

Michigan Law Review

Volume 115 | Issue 6

2017

Private Rights and Private Wrongs

Andrew S. Gold

DePaul University College of Law

Follow this and additional works at: <http://repository.law.umich.edu/mlr>



Part of the [Law and Philosophy Commons](#), and the [Torts Commons](#)

Recommended Citation

Andrew S. Gold, *Private Rights and Private Wrongs*, 115 MICH. L. REV. 1071 (2017).

Available at: <http://repository.law.umich.edu/mlr/vol115/iss6/15>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

PRIVATE RIGHTS AND PRIVATE WRONGS

Andrew S. Gold*

PRIVATE WRONGS. By *Arthur Ripstein*. Cambridge and London: Harvard University Press. 2016. Pp. xiv, 295. \$49.95.

INTRODUCTION

When should one private person get to be in charge of another? Arguably, this is the central question that private law theorists must answer. On Arthur Ripstein's¹ recent account of tort law, there is a clear answer: never. Indeed, he develops a very sophisticated account of tort law by building on this seemingly simple premise. I will suggest a different answer. Tort law sometimes lets one private party call the shots for another private party. And, furthermore, this can be desirable.²

Suppose Jane falls asleep on the beach, and she forgets to take off her watch. She wakes up from a restful sleep to see that someone is in the process of unclasp[ing] her watch and stealing it. As she awakens, Jane sees that the watch is no longer on her wrist; it is hanging in the air just above her arm and the thief is about to abscond with it. She reaches up and pries the watch out of the thief's hands, calling for help as she does so. Friends arrive quickly and the thief flees the scene.

Let's call this the *Watch* example. This case involves a tort doctrine known as "recaption" of "chattel[s],"³ and the conduct in taking the watch back can be perfectly legal. But it is not self-defense, and it is not even *ex ante* conduct. Taking the watch back is an *ex post* undoing of a wrong, rather than a prevention of a wrong that might occur. It is also a case in

* Professor, DePaul University College of Law. I am grateful to Arthur Applbaum, Avihay Dorfman, Dick Fallon, Kim Ferzan, Evan Fox-Decent, John Gardner, Joshua Getzler, John Goldberg, Nathan Oman, Arthur Ripstein, Stephen Siegel, Zoë Sinel, Henry Smith, Victor Tadros, Mark Tushnet, and Deborah Tuerkheimer for helpful comments on the ideas in this paper. This paper benefitted greatly from discussions during a visit at Harvard Law School, and I am thankful for many helpful conversations about the topics covered. I am also grateful to Eli McCrain for excellent research assistance. Any errors are my own.

1. Arthur Ripstein is a Professor of Law and Philosophy, University of Toronto Faculty of Law.

2. Much depends on what it means to be in charge of another. According to Ripstein: "[t]he moral idea that no person is in charge of another is both simple and familiar. It is up to you, rather than others, what purposes you pursue." P. 33. Further ramifications will be developed *infra* notes 9–10 and accompanying text.

3. See RESTATEMENT (SECOND) OF TORTS § 100 (AM. LAW INST. 1965) (recognizing the defense of recaption of chattels). A classic example of recaption is found in the English case of *Blades v. Higgs*, (1861) 142 Eng. Rep. 634; 10 C.B.N.S. 713 (addressing the retaking of rabbits that were caught on the defendant's land). For helpful discussion of that case, see Zoë Sinel, *De-Ciphering Self-Help*, 67 U. TORONTO L.J. 31, 46–51 (2017).

which one private person gets to be in charge of another, or so I will argue. Accordingly, to the extent that tort law relies on a principle that one person does not get to be in charge of another, it does so inconsistently.

In developing these points, I will begin with an overview of Arthur Ripstein's new book, *Private Wrongs*. Before doing so, I wish to emphasize the depth of insight that *Private Wrongs* shows throughout. This is a brilliant book, one that deserves a close read by tort theorists, and also by legal theorists more generally. *Private Wrongs* will be a landmark in tort theory, and deservedly so. Of particular note is the book's careful analysis of specific tort law settings, an analysis that demonstrates the clarity and vision for which Ripstein's work is known. My focus, however, will not be on individual torts. This Review will address the overarching framework that binds together the different applications of Ripstein's account.

Part I will discuss Ripstein's theory of tort law, outlining several key propositions. Part II will describe the challenge presented by the law of self-help. On the most natural reading, self-help in the United States is often a form of private enforcement of rights, rather than an instance in which individuals stand in for public officials. This reading, however, is inconsistent with the view that one individual does not get to be "in charge of" another. Part III will suggest that interpreting tort law consistent with a morality criterion does not rescue Ripstein's account from this challenge. Courts can quite plausibly understand the private enforcement of rights to be morally legitimate behavior. Part IV will consider an alternative criterion for interpretation—a justice criterion. While adopting a justice criterion raises interesting additional questions about the interrelation of norms of justice, it once again does not solve the problem for Ripstein's account. Part V will then discuss the implications of this analysis. While *Private Wrongs* does not succeed as a unifying account of tort law, it does offer valuable insights for a pluralist understanding of the field.

I. THE ACCOUNT IN *Private Wrongs*

First, it may help to give an overview of Ripstein's project, beginning with its methodology. While *Private Wrongs* offers descriptive, prescriptive, and interpretive analyses, the core of the book is interpretive: it is an effort "to identify a set of relevant norms and concepts, and a way of reasoning with them, which govern the interactions between private persons" (p. 22). Ripstein seeks to explain tort law from the legal point of view—that is, to take tort law "at face value."⁴ The way law presents itself is therefore central to his endeavor.

Ripstein candidly recognizes that some cases do not fit his interpretation of tort law. In Chapter Seven, he even describes an entire category of tort—

4. P. 23 ("My aim is to offer a different way of looking at tort law, taking its structures and doctrines at face value.").

defamation—where United States legal doctrine is inconsistent with his account.⁵ But, on his view, these instances are best seen as legal mistakes.⁶ I think this perspective raises interesting questions about mistaken or outlier cases. An allowance for judicial error is important, as it means that dissenters from the *Private Wrongs* perspective cannot make their case by simply pointing out features of the law that don't fit. On the other hand, an interpretive account should be falsifiable if it is truly taking tort law doctrines at face value. In the real world, perhaps there are no doctrinal mismatches significant enough to undermine Ripstein's account; but in principle, at least, doctrinal mismatches should be capable of rebutting an interpretive theory of tort law. We need the ability to distinguish those cases that are merely legal mistakes from those cases that, perhaps, undercut the *Private Wrongs* perspective itself.

Ripstein's substantive account is broadly Kantian, although not developed as such: common law judges rarely refer to Kant, and the book is not meant to show otherwise.⁷ Rather, the correct understanding of tort law is thought to match a Kantian vision of private law even if courts don't consciously intend it to. Ripstein's argument in support begins with "the moral idea that no person is in charge of another" (p. 6). With the exception of defamation—which is likewise explicable in terms of no person being in charge of another—each category of tort is a private wrong involving the use of another's means. In turn, legal remedies are justified by this same structure: even after a wrong has been committed, no person gets to be in charge of another. Remedies are a way of enforcing the plaintiff's right, a right that survives whatever wrong has occurred (p. 6).

On this account, "[y]our means are just those things about which you are entitled to decide the ends for which they will be used" (p. 9). And, once we focus on the importance of an individual's means for tort law, a three-part structure emerges:

First, [tort law] protects the means that each person has for setting and pursuing purposes. Second, it restricts the means that each person can use by precluding one person from using means that belong to another without that other's authorization. Third, it restricts the ways in which each

5. In particular, Ripstein seeks to argue against a picture of defamation that involves a balancing of "the plaintiff's interest in having a good reputation against the interests of others in such things as freedom of expression." P. 188. In Ripstein's view, "many of the recent developments in the American law of defamation reflect the assumption that the law of defamation is a tool for protecting an interest that is intelligible entirely apart from its mode of protection." P. 190. He claims, to the contrary, that the law of defamation "gives effect to a set of normative ideas that are *already* inherent in private law as a system of individual responsibility." P. 191.

6. P. 20 ("In my discussion of defamation, I consider and criticize cases that could not be legitimate applications of the structure of a defamation action. Not all speech that makes others think ill of a person is thereby defamatory. I criticize these cases as mistaken; my readiness to do so might lead some to label this a prescriptive enterprise.").

7. Pp. xi–xii (recognizing that "common law judges of earlier centuries did not read Kant").

person can use his or her own means, to those ways that are consistent with everyone else being able to do the same. (p. 9)

Individuals may use their property or body for whatever ends they wish, so long as they do not use another's property or body without that person's permission, and so long as their conduct does not have effects that interfere with the entitlements of others.

