Against Private Law Escapism: Comment on Arthur Ripstein, Private Wrongs

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COMMENT ON ARTHUR RIPSTEIN, PRIVATE WRONGS

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INTRODUCTION

Can a comprehensive theory of tort law evade the ultimate test of our moral intuitions (or reflective equilibrium)? We shall argue, first, that Ripstein’s illuminating *Private Wrongs*, including in particular his organizing distinctions between misfeasance and nonfeasance, between relation and comparison, and between horizontal and vertical justice, cannot escape that test; and, second, that his theory fails to meet such a test.

The Comment proceeds in four stages. We first lay out the basic structure of Ripstein’s theory of the justice of tort law and the nature of the argument he deploys in developing this theory (Part I). We then suggest that, and explain why, his effort to derive the content of the justice of tort law by taking legal doctrine at face value must fail (Part II). The next two stages of the argument consider an alternative reading of *Private Wrongs* (Part III) and a broader assessment of the justice of tort law against the background of public law (Part IV).

I. THE ARGUMENT OF *PRIVATE WRONGS*: STRUCTURE AND NATURE

The basic structure of Ripstein’s argument consists in three elements:

1. The *concept* of tort law picks out the challenge of “doing justice between private persons.”¹ This concept contrasts with various reductionist views which take tort law, and private law more generally, as the continuation of public law by other means.

2. Ripstein’s main task in *Private Wrongs* is to develop a conception of this concept: a theory of the justice of tort law grounded in “the moral idea that no person is in charge

¹ ARTHUR RIPSTEIN, PRIVATE WRONGS 11 (2016).
of another.”

More specifically, Ripstein takes up the task of demonstrating that tort law addresses the problem of doing justice between private persons by ensuring that “no person is in charge of another’s purposes.”

Tort law in this conception single-mindedly safeguards our independence, irrespective of the putative contribution of such independence to our autonomy (or self-determination); it is thus strictly about the negative relationships between people, and these relations do not admit of degree or comparison.

3. For this conception to meet the bar of justice, certain *background conditions* must be met. Ripstein’s conception of the justice of tort law requires “the role of the state as providing background conditions for a social world in which everyone is a full member.”

Accordingly, Ripstein situates his conception of tort law within a broader theory of justice, consisting in a division of moral responsibility between the state’s obligation to provide background justice and the individual’s obligation to limit the pursuit of his or her ends to the means (body and property) that he or she happens to have, including state-provided means.

The second element, perhaps the most important contribution of *Private Wrongs*, rests on a *formal* articulation of a moral idea. As such, it presupposes a normative baseline against which to determine what counts as “being in charge of another’s purposes,” that is to say what could count as a wrong for the purpose of a just tort law.

For instance, merely saying that a duty to refrain from discriminating against one’s customers or to provide an easy rescue places its beneficiary in the position of being in charge of the duty-holder would be to beg the question.

It is at this (crucial) point that Ripstein turns his attention to the positive law of torts and, in particular, to the traditional common-law of tort law. (It is worth noting at this point one critical point which will not be pursued directly in this Comment: Ripstein reduces tort law to the common-law of tort law without explaining the reason for excluding other legal sources—such as statutory law—even when they stand behind some crucial developments in the life of modern tort law.) The nature of his argument is that of reconstructing existing common-law tort doctrines and structures in order to fill out the normative baseline that his conception of tort law must presuppose. This is why Ripstein announces that his “aim is [to take tort law’s] structures and doctrines at face value.”

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2 *Id.* at 6.

3 *Id.* at 21.

4 *Id.* at xii, 12, 33, 37.

5 *Id.* at 289.

6 To be precise, being in charge of another defines tort law’s *generic* wrong.

7 RIPSTEIN, supra note 1, at 23.
Ripstein’s notion of taking doctrine at face value is robust. He specifically distinguishes *Private Wrongs* from other interpretive accounts which aim to make tort doctrine the best that it can be, since this strategy assumes that there can be an external measure against which it can be evaluated. Because tort law, or, what Ripstein actually means, the common law of tort law, is “a reasoned enterprise” whose content is *necessarily* prescribed by courts, a credible tort theory must come from within tort law (whatever it means).8 So Ripstein rejects any reference to “external” moral intuitions—and thus to the familiar justificatory strategy of reflective equilibrium—and he insists that “[t]he prescriptions [he] make[s] are not from a standpoint outside of what is presupposed in the legal materials.”9 By establishing tort law’s normative baseline of formal equal freedom to use one’s body and property in setting and pursuing ends, Ripstein seeks to establish that “tort law does not need to have a function in order to have a point.”10

