Law and the Moral Dynamics of Collective Action

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Many moral demands on social groups cannot be met without cooperation among group members. In some cases, individual action does not advance the collective moral interest at all without some threshold level of cooperation by other group members. Is an individual required to act as if others will cooperate even if she knows that they will not? This Article argues that individuals may take into account the reality of pervasive noncooperation and decline to attempt cooperation. Only ex ante mandatory rules can solve moral collective action problems. In a political community, those rules are public law.

The most compelling argument in favor of recognizing individual duties to attempt cooperation is that we may not predict that other people will fail to comply with their moral duties. A variety of legal rules reveal discomfort with such "agent predictions" in the context of criminal law, tort law, and First Amendment law. This Article will show, however, that legal shifts in several doctrinal areas, especially tort law, not only tolerate but, in some cases, appear to require that individuals make agent predictions. This trend is consistent with contemporary thinking about how people relate to contingent features of our environment. This Article will parse out permissible and impermissible agent predictions.

The agent predictions at issue in moral collective action problems are usually permissible. This Article articulates and defends a "no-martyr principle" that denies a duty to (attempt to) contribute to collective endeavors that are futile in the light of sound agent predictions. While such conduct is virtuous, it is not compulsory. Private law rules (in tort and contract law) largely respect the no-martyr principle. This Article shows how public law gets

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around it and why we should use mandatory rules issued by the state rather than moral exhortation of individuals to solve moral collective action problems.

I. INTRODUCTION

A group of three-year-olds is told that if they form a line by 1:00 p.m., they will be taken to the playground for recess. Although all the children would rather play on the playground than in the classroom, most of them run around the room. You are a sober and precocious child in their midst. It is apparent that your class will not go to the playground. Should you stand quietly in a position that could be part of a line should others care to form one?

No, you should not. The rational course is to maximize your fun given the facts as you find them—unless you have the means to solve the collective action problem. What if the collective ambition is not fun but moral compliance? Instead of forming a line for recess, imagine a community of adults understands that only if at least a quarter of them march in protest of an unjust regime can they expect the government to alter its course. Assume for now that you *know* that there will be no change in governance unless the 25 percent threshold is met, and you are confident that it will not be met. Do you have a duty to march? Put aside certain reasons that you might have for marching such as interests in self-expression and solidarity. Must you march *in order to bring down the unjust regime*? Like the sober preschooler, you lack the capacity to bring about the desired end. Your action will make no difference to the collective outcome. The outcome in this scenario, however, is a collective wrong, not merely a collective disappointment.

I will argue that you have no duty to march on these facts. More generally, we have no duty to perform actions in service of collective ends when we know our individual actions will be futile.[1] The collective duty to promote justice, or avert the course of an unjust regime, does not evaporate in the face of collective inaction. It often generates reasons to do something different, something more fruitful. But a collective duty cannot ground an individual duty to act if individual action will not contribute to fulfillment of the underlying collective

[1] This Article does not address the question of how much we should contribute when we can make an individual difference to the collective end. *Cf.* Liam B. Murphy, *The Demands of Beneficence*, 22 PHIL. & PUB. AFFS. 267 (1993). I explore here only the scenario where compliance by numerous people is required to meet moral demands on the collective, and individuals cannot make a difference without a threshold level of compliance by others.

duty, even if that action would have been the optimal course had others cooperated. The content of our moral duties turns on facts as we find them. Some of those facts justify beliefs about how other people will behave. I will argue that we are entitled to make sound predictions about whether the people around us will comply with moral duties, and especially whether the people around us will conform to a rule of conduct that would secure a collectively desired end. Unruly preschoolers and unduly passive citizens are both facts for purposes of individual deliberation.

The same principle is at work outside the grand stage of politics. An employee may not be obligated to resign in protest when her employer engages in some act of discrimination or fires another employee for expressing irritation with her boss, and the act is not illegal under current law. It might be that mass employee departures would turn heads but resigning alone will change nothing. The employee's reason for leaving will be filed away and discarded when files are cleared after five years. It will not help the mistreated employee nor prevent the company from mistreating others. She might choose to resign nevertheless in order to show her disapproval to friends and family.[2] She might choose to resign to show solidarity with the mistreated employee or because she does not want to work at a company that treats its employees badly. But it is not a matter of keeping her conscience clear because she has no *duty* to resign.

In a still smaller way, a person that realizes her neighborhood listserv is racist might not be required to unsubscribe from it. The listserv might be racist because of how it sorts and screens emails or the advice that is found there.[3] But if the person observes that most of the people on the listserv are happy with it and she consistently gets a confused or hostile reaction when she raises her concerns in private conversation with its members, she may have no reasonable expectation that the listserv will change because she resigns. Maybe there are other actions she can take, like publicizing the racist nature of the group and starting an alternative group. But maybe she cannot because she has agreed to confidentiality, or because disclosure would

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[2] One might have special reason to disassociate from others through even ineffectual protest if it is necessary to correct previous actions or social assumptions that would associate one with the wrongdoers. Thomas E. Hill, Jr., *Symbolic Protest and Calculated Silence*, 9 PHIL. & PUB. AFFS. 83, 90–92 (1979).

[3] This hypothetical is loosely inspired by Taylor Lorenz, *Upper East Side Mom Group Implodes Over Accusations of Racism and Censorship*, N.Y. TIMES (June 9, 2020), https://www.nytimes.com/2020/06/09/style/ues-mommas-facebook-group-racism-censorship.html.

violate duties of loyalty to particular members, or because too few people in the neighborhood would join the alternative group. If leaving the group alone cannot be expected to effectuate any change, the person is not *obligated* to unsubscribe and forego its informational benefits.

This is not an easy conclusion at which to arrive. Even if we agree in principle that we cannot be required to try if we are bound to fail (on which, in fact, we will not all agree[4]), we might not agree on whether we can ever "know" that attempting to contribute to collective action is futile. It requires predicting that fellow citizens will not march; co-workers will not resign; neighbors will not unsubscribe. Few of us might directly take the position that we can never predict the behavior of others, but there are strong philosophical arguments in favor of refraining from *acting* on such predictions.

Our collective moral uncertainty on these questions is reflected in law. There are some doctrines that seem to entitle us to act as if we have no idea what others will do—doctrines that would seem to protect speech that promotes violence, or tort doctrines that protect manufacturers of dangerous goods, or those who provide prospective drivers with excess alcohol. While many of these doctrines have come under pressure and some have been revised in recent years, there remains a strong resistance to requiring people to act as if they know what other people will do. Indeed, there are places in the law—especially criminal law—where we are rightly and fiercely committed to the assumption that the future conduct of others is unknowable. Nevertheless, I will suggest in Part II that we are increasingly unwilling to categorically deny the predictability of other people in the context of moral deliberation. At issue is not whether we may *ever* predict what other people will do, as when choosing to walk on the left or right side of the sidewalk. My question is whether our *duties* to others depend on those predictions and, in particular, whether such predictions can lighten our duties to others. What I will call *agent predictions* are sometimes appropriate, and sometimes not.

Once I have shown that we are entitled, under certain conditions, to take into account sound predictions about the behavior of other agents, in the remainder of Part II, I will defend a *no-martyr principle* that denies a categorical duty to act according to a maxim that would be desirable if, and only if, others abide by it when we know that others will not. There is no general rule that actions are only required if they

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[4] *See infra* notes 58–62 and accompanying text.

"make a difference." We are obligated to tell the truth and keep our promises, for example, even if truth-telling or promise-keeping in a given case does not achieve anything tangible. Telling the truth and keeping promises are morally valuable in themselves.[5] But the individual duty of cooperation to advance a collective moral objective is a derivative duty—it operates in service of a collective duty. So, unlike other duties, including the duty of fair play,[6] an individual duty to serve collective justice depends on the prospects for making a difference.

The no-martyr principle is a moral principle, but it finds traction in several doctrines of common law-private law. Most fundamentally, defendants are usually only liable for the actual harms they have caused. Hypothetical injuries that might have flowed from their actions in other states of the world are not enough. The defendant's conduct must usually have been a but-for cause of the plaintiff's injury in order for the defendant to be held responsible.[7] More specific doctrines illustrate the principle at work in the weeds. Our obligations to perform in contract are dependent on performance by the other party, where the other party's performance is due first. Even where we are to perform first, we do not have to if we have reasonable basis to doubt the other will perform when her performance is due and she does not provide adequate assurance that she will. In tort, courts are reluctant to hold individuals *were* subject to standards of conduct to which others have not adhered, even if such a standard might be a good idea going forward—sometimes a frustrating position from the

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[5] Truth-telling and promise-keeping are morally mandatory independent of their consequences on a deontological view. My point here is that even on a deontological view, consequences matter to recognition of an individual duty that is derivative of a collective one, because the individual duty serves the collective one by virtue of what the individual contributes to the collective enterprise. By contrast, consequences will always matter to consequentialists. For an overview of the debate between consequentialists and deontologists, see SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM 146–47 (1982).

[6] The duty of fair play provides that "when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission." H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 185 (1955).

[7] Smith v. Steelcase, Inc., No. 223892, 2001 WL 1545992, at *2 (Mich. Ct. App. Nov. 30, 2001) (quoting Skinner v. Square D Co., 516 N.W.2d 475, 479 (Mich. 1994)) ("The cause in fact element generally requires a showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred.").

standpoint of legal progress.[8] Even under the common law, where we openly authorize them to make law, judges are reluctant to create obligations that apply retroactively; they aim instead to tether any new legal norms in existing doctrinal lines and existing social expectations.

The no-martyr principle is both animated and constrained by the more foundational principle of equality, which I explore in Part III. On the one hand, I will show that rejecting the no-martyr principle, especially in law, unfairly imposes heightened obligations on an arbitrary few. On the other hand, I will argue that we are only entitled to incorporate predictions about the conduct of others into our practical reasoning when our predictions comply with an equality constraint. We can only predict the behavior of other people when our prediction does not turn on any particular characteristic of those persons but applies equally to all persons. The more generalized the assumption we make about human behavior, the more permissible to act on the basis of that assumption. So, we can assume that many people will drive over the speed limit when we regulate the highways, but neither individuals nor the state may act on any predictions about what kinds of people will do this at a higher rate than others.

Even when agent predictions are subject to the equality constraint, from the standpoint of justice, they are devastating. That is, justice is not possible, or at least substantially less likely, if everyone acts in the way I will argue they are entitled to do.[9] I will grapple with these implications in Part IV. First, we should distinguish between what is morally required and what is morally commendable. We have the resources to understand why acting in the way that everyone should—even when they will not—is virtuous without characterizing that conduct as morally compulsory. Thus, there is a limit to the analogy between the protestors and the preschoolers. The preschooler who stands quietly in the hypothetical line is foolish; the protestor who marches, notwithstanding apparent futility, is virtuous. Our collective interest in justice profits from the supererogatory[10] conduct of the virtuous.

Still, the fact that we would be better off if we abided by a hypothetical moral duty does not make that duty real.[11] We have

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[8] *See infra* notes 90–93 and accompanying text.

[9] That is, justice is not possible *absent state action*, as discussed *infra* Part V.

[10] Supererogatory acts are praiseworthy actions that go beyond duty. *See generally* David Heyd, *Obligation and Supererogation*, *in* 4 ENCYCLOPEDIA OF BIOETHICS 1915, 1917 (Stephen G. Post ed., 3d ed. 2004) (1995).

[11] *See infra* Part III.B.

precedent for that way of thinking, not least in the moral theory of Immanuel Kant, and in the political context, we might mistakenly interpret the methodology of John Rawls to suggest it. But we have reason to reject this facet of Kant's moral theory, and we can distinguish the position of the individual agent deliberating about her own duties from that of an individual deliberating about the demands of justice for social institutions. I will rely on the phenomenology[12] of moral decision-making and its essentially individual character to reject the appealing view that our moral duties must be such that, if we each complied with them, our world would be just.

On the heels of that unhappy conclusion, I will turn in Part V to the clear solution to many—but not all—moral collective action problems, analogous to the solution to ordinary collective action problems: state action. The remainder of the Article will be devoted to showing how states can and do solve these problems primarily by way of public law. The primary advantage of public law over common law lies in its timing. The publication of generally binding rules gives us reason to believe that there will be high levels of compliance. But it also gives us an exclusionary reason[13] to comply without worrying (very much) about whether others will. I suggest that we should look to mandatory rules rather than appeals to conscience to solve moral collective action problems in several areas in which we now rely on the latter, including corporate social responsibility, nondisclosure agreements, transfers of intellectual property, liability waivers, and arbitration clauses. I hope to show how taking moral collective action problems seriously and accepting that individuals are not required to take futile action in the pursuit of collective justice might translate into policy. But my aim is also to celebrate the moral wonder of public law. Because moral collective action problems are rampant, the state as an issuer of mandatory rules is a precondition of justice.

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[12] By the phenomenology of individual decision-making, I refer to the subjective, conscious experience of individuals making choices about how to act and how to live. *See generally* DAVID WOODRUFF SMITH, MIND WORLD: ESSAYS IN PHENOMENOLOGY AND ONTOLOGY 76–121 (2004).