The remedial implications are also quite interesting. As noted, tort remedies reflect the survival of a plaintiff's right after the commission of a wrong by the defendant. As Ripstein suggests, "[i]f I take your coat, I need to give it back because it is still your coat; if I consume your sandwich, the reason I need to replace it is that you continue to be entitled to it, even if it has ceased to exist" (p. 12). This same structure even applies to physical injuries, such as broken arms. In some cases, remedies will be a near equivalent, while in other circumstances the best we can hope for is a much weaker approximation.⁸ What all of these cases have in common is a continuity of the plaintiff's right, and this continuity offers insights into both the availability of legal remedies and their content.

With these basic pieces in place, Ripstein develops a theory that effectively spans all of tort law, from negligence to strict liability, from conversion to defamation, from innocent missteps to malicious wrongs. With a great deal of subtlety, *Private Wrongs* offers insightful accounts of rights and duties, foreseeability and responsibility. The applications are rich with ideas, and should benefit readers of whatever interpretive stripe or preferred methodology. Explanatory success in one area, however, does not always translate to explanatory success in another—and in this case the account only partially fits with the law. There is a key doctrinal challenge for *Private Wrongs*: tort law is apparently quite open to the idea of one person being in charge of another.

II. THE PROBLEM OF SELF-HELP

To see where the problem lies, it may help to think further about what it means for one party to be in charge of another. We might think, after all, that whenever a court orders the payment of damages, one person is in charge of another: either the judge is in charge of the defendant, or, perhaps, the plaintiff is in charge of the defendant.⁹ These understandings are *prima facie* reasonable, but Ripstein's account is very different. On his account, courts emerge as a central requirement if we are to *avoid* having one person

8. Pp. 12–13. For a contrary view on the individuation of rights and obligations, see John Gardner, *What Is Tort Law For? Part 1. The Place of Corrective Justice*, 30 L. & PHIL. 1 (2011). On Gardner's view, where a secondary obligation calls for different acts from a primary obligation, the two obligations are distinct. *Id.* at 29–30.

9. Whether it is the judge or the plaintiff may depend on our interpretation of private rights of action. For helpful discussion, see Ori J. Herstein, *How Tort Law Empowers*, 65.1 U. TORONTO L.J. 99 (2015).

be in charge of another. Ripstein contends that “[w]ithout courts, one person’s say-so or enforcement of tort law’s requirements would just be a different way of being in charge of others” (p. 13). Or, in another formulation, “[i]f the plaintiff is not in charge of the defendant, then the plaintiff’s allegation that the defendant has violated some right of the plaintiff’s is just that—an allegation—until a third party with authority over *both* the plaintiff and the defendant has resolved the dispute on its merits” (pp. 272–73).

On this view, we need courts precisely because they are “institutions that can claim to be speaking (that is, exercising judgment) and acting (that is, ordering people to do things, backed by the possibility of enforcement) on behalf of everyone” (p. 13). Ripstein’s concern with unilateral coercion by private individuals thus seems to mandate decisions by third parties with authority over both the plaintiff and defendant. From this perspective, courts are not examples of one individual being in charge of another, but instead alternatives to that scenario. If matters were different—if there were no such third party involved—then plaintiffs would be in charge of defendants (p. 13). This theory also has a very interesting implication: if it turns out that tort law does not view courts (or similar third parties) as necessary to the enforcement of private rights, then apparently a correct interpretation of tort law *would* allow for one party to be in charge of another.

At first glance, self-help looks like a glaring counterexample to the picture elaborated in *Private Wrongs*. It is counterintuitive to think that when someone acts in self-defense, she is doing anything other than acting on her own behalf—at least in the ordinary case. And the same is true *ex post* in the *Watch* example, when Jane seeks to grab her watch back from the thief. She is seemingly a private party unilaterally enforcing her rights, acting on her own behalf; the average bystander would not think of Jane’s acts in any other capacity, and it would be surprising if Jane herself thought differently. Unless a legal system has determined otherwise, the natural understanding of this fact pattern is that Jane is a private party who gets to be in charge of another.

We may even see the legitimacy of self-help as a reason to question Ripstein’s approach on normative grounds.¹⁰ Why shouldn’t a private party sometimes be able to make a determination—correctly, let’s assume¹¹—that his right has survived a wrong in a particular instance, and then within appropriate limits enforce that right through a private remedy? In recaption of chattels cases, this understanding will strike many as perfectly reasonable. In these circumstances, it is not immediately obvious what is problematic

10. This may depend on both the type of self-help involved and the theory of self-help at issue. Recent work addresses a broad range of contexts and perspectives. *See, e.g.*, Adam B. Badawi, *Self-Help and the Rules of Engagement*, 29 *YALE J. ON REG.* 1 (2012); Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 *B.U. L. REV.* 1397 (2009); Sinel, *supra* note 3; Henry E. Smith, *Self-Help and the Nature of Property*, 1 *J.L. ECON. & POL’Y* 69 (2005); Jason M. Solomon, *Judging Plaintiffs*, 60 *VAND. L. REV.* 1749, 1784–1807 (2007).

11. It is a different question whether a private party should be able to define the contours of his or her rights. For present purposes, I am solely considering the possibility that a private party can enforce pre-existing rights, consistent with their boundaries.

about private parties enforcing their rights in the absence of a judicial determination. Moreover, given that tort law seems to allow for such conduct in appropriate contexts,¹² we may accordingly think that a good explanatory theory ought to explain why tort law sometimes permits one party to be in charge of another. From this perspective, *Private Wrongs* fails to explain a crucial aspect of tort law.

Private Wrongs devotes limited space to self-help, but the existence of self-help is clearly acknowledged. In describing how public authorities are entitled to decide on behalf of everyone, Ripstein notes that “[t]his structure manifests itself even in cases in which the law permits self-help; the question of whether the circumstances warrant it is subject to review, even in cases of self-defense” (p. 274). In a footnote to this same sentence he cites to Malcolm Thorburn’s work, which analyzes self-defense in the criminal law setting.¹³ At another point, he suggests that “[t]he right may survive in ways other than a remedy. For example without going to court you can physically reclaim a chattel from someone who has converted it” (p. 273 n.22). It is evident, then, that self-help is part of the *Private Wrongs* vision of tort law.

But how do we get to the view that self-help fits this vision? The fact that self-help is reviewable in the courts will not tell us much one way or the other. Notably, trial court decisions make determinations of rights and enforce them through court orders—trial courts get a say-so. Trial court decisions are nonetheless reviewable by appellate courts, despite the fact that trial courts enforce private rights. Reviewability in the court system is consistent with a party having the power to unilaterally enforce her rights—it is consistent with her getting to be in charge of another—just as it is consistent with the alternative picture.

Ripstein’s citation to Thorburn’s work, however, suggests a potential answer. Arguably, self-help is simply the exercise of a power or privilege by a party acting on behalf of the state. The private party is, in effect, a proxy for a public actor when he or she engages in self-help. Here is how Thorburn describes this view in the criminal law setting:

The beginnings of an answer to the problem of authority start to appear when we recall that private citizens are entitled to make these decisions about the interests of others only under extremely unusual circumstances. That is, we are entitled to decide that it is justified to kill in self-defense, that it is justified to violate a prohibition to avoid a greater harm, or that it is justified to use force to perform a citizen’s arrest only when it is essential to make that decision promptly and there are no properly qualified public officials available to consult.¹⁴

12. See RESTATEMENT (SECOND) OF TORTS § 100 (AM. LAW INST. 1965).

13. P. 274 n.23 (citing Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070 (2008)).

14. Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1126 (2008).

From this point of view, private citizens are “exercising these powers only as stand-ins for public officials who have the power to make these decisions.”¹⁵ Thorburn concludes: “Private citizens do not have the authority to make such decisions in their own right.”¹⁶

Even if we are sympathetic to this account in criminal law settings, it is less clear that it fits private law. The *ex post* self-help available in private law settings is not always a response to extremely exigent circumstances, where public authorities are of necessity unavailable.¹⁷ Moreover, while the wrongs at issue in criminal law are public wrongs, the wrongs at issue in private law are private wrongs.¹⁸ One might think that only a public actor has the proper standing to undo a public wrong—particularly if one is drawn to expressive accounts of legal remedies—but often private wrongs are more plausibly fixable by the specific victims of those wrongs.¹⁹

But there is another, more striking feature of Thorburn’s account, and it is particularly relevant here. For Thorburn, the party engaging in self-defense is a stand-in for a public official; she is a public official *pro tempore*.²⁰ This view could readily have an analogue in private law, and if so, it could help rescue the idea that self-help is consistent with a tort law in which no private party gets to be in charge of another. Intuitively, this reading is an awkward fit for recaption of chattels, though it does fit well with a citizen’s arrest case. Parties engaging in self-help might be understood as stand-ins for public officials, and if viewed in their public capacity, they would then (in theory) represent an omnilateral will instead of exemplifying the unilateral coercion that troubles Ripstein. This is a conceptual possibility—nothing precludes the idea that private parties can be stand-ins for public officials when they engage in self-help. This is not, on the other hand, a very convincing interpretation of private law in the United States, at least not in all cases.