II. CAN ONE RENDER TORT LAW INTELLIGIBLE BY TAKING DOCTRINE AT FACE VALUE?

Ripstein finds several pieces of doctrinal evidence that support this ambitious theory. We shall focus on three of these pieces because they seem, at least at first glance, the most powerful exhibits that Ripstein can enlist in the service of developing the in-charge-of conception of tort law: First, the conservative commitment to enforce the *status quo* as exemplified in the tort of trespass to land and chattels; second, the distinction between mis- and non-feasance; and third, the conceptual necessity of courts in resolving tort disputes. These are the most powerful in the sense that, unlike some of the others he discusses,11 there seems to be far less disagreements at the descriptive level concerning their existence and content in the traditional common law’s black letter law.12 Traditional common law tort of trespass to land has indeed insistently ignored considerations other than the independence of the right-holder from the choice of duty-holders; the same tradition makes

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8 Id. at 22-23.
9 *Id.* at 20.
10 *Id.* at 295.
11 For this reason, we set to one side Ripstein’s intriguing analysis of (among other things) defamation, negligence, and workers’ compensation schemes. We discuss the last two (including in connection with Ripstein’s view) elsewhere. See Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. (forthcoming, 2016).
12 In his oral response to the presentation of an earlier version of this paper, Ripstein seemed to suggest that rather than correspondence to specific black letter doctrines, his account should be judged against its compliance with tort law’s structuring principles. If this is the case, then what is needed is a freestanding defense of these principles. We consider and criticize this reading of *Private Wrongs* in Part III.
little space for enforcing affirmative duties in the absence of undertaking or special role on
the part of the duty-holder; and it is probably true for most jurisdictions that the right to
have one’s injury rectified by the injurer cannot trigger the injurer’s duty to right the wrong
prior to a court ruling to this effect (save, of course, for the voluntary assumption of such
a duty by the injurer).

Clearly, Ripstein must take these three doctrines as more than mere doctrines that
figure in tort law (such as those doctrines that may manifest ideas of accountability or
responsibility13). Rather, it would be impossible to sustain Ripstein’s overall conception
of the justice of tort law if either one of them drops from the picture of tort law (unlike, for
example, the historical withering away of the traditional doctrine of assumption of risk).
In other words, these doctrines are part of Ripstein’s answer to the question of what it is
about tort law that makes it the thing it is: the first two are critical for establishing tort law’s
baseline of formal equality of independence; the last doctrine is also essential for resisting
any test of “external” morality. It is therefore not surprising that Ripstein characterizes
these three doctrines as “fundamental” and thus core features of tort law’s “organizing
principles.”14

Ripstein does not explain what counts as a reason to characterize a specific subset of
the law under consideration as fundamental in this way other than by alluding to their
widespread acceptance. With Ripstein, we shall assume for the sake of the argument that
common-law courts were for the most part right as a matter of interpreting the (then and,
perhaps, now) existing common law to insist on the non-accommodative structure of the
tort of trespass to property, the non/misfeasance distinction, and the necessary role of courts
in rendering effective the right to have one’s injury remedied by the injurer. But this, we
argue, cannot be enough without considering alternative explanations to Ripstein’s that, if
successful, might de-emphasize the centrality of each of the three doctrines in question.
This exercise would be particularly devastating to Private Wrongs if it turns out that these
alternative accounts imply that tort law is not, or at least not necessarily, committed to
sustain the formal equal independence of persons; that its point is not to protect “what you
already have” as such, but rather only those aspects of your property that ought to receive
protection (say, given the duty of both parties to respect their respective rights of self-
determination).

It is important to note that by offering alternative explanations for these three
doctrines, we do not suggest that tort law should be conceived as a set of ad hoc judgments
of pragmatic considerations. Instead, by debunking Ripstein’s fundamentalist
interpretation we seek to open a normative space for an alternative account of tort law (and
private law more generally) that relies on the competing structuring principle of reciprocal

13 See, e.g., RIPSTEIN, supra note 1, at 14-18.
14 See, e.g., id., at 20, 31.
respect to substantive freedom and equality. This account requires, as we show elsewhere, *principled* judgments about the importance of both freedom—viz., the gravity of the different restrictions on different specific liberties and their role in sustaining the conditions for pursuing a meaningful life—and equality—viz., what counts as relating as substantively equal.\(^{15}\) Of course, like in any other account (including Ripstein’s, as our discussion below of the role of courts highlights), any plausible theory of tort law must allow for the application of some pragmatic judgment regarding non-fundamental features of the law (including those that Ripstein typifies as fundamental).

