Private Law Legalism

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Judges decide multiple types of disputes, including disputes involving the property or contractual rights of two private parties (their 'private rights'). The nature of these private rights has long been the focus of philosophical debates between conventionalists, non-conventionalists, and Kantians. In this paper, I offer an argument in favour of the adoption of a legalist concept of private rights by judges and lawyers involved in private law disputes. According to private law legalism, judges and lawyers should see these rights as purely legal rights that do not reflect any pre-existing moral entitlements but are simply the upshots of positive law. The reason for adopting this legalist view is that it contributes to the rationality, predictability, and stability of legal reasoning, as well as to an appropriate evaluative stance towards positive law. Thus understood, the argument for legalism is not an argument about the nature of private rights, but about the conception of such rights that participants in private law reasoning ought to adopt.

Keywords: Private Law, Private Law Theory, Legalism, Conventionalism, Conceptual Ethics

I *Introduction*

Judges decide multiple types of disputes. One such type of dispute is what I will call, as a stipulation, a 'private law dispute': a dispute involving the property or contractual rights of two private parties, plaintiff and defendant. I will call these rights *private rights.*[1]

1 I exclude the rights recognized by and enforced through the law of torts. The interests protected by the law of torts are heterogeneous. Given this heterogeneity, it is dubious whether the structure of the rights protected by the law of torts is to be found in this body of law, or whether this body of law lends itself to a univocal concept of the rights it protects. The interests the law of torts is concerned with arise out of multiple bodies of common law (such as property, contract, etc.), legislation, and constitutional law. See Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) at 4–19. More importantly, those interests are heterogeneous in the precise sense that they seem to be grounded in multiple considerations that have to do with distinct aspects of human life that go from physical integrity to freedom of movement to contractual exchange. See John Murphy, 'The Heterogeneity of Tort Law' (2019) 39:3 Oxford Journal of Legal Studies 455. Perhaps, despite this heterogeneity, the law of torts could be reconstructed along the lines of a single, univocal right to independence or some such. See, e.g., Arthur Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016). That is a possibility I am happy to leave open. But I do think that the heterogeneity is sufficient (and sufficiently distinct from whatever variation one can see in the laws of contract and property) to warrant some caution about general prescription in the domain of tort law.

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In this narrow class of disputes, I will argue, there are good reasons for judges and lawyers operating in the context of contemporary liberal democratic legal systems to adopt a legalist conception of the rights at stake.[2] According to this argument for *private law legalism*, lawyers and judges involved in private law disputes, in the context of contemporary liberal democratic legal systems, should see the relevant rights as purely legal rights: rights that do not reflect any pre-existing moral rights, but are fully grounded in, and obtain as a result of, the actions and decisions of legal institutions, as reflected in positive law.[3] Note that the argument for private law legalism is thus restricted in terms of the domain, agents, and activities to which it applies.[4] Within the domain of private law adjudication, the reasons for judges and lawyers to adopt legalism are rule of law values – rationality, predictability, and stability – and an appropriately austere moral attitude towards the activities of lawyers and judges in private law reasoning.

As I will argue, these reasons should carry weight even for those who disagree regarding the correct foundational theory about the nature of private rights. In other words, even non-conventionalists have reasons to endorse the adoption of legalism as, or at least strongly legalistic features into, what I will call the 'operative concept' of private rights.

Here is the roadmap for the rest of the paper. Part I explains what private law legalism is, situating it in the context of the philosophical dispute about the nature of private rights. Part II offers the normative argument in favour of the adoption of a legalist concept of private rights by judges and lawyers involved in the adjudication of private law disputes. Part III clarifies the nature of this argument, as a limited form of conceptual prescription regarding the operative concept (as opposed to the foundational concept) of private right that ought to be adopted by judges and lawyers in private law adjudication. Part IV responds to certain objections.

II *What is private law legalism?*

A. CONVENTIONALISM AND ITS DISCONTENTS

Private law legalism is a specific variation of a broader family of views about private rights: conventionalism (I will clarify in what sense private law legalism is

2 In this paper, I use 'concept' and 'conception' interchangeably.

3 Given the restriction to this specific institutional and political context, the argument is thus compatible with arguments in favour of other concepts of private rights in different contexts.

4 Because of its restriction to private law adjudication and to lawyers and judges, the argument for legalism offered is also consistent, in principle, with the adoption of different concepts of private rights being appropriate in other domains (such as legislative proceedings, political campaigns, philosophical discourse, and public debate) or for other agents (such as legal scholars interested in normative or interpretive critique, legal and political philosophers interested in normative theory, and politicians and activists interested in the reform of private law). What conception of private rights each of these agents ought to adopt, in each of these settings, and for what purposes, are significant questions. While these are not the questions I am concerned with here, it seems plausible to believe that some of the considerations I offer here might also have a bearing on such questions.

a variation of conventionalism in the next section). The conventionalist view argues that there are, at the most fundamental level, no natural private rights. Private rights are artifices or creations of social conventions.[5] For the conventionalist about private rights, while some moral rights might be explained without appeal to social practices (like the right not to be killed or hurt without a justification, the right to freedom of conscience, etc.), private rights are not part of that category.[6] Instead, private rights are explained by conventions that are justified in terms of their benefits. These benefits can be collective, like social coordination and overall wealth. But they might also be connected to individual moral interests.[7]

In the case of property, the idea is relatively familiar. Property is artificial in the precise sense that it is an *artifice*, as Hume calls it: a human creation that allows individuals to own things, and that generates certainty about possession and concomitant expectations of compliance.[8] In the case of contractual rights, the discussion is somewhat absorbed by the related – but distinct – question about promises. Regarding the latter, the conventionalist story starts from the intuition that there is something mysterious about the possibility of generating moral rights and obligations by mere declaration.[9] This mystery can only be explained away, according to the conventionalist, by reference to a social convention that makes it the case that 'I promise to do X' generates duties.[10]

Many theorists believe conventionalism is false. Libertarians in the Lockean tradition, for instance, argue that human beings have a natural right to control their own person and powers (self-ownership) as well as things (ownership).[11] These natural rights are understood as preexisting legal and social institutions and as constraining those institutions' legitimate content and structure.[12] Private rights are, thus, enforceable rights that precede civil society.[13]

5 Liam Murphy, 'The Artificial Morality of Private Law: The Persistence of an Illusion' (2020) 70:4 University of Toronto Law Journal 453 at 456.

6 Ibid at 457.

7 See David Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2012); David Owens, 'Property and Authority' (2019) 27:3 Journal of Political Philosophy 271.

8 David Hume, *A Treatise of Human Nature*, David Fate Norton & Mary J Norton, eds (Oxford: Oxford University Press, 2000), s 3.2.2.

9 Ibid section 3.2.5. This is a peculiarly modern perplexity. See David Owens, 'Promises' in *International Encyclopedia of Ethics* (Hoboken, NJ: Wiley, 2013) at 1. For doubts about the plausibility of this concern, see Seana Shiffrin, 'Promising, Intimate Relationships, and Conventionalism' (2008) 117:4 Philosophical Review 481.

10 See, e.g., Niko Kolodny & R Jay Wallace, 'Promises and Practices Revisited' (2003) 31:2 Philosophy & Public Affairs 119 at 121.

11 On the transit from self-ownership to private property rights, see Barbara H Fried, *Facing Up to Scarcity: The Logic and Limits of Nonconsequentialist Thought* (Oxford: Oxford University Press, 2020) at 182–189.

12 Anna Stilz, 'Property Rights: Natural or Conventional?' in Jason Brennan, Bas van der Vossen & David Schmidtz, eds, *The Routledge Handbook of Libertarianism*, 1st ed (New York: Routledge, 2017) 244 at 244.

13 John Locke, *Second Treatise of Government*, C B Macpherson, ed (Indianapolis: Hackett Publishing, 1980); Robert Nozick, *Anarchy, State, and Utopia* (New York: Blackwell, 1974) at 10. See also Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1990) at 232.

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But conventionalism's critics are not restricted to libertarians. Seana Shiffrin, for example, argues that conventionalism about promising is mistaken, and that promises and their obligatory force can be explained without any reference to social conventions.[14] She also argues that the legitimate content of contract law is constrained, at least to some extent, by the types of rights it enforces – i.e., promissory rights.[15]

Finally, Toronto formalists in the Kantian tradition also reject, at least in part, conventionalism. They argue that the basic structure of private rights can be explained without reference to legal institutions.[16] According to these theorists, private rights can be understood as normative requirements that exist (even if provisionally) before the state, which arise out of the analysis of the conditions under which 'the choice of one can be united with the choice of another in accordance with a universal law of freedom.'[17] Under this view, the state defines, regulates, and enforces private rights not because we have a collective interest in achieving valuable social consequences, but in order to avoid unilateral enforcement, which would be inconsistent with equal freedom.[18] Public institutions, such as courts, are not the basis but the consequence of private rights,[19] which in the state of nature have an abstract and provisional structure.[20] Legal institutions authoritatively determine and settle the content of private rights,[21] ensuring that each individual's freedom is consistent with everyone else's.[22] Thus, Kant agrees with the conventionalist view that determinate private rights require human institutions and conventions.[23] At the same time, once in civil society, positive laws cannot infringe upon the private rights that we must assume as possible in the state of nature as provisionally rightful.[24] Private rights in the state of nature are what makes civil society necessary,

14 Shiffrin, supra note 9.

15 Seana Shiffrin, 'The Divergence of Contract and Promise' (2007) 120:3 Harvard Law Review 708. Note that this claim is independent from the question about the foundations of promissory obligation.

16 Ernest J Weinrib, 'Liberty, Community, and Corrective Justice' (1988) 1 Can JL & Jurisprudence 3 at 202; Ernest J Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 Chi-Kent L Rev 55 at 65. See also Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009) at 63–64; Arthur Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016) at 8.

17 Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1991) at 56.

18 Arthur Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 Va L Rev 1391 at 1415.

19 Ernest J Weinrib, 'Private Law and Public Right' (2011) 61 University of Toronto Law Journal 191 at 195.

20 Ripstein, supra note 16 at 13.

21 See Otfried Höffe, *Immanuel Kant* (Albany: State University of New York Press, 1994) at 180. See also Jeremy Waldron, 'Kant's Legal Positivism' (1996) 109:7 Harvard Law Review 1535 at 1553.