15. *Id.*

16. *Id.*

17. Interestingly, this appears to be true in recaption contexts—a setting where we might anticipate a limitation to more exigent circumstances. *See* Badawi, *supra* note 10, at 32 (noting “the rather odd result that, through continual pursuit of a stolen chattel, it can be retaken with force even if a significant amount of time has elapsed and even if the victim of the theft does not know the identity of the person who stole the good”).

18. This is not to deny that the wrongs that matter for tort law may also implicate criminal law. In the ordinary case, however, the wrongs that concern courts in applying private law doctrine are of concern to those courts *qua* private wrongs.

19. Ripstein holds the view that expressive accounts lack the basis to explain why a specific plaintiff gets to bring suit against a specific defendant. *See* p. 286 (“Expressive accounts cannot explain why the specific plaintiff gets to recover from a specific defendant.”) But, to the contrary, this is an area where expressive accounts can be at their strongest, as different remedial authorship can have different expressive effects. On the importance of authorship to expressive remedies in the criminal law setting, see Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659, 1692–93 (1992) (discussing the question of which agent should punish in order to properly vindicate the victim’s value).

20. Thorburn, *supra* note 14, at 1127, 1129.

Bear in mind that the question whether private parties are stand-ins for public officials when they engage in self-help is not something to be resolved as a matter of political theory, as it is ultimately a matter of positive law. Some historical sources support the Thorburn view,²¹ while other sources do not. John Gardner contends that Thorburn's analysis is inconsistent with the understanding of the English common law.²² Yet even taking the supportive historical sources into account, the ultimate question still concerns the current legal point of view within a given legal system. As Gardner notes with respect to self-defense:

[T]he historical sources of the law, the causal antecedents of interest to historians, are not the sources of the law that matter to lawyers. The law of self-defence has its legal source, its legal derivation, in whatever case law and statute law is currently authoritative in the legal system under scrutiny.²³

Indeed, current law is exactly where we need to be looking if our aim is to take tort law, and private law more generally, at face value.

Even if it is counterintuitive to see private parties as stand-ins for public officials when they engage in self-defense or recaption of chattels, that view could still be the actual legal point of view. Does the legal point of view support the picture developed in *Private Wrongs*? On self-help, the current legal landscape looks uncertain at best for that picture: when it comes to the law in the United States, case law on the privateness of self-help is a shaky foundation for the views of both Thorburn and Ripstein. For example, consider the Supreme Court's decision in *Flagg Bros. v. Brooks*.²⁴ In that case, Shirley Brooks and her family had been evicted from their apartment, and the city marshal had their possessions stored with Flagg Brothers, Inc. Following disputes over the charges that Flagg Brothers claimed, Brooks received a letter that demanded her account be brought up to date, or else her possessions would be sold. Brooks initiated a class action under 42 U.S.C. § 1983, seeking damages and an injunction. The basis for Flagg Brothers' conduct was section 7-210 of the New York Uniform Commercial Code. On Brooks's view, the sale of her goods under section 7-210 would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.²⁵

A core issue in the case concerned state action. As the Supreme Court explained:

21. *Id.* at 1127.

22. For Gardner's basis of disagreement with Thorburn's account, refer to John Gardner, *Criminals in Uniform*, in *THE CONSTITUTION OF THE CRIMINAL LAW* 97, 100–01 (R.A. Duff et al. eds., 2013) [hereinafter Gardner, *Criminals*]; John Gardner, *Justification Under Authority*, 23 *CANADIAN J.L. & JURIS.* 71, 94–97 (2010) [hereinafter Gardner, *Justification*]. For Gardner's discussion of the English common law, see Gardner, *Justification, supra*, at 95–96.

23. Gardner, *Justification, supra* note 22, at 95.

24. 436 U.S. 149 (1978).

25. *Flagg Bros.*, 436 U.S. at 153.

Here, respondents allege that Flagg Brothers has deprived them of their right, secured by the Fourteenth Amendment, to be free from state deprivations of property without due process of law. Thus, they must establish not only that Flagg Brothers acted under color of the challenged statute, but also that its actions are properly attributable to the State of New York.²⁶

In other words, the nature of the self-help remedy—whether the party exercising self-help should be seen as engaged in conduct attributable to the State—was genuinely at issue.

Absent something more (such as overt involvement of a public official), the Court concluded that Flagg Brothers' exercise of a self-help remedy was not state action.²⁷ The Court explained: "This system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world, can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign."²⁸ Moreover, the Court emphasized that its views were in no way contingent on the statutory origin of the self-help at issue.²⁹ Whether such self-help is permitted by statute or case law, the Court's reasoning would be the same. This picture of self-help is in tension with the idea that self-help characteristically involves private parties acting as stand-ins for public officials.

Now, it could be argued in response that some cases of self-help place private parties in the role of stand-ins for public officials, and others do not.³⁰ That argument may well be right, but it isn't enough for purposes of Ripstein's general approach. *Flagg Bros.* endorses a context-sensitive analysis, depending on the functions at issue, but its logic still covers a great deal. The possibility of private parties unilaterally enforcing their rights against other private parties is not clearly ruled out within the United States legal system.³¹ On the other hand, while this type of case is suggestive for interpretive purposes, there are reasons to consider further possibilities. A case on state action is not tort law precedent, and the law on state action is not exactly pellucid. In addition, in some areas of the law on self-help there is sparse

26. *Id.* at 156.

27. Cases that did involve such overt official involvement were expressly distinguished. *See id.* at 157.

28. *Id.* at 160 (footnote omitted).

29. *See id.* at 162.

30. Note also that the case law on self-help and the state action doctrine may point in more than one direction. *See, e.g.,* *Fuentes v. Shevin*, 407 U.S. 67 (1972) (finding prejudgment replevin statutes violated procedural due process). For helpful discussion, see THOMAS W. MERRILL & HENRY E. SMITH, *THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY* 72–73 (Dennis Patterson ed., 2010). One might also contend that *Flagg Bros.* ought to have been decided differently. *See, e.g.,* Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982). Perhaps so. Yet this argument is not especially helpful if one's project is an interpretive project like Ripstein's, aimed at taking legal doctrine at face value.

31. Arguably, the answer is not definitive, as it is possible to separate state action analyses for purposes of Section 1983 actions from the legal point of view in tort law settings. I thank Mark Tushnet for helpful discussion of this issue.

precedent to draw upon. As others have noted, there is limited case law on recaption or necessity doctrines.³² The view that self-help generally involves private parties acting as stand-ins for public officials might not always be intuitively obvious, yet it may still have some life in it. There are also two interpretive criteria that arguably point in Ripstein's favor. A supporter of the Kantian interpretation of tort law might claim that interpretive theories should conform to a morality criterion, and arguably, this criterion could lend support to Ripstein's reading. Alternatively, a supporter might adopt a justice criterion to similar effect. Neither argument succeeds, and the reasons why are worth developing.

III. THE MORALITY CRITERION

It is natural to interpret self-help as a way that one private individual gets to be in charge of another, and, while not definitive, decisions like *Flagg Bros.* reinforce this reading. Still, one might object that appearances can be deceiving and that the natural reading of self-help is problematic under standard criteria for explanatory theories. Interpretive accounts of private law are often assessed for their consistency with interpersonal morality, and it might be argued that Ripstein's account does better under this criterion than alternative readings. Granted, there are cases like *Flagg Bros.*, but again such cases involve the state action doctrine and are not genuine tort law precedents.³³ From this perspective, when private parties engage in self-help they should be seen as stand-ins for public officials so as to provide tort law with a moral legitimacy that it would otherwise lack.