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**Trespass.** Begin with the tort of trespass and its traditional reluctance to accommodate some forms of vulnerability and inequality on the part of the duty-holder. On Ripstein’s account, its insensitivity to all forms of accommodation is *entailed* by tort law’s commitment to the ideal of formal equality of independence.\(^{16}\) But the insensitivity at issue could also be the upshot of different considerations, principled and pragmatic ones. To see why, recall that if you own a small motel, you may not use your property to set and pursue ends that are discriminatory with respect to potential customers, irrespective of the fact that you are a *private* person.\(^{17}\) This is clearly inconsistent with a system of formal equal independence because it violates your independence—on Ripstein’s view, your decision that a would-be customer is not allowed on your lobby merely changes the context within which the customer can still set and pursue her own ends.\(^{18}\) There are of course other cases that feature a structurally similar departure from invoking the trespass tort to protect what you already have.\(^{19}\) Against this backdrop, it is not clear what to think of the cases in which the tort of trespass makes no accommodation in favor of the duty-holder. In some

\(^{15}\) Dagan & Dorfman, *supra* note 11.

\(^{16}\) See, e.g., Ripstein, *supra* note 1, at 45-46.

\(^{17}\) A private person contrasts not only with public servants and other quasi-public entities. It also excludes private persons insofar as they are commandeered by the state to alleviate social injustice.

\(^{18}\) We do not think that this rule can be explained (as opposed to be explained away) by arguing—as Ripstein claimed in his oral response to this Comment—that the customer’s claim in this case is mediated or derivative of public law, so that her grievance does not rely on her private right, but rather on her status as a member of a co-legislating polity. (This claim, to be sure, is also false as a matter of black-letter law since antidiscrimination laws almost never limit the class of plaintiffs to polity members). The qualitative difference between these alternatives is well reflected in the necessarily parochial scope of the public law (and public law driven) obligations as members of a political community and the potentially universal scope of our obligations in our more fundamental interpersonal interactions governed by private law. See Hanoch Dagan & Avihay Dorfman, Interpersonal Human Rights and Transnational Private Law (unpublished manuscript) (on file with the authors).

\(^{19}\) One striking case in point comes from Scotland’s very expansive variation on the right to roam theme. See Land Reform (Scotland) Act, 2003.
of them “what you already have” merits non-accommodative protection in principle—for instance, your residential dwelling home may be a plausible candidate.\(^{20}\) Other cases may not require this level of rigid protection but may, nonetheless, turn out to be consistent with it. This may be explained by considerations associated with the rule of law or other inherent limitations on the ability of tort law to look through “what you already have” in order to determine the precise scope of tort law protection to which you are entitled.

The non/misfeasance distinction. Suppose that adherence to this distinction is rarely undermined as a matter of black letter law (or, more accurately, of the black letter common-law). What are we to make of it? \textit{Pace} Ripstein, there is no reason to suppose that the basic reason behind the distinction is necessarily that of sustaining formal equal independence. Quite the contrary: a legal system whose tort law is committed to self-determination and relational equality may also be rightly cautious about affirmative interpersonal duties to aid others given certain systematic limitations on the legal enforceability of affirmative duties. Placing limits through a negative duty on a person’s courses of action is typically less intrusive on that person’s autonomy than dictating—through an affirmative duty—what this course of action should be. Furthermore, the pragmatic difficulty of drawing lines between easy and hard cases may likewise push towards a broader application given the constraints of the rule of law. Finally, the traditional adherence to the non/misfeasance distinction may also be explained by reference to the liberal reluctance towards the legal colonization of morality: the concern that imposing an obligation to rescue may dilute the ethical value of altruism.\(^{21}\)

In the course of defending the fundamental role of distinguishing between misfeasance and nonfeasance, Ripstein provides an impressive comparative study of the private law tradition in civil law jurisdictions to show that it, too, draws a similar distinction.\(^{22}\) But the same worry we have just mentioned applies here even if we assume (only for the sake of the argument) that Ripstein is right as a matter of doctrinal analysis.\(^{23}\) It is again far from being obvious that the distinction reflects a foundational commitment to formal equal freedom. Indeed, it is natural to expect that the same principled and pragmatic difficulties

\(^{20}\) For our explanation for that, see Hanoch Dagan & Avihay Dorfman, \textit{The Human Right to Private Property}, 18 THEORETICAL INQ. L. (forthcoming 2017).

\(^{21}\) \textit{See} Dagan & Dorfman, \textit{supra} note 11.

\(^{22}\) \textit{Ripstein, supra} note 1, at 59-62.

\(^{23}\) As an aside, tort law, including even common law tort law, does impose liability for nonfeasance even in the absence of undertaking or special role morality. For instance, the famous ruling in Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc. 114 So. 2d 257 (1959) and Ripstein’s observation (in \textit{Ripstein, supra} note 1, at 53) to the contrary notwithstanding, the Israeli law of torts (which is heavily influenced by the common law tradition) imposes liability for unreasonable interference with the free flow of sunlight. Torts Ordinance [New Version] §48. We briefly analyze Ripstein’s comparative assessment of the non/misfeasance distinction in Dagan & Dorfman, \textit{supra} note 11.
that may have been responsible for the common law resistance to imposing liability for nonfeasance also figure on the other side of the English Channel.