22 Ripstein, supra note 16 at 9.

23 Murphy, supra note 5 at 462. So does Arthur Ripstein's reconstruction of Kant. See Ripstein, supra note 16 at 465.

24 Kant, supra note 17 at 77–78.

if those rights are to be fully binding and enforceable.[25] In this way, the concept of private right can be understood and fully explicated without recourse to a state and its law – on the contrary, the state and its law are explained by the normative demands generated by private rights. The type of interpersonal interaction governed by private rights does not ultimately depend on positive law.[26]

B LEGALISM

Conventionalism and social conventions themselves come in different shapes. Law is not necessary for social conventions to exist, and successful social practices of commercial exchange can exist outside of formal legal systems.[27] Legalism, as a foundational account of the nature of private rights, is a distinct form of conventionalism that sees private rights as the creatures of legal institutions. As Hobbes and Bentham argue, for legalism private rights are constituted by the rules set up by the sovereign, as a means to ensure peace and the collective good.[28] According to legalism, the content of private rights is determined by exclusive reference to legal rules.[29]

The type of private law legalism I will argue for is thus a variation of conventionalism, in the sense that it sees private rights as merely the creatures of legal institutions, and not just of any social practice. Importantly, though, my argument for legalism will not vindicate it as an ontological or metaphysical claim about the nature of private rights. Instead, I will defend private law legalism as what I will call an 'operative concept' that judges and lawyers ought to adopt in the context of private law adjudication, independently of the foundational truth about the nature of private rights.

Let me go back to the difference between legalism and other types of conventionalism (whether foundational or operative): that legalism limits the conventions that can ground private rights to legal practices. A useful contrast here are conventionalist views that reject legalism. Such a view exists in at least one potential reconstruction of classical common law jurisprudence. According to that reconstruction, private rights are the expression of immemorial custom and social practice. From this perspective, courts deciding what private rights agents have articulate, give legal shape, and make public what already exists in

25 Ibid at 124.

26 Ripstein, supra note 16 at 87. See also Weinrib, supra note 19 at 195.

27 See Lisa Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21:1 The Journal of Legal Studies 115; Avner Greif, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade* (Cambridge: Cambridge University Press, 2006) at 8, 309.

28 Thomas Hobbes, *Leviathan*, Edwin Curley, ed (Indianapolis: Hackett Publishing, 1994) at 114. Similarly, Jeremy Bentham, *Principles of the Civil Code* (W Tait, 1843) Art 1 Ch. VIII; Jeremy Bentham, 'Anarchical Fallacies; being an examination of the Declaration of Rights issued during the French Revolution' in Jeremy Waldron, ed, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen Publishing, 1987) at 55.

29 Neil MacCormick, 'The Ethics of Legalism' in Maksymilian Del Mar, William Twining & Michael Giudice, eds, *Legal Theory and the Legal Academy* (New York: Routledge, 2017) at 177.

the traditions and practices of the community.[30] If this view were correct, statements made in common law adjudication about private rights should be interpreted as both describing the rights arising out of social custom and attempting to systematize them.[31] According to this conventionalist account of common law reasoning, then, law is not a mechanism through which the state and its authorities regulate the conduct of private agents.[32] Instead, as classical common law theorists like Coke, Selden, Hale, and Blackstone argued, common law standards are *lex non scripta* (unwritten law), found by judges in the traditions and practices of ordinary people, evolving over time in response to social change and legitimated by their overlap with ordinary customs.[33] Private rights, on this view, would not be natural rights.[34] But they still wouldn't be *posited* private rights, as legalism suggests. They would be private rights derived from social practices and conventions on the ground.[35] Private rights are thus a matter of convention,[36] but not a matter of *posited* law. Whatever the merits of this reconstruction of common law jurisprudence, it is useful to show the relationship between conventionalism and legalism. Both the conventionalist and the legalist deny that private rights reflect natural rights. But the legalist affirms something more: private rights can only be the upshots of the actions and decisions of legal institutions.

Another useful contrast here is legal positivism, which claims that law is exclusively grounded in social facts.[37] While there are certain connections between private law legalism and the ethical argument for legal positivism,[38] the two views are distinct. First, legal positivism is consistent with the idea that some cases fall within the penumbra of legal norms and do not have a straightforward solution derived from the application of those norms.[39] In these cases, legal positivism, at least when understood as a theory about the nature of law, is compatible with the exercise of judicial discretion.[40] There is no reason why, in these circumstances, judges might not appeal to ideas about natural private

30 Historically, this view coincided with the accompanying claim that these customs deserve legal status partly because of their consistence with 'natural reason.' See Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 2019) at 262–263.

31 Stephen E Sachs, 'Finding Law' (2019) 107:2 Calif L Rev 527 at 539.

32 Nathan B Oman, 'Private Law and Local Custom' in Andrew S Gold et al, eds, *The Oxford Handbook of the New Private Law* (Oxford: Oxford University Press: 2020) at 160.

33 Ibid at 161–162.

34 Ibid at 168–169.

35 Ibid at 169.

36 Gerald J Postema, 'Philosophy of the Common Law' in Jules Coleman & Scott J Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) at 601.

37 See generally Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1983).

38 See Neil MacCormick, 'A Moralistic Case for A-Moralistic Law' (1985) 20:1 Val U L Rev 1; Liam Murphy, 'The Political Question of The Concept of Law' in Jules L Coleman, ed, *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford: Oxford University Press, 2001); Jeremy Waldron, 'Normative (or Ethical) Positivism' in Jules L Coleman, ed, *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford: Oxford University Press, 2001).

39 HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71:4 Harvard Law Review 593 at 607–608.

40 HLA Hart, 'Discretion' (2013) 127 Harvard Law Review 652 at 658.

rights to decide disputes outside of the core of legal norms. Legalism about private rights is different. It denies the validity of extra-legal arguments about private rights in private law adjudication, even in the penumbra. Beyond positive law, there is no such thing as a private right. Second, legal positivism is only a claim about the grounds of law, i.e., about the facts that constitutively explain legal facts, such as the fact that contracts for the sale of an interest in land need to be in writing.[41] It is a theory about the nature of law. As such, the theory is compatible with different theories of adjudication, and with different conceptions that judges and lawyers might have about the tasks they are performing. Moreover, legal positivism is compatible with moral arguments about the circumstances in which judges and lawyers might do better by going against the law.[42] Finally, at least some versions of legal positivism – which go under the label of "inclusive legal positivism" – are compatible with the incorporation of moral notions, including notions about natural pre-legal private rights, within the relevant criteria for validating specific legal rules in any given legal system.[43] Legalism rejects this possibility. It denies that natural private rights might play any role constraining the validity of the legal rules governing private rights. In all of this legalism is different from legal positivism: it rejects the legitimacy of reference to moral concerns about private rights, even in penumbral cases; it rejects that judges and lawyers might legitimately engage in the moral second-guessing of legal rules; and it argues against the inclusion of moral notions within tests of legal validity.

There is much that might seem unappealing about the legalist view. And it might very well be false (a worry I return to below). But, as I will argue in the next section, there is much that it has going for it, at least within the domain of this paper: the adjudication of contract and property disputes between private parties.

III *The argument for private law legalism*

A THE RULE OF LAW

The normative argument for legalism could be made from multiple perspectives. My argument here will focus on basic rule of law values like rationality, predictability, and stability. If we value the rule of law, legalism's consistency with some of its central tenets gives judges and lawyers at least a *pro tanto* reason – and a particularly weighty one – to adopt a legalist concept of private rights.

41 David Plunkett, 'Robust Normativity, Morality, and Legal Positivism' in David Plunkett, Scott J Shapiro & Kevin Toh, eds, *Dimensions of Normativity* (Oxford: Oxford University Press, 2019) 105 at 106–107.

42 See Hart, supra note 39.

43 See generally WJ Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994).

1 *Legal rationality*

A familiar thesis in the history of legal thought affirms that lawyers elaborate distinctively legal or juristic principles which derive from the exercise of a specific form of legal rationality, sometimes called law's 'artificial reason.'[44] According to this idea, legal discourse is not the mere application of moral norms and standards, but rather a form of institutionalized discourse with its own criteria of correctness[45] and an aspiration to rational consistency and coherence.[46]

This form of distinctively legal rationality is highly formal: it proceeds through the application of abstract legal concepts to specific factual patterns.[47] It is a form of rational taxonomy that orders legal norms into 'an internally consistent complex of abstract legal propositions,'[48] and ensures that lawyers and judges are both 'the masters and the servants of a complex system of reasoning.'[49]

Legal rationality in private law adjudication is instrumentally valuable: it helps us achieve whatever goals law achieves in a better way.[50] There is also a strong connection between this idea of legal rationality and a non-instrumental outlook towards private law adjudication. More specifically, I am referring to a set of Kantian ideas: (i) that under a legal order, private law adjudication allows for the enforcement of rights to coexist with freedom and the avoidance of unilaterality;[51] and (ii) that many (perhaps most) normative questions about justice in private interactions cannot be answered without the aid of legal institutions' authoritative settlement.[52]

The first notion is nicely captured in the idea (found both in Blackstone and Locke) that 'where there is no law, there is no freedom.'[53] Yet the notion means something more specific: a publicly available set of legal norms governing private law adjudication allows for the coercive enforcement of individuals' rights in conditions that avoid domination.[54] What belongs to each of us as a matter

44 Charles Fried, 'Artificial Reason of the Law or: What Lawyers Know' (1981) 60 Tex L Rev 35 at 39.

45 Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, MA: The MIT Press, 1998) at 234. See also Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UW Austl L Rev 1 at 99.

46 Habermas, supra note 45 at 237.

47 Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Los Angeles: University of California Press, 1978) at 657. See also Chaim Saiman, 'The Law Wants to be Formal' (2021) 96:3 Notre Dame Law Review 1067 at 1114.

48 Weber, supra note 47 at 657.

49 Birks, 'Equity in the Modern Law,' supra note 45 at 98.

50 As I argue in Felipe Jiménez, 'Contracts, Markets, and Justice' (2021) 71:1 University of Toronto Law Journal 144 at 148–152.

51 See Rafeeq Hasan, 'The provisionality of property rights in Kant's Doctrine of Right' (2018) 48:6 Canadian Journal of Philosophy 850 at 861; Louis-Philippe Hodgson, 'Kant on property rights and the state' (2010) 15:1 Kantian Review 57 at 71; Ripstein, supra note 16 at 33.

52 See Martin Stone, 'Legal Positivism as an Idea about Morality' (2011) 61:2 University of Toronto Law Journal 313.

53 See William Blackstone, *Commentaries on the Laws of England* (Oxford: Oxford University Press, 2016) at 86; Locke, supra note 13 at para 57.

