

POSTSCRIPT TO *JUST RELATIONSHIPS*:
REPLY TO GARDNER, WEST, AND ZIPURSKY*Hanoch Dagan** & *Avihay Dorfman***

INTRODUCTION

Just Relationships develops a novel theory of private law for a liberal legal order.¹ It argues that private law assumes the moral responsibility to determine just terms of interactions among private persons. Its most basic organizing ideas are *substantive* freedom and equality. We are grateful to Professors John Gardner, Robin West, and Benjamin Zipursky for their fascinating comments on our theory. Their rigorous engagement with our work and the penetrating insights they each develop provide an excellent opportunity for us to pause and reflect on some of the basic questions that arise in connection with the theoretical study of private law. This Reply is organized around three issues: the normative status of private law, the private-law–public-law distinction, and interpretation and social criticism. It focuses on these issues because they reflect key areas of disagreement between our commentators and us. Elaborating them can help us clarify and refine our characterization and justification of private law, defined as the law governing the interactions among private persons.

I. THE NORMATIVE STATUS OF PRIVATE LAW

Gardner doubts the claim that private law is both indispensable and intrinsically valuable.² *Just Relationships* develops the argument that private law is indispensable in the sense that no legal order can respect the status of its subjects as substantively free and equal persons in the absence of an adequate system of relational powers, rights, and duties—in other words, in the absence of private law as defined and defended in *Just Relationships*.³ In this regard, private law is indispensable because even the most elaborate and generous system of public law cannot satisfy the horizontal

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1. Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 *Colum. L. Rev.* 1395 (2016) [hereinafter Dagan & Dorfman, *Just Relationships*].

2. See John Gardner, *Dagan and Dorfman on the Value of Private Law*, 117 *Colum. L. Rev. Online* 179, 187–91 (2017) [hereinafter Gardner, *Response to Dagan and Dorfman*], <http://columbialawreview.org/wp-content/uploads/2017/09/Gardner-v5.0.pdf> [http://perma.cc/DQ3H-YP7R].

3. See Dagan & Dorfman, *Just Relationships*, *supra* note 1, at 1421–24.

demands of relational justice.⁴ Furthermore, private law is of intrinsic value in the sense that its construction of frameworks of respectful interactions among private persons is valuable *quite apart* from these frameworks' contribution to other, collective values such as distributive justice.⁵ Against this backdrop, Gardner's concerns are misplaced because *Just Relationships* employs qualitatively different ideas of what makes private law both indispensable and intrinsically valuable than his comment suggests.

There are (at least) two different interpretations of the indispensability and intrinsic-value theses: an absolute and a comparative one. On the absolute interpretation, private law is indispensable and intrinsically valuable in the sense that there is no other extralegal scheme of rules, be it moral, conventional, or the like, that could perfectly offset the absence of private law. On the comparative interpretation, private law is both indispensable and intrinsically valuable *vis-à-vis* its *legal* alternatives. The latter interpretation seeks to establish the precise role and significance of private law within the broader category of legality.

Whereas Gardner takes up the former, absolutist interpretation, our account focuses on the latter. After all, our motivation has been to defend the role of private law against the two dominant approaches to private law.⁶ The first of these is the approach of those (such as lawyer-economists and critical legal scholars) who attribute no significance to private law's interpersonal domain and thus view it as public law's annex. The second is the approach of those—whom we called traditionalists—who insist that private law has no responsibility for liberalism's most fundamental commitments to substantive freedom and equality and is founded, instead, on the maxim of reciprocal respect to formal equality of independence. Our references to both private law's intrinsic value and its indispensability should be read with this context in mind. The argument is that it is intrinsically valuable to address—indeed, to give effect to—the liberal commitments to self-determination and to substantive equality *not only through public law*, but also through the law governing interpersonal interactions, namely, private law. Put differently, a legal system that takes these commitments seriously (as any legal system should) cannot endorse them only as the touchstone of its public law; the significance of interpersonal interactions as individuals renders the use of private law *indispensable for this legal task*.

