

Private Law Exceptionalism?

Part II: A Basic Difficulty with the Argument from Formal Equality*

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I. Introduction

Most non-economic approaches to the study of law acknowledge that equality poses a fundamental challenge for both understanding and evaluating private law. That is, private law remains largely indifferent to some substantial inequalities in the course of giving effect to, enforcing, and vindicating rights of the people concerned.¹ This apparent tension between equality and private law's tendency to sustain, and indeed authorize, the status quo has provoked one of the most basic theoretical distinctions in the modern history of private law theory: Corrective vis-à-vis distributive justice. The corrective/distributive distinction has come to dominate the debates concerning the justice of private law—in particular, whether the demands of justice put forward by private law entail a formal conception of “transactional equality” or “bilateral equality”² or whether they can embody a distributive conception of equality which tackles inequalities in the overall distribution of resources in society (say, according to some measure of merit or need).³

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1. This observation is made at very different levels of abstraction. See, for instance, Jules L. Coleman, “Mistakes, Misunderstanding, and Misalignments” (2012) Yale LJ Online 121:541 at 553-54; Ernest J. Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) at 74 [Weinrib, *Idea*]; Kenneth S. Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11* (Harvard University Press, 2008) at 214; Jeremy Waldron, “Moments of Carelessness and Massive Loss” in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford University Press, 1995) 387 at 388; Alan Brudner with Jennifer M. Nadler, *The Unity of the Common Law*, 2nd ed. (Oxford University Press, 2013) at 141 n.75.
2. See Martin Stone, “The Significance of Doing and Suffering” in Gerald J. Postema, ed., *Philosophy and the Law of Torts* (Cambridge University Press, 2001) at 156-57; Weinrib, *Idea*, *supra* note 1 at 82; Jules Coleman & Arthur Ripstein, “Mischief and Misfortune” (1995) 41 McGill LJ 91 at 109, 112 [Coleman & Ripstein]; Jules L. Coleman, “Second Thoughts and Other First Impressions” in Brian Bix, ed., *Analyzing Law: New Essays in Legal Theory* (Clarendon Press, 1998) 304.
3. The notion of distributive or distributional equality is most frequently used by political philosophers, especially since the publication of John Rawls, *A Theory of Justice* (Belknap Press, 1971). See, e.g., GA Cohen, “On the Currency of Egalitarian Justice” (1989) 99:4 Ethics 906; Richard J. Arneson, “Equality and Equal Opportunity for Welfare” (1989) 56:1 Philosophical Studies 77; David Miller, “Equality and Justice” in Andrew Mason, ed., *Ideals of Equality* (Blackwell, 1998) 21; Samuel Scheffler, “What is Egalitarianism?” (2003) 31:1 Philosophy & Public Affairs 5 at 13; Joseph Raz, “On the Value of Distributional Equality” in Stephen de Wijze et al., eds., *Hillel Steiner and the Anatomy of Justice* (Routledge, 2009) 22 at 23.

Indeed, some leading theories of private law have introduced the notion of corrective justice and the formal conception of bilateral equality it embodies as the organizing idea of private law's normative contents.⁴ By contrast, there are those who place distributive justice and its corresponding conception of equality in the overall distribution of resources at the actual or desirable core of certain areas of private law (such as contract or torts).⁵ Finally, there exists a variety of different intermediary approaches identifying some important measure of integration or combination of corrective and distributive justice.⁶ They all share, however, the assumption that the currency of private law justice comes in either form—corrective or distributive justice (or a mix of both). And accordingly, the question of equality comes down to a choice between formal equality between the interacting parties and equality in the overall distribution of resources in society.

In these pages, I seek to criticize *one* aspect of this picture: That it draws the wrong map of the logical space in which conceptions of private-law equality are located. On this map, there is only one such conception, which is the formal conception of transactional equality associated (in the right sense) with corrective justice. By contrast, I argue that the map of the logical space occupied by conceptions of equality in private law leaves ample room for (at least) another such conception: a substantive conception of transactional equality. Its aspiration is to treat both parties to a private-law-governed interaction as (more or less) equally important in determining, or influencing the law's determination of, the terms of this interaction. The main ambition of the paper, however, is *not* to provide a complete elaboration of substantive equality and its corresponding conception of relational justice (a task I begin to pursue elsewhere), but rather to question the form of reasoning about equality in contemporary theory of private law.⁷ This ambition, moreover, does not aim at criticizing formal equality on normative grounds; nor does it primarily seek to criticize the measure of fit between the theoretical development of the formal conception and actual private law (although I shall offer some reasons in support of this suspicion). Instead, I develop a conceptual critique: That the claims made on behalf of the theory of corrective justice to the contrary notwithstanding, the formal conception of equality does not exhaust the logical space in which conceptions of private law equality are located.

It is important to note that most criticisms of corrective justice are developed from within one or another instrumentalist outlook. Mine, by contrast, assumes

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4. See Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012) at 21-29 [Weinrib, *Corrective Justice*].
 5. Aditi Bagchi, "Distributive Justice and Contract" in Gregory Klass et al, eds, *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 193 at 193-95; Anthony Townsend Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale LJ 472 at 499; Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate, 2007).
 6. Peter Cane, "Distributive Justice and Tort Law" (2001) 2001:4 NZLR 401 at 412; John Gardner, "What Is Tort Law For? Part II: The Place of Distributive Justice" in John Oberdiek, ed, *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 335 [Gardner, Distributive]; Hanoch Sheinman, "Tort Law and Distributive Justice" in *ibid* 354 [Sheinman, Tort].
 7. For a preliminary development, see Hanoch Dagan & Avihay Dorfman, "Just Relationships" (2016) 116:6 Colum L Rev 1395 [Dagan & Dorfman, Just Relationships].

no such outlook. To the contrary, I shall seek to engage, and defeat, some of the views put forward by corrective justice on its own court. To this extent, the argument going forward offers a more general basis for rejecting such a view (or parts thereof).

Identifying the mistake in the way contemporary private law theory maps out the logical space in which different conceptions of private law equality are located has several implications. Two of them stand at the center of the argument going forward. First, the current map deflects attention from a set of concerns about power disparity, vulnerability imbalance, and accommodation in private law interactions. To be sure, even a fairly robust egalitarian public law cannot eliminate these concerns.⁸ Second, because (as I explain below) the pursuit of distributional equality in private law confronts certain principled and pragmatic difficulties, formal equality might present itself as the only game in town, as it were. That is, if equality is viewed as lexically prior to efficiency (among other welfarist considerations), the formal conception of equality suggests itself as private law's regulative ideal by default if not by choice. By acknowledging the insurmountable, principled, and pragmatic difficulties of utilizing private law (as we know it) in the pursuit of achieving equality in the overall distribution of resources in society, the formal conception of bilateral equality suggests itself even when it is *generally* viewed by liberal egalitarians as inferior to non-formal equality.⁹ But all these implications can be avoided by correcting the corrective justice's map of the logical space in which conceptions of private law equality are located—formal equality, I argue, does not exhaust this space.¹⁰

II. Reconstructing the Place of Formal Equality in Corrective Justice

A. Introduction

The focus of my present critique is not the grand scheme of corrective justice, but rather the place of the formal conception of equality in this scheme. Before I take up this reconstructive task it will be apt to specify what I mean by 'corrective justice.' The clarification is in order since recent literature runs together (at least) two different conceptions of corrective justice: a narrow and a comprehensive one. Corrective justice in the narrow, more literal sense is familiar from the writings of Gardner, Keating, and, at times, Coleman.¹¹ For them, corrective justice

8. The limited capacity of public law to tackle the issues of power, vulnerability, and accommodation in and around interactions between private persons is not merely a feature of our imperfectly just society. It also concerns the public law of a perfectly just society governed by an ideal theory of justice. See Hanoch Dagan & Avihay Dorfman, "Justice in Private: Beyond the Rawlsian Perspective" 36 *Law & Phil* [forthcoming in 2017] [Dagan & Dorfman, Justice].

9. See Samuel Scheffler, "Distributive Justice, the Basic Structure and the Place of Private Law" (2015) 35:2 *Oxford J Legal Stud* 213.

10. To be sure, the argument's focus on equality in private law neither turns on nor carries immediate implications for any particular theory of the *nature* of rights (in law and morality).

11. Jules L Coleman, *Risks and Wrongs* (Oxford University Press, 1992) at 350-54, 303-28 [Coleman, *Risks*]; John Gardner, "What is Tort Law For? Part I: The Place of Corrective Justice" (2011) 30:1 *Law & Phil* [Gardner, *Corrective Justice*]; Gregory C Keating, "The Priority of Respect over Repair" (2012) 18 *Legal Theory* 293.

is principally a theory that focuses on cost-allocation through regulating the reversal of a prior occurrence of a wrongful transaction.¹² It purports to justify the correction of injustice wherein the injustice itself is not (and even cannot be¹³) one of corrective (in)justice. Roughly speaking, this approach places the conceptual and normative focus on the *remedial* aspects of private law and negligence law, in particular.¹⁴

By contrast, corrective justice in the broader sense (as used especially by modern Kantians such as Weinrib, Ripstein, Hegelians such as Benson, but also, at least sometimes, by pragmatists such as Coleman) articulates an account of the structure and content of private right, by which I mean the basic features of the morality of the law that governs interactions between persons.¹⁵ This is not to say that this approach ignores allocative questions—it does not.¹⁶ In fact, the introduction of Aristotle’s distinction between arithmetic and geometric models of equality in mathematics by Weinrib might give the wrong impression that Weinrib’s corrective justice concerns itself with the remedial aspects of private law exclusively (and his emphasis on the phenomenon of liability further reinforces this impression). Once again, Weinrib’s corrective justice does not focus exclusively on the correction of injustices (by rules of remedies whose function may resonate with the arithmetic logic of subtraction and addition). Indeed, more fundamental to his approach is the specification of the substantive rights and duties and, by implication, the determination of what could count as wrongful transaction. Repair, then, comes last and least since it is the normative upshot of the two prior stages: That of identifying the basic substantive rights and the standards by which to assess whether they were violated.