[13] An exclusionary reason, such as an authoritative directive, preempts first-order reasons that would otherwise govern a choice of how to act. *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 46 (Oxford Univ. Press 1999) (1975).

II. MORAL COLLECTIVE ACTION PROBLEMS

Most philosophical discussion of nonideal circumstances, including my own, has concerned the scope of our obligations when social institutions fail to meet the demands of justice.[14] The classic instance of this problem is the obligation of a wealthy person to aid those disadvantaged by injustice, especially the poor. If we think that, though "[j]ustice is the first virtue of social institutions,"[15] injustice can also arise outside of organized societies, then the moral situation of an individual in an unjust society is one example of a larger set of problems that arise when justice requires the cooperation of many people. When there is no society or collective organization that could reform its institutions to achieve justice, it is even less plausible that individuals are shielded from direct interpersonal duties to the distressed. These duties might be still more robust where social institutions *cannot* adopt an effective mandatory scheme that is sufficient to achieve some important collective end. For example, it might be that enforceable mandatory rules regarding masks and social distancing cannot be finely tailored well enough to contain the pandemic. It seems likely that individuals each have some duty to behave according to pro-social norms that are more demanding than baseline legal rules. The precise scope and magnitude of individual duties in pursuit of collective justice is difficult to answer, but most people would agree that individuals are required to take steps that contribute to important collective ends.

I focus here on a narrow but not unusual set of cases that also involve an individual navigating moral demands on a collective. But in the subset I consider here, individuals are not only incapable of achieving justice; they are also incapable of either promoting it, in the sense of making it more likely, or of advancing it, by mitigating injustice on the margin. In the examples above, individuals are in a

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[14] *See* Elizabeth Ashford, *The Demandingness of Scanlon's Contractualism*, 113 ETHICS 273, 274–75 (2003); Aditi Bagchi, *Distributive Justice and Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 193, 194, 197 (Gregory Klass, George Letsas & Prince Saprai eds., 2014); Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 135 (2008); David Miller, *Taking Up the Slack? Responsibility and Justice in Situations of Partial Compliance*, *in* RESPONSIBILITY AND DISTRIBUTIVE JUSTICE 230, 236–37 (Carl Knight & Zofia Stemplowska eds., 2011); LIAM B. MURPHY, MORAL DEMANDS IN NONIDEAL THEORY 4 (2000); Tamar Schapiro, *Compliance, Complicity, and the Nature of Nonideal Conditions*, 100 J. OF PHIL. 329, 331, 348 (2003).

[15] JOHN RAWLS, A THEORY OF JUSTICE 3 (rev. ed. 1999) ("Justice is the first virtue of social institutions, as truth is of systems of thought.").

position to make a difference: a wealthy person is in a position to improve the lives of some people, even if she cannot achieve justice writ large. Wearing a mask and keeping distance makes it less likely that you will infect someone who may, as a result, never get sick at all. In such cases, the individual makes a difference, even if she cannot achieve distributive justice or bring an end to the pandemic. This is not always true.

Suppose that climate catastrophe can only be averted if billions of people alter their lifestyles in significant ways, sufficient to bring carbon emissions below some critical threshold. Suppose too that there is no chance that this will happen before it is too late. An individual on these posited facts has no ability to avert disaster. It might be that there are some actions that have marginal benefits—not using any one plastic bottle might make it less likely that one sea animal chokes to death. But if we assume that reducing carbon emissions in a given geographic area has no local benefits, then "contributing" to a global reduction in carbon emissions with the aim of averting climate catastrophe is futile.[16]

The individual in this situation is in a tragic position. Even if she were willing to cooperate, she cannot. Cooperation requires the participation of other people. In fact, cooperation in this case requires the cooperation of billions of people. In the example involving political resistance, cooperation may require the contributions of millions of people. Even the company and listserv examples might require the cooperation of dozens. In these cases, does the individual have a duty to do what everyone should do, even if not many others are doing it?

In this Part, I will suggest that the answer turns primarily on whether we are permitted to factor agent predictions into our moral deliberations. Agent predictions are predictions about what other agents will do. In the usual discussion of noncompliance, it is more or less assumed that we can take into account the reality of what other people are doing; indeed, the typical argument that the privileged owe the oppressed more under conditions of background injustice depends precisely on the fact that others are not fulfilling their duties and are unlikely to alter their course dramatically, either individually or collectively.[17] But in other contexts, discussed below, we often rightly resist the idea that our moral obligations are contingent on the

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[16] The reader should assume any further facts, for purposes of this hypothetical, that render it futile.

[17] *See* sources cited *supra* note 14.

expected actions of others. This Part will explore why we resist, and when it is right to do so. After arguing that agent predictions are appropriate in the context of moral reasoning, I will suggest a no-martyr principle that denies a duty to (attempt to) contribute to collective endeavors that are futile in the light of sound agent predictions.

A. *Agent Predictions*

The Kantian categorical imperative does not seem to allow agent predictions in the context of practical reasoning. The categorical imperative is offered in three variations, but in its first formulation it requires that one "[a]ct only in accordance with that maxim through which you can at the same time will that it become a universal law."[18] In evaluating its merits, the deliberating agent is directed to assume that the maxim under consideration would be universal law. But of course, Kant knows as well as anyone that it will not be a law of the physical kind, which all objects will follow. Even a moral precept by which all are bound can be broken, like any human law.

Kant's language is almost bittersweet in its acceptance of the gap between what moral law requires of the people around us and what they are likely to do. Kant insists it is the former that controls in our analysis of our own moral duties:

> [A]lthough the rational being might punctiliously follow these maxims himself, he cannot for that reason count on everyone else's being faithful to them, nor on the realm of nature and its purposive order's harmonizing with him . . . the law 'Act in accordance with maxims of a universally legislative member for a merely possible realm of ends' still remains in full force, because it commands categorically.[19]

On this view, an individual's duty to act in accordance with a maxim that she would will to be universal seems to entail a duty to engage in futile acts. For some readers, this might be an extreme implication that depends on articulating the maxim at hand poorly. But I think Kant is committed to a deep aversion to agent predictions, and his reasons capture something quite fundamental about agency.

Kant is more generally committed to the view that we sometimes should "assent" to beliefs that do not have a sufficient epistemic or rational basis because they serve some fundamental purpose for the

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[18] IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 37 (Allen W. Wood ed. & trans., Yale Univ. Press 2002) (1785).

[19] *Id.* at 56.

subject.[20] One of these beliefs on which we must operate is the idea of freedom. In order to make choices, we must take ourselves to be free. Because we *have* to make choices, the assumption of our own freedom is inescapable.[21] Even if we perceive the empirical world to behave according to deterministic laws, and we perceive ourselves to be a part of that world, as agents we must understand ourselves to operate in some other domain. In the domain of practical reasoning, we must "take on" a belief in our own freedom because, without it, we cannot function as agents at all.[22]

We could interpret the idea of freedom in Kant narrowly and read it only to entail that each individual believe only *herself* capable of spontaneous action. But this cannot be squared with Kant's moral theory, the entirety of which is an implication of freedom, on his view. It is freedom that requires that we abide by maxims endorsed by reason so that we can be self-governing rather than swept along by natural causation. That same capacity for reason and self-governance requires that we treat others as ends in themselves because they too are free agents capable of spontaneous action and governed by *their* own capacities for reason. The moral stance of the categorical imperative—which directs us to assume that others will abide by the same rule to which we subject ourselves—is one that regards others as equally capable of self-governance by reason. It requires that we assume that others will comply with the categorical imperative too. Therefore, in our own deliberations about what to do, we cannot incorporate an expectation that others will fall short and render our own actions futile. It is an unlikely reading of Kant that we must each accord high significance to our own freedom without concerning ourselves with the implications of other people's freedom for ourselves.

I reject this view; however, my target is not really Kant. His view matters because the Kantian idea that we must act as though others are free and unpredictable, regardless of whether that belief is objectively correct, resonates with intuitions we continue to harbor, and which are reflected in criminal, tort, and constitutional law.[23] In each of these

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[20] For a detailed discussion of varieties of assent in Kant's theory, see Andrew Chignell, *Kant's Concepts of Justification*, 41 NOÛS 33, 34 (2007).

[21] Henry E. Allison, *We Can Act Only Under the Idea of Freedom*, 71 PROC. & ADDRESSES AM. PHIL. ASSOC., 39 Nov. 1997, at 39, 40.

[22] *Id.* at 43.

[23] A belief that we must hold and abide by, irrespective of whether it is objectively true, is "regulative." *See* Michael Friedman, *Regulative and Constitutive*, 30 S. J. OF PHIL. 73, 75 (1991).

contexts, we have traditionally resisted agent predictions, either by the state or by other agents.

In arguably the most pivotal context, we affirm the independence of action and decline to infer wrongdoing in a given criminal case from past behavior. As Amit Pundik has argued, we cannot infer guilt with respect to a given crime from past criminal behavior without contradicting the moral basis for attributions of culpability.[24] It is even more outrageous to infer guilt, and it is impermissible even to impose undue burdens on those who find themselves in groups that are statistically more likely to be convicted of crimes.[25] When liberty itself is at stake, we understand that we cannot treat individuals as objects whose movements are a simple function of known variables.[26] We insist on the spontaneity of action that is Kant's starting point.

The criminal context is distinguishable because the state itself would make the agent prediction at issue. We might worry about agent predictions by the state in other, less high-stakes contexts as well, such as in the regulatory context of nudging.[27] There too, the state uses informed predictions about individual behavior to shape policies, which are in turn intended to alter individual behavior. Our worries with respect to state predictions are different though, because the agent making the predictions is of a different sort. While it seems to me likely that a liberal state is especially constrained in what it can take itself to know about citizens and what they want and will do, state predictions about agents raise questions that are different than those raised by individual-level practical reasoning.

The tort law surrounding intervening wrongdoing is mixed in its attitude toward agent predictions. Heidi Hurd has objected to the range of doctrines that "compel findings of liability in instances in which the only wrongdoing with which persons can be charged is the failure to alter their (otherwise) legitimate activities in anticipation of

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[24] Amit Pundik, *Freedom and Generalisation*, 37 OXFORD J. LEGAL STUD. 189, 193, 200 (2017).

[25] Pundik argues that "attributing culpability to an individual requires presupposing that she was free to determine her own behaviour and hence generalisations which require presupposing the opposite should not be used for that purpose." *Id.* at 190.

[26] For a sobering review of the extent to which our commitment is incomplete in the context of pretrial detention, see Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 500–01, 558–70 (2012).

[27] *See* Cass R. Sunstein, *Do People Like Nudges?*, 68 ADMIN. L. REV. 177, 179 (2016); Sheri B. Pan, *Get to Know Me: Protecting Privacy and Autonomy Under Big Data's Penetrating Gaze*, 30 HARV. J.L. & TECH. 239, 251 (2016).

others' illegitimate ones."[28] Anthony Duff is similarly skeptical about liability in circumstances where there is intervening wrongdoing.[29] But to a significant extent, the doctrine actually reflects their discomfort with agent predictions in the private sphere. Courts have not recognized a duty to refrain from selling or giving goods to persons just because the seller can or should foresee that the recipient might misuse the goods, which Benjamin Zipursky and John Goldberg argue would amount to an expansion of negligent entrustment to negligent enabling.[30] Courts are open to claims that parents negligently enabled their children (e.g., in the latter's cyberbullying).[31] But hosts are not usually responsible for the misdeeds of their (adult) drunk guests upon departure,[32] and a tractor manufacturer that installed a texting device in its tractors was not liable for an accident that a driver caused by texting while operating such a tractor.[33]

It took many years for tobacco producers to be held civilly responsible for injuries to tobacco users,[34] and liability for manufacturers of sugary drinks may never come.[35] Notably, success in tobacco litigation stemmed in large part from the active deceit perpetrated by the tobacco industry, especially in marketing to children, rather than the bare act of selling goods that are addictive

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[28] Heidi M. Hurd, *Is it Wrong to Do Right When Others Do Wrong? A Critique of American Tort Law*, 7 LEGAL THEORY 307, 311–12 (2001).

[29] R.A. Duff, *Is Accomplice Liability Superfluous?*, 156 U. PA. L. REV. 444, 451 (2008) ("[I]t is not my business that what I do makes it easier for *P* to commit the crime partly because it is *P*'s business whether he commits the crime . . . it is up to *P* whether he commits the crime or not and—at least sometimes—I am not required to guide my actions by my knowledge of what *P* will do.").

[30] John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1221–24 (2009).

[31] Ronen Perry, *Civil Liability for Cyberbullying*, 10 U.C. IRVINE L. REV. 1219, 1239 (2020); Wade R. Habeeb, Annotation, *Parents' Liability for Injury or Damage Intentionally Inflicted by Minor Child*, 54 A.L.R.3d 974, § 9 (1973).

[32] *See* Goldberg & Zipursky, *supra* note 30, at 1228.