4. See Hanoch Dagan & Avihay Dorfman, Justice in Private: Beyond the Rawlsian Framework, 36 Law & Phil. (forthcoming 2017) (manuscript at 1–3) (on file with the *Columbia Law Review*) (arguing that the demands of substantive freedom and equality have a horizontal, rather than merely vertical, dimension).

5. See Dagan & Dorfman, *Just Relationships*, supra note 1, at 1398, 1420–21, 1444 (defending the value of private law in terms of just relationships and discussing the possible tensions between it and the demands of distributive justice and social welfare).

6. See *id.* at 1401–10 (arguing against the misleading dichotomy posed by the traditional and critical views of private law).

The preceding discussion also clarifies why Gardner's otherwise interesting distinction between strictly and loosely relational duties is beside the point. On Gardner's view, some private law duties are strictly relational in the sense that their value is part of the reason for imposing private law's relational duties.⁷ Other duties—the modern duty of care is Gardner's stock example—are loosely relational because no such value plays a role in justifying these duties' existence.⁸ We do not argue that the value of a specific type of relationship covered by private law necessarily grounds the existence of each and every relational duty in private law. That said, we do maintain that these duties are *not* independent of the relational form of the parties' interaction; that whatever value or good that is instantiated in a particular relationship governed by private law may be, private law's pertinent doctrine should also be (and by and large is) attentive to the requirements of relational justice.

Furthermore, Gardner's distinction between strict and loose relationality relies on an inadequate conception of valuable relationships. Indeed, his conception excludes basic tort interactions among strangers whose value comes down to respecting each other by taking precautions, being considerate of the existence of vulnerable others, and so on. Given the high moral stakes of preventing severe injuries by engaging in such pro-social acts (of exercising care), it is not clear why the value of relations in which people are expected to be mindful of others cannot or should not figure in the justification of imposing them. The fact that the parties are and will likely remain strangers does not negate the value of such relations.⁹ On our account, and contrary to Gardner's view, the modern tort duty of care purports to *establish* valuable relations of care and respect among strangers by way of imposing a duty of care irrespective of contractual privity.¹⁰

Although it is beyond the scope of this Reply to explain precisely where *Just Relationships* stands in relation to the absolutist interpretation of the indispensability and intrinsic-value theses, it is apt to identify the core disagreement between Gardner's and our understanding of the place of private law vis-à-vis extralegal rules and institutions. The discussion gives a rough sense of the future direction of our view of the normative status of private law.

For Gardner, "the main point" of private law and law more generally is to help "people to do the things that they ought to be doing anyway, quite

7. Gardner, Response to Dagan and Dorfman, *supra* note 2, at 193–94.

8. *Id.* at 191–93.

9. See Avihay Dorfman, Foreseeability as Re-Cognition, 59 *Am. J. Juris.* 163, 188–95 (2014) (explaining the otherwise puzzling doctrine of plaintiff foreseeability in duty-of-care analysis in terms of respectful recognition).

10. The leading U.S. decision concerning the modern duty of care is *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). Gardner mentions its British equivalent, *Donoghue v. Stevenson*, [1932] AC 562 (HL) (appeal taken from Scot.). See Gardner, Response to Dagan and Dorfman, *supra* note 2, at 191–92.

apart from the law.”¹¹ This characterization of law’s importance leads Gardner to suppose that law operates on preexisting reasons and norms. In connection with tort law, Gardner observes that “[t]he law exists to help people to avoid wronging each other, to have healthy relationships, to avoid wasting their lives . . . and so forth.”¹² This observation suggests that tort law is about enforcing norms of appropriate behavior that are roughly identifiable quite apart from the law, even though tort law can improve things “by rendering [them] more determinate.”¹³ Gardner then extends this view concerning the normative status of private law beyond the category of duty-imposing rules exemplified by tort law to capture the category of power-conferring rules exemplified by contract law.¹⁴ Here, Gardner asserts that “[c]ontracts exist apart from the law and are merely recognized and upheld (under limited circumstances) by the law.”¹⁵ The exceptional case for Gardner is trust law, for it is a genuine creature of law (equity included).¹⁶

