

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Faculty Scholarship

2017

The Cathedral Through the Looking Glass: A Commentary on Dagan and Dorfman's Just Relationships

Benjamin c. Zipursky

Fordham University School of Law, bzipursky@law.fordham.edu

Follow this and additional works at: https://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [Law Commons](#)

Recommended Citation

Benjamin c. Zipursky, *The Cathedral Through the Looking Glass: A Commentary on Dagan and Dorfman's Just Relationships*, 117 Colum. L. Rev. Online 165 (2017)

Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/895

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE CATHEDRAL THROUGH THE LOOKING GLASS:
A COMMENTARY ON DAGAN AND DORFMAN'S *JUST*
RELATIONSHIPS

*Benjamin C. Zipursky**

INTRODUCTION

In their edifying and ambitious recent article *Just Relationships*, Professors Hanoch Dagan and Avihay Dorfman suggest that everyone before them has erred in their account of the distinction between public law and private law.¹ Classic liberal scholars—a category meant to cover Thomas Hobbes and William Blackstone through the nineteenth century to Richard Epstein,² Ernest Weinrib,³ and Arthur Ripstein⁴—endorse a prepolitical conception of rights and then treat private law as clarifying and concretizing that domain; clarity of enforceability of rights permits freedom and recognizes equality. Conversely, realists and instrumentalist scholars—typified by the law and economics school—do not really think there is a distinction between private law and public law; private law is just public law in disguise.⁵ The legal system creates legal entitlements and rules enforcing them in order to serve important public benefits in the long run.⁶

Both sides are wrong, Dagan and Dorfman tell us. Classic liberals are wrong in thinking there is a domain of prepolitical rights and private law preserves this domain through special juridical forms. Instrumentalists are mistaken in rejecting the public–private distinction altogether. Dagan and Dorfman put forward the best of both worlds in their “just relationships” theory. They tell us that private law is distinctive because it focuses on the relations between private people as free and equal persons (while public law—such as constitutional law—is essentially about the state’s relation to individuals and the regulation

* Professor of Law and James H. Quinn '49 Chair in Legal Ethics, Fordham Law School. Thanks to John Goldberg for helpful comments on an earlier draft and to Professors Hanoch Dagan and Avihay Dorfman for being great interlocutors.

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

2. Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. Legal Stud.* 151 (1973).

3. Ernest J. Weinrib, *The Idea of Private Law* (1995).

4. Arthur Ripstein, *Private Wrongs* (2016) [hereinafter Ripstein, *Private Wrongs*].

5. Leon Green, *Tort Law as Public Law in Disguise*, 38 *Tex. L. Rev.* 1 (1959).

6. See Dagan & Dorfman, *supra* note 1, at 1410 (arguing lawyer-economists “see private law as just another means to serve our public goals”).

of individual interactions⁷). Yet private law is not derived from individualistic, mutually independent persons having their own prepolitical domain of entitlements. To the contrary, it is a normative legal scheme that the state puts forward for public-law-like reasons: to enhance human liberty, equality, and flourishing in a world of interdependent persons.

Traveling from moral and political theory to black letter law, Dagan and Dorfman focus on cases from tort, contract, property, and restitution to make their point. They offer the variability of the standard of care,⁸ incompetence and unconscionability,⁹ mistaken payment,¹⁰ and numerous other doctrines to explain the sense in which private law is already engaged in the enterprise of defining the realm of horizontal rights and duties for a substantively free and equal society.

In a number of ways, I am sympathetic to Dagan and Dorfman's project. Indeed, over the past twenty years, Professor John Goldberg and I have devoted much of our energy to displaying tort law as a domain of relational duties among private parties, and, unlike some of those whom Dagan and Dorfman criticize, our model is substantive rather than formal.¹¹ Like Dagan and Dorfman, we have rejected both corrective justice theory and instrumentalism. And, like them, we have recognized both the possibility and the importance of designing schemes of rights and duties that answer to substantive values.¹²

Nevertheless, there is plenty in Dagan and Dorfman's *Just Relationships* with which I disagree as a matter of legal theory and as a matter of law. Disagreements tend to provide more engaging reading than incessant head-nodding, so Part I will set forth objections to a variety of medium-sized claims in their paper. Part II articulates my reasons for rejecting what I refer to as their taxonomic claim: the claim that *private law is best understood as an effort by our political system to set out just terms of interaction between private parties*. In Part III, however, I step back from my negativity and offer a reconception of their article as a transformation of the standing, realist view of private law set forth in

7. *Id.* at 1397 (noting “public law . . . governs our interactions as patients of the welfare state or as citizens of a democracy”).