[33] Durkee v. C.H. Robinson Worldwide, Inc., 765 F. Supp. 2d 742, 756–58 (W.D.N.C. 2010) ("If . . . a legal duty to anticipate misuse were to be imposed on [texting device] manufacturers, no vehicle would be capable of traveling above the speed limit, car ignitions would all be equipped with ignition interlock devices, and guns would not be sold to persons with poor judgment.").

[34] *See* DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY, at xi, xiii–xiv, 391 (2001).

[35] Regulation aimed at sugary drinks mostly aims to alter consumer behavior. *See* Alexia Brunet Marks, *Taming America's Sugar Rush: A Traffic-Light Label Approach*, 62 ARIZ. L. REV. 683, 691 (2020).

and harmful.[36] The tobacco and sugary drinks examples are also distinguishable because the harm from those products is borne by the intervening actor; the buyer of the tobacco or sugary drinks is usually also the user. On the other hand, the intervening actions in these cases—consumption or excess consumption—are not just predictable; they are intended and encouraged.[37]

Notwithstanding these limitations on liability for harms brought about by intervening agents, there are now established lines of cases in which individuals are held liable for careless acts that make some criminal acts more likely. For example, many people have pressed for liability for how guns are marketed and distributed, with some early success.[38] Gun manufacturers won federal statutory protections, which thwarted the development of tort theories that would hold them accountable,[39] and the public is divided about whether it is appropriate to hold manufacturers and retailers responsible for the wrongdoing of third parties.[40] But recent legislation in New York would circumvent the federal statute protecting gun manufacturers by empowering individuals to bring civil suits against manufacturers and dealers, and President Biden indicated that he would support the repeal of the federal immunity statute.[41] A few weeks later, Remington, a gun manufacturer, offered $33 million to families of the Sandy Hook massacre to settle claims filed against it.[42]

Still more telling examples involve cases where an individual is held responsible for predicting wrongdoing by some agent but no

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[36] *See generally* RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS (1996) (describing the history of deceit by tobacco industry); Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 479 (1999).

[37] *See* Richard A. Daynard et al., *Live for Now: Teens, Soda Marketing, and the Law*, 9 J. FOOD L. & POL'Y 149, 172 (2013).

[38] *See* Vanessa O'Connell & Paul M. Barrett, *Squabbling, Jury Panel Managed to Form Consensus on Negligence*, WALL ST. J. (Feb. 16, 1999, 12:01 AM), https://www.wsj.com/articles/SB919122340860404500.

[39] Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–7903.

[40] Of course, there are other relevant disagreements as well, such as whether guns should be sold to individuals at all.

[41] Luis Ferré-Sadurní, *It's Hard to Sue Gun Makers. New York Is Set to Change That*, N.Y. TIMES (Nov. 2, 2021), https://www.nytimes.com/2021/06/08/nyregion/gun-manufacturers-lawsuit.html.

[42] Rick Rojas & Kristin Hussey, *Is Remington's $33 Million Offer Enough to End Sandy Hook Massacre Case?*, N.Y. TIMES (July 29, 2021), https://www.nytimes.com/2021/07/29/nyregion/sandy-hook-shooting-remington-settlement.html.

particular agent. Liability is most likely in these cases; that is, we seem more comfortable accepting agent predictions about people in general than about particular persons.[43] In the so-called key-in-ignition cases, someone leaves their keys in the ignition of their car, making it easier to steal the car. Courts are sometimes, but not always, willing to hold owners liable in negligence for injuries sustained as a result of a thief having ready access to a car which he then misuses. Courts have not categorically ruled out liability if the keys were left in the ignition of a car located in a "high-crime" area.[44] Other types of property owners have been more readily held accountable to victims for making crime more likely: apartment buildings and the owners of parking lots have both been held responsible for safety on their premises.[45] Courts have also found liability when not only the potential wrongdoer but also the potential victim was any member of the public, not someone to whom the defendant stood in a special relationship. For example, in *Weirum v. RKO General, Inc.*, a radio station conducted a contest in which the first listener to reach a disk jockey traveling on the freeway would win a prize.[46] The location of the disk jockey was revealed through a series of clues.[47] Two teenage drivers in separate vehicles raced to get to the jockey first, resulting in the death of another driver on the highway.[48] The station was held liable.[49]

One early case helped spark what is now a growing line of cases that recognizes the responsibility to avoid putting someone—or anyone—in a dangerous position, even where the danger at issue lies in the wrongful conduct of another person. In *Hines v. Garrett*, a train conductor missed a stop and let a passenger out in what was considered

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[43] I will myself argue below that generalized predictions are more permissible than particularized ones. *See infra* Part III.A.

[44] *See* Palma v. U.S. Indus. Fasteners, 681 P.2d 893, 902 (Cal. 1984); State Farm Mut. Auto. Ins. Co. v. Grain Belt Breweries, Inc., 245 N.W.2d 186 (Minn. 1976); Guaspari v. Gorsky, 36 A.D.2d 225 (N.Y. App. Div. 1971); Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 441, 446 (1999).

[45] *See, e.g.*, Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 486–87 (D.C. Cir. 1970) (determining the owner of an apartment building responsible for safety on the premises); Butler v. Acme Markets, Inc., 445 A.2d 1141, 1146 (N.J. 1982) (explaining that the New York Court of Appeals "recently reaffirmed its imposition of a real property owner's duty to protect against foreseeable criminal acts on his premises….").

[46] *See* 539 P.2d 36, 37–38 (Cal. 1975).

[47] *Id.* at 44.

[48] *Id.* at 45.

[49] *Id.* at 42.

a dangerous area.[50] Although the court "[did] not wish to be understood as questioning the general proposition that no responsibility for a wrong attaches whenever an independent act of a third person intervenes between the negligence complained of and the injury," it held that "this proposition does not apply where the very negligence alleged consists of exposing the injured party to the act causing the injury."[51] *Hines* specifically observed that while there may be a general "presumption . . . that crimes of this character will not be committed," the presumption "is not to be indulged, and ordinarily prudent men do not indulge it, to the extent of regarding it safe to expose a young woman to such a risk as the plaintiff in this case incurred . . . ."[52] Although the court seemed to find the discharge of the passenger at the wrong location problematic mostly because it was in a neighborhood that was considered dangerous, arguably it is just this element that made the case most problematic—marking out a particular neighborhood as so dangerous that it was imprudent for anyone to cause a woman to walk through it. One might wonder whether it is really the case that women did not walk through that neighborhood, or perhaps just not women that resembled the plaintiff in that case.

What we can observe here is a trend in favor of holding people accountable for creating the conditions of others' wrongdoing.[53] Most important for our purposes, the actions of the intervening agent are regarded as foreseeable. But these cases are still framed as exceptions to the general rule that liability does not extend to conduct that only results in harm because of the intervening acts of another autonomous person.

Legal resistance to agent prediction, which I take here to be indicative of a deeper moral intuition, has proven more robust when speech is at issue. I have argued elsewhere that the First Amendment operates on a regulative assumption[54] that individuals are capable of

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[50] 108 S.E. 690, 691 (Va. 1921).

[51] *Id.* at 695

[52] *Id.* at 694.

[53] Rabin, *supra* note 44, at 453. ("Looking back to the early 1900s one would have been hard put to predict where our social mores and ethical dictates would take us in creating legal obligations to protect against injuries from unrelated third parties."). Rubin hesitates to predict the future; the characterization of these cases as establishing a trend is my own.

[54] *See generally* Friedman, *supra* note 23.

deliberating about and assessing the quality of speech.[55] Thus, the state is not permitted to restrict one person's speech on the grounds that injuries will result from other people failing to act as free, deliberative agents. The state regulates speech mostly where there is no opportunity for deliberation, as where a person shouts "fire" in a movie theater. In those cases, we can expect that harms will follow even without any agent's failure to live up to the demands of her own agency. But if a person stands up in a park and tells people to raise arms against others, that speech is usually protected.[56] It is up to the listeners not to raise arms; and if someone does, she alone bears legal responsibility.

The two categories of speech which may result in a kind of speaker liability for third party actions are fighting words and incitement. *Chaplinsky v. New Hampshire* held that fighting words by their nature incite immediate violence and may thus be restricted.[57] But fighting words doctrine has since been narrowly construed.[58] The other category is incitement. For incitement to fall outside the protective scope of the First Amendment, the speaker's words must be "directed to inciting or producing imminent lawless action and … likely to incite or produce such action."[59] It turns out to be very difficult to characterize speech as unprotected under either doctrine.[60]

Notwithstanding legal protection, as individuals, we have more than one reason not to incite others to violence. Even if the state is not prepared to recognize some speech as incitement, as I observed above in the criminal context, it might be constrained in its attitude toward citizens in ways that individuals are not vis- à-vis one another. It seems not only permissible but morally mandatory that individuals refrain from speech that we predict could lead to actual violence,

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[55] Aditi Bagchi, *Deliberative Autonomy and Legitimate State Purpose Under the First Amendment*, 68 ALBANY L. REV. 815, 823–29 (2005).

[56] *See* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).

[57] 315 U.S. 568, 571–72 (1942).

[58] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

[59] *Brandenburg*, 395 U.S. at 447.

[60] Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 815 (2010) (because "First Amendment doctrines rely on a model of the audience as rational, skeptical, and capable of sorting through masses of information to find truth," cases that allow liability for incitement are rare outliers).

should someone heed our invitation.[61] Thus, the free speech examples, like the tort examples, demonstrate both that there is a strong intuition that it is not always appropriate to act on agent predictions but also that it would be wrong to set those aside categorically.

One might argue that these legal doctrines are inapt because at issue is whether we can expect someone to do something or not because her action will cause another person to commit serious wrongs against another. Maybe we are permitted—and even expected—to make agent predictions when not making those predictions could result in serious injury; it could be nevertheless impermissible to make agent predictions just to avoid taking futile action. That is, maybe the regulatory presumption of spontaneous action may only be invoked against us: it can heighten our obligations under both noncompliant social institutions and where there is a rational expectation of third-party wrongdoing. But, on this view, we cannot invoke agent predictions to excuse ourselves from conduct.

It is doubtful that agent presumptions operate asymmetrically in this way. As discussed further below, it may be virtuous to set aside certain applicable reasons when doing so makes it more likely that you and others will fulfill moral duties over the long run. But, for now, I am only concerned with whether it is permissible to take into account agent predictions. And if the law regularly requires us to act on those predictions, it seems unlikely that we are morally required to ignore them—unless we are prepared to dismiss many legal doctrines at once as all confused. The underlying reasons for resisting agent predictions, if they are rightly captured by Kant, apply in the context of practical reasoning about what we are required to do, including both whether we are obliged to take certain precautions or whether we are required to contribute to a potential collective action.

In fact, there is some reason to think that agent predictions are even more appropriate outside these legal contexts. In the kinds of legal cases just discussed, the defendant is alleged to have caused wrongful action by a third party. Admittedly, the causation claim is attenuated; it requires that we accept "enabling" as a mechanism of causation. But even this element of causation is absent in moral collective action problems where agents are making separate, simultaneous (or at least, non-mutually responsive) decisions about

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[61] *See* Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1299–1300 (2007) (discussing how courts strike a balance between free speech principle and potential physical harms from speech).

what to do. Indeed, the whole point of the moral collection action problem is that no individual is in a position meaningfully to cause a group either to meet or fail its collective obligation.

The moral failure of the group may very well be a moral blemish on the individual, short of a culpable wrong. When a group to which we belong—a university, book club, union, firm or country—engages in wrongdoing, we rightly feel tainted. These blemishes on our character are not unlike other results that flow remotely from our actions, so remotely as to put them outside of our effective control. What we have learned from the philosophical literature on "moral luck" is that, contra Kant, most of us are not prepared to disavow our moral dependence on events in the material world.[62] We know that our moral standing depends on what actually happens, and we do not control that.[63] Still, most of us no longer regard the physical, determinate world as a corruption or an embarrassment. We not only accept but embrace that we are physical beings, situated in bodies that inhabit a physical world.[64] We no longer take our moral personality to be the pure product of our capacity for reason; the salient features of our respective identities are more bound up in our differences, which in turn are the product of numerous contingent features of our environment and arbitrary events in our particular life stories. The Kantian impulse to elevate our mental world above our physical one rests on anxieties that are inescapable—such as the problem of free

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[62] *See* BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980 20–39 (1981) (introducing the concept of moral luck and exploring its challenge to Kantian moral theory); THOMAS NAGEL, MORTAL QUESTIONS 24–38 (Canto ed. 1991) (developing the concept of moral luck).

[63] *See* John Gardner, *Obligations and Outcomes in the Law of Torts*, *in* RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ ON HIS EIGHTIETH BIRTHDAY 111, 136 (Peter Cane & John Gardner eds., 2001) ("To deny that success can have independent rational significance is to leave us without *any* story of our lives as practical reasoners."); Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 72, 83 (Gerald J. Postema ed., 2001) ("[O]utcome-responsibility in the achievement sense comprises a fundamental element in our understanding of our own agency.").

