

# Dagan and Dorfman on the Value of Private Law<sup>†</sup>

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Hanoch Dagan and Avihay Dorfman believe that theoretical work on private law has become too polarised. Ranged on one side, there are those who ‘conceptualize private law as a set of regulatory strategies with no unique ... moral significance’ (1401). On the other side we find those who associate private law with ‘values that dissociate it entirely from politics (broadly defined)’, values that Dagan and Dorfman label ‘formal’ (1401). Dagan and Dorfman point out, masters of understatement that they are, that this is ‘a misleading dichotomy’ (1400). There is plenty of habitable space between the two poles. In ‘Just Relationships’ they locate, and recommend, one possible intermediate position. With the ‘formal’ (‘traditional’) types they share the conviction that private law has some unique moral significance. With the ‘regulatory’ (‘critical’) types they share the view that private-law values cannot be dissociated entirely from politics. For, they claim, private-law values are the same ‘core liberal values’ (1414) that are important outside private law too, including in public law. It is merely that, for Dagan and Dorfman, private law contributes to the realisation of those

<sup>†</sup> A comment on Hanoch and Dagan, ‘Just Relationships’, *Columbia Law Review* 116 (2016), 1395. All parenthetical page references in the text are references to this article.

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values in its own special way, so that it ‘stands on its own, distinctive ground’ (1442).

I think Dagan and Dorfman would agree that their account of private law’s ‘distinctive ground’ leaves their thinking closer to the ‘traditional’ pole than to its opposite. Specifically, they agree with the ‘traditionalist’ in portraying private law’s contribution as a (a) non-instrumental and (b) indispensable contribution to (c) a valuable framework of interpersonal relationships, a framework the value of which also (d) does not rest on values other than the core liberal values that they list. The main difference between them and their ‘traditionalist’ neighbours lies in which values are listed for the purpose of (d). For the ‘traditional’ theorists it is ‘formal freedom and equality’ (1410, 1417). For Dagan and Dorfman, by contrast, it is ‘substantive freedom and equality’ (1427, 1451). This shift from ‘formal’ to ‘substantive’ makes a lot of difference, in ways that Dagan and Dorfman elegantly explain. But it does not make the key difference that the full-blown ‘critical’ theorist would apparently want it to make. It does not leave private law as ‘just another means to serve our public goals’ (1410).

As well as admiring their complex and careful execution, I broadly sympathise with Dagan and Dorfman’s aims. I have myself complained about, and sought to escape, the strange polarisation of theoretical work on private law.<sup>1</sup> I agree with Dagan and Dorfman, moreover, that private law is morally distinctive even though it cannot avoid being implicated in politics.<sup>2</sup> And while I differ on some points that need not detain us here, I also share their wider liberal outlook on life, and hence

<sup>1</sup> See Gardner, ‘Tort Law and its Theory’, forthcoming in John Tasioulas (ed), *The Cambridge Companion to Philosophy of Law* (2017), preprint available at <https://www.dropbox.com/s/otsl7dsvc7re7v0/torts-cambridgeencyclopedia.pdf?dl=1>

<sup>2</sup> See Gardner ‘What is Tort Law For? Part 2. The Place of Distributive Justice’ in John Oberdiek (ed), *Philosophical Foundations of Tort Law* (2014).

many of their concrete judgments on how the law ought to deal with various problems. So we have much in common. Yet for my tastes Dagan and Dorfman are still drawn too much towards the 'traditionalist' pole. My instincts, if they have any general leaning at all, lean a little more towards those of the 'critics'.

In particular I am a good deal less worried than Dagan and Dorfman are about the possibility that private law is 'just another means to serve our public goals.' Or rather I would be less worried, if we could drop the tendentious words 'just another'. The main resistance to thinking of private law as a means to serve our public goals comes, I think, of a common misunderstanding of what our public goals are, and hence of what it takes to serve them. Get that right and we will see that thinking of private law as a means to serve our public goals does not mean regarding private law as anything like 'public law in disguise' (1408). If anything, it seems to me, the reverse is true. We will come to see that private law is in most ways a 'garden-variety' (1430) or vanilla case of law as an instrument of public policy, and that public law is in large part a specialised adaptation of it. Dagan and Dorfman, it seems to me, surrender too quickly to the same common misconceptions about public goals which lead some 'critics' to think otherwise. They do not see the radical potential of their own liberal ideals as correctives for those misconceptions. The result is that they still show what I regard as an excessively defensive reaction to the challenge of the most reductive 'critics'. They still erect too many of the 'traditionalist's' contrived, overblown, and high-maintenance fortifications against the embarrassingly paltry attacks of an ill-equipped but noisy army of (what shall we call them?) public policy technicians.

It is unlikely that, within the confines of a commentary like this, I could spell out these claims satisfactorily, never mind bear them out. Towards the end I will have a little more to say about them. In the main, however, I will limit myself here to exposing the 'contrived, overblown, and high-maintenance fortifications' that, in my view, Dagan and Dorfman inherit from the

‘traditionalists’. In my view that exposure can best be achieved by reflecting, one by one, on the four principal motifs of Dagan’s and Dorfman’s portrayal of private law. To recapitulate and abbreviate, they are (a) non-instrumentality, (b) indispensability, (c) relationality, and (d) value-specificity.

*(a) Non-instrumentality*

For Dagan and Dorfman, ‘private law is valuable beyond its contingent ... benefits: It is intrinsically valuable’ (1397). Intrinsic value is contrasted with instrumental value, which, we may infer, is the value that lies in the ‘contingent benefits’ of whatever possesses it. Yet the word ‘contingent’ here is misleading. It may make you think that Dagan and Dorfman see the intrinsic value of private law as entirely unconditional, as holding whatever else may hold. Although they do say once that private law has ‘value in and of itself’ (1412), I am fairly sure they do not really see it that way. They see the intrinsic value of private law as derivative, derivative of the value of the ‘interpersonal relationships’ (1398 and *passim*) to which it contributes. They claim that private law is necessary for the existence of these valuable interpersonal relationships (see heading (b) below), but wisely they do not say that it is sufficient. In particular, they do not say that private law contributes to valuable relationships irrespective of which doctrines private law contains. In later sections of their paper, they note various respects in which private law doctrines could be more or less successful by Dagan-and-Dorfman standards. Presumably, then, private law doctrines could be corrupt or derelict, adding little to the value of anything, maybe adding only to the malformation (e.g. the ‘substantive inequality’) of relationships on which it bears.<sup>3</sup> This shows that the reference to

<sup>3</sup> I take it that Dagan and Dorfman would not run the ‘definitional stop’ argument according to which, if certain doctrines are corrupt or derelict, they

contingency by Dagan and Dorfman is a red herring. Intrinsic value is not the same as non-contingent value. To get with the Dagan and Dorfman program, we need to distinguish instrumental from intrinsic value in some other way.