In order to assess this kind of argument, we need to think carefully about our approach to interpretive methodology. The manner in which interpersonal morality figures in interpretation appears to vary from one private law theorist to another. Superficial resemblances in language may mask very different ideas on interpretation, and relying on prior work in the field can lead us astray if we don't first figure out what methodology a theorist is adopting. I will take Ripstein's interest in taking tort law at "face value" as a touchstone (p. 23), and assume that our aim is to understand tort law in terms of its self-understanding, or, as it is sometimes expressed, in terms of the internal point of view.³⁴

32. See Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 Nw. U. L. REV. 1823, 1852 (2009) (noting that necessity cases "are rather rare"); Sinel, *supra* note 3, at 65 (referencing the *Blades v. Higgs* case as one of the "few self-help cases on the books").

33. To put the concern differently, we may want to avoid giving public law understandings priority over private law understandings when interpreting private law. That said, there are circumstances in which private law and public law concepts interrelate, a reality that Ripstein recognizes in *Private Wrongs*. See p. 231 (noting a context in which a private law defense "requires the prior public law classification of something as a public office"). The question of when a private party is a stand-in for a public office-holder is plausibly a question that implicates public law determinations of status.

34. References to the internal point of view may also implicate a range of perspectives. For helpful discussion, see Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203 (2015). On the internal point of view as it

With this starting point, one might adopt an interpretive theory of law like Ronald Dworkin's.³⁵ In that case, a good interpretive theory may need to show how tort law actually *is* justified.³⁶ Ripstein eschews Dworkin's mode of interpretation (as do several other leading private law theorists),³⁷ and I think he is right to do so. It seems too much to ask if we insist that a theory of tort law must show that the principles of tort law are in fact morally justified. As Stephen Smith aptly notes, part of the law's self-understanding is that the law can be mistaken.³⁸ The legal point of view makes room for error, and by extension a theory of tort law should not be called into doubt if it happens to describe conceptual features that are regrettable.

There are, however, more moderate versions of a morality criterion, and these moderate versions allow for legal error. Smith has offered one of the leading examples in his account of interpretive criteria. As he indicates, private law theorists are characteristically concerned with figuring out the law's self-understanding; they want to explain the law from the internal point of view.³⁹ And, as Smith argues, "there has been general agreement that a central feature, if not *the* central feature, of that self-understanding is law's claim to authority—the claim or belief that law is morally justified."⁴⁰ From this standpoint, a good explanation of a private law field should show how a legal field *could be thought* to be morally justified, whether or not it actually is morally justified.⁴¹

relates to tort law, see John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 *FORDHAM L. REV.* 1563 (2006). On the potential for overlap between functionalism and the internal point of view, see Andrew S. Gold & Henry E. Smith, *Sizing Up Private Law*, SSRN (Aug. 10, 2016), <http://ssrn.com/abstract=2821354> [<https://perma.cc/LV9P-QRNR>].

35. See RONALD DWORKIN, *LAW'S EMPIRE* 285 (1986) (contending that "[a] successful interpretation must not only fit but also justify the practice it interprets").

36. See *id.*

37. See pp. 21–22 ("My account is not interpretive in that ambitious sense, because unlike Dworkin's enterprise, I do not suppose that the ideal case of this exercise would be a complete Herculean determination of every actual or possible case."); see also STEPHEN A. SMITH, *CONTRACT THEORY* 17–24 (2004) (associating Dworkin with a strong morality criterion, while adopting instead a moderate morality criterion); John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 *FLA. ST. U. L. REV.* 341, 346 (2011) ("We are not on board with this aspect of Dworkin's thought and accordingly have never suggested that civil recourse theory provides the best interpretation of tort law because it makes tort law as morally attractive as possible.").

38. SMITH, *supra* note 37, at 17–18.

39. Smith states as follows:

Since at least the publication of H.L.A. Hart's *The Concept of Law* [in 1961], there has been broad, if not quite universal, agreement amongst legal theorists that law's self-understanding (an aspect of what Hart called 'the internal perspective on law') is a feature of law that legal theories must take into account.

Id. at 15 (footnotes omitted).

40. *Id.*

41. See *id.* at 18–19.

In some cases a weaker morality criterion might have merit, particularly if our interpretive criteria are grounded on a theory of what law claims.⁴² Even so, let's start from the premise that a moderate morality criterion is appropriate here. In that case, an explanatory account of tort law should indicate how tort law doctrine could be thought to be morally justified, whether or not it actually is.⁴³ Would this rule out a theory of tort law that allows one private party to be in charge of another? Ripstein's theory of tort law is effectively an extension of Kant's theory of private law, and the answer to this question may therefore depend on how morally compelling courts would find the Kantian theory.⁴⁴ If courts would inevitably agree with Kant on the core moral issues, then a moderate morality criterion will offer support for Ripstein's theory. If reasonable minds could differ on those issues, then self-help becomes a more difficult hurdle for *Private Wrongs*.

There is not space here for a detailed description of Kant's theory of private law, but it may be helpful to provide a brief overview of some key premises.⁴⁵ Ripstein contends that there are, on Kant's account, three defects in the state of nature: (a) "it is impossible to acquire a right to anything in a state of nature" because doing so would allow individuals to make a unilateral choice regarding the entitlements of others; (b) "acquired rights cannot be enforced in a state of nature" due to a lack of assurance regarding the conduct of other individuals; and (c) "the application of private rights to particulars can only be determined in accordance with standards that are not unilateral exercises of the judgment of one of the parties to a dispute, [yet] objective standards cannot be established in a state of nature."⁴⁶ On this view, the private enforcement of rights raises a problem of unilateral choice, a problem of assurance, and a problem of indeterminacy.

42. Notably, law arguably claims to be morally binding, rather than morally correct. See JOHN GARDNER, *How Law Claims, What Law Claims*, in *LAW AS A LEAP OF FAITH* 125, 139–44 (2012). I discuss some of the interpretive implications in Andrew S. Gold, *Interpreting Fiduciary Law*, in *RESEARCH HANDBOOK ON FIDUCIARY LAW* (D. Gordon Smith & Andrew S. Gold eds., forthcoming 2017).

43. See SMITH, *supra* note 37, at 18–19.

44. There are other bases for arguing against private enforcement of rights on moral grounds, but there are no evident examples that would be sufficient to rule out contrary readings of tort law doctrine under a moderate morality criterion. Recall that it is enough under a moderate morality criterion that an explanation can show why judges might think tort law is morally justified – a moderate criterion does not require showing that tort law actually is morally justified.

45. Much of the key discussion is set forth in IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor trans., Cambridge University Press 1991) (1797). As my aim for present purposes is to assess Ripstein's account, I will be responding to his interpretation of Kant's theory of private law.

46. ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 146 (2009).

Self-defense is a special case: self-defense involves innate rights, and the rights involved are considered to be enforceable.⁴⁷ But once we depart from self-defense, the enforcement of private rights is problematic. Notably, this understanding also means that remedial rights cannot be enforced by private parties: “The absence of enforceable rights to external objects of choice . . . means that you can have no remedial right if someone commits a wrong against your person.”⁴⁸ Thus, on the Kantian view, the only way that such private rights can be legitimately enforced is by means of public institutions acting on behalf of everyone; the state is needed because it can enforce these remedial rights through an omnilateral will.⁴⁹

As Ripstein notes, Kant therefore “needs to explain how institutions can act omnilaterally.”⁵⁰ The answer is through the use of public roles, by which officers of the state act on behalf of everyone rather than on behalf of private actors. State actors occupy a status relationship, and the state’s relation to its citizens can be analogized to the relation that exists between a parent and his or her children.⁵¹ And the consequence of state officials acting in their official capacity is that unilateral choices are avoided: “So long as everyone acts in his or her official capacity, the result is authorized by law, and so is not arbitrary from the standpoint of freedom.”⁵² On this view, “a rightful condition can give authority to laws rather than human beings, so that the actions of particular human beings in making, enforcing, and applying laws can be exercises of public rather than private power, and so are instances of an omnilateral will.”⁵³ The required omnilateral will, however, is something “deemed by law,” and it is not the product of an “affirmative act.”⁵⁴

The Kantian account of private rights faces challenges in several areas. One objection has been powerfully elaborated by Victor Tadros.⁵⁵ From the Kantian perspective, private enforcement of property rights is wrongful conduct to the extent it means that one person gets to be in charge of another. Yet, as Tadros indicates, there are cases in which it is quite counterintuitive

47. See *id.* at 161 (“Your entitlement to use force to exclude others from your own person is consistent with your obligation to refrain from interfering with the person of another, because your right to self-defense is purely protective.”); *id.* at 179 (“Your right to repel those who invade the space occupied by your body does not require an omnilateral authorization.”).

48. *Id.* at 180.

49. See *id.* at 180–81.

50. *Id.* at 183.