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12. See also Dennis Klimchuk, “On the Autonomy of Corrective Justice” (2003) 23:1 Oxford J Legal Stud 49 at 51-52.
 13. This is Gardner’s view. See John Gardner, “The Purity and Priority of Private Law” (1996) 46:3 UTLJ 459 at 469-70.
 14. In a recent article, John Gardner has reintroduced Nozick’s attempt to recast distributive justice broadly to include *every* norm of allocating burdens and benefits except for norms of correcting injustice, namely norms that aim at *undoing* a given allocation. I believe that this Nozickian framework fails to illuminate the norms of justice that underlie private law (or tort law, in particular). Gardner’s depiction of corrective justice in terms of allocating burdens or benefits “*back* from one party to the other” mischaracterizes paradigmatic cases of private law—although it captures typical cases of restitution, it explains away basic cases involving compensatory damages. Gardner, *Corrective Justice*, *supra* note 11 at 12. Some ordinary torts cases, especially those pertaining to accidental infliction of injury on the person or property of another, do not aim at the reversal of a wrongful transaction in the sense discussed by Gardner. The injured person who wins her day in court is entitled to transfer some (certainly, not all aspects of) her loss to the injurer; but it is imprecise to cast this transfer in terms of allocating the loss *back* from the former to the latter. Indeed, since the injurer did not own or hold the “loss” prior to his injuring the victim, it is not clear how could the tort remedy be viewed as an instance of backward allocation.
 15. Coleman & Ripstein, *supra* note 2; Weinrib, *Idea*, *supra* note 1 at ch 4; Weinrib, *Corrective Justice*, *supra* note 4 at ch 8; Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016) [Ripstein, *Private*]. It has been suggested that Coleman’s mature account of tort law focuses on the idea of corrective justice in connection of allocation of costs only. This is not the most sympathetic reconstruction of his scholarship (and is certainly at odds with the way he used to teach his torts class at Yale). See, e.g., Jules L Coleman, “Doing Away with Tort Law” (2008) 41 Loy LAL Rev 1149 at 1167 n 44.
 16. Ripstein, *Private*, *supra* note 15 at ch 8; Weinrib, *Corrective Justice*, *supra* note 15 at 87-98.

The following discussion of formal equality in private law will track the broader sense of corrective justice (but my critical conclusions are relevant to the narrower sense of corrective justice as well). Indeed, the ideal of formal equality figures not merely at the stage of rectifying wrongful losses, but rather already in determining the content of the substantive rights and duties private individuals owe one another in private law. Put differently, the justice of private law is important not only for tackling injustices by way of subtraction and addition, but rather for setting the normative baseline of primary rights and duties against which to determine what counts as injustice and what counts as correcting it.

B. The Structure of the Argument from Corrective Justice

Here is a reconstruction of the overall argument from corrective justice with a particular emphasis on the place it designates to the formal conception of equality.

1. Premise: Private law has to meet the demands of justice (as opposed, say, to welfare or virtue ethics) by giving effect to a defensible notion of equality;¹⁷
2. Observation: The structure of private law interactions is necessarily bipolar;¹⁸
3. The Exceptionality Thesis: A certain formal conception of equality is the only conception capable of fitting #2;¹⁹
4. Conclusion: If #3 obtains, and certain other conditions concerning the state's responsibility to provide for background justice obtain, private law can meet #1.²⁰

As I mentioned above, my critique focuses on the Exceptionality Thesis. I accept as true the Premise (#1). I also accept for the purpose of the present argument a *modest* version of the Observation (#2). That is, some corrective justice theorists have argued that the bipolar structure of private law powers, rights, and duties are not merely necessary for these norms to count as private law norms. Instead, these norms are often presented (by both corrective justice and civil recourse

17. In private law theory “justice” is usually understood as social justice (or justice in the institutionalized domain), rather than the personal virtue of human agents.

18. This observation has been developed, separately, by Jules Coleman and Ernest Weinrib. See, e.g., Jules L Coleman, “The Structure of Tort Law” (1988) 97 Yale LJ 1233 at 1241-42; Weinrib, *Idea*, *supra* note 1 at 9-10, 42-55.

19. See, e.g., Weinrib, *supra* note 1 at 19 (arguing that corrective justice and Kantian right with its focus on the equality of free purposive beings are “the arch-concepts by which one *must* conceptualize the features of private law if they are to constitute a coherent normative ensemble.”) [emphasis added]. In his more recent book, Weinrib has argued, in the course of discussing the idea of personality (i.e., the abstraction that underlies the equal standing of the parties *qua* bearers of the capacity for purposiveness), that “Personality encapsulates the normative standpoint from which private law *has* to view the parties if it is to regard them as having its rights and being subject to its duties.” Weinrib, *Corrective Justice*, *supra* note 4 at 24 [emphasis added]; see also Arthur Ripstein, “Civil Recourse and Separation of Wrongs and Remedies” (2011) 39:1 Fla St UL Rev 163 at 181 [Ripstein, Civil] (noting that “the conceptual structure of private right can only be made to apply to particulars if it is applied in the *same way* for everyone.”)

20. For more on the corrective justice account of division of responsibility between society and the individual, see Arthur Ripstein, “The Division of Responsibility and the Law of Tort” (2004) 72:5 Fordham L Rev 1811; Weinrib, *Corrective Justice*, *supra* note 4 at ch 8.

theorists) as a *distinctive* feature of private law.²¹ This is, as I show elsewhere, a mistake that can (perhaps) be traced to the tendency of corrective justice and civil recourse theorists to draw inferences about private law's exceptional structure by reference to a comparison between criminal law and private law (or tort law).²² But once one enlarges the public-private law comparison to include other paradigmatic instances of public law, such as constitutional rights law, the argument that the bipolar structure of private law is distinctive fails. The bipolar structure of powers, rights, and duties is not a feature of private law in particular. Rather, it is a juridical form of establishing normative relations, private *and* non-private law relations.²³

The Exceptionality Thesis, then, takes up one implication of identifying private law's structure as bipolar: Its equality.²⁴ Because it has this structure, Weinrib argues that any plausible conception of equality in private law must be able to distinguish the equality considerations that pertain to the participants in a private-law interaction from those that apply generally to each and every member of society. Accordingly, the formal analysis of corrective justice frames the question as *what it is for the parties in a private-law interaction to relate as equals*.²⁵

At this point, the corrective justice approach *could* have provided a conceptually modest answer to the question of relating as equals. That is, the (Kantian) theory of corrective justice develops one (arguably, attractive) interpretation of what it means to relate as equals in the context of private law. The interpretation would read along these lines: Parties relate as equals when their private-law terms of interactions treat them as formally equals. To treat these parties as formally equals means, among other things, to conceive of them as equally constituting their respective capacities for choice, to the exclusion of differentiating factors such as powers, vulnerabilities, needs, and virtues.²⁶ And a subsequent stage of this argument would owe us an explanation as to why this interpretation is normatively superior to other competing interpretations.

However, this is *not* how the corrective justice account presents the nature of the argument from formal equality. It seems that it opts for a more ambitious claim, namely, that this formal conception of equality is not merely an (attractive) interpretation of the notion of relating as equals, but rather the only

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21. Weinrib, *Idea*, *supra* note 1 at 76 ("The most distinctive feature of private law, expressed both in its procedures and in its doctrines, is the bipolarity of the relationship between the parties.") See also Weinrib, *Corrective Justice*, *supra* note 4 at 19-20. For civil recourse theorists, John CP Goldberg, "The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs" (2005) 115:3 Yale LJ 524 at 601; Benjamin C Zipursky, "Philosophy of Private Law" in Jules L Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 623 at 642, 645-48, 651.
 22. Avihay Dorfman, "Private Law Exceptionalism? Part I: A Basic Difficulty with the Arguments from Bipolarity and Civil Recourse" (2016) 35:2 Law & Phil 165 [Dorfman, Private Law].
 23. The argument is developed in *ibid*.
 24. Weinrib argues that "we cannot understand the normative character of corrective justice until we elucidate the normative significance of its equality." Weinrib, *Idea*, *supra* note 1 at 77.
 25. Weinrib, following Aristotle, provides a slightly different version: "What conception of the parties would put them on an equal footing?" Weinrib, *Idea*, *supra* note 1 at 80.
 26. *Ibid* at 77-83; Ripstein, *Civil*, *supra* note 19 at 181.

interpretation available in the light of the bipolar structure of private law.²⁷ This is just another way to describe the Exceptionality Thesis (on which more below).

Hence, the ambition to cast the formal conception of equality as uniquely appropriate to private law depends for its success on two conditions: First, that pursuing distributive equality in private law is in some sense incoherent; and second, that there is no other conception of equality (i.e., other than the formal and distributive ones) that can be made consistent with the bipolar structure of private law.

In what follows, I shall defend the first condition. However, I also seek to show that the second condition is not met. I argue that the Exceptionality Thesis fails because there can be a *non*-formal conception of equality, the egalitarian ambition of which is *non*-distributive. I also wish to show that some such conception implicitly figures in some important areas of private law. This third conception of equality, substantive equality as I shall call it, reveals how the argument from formal equality should be characterized—a plausible interpretation of the notion of relating as equals, but certainly not an exclusive one. By implication, it makes private law far less exceptional (*vis-à-vis* non-private law) than the corrective justice's Exceptionality Thesis suggests. It does not mean that private law cannot be exceptional in other ways, but given my arguments in these pages and in an article preceding the current one²⁸ it is not clear what else can render private law exceptional in the eyes of corrective justice theory.