Dagan and Dorfman do not make it easy for us to do so. They use a bewildering variety of verbs to capture what they take to be the kind of contribution that private law makes to valuable interpersonal relationships, in virtue of which it has intrinsic value. It ‘construct[s]’ relationships (1397); it ‘forge[s]’ and ‘sustain[s]’ them (1398); it ‘structures’ them (1406); it ‘marshal[s]’ their rights and obligations (1410); it ‘sets [them] up’ (1413); it ‘constitut[es]’ and ‘authoriz[es]’ them (1416); it ‘uphold[s]’ them (1422); it ‘casts’ them in a certain form (1430); it ‘establish[es]’ and ‘facilitate[s]’ them (1430); it ‘secur[es]’ them (1436). For anyone who imagined that the instrumental value of something would be value that it contributes in virtue of its causal consequences (which is how the expression is used by many philosophers<sup>4</sup>) some entries on this list are disorientating. My breakfast sustains me until lunchtime. My keyfob facilitates my entry to the building. My IT guy sets up my new software. My soldering iron forges a new connection. My parasol casts a big shadow. I do not see anything here other than various causal

do not form part of private law. Much that Dagan and Dorfman say suggests that, on the contrary, they are mainstream legal positivists who think that ‘[t]he existence of [private] law is one thing; its merit and demerit is another.’ Those words are from John Austin, *The Province of Jurisprudence Determined* (1832), lecture V. They are repeatedly echoed by Dagan and Dorfman: ‘some or all these doctrines may currently fail to sufficiently limit this gap’ (1426); ‘private-law doctrines ... may undermine these commitments’ (1428); and ‘these doctrines manifest a (perhaps overly) cautious approach’ (1456).

<sup>4</sup> See e.g. Joseph Raz, *The Morality of Freedom* (1986), 177; Christine Korsgaard, *Creating the Kingdom of Ends* (1996), 251-2, Shelly Kagan, ‘Rethinking Intrinsic Value’, *Journal of Ethics* 2 (1998), 278, Larry Temkin, ‘Equality, Priority, and the Levelling Down Objection,’ in Matthew Clayton and Andrew Williams (eds), *The Ideal of Equality* (2000), 129.

consequences, in virtue of which value is transmitted to whatever has them. My parasol is instrumental in providing me with shade, my IT guy is instrumental in getting my computer updated, etc. What, then, is supposed to be noninstrumental about private law?

I detect that, in some of the passages from which I just quoted, Dagan and Dorfman are struggling for the right word to capture the noninstrumentality they have in mind. The word they finally seem to settle on, late in the article, is 'constitutes'. Private law, they say, is 'constitutive' of some relationships (1449). Although the idea of constitution is rife with philosophical difficulties, many borne of its connection with the idea of identity,<sup>5</sup> it is tolerably clear that constituting is a way of contributing other than by way of causal consequences. A constitutes B only if A is the whole or a part of B, or (as Dagan and Dorfman also put it) only if A is 'integral' to B (1424). As its name suggests, the constitution of any legal system part-constitutes that system. The norms of the constitution do not exert their hold over the other norms of the system from without but from within. In much the same way, ordinary legal norms part-constitute certain social roles, including not only some that owe their existence to the law (being a trustee or a freeholder or a plaintiff) but also some that would already exist apart from the law (being a parent, an adult, an employee, a rescuer, a giver of consent, a self-defender, etc.). In the latter cases the law constitutes the role, to the extent that it does, mainly by contributing extra determinacy to the role's already-constitutive (set of) norms. Legal norms thereby become integral to the role. It seems that this is the kind of contribution that, for Dagan and Dorfman, private law makes to the 'interpersonal relationships' that interest them. That is what they are trying to convey, I

<sup>5</sup> For a good introduction, see Ryan Wasserman, 'The Constitution Question', *Notis* 38 (2004), 693.

think, in their obscurely formulated remark that private law ‘participate[s] in constructing core categories of interpersonal relationships around their underlying normative ideals’ (1450).<sup>6</sup>

It is, however, a further step from here to the conclusion that private law contributes constitutively to these relationships ‘quite apart from’ any instrumental contribution it may make (1412). I have argued elsewhere, at some length, that only instrumentally successful legal norms can be constitutively successful.<sup>7</sup> Only a legal norm that helps people to do what they ought to do anyway, quite apart from that norm, can help to determine (add determinacy to) what people ought to do. Only a law that helps people to be good parents, for example, can help to settle what counts as being a good parent. I will not rehearse the full argument to that effect here. Suffice it to say that, if sound, the argument would explain why Dagan and Dorfman are still tempted to use instrumental vocabulary (‘forge’, ‘sustain’, ‘facilitate’, ‘secure’ etc.) even when the contribution they are talking about is supposed to be a non-instrumental one. Foregrounding private law’s instrumentality does not compromise the thesis that private law has intrinsic value. Quite the contrary. One must foreground private law’s instrumentality if one wants to explain how it can be that private law has intrinsic value.<sup>8</sup> The implication is that Dagan and Dorfman should further tone down some of what they say about private law’s intrinsic value. They should not merely eliminate any suggestion that this intrinsic value is unconditional value. They

<sup>6</sup> Here the authors are almost quoting from Dagan, ‘The Utopian Promise of Private Law’ *University of Toronto Law Journal* 66 (2106), 392, but I did not find any additional illumination of the remark’s intended meaning in that article.

<sup>7</sup> In Gardner, ‘What is Tort Law For? Part 1. The Place of Corrective Justice’, *Law and Philosophy* 30 (2011), 1. My argument lends extra support to the position defended by in Kagan in ‘Rethinking Intrinsic Value’, above n 4.

<sup>8</sup> Here my argument lends extra support to one position defended by Kagan in ‘Rethinking Intrinsic Value’, above n 4.

should go further and eliminate any suggestion that it is value that private law has independently of private law's instrumental value. In doing so, they cannot but tone down the bold picture they paint of private law's distinctiveness.