By contrast, we see a much more ambitious role for private law in people’s practical affairs. The distinction between duty-imposing and power-conferring rules, which is to say between guiding and empowering, is crucial for clarifying our disagreement. Consider first duty-imposing rules. Regarding this type of rule, our position may not be qualitatively distinctive from Gardner’s, but it is nonetheless different. We share his intuition that what he calls “raw morality” and “raw moral rights and duties”¹⁷ provide us with a secure starting point, so that the role of the law is to render an “already-constitutive (set of) norms” more determinate.¹⁸ Thus, because all private persons have certain basic rights to a good name and bodily integrity, certain core aspects of the rights protected by such torts as battery, defamation, or negligence can be identified quite apart from the law, and yet they oftentimes require legal specification.

That said, even regarding duty-imposing rules, we think that Gardner understates law’s significance by eliding an important distinction as per the epistemic role of law in giving effect to moral duties: It is one thing to say that law turns awfully crude moral prescriptions into fully fleshed norms of respectful interactions; it is quite another to say that law’s added value applies only at the margins, as if tort law merely reports on what counts as wrongdoing. The distance between the moral requirement

11. Gardner, Response to Dagan and Dorfman, *supra* note 2, at 197.

12. *Id.* at 198.

13. *Id.* at 197.

14. See H.L.A. Hart, *The Concept of Law* 27–28, 96 (3d ed. 2012) (developing a distinction between duty-imposing and power-conferring rules in law).

15. Gardner, Response to Dagan and Dorfman, *supra* note 2, at 194.

16. *Id.* at 193–94.

17. John Gardner, What Is Tort Law for? Part 2: The Place of Distributive Justice, *in* *Philosophical Foundations of the Law of Torts* 335, 338–39 (John Oberdiek ed., 2014).

18. Gardner, Response to Dagan and Dorfman, *supra* note 2, at 183.

against punching another's nose and the mature tort of battery, with its doctrinal complexities, comes closer to the former pole.¹⁹ And so does much of tort law. Tort law is often needed to decide what behavior counts as appropriate interpersonal respect as well as whether victims have legal rights (and injurers correlated duties) to begin with.²⁰ In any event, the debate between our position and Gardner's on this front is not on whether private law is without any qualifications indispensable and intrinsically valuable. Rather, the debate will center on identifying these qualifications and considering whether they are sufficiently interesting to merit the view that private law is a mere means whose products (forms of interpersonal relations) can be systematically reproduced by other extralegal means.²¹

Be it as it may, private law is much more than an instrument of guidance, and it is in these contexts—the vast areas of private law that are first and foremost empowering—that the difference between Gardner's position and ours becomes quite dramatic. As Zipursky correctly observes, an important aspect of private law lies in the normative powers it confers upon private persons,²² which Gardner's view of private law's normative status improperly downgrades (if not obscures). We have argued, jointly and separately, that property, contract, and trust are at their conceptual and normative core power-conferring, private law institutions.²³ More im-

19. Consider, for instance, the complexities underlying some of the major doctrines associated with the tort of battery (among other neighboring torts): the definition of intent, the doctrine of transferred intent, and the boundaries of the element of offensive contact. These and other complexities inform some of the ongoing discussions concerning the tort of battery in the twenty-first century. See, e.g., Restatement (Third) of Torts: Intentional Torts to Persons, at xvii (Am. Law Inst., Tentative Draft No. 1, 2015) (noting the "controversial issues" awaiting the forthcoming Restatement).

20. See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 343–46 (Cal. 1976) (finding a duty on the part of a therapist to use reasonable care to protect the intended victim of the therapist's patient); *Campbell v. Kovich*, 731 N.W.2d 112, 116 (Mich. Ct. App. 2006) (addressing the question of what degree of due care a person mowing a lawn owes a passerby).

