be made into intellectual property; whether basic needs like housing, food, or water can be commodified; whether expected profits or expected business relations should be considered part of what someone owns; whether Internet users should own the data they produce. They determine rules about the durability and convertibility of these entitlements—whether, for instance, mortgaged land can be seized in its entirety by creditors; whether foreign-owned assets enjoy special protections; and whether assets can be converted to foreign currencies. Legislatures lay down rules of contract formation. They impose affirmative duties of disclosure. They impose limitations on contract terms in the form of minimum wage laws, rent control, and other price controls. Legislatures can define new torts and the elements thereof. They can specify evidentiary standards for establishing the elements of torts, deciding, for example, whether emotional distress is evidence of tortious harm.

It is often assumed that insofar as legislatures make these commonplace interventions, they can *only* be acting for the sake of promoting some conception of distributive justice. And, of course, these decisions have important distributive consequences. But they also have important consequences for the possibility of achieving a system of reciprocal independence, and decisions about the definition of private entitlements can be based on their effect on securing the conditions of substantive independence. In other words, public legislative decision-making can also have substantive independence—not distributive justice—as its constitutive aim.

There are two ways in which a system of private rights can lead to substantive dependence. One is that some—but only some—private rights are defined

in a way that enables them to accumulate rapidly. Katharina Pistor has argued that this is how we should understand *capital*—capital assets are legally supercharged private entitlements, larded with special properties that give them unusual durability and capacity for growth. These legal characteristics, she argues, explain the economist Thomas Piketty's observation that the rate of return on capital outpaces the rate of growth of the economy.[71] Hence, the optional legal coding of some private rights guarantees large wealth inequalities, which in turn are likely to produce substantive dependence. On this approach, however, the definition of private entitlements produces distributive inequality, and distributive inequality produces substantive dependence. It may seem, therefore, that redefining property entitlements so understood does follow a kind of distributive logic after all, and so is incompatible with a system of corrective justice.

I am not sure if that criticism is correct, but there is in any case another way to see the connection between private entitlements and independence. We can think of the recoding of private entitlements in terms of directly attacking the *control over others* that ownership of certain assets affords. Some private entitlements operate, in the context of a civil condition and productive economy, to give their owner control over other peoples' choices. Ownership of the means of production is an obvious example. In virtue of such ownership, others who lack control over the means of production must contract on favorable terms to work for the owner for a wage. It is possible that such an arrangement is consistent with the reciprocal independence of all involved, but it is not difficult to see how dependence can arise either (i) in the wage contract, or (ii) during the production process. Therefore, alterations in the private entitlements held throughout the labor process might be necessary to make them compossible.

Private law rules are often contested with an eye toward achieving substantive independence, social equality, and citizenship—not distributive equality *per se*. American labor history illustrates. Gilded Age labor advocates often tried changing the definition of property. Advocates invoked the Thirteenth Amendment to argue that human labor itself could not be considered property, a battle consecrated in the Clayton Act's affirmation that "the labor of a human being is not a commodity."[72] They also sought to amend statutory definitions of property so that strikes and boycotts that inhibited the boss's profitability

[71] Katharina Pistor, *The Code of Capital* (Princeton UP 2019).

[72] William E. Forbath, *Law and the Shaping of the American Labor Movement* (Harvard UP 1991) 154–58).

could not be construed by equity courts as interferences with the boss's "property" and therefore subject to equity jurisdiction and injunction. These efforts surely had and were intended to have distributive consequences. But at a more basic level they were about independence and equality of control over production. Similarly, under early industrial production, it was not taken for granted (as it is now) that the capitalist's ownership of fixed capital implied a right to managerial control over how machinery was used. Instead, the productive process was still governed by the "laws" developed by the craft guilds. (This is why Kant considered craft knowledge a kind of property.) Early twentieth-century labor struggles contested whether the capitalist's property rights implied a right to control the labor process. It was only later that labor shifted its focus decisively to questions of distribution.

Laws that prevent workplace discrimination, strengthen workers' capacity to form unions, engage in effective collective bargaining, to strike, to picket, and to engage in solidaristic or secondary boycotts might all help further the substantive independence of workers, who are otherwise subject to excessive vulnerability and subordination at work.[73] It is true that such laws have distributive effects, but their more fundamental justifications (and limitations) can be rooted in their contribution to securing the conditions under which each person is publicly recognized to make effective, non-subordinated choices throughout the production of socially necessary goods.