8. *Id.* at 1431–35.

9. *Id.* at 1425–26.

10. *Id.* at 1456–57.

11. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *Tex. L. Rev.* 917 (2010); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 *Vand. L. Rev.* 1 (1998) [hereinafter *Zipursky, Rights, Wrongs, and Recourse*].

12. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Oxford Introductions to U.S. Law: Torts* 27–45 (2010) [hereinafter *Goldberg & Zipursky, Oxford Introductions*].

Guido Calabresi and A. Douglas Melamed's classic *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*.¹³

I. PROBLEMS WITH SETUP AND EVIDENCE

First and foremost, Dagan and Dorfman's setup is exaggerated in ways that will matter to their targets. Let's start with the classic liberals. To be sure, there is some resemblance between Epstein's Lockean view and Ripstein's Kantian view; each is willing to be grouped with a corrective justice theorist and each is committed to a rights-based conception of private law.¹⁴ But on crucial issues, Epstein and Ripstein are diametrically opposed in ways that run contrary to what Dagan and Dorfman say. In particular, Ripstein could not be clearer in *rejecting* a view that Dagan and Dorfman claim is central to him: Private law involves state enforcement of "prepolitical or apolitical interactions."¹⁵ For Ripstein, the role of the state in articulating rights goes all the way down; there are rights only because there is a state.¹⁶ In this sense, rights are intrinsically postpolitical. Relatedly, nothing in Ripstein's view precludes the existence of legislative measures that are aimed in a Razian, perfectionistic direction of the sort Dagan and Dorfman suggest. Ripstein has no reason to reject, for example, the sorts of worker protection we see in mandatory workers' compensation laws. He would view this as public law playing a role in spelling out the fuller state of what background justice requires for individuals in a particular legal community.¹⁷

In addition, Dagan and Dorfman exaggerate their description of law and economics on the public-private distinction in problematic ways. It is true, as they claim, that many realists and instrumentalists essentially denied the public-private distinction altogether.¹⁸ But law-and-economics scholars like Coase, Calabresi, and Posner are in a somewhat different place. They do think that courts and legislators need to design contract, property, and tort law in a manner that maximizes overall wealth or

13. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1104–05 (1972).

14. See Ripstein, *Private Wrongs*, supra note 4, at 6–8 (emphasizing a rights-based approach and recognizing the superiority of the Weinribian corrective justice approach over instrumentalism); Richard A. Epstein, *Toward a General Theory of Tort Law: Strict Liability in Context*, 3 J. Tort L., no. 1, 2010, art. 6, at 3–4 (recognizing himself among corrective justice theorists, but emphasizing differences in approach).

15. See Dagan & Dorfman, supra note 1, at 1397.

16. Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Theory* 145–81 (2009) (explaining that, on the Kantian view, rights require the institutionalization and enforceability provided by the state).

17. See id. at 267–99; Ripstein, *Private Wrongs*, supra note 4, at 292–93 (discussing workers' compensation).

18. See, e.g., Green, supra note 5.

minimizes overall cost.¹⁹ Yet it is misleading to say that they merely efface the public–private distinction. In different ways and to different degrees, all three thinkers conceive of private law as a means whereby wealth can be maximized with relatively minimal top-down control. With privately allocated entitlements plus a set of property rules, liability rules, and mechanisms for transactions, private actors in a market economy can pursue individual preference satisfaction while simultaneously expanding overall wealth. Private law constitutes a distinctive means by which social welfare moves forward. And, in different ways as to Calabresi, Coase, and Posner (and the intellectual movement of law and economics generally) there is a Hayek-inspired admiration for the liberty-enhancing capacity of private law.