In these last remarks I took it for granted that, if private law contributes non-instrumentally to valuable relationships, then private law inherits intrinsic value via that contribution. But of course further conditions need to be satisfied before that is true. Firstly, the relationships in question need to be not just valuable but intrinsically valuable. There needs to be intrinsic value in them that can be inherited by private law. Secondly, the constitutive contribution of private law needs to be a contribution to that very intrinsic value. Consider the tiny cogs (they are called 'pinions') in my watch. They partly constitute my watch and contribute in many ways to its value as a watch (by helping to make it operational, accurate, durable, wearable, adjustable, repairable, quiet, etc.). But that only makes the cogs intrinsically valuable if the watch itself is intrinsically valuable. If the watch itself is a mere instrument then its constituents, as its constituents, inherit only instrumental value from the watch by their contribution to it. And even if the watch has intrinsic value (e.g. as a thing of beauty or a family heirloom or part of my carefully curated watch collection), it does not follow that the pinions contribute to that value. Maybe the watch's intrinsic value would be unaffected by the loss of instrumentality in the watch that the failure or loss of a pinion would cause. Maybe the watch was, for example, the one that saved my father from a bullet during the war, such that repairing its warped mechanism and getting it working again would restore its instrumental value but do nothing for, maybe even deplete, its intrinsic value. If at some point, unbeknown to anyone, a pinion were to fall out of the case and be lost, the intrinsic value of the watch would be unaffected. Although the pinion was a constituent of the watch, it contributed nothing to its intrinsic value. Its only role lay in a possible revival of the watch's instrumental value.



So far as I can see Dagan and Dorfman do not stop to discuss whether and how the interpersonal relationships that private law helps to constitute are themselves intrinsically valuable. If friendship, parenthood, and the like are our foreground examples, we may think it obvious that interpersonal relationships are not mere instruments (although even these examples are more problematic than they seem). But does it seem so obvious with ‘bailment, suretyship, and fiduciary’ relationships (1449), three which are mentioned by Dagan and Dorfman as relationships constituted, in part or in whole, by private law? Dagan and Dorfman do not explain what exactly they take to be the intrinsic value of relationships such as these, or indeed any others. However they do make clear — even in the title of their paper — which value they take private law to contribute to such relationships, by virtue of which private law counts as intrinsic valuable. Private law helps (constitutively) to make such relationships *just*. So it seems reasonable to suppose that, whatever else about such relationships they may regard as intrinsically valuable, Dagan and Dorfman regard them as intrinsically valuable inasmuch as justice prevails in them.

Dagan and Dorfman are far from alone if they take the view that acting justly towards others is intrinsically valuable. It seems to be a common view.<sup>9</sup> But personally I am not sure where it gets its purchase. One possible explanation is that the analytic value of acting justly is mistaken for intrinsic value. The thought is that, if the value of acting justly were only instrumental, it would vary from case to case. Sometimes acting justly would not be valuable at all, because it would not have any good causal consequences. So to preserve the analyticity of justice’s value, it

<sup>9</sup> For recent evidence, by both example and testimony, see Justin Klocksiem, ‘Two Conceptions of Justice’, *Journal of Moral Philosophy* 14 (2017), now in press (advance access at DOI [10.1163/17455243-46810055](https://doi.org/10.1163/17455243-46810055)).

is thought, that value cannot be instrumental.<sup>10</sup> But that doesn't follow. It is equally possible (and in my view often true) that when the act would not have any good causal consequences, it would also not be just. That preserves the analyticity of justice's value without adding any hint of intrinsic value. Another possible explanation lies with Rawls' famous association of norms of justice with 'deontology', or 'the priority of the right over the good'.<sup>11</sup> Often overlooked is that Rawls' argument for that association, such as it is, is limited to his own norms of justice (the ones applying to institutions in the basic structure of society) and is not claimed to extend to principles of justice generally. Its extension to those norms of justice that regulate what Dagan and Dorfman call 'horizontal' relationships (1414 and *passim*) would arguably be the hardest of all to engineer, given Rawls' consignment of such relationships to the realm of goodness. But even if the extension could be engineered, it is far from straightforward to convert the thesis that norms of justice are deontological into the thesis that doing justice has intrinsic value. If the rightness of doing the just thing does not depend on the good that is thereby done, then it is true that this rightness cannot be defended by pointing to its instrumental value. By the same token, however, it cannot be defended by pointing to its intrinsic value. That is because, for a deontologist about justice, the rightness of doing the just thing does not depend on its value at all. Whether doing the just thing *has* intrinsic value is a further question. Rawls did not address it.<sup>12</sup> In fact, in as much as he did point to any value in institutions acting in line with his own 'two

<sup>10</sup> This line of thought is what drives the dialogue between Socrates and Glaucon in Plato, *Republic* (trans. C. D. C. Reeve, 2004), book II.

<sup>11</sup> Rawls, *A Theory of Justice* (1971), 30 (deontology), 31 (priority of right).

<sup>12</sup> Rawls did return to the question of 'the good of justice' in *ibid*, 513–87. However, his discussion there concerns the intrinsic value of each of us having and acting on a sense of justice, not the intrinsic value of institutions in the basic structure acting justly.

principles of justice' it was entirely instrumental value. It was the value of protecting people from some of the worst risks that they could face once they become socially organised. Protection against such risks is famously what the parties to the 'original position' are motivated to seek for themselves.<sup>13</sup> How this instrumentality of user motivation is meant to interplay with Rawls' deontology about justice is one of the great mysteries of his work. But if one thing is certain it is that one cannot conclude merely from the deontology that doing the just thing is ever, let alone always, of intrinsic value.

I am not saying that Dagan and Dorfman make this particular move. It is hard to know what move they are making on this front. All I will say is that, whatever move they are making, it is too quick. Even if we can agree that the relationships that interest Dagan and Dorfman have intrinsic value, we should be careful not to assume that the mere fact that they are justly conducted forms part of it. One may think, for example, that when the intrinsic value of such relationships is riding high, the question of how justly they are being conducted doesn't arise.<sup>14</sup> For one may think, developing the thought that motivates those in Rawls' original position, that the role of norms of justice in such relationships is to protect people against risks of mistreatment that arise, *inter alia*, from breaches of the other norms (perhaps not norms of justice) that help to constitute their relationships' intrinsic value. They are a failsafe mechanism that helps to stop a hemorrhage of intrinsic value from turning into an instrumental catastrophe. If that is so then private law's contribution to the

<sup>13</sup> Ibid, 14.

<sup>14</sup> This point was central to Michael Sandel's famous critique of Rawls in *Liberalism and the Limits of Justice* (1984), at 31, where he presents justice 'as a remedial virtue, whose moral advantage consists in the repair it works on fallen conditions.' Notice the vaguely instrumental word 'works'. Notice also the ease with which this way of demarcating the business of justice accommodates the main work of the courts in private law cases.

justice of the relationships is not a contribution to their intrinsic value, and private law inherits no intrinsic value from it.