C. Why Rule Out Distributive Equality in Private Law? The Structural Difficulty

Before I take up the structural difficulty with making distributive equality private law's conception of equality let me note that it is not the only difficulty with marrying distributive equality with private law. Another genuine difficulty is an institutional one. Because it often governs occasional interactions, private law will typically fail to redistribute resources regularly and systematically across *all* members of society.²⁹ However, the more fundamental difficulty is structural, rather than institutional. That is, terms of interpersonal interactions grounded in equality in the overall distribution of resources in society necessarily *eliminate* the relational form of the rights and the duties that, according to corrective justice theorists, characterize the private law. That is, a commitment to redistribute resources across society makes it the case that private law rights and duties find their grounds not between the interacting right-holder and duty-holder in particular, but rather among all members of society, including of course those who take no part in this interaction. For instance, suppose that private law would rely on assessment of individual merit (of whatever kind) for the purpose of deciding both the content of the relevant primary rights, the protection they deserve, and

27. See sources in note 19 above.

28. Dorfman, Private Law, *supra* note 22.

29. See, e.g., Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981) at 106.

the appropriate remedy for their breach. In doing so, private law will shift the focus to the ‘relationship’ that holds between each party to the interaction, taken separately, *and society*. The relevant merit will fail to single out the interacting parties as a source of concern and of value quite apart from the comparison of merit across society. ‘Private law’ would then become a nominal description of a legal framework, the real function of which is to achieve better conformity with equality in holdings *across society*. Indeed, repudiating formal equality and embracing distributive equality instead represents a break away from, rather than a shift within, private law.³⁰

This thesis has recently been put under philosophical pressure by tort theorists (such as John Gardner and Hanoeh Sheinman) who have sought to debunk the dichotomy between corrective and distributive justice. The critique at issue does not address the Exceptionality Thesis directly, but rather seeks to refute the broader argument made by the Kantian articulation of corrective justice, namely, that the justice of private law cannot coherently meet the demands of *both* corrective and distributive justice. However, it may carry important implications for the Exceptionality Thesis. To mention just one, private law equality need not be, and perhaps must not be, indifferent to the redistributive consequences of its operation. Thus, a court contemplating the affirmation of a new tort cause of action must account for the broader consequences of its decision on future victims, risk-creators, and other participants in the practice of tort law. Now, the debunking argument is that tort law (and, perhaps, private law more generally) must face some considerations of distributive justice as they arise *inevitably* in the course of pursuing corrective justice.³¹

However, this attempt at refuting the corrective/distributive justice distinction fails; by implication, it does not pose a threat to the Exceptionality Thesis. The source of the difficulty with the debunking attempt in question is that it is not inconsistent with corrective justice’s ambition to exclude considerations of distributive justice from the private law. Here is why.

The basic insight developed by both Gardner and Sheinman comes from their insistence on evaluating the justness of tort law, in part, by reference to the opportunities and effects this law creates (or eliminates) for the entire class of participants in the tort practice. To be sure, both Gardner and Sheinman (not to mention corrective justice theorists such as Weinrib and Ripstein) are reluctant to commit tort law to robust redistribution of resources or opportunities along Dworkinian or Rawlsian lines.³² Rather, both theorists mainly focus on opportunities and effects that arise in connection with the availability of a cause of action in tort and with the remedial apparatus that courts facilitate. For this reason, Gardner contrasts (what seems to be the corrective justice orthodoxy) doing “justice between parties” with his observation that “doing justice between the parties ... cannot but entail consideration of whether the plaintiff belongs to a class of people who should enjoy a right to proceed in tort against the defendant.”

30. Note that the argument is not that a distributive turn can never be desirable. Rather, the point is that pursuing distributive justice will turn ‘private law’ into a qualitatively different thing.

31. See Gardner, *Distributive*, *supra* note 6; Sheinman, *Tort*, *supra* note 6.

32. Gardner, *Distributive*, *supra* note 6 at 336-37; Sheinman, *Tort*, *supra* note 6 at 379, 380.

And he concludes: “no judge may rule in favor of any plaintiff except by locating the plaintiff within a class of imaginable plaintiffs who would, according to the judge, be entitled to the same ruling.”³³

It seems to me that Gardner is correct on this last point, but is there a genuine disagreement between Gardner/Sheinman and corrective justice theorists (such as Weinrib and Ripstein)? I think not. It does not seem right that Gardner’s way of characterizing the judge’s mode of reasoning *must* be inconsistent with at least the spirit of the theory of corrective justice. This may come as a surprise since corrective justice theorists (as just noted) are reluctant to admit the relevance of considerations of distributive justice to the explanation and evaluation of tort law. But these theorists simply understand the character and scope of ‘distributive justice’ in qualitatively different ways than both Gardner and Sheinman do. Evidence for this can be discerned from the importance of *systematicity* in leading accounts of tort law as corrective justice. For instance, at one point Weinrib notes the court’s “omnilateral authority” to extend “the significance of the decision beyond the specific (private law) dispute.”³⁴ This observation potentially preempts much of the criticism made by Gardner’s insistence³⁵ on the distributive aspect of correcting injustices through tort law. Accordingly, it may be said that the ‘distributive justice’ considerations under discussion arising in the course of correcting injustices are endogenous, rather than exogenous, to a practice of corrective justice properly so called.³⁶ The Exceptionality Thesis can therefore survive the Gardner/Sheinman broader line of attack on the dichotomy between corrective and distributive justice.

However, and this is the important point, it does not survive the argument that there can be a non-formal conception of equality and that it suits the bipolar structure of private law. Or so I shall argue.

III. Is Private Law’s Formal Equality Exceptional? A Critique

The source of my critique lies in the distinction between the formal conception of equality and its distributive counterpart. Reconsidering this distinction is consequential, I argue, because it conceals more than it reveals. In particular, the distinction runs together two different dimensions, namely, structure and content. For instance, the formal conception of equality that figures in the

33. Gardner, Distributive, *supra* note 6 at 342.

34. Weinrib, “Private Law and Public Right” (2011) 61:2 UTLJ 191 at 196; see also Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Harvard University Press, 2009) at 238, 251-52 [Ripstein, *Force*].

35. Gardner, Distributive, *supra* note 6 at 338-44.

36. There may well be a genuine disagreement between Gardner and Sheinman, on the one hand, and Weinrib and Ripstein, on the other, on the question of whether the “distributive” considerations necessary to achieve systematicity can transcend the demands of formal equality defended by the latter. Corrective justice theorists (such as Weinrib and Ripstein) cast the legitimate authority of courts (or legislatures) to achieve systematicity in terms of pinning down in an impartial manner the pre-political demands of formal equality and freedom. By contrast, both Gardner and Sheinman can allow for a far more generous approach to the character and the scope of the discretion that judges and legislatures can exercise in the course of correcting injustices, in which case formal equality may count as one consideration among others.

Exceptionality Thesis features *both* bipolarity as its structural dimension and the equal capacity for choice as its content dimension (or, as Weinrib puts it, “the subject matter of this equality”³⁷). And a distributive conception of equality defended, say, by Rawls or by Dworkin is both multilateral (in its structure) and substantive (in its content).³⁸

Thus, because a conception of equality can be analyzed along these two dimensions, the distinction between formal and distributive equality gives rise to four, not two, different conceptions of equality:³⁹

Conception 1a: bilateral (in structure) and formal (in content).

Conception 1b: bilateral and substantive.⁴⁰

Conception 2a: multilateral and formal.⁴¹

Conception 2b: multilateral and substantive.

The Exceptionality Thesis, recall, begins with ruling out any conception of distributive equality, 2a and 2b, on account of its incompatibility with private law’s bipolar structure. But can ruling out distributive equality entail singling out the formal conception of equality? The argument presented in Weinrib’s account of corrective justice seems to answer in the affirmative.⁴² But the distinction between 1a and 1b shows that there is *no* relationship of entailment between ruling out any 2 and singling out 1a. Thus, the answer should be negative. A conception of equality that takes a bilateral form can, i.e., conceptually speaking, advance either formal or substantive notion of relating as equals. Hence, the Exceptionality Thesis fails because it draws the map of the logical space in which conceptions of private law equality are located too narrowly, that is, to the exclusion of at least conception 1b.

What can explain the omission of 1b? There can be any number of explanations. Let me preempt two such explanations and then offer what, in my view,

37. Weinrib, *Idea*, *supra* note 1 at 83.

38. At least in Dworkin’s case, the scope of the defense does not include private law. See Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986) at 296, 299.

39. I do not deny the possibility of adding more dimensions, thereby increasing the conceptual menu of conceptions of equality. However, my argument does not turn on this possibility.

40. To fix ideas, consider a non-waivable, implied warranty of habitability (in the landlord-tenant context) or warranty of safety (in products liability and consumer protection contexts). These are, in my view, private law interactions that do away with formal equality. The reason why these are private, not public, law interactions is that they govern the *horizontal* interaction between private persons, rather than the vertical one between the state (including its agents) and its subjects. And while they may have important distributive consequences (and so does corrective justice’s formal equality), they both seem to conceive of the landlord/tenant or manufacturer/consumer interaction as a source of concern quite apart from its aggregate effects in terms of distributive justice or welfare on society as a whole. As I argue below, the 1b conception is implicit in other key areas of private law such as in the manner in which tort law approaches the distinction between defendant-care and plaintiff-care (or negligence and comparative negligence).

41. The ideal of one-person-one-vote can be viewed as giving effect to this conception in the domain of political equality. Certain libertarian accounts of distributive equality may be reducible to this conception as well.