51. *Id.* at 194 (“The parent guides a child to make it into its own master; the state creates a rightful condition in which each person can be his or her own master.”). That said, there are reasons to doubt that the parent-child relation is a helpful starting point for theorizing state authority. See Andrew S. Gold, *Reflections on the State as Fiduciary*, 63 U. TORONTO L.J. 655, 661–65 (2013).

52. See RIPSTEIN, *supra* note 46, at 197.

53. *Id.* at 191.

54. *Id.* at 196.

55. See Victor Tadros, *Independence Without Interests?*, 31 OXFORD J. LEGAL STUD. 193, 202–06 (2011) (reviewing ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* (2009)).

to deny private parties the authority to enforce their rights against others in a state of nature. Tadros's core example involves Jewish people who have had their food taken away by a Nazi sympathizer during the Nazi rule of Germany, an act done with the knowledge that this would lead to their deaths.⁵⁶ The Nazi regime is illegitimate, and its illegitimacy is such that these individuals are effectively in a state of nature.⁵⁷ Do the Nazi sympathizer's victims have enforceable rights to the food taken from them, such that they personally can take it away from the thief? Do they have such rights even if this requires physical interference with the individual who took the food from them? Tadros suggests the answer is yes,⁵⁸ and I agree. This conclusion, however, is hard to square with the Kantian view Ripstein describes.⁵⁹

There is also an additional concern: the Kantian approach to private law seems to presuppose a Kantian political philosophy. Even if Kant is right that no private party should get to be in charge of another, it need not follow that he is also right in thinking that the state and its institutions are a realistic solution to that problem. This is particularly evident from the perspective of voluntarists who insist on consent as a legitimizing force.⁶⁰ The Kantian approach solves the problem of one party being in charge of another by viewing the state's enforcement of private rights in terms of an omnilateral will, and Ripstein endorses this view in *Private Wrongs*.⁶¹ Yet, in order for an omnilateral will to be something more than a tempting legal fiction, we need a basis for thinking that individuals participate in that will, and it is extraordinarily unlikely that every citizen has consented—tacitly or otherwise—to share in this omnilateral will.⁶²

56. *Id.* at 202–03.

57. *See id.* at 200 (“[P]eople living under Nazi rule in Germany were not in a rightful condition by Ripstein’s own lights: those governed by a law that has slavery or genocide at its foundation are in a barbaric condition.”).

58. *See id.* at 202–03.

59. It is arguably not impossible to reconcile these views, but for reasons Tadros develops, the potential responses to this problem are not very convincing. *See id.* at 203 (discussing potential responses).

60. For a voluntarist critique of Kant’s political theory, see A. JOHN SIMMONS, *Justification and Legitimacy*, in JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS 122 (2001). Institutional challenges may also arise. *See* David Dyzenhaus, *Liberty and Legal Form*, in PRIVATE LAW AND THE RULE OF LAW 92, 109–15 (Lisa M Austin & Dennis Klimchuk eds., 2014). I leave these institutional concerns to one side, but it is worth noting that the law of torts may fail to implicate an omnilateral will for reasons that go beyond concerns about consent and voluntariness.

61. *See* p. 13 (describing the importance of institutions “that can claim to be speaking (that is, exercising judgment) and acting (that is, ordering people to do things, backed by the possibility of enforcement) on behalf of everyone,” and concluding that “[w]ithout courts, one person’s say-so or enforcement of tort law’s requirements would just be a different way of being in charge of others”).

62. *Cf.* Tadros, *supra* note 55, at 206. Tadros writes:

Ripstein’s answer is that the law provides the answer for the law, in a rightful condition, is identified with all of our wills.

If Kant is right about the morality of unilateral rights enforcement and is wrong in thinking that an omnilateral will is a plausible solution, then the enforcement of private rights may involve a tragic circumstance—a sad but inevitable wrongfulness in the way we treat each other, rather than something that can properly be addressed by courts deciding private law cases. Judges could easily share this conclusion if confronted with the issue: they might not think that a private law under which private parties are legal stand-ins for public officials is morally better if judges do not also think that having private parties act in this capacity will offer a truly omnilateral will. Interpreting tort law such that it incorporates an omnilateral will thus does not make tort law more obviously consistent with the ideas on morality that judges are likely to hold, even if we are convinced that judges are concerned with the legitimacy of unilateral rights enforcement.

Of course, whatever doubts we may harbor about Kantian views on private rights and/or political philosophy, a Kantian understanding of tort law might still deserve to prevail as an interpretive matter if we had nowhere else to turn. For example, one might think that there is no alternative account that adequately fits the structure of tort law while still appearing morally plausible. And some, at least, are drawn to the view that it takes a theory to beat a theory.⁶³ Yet, there are appealing alternatives to a Kantian analysis that can also broadly fit the structure of private law adjudication, not to mention the concepts of right, duty, wrong, and remedy that are immanent in that structure. A leading example is the Lockean account developed by John Goldberg and Benjamin Zipursky.

Goldberg and Zipursky suggest that private rights of action implicate a wronged party's prelegal right to act against the party who wronged her.⁶⁴ John Locke is well known for his argument that, in a state of nature, individuals have a right to punish wrongdoings.⁶⁵ This right of punishment is given

This, I should say, will strike many people as an unsatisfactory answer—it is not clear how governance by law under a rightful condition is equivalent to the law acting through my will.

63. There is cause to question such a view, as it is quite reasonable to think that a theory can be rebutted without having a viable alternative theory in place. For example, Judge Easterbrook and Daniel Fischel argue that “it takes a theory to beat a theory,” in support of their contractarian account of fiduciary obligations. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 434 (1993). Yet, for all its successes in some areas, Easterbrook and Fischel's account fails on multiple grounds due to an inability to fit legal doctrine. See Lionel Smith, *Contract, Consent, and Fiduciary Relationships*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* (Paul B. Miller & Andrew S. Gold eds., 2017) (providing examples). Even if there is no fully adequate alternative theory of fiduciary obligations, this doesn't rehabilitate the weak spots in the contractarian account.

64. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 606 (2005); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 734 (2003).

65. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (1689), reprinted in *POLITICAL WRITINGS OF JOHN LOCKE* 261, 264–65 (David Wootton ed., 1993).

up when entering a civil society, and in return the state takes on that responsibility.⁶⁶ Zipursky notes that Locke also recognizes another natural right in a prelegal world.⁶⁷ Locke holds the view that individuals have a natural right to redress injuries they have suffered.⁶⁸ Likewise, Locke argues that the individual's right of redress is given up upon entering a civil society, and in return the state provides for redress.⁶⁹ As Zipursky points out, "the obligation of the individual not to engage in private punishment is conditional on the state's having undertaken that role."⁷⁰ He concludes, "it seems likely that Locke held an analogous view as to the right to seek compensation for individual injuries. There is a natural right and power to seek compensation for an injury done to one."⁷¹

As developed in the work of Goldberg and Zipursky, Locke's views on natural rights are quite capable of grounding private rights of action.⁷² Private rights of action are a mechanism for the exercise of individuals' natural right of redress, provided by the state as a substitute for self-help. With suitable adjustments, their account also suggests a picture of private law in which self-help can be legitimate even if private parties are not stand-ins for public officials. Should we think that private rights of action are needed substitutes for the self-help that we could otherwise permissibly engage in, it is a short step to the idea that unilateral acts of self-help are also legitimate when the state allows for this.

Furthermore, this perspective has the flexibility to ground a range of approaches to tort law. For Goldberg and Zipursky, civil recourse is a way that tort plaintiffs can hold defendants accountable, or get satisfaction, based on the wrong that was committed against them. Whether or not self-help is always about holding someone accountable or about getting satisfaction (I doubt that recaption of chattels is best seen in that way), a broadly Lockean view can aid our understanding. In prior work, I have argued from Lockean premises that private rights of action may be concerned with a wronged party's enforcement rights.⁷³ In addition, Linda Radzik has offered a corrective justice approach that also builds on Lockean arguments, and she sees tort law as a mechanism for making amends.⁷⁴ The idea that we have a natural right to seek compensation fits each of these accounts, and it can

66. *Id.* at 304–05.

67. Benjamin C. Zipursky, *Philosophy of Private Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 623, 637 (Jules Coleman & Scott Shapiro eds., 2002).

68. LOCKE, *supra* note 65, at 265–66.

69. *Id.* at 305.

70. See Zipursky, *supra* note 67, at 639.

71. *Id.* at 639.

72. See, e.g., Goldberg, *supra* note 64, at 527–626; Zipursky, *supra* note 64, at 735–38.

73. Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 *WM. & MARY L. REV.* 1873 (2011).