As with the case of trespass, the availability of these alternative explanations implies that there is no straightforward way to take these doctrines at face value. Casting them in fundamentalist terms may thus essentialize what may properly be treated as contingent. This move also poses a significant risk because essential features are typically viewed as the theory’s fixed starting points, which implies that a mistake in identifying the essential features may end up as a quietist exercise, which unjustifiably shields specific doctrinal details from critical scrutiny.

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Courts. Recall that one manifestation of Ripstein’s resistance to external justification is his insistence on the essential role of courts (in that, Ripstein joins other private law theorists who take legal doctrine at face value and insist, for very different reasons, on the essential place of courts24). On Ripstein’s view, courts are essential because only they can render effective the right of repair by giving practical reasons, namely: reasons that change the normative situation of both the defendant and the plaintiff and, in particular, turn the former into a duty-holder with respect to righting the wrong done to the latter. But this explanation of the doctrine that makes the secondary right of repair conditional on court authorization is not obviously correct. In fact, it does not seem the most plausible one given the alternative account of the significance of courts, which relies on considerations that, from the point of view of tort law, are instrumental.25

Consider the following hypothetical case. A parent seeking to impress his kids with his powerful soccer kicks negligently smashes one of his neighbor’s car windows. Imagine that both the parent and the neighbor know all the facts of the matter and that they share this information as a matter of common knowledge (so that each knows that the other knows that he or she knows and so on). The money value of the window is easily ascertainable and both parties are sincerely motivated to do as they are legally required (in the parent’s case) and entitled (in the neighbor’s case). Under these circumstances (let’s

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24 Two familiar examples are Stephen Smith’s elaboration of the repayment rule and John Goldberg and Ben Zipursky’s account of civil recourse. See Stephen A. Smith, Duties, Liabilities, and Damages, 125 HARV. L. REV. 1727 (2012); John C.P. Goldberg & Benjamin C. Zipursky, Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette, 88 IND. L.J. 569 (2013). Although our current argument addresses Ripstein’s variation on the court-essentialism theme, it may have some implications for these other variations as well.

25 There may also be non-instrumental reasons, such as reasons against the private enforcement of law, but they stem from considerations (such as political legitimation and democracy) that are external to the law of torts or to the morality of formal equality of independence. Hence, this Comment will focus on instrumental reasons only.
assume) it is absolutely clear to both that the parent is liable in negligence for the harm done to the car window of his neighbor. On this scenario, are there any non-instrumental reasons to deny the neighbor’s pre-court legal entitlement to have her injury repaired by the parent? The argument in Private Wrongs is that in the absence of a court ruling, such an entitlement would place the neighbor in a relation of in-charge-of to the parent. But this cannot be right because the neighbor’s demand (that the parent right the wrong) does not create a new legal obligation on the part of the parent; nor does it add another reason to the reasons for action the parent already had. As Ripstein correctly observes, the violation of the primary right of the neighbor, that her property not be exposed to unreasonable risk of harm, cannot eliminate that right. It follows that the “demand” to right the wrong placed on the parent is in the nature of reporting on, rather than creating, the duty that applies independently of her reporting so. Therefore, a demand of this sort does not take the form of imputation of wrongdoing—once again, the demand just is a reminder of the normative situation that applies in the case of the parent and the neighbor.

The reason why it is necessary to make this demand conditional on a court ruling is precisely because the hypothetical case of the neighbor/parent hardly obtains and even when it does, people may utilize their epistemic powers of reporting on existing duty of care in manipulative and deceptive ways to create a duty where none exists. But this reason for defending the necessary role of courts in giving effect to duties of repair is not grounded in Ripstein’s suggestion that the legal right of repair (or any other remedial right) cannot arise prior to judges saying so. To hold otherwise, we need to interpret Ripstein’s proposition that courts are conceptually necessary because the structure of private wrongs is abstract and “needs to be made more determinate to apply consistently to particulars” to stand for a counterintuitive claim of radical indeterminacy, in which there are no easy cases and no right answers, and we have no reason to suppose that this is Ripstein’s view.

26 See RIPSTEIN, supra note 1, at Ch. 8.

27 In his discussion of defamation, Ripstein argues that “The organizing rule of imputation, presupposed by any more specific rules, is that you are not accountable for something unless you have done it.” RIPSTEIN, supra note 1, at 200. And when it comes to a pre-court demand to right the wrong, Ripstein suggests in a way that, as we argue in the main text, stands in tension with the normative continuity between primary and secondary tort rights and duties, that “any imputation of wrongdoing [must] be established,” by which he means must be established in a court of law. Id. at 273.