54 There are obvious connections between this idea and the Republican notion of freedom as non-domination. See Philip Pettit, *Republicanism* (Oxford: Oxford University Press, 1999) at 35–41.

of right is a disputed question, and a question over which we are uncertain and divided. These problems of uncertainty and disagreement are partly epistemic. But they are also partly constitutive: many of the most central and pressing questions about our rights in interpersonal relationships are simply left unaddressed by pre-legal morality. We lack answers and we disagree about how to produce them because pre-legal morality just doesn't provide an answer. At the same time, rights – over things and over others' actions – are necessary for social life and for joint cooperation, particularly in the context of diverse, pluralistic, and complex societies. Thus, we need to resolve disputes about private rights even in the face of uncertainty about who is ultimately right about it, and in a way that is consistent with the moral equality of the agents in dispute.[55] Law, and its authoritative set of standards for resolving our disputes, is thus necessary – or at least particularly helpful – to manage this problem.[56]

Private law adjudication's ability to settle moral questions about private rights turns on its ability to avoid simply replicating our fundamental moral disagreements and uncertainties about these rights in the judicial venue.[57] It turns on the distinctiveness of legal rationality, which is itself dependent on the idea of legal reasoning as the derivation and articulation of rules from authoritative legal sources. Adopting morally and philosophically contested claims about the foundations of private rights or about their pre-legal grounding in the context of private law adjudication undermine this aspiration to avoid unilateralism.

The avoidance of unilateralism is a formal virtue: legal rationality avoids enforcing any single individual's contested view about the morality of private interaction, enforcing instead the law's view about the relevant practical question confronted in a private law dispute, whatever the content of the law in force might be. This is why the virtue of legal rationality is formal: it is independent of the content of the law. This certainly means that sometimes legalist judges will uphold legal norms that *substantively* license unilaterality – for instance, if the property rules of the legal regime allow property owners to impose their unilateral choices on others. Here, though, we must remember that substantive morality never appears as such in litigation – it is always someone's contested moral position.[58] Private law legalism redirects moral contestation to public debate, legislation, and ordinary politics, offering in the judicial resolution of private disputes the more austere but, still, important formal value of legal rationality.

Certainly, there are multiple moral reasons that pertain to questions about the law of contracts and property, and plausible moral constraints on what they should look like. For instance, chattel slavery is morally wrong, whatever the positive law says. But there are two issues to consider here. First, chattel slavery is wrong for reasons that have nothing to do with foundational questions about property rights, but rather with the inalienable dignity and basic moral equality of human beings. A concept of private rights as natural rights does not seem to add

55 Evan Fox-Decent, 'Unseating Unilateralism' in Lisa Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014) at 126–129.

56 See MacCormick, supra note 29 at 188.

57 See Felipe Jiménez, 'A Formalist Theory of Contract Law Adjudication' (2020) 2020:5 Utah Law Review 1121.

58 Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999) at 111.

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anything of independent normative significance to the moral conceptual repertoire of judges and lawyers. That conceptual repertoire can continue to include, under my argument here, everything we might want to preserve in our discourse about basic human rights, human dignity, and so on. As I will note below, in these domains the balance of considerations might be different from what it ultimately looks like in private law disputes. Whatever costs in uncertainty and unpredictability these concepts might generate might in the end be worth the moral tradeoff, unlike what – if I am right – what happens in the domain of private law. Second, the question here is the understanding of private rights that judges and lawyers ought to adopt in the context of private law disputes. It is not a question about moral evaluation *simpliciter*, or outside of the context of private law adjudication.

One potential reply to this argument is that I am overstating the indeterminacy of (and disagreement over) questions regarding our private rights. While perhaps morality is silent or at least disputed when it comes to concrete questions of justice in specific cases, at a broad level there seems to be widespread agreement that, e.g., certain promises ought to be legally enforced, certain remedies for breach of those promises are proportionate and adequate and others would be excessive, and so on. But here we come to the second point: the few aspects that might be settled by a correct foundational understanding of private rights get us pretty much nowhere, at least in the conditions of contemporary liberal democratic legal systems, in the context of the resolution of private law disputes. In this latter setting, we need to settle precisely those questions on which different foundational views about private rights disagree or remain uncertain. Thus, even if some basic aspects of private law might be determined by pre-legal morality and be the subject of a broad overlapping consensus,[59] there is much that will not be settled and will have to be determined by legal institutions resolving private law disputes. This is not a new idea.[60] But if we take it seriously, then the notion of private rights as pre-legal moral rights becomes unhelpful for judges and lawyers. It comes with a cost in terms of replicating moral disagreement and raising their stakes, but has very little practical value as an operative feature of legal discourse.

An example from the law of contracts might help. Assume, first, that we have good reasons for making some voluntary undertakings legally mandatory. Call this set of reasons *cooperation*. Assume, too, that we have good reasons for treating the content of contractual rights as mostly determined by the parties' agreement. Call this set of reasons *sovereignty*. There are at least two further questions we need to answer: we need to answer which oral or written statements are part of the parties' agreement, and how we ought to determine the meaning of those statements. In American contract law, the first question is usually answered through the application of the parol evidence rule,[61] while the second is answered by a series of standards governing the use of extrinsic evidence to clarify the meaning of ambiguous terms.[62] And both questions are also partly determined by whether

59 On overlapping consensus, see John Rawls, *Political Liberalism* (New York: Columbia University Press, 2013) at 133–172.

60 See Tony Honoré, 'The Dependence of Morality on Law' (1993) 13:1 Oxford Journal of Legal Studies 1; Stone, supra note 52.

61 American Law Institute, Restatement (Second) of Contracts (1981) § 213.

62 Id., §§ 200-207.

the law of contracts is interpreted as trying to capture the subjective intentions of the parties or the objective meaning of their expressions and actions. These three sets of questions – what terms constitute the contract, how we ought to determine their meaning, and whether in the overall project we should try to pursue subjective intentions or objective appearances – are all underdetermined by *cooperation* and *sovereignty*.

More importantly, while you and I might see the relevance of *cooperation* and *sovereignty*, others might think that the actual reasons at stake are different (e.g., *efficiency* and *epistemic authority*, or *freedom* and *non-paternalism*). And others might think that all of these reasons are *post hoc* moral rationalizations of a morally corrupt practice. They might think that, in fact, making some voluntary undertakings legally obligatory and making the content of the resulting rights turn on the parties' agreement are not justified practices but rather instruments of alienation and exploitation.

Amid this, agents will enter into voluntary transactions, they will have disagreements and disputes about these transactions, and judges and lawyers will need to figure out a way to resolve them. The fact that the applicable rules in any jurisdiction can be determined by looking at social facts – the enactment of a certain statute, the recognition of a certain doctrine as part of the law by a certain judicial institution, etc. – is an achievement considering the need to govern private relationships in conditions of substantive disagreement. But the determination of the content of the rules governing those private relationships through means that replicate our disagreement undermines that achievement. The adoption and exercise of a distinctively legal rationality, bolstered by a legalist conception of private rights, is a mechanism that allows judges and lawyers to debate the determination of legal facts – including facts about our private legal rights – without falling into first-order moral debate. It also allows them to determine questions that are simply not settled by morality – or at least by our convergent intuitions about it. Legalism, thus, gives a morally central role to legal rationality: it does not see it as a second-best substitute for determining our natural rights in conditions of moral disagreement, or as a hypocritical form of window-dressing that obscures the actual moral stakes. Instead, it sees it as the authoritative construction of the rights that govern our interpersonal interactions.

The deployment of a distinctively legal form of rationality would allow judges and lawyers to avoid replicating underlying moral disputes. It is also attractive, *ex ante*, to parties involved in the resolution of private law disputes. Let me illustrate both points with an example. Richard Posner was a federal judge on the United States Court of Appeals for the 7th Circuit. He is also a famous instrumentalist (or pragmatist), who believes judges should decide disputes by trying to reach the optimal outcome, all things considered.[63] As a judge, he had to decide the case of *Northrop Corp v Litronic Industries*.[64] This case involved, among other issues, the

63 See, e.g., Richard Posner, 'Pragmatic Adjudication' in Morris Dickstein, ed, *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* (Durham: Duke University Press, 1998) 235.

64 29 F3d 1173 (7th Cir 1994).

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application of § 2-207 of the Uniform Commercial Code. Litronic had offered to sell printed wire boards to Northrop on a form that provided a 90-day warranty, while Northrop's acceptance contained a warranty period of unlimited duration. The question was which warranty provision was part of the parties' agreement. One might have expected a pragmatist like Posner to decide on the basis of what approach would make things go better, all things considered. Instead, he decided by deferring to the authoritative interpretation of § 2-207 under the law of Illinois. One can imagine other judges, situated in similar disputes, who believe the morally correct outcome would be divergent from the outcome of applying the conventional interpretation of § 2-207. However, if such judges adopted private law legalism, they would, like Posner – who, in this and a handful of other cases acted very much like a legalist[65] – apply the authoritative legal materials. These judges, in other words, would not even entertain the question of how to decide this dispute in terms of the deep moral rights of the parties because they would see, correctly, that it would be better if they decided the case by reference to the authoritative legal materials, and nothing else. This is, precisely, how a distinctive form of legal rationality – based on authoritative legal materials and their systematic interpretation – avoids direct resort to moral concerns.

In the case of the parties, of course at the moment of litigation presumably each would want whatever argument their lawyers are making to prevail. But from an *ex ante* perspective, parties situated in a similar situation to the one Northrop and Litronic were in their negotiation and back-and-forth forms would want judges to adopt a legalist perspective: a legalist perspective makes it irrelevant, for instance, whether the parties' dispute ends up being decided by Judge Posner, by a Herculean promissory theorist, or by a socialist skeptic of contractual rights. Instead, legalism allows the parties to know where they stand and to arrange, *ex ante*, their affairs with the certainty that one authoritative determination – in this case, Illinois law's approach to § 2-207 – will govern their future disputes.[66]

2 *Predictability*

Predictability is not an absolute value. It does not trump all other normative concerns. But it matters, because it is connected to autonomy – to our ability to lead our own lives and to decide their trajectories without the undue intervention of third parties, and particularly state authorities who exercise coercive powers.[67] An intervention is 'undue,' from the perspective of predictability, when one cannot know, reasonably far in advance, that it will happen.[68] In this aspect, the adoption

65 Not, however, in every or most cases. For a contrasting case where Posner decides directly on the basis of first-order considerations, see *Walgreen Co v Sara Creek Prop Co*, 966 F2d 273 (7th Cir 1992).

66 The argument here echoes Alan Schwartz & Robert E Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113 Yale LJ 541.

67 Jeremy Waldron, 'The Rule of Law in Contemporary Liberal Theory' (1989) 2:1 Ratio Juris 79 at 84.

68 Ibid at 88.

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of legalism by lawyers and judges increases our ability to predict the behavior of private agents and of judicial institutions.