74. See Linda Radzik, *Tort Processes and Relational Repair*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 231, 247 (John Oberdiek ed., 2014).

give us the necessary resources to theorize tort law without being troubled that private parties may be acting on their own behalf when they enforce their rights.⁷⁵

Ripstein is quick to note that the legal processes that civil recourse theorists emphasize are just as explicable from a Kantian point of view, and he is right.⁷⁶ But this type of argument cuts both ways: what can be explained in Kantian terms can frequently also be explained in Lockean terms. Insofar as we may need to locate an alternative to Ripstein's view—especially given the intuitive force of the idea that self-help often involves private parties acting on their own behalf—there is no lack of reasonable alternatives. Various Lockean accounts are available, and each of them is capable of explaining tort law duties, defenses, standing doctrines, and remedies in a credible way. These theories have the additional advantage that they can explain why one private party sometimes gets to be in charge of another.

Courts could very plausibly be drawn to the idea that private enforcement is acceptable under appropriate conditions, particularly in cases where the state is not well positioned to provide an adequate alternative remedy. Furthermore, the interpretive inquiry does not depend on whether Kant or Locke (or another theorist) is actually correct on the underlying moral questions, for what matters is simply whether courts could think private enforcement of rights is morally appropriate.⁷⁷ Even if a Lockean perspective were mistaken, as long as such views might be thought to be correct, that is enough to avoid problems under a moderate morality criterion.⁷⁸ As the above discussion suggests, a Lockean perspective is well within the mainstream, attracting legal theorists of various sympathies and building on ideas that judges could readily accept.⁷⁹ A moderate morality criterion thus provides no support for the interpretation that private parties may not be in charge of one another.

IV. THE JUSTICE CRITERION

It may be worthwhile to anticipate another, related response. Perhaps, the interpretive problem is not precisely a concern with the morality of private law so much as it is a concern with its justice.⁸⁰ Private law theorists

75. It should be noted that Goldberg and Zipursky's account of civil recourse is not focused on revenge, contrary to Ripstein's apparent suggestion. P. 268 (referring to the "thought that people will put up with being deprived of their right to revenge only if they get what they regard as an acceptable substitute"). To the extent that "getting satisfaction" is (perhaps) thought by some to be in the same normative neighborhood as revenge, however, the Lockean accounts developed in my work and in Radzik's work are very different.

76. See p. 287 ("All of the facts about legal processes to which defenders of civil recourse draw attention are just what tort law would look like if remedies turned on the axis of rights.").

77. See *supra* text accompanying notes 41–43.

78. *Id.*

79. See *supra* text accompanying notes 64–75.

80. On the potential for gaps between justice and morality, see GARDNER, *supra* note 42, at 140 ("It is possible for something to be morally correct yet unjust, or *vice versa*.") and

typically espouse a morality criterion rather than a justice criterion, yet there are good arguments for adding a justice criterion to the mix.⁸¹ Even if law as such does not claim to be just, legal actors characteristically act as if they are engaged in bringing about justice—and particularly so in the setting of adjudication.⁸² The resolution of private law disputes is described in legal opinions as if it involves justice, and private law is filled with concepts and conceptual inferences that concern just results.

Arguably, then, we need to assess a theory of tort law to see whether it properly reflects these features of tort law adjudication. If a theory of tort law presents tort law doctrine as something flagrantly inconsistent with principles of justice, we might wonder if the subject has been accurately understood. Yet a justice criterion could also take various forms, each with differing levels of strength. For example, one might think that the only acceptable explanations of tort law are explanations that show tort law to actually be just. As with principles of morality, courts can be mistaken about what is just, and the legal point of view allows for this.⁸³ I will therefore suggest a moderate justice criterion: all else equal, if a theory of tort law presents tort law such that legal actors could not plausibly think it is just, we have cause to doubt whether that theory has accurately captured tort law.⁸⁴

Justice, on a leading view, governs questions of allocation—that is, questions of who gets “how much of what.”⁸⁵ Not all moral problems are problems about how to allocate,⁸⁶ and so from this perspective justice has its own sphere of operation. If we recognize this as a potential distinction between the just and the moral, however, it might not be immediately obvious how a challenge to unilateral enforcement of rights involves a question of justice. One might object to unilateral enforcement on purely moral grounds, without implicating justice at all, if one’s objection is not premised on allocative concerns. Arguably, this is what we see when unilateral enforcement is challenged on the understanding that one person should not be

Andrew S. Gold, *Justice, Redress, and the Right to Do Wrong*, in *EQUITABLE COMPENSATION AND DISGORGEMENT OF PROFIT* (Simone Degeling & Jason N.E. Varuhas eds., forthcoming Apr. 2017) (describing cases in which it is morally wrong to pursue preventive or redressive justice).

81. Cf. Andrew S. Gold, *A Theory of Redressive Justice*, 64 U. TORONTO L.J. 159, 204 (2014) (suggesting that connecting private law concepts and norms of justice can make an explanatory theory more cogent).

82. On the link between adjudication and justice, see JOHN GARDNER, *The Virtue of Justice and the Character of Law*, in *LAW AS A LEAP OF FAITH*, *supra* note 42 [hereinafter “GARDNER, *Virtue of Justice*”]. For the view that law does not claim to be just, see GARDNER, *supra* note 42, at 141.

83. See *supra* text accompanying notes 41–43.

84. *Id.*

85. For views that tie justice to allocative questions, see, for example, Gardner, *supra* note 8, at 6, and H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 1, 21 (2d ed. 2008). Not all theories of justice take this approach; I am assuming an allocative component here for purposes of discussion.

86. Gardner, *supra* note 8, at 6.

able to impose their will on another. What is the allocative objection to unilateral enforcement of private rights?

We can see a tighter connection to justice and its allocative concerns if we turn to another critique of unilateral enforcement. Drawing on the work of Thomas Hobbes, Evan Fox-Decent has argued that the key problem with a unilateral enforcement of rights is that it means an individual gets to be a judge in his own cause.⁸⁷ Fox-Decent notes that “Hobbes insists that it is a law of nature ‘that they that are at controversy, submit their right to the judgment of an arbitrator[.]’ and that it is a further such law that ‘no man is a fit arbitrator in his own cause[.]’”⁸⁸

This understanding bears some similarities to Ripstein’s Kantian account, but the arguments are not identical. For Fox-Decent, the core problem is a problem of asymmetry between the parties to a dispute. He argues:

It is important to underscore, however, that the fundamental wrongfulness of unilateralism lies not in the possibility of unresolved disputes, nor even the prospect of disputes decided by the will of the stronger. While these concerns are serious, they are not fundamental These instances of unilateralism are wrongful because they implicitly deny the equality of the parties to a dispute by giving to one, but not the other, adjudicative and executive authority.⁸⁹

On this view, one party is getting the advantage, illegitimately, of an authority that the other party does not get to share in.⁹⁰

This is an allocative concern, and as this discussion suggests, the key norm of justice at issue is the principle of *nemo iudex in sua causa*—no one should be a judge in her own cause. This is a well-known norm of procedural justice,⁹¹ and the objection is clearly a justice-based objection. Fox-Decent’s argument also sets up a very interesting legal theory problem, for there is a potential tension between conformity to the *nemo iudex* principle and other norms of justice. It might well be the case that a victim of a tort will miss out on another type of justice if *nemo iudex* is satisfied. For example, if we return again to the *Watch* case, imagine that Jane does not grab the watch back. The thief will predictably run away, never to be seen again. The justice involved in a right holder’s undoing a wrong she suffered by allocating back what was taken from her—redressive justice⁹²—is no longer an

87. Evan Fox-Decent, *Unseating Unilateralism*, in PRIVATE LAW AND THE RULE OF LAW, *supra* note 60, at 116, 128–29.

88. *Id.* at 127 (quoting THOMAS HOBBS, LEVIATHAN ch. XV, paras. 30–31, at 98 (Edwin Curley ed., Hackett Publishing Company, 1994) (1651)).

89. *See id.* at 128–29.

90. Fox-Decent also builds on another norm of procedural justice — the maxim that “justice should not only be done, but should also be seen to be done.” *See id.* at 130. The argument developed below is as much a response to this norm of procedural justice as it is to the *nemo iudex* principle.