21. *Just Relationships* mentions the possibility that law-like social norms could more or less satisfy the demands of just relationships. Dagan & Dorfman, *Just Relationships*, supra note 1, at 1422. Contrary to Gardner's claim, this observation is not an admission that the absolute interpretation of the indispensability and intrinsic-value theses is necessarily false. Rather, the point is to acknowledge that "law" need not be described narrowly as state law or any other law of a formal legal system.

22. Benjamin C. Zipursky, *The Cathedral Through the Looking Glass: A Commentary on Dagan and Dorfman's Just Relationships*, 117 Colum. L. Rev. Online 165, 166 (2017), <http://columbialawreview.org/wp-content/uploads/2017/06/Zipursky-final-read-PDF.pdf> [<http://perma.cc/PVG3-L5E3>].

23. On the normative power underlying private property, see Hanoch Dagan & Avihay Dorfman, *The Human Right to Private Property*, 18 *Theoretical Inquiries L.* 391, 396–400 (2017); Avihay Dorfman, *Private Ownership and the Standing to Say So*, 64 *U. Toronto L.J.* 402, 413–19 (2014). On the power-conferring nature of contract, see Hanoch Dagan & Michael A. Heller, *The Choice Theory of Contracts* 37–39 (2017). And with respect to power's crucial role in the legal institution of trust, see Avihay Dorfman, *On Trust and Transubstantiation: Mitigating the Excesses of Private Ownership*, in *The Philosophical Foundations of Fiduciary Law* 339, 349–54 (Andrew S. Gold & Paul B. Miller eds., 2014).

portantly, these power-conferring institutions are constitutive of the interactions they set out to establish. Gardner seems to disagree. Thus, he supposes that although the law becomes integral to the employer–employee interaction, this interaction can be specified, at least in principle, apart from the law.²⁴ Driving this wedge between private law and extralegal norms, even if conceptually possible (we doubt that it is), radically understates the normative significance of private law to creating categories such as employer, employee, and employment relation (as well as numerous other categories that derive from various other contract and property types).

II. THE PRIVATE-LAW–PUBLIC-LAW DISTINCTION

Just Relationships offers an account of the distinction between public law and private law.²⁵ The distinction, we have argued, picks out the difference between two dimensions of our practical lives: the horizontal and the vertical ones. The horizontal dimension takes up the rights and duties that define the terms of interactions between private persons. By contrast, the vertical dimension pertains to the rights and duties that define the interactions between political authorities and their subjects, citizens, and residents rather than merely private persons. In liberal democracies, the vertical dimension also consists of the interactions among citizens acting as the co-authors of the laws enacted and enforced by the political authorities just mentioned.

Zipursky argues that our account of the private–public distinction is “unsustainable,” because relational norms are not distinctive of private law given that “many areas of public law are filled with relational duties.”²⁶ He suggests that the only two possible ways out of this difficulty are not available to us: We can neither downplay the role of relational norms in public law nor argue that relational norms of conduct are definitional of private law only.²⁷ And indeed we do not. In support of the former proposition, Zipursky asserts that the legal norms that govern employment relations, consumer protection, or landlord–tenant relations are “paradigmatic of public law.”²⁸ We will shortly dispute this assertion, but we surely agree that in and of itself the relational *form* cannot provide private law’s litmus test (this was in fact part of our claim in *Just Relationships*²⁹). By the same token, we agree that in addition to its “rela-

24. Gardner, Response to Dagan and Dorfman, *supra* note 2, at 183.

25. See Dagan & Dorfman, *Just Relationships*, *supra* note 1, at 1397.

26. Zipursky, *supra* note 22, at 173.

27. *Id.* at 172–73.

28. *Id.* at 172.