[64] *See* Nagel, *supra* 62 at 37–38; Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 L. Q. REV. 530, 543 (1988) ("If actions and outcomes were not ascribed to us on the basis of our bodily movements and their mental accompaniments, we could have no continuing history or character."); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 505–07 (1992) (arguing agency is "meaningful notion" because one can imagine agent with knowledge of all relevant causal regularities who is capable of controlling natural processes, and observing outcome responsibility involves "retrospective evaluation of action" that turns on what would have been foreseeable to such an idealized agent).

will—but also hierarchies—such as favoring the universal over the particular, or the spiritual over the material—that are anachronistic. And so, while there must be *some* constraints on how we respond to facts about the world, we should not be expected to set aside completely what we know about the world and how it works, including the behavior of the flawed agents that constitute its social dimension.

B. *The No-Martyr Principle*

I will return to the matter of when we may act on agent predictions in the next Part.[65] In this section, I elaborate on the implication of those predictions (where we may make them) in the context of moral collective action problems.

If we may make agent predictions then, in the context of moral collective action problems, we sometimes know that any action of ours is insufficient to avoid collective wrongdoing. For many people, it seems obvious that one has no duty to engage in such futile action. Felix Pinkert states that it is "implausible" that "you ought to contribute even if not enough others contribute as well" such that the action would be "pointless."[66] John Gardner has argued that there is no duty to try if trying is futile, even when the duty to succeed persists.[67] Similarly, Björn Petersson seems to assume that an individual cannot be morally responsible for a collective harm if her omitted act would have made no difference "to the occurrence of the event in question."[68] Donald Regan says one must "cooperate, with whoever else is co-operating, in the production of the best consequences possible *given the behaviour of non-co-operators*" but he should not be read to imply one has a duty to cooperate hypothetically.[69] Actual cooperation requires that there be at least one other person participating in the act of cooperation. Virginia Held has persuasively argued that one might be responsible for failing to act collectively under nonideal conditions, but this is different from failing to act as if everyone were acting

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[65] The second section of Part III proposes and elaborates an equality constraint on agent predictions.

[66] Felix Pinkert, *What We Together Can (Be Required To) Do*, 38 MIDWEST STUD. PHIL. 187, 189 (2014).

[67] John Gardner, *The Wrongdoing That Gets Results*, 18 PHIL. PERSPECTIVES 53, 56 (2004).

[68] Björn Petersson, *Collective Omissions and Responsibility*, 37 PHIL. PAPERS 243, 251–52 (2008).

[69] DONALD H. REGAN, UTILITARIANISM AND CO-OPERATION 134 (1980) (emphasis added).

collectively.[70] On her account, fault lies in failure to cooperate where possible (as where there is an available decision-procedure or a salient single solution to a collective problem), not in failure to act unilaterally.[71]

Some have argued that we can assign responsibility to a person even if she lacked the capacity to avoid the wrongdoing.[72] But these attributions are usually in contexts where the agent is uniquely thrust into the causal chain of events leading to the wrong. They are distinguishable from scenarios where the individual's only participation is by way of an anonymous omission that is indistinguishable from that of numerous other agents.

Christopher Kutz is the scholar who has most forcefully advocated for a duty to act in accord with a collective plan even where no plan has been collectively formed.[73] While the argument I have thus far considered in favor of a duty to perform futile actions is founded on a rejection of agent predictions, Kutz offers a different kind of argument in favor of understanding ourselves bound in these situations. It is essentially an argument from collective moral necessity.[74] Kutz argues that "[s]olving the problem of marginal effects *requires* not simply an institutional mechanism guaranteeing general compliance but also a psychological solution that preserves the human face of the claim upon me."[75] We are not supposed to ask, he says, "[w]hat should I do, given what others do?" because "the only effective way to solve the problem is to ask a different question, namely: What should *we* do to meet the claims of the [imperiled group] while minimizing the demands on each of us?"[76]

One way of understanding Kutz's argument is that he too wishes us to act on a regulatory presumption. But instead of a presumption that agents are capable of spontaneous action, such that we cannot know that they will not act in service of collective moral duties, Kutz

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[70] Virginia Held, *Can a Random Collection of Individuals Be Morally Responsible?*, 67 J. OF PHIL. 471, 476 (1970).

[71] *Id.* at 476–77.

[72] *See, e.g.*, D.E. Cooper, *Collective Responsibility*, 43 PHIL. 258, 264 (1968).

[73] *See generally* CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE (2000); Christopher Kutz, *The Collective Work of Citizenship*, 8 LEGAL THEORY 471 (2002).

[74] I will argue in Part IV for the limits of theories of individual obligation based on collective moral necessity.

[75] Kutz, *The Collective Work of Citizenship*, *supra* 73, at 478 (emphasis added).

[76] *Id.* at 479.

would have us operate on the presumption that we are members of an organized and functioning collective. This interpretation of Kutz is consistent with his argument that allegiance and social membership are reasons for acting in accord with a joint plan, even if that plan is imaginary.[77] He argues that we should act like we are working together as a team, apparently even when we are not part of a team at all—unless the idea is that the relevant group is ultimately all of humanity, as it is accidentally configured to face various problems of justice as they arise.

I will address below the more general question of whether we should understand necessity to give rise to moral duties in the way that Kutz implies, or whether we must accept that sometimes individuals can comply with their moral duties and still produce an unjust state of affairs.[78] Here, I focus on the more specific question of whether we should assume not that other agents are free and their future actions unknowable, but that we are together a kind of team with duties to abide by the plans that such a hypothetical team would produce. Such a team could be a few people working together to rescue a drowning man, all the voters in the United States working together to implement democracy, or all consumers in rich countries working together to shut down sweatshops in poor countries.

Such a presumption of team or group cooperation is not motivated and cannot bind us. If the team in question is all humanity, it is awkward to deny membership. But what kind of team is this? Teams are defined by boundaries; they are finite. Indeed, they usually have opponents. And if humanity is the relevant team, how do we know our assigned roles or the specified goals of the team in a given context? On the other hand, if the team in question is the subset of individuals who are in a position to achieve justice of a particular kind, it is not clear why we owe them allegiance. John Gardner argues that it is actually illiberal to invoke "team"-like reasons as ones that bind us all to some collective pursuit.[79] We did not choose to associate with them; we do not know whether they are people that we might like or dislike, endorse or repudiate. We tend to feel obligations toward

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[77] Kutz offers this in the context of a discussion of the obligation to vote, which he says is "best treated in terms of allegiance, as part of the general set of commitments constitutive of valuable social membership, and not as an independent moral obligation grounded in another's needs." *Id.* at 490.

[78] *See* Part IV.

[79] Gardner argues that we cannot rely on "the intrinsic value of teamwork" but must justify the demand for team loyalty by its contribution to the lives of individuals. John Gardner, *Reasons for Teamwork*, 8 LEGAL THEORY 495, 507 (2002).

family that are similarly independent of choice or merit, but familial loyalty is more often considered a fact that we have to accommodate in theories of justice than a duty of justice itself.

There is still another problem with a team presumption. Understanding our duty to act in moral collective action problems on such an account characterizes the duty as one we owe to other team members. But surely when we have a collective obligation to avert some harm, the primary duty is owed to those who stand in harm's way, and any duty to others is merely derivative. To be sure, we have a duty of fair play that entails a duty to do our fair share and bear our fair burden, and that duty is owed to hypothetical team members. But these arise only after a norm or plan is in place or plausible, and they are secondary to the primary duty in the context of moral collective action problems, which runs to the prospective victims of collective inaction.

If we reject both a categorical rule against agent predictions and a presumption of team membership with attendant obligations of solidarity, we can affirm the no-martyr principle: there is no duty to take action in service of a collective duty if the action will not advance a fulfillment of the collective duty.

One might argue that the no-martyr principle is theoretically valid but practically irrelevant because we can never know what others will do in the way we must in order for it to have effect. That is, even if we are not bound by any presumption that bars agent predictions, it might be that we are just never in a position to predict with confidence that other agents will not cooperate. As long as it is possible for our actions to make a difference, we are not free to refuse action that could advance a valuable end.

It is true, of course, that we can never be sure about what will result from our actions. But the no-martyr principle should not be understood to require action in furtherance of collective moral demands, just so long as we cannot *conclusively* rule out the possibility of making a difference. It is almost always possible that one person's actions will have an unexpected cascading effect that will, for example, spur others to action or raise social consciousness regarding a problem. If this possibility is of negligible probability, the prospect for impact alone cannot ground the obligation. It is actually even less plausible that we could be required to make substantial sacrifices either for the small possibility of making a difference or the meaningful possibility of making a trivial difference than it is plausible that we could be required to take actions irrespective of whether they make a difference. The latter argument at least rests on a claim about

the right way to think about our duties and what we can take into account; it rests on a plausible claim that consequences of individual acts do not figure directly into whether they are required.

By contrast, relying on unlikely or trivial causal impact of an action to render it compulsory assumes that consequences do matter. But if consequences matter, then it has to matter exactly what the consequences are, not just whether there is a consequence. And if consequences matter, then the consequences of the action for the agent matter too. If the burdens on the agent are taken into account, negligible probability of impact and trivial impact alone will require only costless action.

If we are entitled to make predictions about other agents, we are entitled to make sound predictions and act on those. Of course, we should be more careful when the stakes are higher. If two rescuers will succeed where one will fail, we had better go ahead and try rather than coldly predict that our fellow would-be rescuer will be too lazy. By contrast, if I am one of several noisy patrons of a bar with open windows and I rationally believe that silencing myself alone will deliver no benefit to the neighbor who wants to sleep, it might be okay for me to act on the prediction that reducing my own noise level is pointless. The more remote the odds of cooperative success, and the lower the stakes, the more robust the license reflected in the no-martyr principle. In high-stakes situations, or where it is genuinely unclear what others will do, we must be appropriately risk-averse in our agent predictions. I am not arguing here that we should not err on the side of complying with a duty that would exist should it be possible to make a difference; only that if there is a duty to act, it will turn on some prospect for impact together with some level of risk tolerance. In most cases, we cannot be sure that our actions will have no consequence, but because results matter, we should take into account the prospects for making a difference in deciding not only whether to try, but also how hard to try. Symbolic acts may be justified, but they are usually justified in some quite separate way that probably has more to do with expression than advancing material justice.

The phenomenon of moral collective problems has consequences for the legal rules that govern individual conduct. In fact, the common law of private law largely respects it. Liability in common law usually involves finding that some conduct by the defendant was wrong, that she should have acted otherwise. Absent the no-martyr principle, we would expect people to be liable for a range of acts and omissions that are antisocial; justice would be served if everyone held themselves to a higher standard. Yet we see that private law, which is backward-

looking, does not find wrongdoing because an individual did not comport to the standard of behavior that, if universalized, would be optimal from a social point of view. Instead, contract law and tort law both tend to assess the quality of a defendant's actions in light of the contingent circumstances in which she acted, taking full account of how other agents behave and what difference the defendant really made. A couple examples narrowly and broadly show the no-martyr principle at work, albeit imperfectly in each case.

Very broadly, both contract and tort law do not recognize conduct as wrongful unless the plaintiff demonstrates that she suffered an injury, and that the defendant caused the particular injury suffered by the plaintiff. [80] Common law-private law does not ordinarily impose standards of conduct that are not general and backward-looking. We tend to take these features for granted, but they are not inevitable. Theoretically, we could allow recovery for potential or probable losses resulting from breach of contract. We could find liability for imposition of risk.[81] We might allow liability for antisocial conduct, absent any special duty to the plaintiff. We do not. Instead, we wait until plaintiff has been actually harmed by defendant's breach of a duty before we recognize any claim.

The requirement of causation is sometimes implicit in contract, but it is an express element of tort.[82] Where individuals are not in a position to prevent harm by altering their own conduct alone, tort law does not offer recourse because the plaintiffs cannot establish

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[80] There are exceptions that sound more property, like trespass. Within tort, I have in mind primarily actions for negligence. *See* Red Ball Brewing Co. v. Buchanan Ingersoll P.C., 51 Pa. D. & C.4th 129, 141–42 (Pa. Com. Pl. 2001) ("Claims for breach of contract, negligence and fraud require that the plaintiff suffer damages as a proximate result of the defendant's conduct."); *see also* Nuncio v. Rock Knoll Townhome Vill., Inc., 389 P.3d 370, 374 (Ok. App. 2016) ("The essential elements of a negligence claim are a duty owed by the defendant to protect the plaintiff from the injury alleged, a breach of the duty, and injury to the plaintiff proximately caused thereby."); Logan v. Mirror Printing Co., 600 A.2d 225, 226 (Pa. Super. 1991) ("[i]n order to recover for damages pursuant to a breach of contract, the plaintiff must show a causal connection between the breach and the loss.").

[81] *See* Adriana Placani, *When the Risk of Harm Harms*, 36 L. & PHIL. 77 (2017). *But see* Perry, *supra* note 63 (rejecting treating risk imposition as injurious).