91. See Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 386–87 (2012).

92. For elaboration on this category of justice, see Gold, *supra* note 81, at 159–60.

option if the thief disappears. Attempted conformity with this procedural norm of justice means that redress will be unavailable.⁹³

The relationship between distinctive norms of justice, however, is complex.⁹⁴ Possibly, there was never an opportunity for redressive justice to properly be brought about in the *Watch* example because redressive justice can only be legitimate when it meets the terms of procedural justice.⁹⁵ Consider the following argument put forth by Gardner. He notes that norms of procedural justice may be different from norms of distributive or corrective justice: “[norms of procedural justice] are concerned with the interpersonal allocation of goods and ills, but not so much with what would *count as* a sound allocation . . . as with *how to go about making* a sound allocation.”⁹⁶ Distinctive norms of justice, however, may still be interconnected. As Gardner indicates, “[t]here may be an interplay. The fact that it was approached in the right way might turn out, for example, to be one of the factors contributing to making a certain allocation count as correctively or distributively just.”⁹⁷ On one reading of this interplay, procedural justice may be a necessary condition for another type of justice to operate.⁹⁸ For example, *nemo iudex* could relate to redressive justice in a constitutive way, with procedural justice as a condition on the exercise of redressive justice. If so, this could rule out unilateral exercises of redressive justice.

Yet there is also another way to think about a potential interplay between procedural justice and other norms of justice. Gardner offers the following additional comment:

Perhaps the fact that the doctrines of *audi alterem partem* and *nemo iudex in parte sua* were observed not only made it more likely that a just settlement of a dispute would be arrived at, but also made whatever settlement of the dispute was arrived at *more just* than it would have been had it been arrived at by other means.⁹⁹

From this point of view, procedural justice may enhance redressive justice—with the right procedures in place, an outcome may be *more just*—even though redressive justice can be achieved in the absence of procedural justice.

93. See generally *id.*, at 197–202 (discussing whether redressive justice is always a sound principle to pursue in every case).

94. GARDNER, *Virtue of Justice*, *supra* note 82, at 248.

95. See *id.*

96. See *id.*

97. *Id.*

98. See *id.* at 248–49.

99. *Id.* at 248 (emphasis added). *Audi alterem partem*—“hear the other side”—is a norm of procedural justice concerned with both sides getting to have their case heard. See S.A. de Smith, *The Right to a Hearing in English Administrative Law*, 68 HARV. L. REV. 569, 576–77 (1955). *Nemo iudex in parte sua* is a variant of the *nemo iudex* principle discussed elsewhere in this paper. See *supra* text accompanying notes 90–93 for discussion concerning the *nemo iudex* principle.

To the extent there is an interplay between these norms of justice, the latter reading is the better one in this setting, and I will offer some examples to show why. First, consider the way that *nemo iudex* plays out in public law. Adrian Vermeule has recently argued in *The Constitution of Risk* that public law institutions regularly violate the *nemo iudex* principle.¹⁰⁰ Moreover, he contends that they ought to do so.¹⁰¹ His reasons are compelling, and they are worth careful consideration for anyone who adopts the *nemo iudex* principle in legal argument.

As Vermeule notes, “in some cases there is no impartial official or institution in the picture, so that wherever decision-making authority is lodged, someone or other will have to be the judge in his own case.”¹⁰² A leading example is the case of judges adjudicating their own salaries. This is not a problem due to an indirect conflict of interest: “When federal judges sit to decide cases concerning judicial salaries—cases brought by judge-plaintiffs to determine the salaries of the whole group of sitting judges, including the judges who will decide the case itself—there is no attenuated conflict of interest, but rather a direct violation.”¹⁰³ Still, such cases are clearly permissible under United States law, and given the need for adjudication, this seems desirable.¹⁰⁴

A response might be that these examples are public law examples, and that accordingly they do not implicate the concerns Fox-Decent has in mind.¹⁰⁵ Perhaps each public law institution is properly understood to be representing the state’s citizens as a whole, and this might (arguably) differentiate these settings from private law contexts. Granted, it seems naïve to think that when judges adjudicate their own salaries this is just a matter of judges acting on behalf of everyone. Still, let’s assume that public law institutions are somehow distinguishable from private law cases when it comes to *nemo iudex*. What then of self-defense?

Imagine a case of self-defense within a legal system that permits self-defense without viewing the defending party as a stand-in for a public official. Such self-defense involves the very asymmetry that purportedly violates *nemo iudex* in other settings. On a common understanding, an attacked party quite appropriately gets to unilaterally enforce her rights whether or not the attacker agrees on the scope of those rights: she gets to be a judge in her own cause.¹⁰⁶ And the victim of an attack had better have the ability to enforce her rights in this way, because if she waits it will often be too late.

100. See ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* 107–40 (2014).

101. See *id.*

102. *Id.* at 110.

103. *Id.* at 114.

104. As Vermeule adds, “[t]he Court . . . allows such suits to proceed under the common-law rule of necessity, which holds that if all judges would be disqualified, none are.” *Id.* at 123.

105. See discussion of Fox-Decent’s concerns *supra* text accompanying notes 87–89.

106. There is some ambiguity when people refer to being a judge in one’s own cause in these settings. I have in mind here the fact that the potential victim gets to decide whether to defend herself, thereby enforcing her rights on her own behalf. The possibility that she could also authoritatively determine the scope of her rights involves a different type of decision

The damage will already have occurred. If she is not a stand-in for a public official—a genuine possibility, depending on the legal system—are we ready to say that she can't legitimately engage in unilateral preventive justice, given the *nemo iudex* principle? Isn't it more plausible to say that she can legitimately engage in such preventive justice, but that it would be even better—and more preventively just—if she were able to obtain a neutral third party's determination *ex ante*?¹⁰⁷

Kantians are not troubled by self-defense as a unilateral enforcement of rights, since for them self-defense is a special case.¹⁰⁸ But Fox-Decent's asymmetry argument does not readily incorporate the idea that self-defense is anomalous, as his argument is premised on a problem with unequal treatment.¹⁰⁹ The legitimacy of self-defense is thus a very real challenge for the asymmetry argument. What becomes of the idea that *nemo iudex* is a principle of justice? I think the best answer is the most obvious one: in the self-defense setting, if procedural justice plays a constitutive role at all, it is because it is *more just* if one acts under the auspices of a neutral third party than otherwise. Preventive justice can still quite properly take precedence over the *nemo iudex* principle, with one type of justice giving way before another.

And, of course, this is the thin end of the wedge. Once we allow for self-defense as a permissible exception to *nemo iudex*, we can quickly recognize room for exceptions that cover other forms of self-help. The same point that applies to self-defense—that is, that there are cases in which violations of the *nemo iudex* principle can't be helped—is available in other self-help settings. Notably, this point applies to recaption of chattels.

It might be argued, however, that there is a problem if complying with one norm of justice means that you are consequently not complying with another norm of justice. One might think that if a sound norm of justice is applicable to a given fact pattern and it is not complied with, this means something has gone wrong. Not necessarily. It is a feature of norms of justice, and their interrelation, that the application of one type of justice will sometimes displace the application of another.¹¹⁰ While perhaps regrettable, this is not always a sign that the ultimate result is undesirable all things

making, and I am not claiming that self-defense involves that type of decisionmaking. For helpful discussion, see Gardner, *Justification*, *supra* note 22, at 84–85.

107. Or, perhaps, *nemo iudex* has no bearing on whether her conduct is preventively just. We should be open to the idea that *nemo iudex* does not play a constitutive role at all in this setting. I thank Victor Tadros for emphasizing this point.

108. See RIPSTEIN, *supra* note 46, at 161 (“Your entitlement to use force to exclude others from your own person is consistent with your obligation to refrain from interfering with the person of another, because your right to self-defense is purely protective.”). *But see* Tadros, *supra* note 55, at 208 (suggesting that the Kantian distinction between self-defense and enforcement of property rights does not hold up well). It is worth noting, however, that many cases of self-help can be characterized in preventive terms. I am grateful to Arthur Ripstein for emphasizing the importance of these preventive cases.

109. See *supra* text accompanying note 89.

110. See *supra* text accompanying notes 94–98.

considered; it just means that a particular type of justice has been foregone. These are cases of justice trade-offs. In such settings, there is a lost opportunity to obtain a particular type of justice because another type of justice has been opted for instead.

In certain situations, choices among norms of justice are difficult, particularly if the norms of justice at issue are supported by incommensurable values. In such cases a legal system might need to adopt norms of justice that govern trade-offs between distinct types of justice.¹¹¹ These second-order norms of justice—justice-allocating norms of justice, we might call them—may be relevant to private law in multiple settings. The interplay between the justice of law and the justice of equity may call for such a norm.¹¹² Similar norms may govern the interplay between procedural justice and corrective justice, or between procedural justice and redressive justice. Whatever the best approach in justice trade-off settings may be, it is doubtful that conformity to the *nemo iudex* principle is always required in order for other types of justice to legitimately be obtained. More importantly, courts could plausibly *think* that they are facilitating a type of justice when they allow for self-defense or recaption of chattels by private parties, acting on their own behalf.