Similar accounts and arguments can be made for other areas central to the equal standing of citizens engaged in a productive economy like housing, education, and public accommodations. Ongoing disputes pitting owners' property and contract rights to control and discriminate against pleas for accommodation in the provision of public services, private and parochial schools, and housing, bear directly on substantive independence and social equality.[74] To the extent that private entitlements undermine the achievement of mutual independence, then a private law system that constitutively aims for mutual independence must alter those entitlements. Considerations of substantive independence are necessary for the institutionalization of a public system of private rights and hence can permissibly figure into the definitions of private entitlements.

[73] Tsuruda (n 39) 321.

[74] J. Colin Bradley, "Solidarity, Legitimacy, and the *Janus* Double-Bind" (2022) 131 Yale LJ Forum 823–53.

B. Substantive Independence and Corrective Justice in Litigation

The more troubling question is whether private litigation between a given plaintiff and defendant has any room for large-scale considerations of substantive independence when determining liability or crafting remedies. Though this question deserves greater attention, I sketch an approach on which it is consistent with corrective justice to consider issues of substantive independence in the context of private litigation. I argue that an individual defendant may bear limited legal liability when she *exploits* another's *dependent* condition. In moral philosophy, exploitation is widely regarded as unfair taking advantage. *Legally cognizable exploitation* (exploitation$_{LC}$) will be a subset of exploitation, narrowing the general concept by reference to the idea of correlative wronging at the heart of corrective justice.[75]

Theorists of exploitation disagree about what kind of unfairness is involved in exploitation. Some offer procedural or counterfactual accounts: a price[76] is fair only if it *would be* agreed to in some hypothetical situation. That hypothetical situation may be a competitive market without undue asymmetries in information or pressure.[77] Or it may be a world without unequal distribution in ownership of productive assets,[78] or without some other historical injustices.[79] Others hold that a price is fair only if it meets some substantive standard of fairness. Candidate standards include *equality*—a price is fair only if it distributes the social surplus of exchange equally—and *sufficiency*—a price is fair only if, by accepting it, both parties to the exchange are able to satisfy basic needs.

The problem with all these accounts, from the perspective of corrective justice theory, is that they define unfairness, and hence exploitation, in terms of welfare.[80] Exploitation therefore appears to be a non-correlative wrong. But an alternative approach to exploitation makes no reference to unfairness: *A* exploits *B* when *A* gains from taking advantage of the power she has over *B* in virtue of a relationship of economic dependence in which *B* stands to *A*.[81] To exploit$_{LC}$ someone, on this view, does not simply involve benefitting from a transaction against an unfair background. It involves instrumentalizing

[75] The appeal to exploitation is influenced by Amiya Kumar Bagchi, *The Political Economy of Underdevelopment* (CUP 1982).

[76] I use "price" as a shorthand for any term in an agreement or transaction. I assume the seller is the offeror.

[77] Alan Wertheimer, *Exploitation* (Princeton UP 1996).

[78] John Roemer, *A General Theory of Exploitation and Class* (Harvard UP 1982).

[79] Hillel Steiner, "A Liberal Theory of Exploitation" (1984) 94(2) Ethics 225–41.

[80] Cf. Allen Wood, "Unjust Exploitation" (2016) 54 Southern J. Phil. 92–108, 99.

[81] Nicolas Vrousalis, "Exploitation, Vulnerability, and Social Domination" (2013) 41(2) Phil. & Pub. Aff. 131–57.

another's dependence. It is not sufficient for *A* and *B* to stand in a relationship of economic dependence that they have an unequal share of resources, or even that *B* has an insufficient share of resources. *B* is not dependent on *A* simply in virtue of background distributive injustice. But unfairness might be causally responsible for producing a relationship of dependence. It may be that *B* is dependent on *A* in virtue of participating in an uncompetitive market in which *A* has a monopolistic position. Or it may be that historical injustices have produced a present, ongoing relationship of dependency because *B* lacks an acceptable alternative to accepting *A*'s price. So, familiar accounts of unfairness are still relevant to understanding exploitation$_{LC}$ if we are clear that their relevance is in producing a *relationship* of dependence.

I propose the following:

EXPLOITATION$_{LC}$: *A* exploits$_{LC}$ *B* when

(i) in virtue of either (a) a presently uncompetitive market, or (b) historical injustice, or (c) *B*'s lack of an acceptable alternative; *B* is dependent either on *A* directly or on anyone who occupies the socioeconomic role *A* occupies, and

(ii) *A* knowingly or negligently takes advantage of *B*'s economic dependence, for economic gain, in a way that tends to perpetuate *B*'s dependent position.