*(b) Indispensability*

It is tempting to think that whatever is integral to something (constitutive of it) is also indispensable to it. But that is a mistake. Many integral parts of modern household appliances are over-engineered (sometimes to build in their obsolescence) and could readily be replaced with something simpler. The same goes, probably, for many integral parts of modern government. The alternative would sometimes be an improvement on what it replaces, but that is not crucial to my point. Sometimes one could still muddle along, albeit not optimally, with a piece of old hosepipe or an eager bunch of amateurs. These are cases where we are hoping to maintain sheer instrumentality by replacing a part, but that too is not crucial to my point. Even constituents of an intrinsically valuable thing that contribute to its intrinsic value may be replaced by new constituents, sometimes adding to the intrinsic value of the whole, sometimes subtracting from it, but sometimes neither. Take the constituents of your own life. Over time they change. Indie rock may have been your passion in your teens, then a few years later it was mountaineering, then independent travel in remote lands, but these days you throw yourself into home improvements. These are all constituents of your life that, over the years, have filled similar spaces in it. I hope you will agree that they have contributed to the value of your life not merely instrumentally, i.e. not only by their causal consequences. Home improvements may improve your living conditions and your house's resale potential, while saving you money on contractors. That may have been what got you started on it. But these days that is no longer the whole, or even the main, point. There is also your own engagement in the activity, which is lending, as people often like to put it, extra meaning to your life, enriching your life with new skills and

accomplishments, perhaps even new virtues. Yet as the history of your life shows, that does not mean that your life is deprived of meaning without it. Few if any value-contributing constituents of a valuable life are irreplaceable, however it may seem at the time.<sup>15</sup> Remember the mountaineering years?

Dagan and Dorfman do not conflate their claim that private law contributes intrinsically valuable constituents of intrinsically valuable relationships with their claim that this contribution is indispensable or irreplaceable. But nor do they put as much effort as they should into preventing the two claims from becoming conflated in the mind of the reader.<sup>16</sup> The threat that private law's value will otherwise be rendered 'contingent' is used to advance both claims in quick succession (1398) and the expressions 'irreducible role' (1422) and 'integral role' (1424), again used in quick succession, are too open to being read as synonymous. And then there is the unexplained segue from private law's being 'constitutive' to private law's being 'crucial' (1449). Nevertheless, on closer inspection, Dagan and Dorfman do provide arguments (or sketches of arguments) for the indispensability of private law's contribution that are quite distinct from anything they say about its intrinsic value. These arguments have their appeal. My worry is that they lend support to two rival pictures of what the indispensability of private law's contribution comes down to.

To see the space for equivocation in what Dagan and Dorfman say, consider their concluding remark:

<sup>15</sup> Returning for a moment to Sandel's *Liberalism and the Limits of Justice*, previous note: Sandel trades throughout (see especially at 179-83) on the thought that what is more constitutive of our lives (and our selves) is less dispensable. He doesn't offer any serious argument that I can find.

<sup>16</sup> This risk comes partly of the wider phenomenon that Fred Feldman captures in the title, and treats in the text, of his classic article 'Hyperventilating about Intrinsic Value', *Journal of Ethics* 2 (1998), 339.

Private law is indispensable. Only such a legal order can establish frameworks of interaction among free and equal individuals who respect each other for the persons they actually are (1460).

The ‘can’ here is the main problem. The word is, as J.L. Austin memorably put it, ‘constitutionally iffy’.<sup>17</sup> There is no such thing as what is possible full stop; there is only what range of possibility is opened up when certain actualities, but not others, are held constant in the imagination. There is only what is psychologically possible, humanly possible, physically possible, conceptually possible, logically possible, etc, where the qualifying adjective (which we often infer from context) is there to fix some constants, and thus by implication to allow some variables.

So which set of constants, you may wonder, are Dagan and Dorfman fixing when they say that only private law can do what (in their view) it does for just relationships? At the start of their paper, it seems to be something like logical or conceptual possibility that they have in mind. ‘Since private law is the law of our horizontal interactions,’ they say, ‘its roles cannot be properly performed by any other legal field’ (1398). No other premises are stated. So what should we make of this ‘since’, if not that it is the ‘since’ of logical or conceptual necessity, or entailment, blocking the logical or conceptual possibility of private law’s displacement? One may initially understand Dagan and Dorfman, then, to be saying this: The fact that private law is the law of horizontal interactions *entails* that no other law establishes frameworks for horizontal interactions. If any law establishes frameworks for horizontal interactions, that makes it private law. It cannot, logically or conceptually, be otherwise. We may then correspondingly read the word ‘properly’ to mean ‘properly speaking’ or something like that. Take away private law and, properly speaking, no law establishes frameworks for horizontal interactions. For, properly speaking, any law that did

<sup>17</sup> Austin, ‘Ifs and Cans’ in his *Philosophical Papers* (1961).

so would be private law, in just the same way that, properly speaking, any tiny rotating wheel of metal that helped to transmit motion to the escapement in my watch would be a pinion.

Yet the word ‘properly’ already sows seeds of doubt in the reader’s mind. And so it should. Later in the paper, a different kind of propriety, and a different range of possibility, seems to be what Dagan and Dorfman have in mind:

[T]he responsibility for upholding just horizontal relationships requires a legal apparatus and cannot be fully delegated to social norms. To be sure, social norms may suffice insofar as they respond to the dictates of just relationships and are taken to have an obligatory nature so that they in fact govern people’s interpersonal relationships. But this is only because they would then be law-like. If, however, this is not the case — which is likely given our contemporary social environment — relying on social norms amounts, at best, to an indirect and opaque endorsement of private-law libertarianism. This is deeply problematic because it would threaten the liberal state’s commitment to individual self-determination and substantive equality. There is, therefore, a clear role for law in upholding and promoting just relationships. (1421-2)

Here we find the ‘can’ of moral acceptability or legitimacy. It is more like a ‘may’. That social norms would do the relationship-upholding work of private law not is logically or conceptually impossible, it turns out, but only morally forbidden. How do we know that it is not logically or conceptually impossible? Because if something is logically or conceptually impossible, the question of whether it is morally forbidden cannot arise. So this is surely a rival picture of private law’s indispensability. I will assume that it is the picture that Dagan and Dorfman finally endorse.