42. See Weinrib, *Corrective Justice*, *supra* note 19.

accounts for this exclusion. To be sure, I do not find any of these compelling—in fact, it is hard to imagine what explanation can defeat the conceptual difficulty of overlooking conception 1b. Begin with preempting one explanation—that treating the parties as formally equals provides a better interpretation of bilateral fairness than treating them as substantively equals. However, saying that conception 1b is normatively inferior to 1a may (or may not) be true, but it offers no explanation at the conceptual level at which the Exceptionality Thesis is defined. Likewise, arguing that conception 1a better accounts for the actual workings of contemporary private law may (or may not) be true, but it too fails to engage the conceptual level of the analysis; and at any rate, I shall show some indications that this argument fails on its own terms (since the doctrine does not fit the prescriptions of treating the parties as formally equal in some important private law interactions). The more straightforward explanation (or speculation) comes from the broader theoretical framework of the corrective justice approach. It begins with Aristotle's distinction between the two forms of justice, corrective and distributive, and only then reconstructs Kant's answer to the question left unaddressed by Aristotle: The precise sense in which parties in a private law interaction can relate as equals. This strategy leaves the modern corrective justice theorist with no theoretical resources in Aristotle or in Kant on which to draw in developing the conceptually richer picture of the idea of equality in private law (one which includes conception 1b). There are two interesting inferences that can be drawn from this kind of explanation. First, if the connection between an Aristotelean form of justice and its corresponding conception of equality is as tight as modern corrective justice seems to suggest, conception 1b implies that there can be a third form of justice, and that it could figure in the private law.⁴³ Thus, contrary to Aristotle's teachings, corrective justice and distributive justice are but two forms of justice in holdings. Alternatively, conception 1b indicates that the connection between an Aristotelean form of justice and its corresponding conception of equality is conceptually looser than what the modern theory of corrective justice assumes. And this looseness creates the demand for further normative efforts on the part of corrective justice theorists to defend the desirability of the formal conception of equality against its most immediate competitor, conception 1b. At any rate, however, none of the explanatory strategies just sketched can alleviate the conceptual difficulty of excluding conception 1b from the logical space of conceptions of private law equality. It will be apt, then, to provide some preliminary observations on what this conception might be.

IV. A Substantive Conception of Equality: Preliminary Presentation

I shall call conception 1b the substantive conception of equality or simply substantive equality, and it must be recalled throughout that this conception picks

43. The general possibility of other forms of justice is discussed in Gardner, *Corrective Justice*, *supra* note 11 at 8-9. Elsewhere, I defend a third conception of justice, relational justice, and argues that it explains and justifies key features of private law. See Dagan & Dorfman, *Just Relationships*, *supra* note 7.

out *both* the substantive and the relational dimensions of equality. I introduce its main themes by reference to two distinctions: vis-a-vis formal equality (1a) and vis-à-vis distributive equality (2a and 2b). Concerning the first, substantive equality denies that being the bearers of the capacity for choice can serve as a satisfactory basis for treating the parties in a private law interaction as equals. Concerning the second, I argue that substantive equality makes the private law interaction its source of concern and of value quite apart from its effects on the overall distribution of resources in society.

To forestall misunderstandings, two interrelated clarifications concerning the nature and scope of the argument going forward are in order. First, my argument is *not* that substantive equality is the most, or even just more, desirable conception of equality on which to model private law's terms of interaction. Nor do I seek to make the ambitious interpretive claim that this conception, as opposed to the formal one, already informs all or most aspects of the normative content of contemporary private law (although I shall provide some evidence to support such a prima-facie claim below). Rather, my ambition, recall, is to refute the Exceptionality Thesis by showing that formal equality is not the only conception of equality that can coherently fit the bipolar structure of private law. Accordingly, I seek to show that it is conceptually possible to ground private law's normative content in a conception of substantive equality (which is neither formal nor distributional). Second, my ambition is *not* that of criticizing the normative ideal of formal equality in general or even in the limited domain of private law, although some of the things I say, especially in this and the next Part of my argument, will provide some reasons to doubt the normative cogency and doctrinal accuracy of the formal conception.⁴⁴ Rather, my main aim is to criticize the conceptual ambition underlying the Exceptionality Thesis.

A. Substantive Equality vs. Formal Equality

For the sake of exposition only, I shall outline the main implications of the formal conception of equality for private law by reference to a distinction between voluntary and involuntary interactions. On an influential version of the formal conception in question, *voluntary* interactions are governed by a principle of independence.⁴⁵ Gaining access to my property, having an entitlement to my services, or entering into a joint venture with me depends on my consent (at the very least). Anything short of that amounts to an attempt to denying my independence by converting my person or property into a mere means of yours. For this reason, the terms of a voluntary interaction must be determined (or otherwise accepted) by the party whose basic entitlements to exercise choice over her person and property are at stake. *Involuntary* interactions are typically accidental and so

44. For a general criticism of formal equality, see Karl Marx, "Critique of the Gotha Program" in Lawrence H Simon, ed, *Karl Marx: Selected Writings* (Hackett, 1994) 315 at 320-21. For a critical exploration of formal equality (or abstract personality) in the torts context, see, e.g., Stephen R Perry, "The Moral Foundation of Tort Law" (1992) 77:2 Iowa L Rev 449 at 481-82.

45. See Ripstein, *Force*, *supra* note 34 at 42-43.

turns far less on consent.⁴⁶ Nonetheless, they, too, are governed by a principle of independence, according to which the terms of such interactions must reflect the formal equal independence of each interacting party, taken severally. By implication, they cannot be determined by your (or my) judgment concerning what respect to my (or your) person and property requires.⁴⁷ Nor can they be fixed by reference to your (or my) substandard competence.⁴⁸ Incorporating such subjective factors into the terms of an involuntary interaction violates formal equality because it gives one party to the interaction the standing unilaterally to determine some of these terms. Thus, in order to be consistent with formal equality, the terms of involuntary interactions must be determined *objectively* in the negative sense that they must refrain from taking into account the idiosyncrasies of the particular person's condition whose conduct is being assessed.⁴⁹

The formal conception under discussion presupposes a rather thin conception of the person as free and equal agent. In particular, a private individual is free in virtue of her capacity for choice, which is to say the capacity to set and pursue ends by deploying one's person and property. Private individuals are equal in virtue of having this capacity (to a sufficient degree). Accordingly, for any set of terms of an interaction between private individuals to count as fair, the ability of one participant to set and pursue her ends using her means must be consistent with a like ability on the part of the other participant(s).⁵⁰ In conceptualizing the person in these terms, corrective justice theory insists on insulating the interacting individuals from their actual particularities. This is why proponents of corrective justice's formal equality use such terms as "abstract equality of free purposive beings,"⁵¹ "noumenal selves"⁵² and "generic personality"⁵³ to express formal equality's ambitious claim: That "the conceptual structure of private right can only be made to apply to particulars if it is applied in the *same way* for everyone."⁵⁴

Substantive equality, as I said a moment ago, picks out a thicker conception of the person. It is substantive in the sense that it does not ignore (at least not entirely) the differences between persons: Substantive equality takes difference seriously by supposing that people can relate as genuinely equals only insofar as their different situations are brought to bear (in the appropriate sense) on the legal determination of the terms of their interactions.⁵⁵ For instance, the typical

46. Consent is not entirely irrelevant to involuntary interaction (consider the doctrine of secondary assumption of risk). It is just that its role is not as prominent as in voluntary ones.

47. See Coleman & Ripstein, *supra* note 2 at 109, 112; Ripstein, *Force*, *supra* note 34 at 171.

48. Substandard competency is different (i.e., less acute) than complete incapacity.

49. See, e.g., Weinrib, *Idea*, *supra* note 1 at 148, 177-79; Jules Coleman, "Tort Law and Tort Theory: Preliminary Reflections on Method" in Gerald J Postema, ed, *Philosophy and the Law of Torts* (Cambridge University Press, 2001) 183 at 206; Ripstein, *Civil*, *supra* note 19 at 181.

50. Ripstein, *Force*, *supra* note 34 at 362-63.

51. Weinrib, *Idea*, *supra* note 1 at 58.

52. *Ibid* at 82.

53. Daniel Markovits, "Promise as an Arm's Length Relation" in Hanoch Sheinman, ed, *Promises and Agreements: Philosophical Essays* (Oxford University Press, 2011) 295 at 307, 312.

54. Ripstein, *Civil*, *supra* note 19 at 181.

55. Cf Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) at 227 (distinguishing between equal treatment, which is a variation on formal equality, and treating persons as equals, which is a basic pillar of substantive equality). To be sure, my account does *not* share

power imbalance between an employer and an employee can be deemed irrelevant from the point of view of formal equality. Indeed, proponents of the formal conception would say that in making an employment decision such as refusing to accommodate the employee's familial commitment, the employer merely changes the context within which the employee can *still* set and pursue ends using her own means (she can try her luck with other private or public employers or start her own business).⁵⁶ But from the perspective of substantive equality, the power imbalance cannot be overlooked in deciding the question of accommodation.⁵⁷ It cannot be overlooked in other contexts of employment relations, such as the tort law context pertaining to the employer's duty to provide a reasonably safe workplace.⁵⁸ Thus, although both the formal and the substantive conceptions of equality in interactions seek to address the same question—what it is for *persons* to relate as equals—they differ on the *conception of the person* that each underwrites. Whereas formal equality equates the person with “generic personality,” substantive equality allows the relevant personal qualities, powers, and vulnerabilities to inform the conception of the person for the purpose of determining the terms of the private law interactions.

Consider, once again, a typical interaction between a work candidate and an employer and the private wrong of discrimination in this context. These two may well be formally equal by virtue of possessing the capacity for choice, but they may not be substantively equal insofar as it is permissible—morally and legally—for the employer to refuse to accommodate, to a reasonable extent, basic family or even religious commitments of the former. A refusal to accommodate means that, as between the two, the work candidate is left to bear the entire costs of care-giving or of religious devotion. But this view offends against our moral intuitions (and the modern law) concerning what it is to stand in a relationship of equality—in particular, the non-accommodating employer and the candidate do not stand in a relationship of equality if the former can dictate terms of interactions that discriminate against the employee's special needs or vulnerabilities.⁵⁹

Note that I do not claim that the employer must owe the would-be employee a duty to accommodate *all* of his or her particular traits and qualities. It seems

Dworkin's controversial view that distributional equality is equality's only or main concern (or that realizing substantive equality is the state's, rather than the individual's, responsibility).