29. See Dagan & Dorfman, *Just Relationships*, *supra* note 1, at 1413 n.88. In discussing the significance of the relational form, we drew upon Avihay Dorfman, Private Law Exceptionalism? Part I: A Basic Difficulty with the Arguments from Bipolarity and Civil Recourse, 35 *Law & Phil.* 165, 177–85 (2016) (arguing that the relational structure of powers, rights, and duties in law is a juridical form of establishing normative relations, in private and public law).

tional directives, relational duties, and [relational] rights,”³⁰ private law also consists of power-conferring rules. But these powers are no less relational than the other relational norms that figure, according to Zipursky, in private law. In fact, as we argue elsewhere, the relationality of both property and contract—the *interpersonal* respect that is core to their justification—is key to their power-conferring function.³¹

Simply put, like Zipursky, we do *not* claim that relationality as such is the defining feature of private law. Rather than focusing on the relational form that legal norms may or may not take, our understanding of the private–public distinction relies on the conception of the persons that are the object of these relational norms. Private law, we argue, conceptualizes them as persons, not citizens.³² This is precisely why Zipursky must be wrong in supposing that the landlord–tenant interaction is “paradigmatic of public law.”³³ There is nothing in this relationship that makes an essential reference to the shared national identity of the parties; furthermore, there is nothing in the letter or the spirit of the doctrines governing this interaction that casts the parties in terms of citizens or members of the same political community. For example, the reason for reading a warranty of habitability into the landlord–tenant legal relationship does not turn on the fact of their shared citizenship, as this fact is orthogonal to their property interaction. The same is true with respect to the employment relationship and to the interaction between consumers and manufacturers or sellers. Employment law, consumer protection law, or landlord–tenant law fall squarely within the proper domain of private law, and the fact that these doctrines are mostly legislated, rather than the primary products of common law–making, does not change this conclusion. To this extent, these doctrines are no less private law than the common law doctrine that requires risk-creators to exercise (contrary to what Zipursky suggests) extra care toward mentally (and not just physically) disabled plaintiffs.³⁴

30. Zipursky, *supra* note 22, at 173.

31. See *supra* note 23 and accompanying text.

32. See Dagan & Dorfman, *Just Relationships*, *supra* note 1, at 1415.

33. Zipursky, *supra* note 22, at 172.

34. Zipursky argues that we mischaracterize negligence law’s treatment of the mentally disabled plaintiff. *Id.* at 169–70. We do not. Zipursky shares the widely held conventional view that mental disability is largely ignored in the law of torts. On this view, there exists a sharp contrast between the current law’s treatment of the physically disabled person and the mentally disadvantaged one. Thus, persons with either mental illness or developmental disability are expected to exercise the care that a reasonable person would exercise, their disability notwithstanding. That said, a closer examination of the law reveals that courts are increasingly willing to apply an asymmetrical measurement of reasonableness than the conventional view implies. In particular, mentally disadvantaged *defendants* incur an unaccommodating objective duty of care (this is also true with respect to physically disabled defendants). By contrast—and this is the point that Zipursky and the conventional view miss—there is a strong trend toward assessing the conduct of the mentally disadvantaged *plaintiff* subjectively. This is true not only in hospitalization and custodial contexts but also—

Indeed, part of the ambition of *Just Relationships* has been to emphasize this point—private law is not public law precisely because it is simply horizontal. Both traditionalists and their critics, we argue, fail to appreciate the irreducibly horizontal dimension of legal areas such as workers’ compensation schemes, antidiscrimination laws in employment and housing contexts, and the law of restitution governing common projects. By reinvigorating the seemingly banal interpretation of the private–public distinction along the lines just restated, we hope to free these and similar human interactions from both camps’ reductionist tendencies to relegate any commitment that goes beyond formal freedom and equality to our public law institutions and to our roles as citizens.³⁵

In other words, getting the private–public distinction right figures prominently in *Just Relationships* because of the normative status of private law highlighted above. It is important to rehabilitate the private–public distinction, we argue, because only private law can give effect to relational justice, a point that the dominant approaches to private law obscure.³⁶ We do not dismiss the value of civil recourse emphasized by Zipursky, though we do not believe it is distinctive of, or otherwise special to, private law.³⁷ But rules about litigation and remedies in private and in public law represent law’s fallback plan in case the reasons it offers—mandatory reasons that come in the form of primary duties—have been compromised or neglected by their addressees.³⁸ Although the remedial apparatus need not, and often does not, merely replicate the parties’ pre-existing rights, it is nonetheless grounded by and subservient to them. Private law is therefore important first and foremost not because of its fallback plan but rather because it sets up the basic terms of our interpersonal interactions.