Dagan and Dorfman must sharpen their critical points if they want to lift their view above their adversaries'. Their actual point is that these other theorists are too narrow in their vision of the value of tort, contract, property, and restitution, and this narrowness stems from a cramped view of the public–private distinction. If we adopt Dagan and Dorfman's account of the public–private distinction, which is attractive for independent reasons, we will see that these areas of law typically described as "private law" in fact have the capacity to help realize a fuller sense of liberty and equality. On the liberal view that enshrines the public–private distinction, the achievement of private law is simply to safeguard liberty conceived of as a capacity for independent choice and equality conceived of formally.²⁰ On the instrumentalist view that recognizes all law aims as public ends, private law manages to structure private entitlements so that private actors fortuitously achieve more welfare-enhancing results.²¹

Dagan and Dorfman invite us to regard private law as the law governing interactions between private persons (or entities), and, more generally, as the law specifying the rights and duties as between private parties. Once we see the domain of private law in this light, then it is natural to ask: *What is the proper allocation of rights and duties between persons?* We cannot answer this question until we get a grip on core values from a moral and political point of view. Dagan and Dorfman argue that a legal system and political system like ours is obligated to design political and legal structures so as to enhance the opportunity for individuals to flourish as autonomous beings, setting their own ends and

19. See, e.g., Guido Calabresi, *The Costs of Accidents* (1970); William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (1987); R. H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960).

20. Ripstein, *Private Wrongs*, *supra* note 4, at 51 (private law protects "the capacity of each person to set and pursue his or her own purposes").

21. See, e.g., Calabresi & Melamed, *supra* note 13.

values within the context of just relationships.²² Somewhat ironically, they have really borrowed from each of their (polar opposite) antagonists: from the corrective-justice theorists, the insistence on correlative rights and duties as essential to private law, which safeguards genuine individual autonomy, and from the instrumentalists, the willingness to use these private law structures as means of pursuing overall social goals. Their general point, in the doctrinal section of the article, is to show that “private law casts (as it should) interpersonal interactions as frameworks of relationships between self-determining individuals who respect each other as the persons they actually are.”²³

At least with regard to their principal torts example, Dagan and Dorfman’s doctrinal discussion is problematic. Their basic claim is that the standard of care in negligence law is sensitive to the disabilities of a potential victim.²⁴ In the context of considering a mentally disabled person “who is hit by a car while crossing the street,” they state that the victim’s disability can count in two ways.²⁵ First, it can bear on “the contents of the duty of care owed by the potential injurer” whether the victim was mentally disabled (and responded as a mentally disabled person as the car approached her).²⁶ Second, “the victim’s disability may, under the doctrine of comparative negligence,” alter the negligence attributable to the victim and correspondingly alter the apportionment of liability to the injurer.²⁷

Dagan and Dorfman’s read of negligence law on breach is importantly different than my own and, indeed, is inconsistent with that of most American jurisdictions and tort scholars. It is true that juries must consider whether the defendant conducted herself as a reasonably prudent person would have done *under the circumstances*,²⁸ and perhaps it is true that circumstances will sometimes allow mental disabilities to enter the analysis implicitly.²⁹ And it is true that certain kinds of demonstrable physical disabilities, such as blindness, will alter the applicable standard of care for both injurers and victims.³⁰ But, in conflict with Dagan and Dorfman’s characterization, negligence law famously and overwhelmingly utilizes an *objective* standard of care that is

22. Dagan & Dorfman, *supra* note 1, at 1412 (arguing that “private law’s rights, obligations, and frameworks structure the pursuit of ends in a relational way”).

23. *Id.* at 1433.

24. *Id.* at 1431.

25. *Id.*

26. *Id.*

27. *Id.*

28. Benjamin C. Zipursky, *Sleight of Hand*, 48 *Wm. & Mary L. Rev.* 1999, 2014 (2007).

29. See Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 11 cmt. e (Am. Law Inst. 2010) (noting “[t]here are, moreover, circumstances in addition to apportionment that warrant taking actor’s emotional disorders into account”).