Regarding private agents, private rights allow right-holders to exercise legal powers within a sphere of autonomy, and to reliably generate certain legal consequences through the exercise of those powers.[69] The right-holder requires certainty about what types of behaviors will count as an exercise of these powers, and what consequences will follow from those exercises.[70] Similarly, in bilateral relationships like those governed by the law of contracts, private parties whose normative situation might be affected by the rightsholder need to be aware of the sphere of action that private rights generate for the latter, and the consequences that follow for them if such rights are exercised. When these rights and powers are derived exclusively from authoritative legal materials by lawyers and judges because the latter see the relevant rights as determined exclusively by reference to those materials, it is possible for private parties to determine where they stand in private relations by reference to questions of social fact. Such ability is undermined, however, if that determination is understood by lawyers and judges as the elucidation of the pre-legal natural or moral rights of the relevant parties. It could be the case, of course, that the judge's moral determination coincides with the private party's *ex ante* conjecture about it – whether that conjecture will turn out to be true, however, will depend on the specific identity and substantive moral views of the judge, factual convergence in moral intuitions, and a host of other factors beyond the law in force. All else being equal, a legalist approach increases predictability because it makes the outcome of judicial decisions independent, in principle, from these complex contextual factors.

A conception of private rights as natural rights empowers judicial institutions resolving private disputes to engage in first-order moral reasoning about questions that are both disputed and uncertain, affecting predictability. Consider the case of a theory that could explain how individuals acquire moral property rights in the state of nature. It is implausible to think that any contemporary legal system precisely reflects those natural property rights. Given the obvious normative and epistemic difficulties involved, there will be no plausible link between all currently legally protected holdings and those justified by the correct theory of natural property rights, and the task of ascertaining which legally protected rights fit the theory seems impossible to fulfil.[71] Perhaps a Herculean judge might believe they are able to discern which legal rights are morally worthy of protection. But two problems arise. The first problem is that, despite their confidence, our Herculean judge might get things backwards: they might be unable to properly discern which legally protected holdings are morally justified.[72] The second problem is that, even if they get it 'right,' others might disagree with the

69 Lisa Austin, 'The Power of the Rule of Law' in Lisa Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014) at 273. Note that Austin makes a distinction between powers and rights that, while plausible, I ignore for my purposes in this paper.

70 Ibid at 276.

71 Murphy, supra note 5 at 464.

72 Waldron, supra note 62 at 89.

Herculean judge's account of what rights are morally justified because they track the underlying moral entitlements, or might at least be legitimately surprised to discover that the rights they thought – according to the positive law – they had are not actually going to be protected by judicial institutions.

This is not an unrestricted argument in favour of interpretive formalism in private law adjudication and, more specifically, in the determination of private rights. As Jeremy Waldron argues, it is a mistake to assume that predictability is *necessarily* best served by sticking as close as possible to the text of a statute or to pre-existing doctrine. Perhaps, a more principled orientation to adjudication (particularly in hard cases), drawing on analogy from pre-existing law,[73] makes things even more predictable.[74] This position is perfectly plausible as an account of the appropriate interpretive procedure for deciding legal disputes[75] – as long as lawyers and judges remember that the interpretive question is about *legal* principles and rights, understood in the legalist manner.

Finally, note that the argument does not assume – implausibly – that legal materials will give judges and lawyers a clear answer for every potentially imaginable dispute. There will be *hard cases* even in a world where legalism is widely accepted. But, in these cases, judges and lawyers will still operate under the assumption that they are in charge of the *legal* (i.e., constrained) elaboration and development of authoritative legal materials – not the elucidation of the deep moral structure of private law. This is an idea that, in itself, can have an important disciplining effect on the practice of legal reasoning in hard cases, thereby increasing predictability (which, admittedly, will not be complete or absolute) even in these types of disputes.

3 *Stability*

The advantages of clearly identifiable and predictable private rights accrue even if those rights would not exist, or would be arbitrary, outside of the context of the particular legal institutions that support them.[76] In fact, because the legalist judge or lawyer does not claim that the private rights that we observe in any legal system track or ought to track pre-legal moral entitlements, the legalist judge or lawyer is not concerned with questions about discerning what the latter would be.

Non-conventionalist judges and lawyers, on the other hand, seem to face a problem precisely because they would be concerned with questions about the moral justification of private entitlements. This is particularly true of historical principles for justifying pre-legal private rights. The task of determining the history and moral standing of legally protected private rights is almost insurmountably demanding. But the deeper problem is that the project's success would be worse than its failure. If successful, a historical natural-rights analysis that diverges from legally protected rights would threaten the legitimacy of present legal claims and call an important part of them into question,[77] making the overall scheme of legal rights unstable and uncertain. Something similar would be

73 Postema, supra note 30 at 198.
74 Waldron, supra note 62 at 92–93.
75 But, for an argument to the contrary, see Jiménez, supra note 57.
76 Ira K Lindsay, 'A Defense of Humean Property Theory' (2021) 27:1 Legal Theory 36 at 17–18.
77 Ibid at 18.

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true for non-historical claims of natural right. Whatever our natural private rights might be, it seems dubious that any existing configuration of private rights in any legal regime coincides with them.

A potential response here is that the demands of justice should not be undermined by the demands of stability and certainty. There are two problems with this plausible rejoinder, however. The first is simply a restatement of the problems of uncertainty and disagreement that characterize moral discourse, mentioned in the previous section. We simply do not agree about the demands of justice. The second is that the response takes for granted that private law regimes are robust and resilient in the face of moral questioning *from the inside*, and that such questioning would lead to a reordering along the lines of what justice demands rather than the deterioration or even collapse of the regime. One of the great insights of a conventionalist view – independently of whether it is right as an account of the foundational concept of private rights – is that it highlights the fragility of private law institutions, i.e., the fact that they can unravel quickly when they cannot be taken as the legitimate basis for reliable expectations,[78] and when a 'correct' outcome in the specific case is preferred over the stability and predictability of law.[79] Legalism has this same virtue.

This might seem like a quietist position. I will say more about that below. However, as I argue next, legalism's contribution to stability given that it rejects the legitimacy of lawyers and judges approaching private law disputes as a quest to determine our natural rights is the mirror image of its refusal to see the activities of lawyers and judges within private law disputes with more moral dignity than they deserve.

B NORMATIVE AUSTERITY

Legalism is a normatively austere conception of private rights. It does not claim any particular moral significance for private rights – lawyers and judges, under legalism, do not see the upshots of their activities as identifying our most basic moral rights. This stance is open to the possibility of moral arguments that might show why the rights enforced in private law adjudication are genuine, legitimate, all things considered justified, and so on. But it leaves this as a mere possibility, a legitimate concern for others rather than for lawyers and judges acting as such within private law adjudication. In this way, legalism has the virtue of preventing a certain form of self-flattery by lawyers and judges. Instead, it encourages an appropriately modest moral perception, both by lay citizens and by legal agents, of the activities of the latter.

There is a certain symmetry here: legalism affirms that our private rights' content or standing do not necessarily depend on any natural or pre-legal entitlements. In this, it preserves – as I have argued – legal rationality, predictability, and stability. But, at the same time, legalism prevents confusing what's legally the case with what's morally the case in the opposite direction – which is, at least, a potential danger in non-conventionalist views, if adopted by legal officials and agents. Legalism avoids giving our contract and property rights more moral significance than they have. It recognizes the multiple ways in which the

78 Here I build upon ibid at 9.

79 See Postema, supra note 30 at 193.

legally defined rights might diverge from the demands of justice.[80] It deliberately leaves the question about private rights' moral standing open, for others to address.[81]

In summary, then, legalism is normatively austere. If adopted by legal agents, the latter would not see their task as concerned with the moral justification or moral force of private rights. In fact, legalism remains agnostic about these questions. It sees private rights as the rights that derive from the rules and institutions posited by the law in force in the jurisdiction, determined exclusively by reference to social facts (such as whether a statute was enacted in accordance with the constitutional procedures regulating such enactment, or whether a common law precedent has binding authority regarding a certain type of dispute), for the governance of private relations.[82] This is compatible with the investigation of the conditions under which these rules and institutions might generate genuine reasons for action, duties, and so on. But that inquiry is different from the perspective that lawyers and judges ought to adopt, which according to legalism is purely answered by positive law's rules and institutions. If adopted by judges and lawyers, legalism would entail that legal discourse around private rights would treat them as the creations of the complex set of conventions, practices, and shared understandings that constitute the valid law in any legal system. If we think there is something attractive about such a normatively austere understanding of the activities of legal agents in private law disputes, then legalism's austere character gives us too at least a *pro tanto* reason in favor of legalism.

IV *Private law legalism as a conceptual module*

If I am right that there are good reasons for judges and lawyers to adopt a legalist view of private rights, does this mean that legalism is true? The short answer is no – but I will also add that the truth of a concept is not the only consideration militating in favor of its adoption. I will flesh out this answer in this section, in order to clarify the status of the argument so far, and to explain how legalism acts as a 'conceptual module' to be adopted by judges and lawyers whatever we think is the ultimately true account of private rights, at the most fundamental level.[83]

80 In this aspect, legalism is connected to other views that highlight the indeterminacy of the demands of justice in private relationships. Legalism is also hospitable to, and compatible with, questions about the conditions under which the enforcement of legal rights might be morally permissible even if those rights diverge from the demands of ideal morality. For an excellent account that focuses on these two issues from a perspective that is closer to non-conventionalism, see Rebecca Stone, 'The Circumstances of Civil Recourse' (2021) 41:1 Law and Philosophy 39; Rebecca Stone, 'Private Liability without Wrongdoing' (2023) 73:1 University of Toronto Law Journal 53.

81 There is, again, a parallel between this aspect of legalism and the similarly austere conception of the normative significance of rules' legal status in legal positivism. See Hart, supra note 39 at 618.

82 Weber, supra note 47 at 641–644.

83 This framing of legalism as a conceptual module owes much to Rawls, supra note 59 at 12–13.

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A OPERATIVE AND FOUNDATIONAL CONCEPTS

It is common for legal philosophers to argue in favour of a specific concept of law, or of specific understandings of certain central legal concepts – such as *constitution*, *contract*, *property*, *torture*, or *reasonableness* – based on broadly normative considerations. There is, for instance, a long tradition of arguments in favour of the adoption of a positivist concept of law on the basis of moral considerations.[84] In special jurisprudence, Henry Smith and Thomas Merrill have argued for the benefits of recovering an *in rem* conception of property rights,[85] and they have explicitly argued for subjecting different concepts of property to comparative normative analysis.[86] Similarly, Thomas Nagel and Liam Murphy have argued against the dangers of an *everyday libertarian* conception of property rights.[87] Even seemingly descriptive questions – such as 'does the United States have an unwritten Constitution?' – commonly involve normative questions about the concepts we should adopt – in the example, whether it would be better to think of the United States Constitution as exclusively a written document or not.[88]

My argument in favour of legalism is, like these, an argument about conceptual ethics.[89] It is a prescription in favour of adopting legalism as (what I will characterize as) the *operative concept* of private rights. To clarify what I mean by an operative concept, I will distinguish them from *foundational concepts*. By an operative concept, I understand *the concept that governs or drives representational, discursive, and inferential practices regarding an object within a specific domain*. A foundational concept, on the other hand, is *the concept that fully captures the true nature or the constitutive features of the object*.[90]

84 See, e.g., Tom D Campbell, *The Legal Theory of Ethical Positivism* (New York: Routledge, 2016); Bruno Celano, 'Normative Legal Positivism, Neutrality, and the Rule of Law' in Jordi Ferrer Beltrán, José Juan Moreso & Diego M Papayannis, eds, *Neutrality and Theory of Law* (Dordrecht: Springer Netherlands, 2013) 175; Liam Murphy, 'Better to See Law This Way' (2008) 83 NYU L Rev 1088; Frederick Schauer, 'Normative Legal Positivism' in Patricia Mindus & Torben Spaak, eds, *The Cambridge Companion to Legal Positivism* (Cambridge: Cambridge University Press, 2021) 61; and other references supra note 38.