28 Furthermore, to say that prior to the judge’s ruling the neighbor is necessarily in a relation of being in-charge-of by the parent is no more convincing than to say that he is in such a relation with the judge. While the honest law-abiding parent may not be the average tortfeasor, Ripstein’s assumption that making the neighbor’s right dependent upon a court ruling would secure an effective realization of his right is also empirically dubious given the prevalent scarcity of judicial resources and inequalities of access to (and representation in) the judicial process.

29 RIPSTEIN, supra note 1, at 13.
We do not deny the importance of courts proceedings. With the exceptions of hard cases and other occasions in which courts innovate to change existing doctrine, courts exercise their authority by giving *epistemic* reasons; they report on the normative status that the defendant has been occupying since the moment of committing the wrong, functioning more or less in the spirit of Montesquieu’s metaphor as the mouth of the law. This role is invaluable in the real world, not the least given the likely adverse consequences of a private enforcement regime. But none of these instrumental justifications of rendering enforcement dependent upon a court ruling establishes the indispensable role of judges in determining the parties’ rights in a way that denies the possibility of external moral evaluation.

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We conclude that taking the three doctrines at issue at face value begs the question of what counts as a reason to pick these doctrines as fundamental. This is because, as we have seen, their face value is conceptually and normatively consistent with both a fundamentalist and a pragmatic reconstruction. By implication, the argument that begins with the face value of these doctrines is missing the preliminary stage of identifying how important they are and why. This stage is crucial. A tort theory that takes certain doctrines as core simply because of their empirical or historical prominence in the case law or in the imagination of classroom discussions assumes the risk of essentializing the contingent and thus marginalizing what deserves to count as necessary for any account of the justice of tort law.

One way to avoid this risk is to conduct a bottom-up analysis of various existing doctrines in search of their normative importance—virtually no one (and certainly not

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30 To be sure, unlike Ripstein, we do not think that tort law must single out courts, rather than other public institutions (such as bureaucratic agencies). This is an important question that does not receive sufficient attention in *Private Wrongs* partly because the book focuses on the common-law of tort law and partly because the analysis of workers’ compensation schemes offered in the book’s concluding part fails to appreciate the important level of synergy between these schemes and the traditional common-law of tort law. We further develop the latter theme in Dagan & Dorfman, *supra* note 11; Avihay Dorfman, The Relative Necessity of Tort Law (unpublished manuscript); and Hanoch Dagan & Roy Kreitner, The Bureaucrats of Private Law (unpublished manuscript).

31 We thus find implausible Martin Stone’s suggestion that the fault of non-formal accounts of tort law lies in their deficient assumption that the morality of interaction *can* be specified apart from law. See Martin Stone, Legal Positivism as an Idea of What Morality Might Be (unpublished manuscript) (suggesting that “[m]orality without law would be empty.”). His suggestion could have been more plausible if stated differently, namely, that *some* aspects of the morality of interaction would be empty without law. These aspects would reflect the complexities of implementing abstract moral ideas to more concrete questions (say, what would satisfy the demand to right a wrongful assault on another person), especially when our moral intuitions about resolving these questions have run out.
Ripstein or us, for that matter) would deny the prominence of some duty against committing assault and battery or some duty of (at least) reasonable care toward the physical integrity of others. The reason that these duties (along with others) should be taken as tort theory’s fixed points cannot be derived by reference to empirical or other non-normative criteria of importance (such as that of taking the law at face value). A top-down approach shares the same conviction—that the reason to pick one set of doctrines over another as the most basic one in developing a theory of tort law is normative—but seeks to vindicate it in a more abstract and systematic fashion. This approach—the second reading of *Private Wrongs* to which we now turn—appeals to the point of an ideal theory of tort law and determines the normative contents of this theory (at least in part) by reference to our moral intuitions about what counts as just terms of interaction among private persons.

### III. AN IDEA TORT THEORY: ANOTHER READING OF *PRIVATE WRONGS*

To explain what ideal theory of tort law is and what theoretical difference it can make, it is helpful to begin with a non-ideal theory of tort law. On this theoretical approach, tort law is important because we occupy an unjust world in which people routinely fail to comply with their primary duties of care and respect toward the rights of others. An ideal theory, by contrast, rejects the reduction of tort law to tort litigation and remedies, insisting that tort law can be immensely important *even when* our society is perfectly just. Such a theory, to be sure, is not about the absence of conflicting interests; rather, it is a theory of conflict among people who recognize the tension between their respective interests. Tort law, in this view, perfects, and in some cases even makes possible, this recognition by determining the basic terms of interactions, including discrete interactions between complete strangers. Non-ideal theories of tort law remedialism should, therefore, be put in the right context, namely, as tort law’s *fallback plan* in case the reasons offered by tort law—mandatory reasons that come in the form of primary duties of respect—have been compromised or neglected by their addressees. So understood, tort law’s remedial apparatus may represent the most immediate way to complete the transition from the ideal to the non-ideal theory of tort law, but it is not an essential, definitional, or core property of tort law. While the remedial apparatus need not, and often does not, merely replicate the parties’ preexisting rights, it is nonetheless subservient to them. This implies that non-ideal

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33 For more on the distinction between ideal and non-ideal theory of tort law, see Dorfman, *supra* note 27.