56. Compare with Ripstein, *Force*, *supra* note 34 at 39.
57. The power imbalance at issue is not wholly contingent. There are reasons to believe (supported by social science studies) that it is built into the structure of the interaction, including in the case of highly-skilled technical professionals. See Matt Marx, “The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals” (2011) 76:5 *American Sociological Rev* 695 at 706.
58. For doctrinal and theoretical discussion of the past and present doctrine of assumption of risk in the employment context, see Avihay Dorfman, “Assumption of Risk, After All” (2014) 15:2 *Theoretical Inquiries in Law* 293. Note that although modern workplace safety is partially regulated by workers' compensation schemes and safety regulations, the tort duty of due care in connection with providing safe working environment has remained in place. See, e.g., *Smith v Western Elec Co* (1982) 643 SW2d 10 at 12 (Mo Ct App).
59. There exists a second-order question concerning the wrong of discrimination in the situation described above: Must this wrong be characterized as an intentional tort? It is beyond the scope of the current argument to explain why, in my view, the answer should be that the wrong of discrimination may also cover negligent discrimination.

fair to assert for the limited purpose of criticizing the conceptual neglect of substantive equality that familial status and religious faith present compelling cases for the proposition that *some* measure of accommodation on the part of the employer is in order. (Might one not say that the goal of accommodation is to put the interacting persons in a position of *formal* equality? I believe not. Certainly, accommodation seeks to allow the parties to relate as equals. However, the distinction between formal and substantive equality on which my discussion centers takes up the implication of inequalities in power and vulnerability between the employer and employee *at the get go stage* (which is the stage in which the legal terms of the interaction are determined). The formal conception of equality does not conceive of these inequalities as a problem (insofar as they do not undermine the very capacity for choice on the part of the employee). Substantive equality, by contrast, identifies them as the basic hurdle to overcome by imposing a duty of accommodation on the employer (rather than on society or the state)).

Thus, the animating worry for the substantive conception is whether or not the interacting persons, given their powers (say, as employers) and vulnerabilities (say, as disabled pedestrians crossing a busy street or simply as potential victims of a risky act) enjoy a more or less equal importance in determining, or influencing the law's determination of, the terms of their interaction. In the next Part I show the important extent in which contextual analysis can help to determine, in the case of a particular type of interaction, what powers and vulnerabilities may count as relevant.

Note that the point of addressing power and vulnerability imbalances as between the interacting parties is not that of correcting historical social injustices—furthermore, it is not about the overall redistribution of respect and fault across society. Rather, the point is that of treating both parties to a private-law-governed interaction as (more or less) equally important in determining, or influencing the law's determination of, the terms of this interaction. Considerations of difference in powers and vulnerabilities guide the determination and enforcement of the rights and duties that figure in private law, *regardless* of whether these powers and vulnerabilities are the upshot of past and present discriminatory treatment of a certain class of people by society. Accordingly, from the perspective of substantive equality, the employer is not allowed to act on his or her unequal power advantage *even when* the work candidate at issue is not a member of a historically marginalized group; more generally, the employer incurs this obligation *even when* the candidate may be able to find equally beneficial jobs with other, more accommodating employers.⁶⁰ Substantive equality, therefore, is not a scheme of state delegation of public responsibility to correct past social injustices to private

60. Why, then, modern antidiscrimination laws typically include a list of suspected classes or human traits? On the proposed account, enumerating certain classes helps to ensure effective guidance to the law's addressees and effective constraint on judicial and administrative exercise of discretion. In that, these laws can defuse some potentially intrusive and overly demanding aspects of accommodation by setting out clear categories, frameworks, and doctrines with which individual persons can adequately discharge their duties, on the one hand, and exercise their rights of accommodation, on the other. The enumeration technique is best understood as a way station on the road to a more inclusive commitment for realizing the demands of substantive equality in relations among private persons.

individuals. Tackling power and vulnerabilities imbalances is important because even a discrete case of interacting under such circumstances can in itself, that is, independently of its cumulative consequences, be unjust.⁶¹

B. Substantive Equality vs. Distributive Equality

One might suspect that substantive and (some versions of) distributive equality share more than just the rejection of the formal conception of equality. Substantive equality, it may be thought, is essentially a form of distributional equality. The suspicion can arise in the light of the example of workplace accommodation and, especially, the *cost*-internalization it requires: That our employer must make reasonable accommodation in the light of the employee's familial status, religious faith, or physical disability. In response, I shall seek to show that this suspicion is groundless—substantive equality is not reducible to distributive equality, including substantive distributive equality (conception 2b).⁶²

To begin with, the suspicion at issue cannot be that substantive equality has important allocative and, therefore, distributive *consequences*. It surely does, but so does the formal conception of equality. Instead, the suspicion must be that substantive equality aims, at bottom, to realize distributive equality, viewed as equality in the overall distribution of resources in society. A suspicion of this sort reflects a tendency among some liberal egalitarians to cast virtually all questions of equality in distributive terms. On this approach, equality is, at bottom, a distributive value so that a theory of equality, and ultimately of justice, is primarily an account of the equalisandum, which is the kind of thing (resource, welfare, etc.) whose equal distribution is necessary (though perhaps not sufficient) to meet the demands of justice.⁶³ However, substantive equality is no mere subset of distributive equality.

Indeed, achieving equality in the overall distribution of resources in society does not take the one-to-one relationship and the possible equality that holds between each party to the private law interaction as important in and of itself. Rather, it focuses on the different relationship between either party to the interaction and society as a whole (it has a multilateral, rather than bilateral, structure). Accordingly, whereas substantive equality concerns the *terms* of the relationships between individuals, distributive equality focuses on considerations of equality in the holdings of persons, *taken severally*. The different normative orientations just mentioned are not merely theoretical. Rather, the distributive implications of establishing substantively equal terms of interaction need not be compatible with

61. I elaborate on this claim in Dagan & Dorfman, Justice, *supra* note 8.

62. The general claim that substantive equality is not reducible to distributive equality has been variously defended in Iris M Young, *Justice and the Politics of Difference* (Princeton University Press, 1990); Elizabeth Anderson, "What Is the Point of Equality?" (1999) 109:2 *Ethics* 287; Samuel Scheffler, *Equality and Tradition: Questions of Value in Moral and Political Theory* (Oxford University Press, 2010) at chs 7-8.

63. A representative statement of this tendency (by one of its most important proponents) is Richard Arneson, "Egalitarianism" in *The Stanford Encyclopedia of Philosophy* (Summer 2013 ed) by Edward N Zalta (<http://plato.stanford.edu/entries/egalitarianism/>).

the demands of distributive equality. Demanding the employer in particular to accommodate, to a reasonable extent, some of the personal qualities and circumstances of the employee need not pass the bar of distributive equality. Perhaps it might be better, from the point of view of distributive justice, to impose the duty of accommodation on the entire class of taxpayers, according to a criterion of desert, responsibility, or any other just method of meritorious assessment. The claim is not that distributive equality must always resist the imposition of the duty of accommodation on the employer; rather, the point is that distributive equality approaches this ‘duty’ question from the perspective of society, not from the employer-employee one.

Thus, let’s stipulate that substantive equality imposes a duty on our employer to accommodate, to a reasonable extent, the physically-disabled employee (or, for that matter, his familial commitments). Whether or not this duty can also be justified on grounds of distributive equality depends on considerations that are not relevant to the employer/employee terms of interaction only. Some of these considerations will focus on the employee’s situation: For instance, the responsibility of the employee, say, for how his disability came about—viz., whether through fault (no fault) or choice (no choice) of his own. Another relevant consideration would be the employee’s economic status—he or she can be relatively wealthy (including even in comparison to the employer’s financial situation). Another relevant consideration is the availability of adequate job alternatives provided by either public or private employers who are ordinarily willing to accommodate the likes of the employee. Other considerations will focus on the employer and on the distributive-based reasons for or against imposing a duty of accommodation on the employer in particular.⁶⁴ For instance, all else being equal, hiring a physically disabled person is commonly considered morally and socially desirable—for work is consequential to social and political integration.

These and other considerations of distributive equality or fairness determine what allocation of the responsibilities and costs associated with the employee’s choice and circumstances counts as distributively just. Substantive equality, by contrast, focuses on the terms of the interaction between the employer and the employee. In particular, it focuses on what it means for the former to respect the latter—to take her seriously—by recognizing her rather than merely her generic personality or capacity for choice. It emphasizes the responsibility of the employer to make reasonable accommodation even when considerations of distributive equality will pull in other directions (as when they single out the responsibility of the public as a whole). Thus, substantive and distributional equality are simply different conceptions of equality. This difference, moreover, is institutionally manifested in the different dimensions they each currently capture: whereas the former governs the horizontal interactions between *agents*, the

64. Some liberal egalitarians seem to suggest, in the spirit of distributive equality, that some choices—such as religious commitments—should be allowed to fall on *society* as a matter of justice. See Seana Valentine Shiffrin, “Egalitarianism, Choice-Sensitivity, and Accommodation” in RJ Wallace et al, eds, *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford University Press, 2004) 270 at 302; Daniel Markovits, “Luck Egalitarianism and Political Solidarity” (2008) 9:1 *Theor Inq L* 151 at 177-81.

latter regulates the vertical interactions between the distributing agent, which is typically the welfare state, and its *patients*.

V. Does the Substantive Conception of Equality Figure, in some measure, in the Private Law?

Substantive equality, I have argued, proposes an ideal of equality irreducible to the formal or distributive conceptions of equality. Contrary to the formal conception of equality, it can work out a sufficiently thick conception of the person in defiance of the austere conception of the person as constituting a “generic personality.” And in contrast to equality in the overall distribution of resources in society, it focuses on the terms of the interaction between the right- and the duty-holder in particular. At least in *theory*, the existence of substantive equality refutes the conceptual ambition of the Exceptionality Thesis. It will be apt to elaborate on this conception by addressing two questions: First, how to determine what powers and vulnerabilities count in order for the parties to relate as substantively equals; second, does the substantive conception of equality figure in legal practice without collapsing to either formal or distributional equality. I address the first question in the course of responding to the second one. That is, by focusing on the doctrinal footsteps of the substantive conception in private law as we know it, I showcase how the distinction between relevant and irrelevant aspects of the parties’ respective situations does not give rise to radical indeterminacy and *ad hocery*. The argument going forward, therefore, further elaborates on the notion of substantive equality in private law. The discussion will be brief, since my ambition is to identify, rather than pursue, the doctrinal footprints of substantive equality in familiar areas of private law. But even this brief inquiry will be able to demonstrate that the Exceptionality Thesis is implicitly rejected by courts and that, by implication, private law can give rise to a non-distributive ideal of substantive equality.