Thus conceived, the distinction between private and public law highlights the most fundamental considerations, purposes, and values that should inform legal questions concerning our relationships. Private law should strive to structure our horizontal relationships around the ideal of

most importantly—in connection with interactions between complete strangers. See Avihay Dorfman, *Negligence and Accommodation*, 22 *Legal Theory* 77, 119–21 (2016).

35. Elsewhere, we explore the potential of this approach to provide the necessary conceptual and normative underpinnings to the resolution of transnational wrongs. See Hanoch Dagan & Avihay Dorfman, *Transnational Wrongs and Interpersonal Human Rights* 26–32 (July 24, 2017) (unpublished manuscript) (on file with the *Columbia Law Review*).

36. As mentioned above, this is a comparative, rather than an absolutist, claim about private law’s special role.

37. See *supra* note 29 and accompanying text.

38. Cf. H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in *Essays on Bentham* 243, 254 (1982) (explaining that a commander may attach threats to a command which function as “secondary provisions for a breakdown” in the event that the listener does not accept “the primary intended peremptory reasons” as independently sufficient for following the command); Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 *Ratio Juris* 164, 167 (2016) (“[L]aw needs a backup plan that comes into effect when we fail to conform to the demands of duty.”).

reciprocal respect for self-determination and substantive equality among private persons. Public law should be acutely concerned with the promotion of other values—distributive justice, democratic citizenship, and social welfare—that also answer to self-determination and substantive equality, but figure in our lives as members of a collectivity.³⁹ Because our horizontal interactions as persons are importantly different from those we have with the state or with our fellow citizens, the division of labor between private and public law should be rehabilitated, rather than dismissed.⁴⁰

III. INTERPRETATION AND SOCIAL CRITICISM⁴¹

West seems to endorse a somewhat similar thesis to ours, in which “private law exists to further the goals of relational justice.”⁴² She is sympathetic to our attempt to develop a theory of private law that is neither apologetic nor dismissive of existing legal doctrine. In other words, she shares our commitment to taking law—let alone morality—seriously without thereby legitimating private law as a device of power politics.⁴³ But she is worried about “[t]he limits” of such a theory, which “stem from the same premise as the source of its strength,” namely its reliance on ideals that “come from the substance of law itself.”⁴⁴ The exercise of excavating the implicit promises of private law is inherently bounded and is thus challenged when law’s ideals themselves turn out to be flawed—that is, when they turn out to be “partial and stunted” or maybe even immoral.⁴⁵ Thus, West asks whether our critical commitment can “cut deeper,” by which

39. Because our social and public lives are often interdependent, private law should not be completely immune from our collective values, just as public law should not ignore relational justice.

40. The text briefly responds both to Gardner’s concern that private law in our account should respond only to the value of relational justice and to his worry that our theory implies that social welfare has nothing to do with freedom or equality or that public law is a residual repository of some loose ideas open-endedly described as public goals. See Gardner, Response to Dagan and Dorfman, *supra* note 2, at 196–97. Our brief discussion of the nature of the connection between tort law and criminal law, see Dagan & Dorfman, *Just Relationships*, *supra* note 1, at 1411–12, implies that we can remain agnostic about Gardner’s position in which criminal law is “an elaborate adaptation of private law.” Gardner, Response to Dagan and Dorfman, *supra* note 2, at 200.

41. Borrowing the title of Michael Walzer, *Interpretation and Social Criticism* (1993), as the heading of this Part is not coincidental, as the text below (implicitly) clarifies.

42. Robin West, *The New Legal Criticism*, 117 *Colum. L. Rev. Online* 144, 163 (2017), <http://columbialawreview.org/wp-content/uploads/2017/06/West-final-read-PDF.pdf> [<http://perma.cc/6H3B-4JJ5>]. It is only *somewhat similar* to ours because, as we argue in Part I to this Reply and elsewhere, private law is not merely an instrument for promoting goals that can be specified, and advanced, apart from it.