85 Thomas W Merrill & Henry E Smith, 'What Happened to Property in Law and Economics' (2001) 111 Yale Law Journal 357. For criticism, see Katrina Wyman, 'The New Essentialism in Property' (2017) 9:2 Journal of Legal Analysis 183.

86 See Thomas W Merrill & Henry E Smith, 'Making Coasean Property More Coasean' (2011) 54:S4 The Journal of Law and Economics S77.

87 Liam Murphy & Thomas Nagel, *The Myth of Ownership* (Oxford: Oxford University Press, 2002).

88 Michael S Moore, 'Do We Have an Unwritten Constitution?' (1989) 63:1 S Cal L Rev 107 at 107.

89 On conceptual ethics, see Alexis Burgess & David Plunkett, 'Conceptual Ethics I' (2013) 8:12 Philosophy Compass 1091.

90 There are other understandings of an 'operative concept' and their contrasting pairs in the philosophical literature (such as Sally Haslanger's opposition between operative and manifest concepts and Eugen Fink's distinction between operative and thematic concepts). My distinction has certain resemblances to these distinctions (and particularly to Fink's) but is not exactly the same. See Eugen Fink, 'Operative Concepts in Husserl's Phenomenology' in William McKenna, Robert M Harlan & Laurence E Winters, eds, *Apriori and World: European Contributions to Husserlian Phenomenology* (Dordrecht: Springer Netherlands, 1981) 56; Sally Haslanger, 'Ontology and Social Construction' (1995) 23:2 Philosophical Topics 95.

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Consider the concept *woman*. The foundational concept *woman* depends on multiple considerations that determine the constitutive features of a woman. Let me assume for the sake of argument that what is constitutive of being a woman is a cluster of different features that specific tokens of the kind satisfy to some extent and that are related to each other by a form of family resemblance.[91] This is, under the distinction offered above, the foundational concept of *woman*. At the same time, perhaps the operative concept of *woman* in American society in the 1950s was simply that of a 'biologically female human being.'

Specifically legal examples can also be imagined. The foundational concepts of *property* and *contract* might be such that property is, at the most fundamental level, a natural right to exclude, and contracts are promises. But whether the operative concepts of *property* and *contract* in the legal systems of 19th century England or 20th century Germany coincide with the foundational concept is a separate question.

Thus, questions about foundational concepts are questions about fit between the mental representation and the nature of the object or its constitutive features. The correct foundational concept will be whatever mental representation correctly captures the relevant features of the object. Questions about operative concepts, on the other hand, are questions about social fact, such as *what is the concept of* woman *in American society in 2022?* This is not to say that foundational concepts are entirely independent of social facts. Plausibly, the foundational concepts of social kinds, such as money, must be at least partly sensitive to social facts because social kinds are constitutively explained, at least in part, by human cognition and conceptual activities.[92]

Although operative concepts refer to the actual usages of individuals in specific social contexts, the questions one might ask about operative concepts are not exclusively descriptive in nature. For instance, we can ask normative questions about these operative concepts, such as what would be the best operative concept of an object, given certain normative considerations and operational constraints in a relevant domain. Under that type of argument, if things would go better if agent A adopted operative concept X, A should adopt operative concept X. The argument I have been offering is an argument that adopts, precisely, this type of structure.

Divergences between operative concepts and the foundational concept they ought to track might be a reason for moral criticism or legal reform.[93] However, within law, and in conditions of bedrock disagreement about the foundational concept, normative considerations – particularly, normative considerations that are significant in the legal domain – might argue in favour of the adoption of one or another operative concept by legal actors. Thus, given the fact of deep theoretical disagreement about the moral foundations of private rights and their status and content as pre-legal rights, normative considerations might

91 See Natalie Stoljar, 'Essence, Identity, and the Concept of Woman' (1995) 23:2 Philosophical Topics 261 at 282–283.

92 On social kinds, see Francesco Guala, 'On the Nature of Social Kinds' in Mattia Gallotti & John Michael, eds, *Perspectives on Social Ontology and Social Cognition* Studies in the Philosophy of Sociality (Dordrecht: Springer Netherlands, 2014) 57.

93 See, e.g., Shiffrin, supra note 15.

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argue in favour of the adoption of a specific operative concept (in this case, a legalist concept) for specific practical purposes – such as resolving private law disputes.

Thus, there are multiple possible relationships between foundational and operative concepts. The fact that operative concept X is adopted in a society does not necessarily settle questions about the foundational concept. And an argument in favour or against a specific operative concept leaves things relatively open regarding the (correct) foundational concept. Again, it might seem tempting to think that the opposite does not hold, and that the operative concept *must follow* the foundational concept. For instance, if we know the true foundational concept *woman*, the natural thought might seem to be that our actual inferential, linguistic, and conceptual practices – our operative concept, in my terms – should track the true foundational concept. This natural implication, however, neglects the existence of situations where even those with epistemic authority do not know – or at least, do not agree about – what the true foundational concept is. In these circumstances of disagreement between epistemic peers, the terrain is fertile for a conceptual prescription argument for an operative concept, particularly if the relevant notion has practical and moral significance. Such is precisely the case of *private rights*.

B A LIMITED FORM OF CONCEPTUAL PRESCRIPTION

This idea of conceptual prescription might seem somewhat puzzling, and this section will be an attempt to clarify it. The distinction between *is* and *ought* is pervasive and familiar.[94] According to this distinction, there is a demarcating line between descriptive statements like 'the sky is blue' and normative statements like 'killing is wrong.' A too crude approach to the distinction, however, might obscure the fact that normative discourse can also refer to the proper usage of concepts (including purely descriptive concepts) in thought and speech. In plain terms, we sometimes discuss whether we ought to understand a certain concept in one way or another. These claims are present in both everyday and philosophical discourse.[95]

That these claims are common should not be surprising. The concepts we have fix what we think, the beliefs we have and the hypotheses we entertain, as well as the ways in which we see social and political institutions.[96] Because of this, we can subject concepts to critical scrutiny and improve upon them,[97] and in fact a significant part of our deliberation in the public sphere involves discussion

94 Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Cambridge, MA: Harvard University Press, 2002) at 14–19.

95 Burgess & Plunkett, supra note 89 at 1091.

96 Ibid at 1096–1097. Similarly, Sally Haslanger, 'Going On, Not in the Same Way' in Alexis Burgess, Herman Cappelen & David Plunkett, eds, *Conceptual Engineering and Conceptual Ethics* (Oxford: Oxford University Press, 2020).

97 In the recent literature, this goes under the notion of 'conceptual engineering.' Herman Cappelen, 'Conceptual Engineering: The Master Argument' in Alexis Burgess, Herman Cappelen & David Plunkett, eds, *Conceptual Engineering and Conceptual Ethics* (Oxford: Oxford University Press, 2020) at 132. See also Alexis Burgess & David Plunkett, 'On the relation between conceptual engineering and conceptual ethics' (2020) 33:4 Ratio 281 at 282.

about how to understand and use certain concepts – such as *justice*, *human rights*, *democracy*, or *equality*.[98]

In fact, many seemingly normative disputes can be reinterpreted as disagreements about the use of concepts. For instance, the question 'is this object beautiful?' can be interpreted, in certain circumstances, as a question about the meaning that the concept *beautiful* should have.[99] In these cases, we ask normative questions about thought and speech, and in particular about concept use,[100] and we do so by discussing the appropriate concepts and usages.[101] The underlying intuition, again, is that the concepts that we use and how we use them have normative significance.[102] This is true of even descriptive (or, at least, not straightforwardly normative) concepts, like *woman*, *man*, or *knowledge*.[103]

The evaluation and improvement of concepts has been a traditional concern of philosophy.[104] It has also been a traditional concern of legal theory, as I have noted above. Still, the activity of conceptual prescription raises a question. To some, it might seem to suggest that it would be up to individuals to decide what to believe, and that the truth of a certain concept might be determined by the normative consequences of its adoption. If so, my argument for private law legalism might seem to involve a problematic form of wishful thinking.[105]

To my mind, this is a plausible concern when the question of conceptual ethics is interpreted as aimed at determining the truth of a concept. But that is patently not the case of the argument I have offered so far. This is shown, precisely, by the distinction between operative and foundational concepts. A normative argument about an operative concept is an argument in favor of certain agents, in a certain domain, adopting a specific concept for a specific practical purpose. In the case of private law legalism, the argument is that judges and lawyers involved in private law adjudication ought to adopt a legalist concept of the rights at stake in the resolution of private law disputes. As such, the argument remains deliberately agnostic about the foundational question about whether the nature of these rights is best explained in terms of conventionalism, non-conventionalism, or any other view. The argument, if successful, shows what concept of *private rights* legal agents ought to treat as appropriate to their activities – it remains purposefully silent about the true nature of those rights. In this way, private law legalism is a conceptual module that can coexist with different foundational views about private rights that recognize the fact of good faith moral disagreement about them.

98 Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011) at 157–158.

99 Burgess & Plunkett, supra note 89 at 1097. See also David Plunkett & Timothy Sundell, 'Dworkin's Interpretivism and the Pragmatics of Legal Disputes' (2013) 19:3 Legal Theory 242 at 262.

100 Plunkett & Sundell, supra note 99 at 247–248.

101 Ibid at 262.

102 Ibid at 265.

103 See Sally Haslanger, 'Gender and Race: (What) Are They? (What) Do We Want Them to Be?' (2000) 34:1 Noûs 31.

104 Matti Eklund, *Choosing Normative Concepts* (Oxford: Oxford University Press, 2017) at 194.

105 Alex Langlinais & Brian Leiter, 'The Methodology of Legal Philosophy' in Herman Cappelen, Tamar Szabo Gendler & John Hawthorne, eds, *The Oxford Handbook of Philosophical Methodology* (Oxford: Oxford University Press, 2016) 670 at 684. For a response, see Raff Donelson, 'The Pragmatist School in Analytic Jurisprudence' (2021) 31:1 Philosophical Issues 66.