30. See *id.* § 11 cmt. b.

insensitive to differences in the mental capacities of defendants.³¹ As indicated in the Second and Third Restatements of Torts, the objectivity of the standard of care—including its insensitivity to mental disabilities of adults—is one of the most striking features of negligence law, and it generally applies both as to injurers and as to victims.³² While it may be the case that the modern trend is toward a more flexible view as to mental capacities and victims' negligence,³³ this—like the prior exceptions—is but another wild rose in a field of dandelions.³⁴

II. TROUBLES WITH TAXONOMY

My central objection pertains to Dagan and Dorfman's taxonomic aspirations. Preliminarily, it will be useful to separate three claims: their taxonomic claim, their analytic claim, and their evaluative claim (my distinctions and labels, not theirs).

The taxonomic claim (most concisely expressed in their second footnote): “[P]rivate law establishes the rights and duties individuals have as against one another; public law, in contrast, pertains to individuals' rights and duties as citizens or vis-à-vis the collective state at large.”³⁵

The analytic claim: Private law constructs “frameworks of respectful interaction—of just relationships—among genuinely free and equal individuals.”³⁶

The evaluative claim: Private law's construction of just relationships renders it intrinsically valuable.³⁷

31. See *id.* § 11 cmt. e (noting that, for adults but not children, a mental or emotional disability “is typically disregarded in considering whether the person has exercised reasonable care” and that “[t]his is the position taken by the Restatement Second of Torts § 283B, and . . . is supported by a consistent line of modern cases”).

32. *Id.*; Restatement (Second) of Torts § 283B cmt. b (Am. Law Inst. 1965).

33. See, e.g., Barry E. Lindahl, 1 *Modern Tort Law: Liability and Litigation* § 3:64 (2d ed. & Supp. 2016). As the Restatement (Second) points out, however, total insanity is quite different from a lesser form of mental disability. Restatement (Second) of Torts § 283B cmt. c.

34. For their assertion that injurers' standard of care varies with the mental capacity of the potential victim, Dagan and Dorfman rely in part on *Campbell v. Cluster Housing Development Fund Co.*, 668 N.Y.S.2d 634, 635 (App. Div. 1998). See Dagan & Dorfman, *supra* note 1, at 1432 n.161. They fail to recognize, however, that the defendant's duty of care with regard to the plaintiff in that case was the affirmative duty of a half-way house to protect the plaintiff. The breach standard in the case of an affirmative duty of an institution to a person institutionalized is of course different from the breach standard among strangers in misfeasance cases.

35. Dagan & Dorfman, *supra* note 1, at 1397 n.2.

36. *Id.* at 1397.

37. *Id.* (“Yet private law is valuable beyond its contingent, external benefits: It is intrinsically valuable. The intrinsic value of private law lies in its construction of frameworks of respectful interaction—of just relationships—among genuinely free and equal individuals.”).

The question of whether private law *constructs frameworks of respectful interaction* is distinct from the questions of: (a) whether that is the only or at least the principal thing that private law does, (b) whether doing so falls outside of the range of things that public law does, and (c) whether private law's *constructing frameworks of respectful interaction* is part of what it is to be private law. Similarly, the question of whether private law's *construction of frameworks of respectful interaction (assuming it does construct such frameworks) renders it intrinsically valuable* is distinct from the questions of: (d) whether private law's construction of frameworks of respectful interaction is the only thing about private law that renders it intrinsically valuable, and (e) whether the (putative) truth that private law's construction of frameworks of respectful interaction renders private law intrinsically valuable is what makes private law intrinsically valuable, qua private law.

My overall contention is that even if Dagan and Dorfman's analytic and evaluative claims are true, the answers to (a)–(e) are all negative, and therefore their taxonomic claim is false.

The easiest way for me to motivate the analytic claim is, for better or worse, to begin with my own work, both individually and in combination with Professor John Goldberg. In 1998 I published *Rights, Wrongs, and Recourse in the Law of Torts* and laid out a view according to which the law of torts consists, in significant part, of relational norms of conduct.³⁸ I claimed, in particular, that tort law includes relational directives such as: For all *X*, for all *Y*, *X* shall not batter *Y*. Or, for another example: For all *X*, for all *Y*, if *X* is a physician and *Y* is a patient of *X*, then *X* shall not injure *Y* through medical malpractice.³⁹ These relational norms of conduct simultaneously impose duties to treat people in certain ways and establish rights to be treated in certain ways.⁴⁰ In a very straightforward sense, then, I asserted that much of tort law consists of norms of interaction.