If so, it is a picture that includes surprising concessions. First, it allows that social norms compete with private law to make the contribution that private law makes to our interpersonal relationships. Second, it allows that social norms might usurp the contribution of private law completely if they were suitably ‘law-like’. This suggests to me that private law is not after all morally indispensable. All that we need is something that is suitably like

private law and it is morally open to us to dispense with private law. No surprise there: All I need to give meaning to my life after my mountaineering days are over is something suitably like mountaineering ... how about home improvements? True, the work of private law might well be done worse if left *entirely* to social norms. That indeed strikes Dagan and Dorfman as 'likely' and leaves them pointing to a 'clear role for [private] law' in 'our contemporary social environment'. But a merely clear role, one that is premised on a mere likelihood, a likelihood which in turn is relativised to a certain social environment, does not amount to a very robust kind of indispensability. In fact, to my ears, it makes the use of the word 'indispensable' seem hyperbolic.

By the same token it provides the 'critics', or some of them, with a possible answer to the Dagan and Dorfman charge that they make private law seem too easily dispensable or replaceable. What stops the 'critic' from saying, with Dagan and Dorfman, that, while there are other possible ways to do what private law does, private law in all likelihood remains the best way to do it in our contemporary social environment, such that not doing it that way would, for the here and now, most likely be a morally unacceptable move? Dagan and Dorfman may reply that the 'critic' probably means an instrumental 'best' where they mean a constitutive 'best'. That, however, is a different issue. There is nothing in what Dagan and Dorfman say about private law's indispensability to suggest that regarding private law as an instrument is at odds with, or indeed has any other implications for, regarding it as indispensable. In the passage quoted above, recall, Dagan and Dorfman talk about the competition between private law and social norms in 'upholding and promoting just relationships.' Even if upholding just relationships were somehow a non-instrumental way of contributing to them (which I doubt), the same clearly cannot be said of promoting



just relationships.<sup>18</sup> So for the purpose of this passage, and more generally for the purpose of thinking about their defence of private law's indispensability, Dagan and Dorfman might as well be treated as if they too were instrumentalists. And why not? If a pinion in my excellent watch is the only one of its kind, and nobody any longer has the skill to manufacture me a new one, then the pinion makes an utterly indispensable contribution to my watch's continuing excellence — even though there may be no intrinsic value in either the watch or the pinion.

(c) *Relationality*

I am also inclined to think that Dagan and Dorfman overplay the relationality of private law. They do not notice, or at least do not note, an important distinction between a stricter and a looser sense in which duties may be relational.<sup>19</sup> Private law need only contain duties that are relational in the loose sense. Dagan and Dorfman give the impression that its duties are also relational in the strict sense. When duties are relational in the strict sense, the value of the relationship to which they belong forms part of the case for their existence. But when they are relational only in the loose sense, the value of the relationship to which they belong plays no such role. Although there is a relationship to which they belong, the case for their existence is independent of the value of that relationship. By giving the impression that private law duties are relational in the strict sense, Dagan and Dorfman bind private law more closely than it should be bound to the value of

<sup>18</sup> Indeed, in his essay 'Consequentialism' in Peter Singer (ed), *A Companion to Ethics* (1993), Philip Pettit chooses the word 'promote' as the one best suited to expressing what a consequentialist would have us do with value.

<sup>19</sup> In this section I sketch a position that is developed in more detail in my forthcoming book *From Personal Life to Private Law* (2016), ch 1.

relationships, and in the process artificially inflate both its value and, I think, the distinctiveness of its value.

To understand the difference between strict and loose relationality, think about the modern history of the tort of negligence. Think in particular about the basis of the ‘duty of care’, breach of which (while not the whole tort) is the ingredient of the tort after which the whole tort is named. This duty was once regarded as existing only between people in certain enumerated special relationships — doctor and patient, lawyer and client, carrier and passenger, host and guest, parent and child, teacher and pupil, etc. But by a gradual process, culminating in the 1932 decision of the House of Lords in *Donoghue v Stephenson*,<sup>20</sup> a general rationale for the incidence of the duty emerged, supposedly revealing the common thread running through all the special relationships with which the duty had hitherto been associated. Lord Atkin famously wrote:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.<sup>21</sup>

One reason why these words represent such a watershed in the history of tort law is that they rule out one possible rationale for inclusion of any given relationship on the ‘enumerated list’ that had previously been used to settle the incidence of the duty of care. Inclusion on the list is not, or no longer, to be rationalised by pointing to the value of the included relationships. Why not? It is not that no relationship at all holds between Plaintiff and Defendant in Lord Atkin’s explanation. The point, rather, is that

<sup>20</sup> [1932] AC 562.

<sup>21</sup> *Ibid* at 580.

the explanation does not depend on there being any value in that relationship. Indeed it is, so far as Lord Atkin characterises it, a relationship that we should all want to avoid. It is the relationship that holds between two people merely in virtue of the fact that the actions of the one put the other at risk. It is true that the entries on the previous 'enumerated list' are all still likely to be covered by Lord Atkin's characterization (that is why he doesn't need to overrule the old cases to get where he is going). People in the relationships on the list are often in a strong position to put each other at risk. The question is: Why do we care enough about this fact that we hold the parties to such relationships to be under duties of care to each other? Here is a previously possible answer, now ruled out by Lord Atkin: We care about supporting people's valuable relationships; upholding (and in the process adding determinacy to) constituent duties of those relationships is one way to do it. Here is the new answer, the one approved by Lord Atkin: We care about protecting people from the risks that they pose to each other; worse luck that they happen to stand to each other in such a way as to pose such risks (and worse luck even when their so standing towards each other is a side-effect of an otherwise valuable relationship).

The previously possible answer made the duty of care relational in the strict sense. The new answer leaves it relational only in the loose sense. True, in the words of Dagan and Dorfman, the new answer still 'addresses our interpersonal interactions by marshaling rights and obligations that take a relational form' (1410). The point is only that, in the post-1932 law of negligence, the existence of a valuable relationship between the rightholder and the dutybearer does not form part of the case for doing the marshaling. That is not to say that there is nothing valuable in being protected by legal rights and duties. When such rights and duties are legitimately created and upheld, they have the value that they are instrumental in the protection of the rightholder. But those rights and duties are created and upheld at the conclusion of an argument, in the premises of

which no *other* valuable relationship between the rightholder and the dutybearer figures. Everything in the premises of the argument is consistent with the possibility that nothing would have been lost had the two of them never crossed paths with each other at all.