43. *Id.* at 148–49.

44. *Id.* at 159.

45. *Id.*

she means “go[ing] beyond the law itself” so as to “urge the law to go in new directions.”⁴⁶

Just Relationships does not take up this deep, methodological point explicitly, for it finds ample normative and doctrinal resources in contemporary private law to substantiate the argument that private law already embodies relational justice, including its two basic pillars, substantive freedom and equality. That said, we do not believe that *Just Relationships*—or, for that matter, any comprehensive theory of private law—can do without the ultimate test of our moral intuitions. There are two aspects to this proposition. The first refers to cases in which law’s ideals are partial and stunted and is already, albeit implicitly, present in our account; the second relates to the (happily hypothetical) case in which they are outright immoral.

The approach we employed in *Just Relationships* is a variation on the reflective equilibrium theme.⁴⁷ This method provides a justificatory procedure by which drawing inductive inferences as represented by considered judgments about particular cases can constrain deductive inferences, and vice versa.⁴⁸ It identifies a set of considered judgments concerning particular cases—or categories of cases—of a general domain of human action to which a basic principle (or principles) of morality applies. These considered judgments express our moral intuitions about what the relevant demands of justice seem to be requiring.

Consider the case of affirmative duties in private law. A general question arises of what, if anything, may justify the traditional hostility of private law toward affirmative duties. We believe that addressing this general question cannot escape the test of reflective equilibrium.⁴⁹ It must in part be anchored in our considered judgments concerning the relevant concrete cases. Cases are deemed relevant if they can figure as fixed points in our moral thinking about our interpersonal responsibility. The paradigm case is one of easy rescue. On the reflective equilibrium method, our moral intuition concerning the simplest instance of easy rescue serves to con-

46. *Id.* at 159–60.

47. Whether this variation is faithful to John Rawls’s use of this justificatory procedure is a question of exegesis that we set to one side. The normative force of this variation need not depend on that question.

48. Strictly speaking, considered judgments need not be limited to particular cases only. According to Rawls, considered judgments can be made at any level of generality as long as they seem evidently correct. See John Rawls, *The Independence of Moral Theory*, in *John Rawls: Collected Papers* 286, 289 (Samuel Freeman ed., 1999).

49. This difficulty is manifested in the traditionalist’s attempt to reduce very different incidents of affirmative duties to formally similar setbacks to defendants’ independence. See Arthur Ripstein, *Private Wrongs* 57 (2016) (“At the appropriate level of generality, [a duty of easy rescue] is no different from [all other cases of nonfeasance]: Absent a special relationship, you do not need to use your means in a way that best suits my preferred use of means.”). We take stock of this approach in Hanoch Dagan & Avihay Dorfman, *Private Law Escapism: Comment on Arthur Ripstein*, *Private Wrongs*, 14 *Jerusalem Rev. Legal Stud.* 37, 42 (2016).

strain the answer that can be given in response to the general question. It means that justifying the denial of affirmative duties must be compatible with the intuitive judgment that, all else equal, people should be legally required to make reasonable efforts to save the life of another who is about to fall off a hidden cliff simply by uttering “beware of the cliff.”⁵⁰ In *Just Relationships* we take up affirmative duties in private law by moving back and forth between this and other typical examples of easy rescue (e.g., restitution of mistaken payments) and the more general question concerning the place of affirmative duties in interactions among substantively free and equal persons.⁵¹

More generally, resort to reflective equilibrium informs our defense of private law as the law of just (horizontal) relationships. In the case of private law, the relevant domain of human action is that of horizontal interactions among individuals acting as private persons, rather than as public officials or members of a particular polity. Our account of private law suggests that the basic normative principle that governs this legal domain is that of relating as substantively free and equal persons. This basic principle coheres with our considered judgments about a set of particular cases that we take as fixed points—in *Just Relationships* we invoke the (judge-made or statutory) rules governing cases like private discrimination, easy rescue, participation in joint projects and collaborative endeavors, and the accommodative standard of extra care toward disabled plaintiffs. We take these rules as fixed points not in the sense that they transcend critical reflection.⁵² Quite the contrary: We hold them as evidently correct, and thus unreviseable, due to the fundamental value they express.