It is easy to see how such a model might be carried over to contract; doing so involves asserting a basic norm of keeping one's obligation: For all *X*, for all *Y*, if *X* formed a contractual obligation to *Y* to do *A*, *X* shall do *A*. And, if along with Wesley Newcomb Hohfeld, we understand property as involving simultaneous multital rights,⁴¹ and we understand those rights to be universal bilateral rights, then we have a basis for including this within property, too. It is possible that restitution will flow from an understanding of property rights.

If this were so, then it would be plausible to assert that tort, contract, and property law all involve relational norms of conduct, which confer

38. Zipursky, *Rights, Wrongs, and Recourse*, supra note 11, at 59–70.

39. *Id.*

40. *Id.*

41. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *Yale L.J.* 710, 719 (1917).

rights and duties among private parties. This is roughly the same as Dagan and Dorfman's analytic claim.⁴² Moreover, Dagan and Dorfman plausibly suggest (and I, along with Professor Goldberg, have suggested) that the construction and enforcement of relational norms of conduct is an irreducibly important part of what tort law does.⁴³ By parity of reasoning, one might argue that the same is true of property and contract. If so, then we are brought roughly to Dagan and Dorfman's evaluative claim. Dagan and Dorfman go further, however: Seeing tort, contract, and property as all parts of private law, they conclude that schemes of relational duty lie at the essence of private law, while schemes of duty to the state relate to public law.⁴⁴ That is their taxonomic claim. Here are my concerns with it:

(a') Private law does much more than construct relational norms of conduct. Contract empowers people to come together for exchanges. Property law allows for transfer of property. Corporate law creates private entities with a variety of powers, rights, and duties. H.L.A. Hart's *The Concept of Law* famously discusses the basic point: Legal rules do not only impose duties; they also create legal powers of various forms.⁴⁵ Surely, private law—with powers to sue, powers to contract, and powers to transfer—is far more than duty-imposing norms of conduct.

(b') Much of what is uncontroversially public law rather than private law creates relational norms of conduct between private parties. It is not just the criminal law with its relational norms regarding theft, sexual assault, and homicide. It is also innumerable statutes and regulations governing employers and employees, strangers who may not eavesdrop upon one another, commercial sellers and their representations to consumers, landlord–tenant relations, and on and on and on. These are all about rights and duties, but they are paradigmatic of public law.

42. See Dagan & Dorfman, *supra* note 1, at 1397.

43. See, e.g., Goldberg & Zipursky, Oxford Introductions, *supra* note 12, at 60–62.

44. Dagan and Dorfman are ambiguous about the degree to which their conception of the private–public distinction differs from the classical liberal conception principally on the nature of private law, rather than on the nature of public law, as well. At some points in the text, it appears that they favor a different conception of public law, too: “[P]ublic law . . . governs our *interactions* as patients of the *welfare state* or as citizens of a *democracy*.” Dagan & Dorfman, *supra* note 1, at 1397 (emphasis added). The suggestion that *public law is about individuals’ interactions and that it is intrinsically tied to the existence of a welfare state or a democracy* appears to convey a view narrower and more particularized than the vertical, individual-state view, as traditionally conceived by classic liberals (not to mention libertarians). However—apart from the fact that this appears untenably narrow on many levels—Dagan and Dorfman’s footnote to that passage reverts to a more familiar conception of public law, indicating that the article really is more about reconceptualizing private law than public law: “Put another way, private law establishes the rights and duties individuals have against one another; public law, in contrast, pertains to individuals’ rights and duties as citizens or vis-à-vis the collective state at large.” *Id.* at 1397 n.2.