Once we see that the principle of *nemo iudex* is not necessarily a precondition for other types of justice to legitimately apply, and also that courts might readily select one norm of justice to advance over another, it becomes very difficult to rule out Lockean interpretations of the law of self-help by means of a justice criterion. Recall that under a moderate justice criterion, an interpretive theory need not show tort law to actually be consistent with justice, so long as legal actors could plausibly think that it is consistent.¹¹³ It is quite reasonable (whether or not correct) to adopt a picture of preventive justice, corrective justice, or redressive justice that is not preconditioned on conformity with *nemo iudex*. With this in mind, it is also quite reasonable to interpret self-help as a legal means of unilateral rights enforcement.

V. TOWARD A PLURALISM THAT INCLUDES KANTIAN IDEAS

That private parties sometimes get to undo the wrongs committed against them—unilaterally enforcing their remedial rights—is an apparent feature of tort law, but it has received less attention than it deserves. One of the major contributions of *Private Wrongs* is that it squarely focuses our

111. For analysis of how one norm of justice may govern the allocation of another norm of justice, see John Gardner, *What is Tort Law For? Part 2. The Place of Distributive Justice*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS*, *supra* note 74, at 335, 340–41 (describing how distributive justice may govern allocations of institutional support for corrective justice).

112. I will discuss how equity involves an interplay between types of justice in a future paper, *Equity and the Right to Do Wrong*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY* (Dennis Klimchuk et al. eds., forthcoming).

113. See *supra* text accompanying notes 83–84.

attention on the question of when one person gets to be in charge of another. I do not agree with Ripstein's response, but in bringing this question to the fore, he has done an immense service to the field. This is not solely because focusing on this question will get theorists to address an area that needs greater scrutiny. It is also because *Private Wrongs* effectively explains so much of tort law by treating this question as a central concern.

Yet, as noted, the areas of tort law that match the account in *Private Wrongs* coexist with other areas that do not match nearly as well.¹¹⁴ Although there is room for debate, it is reasonable to think that self-help, at least in the United States, is inconsistent with the views developed in *Private Wrongs*. If so, perhaps Ripstein could respond that self-help is like the law of defamation. Indeed, Chapter Seven of *Private Wrongs* treats the United States' law of defamation as, in effect, an error, and our tort law might be thought to contain multiple errors. That move, however, is already problematic as applied to defamation, and it would be much more so in the self-help setting. If a legal system adopts the view that a private party *may* be in charge of another in certain contexts, this directly undercuts the idea that the central moral principle of tort law is that one private party may not be in charge of another.

Another response might be to write off the United States itself as an exception to the account offered in *Private Wrongs*. Under that view, the United States could be seen as a jurisdiction that has deviated from the tort law with which Ripstein is concerned. The significance of this response depends on the form it takes. If this reading were adopted, then *Private Wrongs* might succeed as a more parochial endeavor, offering something different from an account of tort law writ large: it might offer a theory of tort law in Canada, for example; alternatively, it might offer an account of an ideal version of tort law, rather than taking tort law doctrines at face value. Either of these could be worthwhile efforts, but they are a different kind of project from simply interpreting tort law in light of its self-understanding. I think that *Private Wrongs* can have a much broader significance, and that its arguments are important for tort law as it exists in any common law jurisdiction.

This significance stems from the scope of the book's explanatory successes. Scholars from various backgrounds should read *Private Wrongs*, as large portions of tort law are convincingly explained by Ripstein's arguments. Certainly this is true for the United States, but this same point should apply for readers from other jurisdictions, jurisdictions that may have their own areas of divergence from the Kantian picture. Various legal doctrines make sense if we assume that one person does not get to be in charge of another. Even so, if tort law adopts this principle, it apparently does so on an inconsistent basis, with a range of features that just don't cooperate well with Kantian premises. And, if we accept this conclusion,

114. There are also further challenges for an effort to unify tort law under Ripstein's account. See Scott Hershovitz, Book Review, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942 (2017) (reviewing *Private Wrongs*) (discussing various hurdles faced by the book).

there is a very interesting implication—namely, that tort law has multiple values. *Private Wrongs* nicely captures substantial parts of tort law even as it fails to unify that law.

Ripstein's argument is not pluralist, but this should in no way detract from the powerful insights that he makes available to pluralists. His account takes the idea that one person should not be in charge of another to be central to all of tort law, and this claim is doubtful—yet in rejecting this view we should avoid rejecting too much. It is entirely possible for Ripstein to be partly right. Tadros has cogently argued that moral and political philosophy must find ways of resolving tensions between the Kantian concern with independence, on the one hand, and a concern with individuals' interests, on the other.¹¹⁵ We might well think that judges deciding tort law cases face a similar challenge. In certain settings, the idea that one person should not be in charge of another may be especially salient—the law of battery is a good example. In other settings, courts may feel the need to balance various interests against each other. Tort law may thus be locally coherent rather than globally coherent,¹¹⁶ and it may reflect Kantian values in some areas and different values in other areas.

Why not think that courts recognize multiple sources of moral demands? If they do, it would not be surprising for Ripstein's book to successfully capture substantial parts of tort law—indeed, to successfully capture substantial parts of tort law in a way that is more convincing than the alternative approaches. In some places, this is precisely what *Private Wrongs* does. It shows us, correctly, how to conceptualize a variety of tort law phenomena, and it accomplishes this task better than most rival understandings of the field. But *Private Wrongs* also presents an incomplete picture, and it is a picture that unifies tort law where it lacks unity. The insights in *Private Wrongs* are at their most valuable to us if we view them at a local level, recognizing that they work well for some aspects of tort law yet not for every aspect.

CONCLUSION

The idea that one person should not be in charge of another explains some of tort law, but not all of it—and not even all of the core features. *Private Wrongs* is nonetheless a significant step forward for tort theory given the profound insights it offers into certain pockets of tort law. Where the argument works, it explains tort law with an elegance and vision that few books in the field can equal. This book will deservedly be a landmark in the field as it offers a range of helpful insights.

115. Tadros, *supra* note 55, at 213 (“One of the great tasks of moral and political philosophy is to investigate how these two sources of moral demands, independence and interests, relate to each other and how we should resolve tensions that arise between them.”).

116. On the significance of local coherence for legal systems, see JOSEPH RAZ, *The Relevance of Coherence*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 261, 298–302 (1994).

It would be a mistake to extend those insights too far, though, and the law on self-help nicely captures the challenges that *Private Wrongs* faces as an interpretive project. Individuals who have been wronged can sometimes undo the wrongs committed against them without resorting to courts, police, or other state institutions as an enforcement mechanism. Such self-help is an ex post analogue to self-defense or property defense, and under the right circumstances, it is something to celebrate. To insist that such cases always involve private parties acting as stand-ins for public officials would be to distort the legal landscape in the name of avoiding a non-Kantian result. On the most natural reading, what self-help often means is just that one party does, in the relevant sense, get to be in charge of another.

One might object that interpretive theories of tort law should conform to a morality criterion, and that only a theory like the theory in *Private Wrongs* will adequately do so. Yet morality criteria, at least the plausible ones, allow for judicial error—and this means that it is enough if courts could think the concepts a theory describes are morally justified. By that standard, a range of non-Kantian approaches to tort law pass the test, including Lockean approaches that allow one person to unilaterally enforce her rights against another. Alternatively, a justice criterion might be urged in support of interpretations like the one in *Private Wrongs*. Such a criterion raises intriguing questions about the interrelationship between norms of justice, but a moderate justice criterion is once again not adequate to save *Private Wrongs* from its challenges. Courts could easily think they are helping to bring about justice if they recognize that private parties can unilaterally undo the wrongs committed against them.

Yet these interpretive doubts suggest a fruitful area of inquiry. One of the most promising features of *Private Wrongs* is the pathway it helps open up for a certain type of pluralism. Some of tort law is precisely about preventing one person from being in charge of another, and in these cases tort law concepts are not about balancing interests, deterring future misconduct, or otherwise advancing external policy goals. And yet the Kantian theory still doesn't work well in all cases. When we recognize this, it becomes clear that tort law does multiple things, and also that in some segments of the law, it does one thing in particular. *Private Wrongs* brilliantly shows how a certain set of ideas has its place in tort law, and these ideas are both distinctive and important. The premise that one person should not be in charge of another is then like a vital piece of a jigsaw puzzle. Once we set this piece of the puzzle into its proper place, we are in a much better position to accurately understand the rest of the field, even in those areas that are best explained in a different way.