Two last introductory remarks are in order. First, I have already introduced workplace accommodation as a possible illustration of substantive equality. At this point one may protest that workplace accommodation is better understood as a combination of private law with regulatory law; in particular, the state addresses social injustice by commandeering the support of private employers. But this is not the only way to approach the matter. A better way is to show that workplace accommodation finds its grounding in substantive equality, rather than in the employer’s responsibility to support the effort of the state to fulfill *its* obligation toward would-be victims of employment discrimination.⁶⁵ The second point is that the cases I shall discuss capture core areas of traditional private law and, moreover, are famously associated with this law’s commitment to the formal conception of equality.⁶⁶ This first piece of doctrine—the standard of reasonable

65. See further Dagan & Dorfman, *Just Relationships*, *supra* note 7; Dagan & Dorfman, *Justice*, *supra* note 8.

66. I will not discuss the distinction between nonfeasance and misfeasance here. Elsewhere, I argue, negatively, that the corrective justice defense of this distinction is conclusory and,

care—is not only key to understanding a major area in the common law of tort law. Rather, it has also been corrective justice’s poster child for the crucial place of formal equality in private law.⁶⁷ The next case is contract, and especially the discrete contractual ‘relationship’ established by self-interested strangers. This latter case figures prominently in some of the most sophisticated accounts of contract law’s commitment to formal equality.⁶⁸ But as I shall seek to show, there are reasons to believe that both cases are better cast in terms of a broader commitment to the substantive conception of equality.

A. Reasonable Care and Substantive Equality: Accommodating the Tort-victim’s Disabilities

The familiar tort maxim that the tort-feasor takes her victim as she finds him is typically associated with the thin skull doctrine.⁶⁹ But a modified version of this maxim—one that incorporates a requirement of foreseeability—applies far more broadly than the determination of the amount of compensation to victims with an unusually sensitive constitution: I argue that it also partially governs judgments concerning what counts as negligent creation of risk of *bodily* injury.⁷⁰

Consider the question of whether the standard of reasonable care ought to accommodate (in the right sense) the disabled victim when his or her life and limb are at stake.⁷¹ Suppose that a person with a disability, physical or mental, is struck by an automobile while crossing the street. The victim’s disability can be relevant to the task of determining the terms of the interaction and, ultimately, the resolution of this case in two important ways: It can partially determine whether

affirmatively, that a commitment to the formal conception of equality cannot account for some of its major exceptions (such as the doctrine of mistaken payment in unjust enrichment law).

See Dagan & Dorfman, *Just Relationships*, *supra* note 7.

67. E.g., Weinrib, *Idea*, *supra* note 1 at 148, 177-79.

68. See, e.g., Peter Benson, “The Unity of Contract Law” in Peter Benson, ed., *The Theory of Contract Law: New Essays* (Cambridge University Press, 2001) 118 at 130-31 [Benson, Unity]; Daniel Markovits, “Contract and Collaboration” (2004) 113 *Yale LJ* 1417 at 1450.

69. See *Smith v Leech Brain & Co* [1962] 2 QB 405 at 414.

70. That is, the maxim in question applies not only to the legal causation (or damages) element of the negligence cause of action, but also—with necessary modifications—to the breach element. It may be protested at this point that there exists a qualitative difference between the maxim’s application to the two respective elements. The worry is that the plaintiff’s vulnerabilities need not be foreseeable *at all* for the purpose of determining the scope of liability for negligent infliction of injury; but when courts address the more preliminary question of whether the defendant’s conduct counts as negligent, the vulnerabilities of the plaintiff count only insofar as they are reasonably foreseeable. However, this difference is overdrawn. The requirement of reasonable foreseeability that is relevant for determining how much care is due does not demand that the defendant know, or even could know, what are the exact vulnerabilities of each and every particular plaintiff. What is required is that the possible presence, say, of physically disabled persons becomes a matter of, roughly speaking, statistical foreseeability. Statistical foreseeability reflects the frequency and distribution of a given vulnerability across society. Tortfeasors are not expected to know the exact numbers, to be sure, but they are certainly expected to be aware of the very existence of vulnerable persons in their society and of the possibility that some of them might happen to be within the zone of foreseeable danger relevant to these tortfeasors’ risky conduct. See, e.g., *Haley v London Electricity Board* [1965] AC 778 at 791, 806 (*per* Lords Reid and Hodson, respectively).

71. I shall set to one side the special case of children. On this matter see Mayo Moran, *Rethinking the Reasonable Person* (Oxford University Press, 2003) 135-38.

the injurer's conduct is negligent at all, on the one hand, and it may determine the scope of the liability that can be imposed on a negligent injurer, on the other.⁷²

Concerning the former, in a tort regime of negligence, the injurer can be held liable only insofar as she has failed to exercise reasonable care toward the victim. The diminished capacity of the victim can be partially constitutive of what counts as reasonable (or unreasonable) exercise of care by the injurer. For instance, any non-arbitrary attempt at identifying the 'reasonable' speed limit presupposes a *prior* judgment concerning what counts as reasonable conduct on the part of a potential *victim* responding to an approaching car.⁷³ In tort law's parlance, the method of assessing the conduct of the responding victim partially constitutes the content of the duty of care the potential injurer owes the potential victim. It will be unreasonable, say, to drive at 20 MPH under the relevant circumstances if the law supposes that the potential victim(s) will likely fail to stay off harm's way—this is why reasonable driving next to an elementary school calls for driving at a very slow pace. Concerning the latter, even when the injurer's conduct is utterly negligent, the diminished capacity of the victim may partially fix the scope of the injurer's liability. This is because his or her liability can be reduced to reflect the fault of the victim.⁷⁴ Hence, it matters whether or not the law ignores the disability in question for the purpose of assessing comparative negligence: ignoring the disability decreases the scope of injurer's liability, and *vice versa*.

In principle, a commitment to corrective justice's formal conception of equality calls for ignoring the disability in question.⁷⁵ This is because the terms of the interaction must be determined objectively in the negative sense that it must refrain from taking into account the idiosyncrasies of the particular person whose conduct is being assessed. Incorporating such subjective factors into the terms of an involuntary interaction would give one party to the interaction the standing to determine these terms unilaterally, which is to say in violation of formal

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72. I describe these two effects of comparative (or victim) fault in some detail to forestall misunderstandings. Some treat comparative fault as if it is morally unrelated to considerations of primary (or injurer) fault. See, e.g., Robert Stevens, "Should Contributory Fault be Analogue or Digital?" in Andrew Dyson, James Goudkamp & Frederick Wilmot-Smith, eds, *Defenses in Tort* (Hart, 2015) 247 at 253; Gregory C Keating, "Reasonableness and Rationality in Negligence Theory" (1996) 48:2 Stan L Rev 311 at 371. On this view, where negligence on the part of the injurer may express a moral failure, negligence on the part of the victim can only reflect imprudence toward oneself. The discussion in the main text below shows why this view misses the intimate connection between the two considerations of negligence (the injurer's and the victim's). That is, *every* time courts determine the reasonableness of the conduct of either one—the injurer or the victim—they necessarily engage in the business of fixing the terms of the interaction between *both*.
73. The argument is not limited to automobile accidents; it applies with equal force to many other contexts of negligent infliction of bodily injury. See, e.g., *Hunt v Ohio Dept of Rehabilitation & Correction* (1997) 696 NE 2d 674 (Ohio Ct Cl).
74. Ripstein's recent account of comparative negligence makes this aspect (of helping to define the scope of liability) central, though he does not discuss the former one. Ripstein, *Private*, *supra* note 15 at 105-06, 121-22.
75. See, e.g., Ripstein, *Civil*, *supra* note 19 at 181 ("The unusual sensitive plaintiff gets no solace from the law. Nor does the incompetent who tries his best... Instead, the law purports to hold everyone to the same standards on the grounds that everyone has the same formal right to the security of what he or she already has.") See also Coleman & Ripstein, *supra* note 2 at 109, 112; Weinrib, *Idea*, *supra* note 1 at 177-79; Ripstein, *Force*, *supra* note 34 at 171.

equality.⁷⁶ It might be protested that accommodating the disabled plaintiff need not be inconsistent with formal equality—there is no qualitative difference between this case and the one of slowing down in the face of a ditch on the road. Both are instances of taking additional precautions and no one can claim that the latter is inconsistent with the corrective justice demands of formal equality.⁷⁷ However, this argument fails, since the analogy between a disabled plaintiff and a ditch cannot do the work corrective justice theorists expect it to do. Indeed, it is one thing to say that an increase in the motorist's amount of care due to an adverse road condition does not undermine the demands of formal equality; quite another to use a similar argument where the increase in the amount of care is due to the condition of a human agent. It is only with respect to the latter condition that the demands of formal equality can become intelligible at all. After all, the whole point of being concerned for inequality in the determination of the standard of care arises when, and only when, one *person*, as opposed to a ditch, gets to fix the amount of care the other party to the tort interaction would owe the former. Accordingly, the failed analogy to the permissibility of a requirement to slow down in the face of changing road conditions returns the corrective justice approach to its point of departure: The persistent impermissibility of allowing the plaintiff's condition to fix the terms of her interaction with the defendant.