[82] *See* Steed v. Bain-Holloway, 356 P.3d 62, 68 (Okla. Civ. App. 2015) (quoting State *ex rel.* Dep't of Pub. Safety v. Gurich, 238 P.3d 1, 4 (Okla. 2010)) ("Causation is a traditional element of tort liability. In any tort, there must be 'some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.'").

causation. In most cases, a but-for causation standard applies.[83] In deviant cases, either an individual defendant's conduct is found likely sufficient to have brought about the injury, even if it was not also necessary (as in the case of simultaneous shooters),[84] or the defendants are regarded as having acted together, implicitly if not explicitly (as in enterprise liability).[85] Causation is thus literally one of the elements of private liability in tort and is consistent with the essence of the no-martyr principle, which affirms an obligation to act toward some morally valuable end (usually the aversion of some harm) only if one's act can be expected to in fact contribute to that end.

In contract law, we can see the no-martyr principle play out narrowly and somewhat obliquely in doctrines that relate to timing of performance and recourse. It used to be that promises in contract were treated as independent.[86] Thus, even if the widget seller did not deliver her widgets as due, the buyer could be sued for payment. To the modern reader this is a bizarre result because of course the promise of the buyer to pay is dependent on the seller's performance. Now courts meet this expectation by imputing constructive conditions of exchange.[87] The court supplies a default sequence of performance and, if one party fails to perform, the other is excused from her performance. Courts have evolved further. The implied sequence of performance still leaves vulnerable the party who is supposed to perform first. It used to be that nothing short of a definite repudiation by the other party could relieve the first mover of her obligation to perform. That is, anticipatory repudiation would require either a clear verbal repudiation or conduct that made performance actually impossible.[88] This was a high bar and left no recourse for many parties with good reasons for worrying that the other party would not perform. By now we have the doctrine of adequate assurance, which allows a party that reasonably doubts the performance of the other to be forthcoming to demand assurance in writing. If the other party fails to deliver adequate assurance, this failure can be treated as repudiation.[89]

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[83] Smith v. Steelcase, Inc., No. 223892, 2001 WL 1545992, at *2 (Mich. Ct. App. Nov. 30, 2001).

[84] *See* Summers v. Tice, 199 P.2d 1, 5 (Cal. 1947).

[85] Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353, 376 (E.D.N.Y. 1972).

[86] K & G Constr. Co. v. Harris, 164 A.2d 451, 454–55 (Md. 1960) (describing evolution of rule).

[87] *Id.* at 455.

[88] *See, e.g.*, Taylor v. Johnston, 539 P.2d 425, 430 (Cal. 1975).

[89] RESTATEMENT (SECOND) OF CONTRACTS § 251 (1981).

This is by no means a perfect application of the no-martyr principle as I have suggested it. But courts have become more comfortable with predictions by one party about the other's performance, and courts no longer require parties to act unilaterally where they have good reason to doubt that the joint exchange will be realized. We might say we require less martyrdom in contract now.

The no-martyr principle also sheds some sidelight on how courts define the duties of care that defendants owe their plaintiffs in tort law. Perhaps because an objective cost-benefit analysis of a proposed conduct rule is rarely at hand, standards of care are usually set by reference to community practices and expectations.[90] The effect is that no one is openly required to be a moral frontrunner. Courts avoid retroactively applying a standard of conduct to which the defendant could not have known she was subject at the time of the alleged tort. The common law court aims to rest a finding of negligence on an existing norm.[91] Now, a defendant that fails to abide by a best practice can be understood to have caused injury to a plaintiff even if there was no social norm that required her to use the best practice rather than some other commonplace one. In that respect, the defendant cannot claim to be situated in a collective action problem because her actions alone could have prevented injury. But while the standard of care question is by no means a straightforward application of the no-martyr principle, it is possible to think of the breach and causation inquiries as less segmented than the doctrinal inquiry suggests. If whether the defendant caused the plaintiff's injury is itself a normative question that turns in part on whether the defendant should have acted differently, then the fact that the defendant complied with prevailing social norms is relevant to the question of whether it is properly said that the defendant's shortcomings, rather than the shortcomings of

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[90] *See, e.g.*, Shilkret v. Annapolis Emergency Hosp. Ass'n, 349 A.2d 245, 246 (Md. 1975); *see also* Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1343 (2017) ("Tort . . . uses 'community' as a transom through which decision makers can import extralegal norms to determine liability for injuries."); Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735, 764 (2002) (discussing "communities" for purposes of setting the standard of care).

[91] *See* Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1, 4 (1999) ("Custom's role in tort law is pervasive."). *But see* Mark A. Geistfeld, *Tort Law and the Inherent Limitations of Monetary Exchange: Property Rules, Liability Rules, and the Negligence Rule*, 4 J. TORT L. 1, 23–24 n.75 (2011) ("Whereas the substance of first-order duties under the early common law were presumably constituted by pre-existing norms, custom today plays a highly circumscribed role in negligence cases.").

social practice, caused the plaintiff's injury.[92] None of this is to suggest that the doctrine should be framed differently. I aim only to suggest that when we hold that a defendant did not breach her duty of care because she acted more or less as she should have, we are functionally refusing to hold her responsible for rising above deficient social norms.

If common law judges aim to locate standards of care in community norms, it makes sense that they are recognized to exercise more law-making powers than their counterparts in civil law jurisdictions. That is because even if common law judges imbue an extralegal social norm with legal effect, judges can deny that they are the original source of the norm they articulate.[93] Courts are only recognizing what the community organically rendered a norm, a norm that was in some sense already binding on the defendant. While there is a sharp difference between legal and social obligation, the existence of *some* obligation may be sufficient to avoid violation of the no-martyr principle.

The no-martyr principle is also accommodated in common law by way of incremental rulemaking. It is rarely the case that conduct that was clearly permissible at the time is found wrongful at the moment of adjudication. If new norms are usually small extensions of existing rules, new norms are less new, and the conduct was arguably impermissible already. Again, the defendant is not subject to a conduct rule that did not apply to others that were similarly situated. Of course, once a legal norm has been announced prospectively, the no-martyr principle is inapplicable. Legal norms that govern private relations, like all legal norms that are not of constitutional status, can be altered through ordinary legislative procedures.

III. THE DEMANDS OF EQUALITY

The no-martyr principle depends, as I have argued it, on agent predictions. That is, it authorizes me to refrain from taking actions that promote justice if one can predict that my actions will make no

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[92] *See* RESTATEMENT (SECOND) OF TORTS § 295A (1965) ("In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling.").

[93] *See* Dan Priel, *Conceptions of Authority and the Anglo-American Common Law Divide*, 65 AM. J. COMP. L. 609, 631 (2017) ("If the law succeeds in reflecting prevailing custom, many problems with explaining its authority become less intractable. When law reflects prevailing custom, it reflects standards of behavior already accepted. This provides a solution to the common law's lack of adequate notice and publicity, as well as its alleged retroactivity.").

difference in light of the actions of others. I have suggested that agent predictions are not categorically inappropriate. The contingency and material rootedness of our situation as agents is not something to ignore. These are such fundamental features of our personhood that thinking about our agency as divorced from the messy reality in which it operates generates a confusion rather than an ideal. The evolution of several legal doctrines affirms this shift in how we think about agency and what is valuable about it.

Even if human freedom itself does not demand that we feign ignorance of human behavior, other principles could constrain what kinds of information we act on. I will argue in this Part that the principle of equality, on the one hand, animates the no-martyr principle and, on the other hand, constrains what kinds of agent predictions we can make and when we can make them.

A. *Refusing Unfair Burdens*

Scholars of private law have tended to exaggerate the problem of horizontal equality among defendants. While some authors, including myself, have argued that distributive justice has a role to play in informing what individuals owe one another,[94] most scholars of private law have insisted that concerns of distributive justice are best left to public law. Legal economists have argued this mostly on efficiency grounds.[95] But philosophers of private law have suggested, albeit sometimes just in passing, that it is morally arbitrary to hold defendants responsible for background injustice when they were not, as individuals, in a position to prevent distributive injustice.[96] On the flip side, awarding poor plaintiffs higher damages because they are poor would amount to a windfall as compared to others who are similarly socially situated but happen not to have a recognized legal claim.

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[94] *See, e.g.*, Bagchi, *Distributive Justice and Contract*, *supra* note 14; Bagchi, *Distributive Injustice and Private Law*, *supra* note 14; Kevin A. Kordana & David H. Tabachnik, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598, 604 (2005).

[95] *See, e.g.*, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW & ECONOMICS 124–27 (2d ed. 1989); MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 97–101 (1993); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 677 (1994).

[96] *See, e.g.*, Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 96 (1995); Melvin A. Eisenberg, *The Theory of Contracts*, *in* THE THEORY OF CONTRACT LAW: NEW ESSAYS 206, 257–58 (Peter Benson ed., 2001); Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, *in* OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES 237, 237–39 (Jeremy Horder ed., 2000).

I have argued in response that distributive justice is relevant in contract, in particular, because individuals have a duty not to exploit and exacerbate distributive injustice.[97] Importantly, my contention that individuals owe each other concern that might be unnecessary under ideal conditions points to the causal impact that individuals can have *given* background injustice. Nothing in those arguments suggests that individuals should be held responsible in private law for distributive injustice per se or that disadvantaged plaintiffs have legal claims against individual privileged defendants by virtue of their respective social roles alone.

Where individuals make no marginal contribution to injustice, I argue here that not only should they not be legally liable for the collective wrong—they have no private moral duty to undertake futile efforts. As observed in Part II,[98] distributive injustice is not a moral collective action problem of the sort I am discussing here. That is because individuals are in a position to ameliorate specific harms associated with distributive injustice even if they are not in a position to rectify the wrongful social state. By contrast, in a collective moral action problem, the individual does not achieve anything from the standpoint of justice by, say, protesting (given facts as I posited them earlier).[99]

The no-martyr principle in the context of collective undertakings is a cousin of the duty of fair play. Both derive from a principle of equality among those in a group subject to certain collective demands. We put aside for now cases where group members cooperate to

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[97] *See* Bagchi, *Distributive Injustice and Private Law*, *supra* note 14, at 135.

[98] *See supra* notes 13–14 and accompanying text.

[99] Note that I am assuming, without arguing here, that individuals might very well have heightened obligations in light of others' noncompliance with an optimal scheme. For example, they might have a duty to organize an alternative scheme of cooperation or, in some cases, to make up at least in part for the shortfall of others. I do not consider here whether this is true of collective and derivative individual duties of beneficence in particular, as compared to other kinds of duties to promote justice. Liam Murphy rejects that view at least with respect to the duty of beneficence and endorses instead a "compliance condition" on individual duties of beneficence:

> In situations of partial compliance . . . the sacrifice each agent is required to make is limited to the level of sacrifice that would be optimal if the situation were one of full compliance; of the actions that require no more than this level of sacrifice, agents are required to perform the action that makes the outcome best.

Murphy, *supra* note 1, at 280. Although this is compelling for his central cases, I leave open the possibility here that not all duties to promote justice are subject to the compliance condition.

advance a shared interest that has no moral valence (such as Nozick's example of a neighborhood radio station);[100] arguably, in these cases, whether an individual has a duty to contribute will turn on whether she knowingly accepts a benefit or otherwise consents to the cooperative scheme.[101] There is no similar requirement of consent where a group is subject to a moral imperative. In that case, individuals are not free to choose nonparticipation. As long as the means for making relevant decisions is fair, individuals are morally compelled to participate in a scheme designed to fulfill justice obligations of the group.

Importantly, individuals are obligated to contribute even if their individual participation is not essential to the ability of the group to fulfill its collective duty. Imagine that within a fishing community, people who fish purple fish rightly complain that the people who fish green fish are fishing so much that there are not enough purple fish left (because the purple fish eat the green fish and do not have enough green fish left to eat). The people dealing in green fish set up a private fund among themselves to pay for various environmental measures that assist those dealing in purple fish, perhaps because there is no political unit with jurisdiction or interest. The fund tends to use all its available funds, but there is no evidence that its efficacy in aiding the disadvantaged fishermen is affected by the precise level of funding available.

I think most of us would say that the green fishermen are doubly obligated. The hypothetical is intended to suggest a primary duty to the purple fishermen, whose livelihoods the green fishermen have disrupted. But in light of the cooperative scheme set up to fulfill that primary duty, the green fishermen also each owe one another a fair contribution to that scheme. This would be even more obvious if the fund was amassed based on a graduated levy. It would be wrong to the other green fishermen to misrepresent one's fishing volume in order to pay a smaller levy, even if doing so did not compromise one's duty to the purple fishermen because some other green fishermen would make up your shortfall.

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[100] Robert Nozick offered a hypothetical where a neighborhood starts a radio station and demands that each person on the street take turns operating it for one day a year. He suggested that we would find it implausible that someone would be required to contribute to the project he did not endorse or benefit from. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 90–95 (1974).

[101] RAWLS, *supra* note 15, at 111–12.

The duty of fair play[102] is intuitive and well-accepted, and it is derivative from the principle of equality. It is wrong to free ride on the contributions of others because everyone has life projects and private interests that must be compromised in order to contribute to the collective endeavor. To refuse to contribute one's fair share is to unreasonably assert the priority of one's own projects and effectively require their subsidization by others without justification.