As we just noticed, Dagan and Dorfman accurately report the loose relationality of private law duties. They are duties owed by one person to another, who is the rightholder, and that is enough to make them relational in the loose sense. But Dagan and Dorfman, it seems to me, tend to jump from here straight to the thesis that private law duties are relational in the strict sense too. They speak of private law's 'implicit normative promise of securing just relationships' (1397), where the justice of a relationship is taken to be not only valuable, but to be part of a case for people to enter into it. They mention the contractual case in which (I roughly agree) the law 'enable[s] free persons ... to set and pursue their own purposes interdependently' (1404), or more generally to create valuable relationships for themselves.<sup>22</sup> There is strict relationality in the law of contract, to be sure, and also in fiduciary law, and even perhaps in some of the law of torts. But it does not permeate the whole of private law. So even if it is true that '[o]nly private law can forge and sustain the variety of frameworks for interdependent, interpersonal relationships that allow us to form and lead the conception of our lives' (1398), it does not follow, and it is not true, that all of private law shares, or helps to perform, this task.

<sup>22</sup> The words quoted here from Dagan and Dorfman are in turn quoted by them from Ripstein, *Force and Freedom* (2009), 107-8. Dagan and Dorfman disagree with Ripstein's interpretation of 'free' but do not appear to depart otherwise from Ripstein's explanation of the value of contract. See their remark at 1412: 'while a contractual promise may enable both promisee and promisor to realize their respective desirable goals, the very manner in which the contractual transaction achieves this is of value, too, for it requires those who utilize it to recognize each other as parties to a joint endeavor.'

Does Lord Atkin make any ‘promise of securing just relationships’? No. Or at any rate, not as those words are most naturally interpreted. He promises to help to secure us against the risks of certain relationships characterised by riskiness, should we unfortunately find ourselves in them. That is very different from promising to secure that, fortunately, we (can) have these relationships. The law of negligence in tort could not be more different, in this respect, from the law of contract or the law of trusts, in which the (claimed) value of forming and maintaining contractual and fiduciary relationships, or at least being able to do so, is argumentatively central.

The examples of the law of contract and the law of trusts show clearly that the valuable relationships on which strictly relational duties depend need not be intrinsically valuable. ‘[E]nabl[ing] free persons to set and pursue their own purposes interdependently’ is an instrumental task for the law of contract if ever there was one. The examples also help us to see that the distinction I am drawing between loosely and strictly relational duties does not map onto, or indeed have any connection with, the distinction that I drew earlier between relationships that ‘owe their existence to the law’ and those that ‘would already exist apart from the law’.<sup>23</sup> Contracts exist apart from the law and are merely recognised and upheld (under limited circumstances) by the law. Trusts not so. They are the law’s canny invention. So valuable relationships may be the law’s invention or otherwise. A duty is strictly relational when the value of a relationship, other than the value of someone’s acquiring and having the duty, plays a part in the argument for the existence of the duty.

Even when the relationship is entirely the law’s invention, the relationship’s value may figure in the argument for including certain constituent duties within it. That is how things are with ‘bailment, suretyship, and fiduciary [relationships]’ (1449), and

<sup>23</sup> See above page 6.

the duties that form part of them. It is not how things are with the relationships of right and duty that exist in large parts of the modern law of torts. Recognizing that difference helps us to deflate the inflationary Dagan-and-Dorfman proposal that private has a ‘commitment to the ideal of just relationships’ (1400, 1427) that can differentiate it from other parts of the law. The offending word is ‘ideal’. It leads one to expect that the relationships of private law will all be worth having and pursuing, at least in the eyes of private law. But in fact, as Lord Atkin explains, in many cases private law, with its marshaling of rights and duties, only attempts to protect one against the dangers of relationships that may, so far as private law is concerned, have nothing to be said in favour of entering into them. The best one can say of them is that at least private law provided one with some protection from their worst dangers — yes, in a ‘relational form’ (in the form of marshaled rights and duties) but no, not on the strength of any positive case for ‘upholding’ (1422), ‘promoting’ (1422), ‘sustain[ing]’ (1411), or ‘facilitating’ (1416) the relationships themselves.

*(d) Value-specificity*

So far I have said little about the particular values that Dagan and Dorfman find to be the animating values of private law, namely those of ‘substantive freedom and equality’. I glean from their text (although I do not think it is actually spelled out) that private law is supposed to answer to these values only. But I am not sure whether this is because (i) for Dagan and Dorfman they are the only values that exist; (ii) there are other values that exist, but for Dagan and Dorfman these are the only values that the law as a whole answers to; or (iii) there are other values that the law as a whole answers to, but private law is distinctive in answering only to these two. In setting out the Dagan and Dorfman position towards the start of this comment, I associated them with

position (iii). But I was sticking my neck out in doing so. There is little evidence in their paper to support that association.

I suppose I associated them with position (iii) partly because I could not imagine that they would sign up to either (i) or (ii), which strike me as wildly implausible. Nobody, be they ever so liberal-minded, should think that the law has no business guiding people towards worthwhile pursuits and away from worthless ones. The law (and indeed every person) has reason to do whatever will help persons to avoid wronging each other, to have healthy personal relationships, to avoid wasting their lives and destroying their self-respect, to cultivate their virtues, tastes, and skills and overcome their limitations, and many other things besides. Of course, as liberal-minded people we tend to agree that it matters greatly whether the worthwhile pursuits towards which we steer people are embraced freely by those people and not 'foisted upon them', as we sometimes say. We should all care that everyone has a decent range of worthwhile options and enjoys a sufficient degree of independence in selecting among those options. In the name of maintaining the element of independence, some suboptimality in any given person's selection often has to be tolerated. Yet the main implication of these points for the law is surely not that they shorten the list of values that the law exists to serve. Quite the contrary: they add an extra value, that of freedom, to the list. What they subtract in the process are not values that the law may serve, but acceptable ways of bringing those values into people's lives. The value of freedom affects the means by which the other values on the wider list are to be served. For they are to be served in ways that do not disproportionately trammel freedom. That is of particular importance to the law because the law is by its nature prone to clumsiness and tends disproportionately to trammel freedom wherever it goes. It is therefore to be used only subject to various constraints and inhibitions, such as the harm principle, the various maxims of the rule of law, the rights of free speech, free association and free conscience, and so forth.