The law, however, rejects formal equality. In its stead the law adopts (subject to necessary modifications) the maxim mentioned above, requiring that the duty of care owed by the injurer to the victim should be partially influenced by the latter's capabilities including, the conventional view to the contrary notwithstanding, some mental disabilities.⁷⁸ The injurer must be responsible to take extra care—viz., incur additional responsibility—to protect the disabled person, rather than merely the non-disabled person, from the former's dangerous activity. As Stable J. points out, it cannot be the case that “the law is quite so absurd as to say that, if a pedestrian happens to be old and slow and a little stupid, and does not possess the skill of the hypothetical pedestrian, he or she can only walk about his or her native country at his or her own risk.”⁷⁹ Stable J. then observes “[o]ne must take people as one finds them.”⁸⁰

76. Corrective justice theorists are quite ambivalent about the possibility of justifying the departure from the objectively-fixed standard of due care. On the one hand, they invoke formal equality against such a departure. See Weinrib, *Idea*, *supra* note 1 at 169 n 53(1); Ripstein, *Civil*, *supra* note 19 at 181. On the other hand they argue for the possibility, under the appropriate circumstances, of reconciling formal equality with a subjectively-fixed standard. See Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge University Press, 1999) at 111-13 [Ripstein, *Equality*]; Weinrib, *Idea*, *supra* note 1 at 183 n 22. I take up the latter approach in the main text below.

77. A version of this argument appears in Ripstein, *Equality*, *supra* note 76 at 111-13.

78. Avihay Dorfman, “Negligence and Accommodation” (2016) 22:2 *Legal Theory* 77 at 90-92, 119-21 [Dorfman, *Negligence*]. There, I surveyed all the cases cited in the canonical U.S. sources (such as the second and third Restatements as well as Prosser's and Dobbs' respective treatises) in connection with the standard of care in the context of physical disability. The study shows that, contrary to the conventional wisdom, injurers are expected to take additional care in the face of disabled victims, irrespective of whether they (the injurers) are themselves disabled. I then took up the case of mental disability only to find some recurring patterns and trends. It appears that my findings (concerning physical disabilities) are not peculiarly American. For English tort law, see Peter Cane, *Atiyah's Accidents, Compensation and the Law*, 8th ed (Cambridge University Press, 2013) at 53.

79. *Daly v Liverpool Corporation* [1939] 2 All ER at 142.

80. *Ibid.*

This requirement, moreover, is best understood as giving rise to an idea of substantive equality as opposed to either formal or (formal or substantive) distributive equality.⁸¹ I have already mentioned that an idea of formal equality calls for a duty of care that exempts the injurer from attending to the special circumstances of the victim. Such a non-accommodative duty would only go so far as respecting the victim in the abstract, that is, apart from her special makeup. Furthermore, it is also clear that accommodating the qualities of the victim need not be grounded in distributive equality. Indeed, the responsibility of the pedestrian concerning how his disability came about—viz., whether through fault (no fault) or choice (no choice) of his own—could matter from a distributive equality point of view. However, it makes absolutely no difference when considering the existence and the content of an accommodative duty of care in negligence law. Moreover, and more fundamentally, taking considerations of distributive equality seriously may plausibly make it the case that society as a whole, rather than either the injurer or the victim, should assume responsibility for the disability in question (including, in particular, the additional costs it imposes on the interaction between the injurer and the victim).⁸²

Substantive equality approaches the matter differently by asking whether the terms of the interaction established by the standard of due care (defendant- and plaintiff-care) is consistent with their ability to relate as substantively equals. This question consists in a structural and a content dimension. Structurally, the focus is on the relationship between the two rather than between each one of them and society.

The content dimension does not focus on their formal equal status. Rather, as I argued above, substantive equality takes *difference* seriously by supposing that people can relate as equals only insofar as their different situations are brought to bear (in the appropriate sense) on the legal determination of the terms of their interactions. Furthermore, the following analysis can defeat the worry that substantive equality's commitment to taking difference seriously is unable to generate a definitive answer to the question of what differences should count. Indeed, the shift from generic personality to a thicker dimension of the person need not result in troubling indeterminacy or *ad hocery*. The relevant difference in the case at hand comes down to the vulnerability to which each is being exposed by the tort interaction—physical injury in the plaintiff's case and impediments to the pursuit of ends in the defendant's case. Indeed, this difference is not merely one among many possible others; rather, it is both *necessary and sufficient* for the purpose of justifying a rule that the amount of care owed by the injurer to the victim should be partially fixed by the latter's disability. Other kinds of difference remain purely incidental to the interaction.

81. Elsewhere I argue that considerations of efficiency cannot account for this requirement. Dorfman, Negligence, *supra* note 78 at 96-103.

82. The assertion about the *social* responsibility to relieve individuals of some unfortunate circumstances does not turn on distinctively liberal-egalitarian intuitions about distributional equality. See, in particular, Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) at 78-79, 82-83, 87, 115.

To see this, consider the following hypothetical case. A, the plaintiff, and B, the defendant, are virtually identical in all respects—both, more concretely, suffer from the same physical or mental disability. However, their otherwise identical characters and circumstances give way to an important difference in a tort interaction in which B imposes risk of bodily injury on A. B's activity might render vulnerable the life and limb of A whereas A's activity renders vulnerable the unimpeded pursuit of ends by B. Accordingly, determining how much care is due implicates the right of A to bodily security as well as the right of B to pursue ends by exposing his or her potential victims to some measure of risk.⁸³

On the substantive equality picture, a requirement to exercise additional care to accommodate the victim's disability gives effect to the qualitative difference between two critical aspects of what makes people's lives go well: A threshold aspect of bodily security and a freedom aspect of pursuing ends autonomously. It puts a basic egalitarian commitment in our practical lives to the task of setting terms of interaction among substantively equals. Within limits, concern for a person's life and limb takes some priority over the free pursuit of ends. Tort law's responsibility to determine what counts as due care can *either reject or conform* to this view; there is no way around this basic question of equality. Thus, tort law can disregard the difference by treating the respective vulnerabilities of the interacting parties as equally important. On the formal equality picture, disregarding the difference in vulnerabilities at issue reflects the fact that the victim and the injurer relate as equals in the generic sense of being the bearers of the capacity for choice.

Alternatively, tort law can fix the terms of the tort interaction with an eye to the difference in question. On this view, the standard of due care ought to *counteract*, rather than preserve, the imbalance in the respective vulnerabilities of the interacting parties. Their being the bearers of the capacity of choice is merely the beginning, rather than the conclusion, of tort law's effort to give effect to the egalitarian commitment of relating as equals. Since the relevant difference at present concerns the parties' vulnerabilities, to physical harm and to unimpeded pursuit of ends, respectively, there exists a compelling reason to require extra-care on the part of the risk-creator in the face of a disabled risk-taker. That is, the standard of care expected from the risk-creator must accommodate, in some measure, the disability of the victim.

Furthermore, the measure of extra-care can be rendered more intelligible by drawing on the notion of substantive equality to fix its upper boundary (the lower

83. Focusing on difference in vulnerabilities in the context of negligence law implies that physical disability, or other forms of human disability, should not be accommodated categorically. To summarize an argument I develop in Dorfman, *Negligence*, *supra* note 78: First, the *defendant's* disability does not typically justify accommodation (if anything, it is the plaintiff's disability, given her vulnerability to bodily injury rather than to impediments to the pursuit of ends, that matters more); and second, the plaintiff's disability does not call for accommodation when there is no imbalance in the respective vulnerabilities of the interacting parties (as represented most vividly in the tort of private nuisance and, in particular, the standard of 'reasonable interference' that lies at its doctrinal center; see, e.g., *Rogers v Elliott* (1888) 15 NE 768 (Mass). Typically, both parties in a private-nuisance interaction seem to be equally vulnerable in the sense that their respective pursuits of land-related ends come into conflict).

one, as just explained above, is set beyond the non-accommodating standard of reasonable care). To begin with, taking difference seriously need not amount to anything close to the total subordination of the tort-feasor at the hands of the potential victim. A principle of relating as substantively *equals* cannot correct vulnerability imbalance by reducing the former into a mere means in the service of accommodating the latter. Indeed, under the current negligence regime (which, recall, requires accommodating the victim's disabilities) the tort-feasor is typically not obliged to forgo his or her freedom of action completely, say, to refrain from going out or engaging in all daily activities *merely* because of the risk his or her acting generates.⁸⁴ Substantive equality, it can be said, demands accommodation, but only to an extent.

To be sure, introducing an idea of substantive equality in connection with negligence law raises concerns that cannot be addressed here. For instance, there exists any number of questions regarding the appropriate scope and extent of the accommodation to which substantive equality gives rise in different situations and contexts.⁸⁵ I set these questions to one side since my present ambition has been to identify, rather than pursue, the possible existence of substantive equality in private law. In that, I have demonstrated that the Exceptionality Thesis is false not merely theoretically, but also legally—it is not implicit or explicit in the private law doctrine of reasonable care (which, recall, has been the poster child of certain corrective justice accounts). To the contrary, the doctrine at issue can plausibly be recast in terms of the substantive conception of equality.

B. Contract, Property, and Substantive Equality

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

The seemingly tight connection between the contract form of interaction and the formal conception of equality is, to an important extent, the product of the various doctrines whose basic organizing idea is that of protecting those whose vulnerabilities to the power of the other party lie below a certain threshold. Such doctrines aim to reduce the risk that the disparities between the parties will make

84. For a leading discussion of this point, see Cardozo's analysis of the standard of due care in *Adams v Bullock* (1919) 125 NE 93 (NY).

85. In addition to the brief discussion in note 83, I take up some of these and other questions in Dorfman, Negligence, *supra* note 78.

formal equality not just undesirable but rather morally hollow. The reduction in question can be produced by placing three different sets of constraint on the legal practice of contract—concerning the requisite personality to make contract, the scope of permissible manipulation within the contract relationship, and the limits of the contract form *itself*. Whereas the first can be made compatible with the demands of formal equality, the next two takes difference—and, to this extent, substantive equality—seriously. I shall take each set in turn.