45. H.L.A. Hart, *The Concept of Law* (3d ed. 2012).

(c') Even if we were to accept that each field of private law (e.g., tort, contract) creates and enforces relational directives, it does not follow that *creating and enforcing relational directives* is part of being private law. Every living person with a disability has a circulatory system, but it would be misleading to say that part of being a disabled person is having a circulatory system. If we want to know what is distinctive about private law, we must be picking out something that is not true of areas of public law or perhaps only true in odd and uncharacteristic domains of public law. Or at least, we must find that—as opposed to public law areas—relational directives, relational duties, and rights are all that constitute private law. Statement (b') above shows that the first disjunct is false: Many areas of public law are filled with relational duties. Statement (a') shows that the second disjunct is also false: Many areas of private law do much more, like empowering private parties to transfer assets, to bring lawsuits, to form joint enterprises, and so on. For all of these reasons, Dagan and Dorfman's taxonomic claim is unsustainable.

It remains an open question whether recognizing rights and duties between parties and regulating “just relationships” are (d) the only things about private law that render it intrinsically valuable, and therefore whether (e) the attributes of recognizing rights and duties between parties and regulating “just relationships” are what make private law intrinsically valuable, qua private law. It should now be clear that in order for this to be so, the other things done by private law, if valuable at all, could not be intrinsically valuable. Presumably, that would mean they are instrumentally valuable—instrumental in enforcing the relational duties and rights and perhaps instrumental in permitting individuals to satisfy their various desires and reach their various goals. Of course, although I accept that part of the value of, for example, the power to bring a lawsuit is that the social benefits of having relational directives are realized through their enforceability, I categorically reject the claim that the value of private powers is entirely derivative or instrumental.

Part of the value of tort law is that it provides individuals with an avenue of civil redress against their wrongdoers. One might view such individuals—as in the case of private rights of action under RICO or the Clayton Act—as acting in part in a private attorney general role.⁴⁶ That is, essentially, what Posner has asserted about tort law.⁴⁷ I have argued that this would be to miss what is especially private about tort law. The locus of power is in the individual, and the individual claims the right to have

46. See *Rotella v. Wood*, 528 U.S. 549, 557 (2000) (noting both RICO and the Clayton Act “share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices”).

47. See Richard A. Posner, *A Theory of Negligence Law*, 1 J. Legal Stud. 29, 48–49 (1972) (describing the efficiency of an individualized, victim-driven enforcement system).

such a power.⁴⁸ This may not be the most effective way to see that rights and duties are generally enjoyed, and it certainly might not be the way to see that an individual's rights are most effectively protected—for example, criminal law and prosecutorial enforcement may be a more effective means than tort in protecting a woman's rights as against her abusive spouse. Yet as a matter of the right of individuals to act self-protectively and to act self-restoringly, and as a matter of equalizing power, each individual has a claim against the state to authenticate and enforce her demands against those who have wronged her.⁴⁹ Hence, tort law is a marriage of relational directives to private rights of action.

Contract and property are in many ways equally clear. Contracts could exist if the state went around *sua sponte* enforcing them. That is not our system. Ours empowers individuals with private powers to demand performance or its equivalent.⁵⁰ This means that some primary conduct will be forthcoming. These are not simply random choices of to whom the state gives the power; the power is provided to the plaintiff because the plaintiff is entitled to make an authentic demand for compliance with an obligation.⁵¹ More striking, still, in contract, is the private power to bind oneself and to bind one another. As the classic liberals have rightly explained, part of having the power is having autonomy. But this is hardly to say that the power is instrumental. The autonomy, in the state, is partly constituted by these powers.

III. RECONSTRUCTION (OR THE CATHEDRAL THROUGH THE LOOKING GLASS)

Elsewhere, I have supplied my own version of a taxonomic claim: Private law areas all prominently feature power-conferring rules that confer powers on individuals and private entities, while public law areas all prominently feature power-conferring rules that confer powers (and limit powers) on public entities, such as sovereigns, government agencies, courts, and legislatures.⁵² Individual areas such as tort law or constitutional law are not necessarily constituted by the features that render them part of private or public law, just as human beings are not

48. See Benjamin C. Zipursky, *Palsgraf*, Punitive Damages, and Preemption, 125 Harv. L. Rev. 1757, 1769–71 (2012) (explaining that tort law empowers a plaintiff to exact a remedy in order to redress a wrong done specifically to her).

49. John C.P. Goldberg & Benjamin C. Zipursky, Rights and Responsibilities in the Law of Torts, *in* Rights in Private Law 251, 265–70 (Donal Nolan & Andrew Robertson eds., 2012).