You may protest that this is already a niche ‘liberal perfectionist’ — I prefer to say ‘liberal imperfectionist’ — view.<sup>24</sup> This is not the way, for example, that the ‘traditionalists’ of private law theory think about the place of freedom in our lives and in our law. But Dagan and Dorfman themselves appear to be ‘liberal imperfectionists’ in something like the way that I am. In connection with the law of contract they speak of the freedom of ‘both promisee and promisor to realize their respective *desirable* goals’ (1412) and they worry, in tort law, about ‘the injurer’s autonomy to pursue *worthwhile* ends’ (1435). So like me they place emphasis on the desirability of goals and the worthwhileness of ends, as well as on the freedom of the law’s subjects to pursue them. What is not so clear is to what extent this ‘liberal imperfectionism’ affects their thinking about the value of private law. When the issue appears to be on the point of being taken up, it almost immediately slips away again. Dagan and Dorfman say that working through the implications of their ideals ‘requires an elaborate theory of autonomy and an account as to what choices make a person’s life go well’ (1419). But they promptly move on to classifying choices according to the way the choice figures in the chooser’s life, content-independently, ignoring the cross-cutting content-dependent question of the value of the option that is being chosen. So they never seem to quite reach the question of whether private law is supposed to help us make better choices, or merely choices that mean a lot to us, self-constituting choices, life-affecting choices, etc. Inasmuch as they do say things that suggest that private law takes an interest in our making better choices, the applicable currency of value still appears to be (equal) freedom. The best choice for anyone,

<sup>24</sup> It is close to that of Joseph Raz in *The Morality of Freedom*, above n 4, ch 15, where he dubs it a ‘perfectionist’ view, at 424. I am impressed by Michael Walzer’s suggestion that ‘imperfectionist’ would have been a better label to use, given the emphasis that Raz places on allowing latitude for suboptimality. Walzer, ‘The Imperfectionist’, *The New Republic*, December 7th, 1987, 30.



the one that counts as serving a desirable goal, is the one in which we 'relat[e] to one another as free and equal agents' (1416), where 'free and equal' means, of course, 'substantively, not merely formally, free and equal' (1417). You can see, then, why I glean from their text that private law is supposed to answer to these specific values — substantive freedom and equality — only.

Yet this parsimony with value may not extend to other areas of the law, or to public policy in general. Apparently there are also various 'public goals' (1410) or 'public ends' (1429) that may properly be pursued by public law. I am not sure whether they are all supposed to be goals relating to freedom and equality, differing from those of private law merely by their lack of 'relational form', or whether acceptable 'public goals' might, for Dagan and Dorfman, include the service of further, and possibly unrelated, values. Certainly 'social welfare' is mentioned more than once (1412, 1435) as figuring among 'any number of external good causes' (1412) that public law might orient itself towards (and that private law might happen to serve but is not to orient itself towards). One has the impression, although the point is not spelled out, that this 'social welfare' is not held to be reducible to freedom or equality or any combination of the two. But one can certainly imagine a view according to which our 'social welfare' is maximised if and only if we have, between us, as much substantive freedom and equality as can be had. If that is what Dagan and Dorfman think would count as maximising social welfare, and if maximising social welfare is their only live example of a 'public goal', then maybe they do after all subscribe to position (i) or (ii) on my original list of possibilities.

But as I said, I am loathe to land them with such an implausible view, and more inclined to think that they are listing 'social welfare' as a further value in its own right. The problem I have now is that I have no idea what 'social welfare' might be such that it might qualify as a value in its own right. It sounds to me like an artifice of public policy technicians, who condescend

to save us, or to save those with authority over us, from the need to confront value in all of its irreducibly diverse and tragically inconvenient reality. It seems, then, as if Dagan and Dorfman, retreating back into the safety of their private-law citadel, are largely abandoning public law to the hostile ‘critics’ outside, not caring much about its fate, even subtly inviting its new captors to make an example of it by submitting it to their notorious ‘aggregat[ion]’ (1409) of ‘preferences’ (1442) torture. Do Dagan and Dorfman really want to give the technicians prowling at the gate the gift of a ruling that people’s preferences, no matter whether they be good or bad, really are ‘considerations’ (1442)? Do they really want to rescue private law from such barbarity only at the price of condemning the rest of the law to it?

What we are detecting here, I think, is a deficiency in Dagan’s and Dorfman’s grasp of the main point of law, by which I mean not just private law, and not just public law, but all law. I mentioned that main point earlier. It is to help people to do what they ought to be doing anyway, quite apart from the law. The idea I was foregrounding earlier was the following: When legal norms are successful in their main point — in helping people to do what they ought to be doing anyway — those legal norms are also capable of changing, by rendering more determinate, what people ought to be doing. Legal norms are morally constitutive on condition that they are morally instrumental. But the idea that I am foregrounding now is the main point itself: What law exists to do, primarily, is to improve the things that people do. Which things, exactly? I listed some of them just a few paragraphs back. The law exists to help people to avoid wronging each other, to have healthy relationships, to avoid wasting their lives and destroying their self-respect, to cultivate their virtues, tastes, and skills and to overcome their limitations, and so forth.

These, and others like them, are the main ‘public goals’ of the law. Notice that I already included ‘avoid wronging each other’ on the list. Wronging is analytically something to be avoided, and we all have reason to help people steer clear of it

(by talking them out of it, or distracting them, or frustrating them, or standing in their way, or disabling them, or whatever works).<sup>25</sup> The law is no exception. The main questions for the law, before it intervenes, are much the same as the main questions for you or me before we intervene. Is there any chance that the wrong still can be prevented or mitigated or curtailed? Will it be productive or counterproductive if the law is the one to intervene, or to attempt an intervention? If several possible modes of intervention by the law would be productive, which would be most productive? Would the most productive also be proportionate? (Killing the wrongdoer: usually not.) Would the most productive make sufficient allowance, in particular, for the value of freedom? Would intervening be too oppressive of the wrongdoer, too judgmental, too intolerant, too intrusive? And would it, not to be forgotten, be too much of a usurpation of the freedom of the rightholder? Possibly, although not necessarily, the rightholder's freedom was already relevant to what made the wrongdoer's act a wrong against her (suppose it is kidnapping or a discriminatory refusal of entry or censorship of her speech or breach of contract). So perhaps her freedom has been counted once already. But even if it has been, a third-party intervention to prevent the commission of the wrong, especially if the third party is the law, poses new threats to her freedom beyond those posed by the wrong, and possibly even worse than those posed by the wrong. These too must be counted.