Exploitation$_{LC}$ is a rights violation that is compatible with the approach to corrective justice developed in this essay. *B* has an innate right to independence. It is held against no one in particular, but it is the constitutive function of the political community to which both *A* and *B* belong to fulfill this right. Derivatively, *B* has a right against *A* that *A* refrain from exploiting her dependence in a way that tends to perpetuate her dependence. When *A* exploits$_{LC}$ *B*, she violates this derivative right. When *A* does this knowingly or negligently, there is a clear sense in which *A* wrongs *B* and is subject to familiar fault-based liability. We might add that for *A* to knowingly "take advantage" of *B*'s dependence, there must be some plausible alternative available to *A*. This is probably not satisfied when *A* offers *B* market price. This helps our account avoid the worry that exploitation$_{LC}$ is a pervasive feature of most exchanges.[82]

[82] Benjamin Ferguson, "Are We All Exploiters?" (2020) 103(3) Phil. and Phenomenological Research 535–46.

A is neither responsible nor liable for *B*'s dependence. Nor does exploitation$_{LC}$ presuppose that *A* has a duty to help those in dependent positions.[83] But when *A* takes advantage of *B*'s dependence for gain while knowing that the effect of the transaction is to perpetuate *B*'s dependence, and when the market in which *A* and *B* transact could bear a less exploitive price, then *A* is responsible and can be liable in a corrective justice framework. It wrongs someone to exploit her dependence, and corrective justice should give legal force to this wrong.

VIII. Weinrib's Ordered Sequence from Private Law to Public Law

Now that I have laid out my approach to corrective justice, I conclude by contrasting it with Weinrib's recent attempt to explain how public justice supplements private law but does not have any bearing on private rights themselves. Because Weinrib continues to interpret public law strictly in terms of distributive justice, he cannot allow such considerations to bear on private law. Consequently, he lacks the resources to explain why we should tolerate a system of private law of the sort he advocates, which avowedly produces subordination and injustice.

In his most recent work, Weinrib emphasizes that "both the bilateral relationship between the parties and the omnilateral relationship among members of the civil condition contribute their respective normative dimensions" to adjudication.[84] This is because the "root idea of a system of rights is the reciprocal freedom of all" and the achievement of a system of reciprocal freedom involves both a bilateral and an omnilateral dimension.[85] Corrective justice describes the form of just transactions between bilateral parties in a state of nature. Yet the state of nature is normatively incomplete. In it, normative rules lack determinacy and are objects of disagreement. There are no authoritative rules for rights acquisition, nor determinate remedies for correcting wrongs. And nobody has assurance that her rights will be upheld, because nobody has the authority to make claims to enforce her own rights. So the justice of bilateral transactions is incomplete. It must be embedded in a civil condition.

So far, so familiar. What Weinrib's recent work adds is an embellished account of how the transition to a civil condition "transform[s] private law into a

[83] Contrast Robert Goodin, "Exploiting and Situation and Exploiting a Person" in A. Reeve (ed.) *Modern Theories of Exploitation* (Sage 1987).
[84] Weinrib (n 2) 71.
[85] Ibid. 98.

community of rights."[86] An institutionalized legal order must be a *public system* of rights for its members to enjoy independence. Consequently, "the publicness and systematicity of the legal order as a whole warrant the adjustment of one person's rights and freedoms because of the presence of someone else's."[87] Courts administering a system of rights must adhere to certain constraints, constraints which derive from "distinctive normative ideas of publicness and systematicity," *not* from correlativity or personality.[88] Judicial decisions must be suitably *public*, both in the sense that they are publicized and also that their decisions are rooted in public reasons. And they must be *systematic* in the sense that they render the use of private entitlements compossible with others' use of their entitlements.

Working private rights into a public system reveals new rights, including the tort of inducing breach of contract, the privilege to preserve property, easements, and private nuisance.[89] Some of these seem to alter the underlying private entitlement itself, though Weinrib is unclear on the point. He insists that although publicness and systematicity can "chang[e] the decision" on right as judged in the state of nature, they nevertheless do "not transform the nature of the underlying right."[90] On the other hand, when publicness and systematicity demand a result that "diverge[s] from the internal logic postulated [] by private right, then that internal logic has to cede."[91] The purely formal description of a property right, for instance, is transformed by the availability of nuisance actions in the civil condition. Nuisance "sets out the terms on which one owner's use has to adjust to another's."[92]

The incorporation of publicness and systematicity into a system of private rights is still part of corrective justice and private law. We only need to distinguish between the first conceptual articulation of private law in a state of nature, and its conceptual development into a *public system* of private law in a civil condition. But this is not the end of the "ordered sequence" that constitutes a full system of reciprocal independence. The "root idea" of reciprocal independence further requires that "distributive justice supplements private law while leaving it intact."[93]

[86] Ibid. 93.
[87] Ibid. 93.
[88] Ibid. 78.
[89] Ibid. 80, 82, 84–88, 88 n 46, 89–90.
[90] Ibid. 78.
[91] Ibid. 80.
[92] Ibid. 90.
[93] Ibid. 98.