C COMMON LAWYERS AND COMMON CITIZENS

This approach captures a familiar set of intuitions in our legal culture about the proper role of lawyers and judges, and about the degree to which their concerns are not the same concerns as those of the philosopher or theorist involved in the elucidation of the nature or justification of private rights. According to this familiar set of intuitions, it is at least not necessary for judges and lawyers to possess a worked-out theory about the nature and ultimate moral justification of private rights. While it is essential for judges and lawyers to understand how to resolve disputes and to do that on the basis of the relevant legal materials, they do not require a worked-out theory about the foundationally correct theory of the rights at stake in their activities.[106]

This is not to say that legalism is simply a theory of legal common sense. It is not. If legalism is right, the claim is not just that lawyers and judges do not need a fully articulated theoretical view about the nature of private rights, but more strongly that even if they had such a theory, it would be inappropriate for them to use it in the context of resolving private law disputes. They should *abstain* from referring to any foundational theories about the grounds of private rights and instead understand them as the mere creations of legal institutions.

In this aspect, legalism endorses a form of epistemic abstinence by judges and lawyers.[107] This form of epistemic abstinence is both possible and legitimate. It is possible because, by refraining from references to foundational theories about private rights and limiting themselves to questions of social fact, judges aren't simply pushing disagreement elsewhere. Instead, they are replacing it with a purely formal, positivistic approach to the resolution of private law disputes. Moreover, this form of epistemic abstinence is legitimate because it allows for moral evaluation, critique, and attempts at reform of private law and private rights. It simply denies that private law adjudication is the proper institutional setting for these activities, or that lawyers and judges are the appropriate actors to engage in them.[108] The task, instead, is better left for ordinary political and moral discourse.

D AN EXAMPLE: KANTIAN FOUNDATIONS, LEGALIST OPERATION

In order to give more content to the notion that private law legalism might act as a conceptual module, in this section I offer an example of the compatibility of a non-legalist foundational understanding of private rights with a legalist operative concept. For that purpose, I use the Kantian account of private law.

According to Kant, as we have seen, private rights can be understood as normative requirements that exist (even if provisionally) before the state, and arise out of the analysis of the conditions under which 'the choice of one can be united with the choice of another in accordance with a universal law of freedom.'[109]

106 As I argue in Jiménez, supra note 57.

107 I take the notion of epistemic abstinence from Joseph Raz, 'Facing Diversity: The Case of Epistemic Abstinence' (1990) 19:1 Philosophy & Public Affairs 3.

108 Here, I build on Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7:1 Int J Const Law 2.

109 Kant, supra note 17 at 56.

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Under this view, the state defines, regulates, and enforces private rights in order to avoid unilateral enforcement, which would be inconsistent with equal freedom.[110] Public institutions, such as courts, are not the basis but the consequence of private rights,[111] which in the state of nature have an abstract and provisional structure that makes their determination through impartial institutions necessary.[112] Legal institutions authoritatively determine and settle the content of private rights,[113] ensuring that each individual's freedom is consistent with everyone else's.[114] The value of legal institutions like the laws of property and contract, then, is that they allow for private interaction in conditions of equal freedom.[115]

The Kantian argument starts from two premises. First, human beings living together can only be free if they enjoy certain rights against each other (including rights to property and contract). Second, these rights can only be enjoyed as fully realized and definite rights in civil society.[116] Thus, the Kantian argument rejects the premises of both non-conventionalists and conventionalists.[117] Unlike the conventionalist, Kant thinks that private rights are not the mere creations of social practices.[118] Positive laws cannot infringe upon the private rights that we must assume as possible in the state of nature as provisionally rightful,[119] because private rights in the state of nature are precisely what makes civil society morally required.[120] Private rights are thus fundamental moral demands that set the questions that legal determination ought to answer.[121] But, unlike for non-conventionalists, for Kant, genuine private rights require civil society.[122] The reason for this is the provisional character of private rights in the state of nature, and particularly, the problems of indeterminacy and unilateral enforcement that characterize – not merely empirically, but necessarily – this situation.[123] In fact, for Kantian views the starting point for moral reflection about private rights is the already constituted juridical order.[124]

110 Ripstein, 'Private Order and Public Justice', supra note 18 at 1415.
111 Weinrib, supra note 19 at 195.
112 Ripstein, supra note 16 at 13.
113 See Höffe, supra note 21 at 180. See also Waldron, supra note 21 at 1553.
114 Ripstein, supra note 16 at 9.
115 Ibid at 14.
116 Hodgson, supra note 51 at 57, 63.
117 Martin Stone & Rafeeq Hasan, 'What is Provisional Right?' (unpublished manuscript), online: <https://cpb-us-w2.wpmucdn.com/wordpress.amherst.edu/dist/f/94/files/2021/10/Stone-and-Hasan-What-is-Provisional-Right-Philosophical-Review1.pdf> at 3.
118 Ripstein, supra note 16 at 87. See also Katharina Nieswandt, 'Do Rights Exist by Convention or by Nature?' (2016) 35:1 Topoi 313 at 313 note 1; Weinrib, supra note 19 at 195.
119 Kant, supra note 17 at 77–78.
120 Ibid at 124.
121 Martin Stone, 'Kant's Apparent Positivism' in Martin Stone, ed, *Freedom and Force: Essays on Kant's Legal Philosophy* (Oxford: Hart Publishing, 2017) 165 at 175.
122 Murphy, supra note 5 at 461–462.
123 Hodgson, supra note 51 at 64.
124 See Stone, supra note 52; Ernest J Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012).

There is a certain tension within this Kantian argument.[125] It seems to affirm both that private rights can only be morally valid once there are legal institutions *and* that private rights are not just the creatures of such institutions.[126] In the following sections, I will offer one way to resolve this tension. As I will argue, within private law adjudication in civil society, and subject to certain constraints, the foundational Kantian concept of right can legitimately lead to an operative concept of private rights as legal rights.

1 *'Rights'*

For Kant, as we have seen, private rights are not the mere creation of state institutions. Nevertheless, without such institutions, private rights are merely provisional. Private rights in the state of nature are provisional because their status as valid claims is unsettled in the absence of – and until there is – civil society.[127] The reason for this is that unilateral assertion of private rights in the state of nature is inconsistent with the equal freedom of all agents.[128] Only a civil society that represents an omnilateral will can ensure the consistency of private rights with equal freedom.[129]

This does not mean that *anything goes*. While there is space for different legal systems to legitimately structure private law in different ways, for Kant they are all responding to the same moral questions, set by the idea of private right, which can therefore serve as an evaluative benchmark for legal institutions.[130] Kantian formalism takes positive law's authority seriously, but only because and to the extent it sees it as the instantiation of an abstract notion of right.[131]

Still, as long as the relevant legal regime operates within this area of legitimate determination, the idea of private rights in the state of nature is precisely that, an *idea*. It is, like Rawls's original position, an 'expository device'[132] supposed to help us elucidate the deep moral structure of private law. What this means is that, in a civil society the law of which is consistent with abstract right (and presumably most, if not all, contemporary liberal common law and civil law systems would be within this group), legal private rights tend to efface, in the operation of legal institutions, whatever rights could be conceptualized in

125 See Katharina Nieswandt, 'Beyond Frontier Town: Do Early Modern Theories of Property Apply to Capitalist Economies?' (2019) 22:4 Ethical Theory and Moral Practice 909 at 920. See also Alan Ryan, *Property and Political Theory* (Oxford: Basil Blackwell, 1984) at 79–80; Stone, supra note 114 at 179.

126 David Dyzenhaus, 'Liberty and Legal Form' in Lisa Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford: Oxford Univerity Press, 2014) at 113; Hasan, supra note 51 at 852–853; Stone & Hasan, supra note 117 at 2.

127 Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence*, 2nd ed (Berkeley: University of California Press, 2017) at 70.

128 Patrick Capps & Julian Rivers, 'Kant's Concept of Law' (2018) 63:2 Am J Jurisprud 259 at 271–272.

129 See Ibid at 268.

130 See, e.g., Ripstein, supra note 16 at 86; Weinrib, supra note 124 at 225–226.

131 Dan Priel, 'Two Forms of Formalism' in Andrew Robertson & James Goudkamp, eds, *Form and Substance in the Law of Obligations* (Oxford: Hart Publishing, 2019) 165 at 168.

132 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at 21.

a provisional manner in the state of nature.[133] Private right in a civil condition is the full realization of the *idea* of rights that, in the state of nature, is merely provisional.[134]

Thus, as long as the positive law does not stray from the abstract limits set by provisional rights, individuals' actual private rights within private law disputes are to be settled by positive law. In this way, the Kantian view ends up committed to a view of the operation of lawyers and judges in private law disputes that closely resembles legalism. Thus, the Kantian can be committed to a legalist operative concept as a module that is consistent with their foundational understanding of abstract private rights in the state of nature.

2 *Equal freedom, legality, and private rights*

This argument is not, of course, a fully faithful interpretation of Kant.[135] But note that all that we need is to show how a Kantian view of private rights at the foundational level might lead one to accept legalism or something very much like it as the operative concept of private rights within private law adjudication.

In fact, this path from Kantian foundations to private law legalism is consistent with the Kantian commitment to equal freedom. That commitment is incompatible with any individual having the authority to enforce private rights in the state of nature. Only public state institutions can permissibly enforce private rights, because only such institutions can do so in a way that is consistent with every individual's freedom.[136] For people to fully realize their equal freedom, then, a legal system authoritatively determining their rights is necessary.[137] Because of this, a judge or lawyer determining agents' private rights by reference to extra-legal standards they happen to accept is a potential threat to this civil condition. These agents ought to answer the specific questions about the structure and determinate content of private rights only by reference to the actions and decisions of legal institutions, independently of anyone's (including lawyers' and judges') foundational views about the nature and ultimate justification of private rights.

Again, this does not mean that Kantians are legalists. Kant holds that the specific questions answered by legal institutions are all derived from a more

133 Brudner, supra note 127 at 72–75.

134 Stone & Hasan, supra note 117.

135 For instance, Kant associates important specific implications to his general doctrine of right. I have emphasized the indeterminacy of abstract right in ways that seems at odds with these fairly specific implications that Kant derived from it. Again, however, all I am trying to do here is to show how Kantian premises *can be* compatible with a legalist operative concept – not that, as an exegetical matter, this would be a plausible interpretation of Kant. Still, as a matter of substance, it is interesting to note that Kant's specific derivations of abstract right track closely the language, concept, and rules of the private law he was familiar with. It is not clear to me whether such specific derivations would have been possible for Kant (or for any other thinker, for that matter) without the aid of legal institutions and their own determinations. Noting this issue in general terms, see Nicholas McBride, 'Are There Any Moral Duties?' in Haris Psarras and Sandy Steel, eds, *Private Law and Practical Reason: Essays on John Gardner's Private Law Theory* (Oxford: Oxford University Press, 2023) 43.