50. See generally Benjamin C. Zipursky, Civil Recourse and the Plurality of Wrongs, 2014 N.Z. L. Rev. 145 (analyzing diverse areas of private law in terms of the powers they provide individuals).

51. *Id.*

52. Benjamin C. Zipursky, Philosophy of Private Law, *in* The Oxford Handbook of Jurisprudence and Philosophy of Law 623, 649–51 (Jules Coleman & Scott Shapiro eds., 2002).

necessarily constituted by being both bipeds and featherless. Certainly, tort law can do things—deter harmful conduct, compensate the injured—that are frequently associated with areas of public law. And part of what one would find in a constitutional law treatise, e.g., *Bivens*⁵³ claims, might well involve the empowerment of private parties.⁵⁴

A fuller defense and development of my taxonomic account would go beyond the scope of this commentary, but such development seems unnecessary. This is because Dagan and Dorfman's focus on recreating the public-private law distinction is a distraction from *Just Relationships*'s key contribution. Whether Dagan and Dorfman realize it or not, *Just Relationships* puts forth a much larger, more provocative, and more important goal—a goal that Dagan and Dorfman have a serious shot at realizing. Clarifying their real goal will require a return to the distinction between classic liberal private law theorists and the instrumentalists and realists.

As Dagan and Dorfman see it, the classic liberal view combines an emphasis on individual freedom and equality as core values of areas like tort, contract, and property with an assertion that the legal framework of private law must be formal rather than material in order to protect freedom. This, according to Dagan and Dorfman, leads to a sharp distinction between private law (which is formal and freedom-protecting) and public law (which is material and welfare-seeking). By contrast, instrumentalists and realists combine the view that private law's crucial contribution is delivering better material conditions—as opposed to freedom and equality—with a skepticism of the putatively intimate connection between legal formalities and substantive normative values. This leads to an evisceration of the distinction between public and private law.

Dagan and Dorfman's announced plan is to combine the classic liberal's recognition of freedom and equality as core values of private law and recognition of a private law-public law distinction with the realist's embrace of the goals of bettering material conditions as a crucial deliverable of private law areas and the corresponding skepticism of the intrinsic importance of formalities of private law. They believe that by putting forward a horizontal conception of private law, they can rescue a version of the private-public distinction since they regard public law as vertical, not horizontal.⁵⁵

For the reasons described in Part II, I do not think their account rescues the private-public distinction, but my larger point in this section

53. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

54. See, e.g., 1 William J. Rich, *Modern Constitutional Law: Liberty and Equality* § 3:22 (3d ed. 2011 & Supp. 2016).

55. See *supra* note 44 (characterizing Dagan and Dorfman's conception of public law).

is that the action in their important article lies in its combination of part of the classic liberal account—the insistence that private law secures freedom and equality—with another part of the realist account—the recognition of the thoroughgoing materiality and nonformality of private law. Following Professor Joseph Raz, Professor Elizabeth Anderson, and a variety of important contemporary thinkers, Dagan and Dorfman believe that a Nozickean or Epsteinian or even Ripsteinian conception of freedom and equality in private law is far too narrow.⁵⁶ Law, including tort law, contract law, and property law, plays a crucial role in constructing the material and institutional conditions in which interdependent individuals can in fact exercise autonomy in building their lives. In particular, relational directives in the legal system—and the ongoing adjustment of relational directives to contemporary needs and aspirations—are critical to the construction of the conditions for freedom and equality. In this vein, for example, property law needs to be adapted from its common law narrowness to include antidiscrimination in housing norms,⁵⁷ and contract law needs to be adapted to make room for more accommodating sorts of employer–employee contracts.⁵⁸ The conditions for individuals to flourish as free and equal require advancement in relational legal norms.

It follows from this view that the formalities of private law, to a great extent, are not what gives private law its special value—it is the existence of a legally realized web of relational rights and duties. To this extent, Dagan and Dorfman share the realist sensibility that private law can and should seek results in a pragmatic, real-world fashion. However, the use of the private law to reach public goals is not principally welfarist in its orientation. To the contrary, the overarching public goal is to create a real-world framework for autonomy and flourishing, conceived of substantively. That is what the range of relational directives in the law, creating rights and duties, is able to do.