Weinrib points out that independence has a "positive side," which requires "having one's fate in one's own hands by being possessed of a power to act in accordance with one's will so far as one's relations with others are concerned."[94] This positive side of independence represents a normative dimension that is not fully available in the state of nature. Having one's fate in one's own hands in the target sense is only possible in the context of a civil condition in which rights are secured and enforced against others. But "this expansion of the range of independence both by adding rights and by allowing them to be omnilateral creates a new problem of subordination."[95] The problem is that the protection of positive independence by a legal order—specifically, the protection of property rights—creates the possibility of property accumulation. Accumulation, in turn, threatens to subordinate those who are unable to acquire much or any property.

Crucially, this new "form of subordination to the will of others is unconnected to injustice within the bipolar relationships of private law."[96] In the state of nature, the possibility of accumulation poses no threat to independence. This is because one can only wrong another, according to the formal conception, by taking or controlling or damaging what that person *already* has. Formal "independence is unaffected by the availability or unavailability of material goods."[97] In the state of nature, you do me no wrong if you take the last unowned apple off the tree, even if you have plenty and I starve as a result. But by enabling accumulation through the protection of a system of property law, the political community both creates and must assume responsibility for a new kind of subordination. Those who lack property "may be so desperate that they find themselves at the mercy of another's will, exposed to the practical domination of others even in a legal system that forbids anyone from being their legal owner or *dominus*."[98]

As Weinrib sees it, this is an independence-based justification for a system of distributive justice, which, unlike corrective justice, can give "normative standing" to "basic material needs," specifically the need to avoid "the extreme deprivations that might lead persons to subordinate themselves to the power of others."[99] Although "independence underlies distributive justice no less than corrective justice,"[100] Weinrib still insists that "distributive justice is posterior

[94] Ibid. 100.
[95] Ibid. 102.
[96] Ibid. 104.
[97] Ibid. 102.
[98] Ibid. 103–04.
[99] Ibid. 106.
[100] Ibid. 100.

to corrective justice" and hence "distributive considerations cannot be backed up into the corrective justice stage."[101] So, although Weinrib allows that private rights must be reconfigured in virtue of their incorporation into a public system of law, and that the concept of independence must be expanded in order to account for the novel form of subordination that becomes possible within a public system of law, he nevertheless doubles down on a firewall between private law and its corrective justice, and public law and its distributive justice.

IX. Weinrib's Crumbling Firewall

This latest iteration of Weinrib's position shares many features with my own. But his attempt to maintain a firewall between private law and public law fails, for at least three reasons. First, despite recognizing the "positive" side of independence, he still mischaracterizes it as limited to forbidding "extreme deprivation" and "gross inequality." Second, he fails to distinguish publicness and systematicity from other public values and thus fails to explain why they alone can be incorporated into corrective justice. Third, he cannot explain why a just legal order should tolerate a private law system that produces subordination.

A. Substantive Independence

Weinrib recognizes that independence has a positive or substantive dimension. Yet he assimilates substantive independence to the thin notion of "human dignity" found in modern constitutional law.[102] To enjoy substantive independence in this sense is to have enough to live one's life in "a minimally decent and satisfactory a manner,"[103] avoiding "extreme deprivations" which put one on a "grossly unequal footing" with others.[104] But, as I've already shown, substantive independence requires more than that, as republicans, including Kant, have long recognized.[105]

[101] Ibid. 109.
[102] Ibid. 105.
[103] Ibid. 105.
[104] Ibid. 106, 104.
[105] Cf. Pettit (n 30) 87.

B. Publicness and Systematicity

Weinrib thinks the public values of publicness and systematicity must be introduced into a system of rights for that system to uphold reciprocal independence. As he puts it, "[u]nder public right the publicness and systematicity of the legal order as a whole warrant the adjustment of one person's rights and freedoms because of the presence of someone else's."[106] And this is simply part of corrective justice and private law itself. The adjustment of rights that "enables the two interacting owners each to realize the usability of their respective things in the most extensive way possible" is *not* a matter of distributive justice.[107] So there is a contrast, in Weinrib's view, between publicness and systematicity on the one hand—which can adjust the content of private entitlements—and on the other hand the distribution of material goods for the sake of avoiding extreme deprivation—which cannot adjust private entitlements. But this contrast is indefensible.