Here you see the loose relationality of private law playing its part in a perfectly typical 'public goal'. My sketch perhaps made you think of a legal intervention in the form of some provision for private-law litigation. But there is no reason to think that the

<sup>25</sup> I am subscribing here to the classical view according to which a reason to  $\varphi$  is also a reason to do whatever is sufficient to  $\varphi$ , whether or not it is also necessary. That it will put an end my cold is a reason to blow up the world. Necessity, like proportionality, comes in only in the face of an objection. For defence, see Anthony Kenny, 'Practical Inference', *Analysis* 26 (1966), 64.

loose relationality in question is restricted to private law. People have, depending on the legal system, not only their contractual rights and property rights and copyrights and so on but also their human rights and constitutional rights and civil rights and charter rights. These rights are relational in just the same way that private law rights are, even though, in many jurisdictions, they can only be upheld against officials acting in their official capacity, and therefore only through the (usually) distinct mechanisms of public law.<sup>26</sup> *À propos* those mechanisms, Dagan and Dorfman say that public law ‘governs our interactions as patients of the welfare state or as citizens of a democracy’ (1397, echoed 1410). But notice that there is a tension in that sentence already. Are we truly patients? Or are we, rather, (inter)agents? There is some truth in both characterisations. When we are rightholders we are sometimes patients (something was done to us without our participation) and sometimes interagents (something was done to us with our participation). But when we are dutybearers, potential wrongdoers, we are always agents. And the law, be it public or private, addresses us only in that agential capacity. Its main point, its overarching ‘public goal’, is to alter what we do so that we do better, or righter — and, when rightholders are involved, so that we do better, or righter, by others.

Dagan and Dorfman may complain that I miss the point here by focusing on the similarities between public law and private law at the point of litigation. They warn against placing too much emphasis, in thinking about the distinctiveness of private law, upon ‘the specific legal mechanisms for addressing deviations from this ideal, be they the familiar one-to-one litigation or otherwise’ (1413). Presumably they would say that, likewise, when they are thinking about public law, writs of

<sup>26</sup> Curiously, these very facts are pointed out by Dorfman, writing alone, in his recent paper ‘Private Law Exceptionalism? Part I: A Basic Difficulty with the Structural Arguments from Bipolarity and Civil Recourse’, *Law and Philosophy* 35 (2016), 165.

*certiorari* and *habeas corpus* and the like are not what they have in mind. They have in mind something more like ‘public regulation’ (1430-1): everything from the income tax code to the licensing system for private security guards to the work of the competition authorities to the regime for protection against disclosure of personal data. In my home jurisdiction, England and Wales, most of this belongs, strictly speaking, to the criminal law (although parts of, especially in the regulation of labour and employment, operate via private law or via what might be called ‘private-law-lite’).<sup>27</sup> So the legal importance of failing to provide a correct accounting for tax purposes, of not being licensed for the security work that one undertakes, of not obtaining clearance for one’s hostile takeover, or of not registering one’s storage of personal data, and so on, is that each of these omissions opens the way, subject to certain further conditions, for a criminal liability in the end. I find it misleading to think of any of this as public law, except insofar as the public officials involved are sometimes open to collateral challenge through judicial review or similar. If the differences between criminal law and private law are Dagan’s and Dorfman’s main subject-matter, it would be have been better if they had said so. Be that as it may, the difference between the two subject-matters, it seems to me, is not as they imagine it to be.

Criminal law, like public law, is in a way an elaborate adaptation of private law, at least across a wide range of cases. A significant part of its *raison d’être*, at least in these cases, is much as Nils Christie famously explained in his classic anti-criminal-law writings of the 1970s. It is to ‘steal’ the ‘conflict’ from the rightholder.<sup>28</sup> As his choice of words suggests, Christie tends to

<sup>27</sup> I am not sure whether Dagan and Dorfman agree with my parenthetical qualification. I find their remarks (1442 and around) about statutory anti-discrimination law, which I think of as private-law-lite, do not give a totally clear impression of how they regard it.

<sup>28</sup> ‘Conflicts as Property’, *British Journal of Criminology* 17 (1977), 1 at 4.

regard that as always a negative, whereas often enough I regard it as a positive. Often enough the freedom of the rightholder to tackle his own grievances in his own way does not count in favour of his being left to his own devices to do so, let alone in favour of his being assisted by the law to do so, such a dreadful hash would he make of it even if he had the law's help.<sup>29</sup> (Remember: the freedom we hope to serve is only the freedom to engage in worthwhile pursuits.)

Whether you favour Christie's verdict on the 'stealing' of 'conflict' or mine, however, there is little reason to think that the main 'public goal' involved is any different. So, yes, 'criminal law should indeed be understood to extend, and even bolster, the force of private law' (1411) over a wide range of cases. In that wide range of cases, it shares private law's public goal. I see no reason to hesitate in using the expression 'public goal' in connection with private law, once one realises the obvious: that protecting people's rights by preventing and mitigating other people's wrongs against them is a 'garden-variety' public goal,<sup>30</sup> and that private law is a 'garden variety' way of serving it, of which public law and criminal law can each be seen as, in some ways, a specialized development or extension. Therefore, unlike Dagan and Dorfman, I see no reason to shy away from

[the] basic view ... that '[t]here is work to be done and it ought to be done in the best possible way,' with the choice between private or public agents (or private or public law) a 'pragmatic' one that 'depends on a comparison between the expected efficacy' of these possible agents 'in performing the job' (1409).

<sup>29</sup> I explored one set of errors that would warrant allowing the criminal law to take over in Gardner, *Offences and Defences* (2007), ch 11. These were errors of vindictiveness. A different set of errors arise from vulnerability: the rightholder can't reasonably be expected to stand up to the wrongdoer.

<sup>30</sup> The idea was most famously developed in Amartya Sen, 'Rights and Agency', *Philosophy and Public Affairs* 11 (1981), 3.

In resisting such ‘pragmatism’ Dagan and Dorfman are quoting, and agreeing with, Alon Harel.<sup>31</sup> As I replied to Harel on a previous occasion: there is nothing to fear in seeing the problem as that of who is best suited to ‘performing the job.’ Working out what *is* the job – now that is where the action is.<sup>32</sup>

Private law is a ‘garden-variety’ way, arguably the most ‘garden-variety’ way, of ‘performing the job’ of helping people to avoid and mitigate their wrongs against other people, thereby protecting the rights of those other people. That job, as I have tried to show, is one that private law performs (a) instrumentally, (b) more or less dispensably, and often (c) only with the loose kind of relationality that is entailed by the mere fact that we are dealing with rightholders and wrongs committed against them. It needs to do so, moreover, (d) with due regard to ‘core liberal values’ but without needing to be exclusively fixated with them. That being so, private law does not seem to have any, let alone all, of the four main differentia that Dagan and Dorfman claim for it. Its moral distinctiveness, such as it is, resides elsewhere.

<sup>31</sup> Alon Harel, ‘Public and Private Law’ in Markus Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014), 1045 at 1051.

<sup>32</sup> See Gardner, ‘The Evil of Privatization’, unpublished but archived at [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2460655](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2460655) and recently discussed further at <http://juris.jotwell.com/the-zeal-of-our-age/>