136 Hodgson, supra note 51 at 58.

137 Sari Kisilevsky, 'Kant's Juridical Conception of Freedom as Independence' (2016) 29 Studi Kantiani 41 at 44.

general, distinctive question that morality demands an answer to, and which explains the need for legal institutions.[138] My more limited claim is that, in the context of an already constituted civil condition that does not run afoul of the demands of abstract right, Kantian premises can very well lead us to the claim that judges and lawyers ought to adopt a legalist operative concept of private rights.

3 *Just an example*

Finally, note that the path I have described from Kantian foundations to a legalist operative concept of private rights is not unique. It is only an example. I believe similar arguments for the adoption of legalism as a conceptual module can be made from other starting points.

For instance, a utilitarian conventionalist can very well endorse the adoption of a legalist conception of private rights, under which judges and lawyers should not appeal directly to foundational questions about utility. The best example is Bentham, who both held the foundational view that utilitarianism determines questions about political morality and that it is appropriate for judges to decide disputes by reference to the rules of positive law, including rules that affirm and enforce rights to property and contract.[139]

Similarly, a plausible non-conventionalist position that affirms the existence of pre-legal rights to property and contract should in principle be always willing to distinguish between the truth about our rights and the legal system's imperfect approximation to those rights.[140] At the same time, non-conventionalists can very well accept that judges and lawyers should not be empowered to go against settled legal rules and doctrines by appeal to non-conventional rights, and that instead they should see the rights they ought to enforce as those exclusively generated by the actions and decisions of legal institutions.[141] Of course, non-conventionalists are not *required* to adopt such a view. They might argue that it is appropriate for judges to attempt, in Herculean fashion, to genuinely capture the non-conventional rights of the parties. In my view, they would be mistaken to think as much, given the argument I have provided in Part II above. But all I have attempted to show in this section is that private law legalism can legitimately act as a conceptual module for different foundational views. If my argument in Part II is right, it also should.

V *Objections*

There are multiple objections that can be raised against private law legalism. In this section, I address some of these objections. This will allow me to show why they do not affect the plausibility of legalism, and to clarify the argument so far.

138 See Stone, supra note 121 at 174.
139 See Postema, supra note 30 at 193.
140 See, e.g., Shiffrin, supra note 15.
141 At a more general level, see Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123 The Yale Law Journal 1288.

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A WHAT IF LEGALISM IS FALSE?

My distinction between foundational and operative concepts suggests that the operative concepts that we ought to adopt might be inconsistent with the true foundational concept. My argument seems to suggest judges and lawyers should treat legalism as true, operationally, even if it is false at the foundational level – for instance, because there are in fact natural private rights.

Certainly, the fact that legalism would make things go better is irrelevant for its truth.[142] In line with this, my argument has not been that legalism is true but rather that it should be adopted by specific agents (lawyers and judges) for a specific purpose (resolving private law disputes). The objection, thus, seems to be based on the premise that the question about what operative concept legal agents should adopt should always be answered by reference to the foundational concept. Thus, these agents should adopt whatever concept of private rights coincides with the true nature or the constitutive features of private rights. The foundational truth might very well be that the private rights enforced in courts are in fact grounded in pre-legal rights, for instance. In such circumstances, under my argument judges and lawyers should adopt an operative concept that is false.

The problem is that we simply do not know what concept of private rights is foundationally true. Epistemic peers disagree about this question – and have disagreed about it for as long as philosophical reflection about private rights has existed. I am not particularly hopeful that this disagreement will be resolved. In the meantime, how legal agents understand private rights (i.e., their operative concept of private rights) is practically significant. In these circumstances, it seems to me that asking a separate question about which operative concept legal agents ought to adopt, whatever the answer might be to the question about the foundational concept, is not illegitimate. The question of conceptual ethics is a concrete practical question about how legal agents ought to think about private rights within private law disputes. Those who want to engage the foundational question are doing something perfectly legitimate, but distinct from my question – which is how judges and lawyers should think about private rights and private law disputes, whatever the foundational truth about private rights might be.

This certainly means that, in the abstract, the operational concept might deny what the true foundational concept of private rights affirms. However, we ought to recall here that legalism about private rights is a conceptual module that remains deliberately agnostic about the ultimate foundational truth about private rights. It is only a view that lawyers and judges ought to adopt in the context of private law disputes. It does not actively endorse a potentially false view, but simply rejects the relevance of the foundational truth about private rights within its domain of application.

B THE PRIMACY OF JUSTICE

Non-conventionalists might still be concerned. Perhaps legalism does not require judges and lawyers to deliberately adopt a false view. But it does seem to

142 Donelson, supra note 105 at 11.

suggest that, if non-conventionalism were foundationally true, the demands of justice (as specified by non-conventionalism) should yield to the values of the rule of law and to the normative austerity of legalism. Instead, the non-conventionalist might want to argue that the demands of justice should not disappear from the sight of judges and lawyers. I respond to this objection in the following sub-sections.

1 *Between ideology and anarchy*

What is the rhetorical function of pre-legal right claims within private law adjudication? The intuitive response, it seems to me, is that there are two possibilities: either the legalistically determined rights coincide with natural rights, in which case natural rights arguments provide a moral justification, or the two diverge, in which case natural rights are asserted in opposition or contrast to legalistically determined rights.[143]

In the first type of situation, non-conventionalism risks becoming an ideology. The reason, to my mind at least, is relatively straightforward: given the historical contingency of our practices of private law and the relative economic injustice that characterizes most societies, it is at least highly unlikely that the rights protected by them would perfectly coincide with the demands of pre-legal morality. In these circumstances, any claim that legally protected rights coincide with natural rights seems dubious, and unlikely to be true. In this case, the non-conventionalist lawyer or judge is at a significant risk of giving legal institutions – and, thus, their own activities – an unwarranted claim to justice.

What about critical claims of pre-legal right, made because the latter diverge from the legally protected rights? In order to answer this question, let me focus on the libertarian version of non-conventionalism. The libertarian tradition is usually contrasted with, and opposed to, liberal egalitarianism.[144] But we should remember that libertarians who believe in the legitimacy of the minimal state are also engaged in debates with anarchists who share their same premises, but believe that any state, including the minimal state, would violate natural rights or lack legitimate authority.[145] Many theorists have observed, rightly, that the libertarian view of private rights as natural, determinate, enforceable entitlements that precede the state is, at least in principle, at odds with robust forms of democratic governance.[146] But libertarian premises can lead one to question whether *any* state could be justified.[147] That's why libertarians are concerned with showing,

143 See Bentham, supra note 28 at 52.

144 See, e.g., Samuel Freeman, 'Illiberal Libertarians: Why Libertarianism Is Not a Liberal View' (2001) 30:2 Philosophy & Public Affairs 105.

145 See Fabian Wendt, 'Political Authority and the Minimal State' (2016) 42:1 Social Theory and Practice 97.

146 See Richard J Arneson, 'Democracy Versus Libertarianism' in Jason Brennan, Bas van der Vossen & David Schmidtz, eds, *The Routledge Handbook of Libertarianism* (New York: Routledge, 2017).

147 See, e.g., Gerard Casey, *Libertarian Anarchy: Against the State* (London: Bloomsbury Publishing, 2012). As Levy notes, '[i]n Britain, the Lockean ideas that did so much to legitimize the Glorious Revolution became gradually less central to Whig proto-liberal thought over the

against anarchists, that a minimal state could be justified,[148] and why that worry is plausible. The obvious way out of this for the libertarian is, in my view, to accept a form of the Kantian path to legalism: while at the most fundamental level private rights might be morally explained without any recourse to state institutions, the only genuinely enforceable and binding private rights in private law adjudication are those authoritatively settled by public institutions.[149]

Still, many non-conventionalists are not libertarians. So, how would the argument so far apply to a critique based on weaker and perhaps more plausible form of non-conventionalism? Let me take Seana Shiffrin's critique of American contract law as an example. In that critique, Shiffrin mentions three instances of potentially problematic divergences between contract law and promissory morality: the general unavailability of specific performance, mitigation, and the legal status of punitive and liquidated damages.[150] Let me focus on mitigation.[151] Shiffrin writes:

> It is morally distasteful to expect the promisee to do work that could be done by the promisor when the occasion for the work is the promisor's own wrongdoing. That expectation is especially distasteful when its rationale is that it makes the promisor's wrongdoing easier, simpler, more convenient, or less costly.[152]

Let us assume that Shiffrin is right and that it is, in fact, morally troublesome to expect promisees to make efforts to avoid losses that are the consequence of the promisor's breach, and that the promisee's moral right should lead – in cases of breach – to compensation that includes avoidable losses. Let us assume, moreover, that there is no distinctive legal argument that might justify the divergence between this moral judgment and contract doctrine. What would happen if lawyers started making this argument in litigation, and judges were persuaded by it? It would probably mean that the law on mitigation would change through the activities of lawyers and judges. There is nothing morally outrageous about such change. There is, however, a significant cost in terms of certainty and predictability. Instead of large-scale, destabilizing anarchy, this weaker non-conventionalism, when successful in its critique and adopted by lawyers and judges, generates small pockets of doctrinal uncertainty, hampering law's ability to guide behavior and

course of the eighteenth century. This was of course in part because the decades of Whig ascendancy in government discouraged Whig interest in revolutionary principles.' Jacob T Levy, 'Toward a Non-Lockean Libertarianism' in Jason Brennan, Bas van der Vossen & David Schmidtz, eds, *The Routledge Handbook of Libertarianism* (New York: Routledge, 2017) at 23.

148 See, e.g., Nozick, supra note 13.

149 Making a suggestion along these lines, Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge: Cambridge University Press, 2012) at 40–41.

150 Shiffrin, supra note 15.

151 Under the doctrine of mitigation, promisees are not entitled to recover damages for losses they could have avoided without undue burden. See American Law Institute, Restatement (Second) Of Contracts (1981), §350.