Legal rules, such as the ones just mentioned, that are surface manifestations of the idea of relating as substantively free and equal persons should be strictly adhered to. Other rules, by contrast, should be understood as blemishes—cases that show us that law’s ideals are insufficiently developed or that their scope of application is unjustifiably partial. Law’s internal point of view should not reaffirm these rules or cases but rather should entail critical reflection. A private law (or a subset thereof) that does not view private discrimination as a clear instance of *private* wrongdoing is a case in point. This is precisely what plagues the famous case of *Shelley v. Kraemer*.⁵³ By deciding that judicial enforcement of racial covenants is unconstitutional because it implicates courts in endorsing racial discrimination, the Supreme Court seems to suggest that these covenants are not void. Which is to say, racial covenants can be privately enforced or they can be enforced indirectly through courts by suing the seller, in-

50. Contemporary tort law by and large rejects this judgment. See, e.g., *Hinson v. Black*, 572 S.E.2d 653, 657 (Ga. Ct. App. 2002) (refusing to impose a duty of care on a social host who could have saved the life of a visibly intoxicated victim from falling off a thirteenth-floor balcony by closing the balcony door).

51. Dagan & Dorfman, *Just Relationships*, supra note 1, at 1452–57.

52. See, e.g., T. M. Scanlon, *Being Realistic About Reasons* 85–86 (2014).

53. 334 U.S. 1 (1948).

stead of the buyer, for breach of contract.⁵⁴ Private law fails, as West will arguably agree, when we must resort to *public* law—in this case, the Fourteenth Amendment, and in other cases, other vertical norms of public law—to tackle the injustice of racial covenants.⁵⁵ The critical test of reflective equilibrium helps us see just that.

But what if, West may nonetheless press on, we could not have credibly found this analysis on the morally appeasing fixed points offered by contemporary private law? What if “there is no positive law supporting” an essential entailment of relational justice, so that what is an eminently *moral* principle cannot be credibly described as a *legal* principle?⁵⁶ What if an entire body of private law doctrine—or maybe private law as a whole—turns out to be, at a given time and place, immoral?

Like West, we think that legal doctrine should not be immune from criticism even if it cannot be criticized based on the actual positive law to which the doctrine belongs. Indeed, nothing in our account of private law implies—nor do we think—that law should be immune from external moral criticism. We see no reason why only, and always, law’s internal critique should count. But as West seems to acknowledge, the option of resorting to abstract moral analysis as an external source for legal criticism does not render private law theory redundant as a means of social criticism.⁵⁷ Private law theory requires us to justify the prevailing rules that currently govern our interpersonal relationships. The requirement of justification, as we hope to have shown, is always potentially challenging to some of our legal practices: It entails an idealized picture that sets standards that our current doctrines do not necessarily live up to and can thus be, and often is, a fertile source of social criticism.⁵⁸ As is oftentimes the case, the idealism of our social world, even if partial and stunted, is an important source of critical engagement.⁵⁹

54. See Richard R. W. Brooks & Carol M. Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms* 173–74 (2013).

55. See West, *supra* note 42, at 162 (“[A]ntidiscrimination is a foundational principle of contract law, not just a principle of public law imposed upon it.”).

56. *Id.* at 162–63. West presents the doctrine of employment at will as an example of an outright failure to comply with relational justice. *Id.* at 163. We find this case to be too complicated to be addressed in this Reply. One of us has dealt with this case in Dagan & Heller, *supra* note 23, at 117.

57. See West, *supra* note 42, at 158–59 (acknowledging the critical force of private law theory that takes seriously the law “itself”).

58. See Hanoch Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* 158 (2013).

59. Cf. Walzer, *supra* note 41, at 46–48 (observing that our moral beliefs create collective “standards of virtuous character” that prompt social criticism to keep the community within these standards).