The basis for the alleged contrast is this: Publicness and systematicity are simply the requirements that a system of rights for a civil condition, or a community of free and equal persons must satisfy. A system of rights can only be a system of rights in which corrective justice can be done at all if it meets the requirements of publicness and systematicity. By contrast, the need for distributive justice arises as a *consequence* of the operation of a system of private rights. That would be a real contrast, but the problem is that Weinrib never explains why publicness and systematicity are necessary requirements for a system of corrective justice, nor why they *alone* are necessary. A system of private law seems vulnerable to any number of deficiencies. Some arise from the absence of publicness or systematicity. Others arise because a long sequence of correctively just transactions produce subordination. The question for Weinrib is why some of these deficiencies can be remedied by altering the definition of private entitlements, whereas others can only be remedied by leaving entitlements in place but engaging in post-hoc redistribution, beyond the scope of private law itself.

Take systematicity, which Weinrib says justifies property easements. It is not clear why corrective justice itself requires that private entitlements be altered to include easements. Systematicity could instead call for easements to be administered on a distributive justice model. The state could instead compensate through tax-and-transfer schemes for those who lost out on their use of their

[106] Weinrib (n 2) 93.
[107] Ibid. 88.

own property owing to others' stubborn uses of their own property. The upshot of systematicity can be distributed, rather than built into the definition of entitlements themselves.

More to the point, as I have argued, we could collapse the distinction in the opposite direction. The novel form of subordination that arises from operating a system of private law can itself be remedied by altering the definition of private entitlements such that that subordination does not arise in the first place. Substantive dependence can be treated the same way Weinrib treats publicness and systematicity, that is, as a problem *internal* to and appropriately remedied within private law itself.

C. Creeping Distributivism

Weinrib acknowledges that a system of private law upholding corrective justice can produce subordination:

> Indeed, private law itself—for example in contracts between parties who stand on a grossly unequal footing—may be the instrumentality that reflects and then further entrenches the practical constraint exercised by the stronger party on the weaker one. Subordination may thus emerge from transactions that are unimpeachable from the standpoint of corrective justice and from injuries that are suffered without anyone else being at fault or civilly liable.[108]

It is surprising to claim both that achieving independence is the constitutive aim of private law, and that when private law *produces* dependence and subordination, it is nevertheless "unimpeachable" from the standpoint of corrective justice. Not only is this contradictory on its face, it runs headlong into the problem of *creeping distributivism*. Because Weinrib conceives addressing substantive independence in terms of distributive justice, he cannot allow it into private law, on pain of abandoning private law's distinctiveness as a normative order. He insists that "corrective justice and distributive justice are categorically different and mutually irreducible."[109] But once he acknowledges that private law upholding corrective justice can produce subordination, he has no principled basis to prevent creeping distributivism. Why should we tolerate a body of law that produces and reproduces dependence and subordination

[108] Ibid. 104.
[109] Ibid. 96.

and is, in itself, completely insensitive to that fact? Once we recognize that private law is an instrumentality of dependence, it is hard to understand how the elegant appeal of a formal theory is enough to stop us from addressing that injustice. Of course, part of Weinrib's point is that a just legal system *taken as a whole* is tasked with addressing these injustices. This is the role of distributive justice—to clean up the mess that private law creates. So Weinrib is sensitive to these injustices and doesn't advocate ignoring them. But he does insist that *corrective justice and private law* should ignore these injustices. It is difficult to see the appeal of such an idea of private law.

My account avoids all these problems: First, it does not reduce independence to a minimalist conception of avoiding extreme poverty. Second, it does not draw an artificial line between publicity and systematicity and other considerations of substantive independence, but rather shows how they all bear on private entitlements. Third, it does not face the problem of creeping distributivism because it explains how social equality as independence provides an alternative, non-distributive conception of social justice. Ultimately, Weinrib's attempted firewall between private and public justice must be rejected because it is incompatible with realizing social equality, which must be effected through private rights themselves. Post-hoc redistribution is simply too late.

X. Conclusion

More needs to be said about what substantive independence requires in any domain of productive economy. And more needs to be said about how to determine when someone is merely disadvantaged or unlucky, and when that person has been rendered dependent by a failure of the political community to achieve the constitutive aim of its legal system. My goal has simply been to clear away some of the apparent obstacles to taking seriously the constraints of substantive independence within private interactions. Corrective justice theory that takes independence as its foundational concept need not restrict itself to a formal or bipolar perspective. Nor need it regard public values as rooted in extrinsic, monadic considerations of distributive justice.