35 For more on the relations between rights and remedies, see Hanoch Dagan, *RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY* 145-52 (2013).
theories cannot offer sufficiently comprehensive accounts of tort law; that we need an ideal theory first in order to grasp the point of tort law’s remedial apparatus and then address the problems that occupy us in the non-ideal world on which our law happens to operate. And as we argued above, we also need an ideal theory in place to avoid the question-begging enterprise of singling out aspects of existing tort law as essential to understanding what tort law is.

The argument in *Private wrongs* can arguably be understood in this spirit. Ripstein presents tort law in terms of giving effect to a “morality of interaction”\(^\text{36}\) by specifying “norms of conduct.”\(^\text{37}\) He even observes that “at least in principle, everyone’s private rights could be enjoyed consistently,” in which case it is theoretically possible that “no case would ever make it to court.”\(^\text{38}\) This is why Ripstein must be right to insist on placing courts, recourse to courts, and remedies as secondary in the order of explanation and justification of tort law (although, we of course think that he is wrong to imply that courts exercise practical, rather than epistemic, authority even in deciding the easy cases). More generally, appealing to ideal theory can help distinguish between tort doctrines that are morally important only because, and only insofar as, we occupy our non-ideal world and doctrines whose importance lies in being essential to a comprehensive account of the morality of interactions to which tort law gives effect.

But merely resorting to the notion of ideal theory is insufficient without specifying the normative content of tort law. In order to know whether the non/misfeasance distinction is of fundamental or contingent importance to tort law, it is also necessary to provide a substantive account of the morality of interaction to which tort law gives effect. *Private Wrongs* can be read as developing such an account according to which the moral importance of formal equal independence is hostile to a duty of easy rescue. This account, if successful, can also be applied to the case of the tort of trespass—it can arguably explain, indeed justify, the traditional common law duty of no entry on another’s premises.\(^\text{39}\) Unfortunately, Ripstein’s substantive account of interpersonal morality cannot deliver on these promises because it does not strike a reflective equilibrium with our moral intuitions.\(^\text{40}\)

\(^{36}\) RIPISTEIN, supra note 1, at 8.

\(^{37}\) Id. at 7.

\(^{38}\) Id. at 13.

\(^{39}\) This sort of questions need not arise in respect of each and every tort doctrine (recall the discussion of assault and battery). In particular, it does not arise when the doctrine is among tort law’s fixed moral points.

\(^{40}\) The ambition of this Comment is not to develop a competing account. We take up this task in Dagan & Dorfman, supra note 11 and in Hanoch Dagan & Avihay Dorfman, Justice in Private, available at http://ssrn.com/abstract=2463537.
Before we explain this failure, it would be apt to make more explicit the method of reflective equilibrium on which we draw. The method of reflective equilibrium provides a justificatory procedure by which drawing inductive inferences as represented by considered judgments about particular cases can constrain deductive inferences, and vice versa.41 We therefore begin by identifying a set of considered judgments concerning particular cases of a general domain of human action to which a basic principle (or principles) of morality applies. These considered judgments express our moral intuitions about what the relevant demands of justice seem to be requiring. In the case of tort law, the relevant domain of human action is that of horizontal interactions among individuals acting as private persons, rather than public officials or members of a particular polity. And the basic principle of morality that governs this domain, according to Ripstein, is defined negatively as that of no person being in charge of another (or, more accurately, a principle of equal formal independence). In what follows we seek to show that the basic moral principle formulated by Ripstein cannot account for our considered judgments about particular cases that, we insist, should be taken as fixed points—the cases of private discrimination and of easy rescue. Note that we do not take these judgments to be necessarily unrevisable in the sense that they transcend critical reflection.42 More importantly, they are fixed points not in the sense that their fundamental value arises independently of other moral judgments—in fact, we believe they are evidently correct because they are surface manifestations of the idea of relating as substantively free and equal persons.