The right to withhold participation from a collective action to which others are not contributing flows from the same principle of equality that gives rise to the duty of fair play in the first place. The individual called upon to contribute to a collective effort is doubly bound, both by a primary duty to whomever the group's collective duty is owed and a derivative duty (of fair play) to others in the group called upon to act. In most cases, even if the duty to fellow group members fails, one's duty to contribute is sustained by her primary duty. Thus, a green fisherman should not refuse to contribute to the measure in aid of the purple fisherman just because he knows some other green fishermen are not paying their fair share. It might be that if cheating is sufficiently rampant, at some point a green fisherman should think about what else she might do to fulfill her duty to the purple fisherman. But the duty to the purple fisherman generates mandatory reasons for an individual green fisherman *even if* the failure of the cooperative scheme eviscerates the duty of fair play that a green fisherman owes her fellow green fisherman.[103]

The moral collective action problem as I have defined it is one where the primary duty cannot be met. I have argued that where one *cannot* advance the moral interest in fulfilling the primary duty, it does not give rise to mandatory reasons for action. In such a situation, the nonparticipation of others in the obligated group also makes moot the derivative duty of fair play. It cannot be owed to those who are not playing themselves. Even if there are a few green fishermen who dutifully continue to contribute, if a sufficient number of green fishermen shirk, the scheme is defunct. The exercise in cooperation has failed, and one cannot be said to be contributing to it any more

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[102] *See* Hart, *supra* note 6, at 185.

[103] I have assumed that the green fisherman's obligations might even increase upon shirking by fellow green fishermen, if her contributions are effective in ameliorating the problem of justice that motivates the cooperative scheme. This, however, is not my object to defend that position here. One might argue instead that a green fisherman's obligations cannot increase as a result of noncompliance by fellow green fishermen. *See id.*

than one can pay taxes to a disbanded state. The green fishermen who keep paying are trying to help, but this is not the same thing as actually helping. In fact, John Gardner has argued that it should not even qualify as trying.[104] They are not advancing the collective duty given the noncooperation of others. The result is that there is no duty to act in furtherance of the primary duty at all in these cases. While I have focused in earlier Parts on the idea that a primary collective duty does not give reason to perform actions that will not advance the cause of fulfilling that duty, the principle of equality has its own part to play in explaining the no-martyr principle because it explains why the duty of fair play does not bind the individual in any case. The derivative duty is suspended because the principle of equality posits that no one should have to carry the burdens of shirkers. Free riders are not entitled to shift costs onto the cooperative. It makes sense then that when people do free ride, those that would be willing to cooperate no longer have a duty to them.[105]

Where my action cannot make a difference, the collective duty to which I am subject cannot give me reason to perform that action. Moreover, uncooperative behavior by others suspends the duty of fair play that I would otherwise owe my group in furtherance of our collective duty. I am left with no duty to perform the action in question. Again, I might have unrelated reasons to act, and I have reason to find some alternative path by which to advance the moral interests that drive the collective duty. But I have no duty to do what would have been required of me if others did the same.

There is one additional egalitarian dimension to the no-martyr principle worthy of observation. As individuals, we usually join our communities midstream. Many of the duties we collectively owe are duties of repair. Our communities are already segmented. Neither the spoils of past wrongs nor the power to rectify them are evenly distributed. The no-martyr principle does not avoid the inequity that those who did not benefit from collective wrongs may nevertheless bear the burden of repairing them where they have the power to do so. But it at least allocates the burdens of collective justice to those

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[104] "Someone who recognizes that his trying will not contribute to his succeeding cannot conceivably try. This is because of the nature of trying. Trying is acting for the reason that one's action will (supposedly) contribute to one's succeeding." John Gardner, *The Wrongdoing That Gets Results*, 18 PHIL. PERSPECTIVES 53, 57 (2004).

[105] *Cf.* Christian Neuhäuser, *Structural Injustice and the Distribution of Forward-Looking Responsibility*, 38 MIDWEST STUD. PHIL. 232, 246 (2014) ("[T]he motivation of agents to embrace a forward-looking responsibility . . . depends on whether other actors contribute their fair share, or at least are held accountable if they do not").

who are presently positioned to achieve it. Those whose life experiences lead them to conclude that what they do matters—in light of the money, voice and social influence they command—are duty-bound to advance important moral interests when and how they can. Other members of society, whose life experiences do not justify any confidence that their actions will make a difference to collective practices, need not be martyrs to the cause.

B. *Equality as a Limiting Principle*

The thrust of my argument has been against the Kantian method of evaluating moral obligations and its disinterest in expected consequences. One might question whether insisting instead that actions be evaluated with an eye to their expected consequences abandons Kant and deontological thinking completely.

It does not have to. The no-martyr principle is not justified on utilitarian grounds: my argument has not been that these actions are not required just because they do not improve welfare. I have been largely silent on our reasons for recognizing some duties but not others, including collective duties. But I have never assumed they were utilitarian. For example, our duty to oppose an unjust regime is not utilitarian, nor is the criteria by which we would identify an unjust regime. Our duty to avert climate catastrophe might stand on a variety of grounds, including the intergenerational or geographic distributive consequences of global warming. Our reasons for recognizing various collective moral imperatives depend on broader theories of justice that I cannot sort through here—but I do not assume utilitarianism.

One might worry that even if the grounds for recognizing collective duties are not utilitarian, I measure individual duties that might derive from the collective duty only by way of their impact, that is, in instrumental terms. But this is again an error. I have only argued that there is a threshold question of whether one's actions contribute to fulfilling the collective duty at all. There is no implication that one is obligated to do only what most efficiently advances that objective. For example, I have argued that one's actions in furtherance of the collective purpose are constrained by the duty of fair play. Other considerations might inform each person's proportional contribution, and one might need to do more than one's fair share if others are shirking—one's actions in such scenarios are nevertheless effective toward the common moral objective.

Even though the reasoning I suggest for the deliberating agent is not utilitarian, there is still an important, related risk that my argument does raise. Agent predictions, based as they often are on aggregate

statistics and generalized claims about human nature, risk failing to take seriously enough the individuality of agents. The individuality of agents is closely related to their spontaneity, or the capacity of each agent to choose her own course, which may or may not conform to what we might predict about her based on superficial characteristics to which we have access. Part of what entitles each agent to inviolable respect is her capacity to act on reasons, and other agents never have full access to the reasoning that will spur her to one action rather than another. It is for this reason that we can never really know what others are going to do any more than we could accept that, or even really make sense of what it would mean for others to know what we ourselves have yet to decide. Mutual uncertainty is a kind of mutual respect, and this is part of what the Kantian approach aims to capture.[106]

Conceding that we can never truly know what any single person will do, it is still permissible to make sound predictions, especially about large numbers of people. Perhaps counterintuitively, it is actually the more generalized predictions about what people will do that are consistent with the principle of moral equality. Predictions may be general in one of two senses: a prediction might concern people in general ("people will (or will not) vote"). Thus, the state may engage in some degree of monitoring of public streets and inspection of motorists, pedestrians, and passengers on common carriers on the grounds that "people commit crimes."[107] But it would be impermissible for the state to target particular groups on the theory that those groups are more likely to be dangerous, as if the state knows the minds of the individuals that compromise those groups.[108]

A prediction about an individual's future conduct might also qualify as general if the prediction is based on an assumption that what the speaker takes to be true of people in general (including the speaker) is true of that individual ("she will lose her temper when provoked"). Predictions about behavior depend on theories about what motivates people. As we could never accept certainty by others

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[106] *See supra* Part II.A.

[107] An interesting intermediate case includes predictions that crimes will occur at particular times and places based on mass data processing. *See* Andrew Guthrie Ferguson, *Predictive Policing and Reasonable Suspicion*, 62 EMORY L.J. 259, 265 (2012) (predictive policing "involves computer models that predict areas of future crime locations from past crime statistics and other data.").

[108] *See* Benjamin Eidelson, *Treating People as Individuals*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW (Deborah Hellman & Sophia Moreau eds., 2013); Patrick S. Shin, *Treatment as an Individual and the Priority of Persons over Groups in Antidiscrimination Law*, 12 DUKE J. CONST. L. & PUB. POL'Y 107 (2016).

about what motivates us, we cannot purport to have certainty about what anyone else will do either. Some reasons, however, for predicting the actions of individuals do not depend on characterizing them in a way that is inconsistent with our own self-understanding. Thus, it is permissible to act on a prediction that your friend will break her promise to meet you for dinner because she is stricken by grief at the loss of her parent. Our prediction is based on an explanation that we can project on to people in general, including ourselves. Whether we think not showing up to dinner is a breach, or justified, or merely excused, we know any one of us might skip a dinner out of grief. But it is impermissible to assume your friend will break her promise and to act accordingly (e.g., make alternative plans) because you consider her particularly fickle.

To be incorporated into our practical reasoning, what we can know about others must include what we know about ourselves. That is, only predictions that are based on reasons that apply equally to all people, including ourselves, are compatible with equal respect for our respective capacities to choose and act. Taking the realities of human cognition and moral frailty into account is not offensive because these features of agents are universal.[109] They are part of the circumstances of justice in which we find ourselves and within which we must act. Similarly, treating the announced intentions of an individual as indicative of their future action is not disrespectful because we would similarly wish our own announced intentions to be taken as indicative of our own future actions. Even predictions about individuals that extrapolate from a coherent narrative that the individual might herself endorse are not disrespectful because they project continuity and coherence that we tend to aspire to ourselves. The equality-based test proposed here does not always generate clear answers to which predictions are permissible, and this corresponds with moral intuitions that the boundary is not bright. Nevertheless, the distinction between general and specific predictions helps to explain why the general agent predictions on which the no-martyr principle depends are permissible.

It is one thing to reason that people are not morally motivated enough to take the risks that political protest often involves. It is

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[109] *Cf.* Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1375 (2004) ("Most of the time, our criminal law definitions and law enforcement priorities emphasize the frailties of some and ignore the frailties of others. But human frailty is pretty well distributed across race, class, and social distinctions.").

another thing to predict that one demographic group will turn up or not, or that a particular political leader will be responsive or not; the latter predictions cannot excuse us from a duty to advance a collective mandate. The agent predictions we may make are based on what we know about agents in general, informed by the full expanse of our highly particularized experiences. The predictions, like everything we think, may be contingent in their derivation; but they are not specific in their object. Legitimate agent predictions are based on what we think we know about people, that is, what each of us believes we know about all of us.

IV. VIRTUE AND JUSTICE UNDER THE NO-MARTYR PRINCIPLE

Christopher Kutz made an important point about how individuals should decide what to do: if we decide in the shadow of others' decisions, justice is a dim prospect.[110] Just as prisoners in a prisoner's dilemma will arrive at a worse outcome for both prisoners if they 'act alone,' so too will citizens consistently sustain injustice in small scenarios and in their basic structure if we do not choose to act as we would under a cooperative scheme, without worrying whether others will abide by it. David Miller has similarly argued from the premise that "it is morally intolerable if [remedial] suffering and deprivation are allowed to continue, in other words that where they exist we are morally bound to hold somebody . . . responsible for relieving them."[111] If it is intolerable and someone must be responsible, and there is no organized entity to blame, it is tempting to lay the responsibility, if not the blame, at the feet of all the individuals that could have cooperated to achieve a different result. And if they are to be held responsible, the implication is not only that they carry remedial obligations going forward, but also that they should have acted differently to begin with.

There is a big difference between injustices in the basic structure and other kinds of unfairness that are potentially remedied by an organized collective. There is already an organized collective intended to address the former category of injustice: the state. Thus, it is not really the case that there is no alternative to unilateral action by individuals, undertaken in blind hope of cooperation by third parties. The state is in the first instance responsible for ensuring the justice of

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[110] *See* KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE, *supra* note 73, at 113.

[111] David Miller, *Distributing Responsibilities*, 9 J. POL. PHIL. 453, 464 (2001) (emphasis omitted).

the basic structure. While its failures trickle down to the individuals on whose behalf it acts, it is not cynical to look to the state as the agent best positioned to coordinate individuals in their collective duties to one another. The next Part will focus on state action as a solution to moral collective action problems, like other collective action problems. But I do not pretend that the state makes the problem go away. The state does not solve all the problems it should. It must itself be moved into action of one kind rather than another, and some unfairness that can be characterized as injustice is not a plausible target of state action at all. There are some kinds of unfairness flowing from social institutions to which the state just has no solution, and there are other kinds of ad hoc unfairness among particular people that practically can be solved only by social cooperation outside of the state. So, while state action goes a long way to ameliorate the tragedy of moral collective action problems, there is plenty of that tragedy that persists even under a just state.

In this Part, I make two separate points in response to this observation. First, while I have argued that individuals have no duty to act in furtherance of a collective plan if they predict with confidence that it will not succeed, unilateral actions of this sort can still be regarded as virtuous. Virtuous people do good, and if they are plentiful, we can expect less injustice. Second, even though it remains true that individual-level moral reasoning of the kind I have defended here does not promote justice in the way that a more collectivist attitude would; we cannot simply reason backward from what we want our world to look like to determine what is required of each of us.