First, some doctrines draw clear and rigid lines between those who possess the requisite legal personality and those who do not—for instance, infants (including grown-up children) and some mentally disadvantaged persons do not possess the legal personality to make an enforceable contractual promise. The second set of constraints consists of doctrines, such as duress, undue influence, and especially unconscionability. This set further constrains the scope of the practice of contract-making even when the participants possess the requisite legal personality and, to this extent, stand in a relationship of *formal* equality. The doctrines in question display hostility toward a particular transaction based on the worry that participants could not approach their bargain on an equal footing, in which case the contract runs afoul of basic demands of substantive fairness. This is especially vivid with respect to the unconscionability doctrine, according to which contract law ought to protect the vulnerable party—in many cases, the “weak, the foolish, and the thoughtless”⁸⁶—if (a) she enjoyed only formal, but not “meaningful,” choice and if (b) the terms of the contract unreasonably favor the other party.⁸⁷ It is not surprising that a recurring criticism of this doctrine is that it is a form of paternalistic protection of the poor. But this charge, it is important to note, posits formal choice as *the* only relevant baseline against which the doctrine can be said to be inconsistent with the freedom to set and pursue ends together by way of contract-making. However, as I have suggested a moment ago, the doctrine in question can also be cast in terms of the law’s commitment on behalf of substantive equality to guard against the excesses of formal equality by preferring meaningful to formal choice.⁸⁸

86. SM Waddams, “Unconscionability in Contracts” (1976) 39:4 MLR 369 at 369.

87. See *Patterson v Walker-Thomas Furniture Co Inc* (1971) 277 A2d 111 at 113 (DC CA). For a somewhat different formulation see *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 459, 462 (Austl.); and notice the important modification introduced by *Kakavas v Crown Melbourne LTD* [2013] HCA 25.

88. Peter Benson has developed the most sophisticated and impressive attempt to defend the unconscionability doctrine on grounds of formal equality. See Benson, Unity, *supra* note 68 at 185–98. Benson argues that the doctrine is best viewed as protecting the presumed intentions of the parties to engage in the exchange of equal value where the things exchanged are *commodities*. *Ibid* at 185. The competitive market price serves as *the* baseline against which this value is fixed, in which case contractual parties are price-takers. *Ibid* at 190. In that, however, Benson argues for a limited construal of the unconscionability doctrine. His argument cannot account for the doctrine’s expansion beyond the realm of commodities and, especially, its application to cases where the measure of competitive market prices seems not merely uncertain but rather unavailable (even given Benson’s relaxed definition of competitive market price (*ibid* at 190) in terms of a “changing range of going market price”). Courts deem unconscionable contract terms that are not easily reducible to commodities; further, courts sometime find contract terms unconscionable without resorting to a (non-existing) competitive market price. For example, consider terms governing the contract’s remedial scheme (*Glassford v BrickKicker* (2011) 35 A3d 1044 (Vt)); contracts with exclusive jurisdiction provisions (*Paragon Homes v Carter*

Finally, and most dramatically, there exist doctrines that seek to do away with the contractual transaction as a necessary means to receive authorization to use another's property. Unlike the preceding constraints (with the exception of unconscionability at least when applied beyond the sale of commodities in competitive markets), the one under discussion runs afoul of the demands of formal equality.⁸⁹ Consider the doctrine of private necessity and, in particular, the entitlement of a severely strained owner to use another's property to save her own property (including or excluding her person).⁹⁰ Normally, securing the *ex ante* agreement of the latter reflects the status of the interacting parties as formally equal. However, insisting on the parties being formally equal in the face of an unexpected emergency is tantamount to empty formalism. After all, it seems implausible to ignore the disadvantageous position occupied by the strained owner relative to the other party in the interaction. To render this point more vivid, suppose that the latter is present on site, willing to let the former use her property subject to an unusually excessive amount of money. The doctrine of private necessity dissolves this inequality difficulty in a way that goes beyond the doctrines mentioned above (especially duress and unconscionability).⁹¹ Private necessity sets to one side the basic requirement to secure the consent of the owner, rendering it permissible unilaterally to use this owner's property to save one's own.⁹²

A person who needs to invade the property of another because her own property is under imminent danger of grave harm does not stand in a relationship of genuine equality to the owner of the invaded property, at least not for the purpose of engaging in a contractual transaction (again, imagine that the latter would let the former use her property in return for an enormous charge). Against this backdrop, the doctrine of private necessity beats a retreat from the contract form, and the owner's right to exclude, not because the persons concerned are formally unequal. Rather, the reason is that although they are formally equal, this measure of equality cannot launder the relationship of substantive inequality (in bargaining

(1968) 288 NYS2d 817 (Sup Ct)); and contracts containing mandatory employment arbitration clauses (*Armendariz v Foundation Health Psychcare Inc* (2000) 6 P.3d 669 (Cal)). These examples, and more general statements such as the one in the *Restatement (Second) of Contracts* §208 cmn a (1981), raise the suspicion that the class of cases on which Benson focuses in developing his defense of the doctrine—viz., cases of gross deviation from competitive market price—is a mere surface manifestation of a deeper worry concerning substantive, rather than formal, inequality among contractual parties.

89. I qualify the claim about the possible tension between unconscionability and formal equality to a broad construal of the doctrine for reasons specified in the previous note.
90. Private necessity, as the famous case of *Vincent v Lake Erie Transp Co* (1910) 124 NW 221 [*Vincent*] demonstrates, applies not only to cases where the person of the defendant is at risk (as in *Ploof v Putnam* (1908) 71 A 188 (Vt), but rather also when *only* her property is at risk.
91. To an important extent, the distance between the doctrine of unconscionability and private necessity is smaller than what is typically believed. To see that, consider maritime salvage cases in which courts are reluctant to enforce the actual bargain if it is not "fair and just" given the special circumstances of the situation. As the Court of Appeal observes, "the fundamental rule of administration on maritime law" tackles the problem of "urgent" situations whereby "the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them." *Akerblom v Price* (1881) 7 QBd 129, 132.
92. My analysis assumes, with the *Vincent* court, that the dock-owner's right to exclude had not run out prior to the situation that triggered the boat-owner's entitlement to decide unilaterally to use the dock. Indeed, it is the unusual weather condition that led the court to assert that "the ordinary rules regulating property rights were suspended." *Vincent*, *supra* note 90 at 221.

powers) that exists due to the unusual circumstances. At the same time, it is important to note that the doctrine is not grounded in considerations of distributive equality.⁹³ In particular, a partial privilege to make an unauthorized use of another's property does not express an ideal of equality in the overall distribution of resources in society.⁹⁴ After all, the law confers this privilege in complete disregard of the material well-being of the relevant parties either prior to or after the interaction. As a result, the duty to compensate for the damage occasioned by the privileged user may allow, reinforce, or even exacerbate standing *inequalities* in the overall distribution of resources in society.

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

To conclude, it is appropriate to replace the Exceptionality Thesis with a more accommodating thesis—that is, that the terms of interactions of at least some, non-trivial areas of private law can be, and already are, grounded in the substantive conception of equality. Another conclusion worth mentioning is that at least with respect to the doctrinal areas just explored, courts do not run into insurmountable difficulties of indeterminacy and *ad hocery* in determining terms of interactions by reference to the substantive conception of equality.

Conclusion

Contemporary discussions of private law theory often assume, or argue, that parties in a private law interaction can relate as equals if, and only if, equality is cast in terms of formal equality. By contrast, other parts of the law, constitutional and administrative law in particular, can accommodate other conceptions of equality,

93. Indeed, such considerations typically fall outside the purview of the private necessity doctrine. See *Southwark v Williams* [1971] Ch 734 at 744 (AC).

94. The privilege (i.e., of not being subject to the owner's right to exclude) is partial only, since the right to use another's property comes with a duty to make good on the damage done to this property. In his recent book, Ripstein explains the *Vincent* case in terms of the need to reconcile the dock owner's right to exclude with the boat's owner right to preserve his or her chattel in the face of a coming storm. Ripstein, *Private*, *supra* note 15 at 146-55. Ripstein, however, does not provide an argument as to why reconciliation must be made at all—his emphasis on the strict liability aspect of trespass to land and chattels seems to counsel against making any allowances for those who enter or use another's land without permission. After all, the point of strict liability (and, more abstractly, Ripstein's philosophical distinction between choice and wish) is to exclude even 'good' reasons to use another's land from legal considerations. And even if reconciliation must be sought, it is not clear why it has to be made in this particular way rather than in some other way.

including distributive equality. This (pseudo) contrast provides support for the thought that private law is exceptional vis-à-vis non-private law.⁹⁵ Its exceptional commitment to formal equality is rendered most vivid in liberal-egalitarian societies—there, the public law administering the welfare state is committed to securing fair (read, non-formal) equality of opportunity.⁹⁶

In these pages, I have argued that private law, too, can give effect to a certain substantive conception of equality. I have explained that the fact that distributive equality cannot fit the bipolar structure of private law does not warrant the conclusion that the formal conception of equality is the one and only fitting conception. The map of the logical space in which competing conceptions of private law equality are located must be redrawn to include (at least) one more conception that I referred to as substantive equality. I have also identified some traces of this latter conception in key areas of contemporary private law, which means that the Exceptionality Thesis fails not only at the theoretical level, but also at the legal-interpretive level.

If I am right, therefore, the ongoing debates that arise out of the distinction between formal and distributive equality (and between corrective and distributive justice, more broadly) might distort, rather than advance, the important task of understanding and evaluating private law. Indeed, the debates concerning the nature of the connection, and possible overlap, between ideals of formal and distributive equality in private law underestimate the potentially egalitarian aspects of private law. The introduction of substantive equality is crucial especially because an *ideal* of formal equality is subject to familiar egalitarian objections,⁹⁷ on the one hand, while the systematic realization of equality in the overall distribution of resources in society through private law is replete with both pragmatic and principled difficulties, on the other.⁹⁸ The next natural step of the argument, therefore, will be developing a comprehensive account of substantive equality in private law.

95. Criminal law presents a hard case (because it is part of public law, but it may not be best explained in terms of considerations of distributive equality and distributive justice). One possible way out is to view criminal law, or some paradigm areas of criminal law, as essentially add-on to private law.

96. Corrective justice theorists (and some liberal-egalitarian political philosophers, more generally) defend this division of responsibility between the state and private persons. I take stock of this dichotomous approach in Dagan & Dorfman, *Justice*, *supra* note 8.

97. See sources in note 44 above.

98. See text accompanying notes 29-30 above.