_Trespass to Land_. Is it true that interpersonal morality underwrites a tort duty to defer to the decision-making authority of the owner? According to the argument of _Private Wrongs_, this must be true in order for the owner and non-owner to relate as formally equal private persons.43 Of course, this view does not apply in case the owner is not a private person or when the owner fails to render his or her discriminatory decision reasonably clear. But even setting these cases aside, it seems unreasonable, morally speaking, that a private owner should be able to decide not to let customers enter his or her boutique café simply because of their gender, race, religious creed, sexual orientation, or for any other morally arbitrary basis. There may well be second-order limitations on the scope of the owner’s openness to accommodating others. Some of these limitations derive from the rule of law requirements of guidance (to law’s subjects) and constraint (of decisionmakers’

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41 Strictly speaking, considered judgments need not be limited to particular cases only. According to Rawls, considered judgments can be made at any level of generality as long as they seem evidently correct. See John Rawls, _The Independence of Moral Theory_, in _COLLECTED PAPERS_ 289 (Samuel Freeman ed., 1999).

42 See, e.g., T. M. Scanlon, _BEING REALISTIC ABOUT REASONS_ 85-86 (2014).

43 Ripstein, _supra_ note 1, at ch. 2.
discretion), which limit the degree of its legitimate granularity; others especially apply when the object of the accommodation (say, the poor economic status of the customer) is not, and should not be, verifiable in the context of private dealings. But where none of these limitations apply, it seems natural to suppose that the morality of horizontal interaction calls for acquiring a principled openness toward accommodating at least some of the traits that make the non-owner the person he or she actually is. Arguing that excluding the non-owner does not violate his or her formal equal independence because he or she can pursue the purpose of getting good coffee elsewhere merely adds insult to injury. We believe that no general principle of tort law justice, and certainly not a general principle that no person is in charge of another, can allow for this particular judgment.

More generally, moral reflection of this sort can raise doubts over deeming tort law’s trespass duty—one which protects what people already have—a fundamental tort doctrine. By implication, fixing the content of Private Wrong’s conception of the justice of tort law by reference to this common law duty runs the risk of rendering essential a doctrine that, at least from the perspective of ideal theory, does not call for protecting what you already have as such, but rather only those aspects of what you already have that ought to be protected against other private persons.

No liability for nonfeasance. Once we realize that Ripstein’s fundamentalist account of the non/misfeasance distinction is not part of the doctrine’s face value, a preliminary question of interpersonal morality poses itself. One way to ask this question is this: Can the morality of interaction require that no affirmative duty be imposed on private persons (acting in their capacity as private persons), not even the simplest duty of easy rescue (say, you can save the life of another who is about to fall off a hidden cliff simply by uttering “beware of the cliff”)? Ripstein maintains that our claim-rights and powers with respect to our body and property “come as a package,” because they are all “coordinate components of a system in which no person is in charge of another,” and thus “each of us is [] entitled to decide whether to stand on our [negative] rights.” But this assertion—that also underlies his account of trespass to land—merely begs the normative question. He also suggests that abandoning his formal equality of independence thesis and revisiting the

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44 Cf. RIPSTEIN, supra note 1, at 31, 32, 54.

45 This claim applies beyond the ideal theory of tort to capture some aspects of tort practice too. The fact that traditional common-law of tort law may lag behind this practical reality only suggests that it does not exhaust the broader category of tort law. As we mentioned above, courts do not hold a monopoly on making the law of tort.

46 RIPSTEIN, supra note 1, at 12.
notorious easy rescue doctrine implies the “remaking” of tort law.\textsuperscript{47} Maybe because he is (at least implicitly) aware of the problems of this proposition (which we discussed in Part II), he quickly adds that “[h]is own view is that the idea that no person is in charge of another is normatively attractive.”\textsuperscript{48} Unfortunately, nowhere does he explain what makes this ideal attractive as the sole, fundamental normative premise of a just tort law (as opposed to an important component of a system that seeks to establish interpersonal relationships of reciprocal respect to self-determination and substantive equality).

It seems striking to see how Ripstein approaches the specific case of easy rescue—again, in a manner that cannot withstand the test of reflective equilibrium—by saying that “At the appropriate level of generality, [a duty of easy rescue] is no different from [all other cases of nonfeasance]: Absent a special relationship, you do not need to use your means in a way that best suits my preferred use of means.”\textsuperscript{49} Note that this statement fails to capture the easy rescue case because what renders this case so urgent and normatively important is that it is not about “my preferred use of means.” In fact, no preferences on “my” part has any bearing on the morality of the duty of easy rescue—rather, it is the very existence of the “mine” that calls for effortless help.

Indeed, it seems counterintuitive to suppose that the moral idea of formal equal independence can bear the burden of justifying a strict requirement of no affirmative duties that categorically rules out such private law duties even in clear cases of easy rescue.\textsuperscript{50} Of course, moving from such a simple case to the complexities of everyday life raises any number of difficult challenges for a legal system to face. But this is precisely why there are compelling reasons to suppose that the non/misfeasance distinction is not as fundamental as the argument in \textit{Private Wrongs} suggests.