A. *Virtue*

One might mistake my view for a stronger one that denies that there is any value in trying to promote justice when one cannot succeed. However, a regular habit of trying to do what everyone should do probably makes it more likely that one will comply with actual duties to contribute to collective ends. Virtues can be understood as cultivated strength of will that makes it more likely that one complies with moral duties even when doing so entails sacrifice.[112] For this reason, we should regard as virtuous a proclivity to engage in even futile action if intended in service of justice. Likely, the tendency at work is not to engage in futile action per se but rather a cognitive practice of declining to weigh the probability of success before

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[112] *See* Mary Gregor, *Kant on Obligation, Rights and Virtue*, 1 ANNUAL REV. L. & ETHICS 69, 95 (1993) (describing the Kantian conception of virtue).

sacrificing for justice. Since we are bound to make mistakes in our assessment of what is likely to result from our actions even if we exercise appropriate caution in our predictions, those who skip that step in moral deliberations are likely to do better (from a moral point of view) in the long run. I refer here only to the step of assessing whether one's own contribution is likely to make a difference, not assessing what kind of contribution is likely to make the best contribution. These are separable analytically even though in practice one can hardly think about one without the other. Failing to consider which potential action is most likely to advance justice is a breach of the duty to support justice. But choosing not to assign weight to the other matter, of the odds of succeeding at what one has already determined is the most promising course of action, is virtuous because it effectively causes one to err always on the side of justice.

Even the less heroic among us tend to abandon calculations of efficacy in the context of certain kinds of choices. For example, many parents would run into a fire to save their child if that was the child's best chance without asking whether it was pointless, i.e., whether the effort was too unlikely to succeed to qualify as compulsory. Most parents are prepared to do a great deal more than what is required of them. But what would be typical and perhaps an obligatory expression of parental love for a child is a kind of heroic love of humanity that would not be required with respect to a stranger. Outside of special relationships, we are permitted to ask whether our actions will make a difference; only the virtuous, having identified a course of action as most likely to succeed, decline to consider further whether success is probable.

Treating a tendency to promote justice without regard to efficacy as a virtue is consistent with the idea that one has an imperfect duty to promote morally valuable ends. In Kant's usage of the concept, one must over time act in a way that promotes a compulsory end even if particular omissions cannot be regarded as immoral.[113] Individuals' acts in furtherance of the imperfect duty are virtuous. The duty to support just institutions and the duty to promote justice generally may not be imperfect in the way that Kant characterizes the duty of beneficence. In some instances, the duty generates mandatory duties to take specific steps in furtherance of justice. Nevertheless, we could depart from Kant but borrow some of the framing to say that a person who cultivates habits of action that make it more likely she will comply

[113] IMMANUEL KANT, THE METAPHYSICS OF MORALS 153 (Mary Gregor ed. & trans., 1996) (1797).

with the duty of justice is virtuous in the same way that a person who regularly acts on imperfect duty is virtuous. This allows us to accommodate the strong intuition that acting without regard to consequences for the sake of justice is not without moral worth, even if, as I have argued, it is not compulsory. Because a minority of people are virtuous in the way described, we can also be optimistic that there will be some movement toward justice over time. Even the less virtuous, who would not be motivated to act if they perceive no chance of making a difference, are more likely to act because they know there are virtuous people out there and they make it more likely that the critical threshold for collective success will be met.

B. *The Inadequacy of Individuals to the Collective Work of Justice*

Supererogatory acts will never get us to justice. Do we need to understand ourselves subject to a duty to promote justice irrespective of others' actions because we are otherwise doomed to pervasive injustice? Such an argument from necessity would set the content of our duties by reference to the common good. Kant's categorical imperative effectively operates this way.[114] The original position in Rawls's theory of justice similarly asks what everyone would want the principles of justice to be, assuming compliance.[115]

The Kantian position, but not the Rawlsian one, is at stake in the question. It makes sense to ask by what principles people would agree to be governed because the basic structure, as Rawls described it, is a matter of political justice. It is inherently a collective question. It necessarily seeks common ground among citizens of the political community, and Rawls's method achieves unanimity by stripping people of characteristics that might create divergent preferences in the original position.[116] Rawls has taken a great deal of criticism for that move.[117] But while this reader of Rawls is sympathetic to the idea that we can be asked to leave quite a bit when we arrive at the doorstep of

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[114] KANT, *supra* note 18, at 31.

[115] RAWLS, *supra* note15, at 251–57.

[116] *Id.* at 252.

[117] *See, e.g.*, ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 297 (1988) (arguing parties to original position have no basis for espousing any value over another); CAROLE PATEMAN, THE SEXUAL CONTRACT 43 (1988) (a feminist critique rejecting the original position as inert); LIBERALISM AND ITS CRITICS 5–6 (Michael J. Sandel ed., 1984) (stating a communitarian critique of the liberal picture of the self as prior to its commitments); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 79 (1983) (parties' choices in original position are irrelevant to the "world of particular cultures.").

political discourse—at least if we can expect similar anonymity by others—asking individuals to set aside their particularities when they deliberate about their individual courses of action is another matter entirely. While we might arrive at and endorse principles of justice by way of reason, those principles will ultimately regulate us through institutions outside ourselves. Those principles do not constrain our thought directly; they shape the circumstances in which we act.

Our duty to support those institutions, by contrast, is an individual duty. The duty to support just institutions is probably the most important of a family of duties to support justice that extends beyond the political context. Virginia Held has argued individuals are bound to cooperate with collectives that are subject to demands of justice, both by following express plans and by taking steps that accord with a salient solution.[118] We may sometimes be obligated even to attempt organization of groups that cannot otherwise meet the moral demands on them.[119] These duties that apply to individual action are very different from duties that apply to groups, such as a political community. Unlike the latter, individual moral duties must take up space in our private deliberations about how to live.

The idea of "support" is not presented in Rawls as a maximalist proposition. The right takes precedence over the good, but the idea cannot be that we must radically prioritize the promotion of justice over private projects or there could be no private projects. The demands of justice would displace the life plans that are at the heart of what Rawlsian justice aimed to protect. Supporting justice, whether in the basic structure or in small spaces of public life, does not require making the pursuit of justice the defining project of one's life, though some people might choose to devote themselves to it in that way given their conceptions of the good life.

The way in which individual life projects relate to collective projects depends on the relationships that individuals have with the various groups to which they belong, including their political communities. Those relations need not conform to any hierarchy specified by principles of right; they are at the heart of what each individual regards as good. Individuals identify with political communities, social groups, and families to the extent those groups factor into their lived experience in a positive way, and on the strength of bonds individuals perceive with other group members. If there is

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[118] Held, *supra* note 70, at 476.

[119] *Id.* at 480.

no collective but only an aggregate of persons[120] whose only connection with one another is the potential to solve a problem, individuals will not identify with that aggregate at all. But even where the group to which moral demands apply is organized, individuals will not usually conceive of themselves as the many hands of that group; the group is often, but not always, conceived rather as an entity that serves individuals, even if that service is a moral one.

People have identities and personal ambitions that they bring to their reasoning about how to live. Some of them will indeed identify closely with a community and will be optimistic about its potential to redress injustice, in part because they are likely to project their own associative feelings onto other group members. They might regard themselves less as agents of the group and more as principals, the people on whose behalf the group acts (even if not for their material benefit). Of those who identify closely with a collective, we could also say sometimes they feel ownership of it. Such associative feeling will be borne of the life experiences of individuals in relation to the group; it will rarely be generated by the moral necessity of cooperation in a given instance. To be sure, moral necessity profits from such solidarity, but it rarely spontaneously *generates* the feeling of solidarity absent background conditions that attach group members to one another already. Those for whom the collective is an essential element of the self are most likely to play their part in fulfilling the moral imperatives of the collective. Their feelings of solidarity are a fine reason for their actions, but those feelings are not reasons rooted in principles of justice and do not generate categorical duties for those lacking in such feeling. Obligations of solidarity apply just in case someone identifies with the group in question, like obligations of friendship apply only if one identifies as a friend.

It is at odds with human experience to ask those who do not identify with—or feel ownership of—a group, either because it is not organized or because it has not played a formative role in the life of the individual, to internalize the moral demands to which the group is subject. Individuals will not adopt group projects where those projects are ill-formed and unpromising, or where the group has not, over the life of that individual, made itself indispensable to her own self-conception. In some ways, those who act on the collective demands on

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[120] Margaret Gilbert, *Who's to Blame? Collective Moral Responsibility and Its Implications for Group Members*, 30 MIDWEST STUD. PHIL. 94, 95 (2006) (contrasting a collective, defined as an organized group, with an aggregate); *see also* Held, *supra* note 70, at 471 (defining a collectivity as a group with a decision-making procedure).

a group are the lucky ones: at least they take the group in question to be truly their own. Fortunately, even those who do not identify closely with one of the groups to which they belong may identify strongly with one or more of the myriad other groups to which they belong. While we are obligated to promote justice in all the groups to which we belong, the pursuit of justice would be all-consuming if we were to devote ourselves to the justice of each of these groups; there would be little left. Again, this is not just a problem of demandingness as such. Construing individual duty in service of collective justice as rigorously as we might construe the obligations of a parent to a child—unrelenting and indifferent to cost—treats individuals as the hands of all the various groups in which she finds herself. In the liberal tradition, we define justice in a way that it is attentive to and protective of the life projects of individuals.

Nothing here rejects the role of solidarity in motivating individual action that rises above moral collective action problems. But solidarity must be real. It cannot be conjured up by the individual nor imposed on her by obligation just because it is the best solution to a problem of justice. For the same reasons that we are entitled to take into account what we know about people, we have to start with people as we find them in construing their moral obligations. Justice, at least on a liberal view, is construed to serve and protect individuals, not the other way around. This idea is often reflected in arguments that morality cannot be conceived in terms that are excessively demanding on individuals.[121] The constraint that we understand moral duties in a way that is consistent with their subject is not merely a way of maximizing the relevance of moral theory. It takes seriously the human agent as the subject of moral rules. Our capacity for reason is no doubt one of our most fundamental qualities, and it is the one around which Kant built his theory. But we have other features that are fundamental to how many people conceive of themselves qua agents—agents with preferences and projects, beliefs, limitations, frailties, and communities. When we reason about moral obligation, we must take them as our starting point and not fashion our idea of the person, as well as our proclivities and obligations, to serve antecedent conclusions about what justice demands of us.

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[121] *See, e.g.*, RICHARD BRANDT, A THEORY OF THE GOOD AND THE RIGHT 276–77 (1979).

V. THE ADVANTAGES OF PUBLIC LAW

We saw above that private law broadly respects the no-martyr principle. In particular, defendants are usually only liable where they have caused actual injury; it is not enough that a person failed to comport with a standard of conduct. Moreover, in tort law, parties are not usually held to optimal standards of conduct where individuals were not already bound to conduct themselves in accord with such a standard by virtue of social norms. Individuals are not held responsible for having failed to behave as everyone should if others have not yet been held to the same standard.

Public law holds everyone to the same standard. That, at least, is its potential. Public law is the essential tool with which we solve moral collective action problems. Its ex-ante character—rules generally predate the conduct to which the rules are applied—accounts for most of its advantages. Once conduct is subject to a mandatory rule, individuals can expect full compliance, or at least compliance at rates sufficient to require their own cooperation. The timing of public law rules is related to other important features, such as its universal character. That is, unlike marginal movement in the rules of private law over the course of adjudicating disputes between two parties at a time, public law rules are universally binding on everyone in the class that a rule governs; they hit everyone at once. Finally, public law allows agents to avoid an epistemic obstacle to navigating collective action problems, namely, a single agent cannot distinguish apparent noncompliance by other single agents from simple disagreement about the upshot of applicable moral reasons. Promulgation of a rule by a public authority solves this problem because it preempts first order reasoning about conduct with an exclusionary reason that is uniform for all.[122] Private law, which can justify its ex-post nature only by tracking the reasons that already applied to individuals, lacks the capacity to solve the problem of moral uncertainty in this way.

A. *Timing is Everything*

Moral collective action problems, like all collective action problems, are driven by uncertainty about the future. We do not know what other people will do, so we make predictions based on what we do know. Even if we are confident that moral demands on the group can be met only if we each conform to some rule of conduct, we may doubt that others will rise up to its demands. The most significant

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[122] *See* RAZ, *supra* note 13.

thing about a mandatory rule issued by the state is that it gives us just the information we need when we need it. Once subject to a rule to which others are similarly subject, we can know that others will participate in the cooperative scheme that the state puts in place. We do not have to worry about free-riding or futility. This works because the public law rule is set out in advance of individual conduct to which it applies.