There is a deep sense in which Dagan and Dorfman turn upside down today's conventional version of realist private law theory. Dagan and Dorfman do not say enough about what the classic liberal conception of private law and the realist–instrumentalist conception share: a sense that private law subjects such as tort, contract, and property are about the distribution of *entitlements*. It is of course a distortion to say that scholars from Coase to Calabresi conceive of entitlements as “stuff possessed,” for each scholar is expansive in recognizing that rights are rights *to conduct certain activities*, and each recognizes that a right of X to do A, as against Y's right of being free from A, does not entail a right of X to do A, as

56. See Dagan & Dorfman, *supra* note 1, at 1442 n.203 (citing Elizabeth Anderson, How Should Egalitarians Cope with Market Risks?, 9 *Theoretical Inquiries L.* 239, 255 (2008)); *id.* at 1451 n.237 (citing Joseph Raz, *The Morality of Freedom* 162, 265 (1986)).

57. *Id.* at 1438–42.

58. *Id.* at 1442–45.

against *Z*'s right of being free from *A*. And yet we will see that Dagan and Dorfman's horizontal, "just relationships" conception of private law is fundamentally different from an entitlements-based view.

Under Calabresi and Melamed's view, we can think of both possessions and raw liberties to do various things as a kind of baseline of distributions, and then we make a decision about different ways of protecting the individual's possession of that stuff and those liberties: a liability rule, a property rule, and an inalienability rule.⁵⁹ This is not to say that they believe these would be legal entitlements without any rule at all; they do not. Nonetheless what is in common to the different rules is that they all protect entitlements. Different departments of private law use different tools, and criminal law uses a different tool still. And the different tools will have quite different impacts on overall social welfare. The Kantian liberal, like Ripstein, cuts deeper in a way; she sees that the notion of having any stuff at all or any domain of liberty is incoherent except against a background of private law. The formality of private law is needed for there to be freedom and "stuff" at all. Unsurprisingly, given the Lockean background of liberalism, there is a property orientation to the conception of entitlement at the core of private law theory.

Dagan and Dorfman are best read, in my view, as challenging the entitlement centrism of private law theory in favor of what I regard as a relationship-centric view. The rules are not different ways of protecting entitlements. There are no prepolitical entitlements, and, what is more, there is no prepolitical and nonnormative baseline of "proto-entitlements" that the legal system converts into authentic entitlements. The aspiration of private law to allow for freedom and equality is not an aspiration to make sure we can use our own private stuff to do what we want; it is the aspiration to put us into relationships of equality with one another, in a system in which we are able to flourish as interdependent beings. Even when we are talking about real property, for example, the real property exists by virtue of the directives of conduct, requiring that others be treated certain ways or that they not be mistreated in certain ways.

CONCLUSION

In my view, Dagan and Dorfman's theory becomes more plausible, powerful, and important when one disregards questions about the public-private distinction and, instead of beginning with the classic liberal, begins with the contemporary realist and instrumentalist. If one is a realist enough to sidestep the public-private distinction and to see the public-facing aspect of rules of tort, contract, and property, and if one wishes to provide a normative framework for evaluating different possible rules, the question is what sort of normative framework is appropriate. Dagan and Dorfman's strongest negative point is that there is no reason

59. Calabresi & Melamed, *supra* note 13.

to assume one must be principally utilitarian or welfarist in selecting a normative framework. Then, if we accept political theoretic normative arguments for seeking law that will support freedom and equality, we can ask whether there is any reason to believe that areas like tort, contract, and property relate to the realization of those values. If we understand these areas as constituted in part by relational directives of conduct, duties, and rights, then of course there is reason for a realist to see the potentially pivotal role of such law in protecting freedom and equality.

There is, then, an irony when we finally turn back to the classic liberal. Both this version of realism and the conceptualism or formalism of the classic liberal do rely on the values of freedom and equality. They have different conceptions of what freedom and equality require and how the law best secures them. But until Dagan and Dorfman's article, private law theory had overwhelmingly placed welfarism along with private law realism and instrumentalism, and placed freedom and equality as core values within a highly conceptualistic private law theory camp. Their important article shows that is a mistake.