\textit{Courts}. Finally, if indeed the primary right and duty survive the wrong, the existence of a corresponding secondary right and duty need not depends, as we argued in Part II, on a ruling by the court. An ideal theory of tort law does not deny that law-abiding people can sometimes commit wrongs (the tort of negligence is a clear case in point). Thus, instances of injustice are not inconsistent with an idea of tort law as the law that determines terms of interactions between free and equal private individuals in respect of some activities. On this approach, it is not clear why the secondary right and duty of repair would necessarily put the victim in an in-charge-of relation with the injurer. Moreover, and more importantly,

\textsuperscript{47} Id., at 64.
\textsuperscript{48} Id.
\textsuperscript{49} Id., at 57.
\textsuperscript{50} As the text implies, we do not think that a virtue-based obligation of rescue (or, for that matter, a public right to be rescued) can offer a satisfactory response to this challenge.
the pre-court existence of secondary rights and duties instantiate, and to this extent re-
establish, the rightful terms of interaction that is, in turn, the basic point of tort law when approached through the lens of an ideal theory. As we mentioned above, implementing this ideal in our imperfect world gives rise to considerations that strongly suggest—perhaps even require—a public institution such as a court. But an argument of this kind falls short of the more ambitious argument of *Private Wrongs*.

### IV. BACKGROUND AND FOREGROUND JUSTICE

So far we have argued that the three doctrines under consideration can neither be taken at face value nor can they withstand the test of moral intuitions. Ripstein’s response to the latter challenge seems to be in locating the justice of private law within the broader universe of justice. Thus, instead of assessing the justice of his conception of tort law on its own grounds, the concluding part of the book defends one familiar version of the liberal-egalitarian argument from division of labor between the individual’s responsibility as articulated (among other private laws) by the law of tort and the state’s responsibility to provide the background conditions appropriate for a property-owning democracy (rather than a welfare state). The responsibilities of both are mutually reinforcing so that so-called “justice gaps” such as the ones we have just identified (especially with respect to trespass and nonfeasance) can be addressed vertically, that is, by public law institutions. This is precisely why Ripstein argues that his conception of the justice of tort law should not be confused with the libertarian’s.

However, the argument from division of responsibility cannot eliminate those justice gaps. In fact, resort to background justice in these cases undermines the justice of tort law.51 The reason for this lies in the methodology we pursued in this Comment—picking one set of doctrines as fundamental cannot avoid the critical test of reflective equilibrium. To see this, consider the boutique café hypothetical again. Suppose that this café is the only one to practice discrimination against gay people in Manhattan (or, say, San Francisco), so that there are easy substitutes and no discernible societal effects to the owner’s bigotry in the liberal environment in which it is situated. In this hypothetical, there

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51 This is not, to be sure, the only difficulty with Ripstein’s robust reliance on the state to remedy the injustices of a libertarian system of private law. Ripstein acknowledges that “states do not always do as good a job as they should of guaranteeing adequate rights and opportunities to private citizens.” *Id.*, at 290. But notwithstanding this (under)statement, he is happy to acknowledge broad state powers of both direct and indirect “forms of conscription through the imposition of affirmative obligations” on the citizens. *Id.*, at 292. It does not take an advanced public choice analysis to appreciate the vulnerabilities that such a carte blanche authority to government generate in citizens, and in particular those belonging to weak and marginalized groups. It is very hard to imagine that behind the veil of ignorance a private law regime, which religiously protects our mutual independence, would be a sufficiently attractive quid pro quo that can justify subscribing to Ripstein’s system.
is nothing that considerations of background justice can or should do in this case – it is a 
simple private law case in which one private person (who really values his or her 
independence) denies the substantive freedom and equality of another person on the basis 
of the latter’s sexual identity.

This case helps to render more vivid the ineliminable dimension of private 
responsibility for justice, one which the foreground justice defended by Ripstein denies on 
grounds of formal equal independence. Thus, the case shows that even a widespread 
egalitarian ethos among private persons and a public commitment to provide for 
background justice could not render tort law just insofar as it authorizes the standing of 
private owners in the position of the café owner to decide whether or not they can 
discriminate against their human fellows in making exclusion and inclusion decisions. 
While the justice of tort law is certainly partially dependent on background justice, its 
dependence cannot relieve tort law of the justice-based task of determining terms of 
interactions that take seriously the (substantive) freedom and equality of both sides of the 
interaction.52

52 Note that nothing in the text implies a renouncement of the important distinction between private and public 
law (and between horizontal and vertical relationships, more generally). Rather, as we argue at length 
elsewhere, our argument implies that in order to retain its normative appeal it should be reconstructed along 
the lines of this Comment. Fortunately, as we also demonstrate in some detail, our private law by and large 
complies with this reconstruction. See Dagan & Dorfman, supra note 11.