152 Shiffrin, supra note 15 at 725.

to reliably determine the contours of our rights. The non-conventionalist might reply again that justice should never be sacrificed in the name of these more prosaic values. At this point, it is hard for me to see why something so morally significant is at stake in the doctrine of mitigation that we should want judges or lawyers to see themselves as tasked with the determination of our pre-legal rights, with the associated costs. Natural rights arguments regarding the adjudication of issues like torture, the death penalty, and religious freedom are probably worth the costs of uncertainty they generate. The cost-benefit calculus seems to be radically different regarding the more prosaic questions addressed by private law doctrine in general, even if the possibility of moral argument in both domains generates equal costs in terms of uncertainty and unpredictability.

2 *Justice, realism, and the first political question*

This line of argument might seem dangerously close to a morally dubious form of advocacy in favor of quietism in private law adjudication, according to which lawyers and judges should never question the legal *status quo* on the basis of concerns about justice. To that extent, it might seem like an argument we ought to reject.

One problem here is that the justice of legal institutions is not the first or even the most important question one might ask about them.[153] There is also another at least equally important question – Bernard Williams called it the first political question – about the conditions under which a political community can secure order, stability, trust, and the conditions of social cooperation.[154] This question is *first* in the sense that it is *prior* to questions about justice. A legalist view of private rights is valuable from the perspective of these issues of stability, order, and cooperation, because it underscores those advantages in private law reasoning, even when the legally protected entitlements do not coincide with (a specific lawyer or judge's view about) the demands of pre-legal morality.[155] Positive law offers a public shared standard for deciding private law disputes, against the private standards to which any individual judge or lawyer might be committed.[156]

Legalism is compatible with the moral evaluation and political contestation of the legally constituted private rights. It merely rejects the notion that this political contestation is part of the determination of their content in private law adjudication, or that judges and lawyers involved in it should engage in political contestation. On this view, there are appropriate venues and agents who can engage in the moral evaluation and political contestation of positive law. Private law adjudication is not, if private law legalism is right, the appropriate site for those inquiries – and lawyers and judges are not the appropriate agents to engage in it, at least when acting as such. Citizens engaging in public debate,

153 Against Rawls, supra note 132 at 3.

154 Bernard Williams, 'Realism and Moralism in Political Theory' in Geoffrey Hawthorn, ed, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton: Princeton University Press, 2005) 1 at 3.

155 Lindsay, supra note 76 at 11–12.

156 This argument echoes Bentham's critique of the common law. See Postema, supra note 30 at 264.

moral and political philosophers engaged in normative evaluation, and legislators deliberating about how to modify the law might be the appropriate agents for these critical tasks.[157] But private law adjudication, according to my argument, ought to authoritatively settle our disagreements about rights in compliance with the rule of law. Note again that disagreement about the content of our private rights is not just a regrettable epistemic limitation, but a characteristic feature of the circumstances in which questions about what deeds we owe to others and what things we can exclusively possess arise and need to be resolved.[158] In these conditions, the central question about the operative concept of private rights in the context of private law adjudication is not which concept fits an ideal conception of pre-legal justice, but which one is best suited for dealing with the precise practical problems that the resolution of private law disputes must deal with.

3 *Private law adjudication and the determination of private rights*

For those who adopt legalism, legal institutions are not supposed to mirror an already existing, independently determinate moral template.[159] For them, legal institutions do not attempt to reveal or ascertain the structure of morality or of natural rights – and are not answerable to conceptions about the latter within the adjudicative domain. The legalist thus rejects a picture of adjudicative procedures as a case of what Rawls called 'imperfect procedural justice': an imperfect procedure to reach an outcome that we can, in principle, determine independently of the procedure.[160] Such a view would rest on a historically dubious optimism, given the actual practice of natural right arguments in specific legal systems.[161]

Private law adjudication, from this perspective, can only resolve conflicts about private entitlement in an impartial and principled way if the determination of the content of private rights avoids replicating our first-order moral disagreements.[162] In other words, legalism rejects the idea that moral truths about private rights can be determined outside, and brought to bear on, private law adjudication. Instead, it advises lawyers and judges to see their task as the humbler elaboration of a distinctively legal form of dispute resolution, and to leave the more ambitious questions about the justice, moral legitimacy, or ultimate justification of the relevant rights to be addressed in other contexts. For

157 In this regard, my argument bears some resemblances to traditional separation-of-powers style arguments: it claims that some tasks are not within the appropriate jurisdiction of judicial institutions and officials that act within them. At the same time, my argument is not a general claim applicable to all areas of law, or a general argument about the structure of judicial power as such, but a more restricted argument about the appropriate conception of private rights in the context of private law adjudication.

158 At a more general level, Jacob T Levy, 'There is no such Thing as Ideal Theory' (2016) 33:1–2 Social Philosophy and Policy 312 at 332.

159 Ripstein, supra note 16 at 224.

160 Rawls, supra note 132 at 86. For an application in contract law, see Aditi Bagchi, 'Contract as Procedural Justice' (2016) 7:1 Jurisprudence 1–38.

161 See Stuart Banner, *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped* (Oxford: Oxford University Press, 2021) at 137, 162.

162 At a more general level, see Steven Kautz, 'Liberty, Justice, and the Rule of Law' (1999) 11:2 Yale JL & Human 435 at 467.

instance, regarding the question of whether an oral commitment not reflected in the parties' written agreement, legalist judges and lawyers would not answer by asking themselves what the best determination of the parties' pre-legal rights and obligations is. Instead, legalist judges and lawyers would follow the rules of the relevant jurisdiction: in California, they would apply a soft parol evidence rule; in New York, they would apply a hard parol evidence rule.[163] Thus, for legalism, private law adjudication ought to be seen as independent, in its operation, from the ultimate or all things considered justification of its outcomes.

Does this mean that legalism should also lead us to something like a continental civil law regime with codification? Is legalism an argument against the common law? The answer is a resounding no. Legalism can find its home in both types of legal traditions, because it is not an argument about institutional design but about the operative concepts that agents already acting within them ought to adopt. Legalism is certainly *Benthamite* in orientation – it is not sympathetic to the idea of judges as Herculean philosophers writing a chain novel. It does not deny that, in the past, common law judges might have innovated and developed the law, sometimes in ways at odds with the tenets of legalism. It simply rejects the idea that, here and now, judges and lawyers ought to engage in first-order moral reasoning about private rights.

C OPERATIONALIZING JUSTICE

None of this means that lawyers and judges should not care about the justice of the institutions they act within and of the private rights they are involved in enforcing and defending. Instead, the notion simply insists on the relevance of distinguishing between substantive standards of correctness and decision protocols.[164] There is nothing problematic or morally illegitimate about discussing the moral foundations of legally protected private rights, their (potential) justification, and their moral evaluation. But these activities should be separated, according to legalism, from the determination of their content. What something is and the process we use to identify it in practice are two different things.[165]

Thus, non-conventionalists can have their cake and eat it too. They can hold a non-conventionalist view about the foundational concept of private right even if I am right about the case for legalism as an operative concept. We can continue to discuss everything that the non-conventionalist believes is true about our private rights without letting this debate bleed into the practice of private law adjudication.

163 On the distinction between soft and hard parol evidence rules, see Peter Linzer, 'The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule' (2002) 71:3 Fordham L Rev 799 at 807; Eric A Posner, 'The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation' (1998) 146:2 University of Pennsylvania Law Review 533 at 538.

164 On the distinction, see R Eugene Bales, 'Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedure?' (1971) 8:3 American Philosophical Quarterly 257–265. For an application to constitutional law, see Stephen E Sachs, 'Originalism: Standard and Procedure' (2022) 135:3 Harvard Law Review 777.

165 Sachs, supra note 164 at 4.

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At this point, some might want to argue in favor of the virtues of a non-conventionalist account of private rights as an operative concept. They might claim, for instance, that the virtues of judges and lawyers seeing themselves as pursuing the ascertainment of our pre-legal rights outweigh whatever virtues legalism might have. The problem here is that non-conventionalism lacks the simplicity and administrability of legalism. The non-conventionalist view is indeterminate and invites disagreement. What the right account of our natural rights is – what the standard of correctness ought to be – is itself disputed, subject to controversy, and unclear. Non-conventionalists offer a family of such responses, but even what one of such theories means is itself a disputed question – consider, for instance, the multiple interpretive disagreements about Locke's theory of private property.[166] It's not just that we disagree about whether non-conventionalism is true – non-conventionalists disagree about what our pre-legal rights are and what they would entail for actual legal institutions. We certainly disagree about legalism as a foundational concept of private right – but, if adopted as an operative concept, it has a clear advantage in terms of certainty and predictability.

Something similar might be said about those conventionalists who would want judges and lawyers to concern themselves directly with questions about social expediency, welfare, efficiency, or some such: standards that ask judges to achieve those effects directly are unpredictable in their application, hard to administer, and so on. Consider, for instance, the long and still unresolved debate about the optimal remedy for breach of contract.[167] Here, just like in the case of non-conventionalism, legalism has a clear advantage: it can give us administrable, clearly determinable answers in the context of private law disputes.

Again, there are some domains where the moral calculus might be different, and the threat of uncertainty and instability might be worth the price. It seems highly dubious why questions like when a contract is formed, or what the measure of damages for breach should be, would reach that level of normative significance.

VI *Conclusion*

A short summary of my main arguments is in order. There is a long philosophical tradition discussing the nature of private rights. The usual interpretation of these views sees them as an answer to the question about the nature of private rights. But, as I argue, we can also ask questions about the best way for legal agents to think about private rights. This, as I have explained, is a question about the ethics of operative concepts. I have also argued we have good reasons to want judges and lawyers to adopt a legalist operative concept of private rights. According to that argument, lawyers and judges should think of private rights as the legal rights produced by the decisions and actions of legal institutions, as reflected in

166 See, e.g., Jeremy Waldron, 'Locke, Tully, and the Regulation of Property' (1984) 32:1 Political Studies 98.

167 See Eric A Posner, 'Economic Analysis of Contract Law after Three Decades: Success or Failure' (2002) 112 Yale LJ 829 at 834–839.

positive law. The reasons for this are connected to the virtues of legal rationality, predictability, and stability, as well as normative austerity. I have also argued that different views about the foundational concept of private rights can endorse, in virtue of their own commitments, something very much like legalism, or incorporating many strongly legalistic elements, as an adequate conceptual module–at least in the circumstances of contemporary liberal legal regimes.

My view is that some version of conventionalism is, at the most fundamental level, true – in other words, that conventionalism is the foundationally true concept of private rights. The notion of right can only arise out of a peculiar combination of historical, intellectual, and social factors, and the existence of particular rights depends on the existence of particular social institutions and practices.[168] Here, however, I have made a more modest argument about why, even though we disagree about the most basic explanation for private rights, we have powerful reasons to want lawyers and judges to adopt a specific version of conventionalism about private rights – private law legalism.

168 Alasdair MacIntyre, *After Virtue*, 3rd ed (Notre Dame: University of Notre Dame Press, 2007) at 67–69.

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