Although people seem only to have this worry with respect to laws that strike them as 'unnecessary,' one could in principle worry that public law rules disrespect agents by implicitly expecting noncompliance. After all, we would not need rules prohibiting conduct if the state did not expect people to otherwise engage in that conduct. We need not worry, though, because the realism about our moral imperfection manifest in such laws is applied equally across all subjects of the law.[123] Even when the state issues rules that seem unnecessary because most people are properly motivated to comply anyway, the rule is not disrespectful of our agency if it is founded on worries about people in general and the risks to which we are all subject. For example, a law that requires parents to feed their children might not do a lot of work, and we might bristle at the idea that the state has something to say about this topic, or distrusts us so. But if the state issues the rule in a general way, without attempting to predict who will not feed their children, it does not disrespect citizens by virtue of its prediction that *some* parents will fail to feed their children. It might turn out that introducing the machinery of the state into some relationships is a bad idea and the damage the state does when it flails its arms in that space is not worth it. That is a contingent judgement that will probably need a different answer in different times and places. But at least the prediction about citizen behavior implicit in the rule is not problematic.

The bare timing of public law rules also helps to foreshadow and manage antisocial conduct that is only cumulatively consequential to the collective practice. I have thus far focused on affirmative acts that might be required of individuals in order to meet demands of collective justice. But a lot of what is required of us is forbearance. Consider the behavior of homeowners that put chairs or cones along the street to prevent others from parking in front of their homes. A norm that permits people to 'appropriate' public parking temporarily when they have some immanent and special need, such as moving

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[123] See discussion of how principle of equality constrains agent predictions in Part III.

heavy furniture, would not seriously undermine the public interest in making neighborhoods accessible to everyone. If the exception were not abused often, people might assume, when they see a chair on the street, that it was placed with good reason. But as increasing numbers of people abuse the practice, the practice disintegrates, and one ends up with unjustified extensions of private property into public space. Public parking rules that clearly establish where people may park and create some financial risk for rule-breakers make it actually easier to accept the occasional violation without prompting copycat behavior. The public rules increase our expectation that the violation at hand is justified and our confidence that it will not contribute to a spiral of parking mayhem of which we might as well be part.

Of course, there are plenty of duties we can recognize between individuals in private law. There is no claim here that private law is generally inept at regulating misconduct. But because it operates one dispute at a time, and after the fact, it cannot motivate a solution to moral collective action problems without making martyrs of particular defendants—that is, without holding them responsible for injuries they were not in a position to prevent acting alone.

A second virtue of public law, universality, is closely related to the matter of timing. Because public law rules are issued in advance of the conduct they regulate, they usually apply to many potential subjects of the law. When we suspect that a rule was not merely 'inspired' by but intended to benefit or target a particular citizen or corporation, the rule is regarded as less legitimate as a result. Rules developed through adjudication tend to evolve one small step at a time; the small extensions of existing rules are intended to be modest, not sweeping in their coverage. While this makes sense for judge-made law that is applied after the fact to a particular defendant, such a method raises the problem of unfair treatment discussed in Part III. By contrast, most public law rules aim to apply broadly. It means that individuals subject to those rules can rest assured that—to the extent there is equality before the law—the rules of collective living that are intended to promote justice and the common good constrain everyone. To be sure, the formal fact of universal application does not ensure that public law is equally burdensome for all, or that everyone contributes equally to moral demands on the collective. Those who suspect they are being shafted will probably regard the legal system as failing its task of solving moral collective action problems because the law is not designed to ensure equal contributions. But while public law is not necessarily universal in the substantive sense that is of ultimate moral

interest, universality of the constraints it imposes is usually a sine qua non of its perceived legitimacy.

That everyone is equally subject to a mandatory rule of public law, as compared to an inchoate moral duty to advance a matter of public justice, has a secondary benefit. When we rely on moral duties at the individual level, the costs of promoting and achieving justice fall on those with moral clarity. Victims of systemic oppression may see injustice as ubiquitous. The imperative to respond to injustice will infuse every aspect of their lives. By contrast, those who see injustice in discrete places in the social structure will be more lightly burdened. Such a dynamic is perverse. When the state mediates competing assessments of its mandate through democratic institutions and then issues mandatory rules that reflect compromise, those rules apply to everyone equally, whether they appreciate the moral interests served by those rules or not.

The final and most important virtue of a mandatory rule literally preempts the other benefits of timing. One of the reasons we might hesitate as agents to predict or assess the actions of others is the phenomenon of disagreement. When we observe noncompliance with what *we* understand rightful conduct to be, how do we know whether other people are choosing to flout what they believe to be their obligation—withholding cooperation because they expect noncooperation from others, or simply disagreeing with us about what justice requires from us all?[124] The timing and generality of public law rules helps us to eliminate the problem of noncompliance in anticipation of the noncompliance of others. The procedural pedigree of public law rules allows us to manage the problem of disagreement.

Promulgation of a rule by a public authority preempts first-order reasoning about conduct with an exclusionary reason that is uniform for all.[125] Public law produces its own agreement on the upshot of applicable reasons by making practically irrelevant the kinds of reasons on which we disagree. Absent a mandatory rule, per the discussion in Part III, a primary duty that is borne by the collective gives rise to derivative duties of reciprocity and free play by individuals. Once a mandatory rule is in place, the hierarchy is reversed. Individuals face

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[124] *See* Jon Elster, *Rationality, Morality and Collective Action*, 96 ETHICS 136, 155 (1985) ("[T]he notion of what constitutes cooperative behavior in any given case is ambiguous . . . The pacifist who is asked, Who would fight the enemy if everybody acted like you? May justly reply, If everybody acted like me, there would be no enemy to fight.").

[125] *See* RAZ, *supra* note 13.

a straightforward duty to abide by the authoritative directives of a legitimate state. What would be a primary duty of justice that applied to the group now undergirds the individual duty to defer to the state. We might think in Razian terms that the duty of justice that applies to the group and the moral collective action problem that impedes decentralized fulfillment of that collective duty together make it the case that we will do better abiding by authority than by flouting it.[126] But the basic point does not depend on a particular jurisprudential view like the service conception of authority.[127] As long as it is the case that individuals will obey mandatory legal rules, those rules achieve just the coordinated action we need, and we in turn are relieved of epistemic doubts about the motivations of others. Disagreement about how we should collectively comply with the demands of justice is channeled into public discourse about how the state should direct individual action *going forward*, instead of an opaque, real-time process of mutual response in the realm of conduct, as the tragedy of noncooperation plays out.

B. *What We Could Do Differently*

Moral collective actions problems at first blush might seem exotic and unlikely. How often is it really the case that we cannot make a difference to justice? Most people already prefer mandatory rules with respect to cases of large-scale coordination, as with carbon pollution, for example. I argued in Part II, however, that the small possibility of making a difference, or the possibility of making only a very small difference, does not do away with the basic tragedy of a moral collective action problem. If the basic framework sheds light on imperfect cases, we can learn from it in how we handle a wide variety of public policy matters. I name just a few here by way of example.

One context in which it is typical to appeal to conscience in public discourse is the matter of corporate social responsibility. Observers often call on corporations to do better by their employees or the environment. Some are optimistic that we can achieve accountability through market measures that allow investors or consumers to punish irresponsible corporations. Not all corporations are susceptible to those influences, and it is hard to imagine major social change coming about through ad hoc pressure that appeals to the conscience of

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[126] JOSEPH RAZ, THE MORALITY OF FREEDOM 53 (1988).

[127] While the argument here does not depend on one elaborated view of the nature of law or why it binds individuals, my argument does require that one regard law as binding in the sense that it creates exclusionary reasons for acting in accord with it.

corporate agents. One might argue that many instances of alleged corporate irresponsibility are not part of any collective action problem because each corporation is in a position to make a difference by unilateral action. If, however, we take most corporations to be subject to competitive pressures, any costly actions in service of corporate responsibility will disadvantage that corporation to its detriment. In the long run, to the extent profitability goes down or prices go up, we can expect its investors and consumers to flee, respectively. While most can probably do *something* useful, it is not clear that many corporations have as much room for unilateral action as would be necessary to bring about substantial change in the vulnerability of even those specific populations dependent on them. My argument here suggests that we might expend less energy exhorting corporations to behave well and invest political resources in mandatory rules. While the corporate social responsibility movement is of course a response to the obstacles to public law reform, nothing short of public law is likely to be successful. Asking companies to behave virtuously is so at odds with their social construction as engines of profit for their constituents and users that it is an unpromising alternative.

My subsequent examples are from the realm of contract. Many commentators are critical of nondisclosure agreements, and there is some cynicism about the people who sign them in exchange for significant sums of money.[128] My discussion here gives us reason to doubt that anyone is required to forego that money in service of justice that she is unlikely to see. As long as nondisclosure agreements are valid and enforceable, each prospective signer can expect that others similarly situated will be offered similar deals and most of them will sign too. It is not reasonable to expect people to turn their lives upside down publicizing horrible facts when there is little prospect of reforming their organization, let alone society, because others similarly situated will not come forward. I doubt that it is appropriate to ask people, usually women, to forego material compensation for their silence in the service of bringing justice to those who do wrong. But if we think that the optimal rule is disclosure, rather than nondisclosure, then there should be a *rule* prohibiting nondisclosure agreements. Until then, those who sign them have done no wrong.

People sign other agreements with adverse social consequences. For example, we all routinely sign waivers of liability that make it

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[128] *See, e.g.*, Taishi Duchicela, *Rethinking Nondisclosure Agreements in Sexual Misconduct Cases*, 20 LOY. J. PUB. INT. L. 53 (2018); Sidney W. DeLong, *Paradigm Shift: #metoo and the Paradox of Secrets Bribery*, 52 U. PAC. L. REV. 7, 19 (2020).

possible for businesses to operate less carefully than might be socially desirable. But it makes no sense for any one of us to protest because there is no chance that the business will adopt a new policy on account of a few troublesome people.[129] We each understand that the individual calculation usually cuts in favor of signing because the odds of injury are sufficiently low in the individual case. Likewise, we sign away our right to sue without much worry because we have no desire to sue in any but the most exceptional circumstances.[130] Surely it is not incumbent on the individual to strike out against the evisceration of public law by declining the benefits of such an agreement; it is up to public law to manage the effects of private agreement, including their enforceability. In other contexts, we agree to transfer intellectual property that is useless to us to an entity that will provide us a useful service at no other cost. The concentration of intellectual property in the hands of a few entities might be regarded as incompatible with a free society in the long run.[131] But again, is the individual really supposed to forego the value of the software in order to shout her worries into the dark? My argument here has been that so much cannot be demanded of individuals. Mandatory rules issued by a public authority are necessary to solve these and other moral collective action problems.

VI. CONCLUSION

I have argued that individuals are not required to take futile action in furtherance of collective justice, even if they must rely on what I have called "agent predictions" to describe a proposed action as futile. Not all agent predictions afford fellow agents equal respect. But because people are material beings whose contingent environments are essential to our self-understanding, we can take into account the

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[129] *See* John Fabian Witt, *Toward A New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 776 (2001) (describing how "the problem of increased risk to third parties arising out of waivers of liability" was recognized early on in tort jurisprudence).

[130] *See* Sarah Baxter, *Employees Beware: Signing Arbitration Agreements May Limit Your Remedies in Suits Filed by the EEOC - Equal Employment Opportunity Commission v. Waffle House, Inc.*, 2000 J. DISP. RESOL. 413, 415 (2000) (discussing how some private claims vindicate the public interest and should not be subject to an individual's right to forfeit the right to sue under an arbitration clause).

[131] *See* Margaret Jane Radin, *Regime Change in Intellectual Property: Superseding the Law of the State with the "Law" of the Firm*, 1 U. OTTAWA L. & TECH. J. 173, 185 (2004) (arguing that individual waivers of certain kinds of copyright should not be enforceable).

reality in which our choices are made, including what we each have learned about what people are like and what they tend to do.

Moral collective action problems, like collective action problems in general, have a clear solution: state action. Institutional solutions to collective action problems make cooperation rational at the individual level.[132] Similarly, it takes public law to make morally compulsory the individuals acts necessary to achieve collective justice.[133] I regard this point as complementary to the Kantian thesis that justice is not possible outside of the state.[134] My view might at first blush have appeared hyper-individualistic or simply selfish; it might have seemed almost lazy for taking aim at the kinds of duties that make life hard. Instead, by showing the limits of individual obligation that is derivative from collective duty, I have placed the state—and in particular, public law—at the center of our collective moral life. Just as the limited reach of state institutions sometimes requires individuals to do more than is legally required of them,[135] the limits of individual moral reasoning demand state action to achieve justice. I have suggested that mandatory rules issued by a public authority are the most promising solution to a variety of moral collective action problems. My discussion is intended to leave us pessimistic about the prospects for spontaneous collaboration in service of justice but optimistic about our capacity to make progress through law. The critical role of the state in solving these problems is one of the reasons that the state itself is morally compulsory, as Kant argued.[136] However demanding Kant was on the individual moral agent, he was not very optimistic about her. He too ultimately looked to the state for justice.

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[132] *See generally* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

[133] *See* IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE 69 (2011) ("institutions are a *necessary* means for promoting justice…For the promotion of justice requires collective action, and that requires organization.").

[134] KANT, *supra* note 113, at 121–22; *see also* Helga Varden, *Kant's Non-Voluntarist Conception of Political Obligations: Why Justice is Impossible in the State of Nature*, 13 KANTIAN REV. 1 (2008); Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535 (1996).

[135] *See supra* note 15 and accompanying text.

[136] *See supra* note 134.


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